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THE TRUST LAWS OF JERSEY AND MALTA: A CIVILIAN INTERPRETATION

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Patrick J Galea

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This thesis has been submitted in fulfilment of the requirements for a postgraduate degree (e.g. PhD, MPhil, DClinPsychol) at the University of Edinburgh. Please note the following terms and conditions of use:

Patrick J Galea

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A thesis is written over a long period. Situations and persons, including its writer, change over time.

This project was born out of two factors: the first was the growing awareness by the author of the need of the law of Malta, following EU accession, to integrate with the newly acquired *corpus* of European Union Law – the EU was then in many ways a different reality from its contemporary situation. The second, going back in time, was the knowledge, developed through further research, of the influence that Scotland and Edinburgh had over the deveopment of the Maltese Codes, during the 18-19th century codification process. Malta could reach out to a comparable jurisdiction with a civilian heritage, within the then British Empire.

The '*Noise of Time*' (Julian Barnes, 2016) changes many situations. What started as a project on European private law of securities and guarantees, transmuted into an emerging European trust analysis and then in its current version. It can be stated, in fairness, that Jersey, Scotland and Malta are the only three European 'mixed' jurisdictions, hence the background of the thesis.

There are too many people whose assistance I should acknowledge. If I have to, I will gratefully single out from St Hélier, Jersey, Jurat Geoffrey Fisher, Advocate Timothy Hanson, Mr Steven Meiklejohn, Ms Lorraine Wheeler, Dr David Marrani of the Institute of Law Jersey, the editorial board members of the Jersey and Gurensey Law Review and the Jersey Legal Information Board. The support of the University of Malta and of the University of Edinburgh are recorded. Professor Paul Matthews, Professor David Johnston and Mr James McNeil QC, all took the trouble to have invaluable discussions and conversations with me on the subject. I was also encouraged by succesful past PhD candidates and must mention Dr Rebecca MacLeod and Dr Ross Anderson.

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CONTENTS

DECLARATION

I, Patrick Joseph Galea, declare that I have composed this thesis, that it is my own work, and that I have not submitted it for any other degree or professional qualification.

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ABSTRACT

This thesis attempts to identify the philosophy, key questions and priorities behind the trust laws of Jersey and Malta.

By wide accord, the Jersey law has served as a model in many ways to its later Maltese counterpart. This affinity is placed against the similar background of either jurisdiction, which embraced, to varying degrees, both the Civil Law tradition and Common Law influence. The analysis is advanced through the different moments of the trust, from its creation to termination.

Nevertheless, the underpinning focus and thrust is on the civilian identity of either trust. It considers whether, and how far, the fundamental Civil Law concepts and language play a defining role in their civilian configuration. The question is asked whether the creation of the trust and the duties of a trustee can possibly be classified as obligational or contractual, or maybe something else. The nature and character of the beneficiary's rights are also reviewed.

The overarching role of good faith and civil responsibility, along with their extent of interaction with traditional Equity fiduciary duties, are weighed, an assessment naturally following from the civilian flavour attributed to the trusts. The conceptual overlapping between the Roman-Civil law *fiducia*, and related figures such as the *mandat prêt-nom*, with the Equity fiduciary duties, is assessed. The role, even if subsidiary, of civilian unjustified enrichment, remains an ever-present relevant factor. Sham trusts and *simulatio*, the Pauline fraud and legitim are considered in the context of the civilian identity of these trusts.

The discussion then engages with the other strand of the thesis, being the role of the governing law, as the 'mind' behind the trust legislations assessed. The discussion engages with the question whether the trusts fall on the side of respect for the '*autonomie de la volonté des parties*' or on other policy determinants behind the law.

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TABLE OF ABBREVIATIONS

H Brown, *The Jersey Law of Trusts* (2013)	Brown
Civil Code (Malta)	MCC
Dicey, Morris and Collins On the Conflict of Laws (2012) 15th edition	Dicey
Jersey Law Review	JLR
Jersey and Guernsey Law Review	JGLR
Jersey Institute of Law Course Notes	Institute of Law
Jersey Royal Court	JRC
Le Geyt P, *Les Manuscrits sur la Constitution, les Lois, et les Usages de Cette Ile de Jersey, publié en 1846*	Le Geyt, Manuscripts
Le Masurier, *Le Droit del l'Ile de Jersey*	Le Mausurier
Poingdestre, *Les Lois et Coutumes de L'Ile de Jersey*	Poingdestre
RJ Pothier, *Oeuvres Complets* (1821)	Pothier, Oeuvres
The Laws of Scotland: Stair Memorial Encyclopaedia	Stair
Thomas and Hudson, *The Law of Trusts* (2010)	Thomas and Hudson
Thomas, *On Powers*	Thomas
Trust (Jersey) Law 1984	TJL
Trusts and Trustees Act (Malta)	MTTA
Trusts and Trustees (Journal)	T&T
Trust Law International (Journal)	TLI
Underhill and Hayton Law of Trusts and Trustee (2010) D Hayton, P Matthews, C Mitchell (eds)	Underhill
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INTRODUCTION AND PLAN

This introduction aims to provide a road-map to the thesis. Therefore, it makes no more than a brief reference to the arguments and questions raised in each chapter. The fundamental questions are introduced in chapter I, developed and discussed in each of the subsequent chapters. The broader focus is the trust in Jersey and Malta, from creation, its functioning, to its termination. Being stated as a compass-guide, the civilian bent and perspective of the trust is the constant and recurring *leitmotif* and is a civilian interpretation of the trusts.

In the opening two chapters, the nature of the trust in either jurisdiction is placed in its historical and cultural perspectives. In particular, it will be recorded that both jurisdictions have both Civil Law and Common Law backgrounds. Relevant questions, such as types of trust, creation and constitution thereof, and the nature of the beneficiary's rights, are asked

The difficulty of conceptualizing power in a civilian context, defined in terms of rights and obligations is assessed. It is enquired whether trustee powers can square with the civil law notion of *faculté*. The review is then taken to the specific contexts of particular trustee powers and discretions. The tormented questions arising from *Hastings-Bass* are considered, both in the light of their codification in the Jersey Trusts Law as also in that emerging from the English Supreme Court judgement re *Futter* and *Pitt.*

The chapter on the duties and responsibilities of the trustees engages with the meaning of fiduciary duty, viewed in a civilian context, as also with the links with the Roman *fideicommissum* and the civil law *fiducia.* The question is asked whether breach of trust carries the same meaning as civil law *responsabilité*. The extent of compatibility of the trusts under review with Equity proprietary or fault-based remedies, and unjust enrichment is then assessed. Does the civil law unjustified enrichment, as distinct from the English law unjust enrichment, have any role to play in the law of trusts?

The chapter on conflict issues poses the question whether the extent of trust jurisdiction is excessively widely-drawn. The point is also mooted whether other

States will necessarily respect and give effect to the jurisdiction potentially arrogated by the courts in Jersey or Malta. The hinging role of choice of law is then addressed: this includes both specific jurisdiction clauses and also the extent of recognition and application of foreign law, particularly where it may be incompatible with the law of the jurisdictions examined. The function of the Hague Convention, and the relevant EU Regulations solely in the case of Malta, is assessed within the wider framework. The focus remains on the critical importance of the governing law of the trust in both jurisdictions.

Once certain essential aspects of the trust and its functioning have been considered, it is then time to discuss those methods or remedies which can undermine or indeed revoke a trust or the exercise of a trustee's discretion. These are sham in Jersey, *simulatio* in Malta, the Pauline fraud and legitim. Each of these remedies is considered, in the civilian context, and how such grounds of challenge interact with the trust, is examined.

Moreover, the tension between the will of settlor and variation of the trusts, with the attendant patrimonial consequences, is here a central concern. The thesis examines the methods of termination of trust, enquiring whether they are consistent with civilian methods of termination of obligations such as subrogation, set-off or merger.

The final chapter will put together, in a civilian context, the various perspectives, and draw conclusions on the fundamental questions of the thesis.

CHAPTER I - HISTORY AND NATURE OF THE TRUST

The aim of this thesis is to explore two questions in the jurisdictions chosen: first, the viability of a civil law trust; secondly, the hypothesis that the key to assessing the trust laws in either jurisdiction is the distinction based on whether the governing law is domestic or foreign.

Jersey and Malta have been chosen for various reasons: they share a similar but not identical tradition, having both in their own way received the Norman-French tradition, together with extensive contact with the Common Law.[1] In the case of Jersey, William of Normandy defeated Harold, King of the English at Hastings in 1066 to become King of England (including the Channel Islands). In 1204, continental Normandy, but not the islands, was lost by King John of England: since then, they have remained in a particular relationship with the British Crown.[2] Malta's contact with Roman law commenced with the second Punic War, circa 216 BC.[3] It continued as *jus commune* uninterruptedly with the exception of the Arab domination (870-1090)[4] up to and throughout the period of the Order of the Knights Hospitalers of St John (1530-1798). Initially a British protectorate since 1800,[5] during the wave of continental codification, it adopted a civil code in 1868,[6] modelled largely on the French Code Napoléon.[7] It later became a dependent territory till independence in 1964.

Another reason behind the choice, is that both jurisdictions form part of the 'mixed' legal systems, or as they are sometimes called examples of legal

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[1] F de L Bois, *A Constitutional History of Jersey* (1972) 14; H Carbeau, *La situation juridique des Isles Anglo-Normandes dans l'Empire Britannique (*1934) 9,137; R Le Masurier, *Le Droit de l'Isle de Jersey* (1956) 47.

[2] P Bailhache ed, *A Celebration of Autonomy* (2005); S Nicolle, *The Origin and Development of Jersey Law* (2005).

[3] H Harding, A *History of Roman Law in Malta* (1950); P Debono, *Sommario della Storia della Legislazione in Malta* (1897) 34.

[4] Vella A, *Storja ta' Malta* (1974) Vol 1.

[5] H Harding, *Maltese Legal History under British Rule* (1980).

[6] Dingli, *Appunt*i (1868). These are the notes by Sir Adrian Dingli, the drafter of the Malta Civil Code, reflecting the sources or foreign codes consulted - French, de Rohan, Sicilian, Italy, Sardegna, Austria, Louisiana, Codice Albertino, Ticino and Parma.

[7] There were previous limited experiences with codes, such as the Code de Vilhena (1724) and the Code de Rohan (1784). These were a collection of the laws and court procedures of the Knights of the Order of St John and Malta, in force at the time, commissioned by the then Order's Grand Masters, hence bearing their name.

hybridity.[8] A third reason is that the Jersey trust law was a major source and model for the Maltese counterpart. It will be argued that, to a greater or lesser degree, English Equity is present in either trust law, but not as a defining factor.[9] The extent of internal consistency is a more complex question. To a degree, perhaps inevitably so, 'mixed' legal systems tend to 'pick and choose' from which source to draw, not necessarily coherently so, but rather on historical and pragmatic bases.[10] The Roman-French tradition is in some instances a distinguishing characteristic, whereas in other, 'mixed' jurisdictions draw liberally, indeed startlingly so, from Equity,[11] for example on tracing the proceeds of an asset disposed of in breach of trust.[12] Some areas remain blurred, such as the reception of unjust or unjustified enrichment. In other instances, the product is home-grown. These two influences are critical to a definition of the nature of the trust and its context in both jurisdictions.[13] Purpose or Charitable trusts, tax and fiscal considerations, have been intentionally excluded.

JERSEY

A. Jersey Trusts

An analysis of the Jersey law of trusts commences with its historical background.[14] The Report of the 1861 Commission stated that "There is no law

[8] V Valentine Palmer (ed), *Mixed Jurisdictions Worldwide* (2012); *ibid*, on Malta, B Andò *et al* 528; G Gretton and K Reid, "The civil law tradition: some thoughts from north of the Tweed" (2007) 11 3 *JGLR*. 286; some striking historical similarities with Malta are identified, particularly on the development of academic teaching; M de Waal and R Paisley, "Trusts" in R Zimmermann, D Visser and K Reid (eds), *Mixed legal systems in Comparative perspective: property and obligations in Scotland and South Africa* (2005) 819; H Verhagen, "Trusts in the Civil Law: making use of the experience of 'mixed' jurisdictions" (2000) 3 *ERPL* 477.

[9] M Milo and J Smits, "Trusts in mixed legal systems: a challenge to comparative trust law" (2000) 3 *Euro Rev Priv L* 421; F Noseda, "The trusts (Guernsey) law of 2007 and other modern trust laws: a civilian perspective" (2008) 22 (3) *Tru L I* 117.

[10] Ganado JM, "Maltese Law" (1947) J. Comp. Legis & Int' L 32; K Aquilina, "Rethinking Maltese legal hybridity: a chimeric illusion or a healthily grafted European law mixture?" (2011) 4 *J.Civ.L.Stud*. 261; B Andò, "The mélange of innovation and tradition in Maltese law" (2012) *Potchefstroom Electronic Law Journal*, http://dx.doi.org/10.4314/pelj.v15i3.4; Donlan et al, "A happy union"? Malta's legal hybridity" (2012) 27 *Tul. Eur. & Civ. L.F*. 165.

[11] L Smith (ed), *Re-imagining the Trust* (2012).

[12] Art 54 (3) TJL, 40A(1) MTTA,

[13] On the nature of the trust, generally, *vide Lewin* (18th ed) 3, (19th ed) 2, *Underhill* 1, *Thomas and Hudson* 11; *Wilson* 3; D Hayton *et al* (eds), *Principles of European Trust Law* (1999) 1-63.

[14] Matthews, Chapter 2 – History of Trusts in Jersey; Brown, Chapter 2 – Customary Law background to trusts in Jersey; SC Nicolle, *The Origin and Development of Jersey Law* (2005); P Bailhache, *A Celebration of Autonomy: 800 Years of Channel Islands Law* (2005) generally and *vide* the presentation by Paul Matthews and John Mowbray (103-111); S Atkins (ed), *Insights into*

in Jersey expressly forbidding the creation of trusts by an act *inter vivos*."[15] Nevertheless, some Jersey lawyers at that time "incline to the opinion that trusts of the kind in question would be treated as covenants running with the land and would be enforced as such."[16] The better view, as Matthews suggests, seems that art 6 of the 1851 *Loi sur les testaments d'immeubles* did not prohibit testamentary trusts of immovables. Will-Trusts of movables, so long as they respected the *portion disponible* in the case of inheritance, were considered as valid. Although some serious doubts existed in the minds of Jersey Lawyers, *inter vivos* trusts of immovables were recognized, and the validity of such trusts of movables was unchallenged.[17]

The Royal Court stated in *The Esteem matter* that:

> "....the 1984 Law was not a codification, nor was it enacted in a vacuum. There was already a customary law of trusts in existence. Many of the provisions of the 1984 Law were simply reflections of the pre-existing law or of English principles. There is no implication that, because a provision is included in the 1984 Law, it is something which did not exist beforehand."[18]

And that:

> "The concept of a trust was incorporated into our customary law notwithstanding its very different roots, compared with English law."[19]

Indeed, the Trusts (Jersey) Law 1984 (TJL) confirms at article 1(2) that "This Law shall not be construed as a codification of laws regarding trusts..."

Trust Law: the Channel Islands and Beyond (2013); J Kessler and P Matthams, *Drafting Trusts and Will Trusts in the Channel Islands* (2013) 1.

[15] *Report of the Commissioners appointed to enquire into the civil, municipal and ecclesiastical law of the Island of Jersey, 186 1* xxv.

[16].In fairness, one has to refer to the opinion of some Jersey lawyers at the time who were of the view that "Jersey law does not recognize trusts." The Commissioners also concluded that "trusts of realty in favour of private individuals and unconnected with public objects, are to the present day, absolutely unknown." (xxv).

[17] *Matthew*s, 17.

[18] *Grupo Torras SA v Al Sabah et al* [2002 JLR 53] 92.

[19] *Ibid* 95.

The nature of a Jersey trust is analysed on the basis of a hierarchy of sources, often in practice interspersed, based on the law, jurisprudence and literature.[20] Article 2 states the circumstances where a trust exists:

> "A trust exists where a person (known as a trustee) holds or has vested in the person or is deemed to hold or have vested in the person property (of which the person is not the owner in the person's own right) –
>
> (a) for the benefit of any person (known as a beneficiary) whether or not yet ascertained or in existence;
> (b) for any purpose which is not for the benefit only of the trustee; or
> (c) for such benefit as is mentioned in sub-paragraph (a) and also for any such purpose as is mentioned in sub-paragraph (b)."

This may not be a definition of the nature of trusts, but rather a functional description: it does not tell us what the trust is, but what it does, and when it exists. The implication is that these essential requisites cause a trust to come into existence.[21] Not surprisingly, a definition of a trust was avoided. So, is it an Equity or Equity-like type of trust?[22] As a lawyer from a different jurisdiction, the author's respectful assessment is, that it is not. Neither the TJL nor other sources acknowledge the distinction between beneficial and equitable ownership. In *Flynn v Reid*, the Royal Court rejected the notion of a distinction between legal and beneficial ownership of land, and the consequent implications of proprietary estoppel.[23] Traditional literature assumes the existence of one unitary notion of ownership.[24] However, the suggested interpretation is that there is a segregation of distinct patrimonies, belonging to the same person. This view is based on the Jersey tradition of the single patrimony – no specific reference has been traced: rather the writings on property and obligations of Pothier,[25] Le Geyt,[26] Poingdestre[27] and Le Gros[28] are all developed on the assumption, known to civil

[20] *Brown*, 11, 37, 53.
[21] P Matthews, *Institute of Law Jersey,* Trusts Study Guide (2013) 14 – www.lawinstitute.ac.je.
[22] M Slater, *Institue of Law Jersey*, Trusts Study Guide (2015) 15.
[23] [2012 (1) JLR 370] 391.
[24] Le Geyt, *Manuscrits* 289; Pothier, *Traité du Droit du Proprieté* 285.
[25] *Coutumes d'Orléans*, 22.
[26] *Privilèges,* 38.
[27] 35,115.

lawyers, that *biens,* the division thereof into movable and immovable, ownership, possession and acquisitive prescription, are based on the single patrimony notion.

It is acknowledged that article 2 above may indicate rather striking similarities to what is apparently Equitable or beneficial ownership: this is borne out by the statement indicating benefit and purpose, at subarticles (a) and (b). The suggested interpretation of the paragraphs however is that it rather indicates a segregation of different patrimonies. This is therefore the defining characteristic of a civil law trust – the ability to create two or more patrimonies of the same person and, at the same time, functionally create the same effects of an Equity trust. This aspect has been clearly developed in Scottish writing.[29] This conclusion in the case of Jersey is based on the notion of vesting in a person, hence a conceptual link to ownership, personhood, and therefore patrimony. This position is further supported by the statement that the trustee "is not the owner in the person's own right." This illustrates again the nexus between personhood and capacity to own as an incidence of personhood – another strong indication in the writer's view, of the peculiarity of the Jersey trust as part of the broader family of civil law trusts. Other characteristics of the Jersey trust deserve mention: first, it can have a potentially indefinite duration, avoiding thereby the sometimes nasty effects of perpetuities and accumulations. Secondly, the creation of charitable purpose or non-charitable purpose trusts is allowed.

The combined effects of the indefinite character of a Jersey trust, along with the two forms of purpose trusts, have important proprietary consequences. The first is that it seems possible for proprietary rights to be tied indeed for generations, if not technically in perpetuity. This is rather similar to the *fideicommissum* and entail tradition, possibly successive usufruct[30], or liferent in the Civil Law

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[28] *Traité de Droit Coutumier de l'Isle de Jersey* (2007) 105.

[29] G Gretton, "Trusts without equity" (2000) 49 *Intl Comp LQ* 599; G Gretton, "Trust and patrimony", in H L MacQueen (ed), *Scots Law into the 21st Century* (1996) 182; K Reid, "Patrimony not equity: the trust in Scotland" (2000) 3 *Euro Rev Priv L* 427; R Anderson, "Words and concepts: trust and patrimony" in A Burrows et al (eds) (2013) *Essays in memory of Lord Rodger of Earlsferry* 347; C Aubry et C Rau, *Cours de Droit Civil Français* (1897) T2 § 162-164; G Baudry-Lancantinerie et A Wahl, *Trattato Teorico-Pratico di Diritto Civile - Dei Beni*, translation P Bonfante (1912) 2; M Planiol et G Ripert, *Traité Pratique de Droit Civil Français* (1952) 19; A Thomat-Raynaud, *L'Unité du Patrimone: Essai Critique* (2007) 31, 67, 143.

[30] G. Pugliese,*Usufrutto, uso e abitazione, Trattato di Diritto Civile Italiano* (1972); Pace, RC, *The Usufructuary and His Rights,* Thesis University of Malta (1981); F Terré and P Simler, *Droit Civil Les Biens* (1998) 591.

tradition. This is significant in the light of the provisions of article 6 of the *Loi (1851) sur les testament d'immeubles*:

> "Les substitutions sont prohibées.
>
> Toute disposition par laquelle le légataire sera chargé de conserver et de rendre à un tiers sera nulle, même à l'égard du légataire.
>
> Toutefois la nue propriété peut être donnée à l'un, et l'usufruit à l'autre."[31]

The 1851 law therefore prohibited entails or *fideicommissa* of immovables: this is partly consistent with the current Jersey Trust Law which prohibits trusts relating to immovables located in Jersey. On the other hand, a private trust without any defined period of validity, can possibly create a *fideicommissum* provided it does not refer to real property in Jersey.[32]

It is therefore worth remarking that a conscious intention is here apparent to allow proprietary assets to be out of economic circulation for generations. The other relevant consequence is the recognition of non-charitable purpose trusts: this is a rather significant departure from the Equity tradition, which limited purpose to charitable trusts. Perhaps its true significance may lie in that the Jersey trust attempted in the past to fulfil a function of a foundation, in the sense of the assets owned by an ownerless foundation, since at the time Jersey had no law on foundations. It is trite law that the trust assets are vested in the trustees, as distinct from the potential free-standing ownership of a foundation which owns the assets, adding that Jersey has now its own fully-fledged foundation.[33] All the above is therefore not only a clear indication of an intention to carve a niche in the international trust market, but also evidences a deliberate shying away from the Equity type to create a particular Jersey, civil law, brand of trust.

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[31] Translated – Substitutions are prohibited. Any disposition whereby a legatee is charged to hold and convey to a third party is null, also in connexion with the legatee. Nevertheless, bare-ownership can be given to a party and usufruct to another. Vide also Brown, 13 and Matthews, 26.

[32] Art 11(2)(3) of the TJL makes invalid a trust to the extent that it applies directly to immovable property situate in Jersey.

[33] Foundations (Jersey) Law 2009.

B1 Is the Jersey Trust a Usufruct?

On a wider perspective, the familiar questions posed by civil lawyers surface.[34] Usufruct is known both to customary and contemporary Jersey law: a current example is the right of the surviving spouse to life enjoyment of the matrimonial home in terms of article 5 of the Wills and Successions (Jersey) Law 1993.[35] Is the Jersey trust therefore a usufruct? It may be difficult to classify the trust as usufruct.[36] The first reason is that, in the case of a trust, there are not the two component divisions of full ownership between *usufructus* and *nuda proprietas*. While it is conceivable to argue that the *nudus proprietarius* is the trustee and the *usufructuarius* is the beneficiary, it is suggested that this possibility be dismissed. A *nudus proprietarius* has a beneficial right to the property, while a trustee, at least as such, does not. Moreover, any equation of usufruct with the trust is totally alien to the concept of the Jersey trust as seen herein, that is, the multiple and segregated patrimonies vested within the same person. The contention that there is in either case a division of ownership is acknowledged: to this it is replied, that the segregation cast by the Jersey trust does not tally with the two component figures in usufruct.

B2 Or a *Stipulation Pour Autrui?*

Can the Jersey trust be categorized as a *stipulation pour autrui* or a derivation thereof? The *stipulans* could be the settlor, while the third party the beneficiary. While such potential classification may be attractive, since it fits neatly within a time-honoured civil law distinction, it is again clearly inapplicable. As seen, private trusts refer to a person with various possible patrimonies, holding therefore separate assets in distinct patrimonies for the benefit of third party beneficiaries or for itself. The stipulation is conceptually diverse, since promisor A obliges itself in favour of a third party C, and there is no vesting in ownership in trustee B, a characteristic essential of the trust. This should show that however

[34] The questions here posed relating to the nature of the Jersey trust apply with equal validity to Malta.
[35] T Hart, "Difficulties encountered with the wills and successions (Jersey) law, 1993" (1999) 3 (2) *JGLR* 216; R Anderson, *Law of Immovable property*, Institute of Law Jersey Notes (2014) 43.
[36] It is recorded here that the 1851 law on testaments of immovables permits the hereditary division of the *nue proprieté* and the *usufruit* to different parties.

elegant the attempted characterization within the civil law tradition, it remains clearly inapplicable.

B3 Or a Deposit?

Deposit is likewise not favourably viewed as a possible civil law interpretation of the nature of the Jersey trust. The Island has no civil code, therefore the sources fall to be its Norman custom and tradition.[37] Deposit may involve custody, such as a bank-deposit-account where the ownership of the money deposited is acquired by the depositary bank, and indeed duties which, as is well known, could be classified as fiduciary. Nevertheless, this does not tally with the view, assuming of course that it is valid and correct, of different trustee patrimonies for various beneficiaries, and need not detain us.

B4 Trusts and Mandate?

A more challenging assessment may be the affinity between mandate and trust. Here again, no reference is found in Le Geyt, Le Gros, Poingdestre and Le Mausurer. Pothier, an important souce of Jersey law, in terms which raise important questions, thus defines the contract:

> "Le contrat de mandat est un contrat par lequel l'un des contractants confie la gestion d'une ou plusiers affaires, pour la faite en sa place et à ses risqué, à l'autre contractant, qui s'en charge gratuitement, et s'oblige de lui en rendre compte."[38]

The trust definition carries similarities with mandate: this contract is presumed to be gratuitous, referring to the administration of proprietary rights belonging to a third party. One may perhaps compare the terms of the trust document with the "*gestion du'une ou plusiers affaires*" as also the accountability of a trustee's "*s'oblige de lui en rendre compte*." Nevertheless, there are absent from the contract of mandate, the defining essentials of the Jersey trust requirements – namely, the *holding* or *vesting* in a trustee of the trust fund "of which the person is not the owner in the person's own right" and this for the benefit of another. The

[37]Pothier, *Traité du Contrat de Dépôt, Oeuvres*, T8, 255; M Huard, *Dictionnaire du Droit Normand*, (1780) II.8.

[38]T IX 1. Freely translated – The Contract of Mandate is a contract whereby one of the contracting parties (the mandator) entrusts, in his stead and at his own risk, the management of one or more affairs to another contracting party, who accepts to do so gratuitously, and binds itself to account to the mandator.

mandatory remains a distinct party executing the orders given by the mandator, and not having vested in itself *qua* mandatory, property for the benefit of the mandatory or a nominated beneficiary. There could be significant analogies between the settlor-mandator and trustee-mandatory, and intersecting of obligations. However, the vesting of property in the trustee remains the *critical* distinction from mandate.

B5 '*Gestion d'Affaires d'Autrui?*'

The relevance of the question is its possible affinity with a trustee *de son tort*, a particular type of trustee acknowledged by the Jersey Courts.[39] There are parallels indeed: both figures intermeddle with the affairs of a third party, without any authority or mandate. The test of characterizing the trust as a '*negotiorum gestio*' however fails because there is no vesting in ownership for a third party.

C. So what is the Jersey Trust?

It is here argued that the Jersey trust finds its place among the family of civil law trusts or 'trust-like' devices – these include Scotland,[40] Malta, Québec,[41] France,[42] and possibly South Africa.[43] Moreover, Jersey fits into the category of the 'mixed' jurisdictions. Its trust finds continuity with the island's civil law tradition, and it is suggested, perhaps boldly, that its remote conceptual roots are in the Roman *fideicommissum*[44] and the civilian *fiducia* – a contract whereby a party held an asset in the name of another, subject to the personal obligation of re-transferring it.

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[39] [2009 JLR 227] *Cunningham v Cunningham*.

[40] Wilson and A Duncan; G Gretton, "Scotland: The evolution of the trust in a semi-civilian System" in R Helmholz and R Zimmermann (eds) *Itinera Fiduciae* (1998) 507; C Van Rhee, "Trusts, trust-like concepts and the *Ius Comune*" (2000) 3 *ERPL* 453; A Stępkowski, *L'Insitutution du Trust dans le Système Mixte du Droit Privé Écossais* (2005) 23, 53; G Gretton, "Up there in the *Bergriffshimmel*?" in L Smith (ed) *The Worlds of the Trust* (2013) 524; generally, the same volume of collection of papers.

[41] M Piccinini Roy, "The Québec trust or '*fiducie*'" (2009) 16 (4) *JTCP* 231; G Fortin, "How the province of Québec absorbs the concept of trust – Part I (1999) 5 (2) *T& T* 22; II (1999) 5 (3) 20; Part III" (1999) 5 (4) 20.

[42] F Barrière, *La Réception du Trust au Travers de la Fiducie* (2004).

[43] M J de Waal, "The uniformity of ownership, *numerus clausus* and the reception of trust into South African Law" (2000) 3 *Euro Rev Priv L* 439; H Sher, "Trusts in South Africa" (1996) 2 (7) *T& T* 11; F du Toit, "Trust deeds as 'constitutive charters' and the variation of trust provisions: a South African perspective" (2013) 19 (1) *T & T* 39.

[44] Generally, D Johnston, *The Roman Law of Trusts* (1988).

This is not to state that the Jersey trust does not confer a proprietary interest on the beneficiaries. Rather, along with the other civil law trusts, it finds distant origins as stated, or, one could call it *confiance*. It has gone a step further and identified a property right vested in the trustee, for a third party benefit, without the Equitable split in legal and beneficial ownership. All this, can be read into the drafting and language, "holds or has vested in the person property of which the person is not the owner in the person's own right." This therefore is the hallmark of the Jersey trust, assets forming part of a person's patrimony held for another and not part of the holder's personal patrimony – acknowledging again, that this presupposes the correctness of this patrimonial analysis. This view is further strengthened by article 54(4) of the TJL providing that on insolvency of a trustee or execution against the trustee's property, "the trustee's creditors shall have no right or claim against the trust property except to the extent that the trustee himself or herself has a claim against the trust or has a beneficial interest in the trust." The trust is stated to include: "a) the trust property and b) the rights, powers, duties, interests, relationships and obligations under a trust."[45] This means that the rights, interests and obligations are bundled together within the trust. Inevitably, this leads to the next questions being the nature of the settlor-trustee and that of the beneficiary-trustee relationship.

MALTA

D. Malta Trusts

That trusts were not generally known to the law of Malta prior to the advent of trust legislation, is in the writer's view, a fair assessment.[46] The first land-mark development was the Offshore Trusts Act, 1988 (OTA): it was here that Jersey law first clearly served as a model for the Malta project.[47] The only trust concept created by this law was an "offshore trust." Setttlors or beneficiaries were required to be non-resident in Malta; settlement of immovable property in the island -

[45] Definitions, at art 2 TJL.

[46] Trust-like devices, such as *mandat prêt-nom* were acknowledged. These are discussed *infra* under duties and responsibilities of trustees.

[47] Generally, E Berti-Riboli, *La Legge di Malta sui Trust* (2007) 3-27; P Vella Sciriha *To Trust or not to Trust* (2004) 3-35, 85-92; *T & T* 11 (6) 2005 – an entire issue dedicated to the Malta Trusts Law; M Ganado and G Griffiths, "The Malta Trusts Project – The Genesis of a New Trusts Act in a Civil Law Jurisdiction" in M Dixon and G Griffiths (eds) in *Contemporary Perspectives on Property, Equity and Trusts Law* (2007) 203.

similarly to Jersey – was prohibited.[48] In the case of a sole trustee, this had to be a licensed nominee and if the trust had various trustees, one had to be a nominee. The Act recognized for the first time in Maltese law a constructive trust.[49] The trust constitutive instrument and any amendments thereto were required to be registered.[50] The Act also granted fiscal advantages to offshore trusts.

At the time Malta was clearly identified as an "offshore" jurisdiction, but this position in the international financial services market had to be revisited in view of the forthcoming accession to the European Union in 2004: the "offshore" model was incompatible with the *acquis communuataire.* It was in this wake that the current trust law, the Trusts and Trustees Act[51] (MTTA) as an amending law to the 1988 OTA came into effect in 1994.[52] Other significant amendments, also with EU accession in mind, were introduced in 2004,[53] to include, for example, trusts for charitable and commercial purposes. Act XI of 2014 saw other additions. The powers that a settlor could reserve in its favour were widened.[54] The maximum duration of a trust was increased to one hundred and twenty five years.[55] The most controversial amendment, assessed in the next chapter, is a qualification to the beneficiary's interest which "cannot be transmitted by inheritance except as provided by the terms of the trust."[56]

The broad similarity to Jersey Law was retained. There are no formal sources documenting such indebtedness, but this clearly emerges from an examination of the legislative texts. The reasoning is plain: both are small island jurisdictions and familiar with the French tradition. Jersey did not adopt the codification, whereas Malta drew very substantially from the Napoleonic Code of 1804: every self-respecting civil law office in either jurisdiction has a copy of the *Oeuvres* of

[48] Art 6 OTA
[49] *Ibid*, art 33.
[50] Art 43
[51] Chapter 331. www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8805&l=1.
[52] Act XX of 1994. Vide debates of the 10th Parliament, sitting 164 of the 27th September 2004, 165 of the 28th September 2004, 166 of the 29th September 2004 and 167 of the 4th October 2004; also, Minutes of the Permanent Committee for the Consideration of Laws, sitting 32 of the 6th October 2004 and 33 of the 18th October 2004.
[53] Act XIII of 2004.
[54] Art 14A.
[55] 12 (1).
[56] 9(2).

Pothier.[57] At the same time, the extensive influence of English law and practice even in a civil law jurisdiction remains unabated. Among the important innovations of the MTTA are the introduction of following and tracing at art 40A, and the incorporation of the Hague Convention on the Law applicable to Trusts and their Recognition as part of domestic law. Nominees as trustees were phased out over a two-year transitory period.[58]

The structure and content of the MTTA show deep concern and attention not to conflict, or otherwise destabilize, the strong and millennia-old civil law substratum. For example, art 331 of the Malta civil code (MCC) provides that "where usufruct is granted in favour of successive persons, it shall only be operative in favour of those persons who are alive at the time when the usufruct devolves on the first usufructuary." Art 757 thereof prohibits entails and "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." Art 761 moreover provides that:

> "Any perpetual or limited burden by reason of which the whole usufruct of the inheritance or of the legacy, or a portion of such usufruct, or any other annuity, is to be given to two or more persons successively, shall be considered as if it had not been written."

Nevertheless, this is inapplicable in the case of "persons called to benefit under a trust or a foundation." Entails are expressly forbidden in wills and donations.[59] The MTTA however expressly excepts these provisions, stating that "trusts created or recognised in accordance with this Act are not prohibited by articles 331, 757 to 761."[60] The civil code provides that an inheritance can only be disposed of by testament[61]: yet the MTTA contemplates that this civil code principle "shall not affect any term of a trust because it relates to the inheritance of the settlor or because a disposition relating to property under trusts is to take

[57] Clearly, the influence of the French code is stronger in Malta than in Jersey. Nevertheless, there are some instances of similarity, such as the *Loi (1851) sur les testament d'immeubles* referred to, which was adopted from the French code.
[58] Art 35, transitory provision to the 2004 amendment.
[59] Art 1776. The Maltese term, reflecting its Latin origins, is *fedekommess.*
[60] Art 6 (4).
[61] *Ibid* 586.

effect after the death of the settlor."[62] A recent provision limiting transmission *mortis causa* of a beneficial interest only by the terms of the trust may here be a discordant note, since it could prevail over the general law of succession.[63] Nevertheless, there is a clear effort and intention to integrate the trust or at least to attempt to harmonize clear areas of possible conflict. This choice is, in the writer's view, a strong argument in favour of a civil law trust, an emerging vehicle which somehow nestles in the wider framework. A concluding comment, applicable through this entire thesis, is that due to the recent introduction of the trust law, jurisprudential indicators are sparse. While the context, language and basic concepts remain Roman-civilian, such as the role of the *bonus paterfamilias* criterion, good faith, delictual and contractual responsibility, some rules of English trust law find application within this civil law context, for example following and tracing. Surprisingly perhaps, there is little reference to Jersey sources, not least because they are not generally known to practitioners in Malta.

E – Nature and characteristics

Article 3 (1) of the MTTA reads thus:

> "A trust exists where a person (called a trustee) holds, as owner or has vested in him property under an obligation to deal with that property for the benefit of persons (called the beneficiaries), whether or not yet ascertained or in existence, which is not for the benefit only of the trustee, or for a charitable purpose, or for both such benefit and purpose aforesaid."

This provision is clearly indebted to its Jersey model – the language of 'holding or having vested.'[64] Both laws wisely do not attempt to define a trust, rather choosing to attribute the effect of the existence of a trust where certain conditions or situations come into being. Previous reflections on TJL asking whether the trust is usufruct, a *stipulation pour autrui*, a deposit, a mandate or a *gestion d'affaires autrui* are also valid in the case of the MTTA. The Malta trust, for the same reasons as those of Jersey, is none of these. The trust property is stated to be

[62] 6(5).
[63] Act XI of 2004.
[64] Art 2, TJL.

"a separate fund owned by the trustee, distinct and separate from the personal property of the trustee and from other property held by the trustee under any other trust." This clearly establishes the segregation of the trust assets. The term "separate fund" raises the question of personification of the trust and it has been argued, that a Maltese trust enjoys separate legal personality.[65]

Clear lines of similarity are identified between the Maltese trust and the proposed *Principles of European Trust Law*.[66] Article I (1) provides that the truste "owns assets segregated from his personal patrimony." – the French text reading "propriétaire des biens séparés de son patrimoine personnel." Moreover, the Nijmegen principles acknowledge that "a beneficiary has personal rights and may have proprietary rights against the trustee .." – Le bénéficiare a .. un droit personnel proper contre le trustee.." The affinity lies in the patrimony segregation, and at the same time the obligational character of the beneficiary rights.

There are however significant differences in policy choices and perhaps notions, that go beyond linguistic differences. The MTTA provision, differently from its Jersey counterpart, states that a trustee "holds as owner" and "under an obligation to deal with that property.....". Holding is a term of art in civil law – the *detentor* is distinguished from the possessor, and the *causa detentionis* is the distinguishing basis of *detentor*'s entitlement to hold. The term *hold* here may not carry the precise meaning as in context of possession. What is relevant is that a trustee *holds*, subject to the defining obligation to deal with the trust fund in the beneficiary's interest.

The term 'obligation' intentionally links the trustee's duty with the general law of obligations: a deliberate intention is identified, to characterize in terms of the civil law category of obligations, the nature of trusteeship. At the same time, the holding or detention by the trustee, displays different capacities of holding, in a personal capacity or in that of a trustee, possibly of various distinct trusts. Is it a

[65] A Micallef, "Basic principles of trust in Malta" (2013) *GhSL On Line Journal* – http://www.lawjournal.ghsl.org/articles-archive.
[66] Fn13.

different kind of ownership? – a resounding no, the writer responds. Rather, it is suggested that, whether by conscious design or through civilian intuitive thinking, the MTTA has inclined towards, or perhaps adopted, the Scottish reasoning of different patrimonies. This prompts, or is linked to, the question whether the Malta trusts have created double or divided ownership, analogous to Equity. While the answer is a trite no, less obvious are the reasons thereof. The obligational character of the trustee's tenure is no decisive or necessary answer. The crux rather lies in the structure of Malta's law of property: this is historically based on *dominium* and *proprietas* as absolute ownership, the distinction between real and personal rights, the division of ownership into lesser real rights, and the basic foundation of the civil code following its French model, orbiting around the different modes of acquiring and transferring ownership or rights over things (*res*). The basis of transfer is consensual but subject to publicity in favour of third parties, for example, immovable property, liquid or quoted investments, company shares, ships or aircraft.

Implanting the trust in this system in the sense of re-defining the whole structure of property rights is difficult or impossible. The various patrimonies theory is acknowledged by Maltese law in different contexts. For example, the Investment Services Act (Control of Assets) Regulations[67] provide that where an investment services provider holds assets of a customer in its name, "such assets shall be deemed to constitute *a distinct patrimony*, separate from the subject person" (the service provider) "and from the assets belonging to the subject person and from that of customers the assets of whom are also held under the control of the subject person." Likewise, an investment company with variable share capital (SICAV) may be constituted as a multi-fund company, with its share capital divided into different classes of shares. In this case, one class or a group of classes of shares constitute a distinct sub-fund of the company.[68] In terms of article 9, a SICAV is entitled to elect that the assets and liabilities of each sub-fund comprised in that company be treated "for all intents and purposes of law as *a patrimony separate* from the assets and liabilities of each other sub-fund of such company."

[67] http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10409&l=1.
[68] Companies Act (investment companies with variable share capital) regulations; http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10491&l=1.

In a different, maritime context, the Malta Merchant Shipping Act[69] provides at article 37A that:

> "Ships and other vessels constitute a particular class of movables whereby they form separate and distinct assets within the estate of their owners for the security of actions and claims to which the vessel is subject."

Similar treatment is afforded to aircraft.[70] The MTTA itself provides for the segregation of trust property which "shall constitute a separate fund owned by the trustee distinct and separate from the personal property of the trustee and from other property held by the trustee under any other trust."[71]

The obligational character of the Malta trust strikes a strong chord, which makes sense in context of future references both in the MTTA and in this writing, to the *bonus paterfamilias* and the degree of diligence attributed thereto along with the utmost good faith.[72] Significantly, therefore, in the writer's view, there is a conscious adoption of the principles of the law of obligations, to include good faith, *culpa*, responsibility in damages *ex contractu* or *ex delicto*. The nature of the trust is also cast within the civilian structure of obligations. This is likewise, to the author's mind, another strong indicator of the autonomous civil law character: steeped in obligational terms, but functioning in practice in almost identical terms to, but without, Equity.

The concluding comment on the nature of the Malta trust is, that it is in many ways a product of its own history and culture. The critical distinguishing factors, to the author's judgement, are the implied separate patrimonies and its obligational nature. This enabled the drafters to wisely avoid a Pandora's box by any reference to, or introduction of, dual ownership from Equity. That would have been alien to the Maltese legal system, even at its most flexible best. Lest

[69] http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8734&l=1.
[70] Art 25, Aircraft Registration Act. http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11388&l=1.
[71] Art 3(2).
[72] Art 21.

however anyone question whether colonial nostalgia is spiriting away, the writer holds the view that English law, practice and academia will call the shots: they will remain the first and most likely the only port of call for judges and practitioners. In fairness, this has to be balanced against the limitations of home-developed resources of a small island state, which however support the trend to resort to English materials.

F. The Civil Law Trust – Separate Patrimonies, Division into Legal and beneficial Ownership?

It is not premature to ask whether the trust in either jurisdiction can be categorized as a civil law trust. The identifying character of this trust encompasses the transfer of assets to be dealt with for a beneficiary or a purpose. There is no 'split' ownership, in the sense of double ownership, legal and beneficial, as in Equity trusts. The core characteristics of accountability to trustees are well preserved. Such civil law trust can accommodate tracing, and simultaneously the action *pauliana* and *surrogatoria*. It avoids legal personhood of the trust, and can straddle unjustified enrichment, in the Roman-civilian tradition, without Equity-based or resititution responses. It is somehow a descendant in memory and identity of the Roman *fideicommissum* and later *fiducia* or *confiance*.[73] The civil law trust can absorb without difficulty the traditional Equity fiduciary obligations. It is to be distinguished from the current of thought which focuses on the reception of the trust by civil law systems.[74] Above all, perhaps, the civil law trusts enable a civil lawyer and practitioner to carry the intellectual 'baggage' of the civil law tradition, including its hidden principles, policies and general principles.

Jersey has developed its own brand of trust, flowing from its civil-*Normande* heritage. At the same time, in recent years, there have been indications that the Jersey Courts will also take into account English Equity, sometimes abandoning

[73] M Lupoi, "A civil law perspective and the Italian case" (2005) (11) (2) *T & T* 10; *ibid,* "Trust and confidence" (2009) 125 *L.Q.R*, 253; M Lupoi, "The civil law trust" (1999) 32 *Vand J Transnat' L* 967.

[74] P Lepaulle, "Civil law substitutes for trusts" (1926-1927) 36 *Yale L.J*. 1126; *ibid*, "An outsider's point of view of the nature of trusts" (1928-29) 14 *Cornell L.Q*. 52.

Equité. Nevertheless, there is no suggestion of division of legal or beneficial ownership in the sense used in Equity.

The Jersey trust is therefore seen as a paradigm of a civil law trust emerging from a mixed system. It has not received the Equity Trust: otherwise, this would conflict with its law of property which reflects the Roman-tradition, for example the division of *biens* into movables and immovables and the civil law notion of ownership.[75] At the same time, the Jersey trust is sufficiently flexible to receive notions simultaneously such as the proprietary tracing claim in the English Equity and the Pauline Action, notwithstanding that the Royal Court rejected English law in relation to restitutionary remedies.[76] It was however, prepared, in another Instance, to acknowledge the existence of an 'equitable lien' in favour of the outgoing trustee against the trust assets, for liabilities properly incurred in the conduct of the former trusteeship.[77] This reflects the mixed nature of the Jersey legal system and trust, clearly avoiding any full Equity reception. At the same time, there is no abdication from the single and undivided patrimony known to civil law.

Malta has remained generally faithful to its Roman-Napoleonic heritage. Saving the important inroads considered, and the multi-patrimony trust, the notion of patrimony has remained faithful to its French tradition, being one, indivisible and unlimited.[78] It is indeed the Maltese trust that has inclined in favour of the traditional civil law rules of property, obligation and succession. At the same time, it allows tracing, lives comfortably with the Hague Convention, the EU and English rules of private international law.

G. Is it a case of Duty-Burdened Rights?

Do these civil law trusts create duty-burdened rights? The rights-against-rights theory suggests that the beneficiary's right is a right against that of the trustee.[79] It

[75] P Matthews and S Nicolle, *The Jersey Law of Property* (1991); R MacLeod, *Property Law in Jersey* (2011) PhD Thesis, Edinburgh.
[76] *Esteem*, Fn 18, which expressly received Pauline fraud as a basis for the action.
[77] *Z Trusts* [2015] JRC 031.
[78] F Barrière, "The French Fiducie" in L Smith, supra 11, 238; Smith, ibid 262.
[79] B McFarlane and R Stevens, "The nature of Equitable property" (2010) 4 *J.Equity* 1.

avoids the distinction between rights against a person and against an object, and the distinction between legal and equitable ownership. This development posits that the right of A against B will persist against any person or right acquiring or deriving from A. Significantly, A's right comes burdened with a duty corresponding to B's right against A, for example the duty of A to use its right for a proper purpose. In context therefore, the trustee's right over the assets it holds in trust, for example disposal, appropriation, powers, discretion are burdened by the beneficiary's rights against such trustee rights – in some instances, these rights may be followed in the hands of a third party. This analysis also places into perspective what exactly is owned: is it the beneficiary's right against the trust assets, or is it the beneficiary's right against the trustee's ownership of the trust fund?[80] Smith has also developed this theory in a civilian context, suggesting that the beneficiary's rights are "rights over the rights which the trustee holds as trust property; they have a proprietary character since they persist against many third party transferees of the trust property."[81]

The "rights-against-rights" analysis has its unquestionable merit: it is even acknowledged that it could work in civil law systems. Nevertheless, the various-patrimony approach is preferable in the emerging civil law trust in Jersey and Malta. True, the growing need for separate patrimonies is identified.[82] The French and Québec *fiducie* have opted for a free-standing patrimony. For all this, the single patrimony remains mainstream in the civil law systems and faithful to tradition: certainly, the separate patrimony approach does not disturb or re-write existing property law rules.

In conclusion, therefore, a strong case for an autonomous character of a civil law trust is seen.

[80] G Gretton, "Ownership and its objects" (2007) 71 *RabelsZ Bd*. 802.
[81] L Smith, "Trust and patrimony" (2008) 38 *Rev Gen*. 379.
[82] D Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring Fenced Funds* (2002); K Reid *et al* (eds), *Towards an EU Directive on Protected Funds* (2009).

CHAPTER II – TYPES OF TRUSTS AND NATURE OF BENEFICIARY'S RIGHTS

A. Scope of the Chapter

This chapter will address the creation and categories of trusts in Jersey and Malta, examining thereafter the beneficiary's rights.[83] The analysis will also be developed in context of the two fundamental questions of the thesis: the feasibility of a civil law trust and the hinging distinction between a domestic and a foreign trust, all against the background of a "mixed" legal system. While the types of trusts, creation thereof and rights of beneficiaries carry with them the civil law tradition, they manage to fit comfortably within established categories of other relevant jurisdictions. They are a paradigm of the civil law trust.

JERSEY

B. Types of Trusts and Creation thereof

The TJL broadly recognizes various trust categories to include express, resulting, constructive, purpose trusts, this comprising charitable and non-charitable, common-intention and the trustee *de son tort.*[84]

(i) Express Trusts

Art 7 provides that, saving for unit trusts which necessarily are to be in writing, "a trust may come into existence in any manner" and at subarticle 2 thereof:

> "Without prejudice to the generality of paragraph (1), a trust may come into existence by oral declaration or by an instrument in writing (including a will or codicil) or arise by conduct."

The term "any manner" indicates the intended flexibility for the creation of a trust. An express declaration of trust, oral or in writing is a valid method of constitution, as is by testament or codicil. The term "settlor" includes "a person

[83] *Jersey Institute Notes* (2015) 16; *Thomas and Hudson*, 19; *Lewin* (18th ed) 15, 37, (19th ed) 15, 51, *Underhill* 79; *Matthews* 37, *Brown* 53; *Wilson* 23.
[84] *Thomas* 20, 157.

who makes a testamentary disposition on trust or to a trust."[85] In *Don Benest*, the testatrix devised land to the Parish of St. Clement, "for and on behalf of the *pauvres honteux*" of that Parish and expressed "the desire" that the income from the land or the investment of the proceeds of sale was to be applied for their benefit.[86] The Royal Court felt it could infer an intention to create a trust by testatrix and declared that a valid trust had been created. Implied trusts though not specifically mentioned in the TJL are however recognized jurisprudentially, an example being *Bermuda Trust (Jersey) Limited v Valibhai*.[87] The court determined the beneficiary for whom they held shares in a company: an implied trust was therefore equated to having arisen by conduct and evidentiary circumstances.

The Jersey Courts have received and applied the English "three certainties" test for the existence of a trust.[88] - *Re Malabry Investments Limited*. The case is also remarkable in that the Royal Court acknowledged itself developing a jurisdiction, in some ways akin to an English Equitable jurisdiction, illustrating the ongoing dichotomy, possibly unresolved, whether the Royal Court applies English Equity or civil law *Equité*, holding that:

> "The general equitable jurisdiction which the Royal Court has exercised particularly in recent years enables me to take note of the English Common Law and to find that if the concept of a Trust of the nature propounded by the Viscount is known to the law of Jersey then the Court may have regard to the principles creating such a Trust which apply under English Law."[89]

This is an illustration of the particular, civilian-yet-hybrid, character of the Jersey trust: roots in the civil law, with simultaneous selective adoption of fundamental Equity principles. The same principle of certainty of beneficiaries was applied in

[85] Art 1 TJL
[86] [1989 JLR 330].
[87] [2001 JLR 254].
[88] Certainties of intention to create a trust, subject-matter thereof and beneficiaries. *Thomas and Hudson*, 43.
[89] [1982 JJ 117] .

Re Double Happiness Trust.[90] In *Re Exeter Settlement*,[91] it was held that a trust without beneficiaries was void *ab initio*, since one of the certainties was missing. Nevertheless, the Royal Court allowed rectification by the insertion of a charity as initial beneficiary since it was satisfied that it was a genuine mistake.

(ii) Resulting Trusts

Resulting trusts are acknowledged by art 42 of the TJL. Jurisprudential references are generally sparse: *Koonmen v Bender*[92] reserved part of its reasoning to an unsuccessful claim, which argued that a resulting trust existed. The Royal Court assumed that the meaning of a resulting trust is clear and well-known, without the need of discussion. The question of a resulting trust arose again in *Jones v Plane,*[93] where, in context of a 'common intention' trust, the Court of Appeal considered that "a resulting trust could only have arisen if, at the time the plots were purchased in the appellant's sole name, the respondent had provided some of the funds or undertaken a legal responsibility to repay part of the mortgage."

(iii) Constructive Trusts

The discussion reverts to constructive trusts, not as an incident of the proprietary aspect of the beneficiary's interest: rather the question is the nature of the Jersey constructive trust.[94]

Article 33 of TJL recognizes the existence of the constructive trust:

> "Where a person... makes or receives any profit, gain or advantage from a breach of trust, the person shall be deemed to be the trustee of that profit gain or advantage."[95]

Earlier pronouncements of the Royal Court seem to indicate that prior to the 1984 TJL, the constructive trust was regarded principally in the context of the French tradition of *Equité*, whereas post-enactment judgements swung the pendulum

[90] [2002 JLR *n* 48].
[91] [2010 JLR 169].
[92] [2002 JLR 407].
[93] [2006 JLR 438]; [2006 JLR *n* 6].
[94] The English Supreme Court in *Williams v Central Bank of Nigeria* [2014 UKSC 10] importantly distinguished the meanings of constructive trust.
[95] A comment here is that a trustee holds identifiable property, whether corporeal or incorporeal. There could be some difficulty how "a profit, gain or advantage" can be, or is always, identifiable property.

towards the English Equity notion. Thus, in *Fiduciary Management Limited v Sheridan*:[96]

> "The Royal Court, as a court of equity, has inherent power to give relief to a person threatened with a wrong. This power requires a specific jurisprudential base against which to judge the circumstances of a particular case. Prior to the coming into force of the Trusts (Jersey) Law 1984, equity in Jersey inclined towards the French *equité*, *i.e.* a question of fairness, rather than towards the English equivalent..."

Later jurisprudential dicta imply that the Jersey Courts looked closely to the English Courts for the meaning of a constructive trust. It was held in *United Capital Corporation v Bender*[97] that:

> "If the defendants were found to be constructive trustees, on the basis of dishonest assistance or knowing receipt, they could be liable to account to the plaintiff as if they were conventional trustees...."

The Royal Court in *Bagus Investments Limited v Kastening*[98] distinguished between two types of constructive trusts known to Jersey Law:

> "...class 1 constructive trustees who had assumed fiduciary obligations in respect of trust property and who were really trustees; and class 2 constructive trustees, who were strangers to a trust but became liable in equity by dishonest acts of interference (*e.g.* knowing receipt).

The *locus classicus* on the nature of the Jersey constructive trust and its creation remains the *Esteem* judgement.[99] The salient lines are that even prior to 1984, Jersey law imposed a constructive trust, where profit was made from breach of trust. A beneficiary under a constructive trust does have an equitable proprietary

[96] [2002 JLR *n* 11].
[97] [2006 JLR *n* 7].
[98] [2010 JLR 355]. Vide also, *Abellan v Standard Chartered (C.I.) Limited* [2004 JLR *n* 36].
[99] Fn 18, 92 -110.

interest in the trust assets. The Royal Court acknowledged that the constructive trust was a mechanism used by English and other jurisdictions to assist in fashioning appropriate remedies to deal with commercial fraud, and opted to follow this direction. Moreover, where property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient so that the victim has a proprietary interest in such property. As a starting point, tracing as known to English law, was also applied, and as part of the law of property. However, the Royal Court did not feel itself bound by any English rule and was free to depart therefrom where it believed a better alternative existed.

(iv) Purpose Trusts

Purpose trusts are created for, and focus upon, a specific purpose. This category of trusts includes both charitable and non-charitable purpose trusts, generally out of the purview of this thesis.[100] In brief reference, however, the TJL requires that a purpose trust has a beneficiary, unless it is a charitable trust, and at all times an enforcer, with a mechanism for succession if the office is vacant. The application of an equivalent to the *cy-près* doctrine is contemplated.[101]

(v) Common Intention Trusts

Other types of trusts, apart from those expressly mentioned by the TJL have been recognized by the Jersey Courts – for example, 'common intention' trusts: in *Plane v Jones,* both the Court of Appeal[102] and the Royal Court applied the rules as developed by English Equity - the common intention to create a beneficial interest for a party, and the principle of detrimental reliance in circumstances where it would be inequitable to deny the interest. The same principle was upheld by the Court of Appeal, in the later *Flynn v Reid,*[103] which applied as an additional basis to the common intention trust, that of unjust enrichment. The facts were broadly, as in similar instances, involving just one party contributing, whether financially or otherwise, to the home, here not the matrimonial home, since parties were co-habitees but never married. Here, the claim on English

[100] *Bird Charitable and Bird Purpose Trust* [2008] JLR 1; *Trilogy Management Limited* [2012](2) JLR 330.
[101] Arts 12, 13, 14 and 47A.
[102] Fn 11.
[103] [2012 (1) JLR270].

proprietary estoppel was dismissed, without the Court pronouncing itself on whether this was part of Jersey law. A constructive trust on an immovable situate in Jersey could not arise, because the distinction between legal and equitable title was never recognized on Jersey immovable property.[104] As formulated, this may be a trifle odd statement, since at no point has Jersey, with such a strong civilian tradition, recognized this distinction in title. In fairness to DB Birt, the prohibiton against a Jersey trust and also of a foreign trust, affecting immovable property situated in Jersey may have been the central concern here.[105]

(vi) Trustee de son Tort

The figure of trustee *de son tort* is known to Jersey jurisprudence and thus defined by the Royal Court in *Cunningham v Cunningham*:

> "A trustee *de son tort* was a person who, not being a duly appointed trustee or having the authority of an actual trustee, took it upon himself to intermeddle in a trust and act as a trustee. He would be accountable to the beneficiaries of the trust as if he were an express trustee for any trust property received."[106]

C. Settlor-Trustee Relationship

The settlor-trustee relationship implies the existence of a trust fund and the transfer by settlor to the trustee of the assets in trust.[107] Its consequence is the divesting of ownership by the settlor and control by trustee of the assets *in terms of the trust*. The TJL nevertheless, particularly after the 2012 amendments, carries distinct features in the wide powers that a settlor can reserve to itself.[108] These include the power to revoke, vary or amend the terms of the trust, or powers granted, and to give binding directions on the appointment or removal of an officer of company in which the trust holds shares. Other powers that can be reserved include appointment or removal of trustees, change of the proper law

[104] DB Birt in *Esteem* at 92 however voiced certain reservations whether the provision prohibiting Jersey trusts over immovables applied to constructive trusts. However, it was not necessary to decide the point.
[105] Arts 11(2) (iii), 49 (2) (iii) TJL.
[106] [2009 JLR 227].
[107] Reid KGC, "Constitution of a Trust – the Scottish Perspective" (2011) 15(3) *Edin.L.R.* 467 – "No fund no trust'" 469.
[108] Art 9A.

and even extend *inter alia* to the exercise of any powers or discretions by a trustee - "by requiring that they shall only be exercisable with the consent of the settlor or any other person specified in the terms of the trust." The Jersey trust does allow, perhaps even encourages, the widest powers to the settlor: certainly, this policy choice may have been prompted by the intention to render Jersey a more favourable jurisdiction for trust creation, for example a safe haven for asset-protection.

This analysis prompts the question whether the trustee becomes in a Jersey trust, a *lunga manus* or *alter ego* of the settlor. This may not be entirely fair, since it is perfectly possible and legitimate to create a Jersey trust with a trustee operating at arm's length and independently. Linked to this is the proprietary issue whether with such potentially-wide reserved settlor powers, there has been a disposal of property interests at all. *Prima facie,* this creates a valid, but potentially challengeable or annullable transfer. Another question is whether the reservation of settlor powers, also known to other jurisdictions, removes the protection and segregation granted to the trust funds because of the settlor's reserved interest, wide powers or discretions. In the event of insolvency of the settlor, can this be subject to creditors' claims?[109]

D. The Nature of the Beneficiary's Right

The TJL provides that "the interest of a beneficiary shall constitute movable property" and that "subject to the terms of the trust, a beneficiary may sell, pledge, charge, transfer or otherwise deal with his or her interest in any manner."[110] Wide rights and powers, normally flowing from proprietary rights, are granted, including the creation of security interests. The beneficial interest is therefore categorized as a *res*, which can be dealt with accordingly, like any other object of property. Is, however, the right of the beneficiary against the trustee purely obligational or proprietary, or perhaps something different? In *Esteem*, the Royal

[109] *Tassaruf v Merril Lynch Bank* [2011] UKPC 17.
[110] Art 10 (10) (11).

Court acknowledged a proprietary interest and remedy of constructive trust to the victim of fraud."[111]

A beneficiary is defined "as the person entitled to benefit under the trust or in whose favour a discretion to distribute property held on trust may be exercised."[112] The key term is "entitlement" cast in terms of a right, against the trustee over the trust assets. The jurisprudence categorizes the beneficiary's claim likewise as *rights* – for example, to request full accounts and inventory of trust assets,[113] vis-a-vis Letters of Wishes[114] or the basic right to hold trustees accountable for their stewardship of trustee property.[115] In short, therefore, the beneficiary enjoys a right against the trustee to demand performance of trust duties, consequently categorized as obligational.

The suggested conclusion to the question is that a beneficiary's right and interest, is both obligational and proprietary. In so far as the right is obligational, personal rights and corresponding enforceable obligations between the parties exist: imposing good faith and fiduciary dealing, proper exercise of any power or discretion, administration of the assets in the interest of beneficiary, accountability and periodic information[116] - in essence the core "irreducible" duties of a trustee.[117] Therefore it is a right of the beneficiary against the trustee related to the trust assets, and possibly against the personal estate of trustee. It is further defined by tracing, constructive trust and possibly unjust enrichment.[118] A further characteristic of the beneficiary's interest is that it is segregated from the claims of creditors[119] or family of trustee. Therefore, because it is a proprietary, a beneficiary's interest would prevail over the creditors in the insolvency of the trustee. This view, it is submitted, is entirely consistent with the nature of the civil law trust: the obligational character of the beneficiary's right lies in perfect

[111] Fn 18, 92-99.
[112] Art 1(1).
[113] *West v Lazard Bros* [1987-88 JLR 414].
[114] *Rabaiotti* [2000 JLR 173].
[115] *HHH Trust* [2012 (1) JLR *N* 6].
[116] D Hayton, "Developing the obligation characteristic of the trust" (2001) 117 *L.Q.R* 96.
[117] *Armitage v Nurse* [1998 Ch 241].
[118] In *Esteem*, fn 18, the Royal Court refused to classify an action where property subject to an interest in trust was received by an innocent volunteer as a proprietary remedy, preferring the personal claim in restitution, 112.
[119] 54 (4).

harmony with the civil law context, the underlying basis being the trust rights and obligations arising from the trust deed and the law.

E. Assessment

Is there anything particularly civilian which justifies the conclusion that the Jersey trust is a civil law trust? The respectful answer suggested is yes. The defining factors remain patrimony, property interests, and rights and obligations, these underlining the civilian character of the Jersey trust. At the same time, the well-known categories of trusts are clearly defined. The Royal Court has stated, acknowledging its civil law history, that, "we have an inherent jurisdiction over trusts as a court applying the principles of *Equité.*"[120] This conclusion is also justified on the basis that the Royal Court has chosen remedies from the English trust without feeling bound to do so.

A relevant factor, is the unquestioned supremacy of Jersey internal law, even in non-domestic trusts.[121] The point is therefore not so much the prevalence of TJL, which should be self-evident, but the significance of the choice. It is clear that the choice of categories, and creation of trusts is significantly shaped by this policy decision of the Jersey trust law. Reception of foreign law, trust or otherwise, for example legitim in succession, or matrimonial questions, even in the foreign trusts, will remain rather difficult. This is a defining, overriding characteristic of the Jersey trust.

A degree of judicial ambivalence is noted. In *Esteem*, departing from the *B Trust*, it was stated that "A Jersey trust is essentially the same animal as is found in English law, subject to certain local modifications."[122] On the other hand, in *Re B*, the Royal Court took the view that "Decisions of the English courts in matters of this kind are always likely to be of considerable interest to the Royal Court and will frequently be treated as highly persuasive. Nonetheless, it remains the case that the Royal Court is not subordinate to the English Court of Appeal."[123]

[120] *B Trust*, [2006 JLR 562, 571].
[121] Art 9.
[122] Fn 18 at 90.
[123] [2013(1) 1] at 9.

The Jersey trust carries its distinctive civilian hue: this is clothed within the English and Commonwealth categories of trusts. A major merit is that while constructed using civil law tools and concepts, it fits neatly into the widely recognized categories. The same assessment applies to the beneficiaries' rights.

MALTA

F. Types of Trusts and Creation thereof

The familiar dearth of sources and references is recorded, and the MTTA therefore acquires even more over-arching importance. It recognizes express, resulting, constructive, testamentary, protective or "spendthrift" trusts, charitable trusts, but not non-charitable purpose trusts: this last instance is a significant departure from the Jersey model, which does recognize such a category. Commercial trusts are defined at article 2: these include the trust as a vehicle for securitisation, securities offerings, collective investment schemes and insurance policy holding. It also acknowledges testamentary trusts in the definition of a settlor.[124] Matrimonial regime trusts, and security trusts have been codified[125] and a consultation process is ongoing relative to family-office trusts and trusts for vulnerable persons,[126] all distinct from Jersey. Trusts are also widely used for estate-planning and testamentary purposes, equity holding, fixed interest, security, discretionary and sinking-fund trusts.

A critical look at the Malta legislation will immediately raise the following questions: how far are the process of trust creation and the beneficiary's right a derivation of its initial Jersey model? The other more basic reflection is whether these facets of the Malta trust, support the view of a civil law trust or possibly one operating in its mixed context.

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[124] Art (1) – ""settlor" means a person who provides trust property or makes a testamentary disposition on trust or to a trust."

[125] Arts 2095A and 2095E of the civil code.

[126] MTTA 43B a 2014 amendment relates to family trusts. The consultation process can be viewed at http://www.mfsa.com.mt/pages/announcements.aspx?id=10. Statutory Instruments SL 331.05 and 331.06 regulate the registration, conservation and access to notarial trust deeds: http://www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono&gotoID=331

Article 7 provides that:

> "(1) Within the meaning of article 3, a trust may come into existence in any manner.
>
> (2) Without prejudice to the generality of subarticle (1), a trust may come into existence unilaterally or otherwise by oral declaration, or by an instrument in writing including by a will, by operation of law or by a judicial decision..."

More significant is the statement that trusts can come into existence "by operation of law or by a judicial decision." This refers to resulting and constructive trusts. Resulting trusts are specifically twice referred to in the MTTA: the first is in context of the court's powers on an application by a beneficiary for directions, stating that the Court "may make any declaration as to the validity or enforcement of a trust, the existence of any resulting or constructive trust, breach of trust, or failure of trust."[127] The second is a defence to breach of trust to a person held to be a trustee under a constructive or resulting trust or as a result of any statutory provision or judicial declaration.[128] If called, the Maltese Courts and practitioners will almost certainly dutifully follow English law, possibly not even Jersey law. They will also refreshingly make use of their own toolbox, which is couched in concepts of contract, damages, and proprietary interest. This is not identical with the Jersey default resources, where a principal dichotomy is between *Equité* and *Equity*. In the Maltese application, both the rules of the "three certainties" will simultaneously apply, as will the meaning to resulting and constructive trusts, with the civil law rules for validity of formation of contracts. While therefore, there may not be much scope for originality, the particularity of the process is the methodology moulding the two sources, which in practice actually works well. One may also creatively question whether this application could include a trust for creditors created by court, as known to English law, or even a *cessio bonorum* trust, by analogy with the civilian tradition.

The positioning of the trust within the civil law context is further illustrated by the proviso to the article under reference:

[127] Art 37(2)(b).
[128] Art 43(13).

> "Provided that where assets are held, acquired or received by a person for another on the basis of oral arrangements of a fiduciary nature, express or implied, there shall be presumed to be a mandate regulated by Title XVIII of Book Second of the Civil Code or a deposit regulated by Title XIX of Book Second of the Civil Code, as the case may be, unless there is evidence of an intention to create an oral trust."[129]

The presumption of mandate or trust in the case of "oral arrangements" is therefore an historical and analytical link to the trust-like devices acknowledged and applied in the past. It imposes on the other hand the certainties test. That the need was felt to distinguish trusts from mandate or deposit, indicates the intention to create a trust within a civil law system.

G. Settlor-Trustee Relationship

Act XI of 2014 amending the MTTA, broadened the extent of settlor's reserved powers.[130] These include the reservation by the settlor of a beneficial interest in the trust property and the power to appoint, add or remove any trustees, protectors or beneficiaries. The new article adds that such reservation of powers of appointment are without prejudice to any other powers that may be reserved. There is evident attention to allow freedom of action and operation by the trustee, provided this remains within the terms of the settlement or of the law – in deference to acquired rights. In line with general principles, the settlor divesting itself in favour of trustee of the settled assets, is a transfer, the *causa obligationis* being trust settlement. Here again, Malta appears to have followed Jersey. The amended article bears close similarity to article 9A of the TJL, with the difference that the settlor's reserved powers in Jersey are significantly wider. The most plausible reason behind this policy direction, risky due to possible challenges to the settlement, is driven by other competing jurisdictions having followed this direction.[131]

[129] Art 7(2).
[130] 14A.
[131] Art 3 of the Bahamas Trustee Act 1988, 14 of the Cayman Trusts Law, 15 of the Trusts (Guernsey) Law.

A classification of the settlor's reserved powers vis-à-vis the trust assets engages the nature of the transfer and the conditions thereof. Transfer by settlement in trust, is an addition to the traditional modes of acquisition and transfer of ownership. More difficult is the categorization of powers: do these create an obligation – this concept is never far off – subject to a resolutive condition? Or is it a limitation imposed on a proprietary interest of which the settlor has divested itself – in other words a *jus in re aliena*? The Malta civil code, following tradition and its French model, creates a *numerus clausus* of real rights – for example, usufruct, servitudes, emphyteusis and *droit de suite* in security interests.

It is suggested that the settlor's reserved powers are more in the nature of a *condicio.* Let us suppose that the terms of the trust allow either for its revocation by the settlor, or grant settlor significant reserved powers. The fact alone of the existence of such powers does not invalidate any transfer or distribution to beneficiaries, properly made by the trustee prior to the exercise of power or revocation. Nor does any change, for example, in the portfolio assets fail *a priori*, if the settlor did not exercise any such power to control investment decisions.

Such settlor powers are not a proprietary right against the assets in the classical *jus in re* sense, carrying a possible *droit de suite* against third parties. Forget for a moment the conceptual and analytical difficulty of defining a power in civil law context: the settlor's powers are in the nature of a condition. This may be resolutive in the sense that on the happening of an event, an obligation, a trust creation, or even a trust decision, may be annulled. It may be a suspensive condition in the sense that prior to the happening of an event creating the fulfilment of a condition, certain trustee decisions cannot be taken – for example, prior consent of settlor to the transfer of certain assets, or the exercise of a limited power or discretion by a trustee. It is acknowledged that this may not be entirely satisfactory, since the classical resolutive condition known to the civil law tradition operates '*ex tunc*,' that is retroactively and affects the obligation from its initial moment of creation. On the other hand, the exercise of a power of variation or revocation by settlor is '*ex nunc,*' taking effect from the time it is actually exercised. It is acknowledged that beyond the tradition, this may depend on the legal system and the type of case. The solution proffered is that there is a

contractual deviation or amendment from the classical civil law tradition – the exercise of the power, the happening of the event triggering the effect of the condition, is contractually cast to come into force only from the moment of exercise of settlor's power: here an example of a civil law trust.

An allied question is the nature of the settlor's right to enforcement of the terms of the trust. The default position *ex lege* is, that this is defined, possibly limited, by the terms of the trust. This remains a personal right against the trustee, but can only be stretched with some difficulty to create a proprietary remedy, meaning a remedy of the settlor against the trust asset, following and tracing. The basis of this conclusion is the complete divestment by the settlor, subject to reserved conditions. If the settlor retained any proprietary rights, perhaps even insignificant, this would raise serious doubts about the genuineness of the exercise, calling in simulation or sham.

The duty-burdened-rights thesis resurfaces: the attractiveness of the argument, couching the settlor's rights as a right against the right of trustee and beneficiary, is acknowledged. However, the analysis herein, faithful to the civil law concepts and language of obligation and condition, is respectfully preferred, and the rights-against-rights analysis is not applicable in context.

H. The Nature of the Beneficiary's rights

The MTTA defines a beneficiary as "a person entitled to benefit under a trust or in whose favour a discretion to distribute property held in trust may be exercised."[132] The nature of the beneficiary's interest is expressed thus:

> 9(1) "A beneficiary has an entitlement, called a beneficial interest, in or to the trust property, as the case may be. The beneficiary may enjoy the beneficial interest subject to the terms of the trust and the provisions of this Act and any other provisions of law applicable to trusts."

[132] Art 2(1).

A beneficial interest is deemed movable property, even if includes immovable property.[133] Moreover, a beneficiary is entitled, subject to the terms of the trust to "sell, charge, transfer or otherwise deal with his interest..." [134] Therefore, a beneficial interest in a trust is treated as any other proprietary *res*. The implication, once the interest is reified, is that this makes a stronger case for the reception of remedies known to Equity, but not of course Equity – constructive trusts, claiming, following and tracing. These are expressly known to the MTTA, and further strengthen the classification of the beneficial interest as proprietary and an object of civil law ownership. On the other hand, the right of the beneficiary and the corresponding duty of the trustee are categorized as obligational. This conclusion is supported by specific references in the MTTA – at art 3 (1), a trustee is "under an obligation to deal with" trust property. Moreover, the statement at subarticle 6 of the same article confirms this view – "Trusts create fiduciary obligations upon the trustee in favour of the beneficiary of the trusts," underlining that the trustee-beneficiary relationship is obligational. A relevant question is how do these two principles, that proprietary referring to the beneficial interest, and the other obligational referring to the trustee duties, intertwine?

That the beneficial interest is of a proprietary character is, no doubt, relevant in the well-known insolvency scenario. The right of action of the beneficiary against trustee, in so far as obligational, is therefore defined as a personal right by the beneficiary against the trustee to have the proprietary objects over which the beneficiary has an interest, dealt with according to the terms of the trust. This raises the question whether such a right could be neither a *jus in re*, nor a *jus in personam*, but possibly a *jus in personam ad rem*, meaning that the beneficiary has a personal right against trustee for the performance of the trust obligations, limited to the trust assets.

There is however an important, and possibly disturbing, tail-end in analysis of the beneficiary's interest, following the 2014 amendments to the MTTA. The revised article 9 (2) reads thus:

[133] 9 (3).
[134] Art 9 (14).

> "Rights of a beneficiary are personal to him and cannot be transmitted by inheritance except as provided for in the terms of the trust. Subject to any applicable laws and only as stated in terms of the trust, creditors, spouses, heirs or legatees of the beneficiary may have rights only to the extent of the beneficiary's entitlements under the trust and have no other rights in relation to the trust property or the trustee."

The subarticle confirms that a beneficial interest is a *'bien'* forming part of the beneficiary's patrimony. The extent of claims of spouse, creditors and heirs are limited to the measure of this proprietary interest. It is in this context that the statement that beneficiary's rights are "personal to him" is placed, underlining the classification of such rights as obligational.

The mischief lies in the statement that beneficiary's rights cannot "be transmitted by inheritance except as provided for in the terms of the trust." The terms of this amendment can hardly stand with the subsequent subarticle (14), noted above, acknowledging the beneficiary's right "to charge, transfer or otherwise deal with his interest in any manner."[135] If the beneficial interest is indeed a proprietary *res*, why should transfer *mortis causa* be limited or indeed defined, if at all allowed, only by the terms of the trust? An internal inconsistency with the system is here identified: are the general principles of succession of the civil code abrogated in their application to trusts and displaced by the terms of settlement? What happens if the trust is silent on inheritance rights? Presumably, the rules of intestacy are inapplicable. What then?: do we have a resulting trust, with the assets re-acquired by the settlor's patrimony? It is true that the MTTA at art 6 (5) expressly avoids any conflict with the rule in the civil code that saving donations in contemplation of marriage of life insurance policies, it is prohibited to dispose of inheritance otherwise than by Will.[136] The MTTA here intended to clear the ground for testamentary trusts. However, no convincing case, for the wisdom of the choice to sweep away the general rules of succession in favour of the provisions of the trust, has been made.

[135] Fn 134.
[136] Art 586.

If the provision were intended to require certainty on the nature of an interest, for example for life and thereafter for children or descendants, then it should have been clear, rather than decimating the application of the entire body of succession rules. For various reasons, this provision is considered misguided, with, wisely, no Jersey counterpart.

I. Assessment

The civilian character of the Malta trust is borne out by its use of the conceptual tools and language related to property and obligations. As a construct therefore, its building-blocks are those of the civil law. The distinction from mandate or deposit further emphasizes, its civilian nature. This neat and clear categorization is not apparent in the Jersey model, although undoubtedly implied.

Trust settlement adds to the established modes of transfer, yet at the same time functions with imported Equity rules: if the system claims to be a "mixed system", it cannot slam the door in their face. The distinctive character of the Malta trust is the manner how, certain otherwise alien principles to the system, have been moulded within it: there is no reason, in the writer's judgement, why a constructive trust cannot be inferred or imposed in an otherwise civil law situation of unjust enrichment, for example the *indebiti solutio* or *actio de in rem verso*. Nor is it necessarily inconsistent with the Napoleonic division of property rights. This may indeed require a wider re-fashioning of the principle of fiduciary obligation as understood. Perhaps it could also do with a jog of historical memory to re-cast the *fideicommissum* and the *fiducia*. In the case of Jersey, there are similar parallels linked to the historical memory and underlying principles of the civil law, not so overtly Romanistic as Malta.

The concluding question is, whether it is feasible to argue that trust law and principles are no longer a *lex specialis*, but have graduated to, and integrated as, a *lex generalis*. Or it may become a general principle, created when a rule becomes a constitutive or basic value of the system, as distinct from statute. Could it possibly be argued that the joint spouses' Will *unica charta* creates reciprocal fiduciary obligation based on the trust reposed? Would it then mean that there is

following and tracing or conversion on the substitute of the asset where an asset left in usufruct has been alienated, or maybe a constructive trust?

It remains to be seen how far the Courts in Malta would be prepared to receive trust law as a general principle. The judicial response could be reluctance or indeed opposition, as distinct from what is intuitively felt in Jersey. Only time and experience can tell whether trusts will integrate to this extent.

CHAPTER III - THE POWERS OF TRUSTEES

A. Scope of the Chapter

The scope of this chapter is to examine the meaning of, and conceptual choices behind, trustee powers. It will also be asked how the concept of power engages with the civil law context, which traditionally characterizes rights and obligations, rather than powers. The extent of reception of the English tradition and the significance of the DCFR will be considered.

B. Classification and definition of Powers

In either of the Jersey or Malta legislation, there are no formal classifications or definitions of the various categories of powers.[137] The starting point will be the traditional classification of powers known to English law[138] - a conclusion based on the Jersey cases and commentators.[139] In *H Trust*, the Court impliedly acknowledged the existence of the trustee's power to make a distribution, criticizing however trustees' failure to do so.[140] Validity or nullity of the exercise of appointment to capital were examined by the Royal Court, which applied the *Hastings-Bass* principle.[141] Fraud on powers known to English law was explicitly recognized by the same Court in a number of instances.[142]

The position in Malta is not likely to be significantly different: there is the familiar dearth of authority and jurisprudential sources. Therefore, the conceptual definitions known to English law should again form the basis. In keeping with the

[137] Generally, *Thomas*; *Underhill* 897; *Lewin* (18th ed) 982, (19th ed) 1245.
[138] Various classifications are known, such as powers collateral, in gross or appurtenant. They are sometimes categorized according to purpose – administrative, dispositive and appointment. Another distinction is between general powers, special powers or hybrid powers depending on the objects in whose favour they may be exercised. *Thomas* 4; E Sudgen, *A Practical Treatise of Powers* (1808) 49.
[139] M Slater, *Institute of Law* (2015) 80; *Brown* 151; *Matthews* 108.
[140] [2007] JLR 569
[141] *Green GLG Trust* [2002] JLR 571; N Chien, "*Hastings-Bass* and beneficiaries of family trusts" (2007) 11 (3) JGLR 360.
[142] *X Trust* [2002] JLR 377; *Basel Trust Corporation v Ghirlandina Anstalt* [2008] JRC 013.

general trend, such classifications are then developed in a traditional civil law context and language.

Trustee powers are fiduciary: while certain categories of powers may allow the recipient of a power to benefit or consider itself as a beneficiary, any exercise thereof by a trustee is subject to fiduciary duties – even if the trustee is a beneficiary.[143] Any exercise of a power or discretion is subject to the rules of conflict of interest, self-dealing and level-handedness with the various objects: a trustee has to show considerable restraint and discretion in benefitting itself, unless it is simply a bare-trust arrangement.[144]

C. General Powers of Trustees

The TJL at article 24 provides that:

> "(1) Subject to the terms of the trust and subject to the trustee's duties under this Law, a trustee shall in relation to trust property have all the same powers as a natural person acting as the beneficial owner of such property.
>
> (2) A trustee shall exercise the trustee's powers only in the interest of the beneficiaries and in accordance with the terms of the trust."

Article 24 of the MTTA reads:

> "(1) Subject to the terms of the trust and to the provisions of this Act, a trustee shall, in relation to trust property, have all the powers of a natural person having the absolute title to such property.
>
> (2) A trustee shall exercise his powers in the interest of the beneficiaries and in accordance with the terms of the trust."

A defining consideration in the TJL is that "any question concerning…the existence and extent of powers, conferred or retained.... and powers of appointment and the validity of any exercise of such powers... shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question."[145] Therefore, in the case of foreign trusts, Jersey internal domestic law is supreme over trustee powers, prevailing over any choice or

[143] *Thomas*, 21.
[144] Bristol and West Building Society v Mothew [1998] Ch 1.
[145] Art 9(1) (e).

provision of foreign law. The MTTA has no specific conflict provisions relative to trustee powers.

The concept expressed by the Maltese text relates to the classical civil Roman law tradition of absolute ownership and title. The link, another illustration of its civilian character, is that the trustee acting "*uti dominus*" in the beneficiary's interest, is vested with all powers of an otherwise full owner: it is not any other category of powers but one related to absolute title. The indebtedness of Malta to Jersey is here evident in so far as the first two sub-articles reproduce substantially the same concept. More innovative is possibly the choice of the term "natural person" first adopted in Jersey. The term "absolute title" in the MTTA tends to link the powers of the trustee to those of the character of absoluteness of *dominium* in civil law systems. The language of the articles considered, establish clearly that the trustees enjoy wide dispositive and administrative powers which are necessary and implied in the proper carrying out of their functions.

D. Is there significance in the choice of term and concept of "Natural Person"?

The choice of "natural person" is adopted by both legislations. There could be some difficulty in identifying faculties, powers or rights, relevant to trustee powers, open and available to natural persons but not to legal persons. The question which naturally arises is, the reason behind the choice of term "natural person", as against "person." The concept of personhood has indeed a venerable tradition in the history of civil law.[146] It could hardly be simply an extension of the historical figure of the trustee as a natural person, given the widespread development of corporate trustees. Even a foundation is endowed with legal personhood. The explanation as to the choice of term and concept of a "*natural person*" as against a *person*, which includes a *legal person*, is that the widest possible powers of action and powers are naturally attributed to a physical person. On the other hand corporate or foundation action and behaviour could be subject

[146] G Deiser, "The juristic person I" (1908) 57 *U.Pa.L.Rev*. 131; "The juristic person II" (1909) 57 *U.Pa.L.Rev*. 216; "The juristic person III" (1909) 57 *U.Pa.L.Rev*. 300; W Geldart, "Legal personality" (1911) 27 *L.Q. Rev*. 90; B Smith, "Legal personality" (1928) 37 *Yale L.J*. 283; H Hazeltine et al (eds), in *Maitland, "Selected Essays"* (1936) "Trust and Corporation" 141 and "Moral personality and legal personality" 223; P Duff, *Personality in Roman Private Law* (1938); R Grantham and C Rickett (eds), *Corporate Personality in the 20th Century* (1998).

to some limitations either by the applicable law or the constitutive documents. In making therefore this choice of powers, it is not necessary for any specific power to be conferred on the trustees by express provision.

In English law, the principle is that trustees have only available to them, and may only exercise, those powers made available to them by the trust document, the law or the court. Thomas and Hudson comment "Equity might have taken the view that, because trustees were the absolute owners of the legal estate, they could and should have all the powers of management that any absolute owner would normally have. However, it did not... ."[147] While of course, the trust document remains the fundamental cornerstone, there may be important distinctions, in the jurisdictions under review, from the classical Equity approach. This difference is principally that by virtue of a trustee having all the powers of a natural person, there is a presumption of normal wide powers and capacity, in so far as not expressly or by implication excluded. It may be added that this distinction today may not be so fundamental since most trust documents grant trustees wide powers. This trend is followed by other instances such as the English Trustee Act 2000, the Scotland (Trusts) Act 1921[148] and recommended by the Scottish Law Commission.[149]

The most likely basis identified for the choice equating the powers of the trustee with those of a natural person is the general method of the civil law - possibly even a general principle thereof - that a person, natural or legal, is vested with all the powers necessary to carry out its duties and functions. In keeping with the rational natural law and enlightenment tradition, the Civil law has generally looked with some diffidence at the rule of the Common law conferring personhood by law or statute, and by implication incorporation as a prerequisite of legal personality. Personhood exists independently of any formal creation by law, and it is not the function of the written positive law to create a person, but to attribute effects to its existence.[150] Therefore, the link is to confer on the trustees

[147] *Thomas and Hudson*, 417.
[148] Sections 4, 4A,B,C, 5.
[149] Report on Trust Law (Scots Law Com No 239, 2014) para 6.8.
[150] In *Curmi v Depiro*, Malta Court of Appeal, 12th February 1936, held, quoting Roman law and the civil law of neighbouring France and Italy, that at the time the law of Malta had no statutory disposition to regulate the creation of a moral person. However, moral persons were not only admitted and acknowledged but in various instances the law presupposed their existence.

immediately all the powers of a person, putting in perspective the centrality of the person, whose existence the legal system acknowledges as its subject - without the need for any formal creation of personhood, such as incorporation by statute or Charter. This is seen as the most likely explanation for the choice involved. There is also logical and conceptual consistency between such central presence of the person and the links to patrimony and separate patrimonies.

E. The meaning and extent of application of the term "Powers"

The term "powers" raises the question of the relationship to a subjective right, *droit subjectif,* which is a right and a sphere of action, enjoyed and exercised by choice of the person.[151] Can therefore *droit subjectif* and power remain totally distinct, or, can they be equated or overlap?[152] For example, the power of the mandatory to bind its mandator, that of the owner on the object owned and of the usufructuary over the usufruct certainly engage both a subjective right and a power, sometimes over a *res*.[153] It is important that the distinction between power and subjective right be kept clear because power not only includes, but goes beyond, the exercise of subjective right.[154] Developing the point, the civil law tradition confers on the term "powers" a variety of possibilities. This may be based on the relationship between a subject and a proprietary right, exercised thereon by the *titulaire* of the powers. Alternatively, it could be a number of choices or legal possibilities available within the legal system, such as the procedural right and power to litigate. Sometimes, power is linked with representation such as that at general meetings of a company, or by a trade union in collective agreement negotiations.

A power is sometimes linked with what is known in civil law language as "*faculté*" – the English translation 'faculty' may not convey the same extent of meaning, but is used here interchangeably for ease of reference. The term *faculté* carries the association with power to act, such as the power to enter into a legal *negotium*, as a contract or a testament. Another example is procedural power to

[151] Hohfeld WN, "Some fundamental legal conceptions as applied in judicial reasoning" (1913) 23 *Yale LJ* 16; Fundamental legal conceptions as applied in judicial reasoning (1916) 26 *Yale LJ* 710.
[152] G Marty et P Raynaud, *Droit Civil (Les Personnes*) (1976) 2.
[153] E Gaillard, *Le Pouvoir en Droit Privé* (1985).
[154] The Civil law also contrasts in the public sphere, power with duty and authority. The Common Law (including Scottish Law) are not dissimilar.

make choices during civil proceedings - for example, the prerogative to choose which evidence to produce, or whether to request leave to appeal. It is also linked with the power of representation of incapable or vulnerable persons. "Powers" may however, beyond representation, be also linked to mandate: there may be representation without any mandate, for example the powers of representation conferred by law to curators *ad litem*. All this is implied in the powers in the case of a natural person. Therefore, "power" in civil law seems conceptually different from right and obligation, and in all likelihood wider, since it implies the possibility to act within a given wide range of choices.

The question of legal interest remains an underlying theme. Direct and personal legal interest is a basic fundamental pre-requisite in civil proceedings. This concept today includes diffuse or mass interests, or even class actions.[155] The exercise of a power requires an interest which pertains directly to the trustee in the interest of the beneficiary.

European Private Law

The Principles, Definitions and Model Rules of European Private Law (*DCFR*)[156] use language conceptually similar to the Jersey and Malta trust law enactments. They confer power on the trustee akin to those of the owner: "Except where restricted by the trust terms or other rules of this Book, a trustee may do any act in performance of the obligations under the trust which: a) an owner of the fund might lawfully do; or (b) a person might be authorised to do on behalf of another."[157] The civil law culture of equating power with capacity, as borne out by the language "may do," is evident: capacity to act grants both a subjective right and in some instances a power. Both - and the familiar overlap is evident - grant a choice to the subject, a right, a *facultas* or a power. Moreover, there is a significant reference to the contract of mandate: trust was not equated with mandate: rather, it is analogy between the powers conferred on the trustee and those conferred in the civil law figure of the mandatory. Both parties act in the interests of a third party, the trustee as a mandatory for the settlor-mandator. The

[155] For example, the current EU initiative on collective proceedings.
[156] C Von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law* (2010) Vol 6, X, 5669.
[157] X. – 5:201: Powers in general.

reference to owner and agent is here particular, designed to give broad powers to the agent, without being tied to ownership of the property. This is an example of the traditional civil law interaction between powers and capacities, frequently present but not so frequently formally expressed. The powers that could be lawfully conferred on the mandatory may also be vested in the trustee. Both provisions are seen as wise provisions, entirely consistent with the civil law tradition and working concepts, and at the same time sufficiently flexible to ensure workability in practice.

The DCFR provisions craft "particular" powers of the trustee, as distinct from "general" powers just considered. These include the power to appoint agents, or even one of the trustees to act on their behalf. Furthermore, a trustee may create subtrusts and possibly a nominee under bare trusts. Power is granted to transfer "physical control" of the trust assets and documents to a storer: this is understood also to include a custodian with obligations in financial law context. The trustee is authorized to delegate, invest the trust fund and to submit trust documents to audit.[158]

A reference to the seminal publication on European trust law is merited.[159] With deep simplicity and elegant drafting, Article V under the heading "Trustees' Duties and Powers" states that "The trustee must exercise his rights as owner in accordance with the law and the terms of the trust." The choice of term "rights" as against "powers" is here noted, with the French text using the terms "*Le trustee doit exercer ses droits*." There is no apparent reason for this choice of language, particularly with the unclear variance between the heading referring to powers and the actual article referring to rights or *droits*. This could be seen as another illustration of the overlapping areas between a power and a subjective right. Significantly, and indicative of a sound policy rule, the commentary reads "The trustee as owner of the assets comprising the trust fund has all the powers of an owner unless restricted by the terms of the trust or the legislation."[160]

[158] Particular powers of a trustee X. – 5:203 -208.
[159] D J Hayton,et al, *Principles* fn13, 17. Vide the development of the same 'Nijmegen' group and principles, Kortmann *et al*, *Towards an EU Directive on Protected Funds* (2009) 2.
[160] *Ibid* 52.

The perspective of legal powers enjoyed by a subject is also developed by other systems, including those familiar with both the Civil law and the Common law tradition such as Québec.[161] Even here, powers are linked to the civil law notion of subjective rights and interest.[162] Typical on the other hand of such civil law drafting are both the Québec and French civil codes: the Québec *code civil* expresses thus the powers of the trustee: "*Le fiduciaire a la maîtrise et l'administration exclusive du patrimoine fiduciaire et les titres relatifs aux biens qui le composent sont établis à son nom.*[163] The French *code civil* displays, perhaps more, a clear intention to address the question of limitation of the powers of the *fiduciare* vis à vis third parties: "*Dans ses rapports avec les tiers, le fiduciaire est réputé disposer des pouvoirs les plus étendus sur le patrimoine fiduciaire, à moins qu'il ne soit démontré que les tiers avaient connaissance de la limitation de ses pouvoirs*."[164] It is therefore a fair and correct conclusion that the methods of the civil law tradition, of a general simple statement expressing a principle, have also been adopted in the case of the powers of the trustees.

One may usefully recall the language of the Hague Convention, famous for its compromises and efforts to bridge what seemed apparently irreconcilable differences between the Common law and the Civil law systems.[165] It states that "the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law."[166]

F. Powers of the Trustee vis à vis proprietary rights, and limitations thereof

Are there any limitations to the powers of the civil law trustee, other than the law and the terms of the trust? The brief answer is no, subject to the overriding rule that the powers are fiduciary. There are mandatory provisions, from which parties cannot derogate, generally referring to the "irreducible core" features of the trust. Both jurisdictions are likely to follow closely - apart from their domestic

[161] M Cantin Cumyn, "Le pouvoir juridique" (2007) 52 *McGill L.J.* 215; H Patrick Glenn, "A l'appui du pouvoir" (2007) 52 *McGill L.J.* 237.
[162] M Cantin Cumyn, "The legal power" (2009) 17(3) *Euro Rev Priv L* 345.
[163] Art 1278.
[164] Art 2023.
[165] D Waters, "The Hague Trusts Convention twenty years on" in M Graziadei et al (eds), *Commercial Trusts in European Private Law* (2005) 56.
[166] Art 2.

legislation - the English and possibly Scottish provisions, to include the *Armitage v Nurse* dicta on such essential features of the trust and fundamental obligations of the trustee.[167] The trustee is inherently empowered to possess *uti dominus*, transmit and acquire ownership by the acknowledged methods of transfer and acquisition and grant security interests. A more sensitive question is the interaction of such property rights with their fiduciary exercise: this is linked to, but distinct from the question of divided ownership. Is *dominium*, with its traditional characteristic absolute powers subject to any limitations *in se*? The subject-proprietary object relationship remains unimpaired, bridled however by this fiduciary obligation. Clearly it cannot be a real right, nor a *jus in re aliena*. The civilian conclusion is that the property right of the trustee remains unimpaired, subject that its exercise is fiduciary. This again calls the "rights against rights theory."

G. Capacity of the trustee

There is a clear link between power and legal capacity: capacity is the legal capability to act. A power confers possibilities and faculties to act. That a trustee enjoys all the powers of a natural person obviates some difficulties related to capacity. The exercise of a power inevitably presupposes capacity, that is to say the legal power conferred on a subject to validly exercise such faculty. Capacity is therefore the link between the trustee, the power and the exercise thereof.[168] Civil law recognizes two meanings to capacity: first, the ability to be vested with rights and second, the ability to exercise them.[169]

The civil law culture consequently views capacity and limitations thereof from two aspects, both substantive and procedural. Capacity is one of the four essential, substantial requisites of contracts, and full capacity is a prerequisite for valid consent. In principle therefore, capacity is the recognition by the system of legal power to perform an act.[170] The procedural parallel is known in civil law

[167] [1998] Ch 241; *Clarke v Clarke's Trustees* [1925] S.C. 693; *Bartlett v Barclays* [1980] 2 W.L.R. 430; *Lutea v Orbis* [1997 S.C. 255]; *Spread v Hutcheson* [2011] UKPC 13.
[168] Arts 1123-1125 of the French *code civil*; arts 153-154, 1409*, code civil* du Québec; arts 27, 28, 1918 Louisiana civil code; arts 967 to 973 of the Malta civil code.
[169] S Deakin, "'Capacitas': Contract law and the institutional preconditions of a market economy" (2006) 3 *ERCL* 317.
[170] The Roman-French tradition, and the *code civil* of 1804 refer to the four essential requirements of contract being capacity, consent, object and *causa* (lawful consideration), arts 1108-1133. This

cultures as procedural legitimation, being the procedural capacity of a party to act in a representative capacity, such as an attorney under a power of attorney, a commercial agent with representation to act judicially, a tutor, or a curator acting in the interest of the legally incapable person. In context, therefore, the attribution of all the powers of a natural person confers legal capacity to act, *qua* trustee, judicially and extra-judicially. Such statements find their roots in the Roman-French tradition, with the pre-codification writings of Domat[171] and Pothier,[172] being received in both systems.

H. Acts by the trustee vis à vis third parties

Good faith plays a critical role in the trustee-third party dealings. This is applicable not only to the trustee, but fundamentally includes the third party in good faith. This overarching role of good faith, is another distinguishing feature of the civil trust analyzed. The principle finds its origin, as a normal, ordinary contractual obligation in the dealings of a trustee with third parties. Good faith, however, also finds broader and all-pervasive application in all exercise of trustee powers.

Both legislations under review have catered expressly for the situation of the third party acquirer. Art 55 of the TJL provides that:

> "(1) A bona fide purchaser for value without actual notice of any breach of trust
>
> (a) may deal with a trustee in relation to trust property as if the trustee was the beneficial owner of the trust property; and
>
> (b) shall not be affected by the trusts on which such property is held.

A similar provision, article 40, has been written in the MTTA:

> **"**(1) A person acquiring trust property from a trustee in good faith and under an onerous title acquires a good title thereto as if

has been adopted by the Jersey law and also by the MCC (arts 966 to 991. In the case of Jersey, it is part of the received Norman tradition, as is evident by the widespread citations of Pothier as a basis of the law. P Harris, "A small step for Pothier – a leap forward for Jersey" (2001) 5 (3) *JGLR* 234.

[171] J. Domat, *Lois civiles dans leur ordre naturel* (1713) Chapters 1-3.

[172] R Pothier, *Oeuvres Completes* (1821) Tome 23, Part I, Title VI.

> he had acquired it from the person having the absolute title thereto and shall not be affected by the trusts on which the said property is held.
>
> …….
>
> and shall, subject to being in good faith, be entitled to rely on declarations made by the trustee with regard to any matters therein stated."

The Jersey drafters have used the word "*purchaser*," as distinct from that in the MTTA, "*acquiring*." The term 'purchaser' is nonetheless, indicative and encompasses other onerous acquisitions, such as exchange or *datio in solutum*. The underlying key terms are the *bona fides purchase*, *acquisition for value* or *onerous title.* The Malta legislation in choosing the term "acquisition" has opted for a wider term. Internal limitations on capacity do not invalidate an act if the purchaser/acquirer is in good faith, for value and without notice of any breach of trust. The rule is further extended in that a purchaser in the TJL need not be concerned with the propriety of the transaction, and echoed in the MTTA where a *bona fide* purchaser for value, acquires good and valid title as if acquired from the absolute owner, unaffected by the terms of the trust.

Similar options are found in other civil law or mixed jurisdictions. The Trusts (Scotland) Act 1961 expressly provides that "the validity of the transaction and of any title acquired by the second party under the transaction shall not be challengeable by the second party or any other person on the ground that the act in question is at variance with the terms or purposes of the trust:.."[173] This provision appears to mean that good faith is not required, as far as the validity of the transaction is concerned. The trustee however may still be liable towards the beneficiaries. The powers of the *fiduciaire* in the French code civil have been referred to.[174]

The clear principle emerging is the critical pivotal underpinning of good faith. The protection to the good faith acquirer by title has been extended even where there is a breach of trust. The MCC in the context of possession defines a possessor in good faith "a person who, on probable grounds, believes that the

[173] Section 2 (1).
[174] Fn 164.

thing he possesses is his own." On the other hand, a possessor in bad faith is qualified as "a person who knows or who ought from circumstances to presume that the thing possessed by him belongs to others."[175] What appears specifically relevant to the acquisition from trustees in good faith is the article relative to the execution of contracts. Its importance merits a full reference:

> "Contracts must be carried out in good faith, and shall be binding not only in regard to the matter therein expressed, but also in regard to any consequence which, by equity, custom, or law, is incidental to the obligation, according to its nature."[176]

Good faith has been judicially equated in Malta with proper conduct between parties, no contractual relationship being immune from "*fraus omnia corrumpit*." A court stated that it was prepared to depart from the principle of separate legal personality of a legal person, if this were necessary to neutralize the effect of *mala fides.*[177] Good faith is also used as a tool of interpretation.[178] The maxim of Roman law "*qui per alium facit ipse fecisse videtur*" was held to be founded on good faith.[179]

There is no definition of good faith in either system. The meaning understood is that it refers to a party acquiring without notice of any limitation in duties and powers of the trustee. While it is clear that good faith remains central in the history of European Civil law systems, the notion often carries different or overlapping shades of meaning or variations on a common theme.[180] The precise concept remains often elusive across the various national state systems.[181]

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[175] Arts 531 to 532, MCC.
[176] Art 993, a very clear derivation from arts 1134 and 1135 of the French *code civil.*
[177] Civil Court, *Enriquez* v *Farrugia* 12th October 1995; Appeal, *Depares* vs *O'Dea* 25th June 1996; Appeal, *Cassar* v *Cassa*r 15th December 1995.
[178] Art 1003 MCC, evidently based on article 1156 of the French *code civil* "*On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes.*"
[179] Appeal, *Herrera* v *Tabone,* 22nd January 1992.
[180] Art 242 of the German BGB; art 1135 of the French code: "*Les conventions obligent non seulement à ce qui est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature*"; art 1375 of the Italian code "*Il contratto deve essere eseguito secondo buona fede*."
[181] S Whittaker and R Zimmermann, "Good faith in European contract law: surveying the legal landscape" in R Zimmermann and S Whittaker (eds), *Good faith in European contract law (2008)* 8.

The *DCFR* opted to treat good faith together with fair dealing.[182] It attempts to bridge the gap between proper correct standards as an objective standard of behaviour, and a subjective belief or conviction, possibly erroneous or unfounded, which is also found in some jurisdictions.[183] Good faith alone, as distinguished from fair dealing, is referred to in the "Definitions" section, an Annex to the *Principles* as "a mental attitude characterised by honesty and an absence of knowledge that an apparent situation is not the true situation." A landmark study on European trust law makes only scant reference to good faith and trusts: where a third party purchaser in good faith is not otherwise protected by "overreaching" legislation, the civil law rules of unjustified enrichment are invoked.[184]

There can be little doubt that good faith lies at the heart of the customary and traditional civil law in Jersey. In matter of acquisitive prescription, Le Geyt writes that "*Possession quadragenaire & paisible, en toute matiere d'heritage, vaut de titre si l'on ne montre qu'elle est de mauvaise foy.*"[185] Nicolle considers that "...because the *droit comun* [Roman/civil law] formed part of the legal system, complementing the purely local customary law, of particular importance was Jean Domat."[186] However, the Royal Court held it to be doubtful whether, the *Hastings-Bass* principle could be invoked to the prejudice of *bona fide* third party purchasers for value.[187] The existence and role of good faith, tracing its roots in traditional and customary Jersey law, is acknowledged, as is reasonably expected, in the context of fiduciary obligations of the trustee.[188]

Good Faith and Trustee Powers

The analysis proffered identifies good faith as a central, defining, feature in trustee powers. This is unsurprising and is based on the central role of good faith, arguably the most important principle in contract law, as *the* general principle in

[182] III. – 1:103.
[183] M Mekki and M Kloeper-Pelèse, "Good faith and fair dealing in the DCFR" (2008) 3 *ERCL* 338.
[184] Fn 13, *Principles*, 19, 60.
[185] P Le Geyt, *Privilèges Lois & Coustoumes de l'Isle de Jersey* (1953) 63. Freely translated - "In the case of immovable property, forty year peaceable prescription is equivalent to title, unless it is shown that possession was in bad faith."
[186] SC Nicolle, "*The origin and development of Jersey law"* (2005) *JGLR* 13.
[187] *Winton Investment Trusts* [2007 JLR Note 56].
[188] S Howard, "*Positions de Confiance* under Jersey Law" (1997) 1 2 *J.L.R.*

the system. This character is considered another sure marker towards the civil law identity of the trust. The good faith requirement invokes the *fraus omnia corrumpit* principle as a means to control the proper exercise of the trustee. This means that anything less than good faith in trustee power exercise can also expose the trustee on a contractual action for damages.

Turning to the third party's perspective, the good faith test requires both the objective and subjective grounds. This is fundamental, since good faith for value defeats proprietary remedies. A party is to genuinely believe that there are no grounds to question whether a trustee is acting improperly or in breach of trust. This subjective conviction alone however is insufficient, since this has to be based on reasonable grounds which are objective. Neither the law nor any reported cases encountered answer the more difficult question as to what level of diligence should a third party acquirer in good faith show: in other words, if the practice is for buyer to examine title, is this reasonably required? Can a buyer therefore simply take the word of a trustee? Notwithstanding the language of the law, current rules and practice evidencing a minimum due diligence will be required to be observed. This also avoids the *vexata questio*, still current and open in European private law, of duties of disclosure in negotiations. How far therefore should the trustee disclose and how far should even a good faith third party acquirer enquire into the status and legal power of the trustee to transfer? An appropriate response is the current legal practice by prudent acquirers to justify the plea of good faith, consistent with the underlying theme of the *bonus paterfamilias*, who makes prudent verifications.

I. Powers of appointment and trustee discretion

How do the legislations analytically classify powers of appointment and trustee discretions generally?[189] Is it a wholesale transposition of English law? How does their categorization stand with the civil law trust and structure of property and obligations?

[189] D Mclean, *Trusts and Powers* (1999) 1-31.

The traditional distinction known to English law is between on the one hand general powers of appointment, exercisable by the trustee in favour of any person in the world, and on the other special powers in favour of certain specified persons. There is then a third category known as hybrid or intermediate powers, being the power to appoint anyone in the world with the exception of certain specified persons.[190] Another suggested classification of powers, which may be material to the assessment, relates to the status of the donee of powers: these are sometimes known as "mere powers", even if in relation to trusts, and, to those powers of appointment specifically conferred on trustees, sometimes known as "fiduciary mere powers."[191] In neither case is there any obligation to exercise the power; however in the case of a fiduciary mere power, and this includes powers vested in a trustee, there is an obligation to consider whether or not to appoint. How does this therefore square with the civilian trust and the division between property and obligation? A case in point is a release of power.

Jersey Regulation

The TJL regulates thus the power of appointment:

> "The terms of the trust may confer on the trustee or any other person power to appoint or assign all or any part of the trust property or any interest in the trust property to, or to trustees for the benefit of, any person, whether or not such person was a beneficiary of the trust immediately prior to such appointment or assignment."[192]

The choice of terminology and distinction of concepts from possibly English Equity – power "to appoint" – and Civil law – "to assign" – are immediately apparent. Assignment carries the meaning of transfer to a beneficiary. Appointment is here understood in the sense that once discretion is exercised in respect of a particular asset, this is henceforth held for the benefit of a nominated beneficiary. There is no limitation as to whether the appointment is made in favour of an existing beneficiary or an addition to already existing beneficiaries. The article contains no further indication as to any possible classification or distinction in powers of appointment.

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[190] *Thomas and Hudson*, 403; *Underhill* 897; *Lewin* (18th ed) 1035, (19th ed) 1287.
[191] *Mettoy Pension Trustees Ltd. v Evans* [1990] 1 W.L.R. 1587.
[192] Art 39.

In *Mubarik vs Mubarak*,[193] two relevant points emerge: first is a reference to fiduciary powers and the other is the source material which assisted the court in arriving at its conclusions. The context was whether approval on behalf of unascertained beneficiaries were possible within the terms of the trust deed, involving the existence or extent of a power of appointment. The Court of Appeal held that the power of exclusion or addition vested in the trustees or protectors was not a fiduciary power and therefore not a bar to approval by the court of an arrangement reinstating a removed beneficiary, the wife, and adding other beneficiaries. The position in Jersey was distinguished from England and Scotland[194] and the Isle of Man.[195] The conclusion is that notwithstanding the general and wide formulation of article 39 of the Trusts (Jersey) Law 1984, "fiduciary powers" are recognized by Jersey Law, without it being a wholesale unreserved adoption of the English tradition, but rather a formulation in domestic terms. The reflection is that the Court of Appeal adopted generally the English distinction and categories of powers. Its reasoning may moreover suggest that the English law distinction between "mere powers" and "fiduciary powers" is approved as a matter of principle. This may arguably be stretching the point in the case of trustees, since a cogent argument can be made that trustee powers which are not fiduciary are a contradiction in terms. [196]

Powers of appointment have regularly been considered by the Jersey Courts in context of the *Hastings-Bass* principles. This rule is formulated in the terms that, where under the terms of a trust, a trustee has a discretion and acts in good faith, the court should not interfere unless (a) what he has done is ultra vires, or (b) it is clear that he would not have so acted, if he had taken into account the proper

[193] [2008 JLR 430].
[194] ibid paras 86 to 107 of the Judgement.
[195] *Schmidt v Rosewood Trust Ltd* [2003] 2 A.C. 709, 40.
[196] In context, *per contram*, *HHH Employee Trust* [2010] JRC 127B, the power of the *settlor*, to remove or appoint new or additional trustees was held by the Royal Court as a fiduciary power. In other cases, a protector's power was considered as fiduciary - *Freiburg Trust* [2004] JRC 056 and *Bird Charitable Trust* [2008] JRC 13.

considerations.[197] These principles have been codified,[198] possibly as a response to the English Judgements in *Pitt* and *Futter*.[199]

An example of the application of the *Hastings-Bass* principle by the Jersey Courts is *Re Green GLG Trust*.[200] The trustee sought a declaration that four appointments of capital made to the principal beneficiary were void, submitting that the legal advice they had received from UK counsel on the issue of taxation did not alert them to the capital gains tax consequences of the appointments. The Royal Court held that, following the English *Hastings-Bass* principle, the Jersey courts would set aside the action taken by a trustee if (a) what such action had achieved was not authorized by the power conferred; or (b) it was clear that trustee would not have taken the action if it had not ignored relevant, or taken into account, irrelevant considerations. Since trustee was held to have ignored a relevant consideration, the appointments were declared void. Significantly, in civil law terms, it was held that "a trustee must act in good faith, responsibly and reasonably."[201]

The proper exercise of powers was also considered in the *VR Family Trust*.[202] Under the terms of the trust, certain powers of the trustee could only be exercised with the prior or simultaneous consent in writing of the protector, who was also empowered to grant consent to a transaction in which it had an interest. In this case, representors sought the removal of the protector. The Royal Court granted the application, holding that protector should have resigned due to a conflict of interest.

Discretion and the TJL

The TJL acknowledges and assumes in various instances the existence of a discretion, but does not define it.[203] Discretion is certainly an important category

[197] [1974] 2 W.L.R. 904; S Kerry, "Control of trustee discretion: the rule in re Hastings-Bass" 2012 1 (2) *UCL J.L. and J* 46.
[198] Trusts (Amendment) No 6) (Jersey) Law 2013, added articles 47B to 47J; *infra* p 101-102; *vide infra* pp 213 *et seq* for further amendments.
[199] *Pitt v Holt; Futter v Futter* [2013] UKSC 26.
[200] [2002 JLR 571].
[201] *Ibid*, 580.
[202] [2009 JLR 202].
[203] Article 1 defining beneficiary, 9A in connexion with reserved powers of settlor, 21 referring to due diligence and prudence in the exercise of powers and discretions.

of powers. The essential elements of a discretion are an obligation and a duty to its exercise, retaining however freedom of action as to manner and mode. It has been described as "a combination of obligation and discretion."[204] The Royal Court quoting *Snell* defined a discretionary trust as "one under which a beneficiary has no right to any part of the income of the trust property but only a hope that the trustees' discretion will be exercised in his favour."[205]

In *Re Seaton Trustees Limited*,[206] a trustee successfully applied to the Jersey Court for the setting aside of two transactions, involving the withdrawal of funds from an Isle of Man company, which had resulted in a far greater UK tax liability for the settlor than expected. The court held that the transactions would be set aside under the *Hastings-Bass* rule as it was clear that (a) the trustee had been under a duty to consider the tax implications of the methods for accessing the funds; (b) it had failed to do so; and (c) if the trustee had considered the tax implications, it would have chosen the other method.[207] In *Re Winton Investment Trust*, the trustee of a Jersey trust sought the setting aside of certain agreements, governed by Isle of Man law, which had been intended to avoid liability to UK tax but in fact had substantial adverse inheritance tax consequences for both the settlor and the trustee.[208] If those consequences had been known, neither the trustee nor the settlor would have executed the agreements. The court, referring to Jersey, English and Cayman judgements[209] set aside these agreements, applying *Hastings-Bass*. This principle applied when a trustee acted under discretion in circumstances in which it was free to decide whether or not to exercise that discretion.[210] The English doctrine of excess or fraud on powers has been applied by the Jersey Courts.[211]

It is fair to add that the *Hastings-Bass* doctrine has been criticized as being unsatisfactory in principle. "There is much to be said for the view that the *Hastings-Bass* infringes the most fundamental requirements of any legal

[204] Thomas and Hudson, 407.
[205] 1983 J.J. 24] *Ex parte Viscount Wimbourne*.
[206] [2009 JLR Note 15].
[207] E Hewitt, "HMRC v Re Hastings-Bass: the battle begins" (2010) 16 (7) *T & T* 548.
[208] [2007 JLR N 56].
[209] Barclays *v Chamberlain (Cayman Islands)* [2007] W.T.L.R. 1697.
[210] *Seaton Trustees v Morgan* [2007] JRC 206.
[211] *X Trust* fn 6.

principle. First, it is inconsistent with established law. Second, the circumstances in which it is applied are unclear. Third, the results of its application are unclear."[212]

There is no indication in the reported cases that the Jersey Courts have accepted the point made by this criticism and changed their previous position on the *Hastings-Bass* rule.[213] In *CC Limited v Apex Trust Limited,* acting on incorrect advice of an English law firm, trustee had transferred family assets to a trust.[214] The Royal Court held that Jersey law of mistake was applicable and set aside the transaction.[215] The relevant questions were crystallized as follows by the Royal Court in *Lochmore Trust*[216] - (i) was there a mistake on the part of the settlor? (ii) would the settlor not have entered into the transaction "but for" the mistake? (iii) was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property? In fairness, in *Re the Onorati Settlement*,[217] following *B Life Interest Settlement*,[218] the Royal Court applied *Hastings-Bass principles*, but was prepared to state that:

> "We propose to say nothing further on the topic therefore other than to say that the position remains open, although any party wishing to submit that Jersey law should continue to plough its own furrow will have to explain why the closely reasoned judgments of Lord Walker and Lloyd LJ should not be applied.[219]"

[212] T Wu, "Rationalising Re Hastings-Bass: a duty to act on proper bases" (2007) *Tru.L.I.* 21(2) 62; A Molley, "*Hastings-Bass*: the true and the spurious" (2008) 14 (1) T & T 26; Lord Neuberger, "Aspects of the law of mistake: re Hastings-Bass" (2009) 15 (4) *T &T* 189; A Molley, "What really *is* the rule in re Hastings-Bass?" (2009) 15 (4) *T & T* 200.
[213] *Leumi Overseas Trust Corporation Limited-v-Howe* [2007] JLR 660; *BB's Representation* [2011 JLR 672]; P Matthews, "Nothing up my sleeve" (2011) 15 (3) *JGLR*; J Howard, "*Hastings-Bass* – oceans apart?" (2011) PCB 23; R MacRae and A Saunders, "The law of mistake in Jersey: the Royal Court declines to follow *Pitt* v *Holt* (2011) 17 (10) *T & T* 952; W Redgrave, "Leviathan can look after itself: Jersey legislated on mistake and *Hastings-Bass* (2014) PCB 92.
[214] [2012] (1) JLR 314.
[215] Also, *A Trust* [[2009 JLR 447]; *S Trust* [2011 JLR 375].
[216] [2010] JRC 068].
[217] [2013] JRC 182;
[218] [2012] JRC 22
[219] At paragraph 17.

Indeed, amendments to the TJL registered in the Royal Court on the 11th October 2013, have firmly entrenched this rule in Jersey Trust Law.[220] The statement that a power "includes a discretion" has been placed within this cluster of amendments, and not in the opening definition article. Very likely, this choice was intended to add emphasis within context. A mistake "includes (but is not limited to)" the effect or consequences or advantage occasioned by the transfer or other disposition of property to a trust, or the exercise of a power in relation to a trust or trust property or a mistake of fact. Where a trustee made a serious mistake in the exercise of its power such that, it would either not have exercised the power, or, if it would still have exercised the power, such exercise would have been done differently, the court is empowered to annul the exercise and transaction where it considers it just to do so. Moreover, in terms of art 47H, where a trustee in the exercise of a power "failed to take into account any relevant considerations or took into account irrelevant considerations" and would not have otherwise exercised the power or in the manner it was exercised, the court is likewise authorised to declare voidable such power.[221] The action is therefore not void, but voidable or annullable. Significantly, in an overt incentive in favour of the jurisdiction, the relief is available only in the case of Jersey trusts.[222]

It is pointed out that neither the jurisprudence nor the amendments require, for the setting aside of the transaction or discretion, a breach of a trustee or fiduciary duty. Moreover, the ackward distinction between the trustee "would have" or "might have" acted differently, is wisely avoided – it is sufficient if the trustee "would have" acted in a different manner. Likewise, the re Hastings-Bass interpretation according to which if an intended purpose is not achieved, the conseuquence is an invalid exercise of power.[223] The conclusion is that it is a 'get-out-of-jail-free' *Deus ex machina* for the trustee.[224]

[220] S Atkins (ed), *Futter and Pitt: Mistakes by Trustees* (2014).
[221] *The Strathmullan Trust* [2014] JRC 056; *E & F Trust* [2014] JRC 107.
[222] It is placed under part II of the TJL which only applies to Jersey trusts.
[223] M Ashdown, *Trustee Decision Making The Rule in Re Hastings-Bass* (2015) 23, 203.
[224] K Purkis, "Reports of the death of the rule in Hastings-Bass are exaggerated" (2013) 17 (3) *JGLR* 345.

Malta Regulation

Powers of appointment in the MTTA are expressed in more elaborate terms than the brief statement in article 39 of TJL.[225] The terms of a trust may provide for an addition or exclusion of a beneficiary to those already existing. Power is granted to the trustee to provide for the imposition on the beneficiary of an obligation as a prior condition for appointment as beneficiary or entitlement to trust property. Where a power is granted to add a person as a beneficiary, the validity of such power is contingent on such person being identifiable or part of a reasonably identifiable class - either in the trust instrument or in any subsequent written instrument signed by the settlor, such as a Letter of Wishes. In language familiar to the Jersey law, there are references to powers and discretions in context of disclosure of reasons or documents over exercise of powers and discretions.[226]

The articles express general principles, widely accepted by trust jurisdictions. While it is suggested that Malta will follow mainstream English practice, an assessment of such powers by a civil lawyer will question the method of reception of a power or discretion in a context which is not traditionally, or in the nature of things, familiar with this category. Contractual obligations require also the ever-present and ever-elusive *causa*, or *raison d'être*, of the obligation. The analytical question remains whether trustee powers and discretions can stand with the civilian categories of property and obligation. A power or discretion is likely to be classified as a *facultas agendi*, while rights correspond to obligations. Transfer of property rights is a different category, even though an obligation may involve such a transfer. The suggested conclusion, applicable for either jurisdiction, is that the civil law substratum is sufficiently robust, to accept the otherwise alien notions. The basis is partly functional, coping with different influences, with which small 'mixed jurisdictions' have extensive experience. At the same time, this reception underlies the civilian character of the trust, because it can flex without altering the essentials of its general principles to enable powers and discretions to operate.

[225] Article 9 (7 to 11).
[226] Article 29 (2).

J. Powers or discretions - Different questions to civil law cultures and methods of reasoning in context of the Malta legislation

While in a similar context, the different question is whether, the exercise of a power or a discretion, is an extension, possibly a new addition, to the traditional civil law received methods of transfer and acquisition - a new beneficiary or the appointment to an existing beneficiary of a new trust asset. In either situation, it is a consequence of the exercise of a power or a discretion. In the first case, it is the acquisition of an entitlement, in the second it is a specific disposition of property.

The effect is clearly that of entitlement to ownership in an asset, and hinges on a fine line between obligation and property. The MCC is structured around what is termed as "Of the modes of acquiring and transmitting property and other rights over or relating to things."[227] Its French model refers to "*Des différentes manières dont on acquiert la propriété.*"[228]

A dispositive appointment, either of beneficiary with property acquisition consequences, or a settlement as an exercise of power of discretion, can be received within the general framework of the civil law of obligations, contract and property. True, this stand may be criticized for disrupting or subverting time-honoured and received methods of transmission of property rights. By virtue of a "simple" exercise of power or discretion, existing temporary interests may be annulled or dissolved, or in Common Law language, defeated. In the same manner, new entitlements or interests may be created, avoiding or circumventing in the process, the rules and principles relating to transfer of ownership of "*biens.*" Moreover, this can be challenged on the basis of rendering property rights revocable and uncertain, upsetting acquisitive prescriptions which are running, or worse still, potentially endangering transfers to unaware third parties in good faith. Transitory law questions may arise: if a contractual situation is regulated by a particular law, then an exercise of power may transfer the legal *régime* to a later or prior law. There is no one moment, saving perhaps the terms of the trust, when the trust power may or should be exercised.

[227] II.II.
[228] *Code civil*, Livre III.

The MCC here comes to the rescue, providing that trust transactions shall be "effective modes of transfer of ownership or other rights to or in such property" which shall "result in the creation or termination of legally enforceable interests in or to such property in favour of such persons as provided by the special laws relating to trusts."[229] The exercise of a power therefore, governed by the *lex specialis* of trusts, transfers ownership: this may require, depending on the nature of the interest or asset transferred, formal completion or perfection, such as Notarial Deed of transfer of immovable property or a registered company share-transfer.

Is there any difference between on the one hand, the more straightforward transfer to the trustee by settlement on trust and on the other, the transfer by the trustee to beneficiary through exercise of power? Typically, the question is couched in language and terms known to English law, but analyzed conceptually in civil law perspective. Both are dispositve acts, subject to the terms and limitations thereof. Transfer by the settlor would fall within the more classical category of transfer because there is in principle a transfer of an interest to a third party, albeit possibly revocable by the terms of the trust. The exercise of a power or a discretion by the trustee is likewise categorized as the volitive act required to effect a transfer. Both are therefore acts classified as capable of transferring ownership. The essential difference may be that the capacity and consent given by the trustee in the exercise of a power, are in many ways an extension or delegation of the consent granted by the settlor, although an autonomous deliberation within the terms of the trust documents may be required.

Malta has no known or recorded experience with the *Hastings-Bass* principle. Speculatively, the more receptive legal minds in the island could understand its application in context, of course, then having to consider *Pitt* and *Futte*r. On the other hand, the idea of challenging an act or a disposal may well raise the hackles of the more conservative school, as being a challenge to the stability to contracts. In the way that change of circumstances was resisted as undermining contractual certainty, the same reaction may predictably be forthcoming. If, at this moment in

[229] Art 958 (2)(b).

time, a *Hastings-Bass* or *Pitt/Futter* issue were to arise, it would sit in the lap of the gods.

K. Mistake and the implied exercise of powers

The question is whether the mistaken exercise of a power which is non-existent, but which would have been available had the trustee exercised a preliminary power as a prelude to the power, is invalid.[230] In *T 1998 Discretionary Settlement*, the Royal Court held that the effective retirement and discharge of a trustee did not need to be effected by a single deed executed by all necessary parties.[231] It was sufficient that the consent of the continuing trustees to the retirement was evidenced by separate deeds and by the actions of the continuing trustees. In fairness, the Jersey Court considered a trust governed by English law, so that this judgement is not necessarily an authority on Jersey law. It is suggested that both Jersey and Malta would be willing to adopt this principle: the basis for this conclusion is that the Jersey Court did apply and examine with sympathy various English authorities on the matter.[232] As for Malta, while there is no known experience, the adoption of this position by the courts is likely. The intention to exercise a specific power and to execute the deed are seen as essential requirements for the implied exercise of the power. This is consistent with the civil law tradition attributing primacy to the will of parties.

L. Powers of accumulation and advancement

The TJL provides that the rule against perpetuities, as known to the English law,[233] may be excluded or avoided. The context here however is the treatment of rules relating to accumulation, advancement or appropriation of property.[234] These provisions are normally also associated with powers of maintenance, but this power is not specifically referred to in either the Jersey or the Malta law. There is no provision comparable to sections 31 and 32 of the English Trustee Act 1925, where the powers of the trustee, to apply trusts funds for maintenance,

[230] P O'Hagan, "Mistake and the implied exercise of powers" (2010) 24 (1) *Tru L.I.* 3; A Binnington, "Problems and pitfalls in the handover of trusteeships – the Jersey experience" (2015) 31 (5) *T & T* 250.
[231] [2009] 17th April 2008.
[232] *D Trust* [20110 JRC 148.
[233] *Thomas* 217.
[234] Arts 38, 39 TJL; arts 26, 27 MTTA.

particularly minors and incapable persons, along with powers of advancement and accumulation, are regulated in detail.

The policy choices involved in the two legislations under review are similar: unless the terms of the trust provide for accumulation of the income, the trustee shall distribute such income. In the case of either legislation, distribution is mandatory, the term "shall" expressing a clear and unequivocal direction to the trustee.

Both laws, in language clearly adopted by Malta from Jersey, grant wide powers and discretion to the trustee where the beneficiary is a minor, subject to the terms of the trust and any prior interest. The exercise of this power and discretion may determine whether the interest has vested absolutely, or vests on attainment of majority or other age, or on the happening of any event. The familiar ring of *condicio* in the civil law culture is here discernable. The options available to the trustee are either to accumulate the interest pending the fulfilment of the conditional happening, or to apply the income or part of it for maintenance, education or other benefit of the beneficiary. The trustee may also appropriate *such interest* or part thereof to the beneficiary.[235]

Beyond the question of accumulation and distribution of interest, a trustee may therefore distribute to the minor beneficiary the entire content of the interest itself or part thereof. This interpretation is supported by the term "such interest" and the provisions of the next sub-article – which, subject to the terms of the trust and any prior interest or charge affecting the property, allow, for the advancement or application to the beneficiary, part of the trust property, prior to the happening of the event upon which the beneficiary becomes entitled absolutely. The concluding comment here, of significant practical importance, is that a receipt by the parent or lawful guardian of a minor constitutes sufficient discharge to the trustee.

Linked to this question is a principle, embodied in similar terms in both legislations related to powers of appointment.[236] Where such power to appoint trust property or any interest in the trust property, is conferred either on the

[235] Art 38 TJL; art 26 MTTA.
[236] Art 39 TJL; art.27 MTTA.

trustee or other person, the appointee or its trustee need not be a nominated beneficiary under the trust immediately before such appointment or assignment. The reflection here is that there is an express adoption of a power long known to the law of trusts, and certainly in the English tradition.

There is no evidence or experience in Malta whether the English doctrine and authority on fraud or excess of powers will be adopted. If the question were to arise, it is likely that a Maltese court would consider English cases and text writers as a most important authority and possibly a direct source. It may be added that where a trustee in terms of the MTTA is granted the power to add a person as a beneficiary, such power is conditional and contingent on the person being properly identifiable.[237]

The Jersey courts have exercised discretion whether or not to uphold the exercise of a power to add beneficiaries when this was not considered in the interest of a beneficiary. In *Pinto Voluntary settlement*, the Trustees sought the approval of the court for their proposal to appoint a part of the trust fund to a new trust which had yet to be established, under which the beneficiaries would be the children of a beneficiary under the principal trust.[238] The principal trust contained no power to add further beneficiaries but included the power for the trustees to advance capital for the benefit of beneficiaries. The Royal Court held that although the scope of the word "benefit" was very wide indeed, it could not be interpreted so widely as to allow the creation of additional beneficiaries since this was expressly forbidden by other provisions of the trust deed.

In *X Trust,* the trustee of a substantial discretionary settlement sought the court's approval of his proposed distributions of the trust property. [239] The beneficiaries of the trust were the husband, any issue of the husband and any charity. In prior family proceedings,[240] the court took into account that the trustee would respond favourably to any request from the husband to advance capital enabling him to meet obligations under the financial provision granted to the wife by the court. The trustee's application was granted, so that husband would settle the legal

[237] Art 9 (9) MTTA.
[238] [2004 JLR Note 11].
[239] [2002 JLR 377].
[240] [2002 JLR 330].

obligation towards the wife. The distribution of the trust property proposed by the trustee was not a fraudulent use of powers, as they had been exercised for their proper end, *i.e.* the benefit of the husband and children as beneficiaries.

M. Powers of appropriation

Allied to powers of advancement are those of appropriation, meaning that the trustee may apply trust property in satisfaction, or settlement, of the beneficiary's interest. The Jersey legislation expressly confers on the trustee such power.[241] This is subject to the terms of the trust and may be exercised even without the consent of the beneficiary "in such manner and in accordance with such valuation as the trustee thinks fit." No judgements, specifically on such powers, by the Courts of Jersey have been identified.

The provisions of the Malta legislation at article 26 (5) grant to the trustee such power of appropriation: as distinct from the law of Jersey, there is no statement that such appropriation may be exercised even without the consent of the beneficiary. No extent of trust property advanced, applied or appropriated shall exceed any presumptive, contingent or vested share of the beneficiary. This provision underscores the evident concern of MTTA to avoid conflicts with succession rules of collation and reserved portion discussed infra.[242] This concern is not of priority to the Jersey legislation.

N. Powers of investment

Neither legislation has a specific provision conferring investment powers on the trustees, comparable to sections 3 to 7 of the English Trustee Act 2000.[243]

The power of investment is understood by both jurisdictions as a consequence of the trustee possessing all powers of a natural person. This includes also the power to assume such obligations and duties as are implied in the investment concerned, such as the obligation to subscribe to shares which may carry further calls on capital. Jersey judgements reveal that there is no question that a trustee has

[241] Art 27 TJL.
[242] Chapter VI.
[243] *Thomas* 255.

powers of investment.[244] The point, whether such powers exist, rarely arises: on the one hand, most trust deeds will provide for express and wide powers of investment. On the other hand, a confirmation of the existence of such powers, whether implied or express, comes, from an examination of the measure of liability conferred by such powers.[245]

It is suggested that practice and courts in Malta will follow the contemporary portfolio theory, being that a trustee should seek a wide spread of investments to hedge against risks. More relevant perhaps may be the civil law distinction between ordinary and extraordinary administration. Ordinary acts of administration are those relating to the day-to-day normal management and administration of a trust. Those extraordinary are traditionally held to be exceptional or fundamental changes, not in the normality of situations. Whether investment decisions are extraordinary measures may not always be clear. A significant change in the types of investment, or the decision to move away from certain recognized categories of investments, such as to extend or confine the bulk of the portfolio in immovable property, can be classified as extraordinary measures.

This is not to suggest that extraordinary powers to invest are necessarily excluded from the trustee's sphere of competence: the real question lies how to reconcile the notion and principle that a trustee enjoys all the powers of a natural person with certain investment decisions which are novel or indeed risky and speculative investments. The suggested solution is that in principle a trustee does also enjoy wide powers, even those related to extraordinary decisions. The question then relates to the proper exercise of such powers. An investment may be within the powers, yet be an improper exercise. The ghost of the *bonus paterfamilias* rises once more, and may be the answer.

O. Delegation of powers by the trustees

Here again marked similarities and identities between the two legislations come to light. Both, in either case article 25, show no reference to other statutes - for

[244] *Midland Bank v FPS* [1994 JLR 276]; *West v Lazard Brothers* [1993 JLR 165].
[245] *Freeman v Ansbacher* [2009 JLR 1].

example, the English Trustee Act 2000[246] which allows the appointment of agents, nominees and custodians, or the Trusts (Scotland) Act l921: this regulates *inter alia* powers of investment of the trustees and also expressly grants power to appoint nominees and to delegate investment management functions.[247]

The TJL clearly states that in principle, subject only to the terms of the trust, "the trustee may delegate the execution or exercise of any of his or her trusts or powers (both administrative and dispositive)… ."[248] Dispositive is here understood as the power to transfer and assign, but certainly not the exercise of any powers such as appointment or revocation thereof, or the discretion whether to accumulate or distribute part of the trust fund. The MTTA provides that delegation is not allowed except as authorized by the Act itself, by the terms of the trust or by the court. Nevertheless, unless specifically provided otherwise by the terms of the trust, power is granted to the trustee to delegate management of the trust property, and to employ professional consultants.[249] What is significant also is that the Jersey law permits sub-delegation, whereas the Malta Act by necessary implication excludes it, without specific authorisation; there is therefore a subtle difference in the way the terms of the articles are couched: the MTTA only allows what is expressly permitted in regulating delegation, whereas the TJL grants wider powers and all seems to be allowed, except in so far as not excluded by the trust document. In either case, however, the civil law consensual tradition of the sovereignty of the will of the parties, is also respected and given effect to.

Although couched in similar but different terms, delegation or appointment in good faith and without neglect, are in both legislations a defence to the trustee for any loss to the trust. The provision of the TJL is wider - without a comparable provision in the MTTA - in so far as it seems to exonerate even a situation where a trustee "permits the continuation" of a delegation or appointment already made provided it satisfies the other requirements. This means that the defence under the Jersey law applies not merely when the trustee makes the delegation, but also where a delegation of power previously made is allowed to remain in effect.

[246] sections 11 *et seq*; *Thomas and Hudson* 457.
[247] Sections 4A-C.
[248] Art 25.
[249] Art 25.

The emerging scenario is that in both systems, the legislation has provided a sufficiently workable and flexible mechanism, with the Malta choices being perhaps more cautious. Here again, the *bonus paterfamilias* will leave his mark with the familiar concept of prudence, diligence and attention being decisive factors. Therefore once more, the civil law cloaks and gives substance to the criteria for the proper exercise of the power of delegation.

P. Power to compromise

TJL contains no specific provision granting power to the trustee to compromise. This can be understood on the basis that such a power is exercisable by a natural person. Whenever the question arose in the judgements, often in context of request to the court to approve such settlement, the relevant trust documents always granted such power. It was held that where Jersey trustees have no power under trust to compromise a claim by UK tax authorities, the court may authorize such agreed payment in general interest of beneficiaries if failure to do so might result in increased assessment.[250] In another matter, the trustees and counsel, requested and obtained the approval of the Jersey Court of a settlement negotiated.[251] Nevertheless, the conclusion in this scenario, as a matter of principle, may not be free from doubt: while invariably contemporary trust deeds incorporate the power to compromise, notwithstanding such express power, the trend is for the trustees still to request prior court authorisation on any significant matter. The fact of such request therefore leaves the question in a sense unresolved. True, a trustee may feel more comfortable with prior court 'blessing' of a proposed compromise, but on the other hand, it could be indicative of a lack of certainty of principle over the extent of such power.

There is but one reference in the MTTA to compromise, and this in relation to management of conflict of laws provision, where the trustee is specifically granted the power to compromise "disputes and claims by third parties."[252] These refer to competing claims against the trust assets where the choice of law or trust provisions may conflict with the mandatory rules of the Maltese forum, for example legitim. The power to compromise is inherent in the powers of the

[250] *Marc Bolan Charitable Trust* [1981 J.J. 117].
[251] *Doctus BVI Consultants Trust* [2004 JRC 122].
[252] Art 6Bc (ii).

trustee, once the trustee is vested with the same powers as that of the natural person. The existence of this power is arguably more clear than that emerging in Jersey: this view is based on an express statement in the MTTA, without an equivalent in the TJL, vesting in the trustee capacity and representation.[253]

Q. Power to borrow and to grant on loan

Neither legislation has any express provision relating to the power of the trustee to borrow or grant on loan. The Jersey judgements however acknowledge such power within the context of the *Hastings-Bass* principle, where an application to set aside a loan to settlor was granted by the Royal Court, as it was clear that a trustee would not have granted the loan if it had been aware of the adverse UK tax consequences.[254] In another instance, an application was acceded to by the Royal Court for the mortgage of trust property in favour of trustee, notwithstanding the possibility of a conflict of interest and without an express power to do so, once speed was essential. There appeared no other way of obtaining the funds to retain the trust's only asset, a yacht - it was in beneficiary's best interest that it be retained.[255] Whether however under a Jersey trust, a trustee is otherwise empowered to take a loan without authority conferred by the trust deed or by court, remains unclear.

The only reference to a loan in the MTTA is in the definition of a commercial transaction which includes trusts as a security vehicle. Nevertheless, from direct knowledge of commercial practice, it can be stated that trustees routinely loan and borrow, on the basis, however, of express authority of the trust deed. Sometimes, borrowing is contingent on the approval of a qualified majority of beneficiaries or the prior *nihil obstat* of the protector. Absent such explicit authority, the point under the MTTA remains doubtful, possibly because of a cautionary reluctance by practitioners to borrow without an express trust provision. Failure by the trustee to act as a *bonus paterfamilias* could engage liability or even breach of trust and unauthorized borrowing could fall within this.

[253] Art 3(5).
[254] *Howe Family Trust* [2007 JLR 660].
[255] *Yates* [1994 JLR 221].

R. Concluding Assessment and Evaluation

It is here argued that the powers just analyzed do bear out the existence of a *civil law trust*. This view is based on the architecture and structure of both laws, on the foundational premise that the trustee possesses "all the same powers of a natural person acting as a beneficial owner"[256] and "all the powers of a natural person having the absolute title to such property."[257] The relation between the subject-owner and object-owned has historically been the basis of the civil law of property. The powers of the trustee have been structured around the power of the trustee to act as *dominus* vis à vis the trust assets. These tally with the transmutation of the traditional notion of patrimony, with different patrimonial capacities attributed to the trustee. Moreover, trust powers have been clearly linked with civilian defining characters – capacity, representation, *bonus paterfamilias* diligence, and good faith. That English practice and drafting have won the day in either jurisdiction, does not detract from this view. It supports the statement of a trust with a civil law identity, flexibly operating in a mixed jurisdiction.

It is also posited that the pivotal distinction between domestic or foreign law governing the trust, is a defining difference and key to the underlying basis of both trust laws. This also applies specifically in the provisions relative to discretion and powers of appointment to beneficiary status or to particular property. The applicable law can scuttle and put paid to any such exercise or appointment, if prohibited by the chosen law or defeated by prior spouse, legitim or creditor rights existing under the governing law. While this is true for every choice of law situation, the role of the governing law becomes more critical: here, Jersey has been less pardoning than Malta, and in case of conflict with the chosen law, Jersey law applies regardless. The MTTA has attempted a degree of flexibility, particularly in the cases of settlors or trust assets having no connexion with Malta.[258] The concluding point therefore is that even in the case of trustee powers and discretion, the applicable law remains a central defining feature to the reading and assessment thereof.

[256] Art 24 (1) TJL.
[257] Art 24 (i) MTTA.
[258] Chapter V.

CHAPTER IV - THE DUTIES AND RESPONSIBILITY OF THE TRUSTEE

A. Scope of the chapter

This chapter will focus on the bases behind the duties of the trustee, and the responsibility consequent to violation thereof. It is enquired whether there is conceptual similarity between such duties and the *fiducia* obligations known to Civil Law. How far can breach of trust be characterized as, or akin to, the civil law notion of responsibility? The question, whether the duties and responsibilities of the trustee carry any civil law identity, sufficient to justify the conclusion of the existence of a civil law trust, will be investigated.

B. The context of fiduciary duties

The term and principle "fiduciary" have been referred to as "a concept in search of a principle."[259] Nevertheless, it remains trite law that fiduciary duties define the trustee-beneficiary relationship.[260]

How far will the trust laws of Jersey and Malta look to the concept of fiduciary duties as known to English Equity?[261] It is widely believed that the term "fiduciary" duty traces its origin to English Equity.[262] Or does it? On the one hand, the well-known words of the Digest, generally prohibiting self-dealing by those who have the administration or control of assets of another, such as tutors

[259] A Mason, "Themes and Prospects" in Finn (ed), *Essays in Equity* (1985) 246.
[260] M Graziadei, "Virtue and Utility – Fiduciary Law in Civil Law and Common Law Jurisdictions" in A Gold and P Miller (eds), *Philosophical Foundations of Fiduciary Law* (2014) 287.
[261] J Getzler, "Rumford Market and the Genesis of Fiduciary Obligations" in Burrows and Rodger (eds) *Mapping the Law* (2008) 577; R P Austin, "Moulding the Content of Fiduciary Duties", in AJ Oakley (ed), *Trends in Contemporary Trust Law* (1996) 153.
[262] *Thomas and Hudson*, 16; *Hudson* 41; D Fox, "Equitable Property" in J McGhee (ed) *Snell's Equity* 32nd edn (2010), 25, 33rd edn (2015) 21; *Underhill*, 647, 1113; S Worthington, *Equity* (2006) 129.

of minors or curators, possibly questioning therefore its origin, are recorded.[263] On the other hand, the Equity tradition has moulded with consistency, in various jurisdictions, the core duties imposed by a fiduciary relationship: these encompass the no-conflict, no-profit rule, the prohibition against self-dealing, and the general duty to act in the interest of the person who has extended trust or faith.[264] The widely-cited words of Lord Millett in *Bristol and West Building Society v Mothew* provide a generally accepted definition of the fiduciary role and duty:[265]

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust ...."

It has also been suggested that the word 'fiduciary'

> "embraces all trust-like situations including the trust itself, but it is more precisely used in contrast with trusts proper, in reference to those situations which are in some respects trust-like, but are not, strictly speaking trusts."[266]

Remedies include the avoidance or rescission of contracts, even *restitutio in integrum.* A fiduciary is not entitled to advantages or profits deriving from his fiduciary capacity or role, the associated remedies being disgorgement or restitution of profits.[267] A traditional exposition, albeit from an American perspective, was formulated thus: "A fiduciary is a person who undertakes to act in the interest of another person. It is immaterial whether the undertaking in the

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[263] "Tutor rem pupilli emere non potest: idemque porrigendum est ad similia; id est ad curatores procuratores et qui negotia aliena gerunt"- D.18.1.34.7.
[264] M Day, "Fiduciary duties" (2009) 15 (6) *T & T* 447.
[265] [1997] 2 W.L.R. 436.
[266] L Sealy, "Fiduciary relationships" (1962) 20 (1) *C.L.J* 69; L Sealy, "Some principles of fiduciary obligation" (1963) 21 (1) *C.L.J* 119; L Sealy, "Fiduciary obligations, forty years on" (1995) (9) *J Cont L* 37.
[267] I Samet, "Guarding the fiduciary's conscience – a justification of a stringent profit-stripping rule" (2008) 28 (4) *Oxford J.Legal Stud.*763.

form of a contract was gratuitous."[268] A similar response is recorded by a Canadian contributor.[269]

Closer to our times, the work of Conaglen stands out as a focus on novel, if controversial and sometimes challenged, re-interpretation of the concept of fiduciary duties. He contends that:

> "Fiduciary duties serve a function which differs from that served by other legal duties. The concept of fiduciary "loyalty" is an encapsulation of a subsidiary and prophylactic form of protection for non-fiduciary duties which enhances the chance that those non-fiduciary duties will be properly performed."[270]

His contribution seeks to show that the fiduciary duty serves an important, indeed on this view, a primary function, of preventing and averting breaches of non-fiduciary duties.[271] Examples of non-fiduciary duties include the duty of care, that to act in the best interests of the company or the trust by the directors or trustees. Whether a protector owes fiduciary duties is a construction of the powers granted in each trust-specific situation.[272] The remedy here is damages as distinct from the specific remedy for breach of fiduciary duties. The prohibition against self-dealing rule is distinguished from the duty of fair dealing, and it is queried whether there is indeed any substance in the distinction between the two rules.[273] The perspective of the fiduciary duties owed to two principals as distinct from the duty-interest conflict of the fiduciary is reviewed and assessed by the same writer.[274] What Conaglen considers to be a *lacuna* in literature, being the conflict

[268] A W Scott, "The fiduciary principle" (1949) 37 (4) *Calif. L.Rev* 539.
[269] R Flannigan, "The fiduciary obligation" (1989) 9 *Oxford J. Legal Stud* 285.
[270] M Conaglen, "The nature and function of fiduciary loyalty" (2005) 121 *L.Q.R*. 452.
[271] M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (2011).
[272] On Protectors, vide generally, E Campel et al, "Protectors", in D Hayton (ed), *The International* Trust 3rd edition (2011) 195; A Holden, *Trust Protectors* (2011); M Hubbard, *Protectors of Trusts* (2013); S Pryke, "Of protectors and enforcers" (2010) 16(2) *T & T* 64; M Conaglen and E Weaver, "Protectors as fiduciaries: theory and practice" (2012) 18(1) *T & T* 17; A Duckworth, "Protectors: law and practice" (2013) 19 (1) *T & T* 98.
[273] M Conaglen, "A re-appraisal of the fiduciary self-dealing and fair-dealing rules" (2006) 65 (2) *C.L.J.* 366.
[274] M Conaglen, "Remedial ramifications of conflicts between a fiduciary's duty" (2010) 126 (Jan) *L.Q.R* 72; M Conaglen, "Fiduciaries" in J McGhee (ed) *Snell's Equity* (2010) 171, (2015) 137.

between multiple sets of fiduciary duties, and the regulation of duty-duty conflicts is developed in the general landscape of his thoughts.[275]

These lines reflect the general prophylactic approach of fiduciary duties to safeguard the observance of important non-fiduciary duties and avoid a violation thereof. Of course, Conaglen has received responses rejecting the basis of his assumptions, amongst which those holding that fiduciary duties are "prescriptive and directional".[276]

Weinrib expresses the Canadian law perspective: first, the fiduciary must have scope for exercise of discretion and secondly, such exercise must have an effect on the legal position of the party related to the fiduciary. Such duties are imposed to ensure proper exercise of discretion.[277] Edelman has posited that the basis of fiduciary obligations is found in voluntary undertakings, direct or indirect."[278]

It does not take much to conclude that the concept and precise extent of fiduciary obligations may remain in serious need of a more consistent definition, beyond the well-known recitations of the general often formal principle.[279]

C. Fiduciary duties of the trustee in Jersey trust law

The previous analysis was proffered as a prelude to four important questions: first, how far the duties, commonly termed as "fiduciary" are part of the trust law of Jersey and Malta. Secondly, if so, can one arrive at a precise content of the meaning carried by this concept in so far as it relates to other trustee duties? Thirdly, has there been a broad reception of Equity fiduciary duties? Finally, if so, how far such fiduciary obligations are generally consistent with the system internally?

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[275] M Conaglen, "Fiduciary Regulation of conflicts between duties" (2009) 125 *L.Q.R.* 111. The "no-inhibition principle" as enunciated in *Mothew* is assessed in context The conclusion of Milett LJ that the "conduct which is in breach of this duty need not be dishonest but it must be intentional" in *Mothew*, at 19, is doubted in so far as intention is "foreign" to fiduciary doctrine. The conclusion in this presentation is that the "inhibition principle" is a novel development in fiduciary duties, and in so far as it tends to prohibit breaches of contract appears to share features with the tort doctrine.

[276] R Lee, "In search of the nature and function of fiduciary loyalty: some observations on Conaglen's analysis" *Oxford J. Legal Stud* (2007) 27 (2) 327.

[277] E J Weinrib, "The fiduciary obligation" (1975) 25 *U Toronto L.J.* 1.

[278] J Edelman, "When do fiduciary duties arise?" (2010) 126 *L.Q.R.* 302.

[279] P Panico, *International Trust Laws* (2010), ch on Trustee investment: powers and duties 109; P Birks, "The content of fiduciary obligations" (2000) 34 *Israeli Law Review* 3.

The Jersey trusts law compiles a familiar compendium of the duties generally included in fiduciary obligations: the no-profit, self-dealings prohibition, the duty to keep accurate records of the trustee's trusteeship and segregation of trust assets from personal trustee property. Moreover, in the event that there is more than one beneficiary or at least one purpose, trustees are to perform the trust impartially and not favouring a beneficiary at the expense of the other.[280] The pressing question is whether and how far there has been a reception or indeed a "codification" of Equity fiduciary duties.

The Jersey courts routinely apply what have been termed as fiduciary principles, and make specific reference to "fiduciary obligations." In some instances, they refer to themselves as "Courts of Equity", while underlining that they are not bound to follow "slavishly" every rule of English Equity.[281]

In *A Trustees Limited*, the Royal Court held that:

> "Beneficiaries are entitled to require that the decisions of their trustees are made independently of any competing duty. There are three possible ways to manage a trustee's conflict of interest. First, the trustee may resign, which will not always be practicable. Secondly, the nature of the conflict may be so pervasive that the trustee has no alternative but to surrender its discretion to the court. Thirdly, the trustees may honestly and reasonably believe that, notwithstanding a conflict affecting one or more of them, they are nevertheless able fairly and reasonably to take the decision"[282]

The no-conflict rule was seen by the Royal Court as part of the proper management of the trust. The duty to provide a robust approach and structure was underlined, so that the trustee should have in advance full information relevant to the transaction to enable him to reach a properly-informed decision.[283] *Midland Bank Trust Company (Jersey) Limited v Federated Pension Services*[284] (*FPS*) attempts to place the concept and function of fiduciary duties in context of what the court terms the "pre-trust concept." The defendant, a trustee for certain

[280] TJL arts 21, 22, 23.
[281] *West*, Fn 228, at 249.
[282] [2008 JLR Note 25].
[283] *Parujan v Atlantic Western Trustees Limited* [2003 JLR Note 11]; also, *vide* the *P Trust and the R Trust* [2015] JRC 196.
[284] [1994 JLR 276].

employees of the State of Jersey, mistakenly believed that it could not transfer the fund to Hambros Bank (Jersey) without a "customer agreement," whereas it could simply have transferred the sum without any such formality. The defendant placed the sum in a deposit account rather than transferring it to Hambros for investment, believing that it had no power to make the transfer: this proved to be considerably less profitable to the pension fund than had it been invested on the Stock Exchange. The Royal Court referred to the fiduciary duty thus:

> "The standards that this court expects are high. It has always been so for anyone who holds himself in a fiduciary position, whether as trustee in the modern concept or in the pre-trust concept of a *bon père de famille*. There is, in our view, a higher duty imposed on those who, like FPS, claim a long and detailed expertise in the field in which they practise."[285]

This is remarkable for two reasons: first, it creates a pre-trust and a trust period. This must surely mean that the historical memory of the trust in civil law prior to the TJL is present and alive with the courts of Jersey. Secondly, there is a perceived link between the fiduciary duties and those of the *bon père de famille*: the civil law response is, that the fiduciary duties impose therefore the duty to act actively, allied with the criterion of diligence of a *bonus paterfamilias*. This establishes a link to obligations flowing from a position of trust and responsibility, and hence the duty to act prudently in the administration of others' affairs. Therefore, the pre-trust in Jersey imposed this measure of diligence as the basis of what are today in contemporary language termed fiduciary duties. The case under review raises the still unsettled question, namely whether there can be a breach of trust without actual loss. The court held that such liability could exist without any diminution of the trust fund: in the event, the action failed on the basis of the exculpation clauses, and that FPS had acted negligently, not with gross negligence or wilfully in default, but indeed had been honest all through.

The question of fiduciary duties and equity was likewise considered in depth in *West v Lazard Brothers (Jersey) Limited.*[286] Plaintiffs brought two actions for alleged breach of trust and mismanagement of transactions. The Royal Court charted an interface between the Trusts (Jersey) Act, English Equity and

[285] At para 35.
[286] [1993 JLR 165].

traditional civil law principles. The first emerging principle is that the trustee owes duties in terms of the trust deed and the Jersey Act, even though the trust had been constituted prior to 1984. The judgement is nevertheless seen as replete with references to principles of equity and indeed an "equitable jurisdiction" of the Jersey Court. Significantly, the traditional categories of "*fraude*" and "*dol*" are seen as superseded, at least partially so, by the Jersey legislation on trusts. It was stated by the Jersey court:

> "There is an equitable jurisdiction in Jersey. It stems from the concept of fairness. This court is not bound to follow slavishly every rule of the English Chancery courts... It does not 'pick and choose' but once it has properly adopted an English concept, it can build on it, amend it or supplement it, provided that it does so consistently."[287]

This is a key statement on the Jersey law of trusts, and therefore ties in with the earlier examination of the fiduciary and other duties of the trustees. It is a relatively early statement after the 1984 TJL. It may not have been the first, since the judgement examined contains valuable references to prior judgements which have developed and endorsed the position.[288] Other judgements reflect the view that the Jersey concept of equity may not be necessarily co-terminous with the English concept of Equity. In another widely-cited judgement, it was stated that "the conditions in the English Courts which gave rise to the system of law known as equity were not mirrored in the history of the Royal Court. It may well be that 'equity' in Jersey inclines more to the French '*équité*' than its English counterpart."[289] Another judicial voice, reflecting on the meaning of "equity" in Jersey law, held that there was again an approximation with *equité*, underlining however the inherent powers of the Jersey court to address and grant remedies to unfair situations.[290]

This ability to straddle both systems is nothing new to small jurisdictions, where practical solutions dictate a balanced approach drawing from the various

[287] *Ibid* 248.
[288] *Pirouet v Pirouet* [1985-86 JLR 151]. In this case, the Jersey Royal Court applied the English doctrine of promissory estoppel which could be applied under the inherent equitable jurisdiction of the Royal Court, flexibly, as a means of preventing injustice.
[289] *Lane v Lane* [1985-86 JLR 48].
[290] *Ex parte Viscount Wimbourne*, fn 205, at 21.

influences on the system: for example, the way the doctrine of *empêchement* was made applicable to prescription for actions against trustees.[291] Here is another case in point, Jersey equity inclines more to the French *equité*, yet the Jersey Royal Court does possess the powers of, but not "*any wider powers than the former Chancellors of the Court of Chancery.*"[292] Nevertheless, there have been suggestions from some quarters that the contemporary role of Equity in French law is generally limited and whittled down[293] - as distinct from its historically strong and far more pervasive influence in the Roman sources and traditional French system.[294] While the actual meaning of *equité* or Equity in Jersey may find various definitions, it is also clear that the generally accepted fiduciary rules relating to trusts, developed from English Equity, are applicable in Jersey – this notwithstanding perhaps some conceptual links to the Roman and English traditions.[295]

One may question whether equity serves any further function in today's contemporary legal landscape with the written law, *La Loi* or *La Legge* having acquired near monopoly in law-making methods, particularly in the civil law culture. This would be a step in the wrong direction for many reasons: a general abstract rule expressed in a law may require a particular application and a more sophisticated approach, reflecting the Aristotelian definition of *Eipeikeia*.[296] The view is even expressed that the natural law tradition expressed in some earlier civil codes should be embraced.[297] Equity based on the law should always be a default source of law, although the view has been validly expressed that perhaps nowadays equity is often masked by the general, often vague, term "good faith."

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[291] *Walker et al v Egerton-Vernon et al* [2014 JRC 25]. Empêchement is the term known to Jersey law meaning suspension of any prescriptive term; Malta, following its Napléonic model, uses the term suspension; A Saunders and R MacRae, "*Walker et al v Egerton-Vernon et al* – a decision on prescription and empêchement by the Royal Court of Jersey" (2015) 21 (3) 301.

[292] Fn 205 at 19.

[293] P Mayer, "*Équité* in modern French Law" in A Mordechai Rabello (ed), *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (1993) 365.

[294] *Ibid*, fn 293, M Humbert, "The Concept of Equity in the *Corpus Juris Civilis* and its Interpretation by Pothier" 29.

[295] A distinction has been drawn as to the Jersey position on equity: prior to the 1984 law it inclined towards French *equité*, suggesting that *post* the Trusts (Jersey) Law, the emphasis shifted towards its English counterpart.- *Fiduciary Management Limited v Sheridan*, [2002 JLR Note 11].

[296] *The Nicomachean Ethics* V. Ch. 10.

[297] G Razi, "Reflections on equity in the civil law systems" (1963-64) *13 Am. U. L. Rev.* 24; art 7 of the Austrian civil code; art 315-317 of the German civil code.

Nor should it be surprising that other mixed jurisdictions such as Scotland, possess their own flavour of "equity" used here in the sense of fairness,[298] but not without influence from south of the border .[299]

There are instances of express reference by the Jersey courts to fiduciary duties as defined by the Equity tradition, for example the finding that a trustee for two beneficiaries should have retired when there was a real prospect of conflict between them.[300] The Jersey court while referring to fiduciary duty, fully endorsed Lord Millett's observations in *Mothew*,[301] described as "repays reading in full."[302]

D. Other Duties of the Trustee in Jersey Law

In strikingly civil law language, article 21 of the Trusts (Jersey) Law provides that:

> "Duties of trustee
>
> A trustee shall in the execution of his or her duties and in the exercise of his or her powers and discretions –
>
> (a) act –
>
> (i) with due diligence,
> (ii) as would a prudent person,
> (iii) to the best of the trustee's ability and skill; and
>
> (b) observe the utmost good faith.
>
> (2) Subject to this Law, a trustee shall carry out and administer the trust in accordance with its terms."

[298] D M Walker, "Equity in Scots Law" (1954) *Jur.Rev* LXVI 18; E Örücü, "Equity in the Scottish Legal System" in Rabello, *ibid*, fn 293 at 382; J M Thomson, "The Role of Equity in Scots Law" in S Goldstein (ed) *Equity and Contemporary Legal Developments* (1992) 911.
[299] D Carr, *Equity in Scots Law* (2010) PhD Thesis, Cambridge; "English influences on the development of fiduciary duties in Scottish Law" (2014) 18 (1) *Edin. L.R*. 2014, 18(1) 29.
[300] *E Trusts v Verite Trust Company Limited* [2008] JLR 360.
[301] Fn 265.
[302] Fn 300 at 374.

This article places in clear civil law perspective the duties of the trustees. The terms "diligence", "prudence" and "utmost good faith," however difficult they may be to define with precision, carry the Roman-Civilian ring. They may be distinguished from the more terse provisions of the Scottish legislation, where but one section specifically refers to the duties of the trustee.[303] The general duty of care is received in Scots Law although not specifically in statute,[304] it being generally developed through the jurisprudence.[305] With some contrast, the English Trustee Act 2000, does contain general provisions creating a "duty of care", made applicable by schedule to the particular activity,[306] and even at section 2 refers to "standard investment criteria."

The question therefore is whether the Jersey law of trusts on the duties of trustee has opted to create specific identifiable duties, or whether more in keeping with the civil law method, it has been felt more appropriate to enunciate a general principle applied and adapted to specific circumstances. Although perhaps not strictly relevant, in the text of Guernsey Law, the duties of the trustee are mentioned under the heading of general fiduciary duties. Thus reads the relevant article:

> "(1) A trustee shall, in the exercise of his functions, observe the utmost good faith and act en bon père de famille."[307]

The observation here, by way of comparison, is that while the term "utmost good faith" is present in either legislation, the Guernsey law mentions the duty to act "*en bon père de famille*," signally absent in Jersey. The conclusion is that the articles express the principle, reflecting the civil law tradition, of the duty of prudence and attention of the *bonus paterfamilias* and the contractual duty of good faith. These go beyond the specific obligations imposed therein, and are basic, and at the same time, default rules.

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[303] The only provision relating to a general statement of duty identified in Scottish legislation is section 4A of the Trusts (Scotland) Act 1921 in context of exercise of powers of investment of trustees. Other sections relate to liability and breach of trust, such as sections 29 to 32 of the Act.
[304] "Equity" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 22 (1987) para 546; *ibid,* "Trustees", Vol 24 (9) 205.
[305] *Lutea Trustees Ltd v Orbis Trustees Guernesy Ltd* 1997 SCLR 735; *Wilson* 454.
[306] Sections 1 and 2 of the Trustees Act 2000.
[307] Article 22 of the Trusts (Guernsey) Law 2007 (TGL).

E. The judgements of the Jersey Courts and beyond

The judgements of the Jersey Courts evidence other duties of the trustee, on a case-by-case basis. In circumstances where the beneficiaries had requested termination of the trust without the assets being fully ascertained, it was considered that the only proper thing to do for the trustee was to apply to the court for directions.[308] The duty of the trustee to provide trust accounts and a full inventory of the trust assets was acknowledged, with "accounts" being given a wide construction and an order made accordingly.[309] This duty of the trustee to give information was subject to the interests of the beneficiaries and the general duty to protect the trust.[310] It was held that a retiring trustee had the duty to co-operate "fully and actively by making all relevant documentation and correspondence available promptly." At the Instance of the new trustee, costs were awarded against the former trustee for failure to make available the documentation.[311] The court remarked that good practice required regular and prompt billing of fees. Trustee should not attempt to obtain payment surreptitiously, but should be open and transparent about their fees.[312]

How far have general guidelines or recommended standards by competent authorities come to form part of the accepted duties of the trustee? This is sometimes referred to as "soft law", viewed not without controversy, as possibly misleading and contradictory.[313] The Royal Court has remarked on the obligation of a professional trustee to be registered with the Jersey Financial Services Commission. "The Commission is entitled to impose, and does impose, stringent conditions upon registered persons. These burdens are in addition to the usual responsibilities of a trustee under the general law."[314] This judgement is noteworthy because it acknowledged the "general law," and specific responsibilities placed on trustees by the professional or regulatory guidelines. These refer to conduct of business with integrity, effective control of affairs,

[308] *Caversham Trustees Limited v Patel* [2007 JLR Note 30].
[309] *West v Lazard Brothers and Company (Jersey) Limited.* [1987-1988 JLR 414].
[310] *L and M Trusts* [2003 JLR Note 6].
[311] *A Trust v C.I. Trustees Limited* [2006. JLR N 35].
[312] *Carafe Trust Guardian Company Limited v Louveaux* [2005 JLR 159].
[313] L Blutman, "In the trap of a legal metaphor: international soft law" (2010) 59 (3) *ICLQ* 605.
[314] *Lincoln Trust Company (Jersey) Limited* [2007] JRC 149.

proper risk management, transparency and "due skill, care and diligence to fulfil the responsibilities that it has undertaken."[315] Other judgements speak of the "requirements of openness and transparency envisaged by the Jersey Financial Commission's Codes of Practice for Trust Company Business."[316] In context of trustee professional fees, the Royal Court mentions "the general good practice and the requirements of transparency as expected by the Code of Practice published by the Jersey Financial Services Commission."[317]

F. Duties of trustee in Jersey law - general conclusions and assessment

From an evaluation of the trustee duties in the St Hélier jurisdiction, the following conclusions emerge. In line with civil law drafting and method, the Jersey law dedicates only a handful of articles enunciating general principles. Perhaps the most characteristic and significant are the terms "due diligence...as would a prudent person...to the best of the trustee's ability and skill." Not least of course, the obligation "to observe utmost good faith" remains the cornerstone of the trustee's obligation.

Returning to the four questions posed earlier, the first, about the role of Equity fiduciary duties, requires further reflection. Without there being in any way a formal reception thereof, it is clear that they are held in high respect by the courts of Jersey. While the Royal Court has consistently underlined its independent approach, it may not be amiss remarking here that the Privy Council remains the highest court in Jersey: there could possibly be "soft" links to English Equity, at least by cultural assimilation. The Normandie "*equité*" has never been formally abrogated, although no recent formal reference has been traced.[318] It seems a correct intuition that a system with roots also in the Roman-civil law retains

[315] *Ibid* at 5-9.
[316] *Alhamrani v Alhamrani* [2007] JRC012.
[317] *Carafe Limited v Louveaux* [2005 JLR 159].
[318] The Royal Court itself confessed to having been unable to trace a direct reference in equity as part of its customs and traditions. In *Ex parte Viscount Wimbourne*, fn 205 at 21 it is stated "I have not been able to find the word "*equité*" in the Ancienne Coutume de Normandie, or in the Commentators, but I note that in the Dictionnaire de Droit et de Pratique (of France it is true and not only of Normandy) by De Férrière, published in 1771, there appears the following under the title of *Equité*:..".

equity, in the Roman sense,[319] as a residual but all pervasive source.[320] Arguably, the Jersey perspective may be less stringent than the English tradition, exemplified in *Keech v Sanford*.[321]

The second question considers the content of trustee duties: why have TJL, jurisprudence and tradition defined the duties of the trustees in such general terms? Even a cursory glance at widely-consulted academic and professional publications, reveals a wide range of formally expressed trustee duties, borne out by judicial statements and professional practice on the matter [322] – for example, duties of accounting, and providing information. There are no specific provisions relating to the duty to exercise discretion, or to exercise such discretion actively, or not to act under the dictation of another. This is significant since the English well-known publications on trust are regularly cited by the Jersey courts. The Royal Court has stated that "...in complex trust litigation, it may be appropriate for trustees to seek advice and assistance from large firms of English solicitors and specialist counsel at the Chancery Bar. First, the Jersey law of trusts, even though it is a discrete body of law, has much in common with the English law of trusts, drawing as it does upon equitable principles developed by the English courts... "[323]

In fairness, there are, at least, four fundamental terms - diligence, prudence, best of ability and utmost good faith.[324] There is a persuasive argument that these terms are sufficiently widely encompassing so as to include, by necessary implication and without the need for express reference, specific provisions or legal statements. Moreover, the drafting process has in various instances opted for

[319] The opening statement of the Digest (D 1.1.1.) attributed to Celsius *"jus est ars boni et aequi*." Ulpian in his Institutes also refers to this statement, Book I, D.1.1.1. as does Paul, Book XIV Ad Sabinum D.1.1.11.
[320] H Jolowicz and B Nicholas, *Historical introduction to the study of Roman Law* (1972) 410; A Schiller, *Roman Law: Mechanisms of Development* (1978) 551 - the concept of Roman *aequitas* has also been linked with the praetorian edict, which was said to have within equity the edict – *habet in se aequitatem*; V Arrangio Ruiz, *Istituzioni di Diritto Romano* (1976) at 28; Cicero links Roman *Aequitas* to a three-fold character: pertaining to the Gods, to the departed and to men: the first is called piety, the second sanctity and the third justice or equity - *Topica XXIII*.
[321] (1726) 25 E.R. 223.
[322] *Thomas and Hudson*, 281; R Nolan "The Duties and Discretions of Trustees" in J McGhee (ed) *Snell's Equity* (2010) 827, (2015) 749.
[323] *Re Internine Trust* [2006 JLR 176] at 186.
[324] The substance of article 21 (1) TJL.

the civil method of a general statement, leaving the matter then to the courts and practitioners to apply the general rule to the particular instance. The TJL may be seen in some ways as being rather brief or perhaps unarticulated or sparsely so. This is a completely unfair and erroneous conclusion, since the Jersey law does incorporate through a number of instances referred to above, rich and highly relevant influences from contemporary legislation. It is only deceptively briefly expressed.

An attempt to address the third question, whether there has been a reception of the classical Equity fiduciary duties in Jersey, requires to look beyond formal reasoning and to assess the substance and perhaps what is sometimes known as "judicial sleight of hand." On the one hand, it may be difficult to argue that Equity and the resultant fiduciary duties have found formal reception in Jersey trusts - the statement that "Equity" is not part of Jersey resounds consistently in judicial pronouncements. On the other hand, the fiduciary duties are regularly applied as law and standards of good practice by the Jersey Courts. Therefore, a reply to the question will in all likelihood reject formal adoption, but acknowledges strong "soft" influence, so that in practice it will often be an application of such fiduciary rules behind formal reasoning.

How does this conclusion therefore stand against the fourth question – is the prevailing position as assessed consistent within the general characteristics and contours of the system? The Jersey law of trusts is therefore seen as having achieved a subtle balance and careful intertwining of the various strands. The French-Norman influence, possibly more than the Roman *jus commune* tradition, is strongly present, sometimes as an unwritten source, on other occasions as residual default legislation. Certainly, this influence is a fundamental cultural definition. This is evident in the drafting and simple clear language. At the same time the core principles of English trust law are present, particularly in the implied, often unwritten or not formally expressed, traditional principles of fiduciary law. Can one speak here of legal transplants? On the subject of duties of trustees, the law here is both robust, consistent and harmonizes the various influences. No inconsistency or contradictions have been assessed; the combination of the partly-unwritten fiduciary duties along with the civil law-

derived formal duties of prudence of the *bonus paterfamilias* and indeed utmost good faith, stand harmoniously together – all characteristics of a mixed jurisdiction. This last term, good faith, may carry *the* all-pervasive influence and indeed a long tail-end in assessing a trustee's conduct, perhaps even more stringent that the traditional fiduciary duties.

G. Fiduciary and other duties in the Malta trust context

An assessment of trustee fiduciary obligations in the MTTA evidences its particular difficulties, posing more questions than in the relatively clearly-mapped position of Jersey. Its recent introduction in 2004 means that, for all its growing traction, the experience and accumulated "wisdom of the years," may not yet have developed or refined themselves to any comparable degree with those of other jurisdictions.

The initial reflection however is that, due to all-pervasive English influence, from the functional and operational point of view, no major differences can be identified from that of Jersey. English academic and professional writings remain widely consulted. There is moreover a strong English regulatory influence in matters of best practice and professional standards.

First to be addressed is the meaning of 'fiduciary duty:' this goes beyond MTTA since the civil code devotes a subtitle to "Fiduciary Obligations."[325] The introduction to the article reads thus:

> "**1124A.** (1) Fiduciary obligations arise in virtue of law, contract, quasi-contract, trusts, assumption of office or behaviour whenever a person (the "fiduciary") -
>
> (a) owes a duty to protect the interests of another person; or
>
> (b) holds, exercises control or powers of disposition over property for the benefit of other persons, including when he is vested with ownership of such property for such purpose; or

[325] Art 1124A.

> (c) receives information from another person subject to a duty of confidentiality and such person is aware or ought, in the circumstances, reasonably to have been aware, that the use of such information is intended to be restricted."

In terms of the subsequent subarticles of the MCC, the content of fiduciary obligations includes the obligation to act in utmost good faith and to act honestly in all cases, subject to an express provision of law or instrument in writing modifying or excluding such duty.[326] More specifically, the fiduciary is to exercise the diligence of a *bonus paterfamilias* in the performance of its obligations, to avoid any conflict of interest, and not to receive undisclosed or unauthorised profit from his positions or functions. The articles of the civil code impose a duty to act impartially when fiduciary duties are owed to more than one person. The fiduciary is to keep any property as may be acquired or held as a fiduciary, segregated from personal property or that of other persons towards whom it may have similar obligations. A person in this capacity is required to keep records and to account to those to whom such fiduciary obligations are owed. Finally, the fiduciary is bound to return on demand any property held under fiduciary obligations to the person lawfully entitled thereto, together with any benefit derived. Moreover, "the obligation to return property derived from a breach of a fiduciary duty shall apply also to all property into which the original property has been converted or for which it has been substituted."

Now, is this something completely new? These provisions of the civil code are relatively recent, 2004 amendments. Their particularity is that they seem to transpose, at least *prima facie*, the traditional fiduciary duties, as known to classical Equity. These provisions include, but are not limited to, trusts. The term in the civil code "fiduciary duties" and its derivations may be both ambiguous in one sense and representative, emblematic in another. The ambiguity arises in so far as it is not immediately obvious or clear whether or how far the term is a derivation from English Equity, including following and conversion. On the other hand, but not less elusive, does the term find its conceptual lineage in the Roman *fiducia* or *fideicommissum*,[327] possibly of the same remote descent or inspiration

[326] Sub-articles 1124A (4) to (6).
[327] D Johnston, Fn 44, 9.

of the French or Québec *fiducie*? Is it therefore an attempt to transport or transplant Equitable principles in an otherwise and erstwhile civil law context? The question requires more investigation.

What is clear is that the provisions on fiduciary obligations partly represent a codification of the duties of the figure long known to Maltese civil law, traditionally known in Italian as the "*mandato prestanome*" or the French term "*mandat prêt-nom*."[328] This essentially means a contractual situation where a mandatory acquires in its own name *but* for the benefit of the mandator. The jurisprudence has long acknowledged the validity of such stipulations and indeed the obligations of the mandatory to transfer what was acquired for the benefit and interest of the mandatory. It is also relevant to add that under the title of mandate in the civil code, there is also a reference to fiduciary obligations. It is more likely here that there is a specific codification of the duties imposed by judgements on the mandatory. It is stated that:

> "Any person holding property for another holds property subject to fiduciary obligations to the person engaging him for such purpose and shall be regulated by the provisions of this title and by the provisions of this Code relating to fiduciary obligations."[329]

This is subject to the obligation of immediate and unconditional return to the mandator.

H. The judgements of the Malta Courts and beyond

The figure of *mandat prêt-nom* has been recognized by the courts of Malta in various occasions, and in unhesitating terms. An example is the judgement re *Mamo v Sant.*[330] These were proceedings instituted by the Revenue for a declaration condemning defendant to pay stamp duty on a transfer of immovable property. Essentially the facts were that plaintiff purchased in his personal name

[328] F Leduc, "Réflexions sur la convention de prête-nom – contribution à l'étude de la raprésentation imparfaite" (1999) 2 *RTD* 283.
[329] Art 1871A MCC.
[330] Appeal, 2nd May 1957.

an immovable by notarial deed. By subsequent notarial declaration, he stated that his capacity was truly on behalf of a company. It was acknowledged by the Court that the mandatory *prestanome* was that person who apparently exercised property rights, but in reality was only a mandatory: this principle applied also when a property had been acquired by public deed, and a secret undertaking existed. The rule was affirmed that the mandatory was bound to enter into the formality, being the public deed, acknowledging acquisition as a mandatory and transferring the property to the mandator. The principle was reiterated in other judgements and qualified as the "*actio mandati directa*", for example in the matter *Bezzina v Caruana*.[331] The Court quoting Pothier, Laurent, Baudry-Lancantinerie and the contemporary Italian Galgano, acknowledged the obligation of the mandatory *prêt-nom* to transfer the object to his legitimate mandator.[332] In a more recent judgement, the Court made specific reference to fiduciary obligations and those flowing from *mandat prêt-nom.*[333] Plaintiff was a beneficiary along with her then husband under a will of a testator who died in Switzerland. The (civil law) testamentary executor transferred funds to her husband's bank account in Malta, as part of her share in the inheritance, which funds were later withdrawn by her husband. Parties subsequently terminated their community of acquests. The court held that the husband was bound to account for his administration of her assets. Specific reference was made to the fiduciary obligations involved, particularly related to the rule referred to above that a person holding an asset of another is subject to fiduciary obligations.[334] Later judgements followed this *jurisprudence constante*.[335]

The Court of Appeal has widened the implication of the provisions on fiduciary duties holding that fiduciary obligations were not necessarily linked to trust law.[336] A relationship based on *fiducia* existed in various situations, such as that

[331] Civil Court, 28th October 2003.
[332] *Galea v Gauci*, Appeal, XXVIII.I.60; *Rizzo v Rizzo*, Civil Court, XXXIVB.II.430; *Farrugia v Farrugia*, Appeal, XXXVIIB.I.350.
[333] *Cordina v Cordina*, Gozo, 26th September 2007.
[334] IFSP, *Maltese cases and materials on Trusts and related topic*" Vol 1 (2004), 2 (2009); Xuereb v Micallef, Civil Court,12th December 2013.
[335] *Gambina v Fithome* Appeal, 24th June 2011; *Mifsud v Axisa*, Civil Court, 28th February 2013; *Galea v Farrugia*. Gozo 6th December 2013; *Abela v Gusman*, Appeal, 28th February 2014; *Menestret v Schembri*, Gozo, 28th March 2014.
[336] *Caruana v Caruana*, 28th February 2014.

between a general manager and employer, which went beyond the specifically contractual duties. It cited with approval a previous judgement holding that the 2004 amendments simply clarified a pre-existing position and in no way created a legal novelty to the system. The Court re-affirmed the principle that Roman law is the *jus commune* of Malta and still in force, where no specific provision exists.[337] The concept of *fiducia* deriving therefrom has long been known to the system.

Jersey Law does not acknowledge as such the *mandat prête-nom*, except in the law of agency: an agent is entitled to act on behalf of, and in duty bound to account to, an undisclosed principal.[338] It was further held by the Royal Court that in the case of a contract made by an agent on behalf of a disclosed principal, it is only the principal but not the agent that may sue or be sued on it.[339]

The Roman trust *fiducia cum creditore* is part of the Malta civil code. A 2010 amendment introduced a further refinement thereto, being the notion of security by title transfer.[340] Its essential nature is that the debtor transfers an asset to his creditor who therefore holds the asset as creditor, trustee and beneficiary.

I. Duties of trustee in Malta law - an assessment

The above, nevertheless, is not the end of our enquiry. A more penetrating question is that raised by the statement of the MCC that:

> "When the ownership of property is vested in a person who holds it subject to fiduciary obligations, third parties may act in relation to such person as though he were the absolute owner thereof. When a person holds property subject to fiduciary obligations, such property is not subject to the claims or rights of action of his personal creditors, nor of his spouse or heirs at law."[341]

[337] *Messina v Galea*, Civil Court 5th January 1881.
[338] *McGorrin v. Pascoe* [1989 JLR Notes–1b].
[339] *Lazard v Bois* [1987-88 JLR 639].The assistance of Mr Timothy Hanson, Advocate in Jersey, is gratefully acknowledged.
[340] Art 2095E to 2095J.
[341] Art 1124B.

This is language clearly reminiscent of the MTTA,[342] and perhaps more distantly, of the Hague Convention.[343]

Has there been a transposition, or an adoption, of the classical Equity rules, in parallel, or, in conjunction with the civil code fiduciary obligations? To the civil law mind operating in a "mixed" context, having out of necessity to move nimbly, this seems nothing strange, or indeed, untoward. Certainly, in the legal history of Malta, there has been no Court of Chancery, nor specialized Equity jurisdiction or sources. At the first level, the conclusion reasonably seems negative. However, the true question is whether rules and principles of Equity have been received, leading to the other possibly un-rhetorical question whether Equity has been received as a separate, particular source within the system - as distinct from the Roman-Civilian sources.

The cardinal obligation of the trustee is, predictably, that:

> "Trustees shall in the execution of their duties and the exercise of their powers and discretions act with the prudence, diligence and attention of a bonus paterfamilias, act in utmost good faith and avoid any conflict of interest."[344]

Other duties include that of safeguarding the trust property, the no-profit and no-conflict prohibition, segregation and identification of the trust assets from personal or those held on separate trusts, proper records and regular accounting. The trust fund is not subject to claims of the trustee's creditors or family, nor to succession rules. Similarly, the Malta trust law embraces the duty of the trustee to observe impartiality and even-handedness between various beneficiaries. Generally, subject to clear exceptions, the trustee is to provide information and disclose accounts to a beneficiary within a reasonable time from request. Trustees are bound to bring trust property under joint control and to act jointly. All these are clear Equity derivations, although not exclusive to Equity.

[342] Art 24 MTTA confers on the trustee all the powers of a natural person.
[343] Arts 3(4) and 11.
[344] Art 21-23; 29 MTTA.

In one of the few known non-local publications on Malta trust law, the duties of the trustee have been paraphrased thus:

> "Inoltre il trustee e' tenuto ad assicurare l'integrita' del fondo: tale dovrebbe risultare fondamentale sulla gestione ed operativita' del trust. Il trustee e' tenuto ad assicurarsi che i beni non vengano danneggiati o il fondo non subisca perdite o svalutazioni...In seguito agli emendamenti del 2004, e' specificato che l'attivita' del trustee deve essere principalmente mirata a preservare il fondo. Questa scelta riflette la volonta' di adeguarsi alla concezione tradizionale di amministrazione, ed in generale di gestione."[345]

First, it would therefore seem that the essential traditional Equity duties, as distinct from the English Trustee Act 2000 as a model, have found their way into the Malta (and Jersey) legislation. While there is undoubted reception of the core trust duties as known to Equity, this neither means that the legislation of Malta has introduced trust equity rules "*tout court*", much less does it mean that the trust concept in Malta finds its roots in Equity. On the other hand, the influence of English law and practice remains extensive and in most cases one of the first mental ports of call to the trust lawyer attempting to solve a difficulty.

Secondly, is there any significance at all, in the apparent juxtapositioning of the various trust duties and obligations with the civil code fiduciary obligations? This second question, queries the existence of any merger of the Equity-trust with the civil-code-fiduciary duties. This is more difficult to answer. Certainly, the civil code articles on fiduciary obligations referred to above (the term obligation is here significant) and the provisions on trust duties overlap. It is difficult to conceive that the insertions in the 2004 amendment to the civil code, almost simultaneously with those to the MTTA, were not deliberate. The likely conclusion is that the true intention was to provide a more comprehensive

[345] E Berti-Riboli, "*La legge di Malta sui trust: l'introduzione del trust nel diritto civile Maltese*" 7 (2007) Trust e attivita' fiduciarie 128. Freely translated this reads "Moreover, the trustee is bound to ensure the integrity of the (trust) fund: this should be fundamental in the management and operation of the trust. The trustee is bound to ensure that the assets are not damaged or that the fund does not sustain losses or loss in value... Following, the 2004 amendments, it is specified that the trustee activity is principally aimed to preserve the fund. This choice reflects the will to adopt the traditional concept of administration and of management."

statement and recapitulation of the various possible meanings of fiduciary duties, in a typical codification-like culture.

J. Fiduciary Obligations on a Romanist base?

It is further suggested that the true basis thereof was twofold: the first was to place the concept of fiduciary, including, but wider than, trust-duties, on a Romanist basis. Fiduciary duties are here defined on the basis of the *fiducia* as understood in terms generally known to the civil law tradition and expressed in the Malta civil code provisions. This means that an asset is transferred to a person, to be dealt with according to the order of the transferor. It implies in many ways a *prêt-nom* situation, without there being any segregation of patrimonies or trust-like remedies. In this situation, fiduciary duties, as distinct from those arising from trust-like positions, apply. The second was to introduce, in so far as not incompatible, rules of English Equity from trusts to fiduciary obligations. Naturally, whether to import Equity rules to a civil code remains an open, controversial question.

It is appropriate here to acknowledge that the link between the Roman-civil law *fiducia* and the trust or trust-like devices has been generally rejected by Lupoi - "The trust is a form of confidence in favour of specific parties or to attain a purpose."[346] He qualifies a *fiducia* as a relationship between two persons, whereby the fiduciary is in a relationship with a principal. The fiduciary holds an object for the principal under the obligation to return it to the principal. This therefore distinguishes the *fiducia* from the trust since, subject to specific powers which may be reserved, the settlor loses control over the object settled in trust: the relationship and obligation then only exist between the trustee and beneficiary. "Accordingly, to speak of a trustee as one would of a civilian fiduciary is a serious error, which has been contested to no effect for sixty years."[347]

[346] M Lupoi, *Trusts: a Comparative Study* (2000) 3, 195.
[347] *Ibid*, 196.

In fairness, Lupoi has more recently returned to the question of trust and *fiducia.*[348] While he maintains that *fiducia*, *fideicommissum* and trust, not least for their different historical perspective, remain diverse, an interpretation of this Lupoi contribution is that these three juridical figures possess, and possessed in the past, common, possibly overlapping, strands. It has been elsewhere noted that civil law distinguishes between what are known as "*negozi fiduciari"* and "*contratti intuitae personae*."[349] The first category refers to the transfer and divesting of an asset, based on a *fides*, to a fiduciary to be dealt with according to the terms of agreement between the *fiduciante* and the *fiduciario*. This sounds very much like a classical trust, whether in Equity or otherwise. The second category includes situations where a contract or legal relationship is based on the *fides* placed on a specific person, without there being any transfer of the asset or otherwise: it is simply a commercial reason for conclusion of the contract. The relevance of this contribution is that it acknowledges in a totally civilian context the existence of the *fiducia* and fiduciary obligations, negating in some aspects Lupoi's position. On the other hand, it acknowledges the existence of "*disordine concettuale*" in the different concepts termed as *fiducia.*[350]

With great respect, Lupoi's conclusions may merit some further reflection and perhaps a few questions. To begin with, it is submitted that the *fiducia* in civil law carries a wide and broad meaning, possibly more than one sense – it can be a nominee, a *prête-nom* or a discretionary portfolio-management arrangement. The term can couch an agreement to hold and receive an asset subject to an obligation of "confidence" or *fiducia* to deal and dispose of the asset as indicated by the confidant. Witness the historical fiduciary testamentary dispositions in civil law, now generally looked upon with some disfavour.[351] Other forms of *fiducia* survive today and flourish, as witnessed by the French and Québec *fiducie.*

A central focal-point of this thesis is that the civil law trust-like creature is a descendant of, and has direct links with, the *fiducia* as known to its tradition.

[348] M Lupoi, "Trust and confidence" (2009) 125 (Apr) *L.Q.R*, 253.
[349] G Criscuoli, "Fiducia e Fiduciae in Diritto Privato: dai Negozi Fiduciari ai Contratti Uberrima Fidei" (1983) 1 *Riv Dir Civile* 136.
[350] *Ibid*, Criscuoli, 137.
[351] Prohibited by article 693 of the MCC.

Moreover, the widely encompassing term *fiducia* links its origin to the Roman *fideicommissum*.[352] The position here taken generally embraces that of Prof D. Johnston in his *Roman Law of Trusts*,[353] being that the basis and origin of "trust-like devices" find their origin in Roman Law, specifically in fideicommissary obligations.[354] One can nonetheless appreciate that fiduciary obligations in civil law may remain conceptually different from trust obligations as known to Equity. There may be important functional differences, such as the segregation of assets or various patrimonies in the case of trusts. This characteristic is historically lacking in the civil law *fiducia*, which is generally an obligation to transfer or deal with an asset according to the *fiduciante*: Lupoi rightly points out that in the case of *fiducia*, the *vestitura* is generally lacking in the way a settlor vests legal but not beneficial ownership in a trustee. There could also be here a point of similarity where the beneficiary's rights are classified as obligational.

It is argued that there is a link, historical, conceptual and functional between the three actors – *fideicomissum*, *fiducia* and civil-law-trust-like mechanisms. Coming across is a fine line of intuition between these three concepts: the *fideicommissum*, with its testamentary context enjoined the *fiduciarius* to deliver to the beneficiary the object indicated. The *fiducia* in its various forms meant that property is held by the *fiduciant*, and we should have a good idea, even with a civil law compass, of the general contours of a trust-like-device. The seminal method of simply transferring an asset to a trusted party by *fideicommissum*, is the basis of later development. The common thread is the *fides*, later *bona fides* in the Roman-civil law tradition. This reasoning is pleaded in favour of the question considered in this thesis, namely whether a civil law trust is a feasible and functional reality. The link demonstrates that a trust-like mechanism, can exist, not only independently of Equity, but more so, drawing from its Roman-civilian tradition.

There may be more, significantly more, to Lupoi's rather general statement that there is a clear and unequivocal distinction between trusts and *fiducia*. With

[352] Inst. 23.I.
[353] Johnston, Fn 44.
[354] *Wilson* 4.

respect, given the historical development and indeed certain common core attributes between *fiducia* and trust, the key defining feature starts from the insight provided by duty to act in good faith. Of course, the limits may be widely drawn, but this does not, nevertheless, obscure the conclusion that the distinction between the two categories of *fiducia* and trust are not so clear-cut and neatly pigeon-holed as Lupoi would suggest.

This distinction however only partly answers the question why the Malta civil code has grouped various duties historically associated with the trustee under the title of fiduciary obligations. One can fully understand the valid and sound policy reasons for codifying general principles implied in the system. It is not however obvious why certain trust law principles should also be included therein. The question of segregation of patrimonies and assets does present particular difficulty, since such segregation is an attribute fundamentally more naturally akin to the trust, than to the *fiducia*. Yet the MCC protects, under the title of fiduciary obligations, property held by a fiduciary from the claims of family or personal creditors. This is seen as a legislative measure to codify both the traditional custom and *jus commune* as developed in the jurisdiction. It is also a step to strengthen and render more credible the protection afforded to assets held by fiduciaries. The codification of fiduciary obligations in the MCC was an attempt to bring back and return, partly at least, to the fundamental characteristics of the Roman trust. Professor Johnston tracing the basis of the Roman trust to the *fideicommissum*, suggests that this was a mechanism often to by-pass the civil law system when for some technical reason, the object of the trust was not possible under the civil law nor protected by the Praetorian Edict. It was here that the leap from the mere *fiducia* to the obligations arising from the *fideicommissum* arose,[355] in so far as through the years of the Empire, under successive Emperors, the *fideicommissum* gradually acquired legal protection and enforceability.[356] On the basis of the *fideicommissum*, as the *fons et origo* linking the *fiducia* and the trust, it was seen appropriate to add and aggregate the fiduciary duties to the trustee: this therefore lies at the basis of the partially "merged" duties of the

[355] T Honoré, *Justinian's Digest: Character and Compilation* (2010) 71, 83.
[356] Johnston, Fn 44, 1-41.

trustee and the fiduciary. This is seen as a powerful argument in supporting the view of the autonomous civil law trust.

K. The responsibility of the trustee

The term "responsibility" to the civil lawyer carries a specific meaning, linked *inter alia* with damages, *ex contractu* or *ex delicto*. The focus here is on the consequences of a breach of a trustee duty. Do such consequences amount to a "responsibility" within the civilian traditional categories mentioned, or something else, particular to trust law?

The questions identified are the following: first, what is the nature and character of such responsibility? Secondly, does the responsibility of the trustee extend to actual loss to the trust fund, but not beyond? This therefore raises the question whether trustee responsibility can, beyond actual loss, encompass other forms of compensation, for example unauthorized gains by the trustee or by a third party, not necessarily gained at the expense of the trust assets. In other words, would a court in Jersey or Malta apply the *Target Holdings v Redferns* principle that actual loss to the trust asset has to be demonstrated, but responsibility is limited to such loss?[357]

There is obvious similarity between the provisions of the Jersey and Malta, and indeed, the Guernsey legislation on "breach of trust." In almost identical terms, the trustee committing a breach of trust is liable for "(*a*) the loss or depreciation in value of the trust property resulting from the breach; (*b*) the profit, if any, which would have accrued to the trust if there had been no such breach."[358] There are, broadly, the same general principles: a trustee may not set-off a gain from one breach of trust against a loss suffered from another breach of trust; there is no liability of a current trustee for a breach of trust committed prior to his appointment; if the breach were committed by some other person, the trustee is obliged to take reasonable steps to remedy the breach; a trustee is not liable for a

[357][1996] 1AC 421.
[358]TJL art 30(2), MTTA 30(1) and TGL 39 (1).

breach of trust committed by a co-trustee, unless in the circumstances the trustee becomes aware or should have become aware of such breach, or actively conceals such breach or intention, or does not within a reasonable time take steps to protect or restore the trust property or prevent the breach. A beneficiary with full capacity may knowingly relieve from, or indemnify the trustee against, liability. The competent court is given power to relieve the trustee from liability if it is satisfied that the trustee acted honestly and reasonably and should be fairly excused and relieved for breach of trust or, in the case of Jersey and Guernsey, for failing to request court directions. Finally, the terms of the trust document may not exonerate or release from liability a trustee for breach of trust arising from the trustee's - the three legislations here use identical terms - "fraud, wilful misconduct or gross negligence."[359]

L. The nature of the trustee's responsibility

The civil law mind intuitively links responsibility with the *bonus paterfamilias* criterion in damages or contractual violation. How correct is the conclusion to carry this reasoning to violation of trust duties? The initial question therefore is whether there is complete or partial identity between the trustee's responsibility and breach of trust, a term used in both statutes examined.[360] A breach of trust is generally a violation of obligations imposed by law or the terms of the trust.[361] The Malta legislation extends the definition to include a duty imposed by the proper law of the trust and, further adds that breach of trust liability for loss or deterioration is without prejudice to "any other liability" of the trustee.

One can argue that, in the first instance, violation of trust duty is a contractual violation: if a trust is characterized as a contract, then any violation thereof is a contractual violation. The acceptance of office by a trustee, the underlying basis of the purpose of the trust, and beneficiaries' rights are also regulated by the trust deed, and properly classified as contractual duties in favour of the beneficiaries. This conclusion however begs the basic question who the parties in the trust

[359] TJL art 30, MTTA 30, TGL 39..
[360] For a brief review of breach of trust in English law and Commonwealth jurisdictions, S Meadway in S Collins et al (eds) *International Trust Disputes* (2012) 131.
[361] TJL article 1, MTTA 4.

"contract" are. What about private trusts for unborn children, or charitable or purpose trusts? How far can the argument therefore be stretched that there exists a contract, maybe one of sorts, *sui generis*, between the settlor and the trustee? A settlor may retain for itself, powers and rights. The contention may also be advanced that a trustee undertakes and obligates himself in favour of the settlor to carry out the terms of the trust. This however may pose the difficulty that if this were in the nature of a standard contractual obligation, it would hardly qualify as a trust, except perhaps in the case of a bare-trust. If anything, contractual obligations may possibly exist in favour of the beneficiaries. Contractual obligations and trust obligations may overlap and intersect, yet remain distinct in nature and function. That trust obligations are enforceable does not in themselves make them contractual obligations because of the truism that there are other sources of obligations, including delict, quasi-contract or the law. This is stated with full appreciation of authoritative opinions that suggest otherwise.[362] Here again, there is some difficulty in pigeon-holing the trust creation within orthodox contractual arrangements and identifying the 'contracting parties.' The conclusion identified is therefore that the violation of a trust obligation may be akin in some ways to contractual responsibility, but hardly a complete identity.

The question is inevitable: is trustee responsibility co-terminous with breach of trust? Perhaps one can postpone an answer to this question, and consider the implications of a statement found at article 3 (5) of the MTTA, "Trusts create fiduciary obligations upon the trustee in favour of the beneficiary of the trusts." A trite statement no doubt, but perhaps one which may open an inkling towards a wider category of "fiduciary liability" as a consequence of violation of trust duties. Neither the Jersey nor the Guernsey legislation evidence any comparable statement, although such fiduciary obligations are clearly implied therein. Direct references in the TJL are few: these are where a trust may be declared invalid because it is in breach of fiduciary duties,[363] and, the 2013 amendments codifying the *Hastings-Bass* principles, setting out the circumstances where the exercise of a fiduciary power can be challenged.[364]

[362] J Langbein, "The contractarian basis of the law of trusts" (1995)105 *Yale LJ* 625.
[363] Art 11 (2)(b)(i).
[364] 47D-J.

In developing the notion of "fiduciary responsibility" as flowing from "fiduciary obligations," it is legitimate to ask which consequences flow from violation of fiduciary obligations. There could be a wide array of sanctions, direct and indirect, against the non-compliant trustee. The most obvious are an order for compensatory damages, a directive to re-constitute the trust fund or to compensate, or a specific performance of what is decreed by a court. Another possibility identified is the loss of indemnity by the trustee towards the trust assets creating an obligation on the trustee to personally contribute towards making up the trust assets, or indeed, personal responsibility of the trustee, for example *ex delicto*. Fiduciary responsibility can hardly be classified as tortuous, since delictual liability is generally inapplicable where a previous relationship between parties exists.

More appropriately, the question is whether there is identity between fiduciary and contractual liability. The short answer, it is suggested, is "no". There can be no question that the trust concept and the trust obligations are replete with duties which can properly be considered as contractual. No doubt either, however it is expressed, the concept of good faith is ever-present in execution of trust duties, as it is in civil law contracts. The fiduciary obligation is diverse from, and possibly wider in scope than, a purely contractual obligation. Beyond therefore the terms agreed and undertaken, common both to a contract and a trust, fiduciary obligations carry with them specific obligations. One can think of the wide powers enjoyed by a trustee, similar to those enjoyed "by a natural person" in both jurisdictions examined. Parties in contractual situations generally owe each other no more in good faith than what was expressly, or by implication, stipulated. The fiduciary owes familiar duties, the no-conflict, no-profit rules, although loyalty may lie in common with contract. On the other hand, the trustee found liable for a breach of trust is bound to make good both the actual loss and the loss of profit. It has to be acknowledged that this sounds rather close to the consequences of contractual violation and damages ensuring therefrom. The familiar categories of damages, both delictual and contractual, in civil law are *damnum emergens*, the actual loss, and *lucrum cessans*, loss of profit or opportunities arising therefrom.

The conclusion is that trustee's fiduciary obligations are distinct from the categories of civil law contractual or delictual responsibility. There is a strong case that a single-minded commitment in the spirit of *Mothew,*[365] may require more than observing the terms of the trust. In other words, the obligations of the trustee and consequent responsibility go beyond the letter of the trust document: they are understood to include loyalty, vigilance and generally positive action, implying therefore wider duties of the trustee than mere contractual terms. There is the question, which may not be entirely settled, whether English Equity, as distinct from other Commonwealth Jurisdictions, admits of "damages" or compensation for breach of trust.[366] It has been authoritatively argued that failure of a fiduciary to disclose an interest in a transaction may give rise to equitable compensation for loss, provided sufficient link is established between non-disclosure and loss sustained by the principal. This therefore moves away from the direction of gain-based remedies to those based on loss suffered.[367]

Is trustee responsibility co-terminous with breach of trust? Is it correct to characterize, with a civil law mind, breach of trust with the principles of damages? The answer is two-pronged. First, the two categories remain conceptually different, even if familiar terms such as good faith and the *bon père* intertwine. Breach of trust and damages, *ex contractu* and *ex delicto*, have their own specific contexts – a trust or fiduciary situation, a contractual relationship or an unlawful act. Secondly, there are strong affinities and wide functional overlapping, but partially so. Trustee responsibility, like the categories of damages, is to make good actual damages and loss from future earnings or missed opportunities. Like damages, a *nexus* of fault between the event and the consequence is required. Trustee liability however potentially extends, as distinct

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[365] Fn 144.

[366] M Pawlowski, "Equitable wrongs: common law damages or equitable compensation" (2000) 6 (9) *T & T* 20. The conclusion was that the English Courts at the time still had to address "the interesting question of the availability of legal and equitable remedies in respect of purely equitable wrongs." This is contrasted with the robust approach taken by the New Zealand Court of Appeal or Supreme Court of Canada; J Gordon *et al*, "Equitable compensatation: a free-standing remedy for breach of fiduciary duty" (2013) 19 (8) *T & T* 811; D Heydon, "Modern fiduciary liability: the sick man of equity?" (2014) 20 (10) *T & T* 1006.

[367] M Conaglen, "Equitable Compensation for Breach of Fiduciary Dealing Rules" (2003) 119 (Apr) *L.Q.R* 246.

from contract or delictual damages where this is excluded, to unjustified enrichment. Another potentially distinct remedy is a proprietary remedy being constructive trust and perhaps wrongful receipt and dishonest assistance.

All this notwithstanding, the view suggested is that both in Jersey and Malta, a response and consequence to breach of trust will remain analyzed in civil law tools – damages or unjust enrichment. This reflects the *forma mentis* of judges and practitioners who intuitively transpose civil-law analytical instruments to trust law.

M. Compensatory responsibility of the trustee - Jersey

The next question reflects on the potential extension of trust responsibility to compensate not merely actual losses to the trust assets, but also gains made by the trustee, which do not cause any loss to the trust fund. In truth, both the Jersey and Malta trust laws only refer to "loss or depreciation of trust property" and the profit otherwise accruing had there been no such breach of trust.[368] Therefore, can one refer to a "core" essential trust liability, defining and limiting the extent of civil responsibility of the trustee? It may be added that the MTTA places the two limbs of responsibility referred to as "without prejudice to any other liability." There is no similar or comparable provision in the Jersey or Guernsey law.

The Royal Court in *West* has given an indication that such responsibility is restitutionary:[369] the obligations of the trustee is to make good direct damage or depreciation sustained and loss of profit, all as a consequence of a breach of trust. It was held by the Court in context of a breach of trust action, that the principles of English law governing remoteness of damages in contract and tort do not apply.[370] The judgment referred to previous Jersey authority prior to the 1984 Jersey Trust Law and which remarked that while English law does not know of damages for breach of trust, Scots Law does.[371] *West* makes a clear implication, although not formally expressed, that breach of trust means loss-based restitutionary damages, unhampered by the rules of causation otherwise known to

[368] TJL art 30(2), MTTA 30(1) and TGL39.
[369] Fn 286.
[370] At 323.
[371] *Cutner v Green* (1980 J.J. at 277).

English law, holding that a link has to be established between the actual loss and the breach of trust. Damage or loss has to be proved.

In *FPS*, the Royal Court quickly concluded that there had indeed been a breach of trust, principally due to failure by the trustee to take legal advice on the requirements to invest the trust fund and the customer-agreement.[372] Breach of trust was linked to the criteria of prudence and best ability and the duty as far as reasonable to preserve and enhance the trust value. The responsibility attributed to breach of trust was pinned to the loss suffered to the trust assets. This confirms that Jersey law assesses breach of trust by the actual loss or loss of profit to the trust fund, occasioned by a failure of duty.

Other judgements refer to breach of trust but generally fall short of expounding a definition of the nature of breach of trust and consequent responsibility of the trustee. In one case, the admissibility of an action by beneficiaries against trustees for breach of trust and fiduciary duties was considered.[373] The Royal Court decided that "dog-leg" claims by beneficiaries against directors of trust companies were generally inadmissible, subject to certain exceptions, under Jersey Law. Another Instance ruled that *locus standi* existed, both as an object of certain fiduciary powers and as a beneficiary under a contingent interest under the ultimate default trust, to sue for breach of trust demanding even the reconstitution of the trust.[374] The point was made that in a breach of trust action, the agent appointed to hold property by the trustee owes only contractual and possibly tortious duties to the trustees but not to the beneficiaries.[375] The significance lies in the intertwining of trust, contractual and delictual areas. It is however suggested that it would be wrong to infer, from this alone, the conclusion that Jersey trust law necessarily attributes contractual and or delictual character to breach of trust responsibility.

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[372] Fn 284.

[373] *Alhamrani v Alhamrani* [2007 JLR 44]; it has been however questioned how far such a remedy for breach of duty against directors of trust companies may be regarded as altogether and entirely unavailable suggesting that there could yet be some life in it. E Weaver, "Private trust companies: a future for derivative claims?" (2011) 17 (3) *T & T* 177.

[374] *Freeman v Ansbacher Trustees* [2009 JLR 1].

[375] *Chvetsov v BNP Paribas* [2009 JLR 217].

Illuminating dicta flow from the Jersey Court of Appeal on constructive trusteeship and trust liability.[376] It was here concluded that TJL was wide enough to encompass constructive trusts, recognized by article 33, holding that a person who makes or receives any profit from a breach of trust, is deemed to be a trustee (referred to as a constructive trustee). Moreover, the existence of accessory liability in Jersey Law was acknowledged. There are two significant points here: first, there are clear references to English law, including the citation of a judgement of the British House of Lords, quoting Lord Millett.[377] Secondly, the question is asked whether this was a reception of Equity, some form thereof at least, or otherwise. The Jersey Court of Appeal veered towards a middle course: there are no statements that Equity is no part of Jersey Law, whereas "*Équité*" remains a residual source. On the other hand, there is a reference to English trust and Equity principles, albeit couched intelligently within the terms of the Jersey Trust Act.

Is therefore trustee responsibility in Jersey law restitutionary, *sic et simpliciter*, or something beyond? The answer indicated is that responsibility is essentially rooted in the articles of the trust law, that is to say loss, either directly or through loss of profit, but then not quite. This, it is submitted, is a clear policy choice. It is natural therefore to ask, perhaps in simplistic terms, whether this is the same as damages, civil law damages. In short, the answer is both 'yes' and 'no.' The Royal Court in the context of a procedural issue equated an action for breach of trust as one of damages, implying therefore that breach of trust was here viewed in a restitutionary context.[378] On the other hand, breach of trust may go beyond a classical damages claim, provided that the breach has caused a loss or depreciation within the terms of the law: such responsibility may include the reconstitution of the trust fund, as distinct from reparation in damages; other specific orders are not excluded.

[376] *United Capital Corporation Limited v Bender* [2006 JLR 242].
[377] *Dubai Aluminium Co. Ltd.* v *Salaam* [2002] UKHL 48.
[378] *Mocha Invs. Ltd. v. Day* [1990 JLR N 10a].

N. Compensatory responsibility of the trustee - Malta

Turning the gaze to Malta, the familiar difficulty of almost total lack of jurisprudential authority re-surfaces. The view has already been expressed that a court in Malta will very likely view breach of trust principally as a restitutionary concept: the strong expectation is that responsibility is understood as damage and losses, occasioned by breach of trust - the traditional conceptual and technical apparatus normally used in damages claims transposed to breach of trust. This view is partly based on an interpretation of the relevant articles in question and experience of the workings of the Maltese courts. There is however one other rider: article 30 of the MTTA states that breach of trust responsibility is "without prejudice to any other liability." This may be over-prudence by the drafters of the law, or merely gilding the lily. Alternatively, it could be an indication leaving open a window for different, alternative or cumulative, causes of action for breach of trust. This second alternative is seen as the more viable interpretation, and for two reasons. First, it is indicative of some concern, whether or not breach of trust would be immediately received as a distinct cause of action - echoing the inevitable question a civil law mind would pose itself, whether there could be any overlap with contractual and delictual responsibility. Secondly, it is rather unlikely that the provision is irrelevant, once so clearly and deliberately written. This therefore leaves the possibility open that an action for breach of trust could be based on separate, possibly alternate, bases, for example involving a *cumul* of violation of trust-fiduciary and contractual obligations.

Trustees are enjoined by TJL to use "due diligence" and act as "a prudent person, to the best of the trustee's ability and skill ... and to use the utmost good faith." Likewise, MTTA requires that a trustee act "with the prudence, diligence and attention of a *bonus paterfamilias* and observe the utmost good faith."[379] This of course reflects civil code iconic language on delictual responsibility.[380] Does this therefore mean, that it could be correct, and by implication a valid defence, if a trustee can show prudence, utmost good faith and having acted "*en bon père de*

[379] Art 21 of both the TJL and MTTA.

[380] "Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence." – art 1382 of the French *code civil*.
"A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a *bonus paterfamilias*." - art 1032 (1) of the Malta civil code.

famille"? Is it therefore proper to conclude that the level of diligence required by the trustee, is analogous to, or commensurate with, the criterion of delictual civil law responsibility? The answer suggested is the familiar overlap and concentric circles. It is difficult to deny a trustee a defence of proper diligence and attention against a claim of breach of trust. Surely, a trustee should be able to plead diligence: the question is rather the degree of diligence required and whether this is a complete defence to breach of trust claim, enabling complete exoneration of the trustee.

O. Other ramifications of trustee responsibility

The question being examined, it will be recalled, is whether trust liability stops at actual damage and loss, or extends beyond. It has been importantly observed on the law of trusts that "The language and organization of the law sets it apart from contract, tort and unjust enrichment…. Similar problems arise when we try to compare breach of trust with other legal wrongs, such as breach of contract or tort."[381] It is true that this statement was made in context of Equity and perhaps with a flavour of Canadian trust law. Nonetheless, it seems equally valid in the Jersey and Malta scenario. Therefore, would these jurisdictions admit other remedies known to Equity consequent to breach of trust? Or is it feasible to argue that the analogy and reception stops at restitutionary damages?

The proposition that Equity considers the award of Equitable compensation should be non-contentious.[382] Rather, whether this principle – a civil law pen may be allowed the licence of the term "principle" referring to Equity – finds application, may elicit a less unequivocal response in the context of Jersey and Malta, even if for different reasons. It would be in many ways, almost naive, to underestimate the influence of certain passages of Lord Browne-Wilkinson in *Target Holdings,*[383] if, nothing else, for directing the stream of English law to require actual loss or damage to establish breach of trust. Liability, in the jurisdictions under examination, is not, *prima facie* at least, proprietary.[384] The

[381] R Chambers, "Liability" in P Birks and A Pretto, *Breach of Trust* (2002) 2.
[382] *Thomas and Hudson* 942.
[383] Fn 357, at 424.
[384] Art 33 of both the TJL and MTTA.

statement is couched with a qualification since both Jersey and Malta have indulged in some flight of fancy relating to constructive trusts viewed within the context of their systems, and by implication perhaps following and tracing.[385] The view expressed is that notwithstanding the acknowledgement of a form of constructive trusts, the action for breach of trust in both jurisdictions under review remains essentially obligational and not proprietary.[386] Obligational means a cause of action based on violation of fiduciary-trust duties but not specifically contractual.

Jersey

Nevertheless, the situation in Jersey may not be entirely without wrinkles and creases. There are recorded various instances where courts have acknowledged and proceeded on the basis that "dishonest assistance", and sometimes "knowing receipt", is received as part of Jersey Trust Law, without any apparent qualms or hesitation.[387] The Royal Court considered the question in an application for leave to amend an Order of Justice by adding a ground that one defendant had become liable as a *trustee de son tort*, while another defendant was liable by reason of dishonest assistance.[388] Quoting English cases - *Dubai Aluminium*[389] - and *Lewin*, the Court concluded that plaintiff had made an arguable case to hold defendant liable as a *trustee de son tort*, by virtue of constructive trusteeship, with reference to well-known English precedents - *Tan, Twinsectra* and other judgements.[390] In another Instance, the Royal Court proceeded on the assumption that dishonest assistance or knowing receipt were part of Jersey Law.[391] Here again, well-known English cases were cited, such as *Paragon* and *Halton*.[392]

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[385] R Chambers, *Resulting Trusts* (1997); L Smith, *The Law of Tracing* (1997); A J Oakley, *Constructive Trusts* (1997) 1, 85; C Mitchell (ed), *Constructive and Resulting Trusts* (2010); M Conaglen, "Difficulties with tracing backwards" (2011) 127 *LQR* 432.

[386] P Matthews, "Constructive Trusteeship: proprietary claims, personal claims and the Hague Convention (1995) 1 (7) *T & T* 25.

[387] S Hoffman, J Corbett, "Dishonest Assistance", in S Collins et al (eds) *International Trust Disputes* (2012) 91; C Mitchell, S Watterson, "Remedies for Knowing Receipt" in C Mitchell (ed) *Constructive and Resulting Trusts* (2010) 115.

[388] *Cunningham v Cunningham* [2009 JLR 227].

[389] [2002] UKHL 48.

[390] *Barlow Clowes Intl. Ltd. v. Eurotrust Intl. Ltd* [2006] 1 W.L.R. 1476; *Royal Brunei Airlines v. Tan* [1995] 3 W.L.R. 64; *Twinsectra Ltd. v. Yardley* [2002] 2 W.L.R. 802.

[391] *Bagus v Kastening* [2010 JLR 355].

[392] *Abellan v Standard Chartered Bank (CI) Limited* [2004] JRC 131A; *Paragon Fin. plc.* v. *Thackerar* [1999] All E.R. 400*; Halton Intl. Inc.* v. *Guernroy Ltd* [2006] WL 2007 3389596.

Of course, the *locus classicus* and landmark judgement, which considered restitutionary remedies and remedial constructive trusts calls to be mentioned, generally known as "*Esteem"* matter.[393] Two principles require mention: first, tracing - the process of identifying a new asset as a substitute for an old asset - was recognized as part of Jersey law: it offered an effective method of vindicating and safeguarding proprietary rights, particularly in cases of fraud. It was held that Equity – principles of English Equity and applied in Jersey – imposed a constructive trust on proceeds or profit made through fraudulent receipt.[394] Secondly, Jersey Law was not bound to – and did not in fact – follow English Law on restitutionary remedies, since "unsatisfactory" in so far as these no longer provided a remedy against an innocent recipient. Where an asset in which a beneficiary had an interest was received by an innocent volunteer, there was a personal action in restitution, even though the recipient had not been guilty of any "fault": here the state of mind for knowing receipt in Equity was not required in Jersey Law. This leaves the door open or half-ajar to the question of unjustified enrichment to which we shall shortly return.

More recently, in a no less high-profile case, the Royal Court returned to the question.[395] Plaintiffs claimed that defendant, the Mayor of São Paulo and others conspired to divert large sums of public money for their own benefit. It was alleged that such sums held by defendant in Jersey bank accounts (over which there was a freezing order) represented traceable proceeds over bribes, secret commissions or otherwise fraudulent payments. Respondents conceded that the former Mayor owed at all material times fiduciary duties to plaintiff. The Court followed *Esteem*, acknowledging knowing as a cause of action, receipt on the basis of guilty knowledge, with change of position defence available. In the case of restitution based on unjust enrichment, such state of mind was not necessary. Tracing into the bank accounts was allowed, since the court considered that plaintiffs under Jersey law had a sufficient proprietary interest in the kick-backs to found such a claim. Had it been necessary to decide the point, the Court would have been prepared to apply the Privy Council judgement in *Attorney General of*

[393] Fn 18.
[394] C Mitchell, "Tracing, following and claiming the proceeds of stolen assets" (2003) 17 (1) *JLR* 7.
[395] *Federal Republic of Brazil v Durant International Corporation* [2012 (2) JLR 356].

Hong Kong v Reid.[396] The same position was taken by the Royal Court, this time citing *Reid* with approval in *Lloyds Trust Co (CI) Limited v Fragoso et al*.[397] The conclusion here was that the trust fund, since it originated from the proceeds of bribery, was held on constructive trust for the Government of Mozambique. Predictably, the Royal Court will, if it maintains its reasoning in the same vein, also cite with approval the UK Supreme Court judgement re *FHR European Ventures LLP and Ors v Cedar Capital Partners LLP*.[398]

Therefore, Jersey law looks at claims for breach of trust as obligational not proprietary. Yet at the same time, it applies the rules of tracing, and imposes constructive trusts on the proceeds or profit thereof, where there has been a breach of trust. No consistent approach has been identified whether the Equity restitutionary remedy of dishonest assistance or knowing receipt is part of Jersey Law, since there are conflicting judgments. It is true, however, that in *Esteem*, the Royal Court was careful to limit the statement that English restitutionary remedies were inapplicable in Jersey, by limiting their exclusion only in the case of an innocent third party. The court held that a party guilty of knowing receipt would be a constructive trustee for the beneficiary, with the remedy being proprietary not restitutionary. By implication therefore, knowing receipt and dishonest assistance are excluded as a personal restitutionary remedy, but possibly available as proprietary based action – say a constructive trust? But is this clear and consistent with the other cases cited above?

While various Equity remedies – not all – are embraced by Jersey Law, breach of trust is limited to actual loss or depreciation, and seemingly not beyond. This, it is suggested is entirely consistent with the underlying restitutionary character of actual loss – not in any Equity sense – as a basis for Jersey Law. Dishonest assistance raises the question whether this is really a primary breach of trust. In a thoughtful assessment of English and Commonwealth Equity sources and judgments, the point has been made that dishonest assistance is essentially a secondary breach, with Equity fixing the dishonest assistance with the same

[396] [1994] 1 A.C. 324.
[397] [2013] JRC 211.
[398] [2014] UKSC 45.

liability as the errant trustee for wrongfully supporting or facilitating a breach of trust.[399] Other views point to the need for a more consistent approach on accessory liability for breach of trust, particularly where the person assisting the dishonesty by the trustee receives no share of the misappropriated trust assets.[400]

Malta

The situation in Malta may not yet be as developed or refined as Jersey. It is suggested that the rules of breach of trust will evolve using classical contractual responsibility as a starting point. Actual loss, or loss of profit or depreciation, will be readily understood and applied by a Court in Malta. However, constructive trusts, following and tracing as a remedy for breach of trust could provide some initial difficulty and their theoretical and practical difficulty will be considered later. Therefore, this will take some time and ground-breaking developments – for Malta – before this right of action is possibly further widened. It likewise remains to be seen how far proprietary remedies will be imposed on knowing receipt and dishonest assistance. Breach of trust in Malta cannot formally or substantially be equated with an action for contractual or tortious damage, since the cause of action is different. The anticipation remains that the judicial conceptual instruments and criteria will take as a point of departure, and draw extensively from, their experience with these two categories of responsibility. It is not likely that there will be wider ramifications of trustee responsibility, such as accessory liability.

P. Loyalty and Disgorgement of Profits

How far would a trustee be stripped of profit made at the expense of the trust or a beneficiary? Would the trustee face an action or a remedy for profit made, without any loss, not even a loss of profit or opportunity to the trust, for the simple fact that the opportunity arose by virtue of trustee office? The answer to the first question seems clear both in Jersey and Malta, on two bases: the first is that the no-profit rule has been formally incorporated in the legislations: both

[399] S B Elliot and C Mitchell, "Remedies for dishonest assistance" (2004) 67 (1) *MLR* 16.
[400] A Berg, "Accessory liability for breach of trust" (1996) 59 (3) *MLR* 443.

prohibit any direct or indirect advantage to the trustee at the cost of the trust, and constitute a breach of trust because any such gain or advantage is the violation of an obligation imposed by law.[401] Secondly, the judgements examined above have amply indicated that the measure of loss to the breach of trust is the actual damage sustained. Therefore, unauthorized profits made by the trustee to the loss of the trust assets or to the beneficiary's interest are due to the trust fund. The answer to the second question may be less straightforward. The Courts of Jersey have avowedly declared that Equity is not part of Jersey Law, yet Equitable principles are sometimes applied. It remains an open question how far either legislation would impose consequences to gains made during the course of office without loss to the trust assets. The view has already been expressed that a Court in Malta will incline towards a compensatory remedy, but not beyond.

It may not be easy to isolate this discussion from constructive trusts. Both jurisdictions, each at article 33, provide in identical terms that "where a person makes or receives any profit, gain or advantage from a breach of trust the person shall be deemed to be a trustee of that profit, gain, or advantage." This could therefore answer the question whether a court possesses the power to impose a constructive trust on any person, which includes a trustee deriving any advantage from breach of trust without loss to the trust fund. This is limited to a receipt of profit or gain from breach of trust, possibly suggesting that actual loss to the trust may not be material or necessary, as long as it is an improper advantage from a breach of trust. These provisions appear to contradict, *prima facie* at least, the view that breach of trust compensation is loss-based. A distinction can possibly be drawn between, what the system is likely to categorize as 'damages' emerging from breach of trust, which tend to follow traditional civil law rules of *damnum emergens* and *lucrum cessans*, and, a constructive trust imposed on improper gains linked to a breach of trust. The remedies are different, and not mutually exclusive, and can potentially co-exist.

The difficulties of the constructive trust have been well developed.[402] The problems encountered in defining its precise nature and parameters may explain

[401] TJL Arts 1, 21 (4) (b) (i)(ii); MTTA 4, 21 (3) (1)(a)(b) (c).
[402] G Gretton, "Constructive trusts: I" (1997) (1) *Edinburgh L Rev* 281; "Constructive trusts: II" (1997) (1) *Edinburgh L Rev* 408.

why Jersey therefore has codified the remedy of following and tracing, adopting a remedy broadly similar to the Equity remedy to attain clarity. On the other hand, it may not be entirely certain whether, or to what extent, the term breach of trust here means solely and exclusively loss to the trust assets or depreciation.[403]

Malta has opted to venture into what may be a more dangerous experiment for a fledgling trust jurisdiction, by introducing a specific article on tracing.[404] While this is subject, in terms of the MTTA, to the important defence of *bona fide* purchase for value, without notice of the trust, it remains to be seen how this remedy will interface with the other rules of civil law transfers: the imposition of a constructive trust may already pose a threat to the stability of transfer of assets. Conceptually, how following and tracing of an asset can be received, and a constructive trust may be imposed within a civil law system, such as the French and the Maltese, remains at best, euphemistically, challenging. A civil law system looks at transfer of title often as an expression of the parties' will: registration and publicity remain necessary for third party protection and stability of commercial transactions, but transfer is an effect of the expression of a will and intention, not of registration. The creeping arm of a tracing or indeed even a constructive trust is difficult to rationalize as a matter of principle with, and may indeed subvert, the other methods of transfer and transmission of ownership. This naturally raises the question whether trust and fiduciary principles can be reliably considered as general principles of law of the system, or whether they remain a special law which applies only within its specific ambit. This tale, however, will have to be told elsewhere: only time and the anvil of experience can provide an answer.

Article 40A of the MTTA protecting *bona fide* acquirers under an onerous title may seem more principled and consistent with the general principles of the system than a concept of following and tracing or constructive trust in a civil law environment. The link to following and tracing is therefore breach of trust, a situation which may exist independently, and for other reasons, from the

[403] L Smith, "Constructive trusts and constructive trustees" (1999) 58 (2) *C.L.J.* 294; W Swadling, "The fiction of the constructive trust" (2011) 64 *C.L.P.* 399; D Wright, "How much of a trust is a constructive trust?" (2012) 18 (3) *T & T* 264; W Swadling, "Constructive trusts and breach of fiduciary duty" (2012) *T & T* 18 (10) 985 - this volume of T & T is devoted entirely to constructive trusts.

[404] Art 40A (1).

imposition of a constructive trust. What may serve to justify and allow the co-existence of the civil law general principle of *dominium* with constructive trusts and tracing, may be the existence of a breach of trust: in other words, the application of these remedies assumes the pre-existence of a trustee/fiduciary-beneficiary situation. An equally important question is whether and how far Malta will go down the direction of imposing a constructive trust in cases where dishonest assistance and knowing receipt are identified. These questions remain largely unanswered.

The TJL[405] has evidently served as a model for the corresponding provision in Malta: there is noted an immediate difference from the Malta counterpart: the defences afforded by the Jersey article are wider, encompassing not merely the *bona fide* purchaser for value, without notice of trust, but also extending to any person other than the trustee deriving title through such a person.

Wrapping up this discussion, it is concluded that breach of trust as a consequence of a violation of fiduciary and other duties, has found its initial development in both jurisdictions as a remedy to restore the losses to the trust fund. Its basis may be identified to go beyond contractual or delictual remedies, and to find origin in the obligations arising from the trust or *fiducia.* This however has not been the end of the affair, in so far as both jurisdictions have selectively adopted Equity remedies: Jersey has taken in specifically constructive trusteeship, sometimes categorized dishonest assistance and knowing receipt as proprietary not restitutionary, tracing and following. Malta has adopted constructive trusteeship and tracing, perhaps brazenly or foolhardily. Is this now "something completely different?" This question recurs in this thesis, and the answer suggested is that it may not be completely different, but possibly just something different, supporting the view of an emerging civil law trust with its distinct identity, albeit heavily indebted to various sources.

[405] Art 54(3).

Q. Trustee Responsibility Exemption Clauses

This question[406] has acquired added relevance in view of the Privy Council Judgement *Spread Trustee Company Limited v Hutcheson.*[407] TJL,[408] MTTA[409] and TGL[410] all provide that the terms of the trust are unable to release or exonerate trustee liability arising from "*fraud, wilful misconduct or gross negligence.*" In *Spread*, the beneficiaries claimed negligence or gross negligence of the current trustee for having failed to investigate or identify alleged breaches of trust by a former trustee. The issue was whether the trustees could rely on a term excluding liability for gross negligence: the TGL in 1990 introduced a provision excluding the possibility of trustee reliance, and what was imputed to the current trustees had occurred before the coming in force of the 1990 amendment. In the event, the Privy Council, by a slender 3-2 majority, found that the trustee could place reliance on such a liability-excluding article for gross negligence, reversing the judgements of the Guernsey Lieutenant Bailiff and Court of Appeal. The debate hinged principally on whether the amendment excluding liability for trustee gross negligence, was a novelty to existing Guernsey law or whether it was simply a legislative enactment reflecting the current pre-existing situation.

What would a court in Jersey or Malta make of this judgement? How sound is the argument that trustee liability for negligence can be excluded by the terms of the trust? There are two competing policy arguments: on the one hand, the width of interpretation of the "irreducible core of obligations" developed by LJ Millet in *Armitage v Nurse*, upholding at the same time the validity of gross negligence exclusion clauses.[411] On the other hand, would the impetus of the provisions disallowing a defence of gross negligence impliedly validate a negligence exclusionary article? *Spread* has been widely criticized, not least for the Privy Council's conclusion that Guernsey's customary law should not look to the Scottish model, also a mixed jurisdiction, or to customary Normandy law, but

[406] J Penner "Exemptions" 241in *Birks et al*, *ibid* fn 381.
[407] [2011] UKPC 13.
[408] 30 (10).
[409] 30(5).
[410] 39(5).
[411] [1994] Ch.241.

rather to English law.[412] The distinction between negligence and gross negligence may not always be one of degree, but sometimes qualitative. For example, how would one classify an investment by a trustee in a hedge-fund, which later turns out to be ruinous, or failure to choose the appropriate moment in the price curve, when to dispose of an asset? – simple or gross negligence, portfolio theories notwithstanding? It is suggested that characterization will be highly fact-specific, involving an *a posteriori* exercise – when the court's mind is made up, it will then find an appropriate badge or pigeon-hole. Certainly, trustee exemption clauses on the basis of contractual certainty should be upheld. But how does this square with the duties of diligence, prudence, ability, skill and utmost good faith in Jersey, and the *bonus paterfamilias* criterion in Malta? To allow the *bonus paterfamilias*, with status of almost public policy, to contract out of his own diligence seems a contradiction in terms.

Spread may not be the end of the story, but will undoubtedly be given, for all its questionable findings, influential consideration in Jersey. A court in Malta is seen as likely applying the maxim *culpa lata dolo aequiparatur*, with the Matthews position given some, but not decisive weight, over the civil law tradition of diligence.[413] The irreducible core of obligations may here also carry an unintended double-edge: it can impose minimum requirements of diligence obligations, rather than serving to validate the exclusion of gross negligence.

R. Unjustified Enrichment – is this linked to breach of trust and trustee responsibility?

How far is civil law unjustified enrichment a basis for, or in some way linked to, breach of trust? Can civil actions based on unjustified enrichment substitute, supplement or otherwise be an alternative to trust remedies? The term "unjust enrichment" in Equity does present some puzzle to the civil law mind familiar with the concept "unjustified enrichment", which has its own meaning harking back from Roman law and is an important tried and tested survivor in the civil

[412] S Howitt, "Scottish invasion seen off" (2011) 17(10) *T&T* 963; P Buckle, "A critical analysis of Spread v Hutcheson and its consequences" (2012) 18 (3) *T&T* 208; D Clarry, "The irreducible core of a Guernsey trust: the offshore trustee *en bon père de famille*" (2014) 1 *JGLR*.
[413] P Matthews, "The efficacy of trustee exemption clauses in English law" (1989) *Conv*. 42.

law tradition.[414] The civil law tradition links its basis to the well-known maxim derived from the statement in the Digest attributed to the Roman jurist Pomponius that "*nemini licet locupletari cum aliena jactura.*"[415] Scotland has provided a valuable proposal for unjustified enrichment in a mixed legal system.[416] Can unjust or even possibly civil law unjustified enrichment be a response to breach of trust?[417] If the answer is in the affirmative, do they carry proprietary consequences? The link is generally seen as being provided by the remedies of tracing and the imposition of a constructive trust as reactions to situations of unjust enrichment.

Birks recanting on earlier positions, formed the view before his untimely death, that unjust enrichment was a distinct autonomous category from what is known to English law as restitution.[418] He challenged previous conclusions that restitution and unjust enrichment form a single unified concept, which meant that unjust enrichment is the only causative event that triggers restitution. He had earlier contended that restitution responded to situations occasioned by consent, wrongs, including unjust enrichment and indeed other events.[419] His final views were that unjust enrichment and responses thereto, excluded contract (consent), and delict (wrongs), and were a separate category.

Is it possible to base a claim for breach of trust on unjust enrichment as a cause of action or otherwise engaging trustee responsibility? Suppose for example that a trustee were to receive an *indebiti solutio* claim? Or what if the trust estate were

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[414] D. Johnston and R Zimmermann, "Unjustified Enrichment: surveying the Landscape" in D Johnston and R Zimmermann (eds), *Unjustified Enrichment* (2002) 3.
R Zimmermann, "The Law of Unjustified Enrichment: the Modern Civilian Approach" (1995) 15 *Oxford J.Legal Stud* 403.

[415] The more exact citation is *Pomponius libro nono ex variis lectionibus* – "Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem." D.50.17.206. Pomp 9. Also, *Pomponius libro 21 ad Sabinum* – "Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem." D. 12.6.14.Pomp. 21.

[416] Appendix to Scottish Law Commission Discussion Paper 99, "Draft Rules on Unjustified Enrichment and Commentary" prepared by Dr E M Clive for a Seminar in 1994. The rules were prepared to test the feasibility of codification of Scots Law on unjustified enrichment.

[417] The commentators of both the 32nd and 33rd edition of *Snell* suggest that to sum up the remedies in breach of trust as depending "on unjust enrichment rather than restoration or compensation for loss" may cause confusion. Therefore, "to avoid confusion with unjust enrichment", they adopt the general expression "restoration" to refer to loss-based remedies." D Fox, "Breach of Trust" in J McGhee (ed) *Snell's Equity* 32nd edn (2010) 863, 33rd edn (2015) 768.

[418] P Birks, *Unjust Enrichment* 2nd edition (2005) ix-xiii, 3-46.

[419] P Birks, "Equity, Conscience, and Unjust Enrichment" (1999) 23 *Melb.U. L. Rev* 1; P Birks, "Unjust Enrichment and Wrongful Enrichment" (2001) 79 *Tex.L.Rev.* 1767.

enriched *sine causa*? Presumably, these would give rise to an action for repayment or restitution. Nothing more is seen to this, it is simply an application of general principles. Another example could be that the trustee made unjustified personal gains: here the question would be whether a cause of action on unjust enrichment can succeed or is feasible.

Suppose that an asset were undersold or improperly donated by a trustee. Recipient pleads good faith without notice of trust. Another hypothesis is where an asset is improperly received through notice of breach of trust. Is it therefore a case of a proprietary remedy of constructive trust, or of following and tracing the asset, or rather, an action claiming no basis for the enrichment or maybe a Pauline fraud? The next question is whether in trust context, unjustified enrichment can lead to proprietary responses. The view is expressed that any such route, equating or linking both, would be foraying Jersey and Malta trust laws much more than a trifle too much into Equity territory. It was held in *Esteem*, that receipt by an innocent volunteer of an "equitable" interest, gives rise to an action in restitution based on unjust enrichment to the extent that recipient is enriched, and with the defence of change of position available.[420] Where there is guilty receipt or co-operation, then the remedy is proprietary. It is suggested that in the jurisdictions under review, it is best to keep trusts with their proprietary remedies distinct from unjustified enrichment. This will avoid blurring the civil and Equity meanings thereof, and avoid conceptual confusion on the possible remedies.

If unjust enrichment is simply a restitutionary claim, then that alone does not confer a priority on the asset in the case of the party bound to make restitution. Is the constructive trust another form of response to unjust enrichment? If it is a remedy against unjust enrichment, then of course, the possibility of a proprietary remedy could exist: in the case of Malta and Jersey, a constructive trust is only seen as a possible consequence of a breach of trust, and therefore not as a consequence of unjustified enrichment. The courts of Malta have yet to grapple with the issue of the imposition of a constructive trust and ranking in insolvency: if proprietary rights are re-ordered or rescinded, what happens to prior rights

[420] Fn 18 at 111.

conferring priority?[421] Another question is whether there is any relevance or necessary link between the remedy imposed as a consequence of breach of trust or dishonest assistance, and unjust enrichment. In the case of both Malta and Jersey, it is suggested that it would be stretching the point, since the definition of breach of trust finds statutory basis. Unjustified enrichment, with its local variations, has its history and identity. The conclusion identified is that the two remedies stand apart and have distinct causes of action.

S. Other Remedies?

Which remedies can be contemplated to breach of trustee responsibility? Both Jersey and Malta trust laws speak of actual losses, depreciation and loss of profits.[422] Moreover, the general basis of breach of trust remedies seems to find general analogy - though different in nature - with damages, contractual and delictual, where money awards are the customary method of compensation.

Trust laws know of other remedies, such as rescission, the imposition of a charge and admits important well-known defences such as clean hands, change of position and laches. The question is therefore whether the courts would be prepared to grant similar Equity remedies. It would seem that in Jersey the doctrine of rescission and/or rectification is enjoying, and has received, both academic and practitioners' comment and attention.[423] However the extent of its application, is not specifically relevant to breach of trust questions.[424] The powers granted by TJL are those normally associated with the supervisory and administrative powers of the Court, such as appointment of resident trustee, power to relieve trustee from liability, power to order the beneficiary to indemnify for breach of trust, to vary the trusts, and wider powers relating to directions on trust applications, and to order the execution of an instrument.[425] It is nevertheless suggested that this catalogue of remedies is not exclusive: on an *ad hoc* basis, the Royal Court could look to Equity or other remedies based on its

[421] G Gretton, "Constructive trusts and insolvency" (2000) 3 *ERPL* 463
[422] TJL art 30 (2), MTTA 30 (1).
[423] Nicole Langlois and Adam Cloherty, "Playing the "Get out of Jail Free" card: mistake in the Law of Trusts" (2010) *J.G.L.R.*14 (1) 1; P Matthews, "Shome, Mishtake, Shurely?" (2010).14 (2) *J.G.L.R* 208.
[424] The Jersey Courts seem to have adopted a different and independent approach on ordering a correction or rectification to a trust deed – *The K Holdings Trust* [2009] JRC 245.
[425] Articles 44-47, 51-52 TJL.

general competence. This view is based on a reading of the workings of the court, which at its discretion, borrows from other jurisdictions.

There are similar provisions in the MTTA,[426] with one possible exception: this refers to the power of the Court, with no Jersey corresponding article, where "on the demand of a beneficiary who has been prejudiced as a result of bad faith on the part of the trustee in the operation of the trust relationship, the court shall have the power to restore the position to what it was had the action complained of not been taken or otherwise protect his interests."[427] Apart from the characteristic allusion to bad faith, MTTA seems to grant wide restorative powers, possibly even to the extent therefore of rescinding transactions. There could be a point that there was a deliberate transposition here of certain Equity powers. This is however understood as the traditional civil law remedy of *restitutio in integrum.* Its significance lies in the wide, almost praetorian, powers to grant remedies: it carries clear civilian content, such as the Pauline power to annul, and also linked to the *nemini locupletari* principle. Placing characteristically bad faith as the centre piece, it is a powerful tool for the courts to respond, and indeed in the hands of a lawyer, to use as a cause of action. On the other hand, it may allow far too much discretion to a judge. The criterion of acting in bad faith may be difficult to define – does this refer to bad faith in possession? It is more likely to be equated to good faith and its absence, in the execution of contracts, although bad faith remains a wide term. Finally, does it potentially re-write the rules of property and obligations? For all the good intentions behind this provision, it may open the door to uncertainty or worse, perverse results: even consequences to breach of trust should be predictable. There is more than something to be said, both in favour and against it.

The remedies known to English law for breach of trust contemplated do not appear to have found any reference or transposition in either jurisdiction. This is not, however, expressing the view that they are necessarily inapplicable, but would rather be considered on an *ad hoc* basis. Therefore, an action for the reconstitution of the trust fund appears admissible in either jurisdiction, with an

[426] Articles 36, 37 MTTA.
[427] Art 37A MTTA.

order for money payment in damages being the expected subsidiary remedy if actual re-constitution is unsuccessful. Specific performance also remains within the powers enjoyed by the Court.

T. Some reflections on the Draft Common Frame of Reference

The DCFR has attempted to develop the concept of duties of the trustee.[428] The relevance to the trust responsibility in the Jersey and Malta legislations is that it is a useful analytical tool to place such duties in perspective and a landmark in European Private Law.[429]

The trustee is enjoined as "a general obligation" to administer "as a prudent manager" and is "obliged to act with the required care and skill, fairly and in good faith." The civilian ring of diligence and attention is evident in the statement that the "trustee is required to act with the care and skill which can be expected of a reasonably competent and careful person managing another's affairs, having regard to whether the trustee has a right to remuneration." This naturally immediately raises the question whether the basis of responsibility is contractual or delictual. The view expressed by various speakers at a symposium held at Edinburgh University in February 2011,[430] where the project failed to raise many cheers, was that the basis was generally a *tertium quid.*[431] It was observed that the draft evidences an intention to create a concept also suitable for use in civilian jurisdictions.[432]

A trustee "is obliged to keep the trust fund segregated from other patrimony and to keep the trust assets safe."[433] The shift to contractual duties rather than fiduciary may be apparent: there is no specific emphasis on the duty of loyalty –

[428] Vol 6, X, p 5669-574;DCFR X- 6:101 – 103.
[429] R Zimmermann, *Roman Law*, *Contemporary Law, European Law – The Civilian Tradition Today* (2001) 163.
[430] This was a symposium organized by the University of Edinburgh on "Book X (Trusts) of the DCFR" held on the 7th February 2011. Among the speakers were Professors K.G.C. Reid, A Braun, B MacFarlane, S Swann and S Van Erp -. *Edin L.R.* 15 (3) 462-282.
[431] S Swann "Aims and Context" (2011) *Edi L.R.*15(3) 463.
[432] A Braun, "Trusts in the draft common frame of reference: the "best solution" for Europe" (2011) 70 (2) *C.L.J.* 327; "The framing of a European law of trusts" in L Smith, (ed) *The Worlds of the Trust* (2013) 277.
[433] *Ibid*, X-6:103.

at least as a defining factor. If anything, the articles evidence strong conceptual resemblance to the duties of a mandatory or administrator or to the management of another's affairs.[434]

What may generally be the breach of trust equivalent in the DCFR is considered in its Chapter 7 titled "Remedies for non-performance." The chapter speaks of reparation and also, in language borrowed from Equity, *prima facie* at least, disgorgement in civil law approximations of unauthorised gain, termed "enrichment" or "unauthorized gains." This obligation also binds those trustees no longer in office.[435] The trustee is under an obligation to reinstate the trust fund in respect of failure to perform obligations or in case of unauthorized gains: *culpa in eligendo* and *culpa in vigilando* here surface. Another trustee obligation is to compensate a beneficiary for loss arising due to failure to execute an obligation. The power to order specific performance is clearly articulated. This may potentially include rescission and tallies with the obligation, where possible, to restore the profit to the trust fund.

The DCFR does acknowledge a form, or analogy, of both constructive trusts and following and tracing. The opening articles of Chapter X provide that a trust may *inter alia* come into effect (a) through "a court order with prospective effect; or (b) arising by operation of law set out in an enactment relating to a matter not determined by these rules." [436] Moreover, a trust asset transferred not in accordance with the terms of the trust, is transferred subject to the existing trusts where "the transfer is gratuitous or where the transferee knew or could not have reasonably known that the terms were not in accordance with the terms of the trust."[437] This is seen as an elegant method of presenting an analogy of constructive trust or tracing by subjecting an improper transfer of trust asset subject to trust. Rather therefore than creating a proprietary interest in the manner known to Equity, the asset is subjected to a continuing trust. It would appear that even in the DCFR the relationship between trustee and beneficiary is obligational rather than proprietary.

[434] Arts 1299.
[435] *Ibid*, X-8:501(4).
[436] X-1:101.
[437] X-10:401.

The DCFR-created mechanism of subjecting a transfer of an asset to existing trusts is not in disharmony with the McFarlane-Stevens theory of "duty-burdened" right.[438] In the words of the authors, equitable property rights "are best understood not as property (rights against things) nor personal rights (rights against persons) but rather as rights against rights."[439] The key concept in the DCFR is that improperly transferred trust assets remain subject to the trusts: the analogy with the McFarlane-Stevens interpretation of equitable property rights is that in many ways the freedom of the new owners to act and operate is curtailed and limited by corresponding rights of the beneficiaries against the new owner of the asset as deriving title from the trustee.[440] An example would be a beneficiary vested with a trust asset, subject to anullability by a third party, or the imposition of a *restitutio in integrum* as a result of transfer received in "bad faith."

The DCFR project establishes that it is not at all improbable or impossible to devise a civil law trust. Indeed as was pertinently observed at the 2011 Edinburgh seminar, the draft was designed for utilisation in civil law jurisdictions, beyond the provisions and applicability of the Hague Convention. It is an example of an alternative method – "without Equity" – of dealing with constructive trusts, by providing that a trust may be imposed by the court with retrospective effect or arising by operation of the law. It is also an example of how trust objectives, such as segregation of patrimonies, may be achieved through alternative methods. Moreover, important historical and defining tools such as obligation, responsibility and good faith can be implanted without major ado in the creation and functioning of a trust. On the other hand, the DCFR articles display what may be regarded as a significant weakness in so far as they display a subordination to

[438] Fn 79.

[439] *Ibid*, McFarlane-Stevens, 3-6. The position here is that equitable property rights are fundamentally different from both property rights recognized by the common law and the Roman law. It is posited that whenever a party B has a right against A, such right against party B is binding on whoever acquires a right deriving from A. The third point is that B will "acquire a persistent right whenever A is under a duty to hold a specific right or power, in a particular way for B."

[440] In Equity, this includes the obligation by third parties, "the rest of the world", to respect such right in the case of a *res* which can be physically identified and located. B. McFarlane, "Equity, Obligations and Third Parties" (2008) 2 *Sing J.L.S* 308.

proprietary securities on movables.[441] If the trust interest is classified as a movable as the definitions in the Annex seem to suggest, then of course the subordination will be complete.[442] This could potentially mean that proprietary remedies are limited or excluded. The jurisdictions here under analysis, given the turn of choices they have taken, may not stand to gain from adopting this rule.

The DCFR is seen to have a major merit of clarity and certainty relating to remedies for breach of trust: these are specific performance, judicial review and ancillary remedies.[443] The responsibility of the trustee is also clearly spelt out: liability to reinstate the trust fund, specific performance, liability to compensate a beneficiary and the disgorgement of unauthorized enrichment.[444] While there is no suggestion that the remedies in Jersey and Malta for breach of trust are unclear, some doubts linger about the extent of applicability of Equity proprietary doctrines: an example is the reservations expressed by the Royal Court referred to in the *Torras v Al Sabah* matter. The neat classification of the remedies and liability involved could be a useful point of reference to the two jurisdictions. Another positive aspect is that its drafting proceeds with the systematic method characteristic of civil law.

U. Concluding Assessment – "Picking and choosing" or in search of a principle?

This subtititle referring to "picking and choosing" may evoke some themes in Pirandello's well-known play '*Sei personaggi in cerca d'autore*, in so far as various disparate actors in a play call upon the producer to identify and assign a role and a part to each of them.[445] The question here is whether the scenario reveals fragments in search of a unifying principle, by analogy with an author attempting to ascribe identity to the characters and persons involved.

[441] *Ibid* X – 1.102 of the DCFR provides for priority of the law of proprietary securities.
[442] Movables" are defined as corporeal and incorporeal property other than immovable property.
[443] *Ibid* X – 7:101 – 103.
[444] *Ibid* X – 7:201-203.
[445] First performed at the Teatro Valle in Rome, in 1921.

This chapter set out to assess trustee fiduciary and other duties, with their consequent responsibility. The analysis was also set within the scenario of the feasibility of an autonomous, distinct civil law trust. Small jurisdictions unabashedly borrow from their larger counterparts, and inevitably display flexibility in their ways. It may be asked whether both Jersey and Malta have opted to "pick and choose". Well-known fiduciary duties have been received and indeed, partly codified. Their roots are not however always or invariably in English Equity, since it is possible to trace some of such duties to the *fiducia* or the *fideicommissum* history and tradition. Therefore, possibly in keeping with the mixed nature of either jurisdiction, trust duties as known to Chancery Courts are no doubt important. As equally important, however, are the civil law roots. In Malta's case, this position is strengthened by the codification of fiduciary duties. Sometimes, Jersey courts affirm that *Equité* not Equity is part of Jersey law, other times that they are a Court of Equity, but not bound by rules of English Equity. This assessment therefore asks whether there is any criterion for such choices. Is this random, or a deeper, perhaps a hidden, "principle or policy" in the Dworkinian sense?

The interface, between civil law property rights, priority charges such as privileges, hypothecs, *droite de suite* and pledge on the one hand, as against, on the other, proprietary responses such as following and tracing and a constructive trust, remains a *vexata quaestio*. Likewise, relationship between fiduciary duties and responsibility, civil law unjustified enrichment and Equity unjust enrichment as a potentially proprietary or personal remedy, remains, at least *prima facie*, difficult. Would a court in Jersey or Malta order *in personam* simply the trustee to reconstitute trust assets, failing which there is responsibility in damages? Or would it impress with proprietary imprints or charges, assets transferred in breach of trust? Would a Court simply stop a personal responsibility in damages, or how far would it interfere with, potentially riding roughshod over, property rights? It also calls the question whether the English law of restitution is applicable to trust law at all. It is suggested that, however inchoate this area of the law may possibly appear, it does not generally offer any material detraction to the nature and quality of the trust duties and responsibilities. The question may however be broader in the sense of its asking whether trust law has indeed remained, in terms

known to the civil law, a special or particular law, or whether its principles find general application. That question, soul-searching indeed and regularly asked, remains a lingering concern.

The definition of trustee responsibility displays the particular hue of the nature of the trust examined. This point has been advanced that the trustee's responsibility approximates closely to the diligence, care and attention of a *bonus paterfamilias.* In particular, the Jersey Royal Court has classified an action for breach of trust as an action in damages.[446] The question is again asked whether the law and particularly the courts in Jersey and Malta would also adopt the "pick and choose" approach to questions of breach of trust and in particular Equity remedies. No definite conclusion was arrived at: it was however suggested that should the occasion arise, either court would be prepared to borrow Equity remedies. One can think of disgorgement of profits, or possibly rescinding transactions. There is no direct evidence to suggest this: while, at least in Jersey, the courts vow independence from Equity, some legal paradoxes may be identified. In *Esteem*, Equity "proprietary remedies" were described as unsatisfactory. The familiar problem of consistency with principle is apparent. On the other hand, the Royal Court applied rules of dishonest assistance and knowing receipt.

It is, at the same time, apparent that the French-Norman tradition is never far from the minds of the Judges in Jersey, and the Napoleonic tradition possibly more so in Malta. The diligence and attention of a *bonus paterfamilias* remains *the* overarching cornerstone in both jurisdictions.

How satisfactory and principled is this "Janus-like" approach? The response identified is, that more than a principle, it is a question of co-existence: in the appropriate situations, claiming, following and tracing can find application. In others, the remedies of dishonest assistance and knowing receipt leading to the imposition of a constructive trust may live well and comfortably with the *actio pauliana*. The traditional civil law obligation can be extended to acknowledge,

[446] Fn 378.

apply and enforce, with a civil law method, fiduciary and other trust duties. Civil law defining qualities are robust and in good health: breach of trust will, in all likelihood, be characterized as a delictual or contractual damage situation, raising delicate questions of *cumul*. Responsibility is likewise obligational. This fits more or less neatly with the traditional distinction between property and obligation, and bears out the existence of a civil law trust. Nevertheless, all this sits within an obviously "mixed" context.

At the same time, existing property categories are not subverted, although they are challenged, by tracing or constructive trusts. The "Janus-face" trust, even in context of trustee duties and responsibilities, carries its particular definition. The distinctive character of the civil law trust, in the context examined, is, that it is rooted in obligations, responsibility, good and bad faith, and of course the *bonus paterfamilias* criterion. It also however makes significant concessions as seen to proprietary remedies, not known to the civil law tradition.

It would be unfair to level a criticism that the trust laws examined are unprincipled or worse opportunistic. The proper analysis suggested is that they are a product of their political and legal history and culture, dosed with a good measure of pragmatism. This produces the civil law trust, grafted on the civil law tradition, borrowing or perhaps "picking and choosing" from the English trust and Equity tradition.

All told, the trust is very much a civil law trust, steeped in the *jus civile*, turning its face to the two traditions as appropriate, as similarly are the trustee duties and responsibility.

CHAPTER V - QUESTIONS OF JURISDICTION AND CHOICE OF LAW

A. Scope of the Chapter

The purpose of this chapter is to evaluate the implications of the jurisdictional net and then the policy behind choice of law rules. Principally, however, the second fundamental question tested is how far the assertion is valid that the distinction between domestic and foreign trust, is *the* key distinction to evaluating the trusts laws under review.

B. The Jurisdictional Context

This jurisdictional perspective identifies two different currents, moving sometimes in opposite directions. There is, on the one hand, a strong, entirely justifiable, movement to confer wide powers on a court to intervene. This may be attributed to the administration of the trust, the residence of trustees or the *situs* of assets within the jurisdiction. A court cannot be excluded from moving and acting, hampered by unclear or insufficient rules of jurisdiction in circumstances where the forum, through an immediate or perhaps not-so-close, connecting factor, identifies an important link. Inevitably, this approach may create tensions with other competing jurisdictions, and indeed difficulties of enforcement of judgements, or with orders, given in a non-domestic context.[447]

There are on the other hand, sound policy reasons to adopt a more "neutral" jurisdictional approach. Clearly, the traditionally accepted rules, and their operation *vis à vis* trusts, relating to public policy, *ordre publique* and illegality, retain full and unabated force. In contrast with the first current, this tide tends towards wider reception and recognition to foreign jurisdiction clauses and judgements, rather than creating entry-barriers.

Striking a balance between the two approaches is a fine-line to tread. In one dimension, the courts of a jurisdiction cannot be seen, either in principle or indeed reputationally, as showing excessive zeal in the application and extension of their own powers. In another, there are clear risks where a jurisdiction is seen

447 J Corbett, "Jurisdiction and Cross Border Issues", in S Collins et al (eds) *International Trust Disputes* (2012) 5.

to be no more than a "sieve", allowing all litigation or other judicial choices to pass through, unfettered and unchecked. At a difficult point, for all its chosen calling to attract international business, it has to draw a line as to what is acceptable and enforceable, or otherwise, within its walls.

Jersey and Malta share in this aspect some common history. Both started their international involvement as "offshore", that is to say tax-efficient and reliable jurisdictions. This remains the status of Jersey, whereas Malta, in view of EU accession, had to shed its "offshore" choice. There are, in this context two important communalities. The first is that historically, even to varying degrees, both jurisdictions have received extensive civil law influence. Nevertheless, their private international law rules have traditionally embodied the applicable Common Law rules.[448] Both jurisdictions have adopted the Hague Convention of the 1st July 1985 on the Law Applicable to Trusts and their Recognition.[449] In the case of Malta, the EU legislation on private international law matters is increasingly acquiring significant scope and importance, particularly Regulations 44/01 and its Recast 1215/12, 593/08 'Rome I' and 864/2007 'Rome II'.[450] Subject to this, English rules of private international law are still applicable as default rules. The other thread of communality is the distinction between a domestic trust and a foreign trust. This carries implications beyond choice of law questions, since in some instances it may even, without any further connection, confer jurisdiction on a court. At the same time, the scenario is dynamic and evolving.[451]

Conversly, jurisdiction may often determine or influence the applicable law: the *lex rei sitae* confers jurisdiction over immovables and almost invariably attracts the applicable law. The procedural measures of staying an action or the succesful

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[448] *Vide* generally, *Underhill*, 1309; *Thomas and Hudson*, 1181; *Lewin*, (18th ed) 365, (19th ed) 456; *Dicey* 1485.

[449] https://www.hcch.net/en/instruments/conventions/authorities1/?cid=59; This was created under the auspices of the Hague Conference on Private International Law and came into force on the 1st January 1992; A E Anton, *Private International Law* (2011) 3rd ed by PR Beaumont and PE McEleavy 967*; vide infra,*fn 556.

[450] J Harris, "Jurisdiction and the Enforcement of Foreign Judgements in Transnational Trusts Litigation" in D Hayton (ed) *The International Trust* (2011) fn 267 at 3; N Le Poidevin and K Robinson, "Jurisidictional Conundrums" (2013) (19) (8) *T & T* 848; D Hayton, "International Recognition of Trusts" in D Hayton (ed) *The International Trust* (2011) 161.

[451] J Harris, "Jurisdiction and judgments in international trusts litigation – surveying the landscape" (2011) 17 (4) *T & T* 236.

plea of *forum non conveniens* may analogously prove decisive for both the forum and its inevitable influence on the governing law. Very often, the attribution of jurisdiction inevitably imposes the basic notions of the forum on litigants, substantive or procedural.

C. Trust Jurisdiction in Jersey

The term jurisdiction is considered here in two senses: the first refers to the territorial limits, meaning the limits of authority of the court where it is empowered to act. This is generally a matter of private international law. The second meaning refers to the power and authority of the courts to exercise jurisdiction within its territorial limits: it includes, in this second sense, division of powers between the various courts, or competence.[452]

The rules conferring jurisdiction on the Jersey courts in private international context are not codified or established by statute.[453] Rather, the English conflict rules have tended to find application.[454] Therefore, general jurisdiction of a Jersey court is conferred by presence of parties including of course defendant and submission to jurisdiction. In a debt recovery claim, *Solvalub Limited v Match Investments Limited*, the Jersey Court of Appeal held that a defendant could not simultaneously protest jurisdiction and counter-claim, since this implied submission.[455] Exceptionally, service out of jurisdiction is another basis thereby extending jurisdiction.[456]

Jersey law reveals no general articles defining the territorial jurisdiction of the courts, as in the case of Malta,[457] France[458] and Italy.[459] The competent Trust court in Jersey is the Inferior Number of the Royal Court.[460] This means that it sits with the Bailiff and two Jurats (lay Magistrates), but may sit as a Judge alone where the question is exclusively one of law. The special trust jurisdiction is

[452] *Jersey Institute Notes* (2015) 194.
[453] *Ibid*, Harris fn 451 at 101.
[454] P Matthews, "No black holes please, we're Jersey" (1997) 1 (2) *JGLR* 133.
[455] [1996 JLR 361].
[456] Service of Process Rules 1994, Chpt 07.840.50 of the Revised Edition.
[457] Art 742 and 742B-F regulating actions *in rem* against ships and aircraft of the Malta Code of Civil Procedure.
[458] Code de Procédure Civile, arts 42-58.
[459] Legge 31 maggio 1995, n. 218 *Riforma del sistema Italiano di diritto internazionale privato*.
[460] Art 1TJL.The sources of general jurisdiction and competence of the Royal Court are found in the Royal Court (Jersey) Law 1948, chpt 07.770, and the Royal Court rules 2004.

created by article 5 of the TJL which defines those instances where, subject to *forum non conveniens* principles *infra* discussed, jurisdiction on the Jersey courts is conferred. The language of Article 5 of the TJL is clear and unequivocal, reading that "the court has jurisdiction where:-

> (a) the trust is a Jersey trust;
>
> (b) a trustee of a foreign trust is resident in Jersey;
>
> (c) any trust property of a foreign trust is situated in Jersey; or
>
> (d) administration of any trust property of a foreign trust is carried on in Jersey."

(i) Where the trust is a Jersey trust

An important preliminary consideration here is the 'firewall' legislation created by the TJL, the latest addition being the Trusts (Amendment) Jersey Law No 5 adopted in 2012, later assessed. These protective provisions are a defining characteristic of the Jersey Trust Law and also relevant in the link between a Jersey trust and the jurisdiction of the Jersey courts.

It is recalled that article 1(1) of the TJL defines a "foreign trust" as "a trust whose proper law is the law of some other jurisdiction" than Jersey, and that a "Jersey trust" means "a trust whose proper law is that of Jersey." There is an intentional link between the application of Jersey law and the jurisdiction of the Jersey courts. This Act provides that choice of law as being (a) either that expressly chosen by the parties, or failing that, (b) the choice implied from the terms of the trust, or failing either, the law with which the trust at the time it was created had the closest connection.[461] These criteria may therefore lead to the default choice, if appropriate, of Jersey law where no express choice has been stipulated. The nub of the question would be whether a Jersey court would infer a high or low threshold to take jurisdiction. Therefore, the significance is that this goes beyond the rules of territorial jurisdiction, and identifies the choice of law as a connecting factor. The Jersey court will be empowered to act on the sole basis that otherwise

[461] Art 4 TJL: this formulation also appears to follow articles 6 and 7 of the Hague Convention on the Law applicable to Trusts and on their Recognition.

unconnected parties have chosen, expressly or by implication, Jersey law as the governing law. Take for example, the case of an Italian *trust interno*, where parties choose Jersey law, where settlor, trustee or fiduciary and beneficiary are all Italian and all assets are out of the Jersey jurisdiction.[462] It is acknowledged that the jurisdiction of the Jersey courts in this instance is neither mandatory nor exclusive: article 5, as seen, simply provides that the court *has* jurisdiction, without stating, by implication, that it is exclusive.

This may perhaps be seen as a wise policy choice, empowering, but not obliging, the court to act whenever Jersey law is invoked or applied as the governing law of a trust. It seems however to carry wider implications, at least on two grounds. The first is that any terms of a trust, even those whose connection is its sole adoption of Jersey law, are unenforceable to the extent that they conflict with mandatory provisions of the TJL.[463] The second is that a foreign trust is regarded to be unenforceable in Jersey to the extent that it purports to do anything against the law of Jersey or relates to immovable property situated in Jersey.[464] The conundrum is that Jersey choice of law carries with it mandatory, although not necessarily exclusive, jurisdiction of the Jersey court: therefore, an otherwise unconnected trust, will confer jurisdiction on the Jersey courts, at the same time opening the door thereby to the unenforceability in Jersey of some of its terms. The adoption of Jersey law, may carry with it the consequence, intended or unwitting, of potentially conferring jurisdiction on a forum which settlor or trustee may not have willed or which may have the effect of frustrating some provisions of the trust document. This may be difficult to rationalize where jurisdictional rules on enforceability, intended for domestic Jersey application, are raised as pleas in another forum: particularly so, where the assets or contention are far-removed from St Hélier. It is specifically provided that such mandatory rules of the forum shall apply to "trusts wherever constituted or created."[465] The question further arises which would prevail if the term were valid in a non-Jersey jurisdiction, but unenforceable in Jersey, due to its jurisdiction

[462] P Panico, "An Italian construction of the Jersey (Trusts) Law" in S Atkins (ed), *Insights into Trust Law* (2013) 49.
[463] Art 9, discussed *infra* at p 215 *et seq*.
[464] Art 49.
[465] Art 9(7).

attracted by choice of law: this potential conflict encompasses important provisions such as liability or powers of trustees, to be determined by Jersey law alone. Another relevant question is whether the plea of unenforceability before the Jersey courts can be a valid plea in the courts of a different jurisdiction?

(ii) Where a trustee of a foreign trust is resident in Jersey

The next ground of jurisdiction of the Jersey courts is when a trustee of a foreign trust is resident in Jersey. The TJL Act contains no definition of the meaning of residence. The Royal Court has defined "residence" of a company in Jersey by equating it with the meaning and test attributed in tax matters that is to say "control and management."[466] It held that the company, incorporated in Spain, was indeed absent, since the directors who controlled the affairs of the company all resided outside Jersey. Residence is therefore understood in its ordinary meaning, and not in any particular technical sense, for example "resident for tax purposes," or "ordinarily resident." It is noted that a connecting factor widely used in European Union legislation, "habitual residence" is here avoided, as are also avoided "ordinary residence" or "domicile." Arguably, the term 'residence' requires a lower threshold to meet, tending towards an expansive jurisdictional mechanism.

More significantly, the residence requirement is applicable in the case of a foreign trust. The *situs* of the trust assets, administration thereof, and possibly choice of jurisdiction are all immaterial. Indeed, not even the governing law is that of the Channel-Island state. Once a trustee of a foreign trust is resident in Jersey, then the Royal Court is vested with jurisdiction. Here again, one may ask whether the jurisdictional net is too widely cast. The only connecting factor here is residence of the trustee in Jersey, which alone in this case is necessary and sufficient to ground the jurisdiction of the Jersey courts. A possible explanation seen is that the courts have jurisdiction *in personam* over the trustee, at least by virtue of presumed presence: this may be designed as a protective measure to

[466] *Rumasa S.A. v W & H Trademarks* [1985-86 JLR 308].

enable a Jersey resident-trustee to have access to a domestic court, rather than being perhaps forced to look at a tribunal of a foreign jurisdiction.

On the one hand, there are solid, albeit not irrefutable reasons, for this choice: more certainty perhaps, convenience and indeed protection for the Jersey trust industry justify jurisdiction. There is no distinction between proceedings under article 51 of the Jersey Trusts Act, where the trustee asks for directions, or may even surrender discretion to the court, if this is accepted (since it is not bound to do so), and contentious, adversarial proceedings. There is here undoubted protection to the Jersey-resident trustee where the trust deed can potentially be varied, even though in all likelihood this will fall to be decided by foreign law. There can be little doubt that the jurisdiction, beyond being a forum to decide disputes involving a Jersey resident trustee, has an undoubted interest in supervising the administration of a foreign trust to ensure that resident trustees behave with propriety.

On the other hand, this provision does not avoid the difficulty of the Jersey court and the Jersey-resident trustee of having to apply a foreign law. The effect of a judgement or order of a Jersey court in the context of a foreign trust has to be assessed on a case by case basis. There is obviously no certainty that such a judgement will be recognized or enforced in another jurisdiction: the strong odds and possibility are that if foreign law governs the trust, the competent, although not necessarily exclusive, forum will be also that of the foreign law. It is acknowledged of course, that there is a strong argument suggesting that the chosen forum in a trust document is that agreed or decided upon between settlor and trustee, and not necessarily between beneficiary and trustee. This could militate in favour of extending the breadth of the Jersey court jurisdiction as an additional protection to the trustee.

It is nevertheless submitted that this provision is wise and necessary, albeit perhaps not easily workable. It would be clearly unsatisfactory if, given the involvement of a Jersey-resident trustee, a Jersey court would be hampered by jurisdictional pleas - more so, with sometimes potentially unpredictable issues such as *renvoi*, an incidental question arising or, even if Jersey is not an EU

jurisdiction, the so-called *Italian Torpedo* defence.[467] This should not mask the lurking difficulties, not least questions of proof of foreign law and recognition and enforcement in foreign jurisdictions.

(iii) Where any trust property of a foreign trust is situated in Jersey

This ground of jurisdiction may be easier to rationalize. Trust property is defined as "the property for the time being held in a trust" and property means "property of any description wherever situated, and, in relation to rights and interests includes those rights and interests whether vested, contingent, defeasible or future."[468] A Jersey trust is "invalid" in so far as "it purports to apply directly to immovable property situated in Jersey"[469] and that a foreign trust shall be unenforceable in Jersey to the extent that it purports "to apply directly to immovable property situated in Jersey."[470]

The reason behind this rule is understandable: it is not a trite re-statement of private international law attributing choice of *lex situs* in questions involving immovable property. Rather, the Jersey court has jurisdiction in the case of a foreign trust whenever, and whatever, trust property is located in Jersey. This may be trust-specific, since it overrides a trust deed choice of jurisdiction and possibly choice of law provision, by simple virtue of the fact that a foreign trust asset, even fleetingly, is situated in Jersey. Property is widely defined and, apart from immovable property, includes movables, corporeal and intangible rights and assets. It may be more difficult to define the meaning of *trust property situated in Jersey*. Where a system of registration is in place, such as vessels, aircraft or trade-marks, this may be easier to identify - as should be in the case of a corporeal asset physically located in Jersey and deposits held by Jersey credit institutions. In the case of a defined issuer, instruments such as shares, bonds and securities should follow the principle that in the case of an issuer registered in Jersey, the issued instruments are classified as Jersey-situated. Possibly less clear

[467] *Gasser Gmbh v Misat srl* [2003] ECR I.
[468] TJL, art 1.
[469] Art 11(2)(3).
[470] Art 49 (2)(a) (iii).

is the situation where the issuer is a Jersey-incorporated entity, while the instruments are floated or registered in a non-Jersey exchange. It is nevertheless suggested that these should likewise be considered as assets situated in Jersey by reason of domicile or place of registration of issuer.

The utility of this provision is clear and the normative justification is that assets within the Jersey jurisdiction should be unequivocally subject to the jurisdiction of the courts there. It may possibly override even choice of jurisdiction provisions in the trust deed, since its jurisdictional character is one of public order. Its wide and encompassing nature need hardly be underlined: the Jersey courts are endowed with jurisdiction even if the trustees or administration of the trust have no connection with Jersey other than holding assets in Jersey. The placing therefore of a deposit with a Jersey-registered or regulated Bank or the subscription to funds issued or regulated in Jersey by an otherwise unrelated trust, subjects the trust to the jurisdiction of the Jersey courts.

The article may leave some questions unanswered: does the jurisdiction extend only to the asset situated in Jersey or to all other assets? In other words, in the event of hostile litigation over non-Jersey assets, but where the trust also holds Jersey-situated assets, how tenable is the plea of exclusive jurisdiction of the Jersey courts? An example would be that of non-Jersey resident trustees of a foreign-law governed trust, which happens to hold some, but not all portfolio assets, in Jersey. It is at least arguable that the jurisdiction of the Jersey courts extends also to non-Jersey situated assets, but then not necessarily exclusive jurisdiction. It will remain doubtful how far a foreign court would necessarily defer to the provision under review: it can reasonably assert its own powers on various grounds such as domicile or place of business of trustees, choice of jurisdiction or *situs* of other trust assets. At the same time, the question lingers as to how far a Jersey court, vested with jurisdiction on Jersey-based property, would recognize a foreign judgement over non-Jersey situated assets. All told nonetheless, this sub-article is seen as useful, positive and necessary, if for nothing else to allow the courts in Jersey to preserve and safeguard the traditional high standards of governance and rule of law.

(iv) Where the administration of any trust property of a foreign trust is carried on in Jersey

Here again, a link, being the administration of any trust property, is created to justify the intervention of the Jersey courts, the context being again a foreign trust. The effect of such link is indeed far-reaching since its consequent reach encompasses any non-Jersey-based asset of a foreign trust which is administered in Jersey. While it may not be an everyday occurrence, the possibility exists, particularly in the wealthier family trusts, of having the administration from different jurisdictions of assets forming part of the same trusts but located in separate jurisdictions, say for tax-efficiency reasons. The question posed under the preceding ground of jurisdiction resurfaces. Once the Jersey court has established its own jurisdiction due to the administration of an asset from Jersey, does this power extend to any trust asset, or is it limited merely to those assets whose administration is physically carried out territorially within Jersey? If the answer to the first limb were in the affirmative, the effect of such a jurisdictional ground is indeed wide, possibly over world-wide assets. The question remains whether this is sufficient to ground exclusive jurisdiction of the Jersey courts. Certainly, it is difficult to conclude that non-Jersey courts will easily renounce to jurisdiction within their territory. Nor does it mean that because the Jersey court is here granted jurisdiction, other courts will necessarily decline their own.

The focus on the provision is administration and what actually constitutes administration may not always be a straightforward task to determine. The Jersey trusts law does not attempt to define it, although it occurs in various contexts.[471] In most instances, it is a *de facto* situation, to include factors such as actual physical keeping of records, office from where instructions by the trustees to manage the asset originate or decisions are taken, and no doubt the actual professional or physical residence of the trustees. True, in these days of virtual administration, place of administration may sometimes be difficult to identify.

[471] For example, when *inter alia* referring to the proper law of a trust (art 4(3) (a)), in context of the extent of application of Jersey law to a trust (art 9 (1) (d)), and, conferring to the court authority to supplement absence of power of trustee, if a transaction is deemed expedient (art 47 (3)).

There is wisdom in this provision. Administration, control and management tend to overlap. This may be relevant not only for tax purposes in various jurisdictions, but also, drawing an analogy from company law, to identify "the mind" of the trust. The Jersey courts have been granted power to intervene whenever an asset worldwide is administered from Jersey. The assessment of this provision is that it is no doubt necessary to ensure the standards referred to in earlier grounds whenever there is some administration in Jersey. Any serious jurisdiction cannot allow activities and "goings-on" in its own backyard, in the case of both companies and trusts, without conferring jurisdiction on the court to regulate and decide, avoiding therefore being hampered by technical questions of jurisdiction.

(v) The philosophy behind the jurisdictional grounds

The grounds of jurisdiction and connecting factors are therefore a Jersey trust, residence of a trustee of a foreign trust in Jersey, either the location in Jersey of an asset of a foreign trust or administration from Jersey of any asset of a foreign trust. An attempt to read the philosophy behind these choices would suggest that presence within the jurisdiction is largely the determining factor: this extends to trustees, assets or administration. Choice of Jersey law is another criterion. The first three grounds are entirely justifiable on basis of principle, convenience and proper functionality. The territoriality principle to assert the court's jurisdiction can hardly be questioned where a trustee is resident, or the *situs* of the assets lie, within its limits. On the other hand, there is no apparent reason for subjecting to the jurisdiction of the Jersey courts whenever it is a Jersey trust. The fact of applicable law, chosen or inferred, should not itself, in principle, necessarily attract jurisdiction. No justification is seen for this extension of jurisdiction from choice of law: this is difficult to justify on principle and practicality, and may, with respect, be viewed as excessive. The possibility also exists that a foreign jurisdiction clause be disregarded by a Jersey court in the case of a foreign trust, where any one of the jurisdictional connecting factors subsists.

Before concluding this section, two points merit further investigation: first, the doctrine and application in Jersey of *forum non conveniens*, and second, the

procedural method of stay of proceedings.[472] The Jersey Courts have generally adopted the English position on the two questions. A significant example is the judgement in *Koomen v Bender.*[473] The Royal Court held that it had *jurisdiction* to serve the proceedings out of territory on the defendants who were not resident or incorporated in Jersey, under the Service of Process (Jersey) Rules 1994, r.7(j). This was because part of the trust property of the AEB Trust, involved in *Koomen*, was "trust property of a foreign trust situated in Jersey" within the meaning of art 5 of the Trusts (Jersey) Law 1984. Moreover, and more relevant to the question of the appropriate forum under discussion, the Royal Court followed the principles and reasoning in two widely-cited judgements of the House of Lords, namely *Amin Rasheed Shipping Corp.* v. *Kuwait Ins. Co*,[474] *The Spiliada*[475] and would presumably also have followed *Lubbe* and *VTB.*[476] It adopted the "most natural forum" test, namely that "with which the action has the most real and substantial connection."[477]

This position in Jersey was confirmed by the Privy Council in *Gheewala v Compendium Trust Company*.[478] Briefly, the facts were that defendants-appellants had successfully applied to the Royal Court for an order to stay an action brought by the plaintiff on the grounds of *forum non conveniens*, contending that Kenya was the more appropriate forum where to litigate. The Court of Appeal reversed this judgement. In the circumstances, while all parties except the defendant company were domiciled in Kenya, only half of them were actually resident there. The assets in dispute were primarily in countries in East Africa, Europe (including substantial assets in the Channel Islands) and North America. The documents were generally found in the same jurisdiction as the assets. Only defendant company was resident in Jersey and other defendants were served out of jurisdiction with the order granting leave for such service unchallenged.

[472] A Briggs and P Rees, *Civil Jurisdiction and Judgements* (2009) 408; A Briggs, *Civil Jurisdiction and Judgements* (2015) 392.
[473] [2002 JLR 407].
[474] [1984] A.C. 50.
[475] *Spiliada Maritime Corp.* v. *Cansulex Ltd.*, [1987] A.C. 460.
[476] *Lubbe v Cape Town plc* [2000] UKHL 41; *VTB Capital plc v Nutritrek International Corp* [2013] UKSC 5.
[477] *Ibid*, *Koomen*, fn 466, 421; this position on *forum non convenens* was also followed in *Leeds United Football Club Limited v Weston [*2012] (1) JCA 083.
[478] [2003 JLR 627]. Also, *Hindocha v Gheewala* [2003] UKPC 77.

However, two summonses were issued (one not further pursued) to stay the action in Jersey. The Privy Council restored the order of the Royal Court, holding that when an application is made to stay proceedings on the grounds of *forum non conveniens*, the court should consider (a) whether an alternative forum was clearly more appropriate and (b) if there were a forum which was clearly more appropriate, whether there existed circumstances which could prevent plaintiff from obtaining justice in that state.

A line of *jurisprudence constante* of the Jersey courts is therefore recorded, sometimes considered in connection with an application for leave to serve out of jurisdiction.[479] In *Federal Republic of Brazil v Durant International Corporation*[480] (FRB), the Royal Court considered that Jersey was the appropriate forum, where the proceedings could be tried most suitably in the interest of the parties and the ends of justice. It was held that, in considering whether a forum was "natural" for the trial of an action, the court would look for connecting factors such as convenience or expense, availability of witnesses, the law governing transaction and the jurisdiction in which the parties resided or carried on business.

(vi) Assessment

In conclusion, it is now necessary to pull the strands together. The Jersey trust jurisdiction provisions and rules display a refined combination of principle, effectiveness and common-sense. The basis of jurisdiction is sufficiently wide to allow the courts to intervene in a wide variety of trusts ranging from the classical administration of property, intangible wealth and assets, inheritance, family separation or divorce devices, to trusts used as vehicle in bankruptcy or for securisation purposes or indeed for asset-protection mechanisms. The effectiveness of the rules is displayed by the breadth of the connecting factors, with some having only a tenuous link with the island, such as the administration

[479] *Heerema v Heerema* [1985-86 JLR]; *Re Allied Irish Banks (C.I.) Limited* [1987-88 JLR 157]; *Noel v Noel* [1987-88 JLR 502]; *James Capel (Channel Islands) Limited v Koppel* [1989 JLR 51]; *Stanway v Bush* [1992 JLR 115]; *Wright v Rockway Limited* [1994 JLR 321]; *Walmsley Will Trust* [2001 JLR Note 34]; *Key Trust* [JLR 2003 437]; *SGI v Wijsmuller* [2005 JLR 310]; *Jaiswall v Jaiswal* [JLR 2007 69].
[480] [2010 JLR 421].

in Jersey of any asset of a foreign i.e. non-Jersey trust. The criticism is that some jurisdictions may regard this with some hostility: indeed, it may be difficult for a practitioner to predict or advise with certainty the extent of recognition and enforcement in a foreign jurisdiction, more so absent the applicability of EU Regulation Brussels I to Jersey. Depending on one's view point, the exclusion of the Jersey courts from the common judicial area as intended by the European Union in the Tampere spirit[481] may have different consequences and implications: in one sense, it is certainly convenient to be able to choose one's jurisdictional policies unshackled from community obligations. In another, the days of "splendid isolation" may have long been over – there are significant disadvantages in not forming part of a network of reciprocal recognition and enforcement.

Two characteristics therefore emerge from the above, which operate simultaneously: the first is that the Jersey rules of trust jurisdiction display possibly an overly zealous inward-looking trend to arrogate wide jurisdiction. On the other hand, the second characteristic reveals resistance to the recognition and enforcement in some instances of foreign judgements or recognition of foreign trusts. It is provided at article 9 (4) of the TJL that "No judgement of a foreign court .....with respect to a trust shall be enforceable, or given effect, to the extent that it is inconsistent with this Article irrespective of any applicable law relating to conflicts of law." The combined effect of these two factors therefore tends to extend the jurisdiction of the courts of Jersey widely, and out of jurisdiction. At the same time, a tendency operates to resist the recognition and enforcement of foreign judgements where these do not conform with mandatory rules of the forum.

This naturally reveals the thinking behind the policy of trust jurisdiction. The characteristic of effectiveness is perhaps best borne out by the inward-looking and protective provisions just considered. The jurisdictional rules, with their width of application, are designed to ensure that the home rules prevail and are implemented, free from any foreign influence or 'invasion.' Perhaps the defining

[481] http://www.europarl.europa.eu/summits/tam_en.htm.

characteristic remains the sense of pragmatism displayed by the trust jurisdiction rules: this is coupled with the ability to combine such a "sense of reality", to use the term with Greene[482], with principle: the wise adoption of the Scottish doctrine as developed by the English courts of "*forum non conveniens*" and the rules on staying of actions and anti-suit injunctions are testament to this.

The present writer, coming from a similarly small jurisdiction, has nothing but admiration and respect for the flair and combination of pragmatism, flexibility and principle, as is displayed by the consistently high quality judgements of the Royal Court - endorsed even by the Privy Council. On the other hand, it is respectfully questioned how far this sense of isolation and possibly insularity – there is no coincidence in the Latin term *insula* here – of the Jersey Island can continue on a long term basis. Here, it may be suggested that the classical "offshore" model, and this includes trusts, may not be tenable over the longer term. While this may have been Jersey's historic strength, it may require serious re-thinking. The reason for this is simply that the days where a jurisdiction could happily exist "*in vacuo*" seem to be fast numbered, if not already over: therefore the model reflecting this choice and policy may, in time, reveal these weaknesses and deficiencies. Otherwise, the Jersey rules on jurisdiction remain robust and are applied with wisdom and to mention the Oxford based philosopher John Finnis with "practical-reasonableness.[483]"

D. Trust Jurisdiction in Malta

Not surprisingly, the trust jurisdiction of the courts of Malta are couched in very similar, but not identical terms, to those of Jersey.

Article 8(1) of the MTTA provides:

> "The Courts of Malta shall have jurisdiction where –
>
> (a) the trust is a Maltese trust; or

[482] G Greene, *A Sense of Reality* (1972).
[483] *Natural Law and Natural Rights* (2011) 88, 100.

(b) the trustee is resident in Malta or is a trustee authorised by the Authority, or is otherwise constituted in terms of Maltese law; or

(c) any trust property is situated in Malta; or

(d) administration of any trust property is carried on in Malta."

The terms of this article, in the light of reflections made on the Jersey law, are to a large extent self-evident: first, a Maltese trust is a trust whose proper law is the law of Malta.[484] Secondly, in so far as residence is concerned, the Malta law is more helpful than its Jersey counterpart since the term is defined as "in case of an individual, a person whose habitual residence is in Malta and in case of a company, a company registered in Malta."[485] The choice of the meaning of residence has opted for the term more current in European Union regulations and directives, being habitual residence. This excludes, therefore, in the case of a company, the criterion of control and management and pins the definition exclusively to registration. This may be seen as an improvement in the interest of certainty. A trustee authorised by the Malta Financial Services Authority or recognized by the Authority is also a ground for attracting jurisdiction of the courts of Malta.[486]

Thirdly, the definition of "trust property" is identical to that of Jersey: ""trust property" means the property for the time being held on trust", whereas "property" in the Malta Act is couched in wider terms, to mean "property of any kind or description, whether movable or immovable, personal or real, and wherever situated, and in relation to rights and interests whether vested, contingent, voidable or future."[487] Fourthly, as in the case of Jersey, there is no definition of "administration".

[484] Art 2 MTTA.
[485] Art 2.
[486] In terms of a statutory instrument, 331.03, the competent authority may recognize a non-resident natural or legal person in an approved jurisdiction, exempting such person from the requirements to act as trustee, even though residence may be in a foreign jurisdiction.
[487] *Ibid* art 2(1).

(i) The Code of Civil Procedure and trusts

It is appropriate in context to summarily refer to the article on general jurisdiction of the civil courts in Malta in the code of organization and civil procedure both *in personam* and *in rem*.[488] The term domicile, referred to in the general articles of the code of civil procedure, originally carried the Italian term "*domicilio*" meaning residence and therefore is more akin to the current term "habitual residence." It was later translated as domicile and, in the fog of history, muted its meaning to the English sense.[489] A string of *jurisprudence constante* holds that where a *lacuna* existed in the private international law of Malta, the English conflict of law principles applied.[490] This accounted for the fact that Maltese law is familiar with terms such as domicile of origin, choice and dependence, as important connecting factors. This rule is entirely judge-created and may be difficult to rationalize in an otherwise civil law context. The reason for this decision is seen as a gesture of deference to the then British colonial administration. Of course, the European Union Regulations have tended to supersede many, but not all, of the traditional English private international law rules.[491] Malta codified its rules of jurisdiction in private international law since

[488] The relevant article reads as follows "***742.*** *(1) Save as otherwise expressly provided by law, the civil courts of Malta shall have jurisdiction to try and determine all actions, without any distinction or privilege, concerning the persons hereinafter mentioned: (a) citizens of Malta, provided they have not fixed their domicile elsewhere; (b) any person as long as he is either domiciled or resident or present in Malta; (c) any person, in matters relating to property situate or existing in Malta; (d) any person who has contracted any obligation in Malta, but only in regard to actions touching such obligation and provided such person is present in Malta; (e) any person who, having contracted an obligation in some other country, has nevertheless agreed to carry out such obligation in Malta, or who has contracted any obligation which must necessarily be carried into effect in Malta, provided in either case such person is present in Malta; (f) any person, in regard to any obligation contracted in favour of a citizen or resident of Malta or of a body having a distinct legal personality or association of persons incorporated or operating in Malta, if the judgment can be enforced in Malta; (g) any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.*" Article 742B refers to jurisdiction *in rem* on ships and vessels, while art 742E refers to jurisdiction *in rem* against aircraft.

[489] *Lepre v Tabone*, Civil Court 28th March 1960; *Cassar v Montanaro Gauci,* Civil Court 3rd December 1962; *Xerri v Sladden*, Appeal 15th December 2015.

[490] *Valentini v Valentini*, Appeal 19th October 1923; *Smith v Muscat Azzopardi*, Civil Court 4th February 1936; *Spiteri v Soler,* Appeal 22nd October 1937.

[491] A Briggs, *Private International Law in English Courts* (2014). In what may arguably be the *magnum opus* of Professor Briggs to date, this work is a characteristic masterly restatement and assessment of the jurisprudence of the English courts on the subject. The true message coming across the entire work, however, is that it acknowledges, with no particular rue or regret, that EU law has taken over the more important territory from the Common Law.

1854. This is significant in view of the principle laid down with approval time and again by the courts relative to *lacunae.* This background is relevant, and has been sketched, to place in context the articles on jurisdiction in the MTTA.

The provisions of the code of civil procedure find simultaneous application with those of the trust law. This view is based on their different areas of application, with the law of trusts prevailing on two grounds: it is a *lex specialis* prevailing over a *lex generalis* and a *lex posterior specialis* derogating a *lex prior generalis*. Article 8(2) of the MTTA specifically gives the court of Malta power to stay proceedings, notwithstanding a foreign jurisdiction clause. Moreover, the provisions of the Malta Code of Civil Procedure in the case of pleas on jurisdiction are made applicable. While a detailed discussion of such pleas is beyond the scope hereof, the civil procedure of Malta has received and adopted generally, the continental distinction between dilatory and peremptory pleas. Dilatory pleas are those which merely serve to delay the issue or postpone the question: examples include pleas on jurisdiction, competence, arbitral or foreign jurisdiction. Peremptory pleas are those, which address and terminate the merit, whether accepting or dismissing plaintiff's claim on the merits. The point made here is that the MTTA adopts, subject always to its provisions, those of the code of civil procedure relating to pleas.

As in the case of Jersey, the question, what the four corners of trust jurisdiction reveal, is asked. The familiar lack of jurisprudential experience here returns. Nevertheless, the assessment made is that the Malta trusts jurisdiction had to build on the existing codified provisions of the code of civil procedure, in the sense of supplementing or qualifying the general rules. The code attributes *inter alia* jurisdiction on the basis of *rei situs*, presence and submission, nationality coupled with domicile, or residence. There is potentially common ground on the basis of residence of a trustee or that trust assets are situated within the jurisdiction. On the other hand, there are no parallel grounds of jurisdiction in the case where the trustee is regulated or any trust asset is administered in Malta. The interpretation adopted herein is that the bases of jurisdiction emerging from both the code of procedure and the trusts law apply simultaneously, with the MTTA prevailing.

A general assessment of judgements of the Maltese courts on jurisdiction reveals a system which is attempting to come to terms with the change of direction occasioned by leaving behind the traditional English rules and adopting the EU rules on private international law.[492] A few examples, are mentioned hereunder, partly to provide a snapshot, but principally to place trust jurisdiction within the broader canvas. In an action for separation, the Civil Court declined jurisdiction on the basis that defendant was neither domiciled nor resident in Malta, nor did he have any assets within jurisdiction over which enforcement was possible.[493] In another matter, the Court of Appeal held that it had jurisdiction to entertain a suit between two English citizens, neither domiciled in Malta, in proceedings related to payment of a share-transfer price in a Malta-registered company. The basis of the judgement was that defendant was present in the island and the obligation necessarily had to have effect there.[494] Maltese nationality, as long as domicile is not established elsewhere, establishes the jurisdiction of the Maltese courts. Plaintiff instituted proceedings in the court of Malta requesting custody of minor children. Jurisdiction was affirmed even though defendant a Scottish national had obtained from the Court of Session in Scotland an order of custody and interdict on the minors.[495] Residence of plaintiff was sufficient for the Court of Appeal to affirm its jurisdiction even when parties to separation proceedings were both UK nationals, and defendant domiciled in England.[496]

Later judgements bear out the change in trend consequent to the EU conflict rules. Two instances relate to an English couple who sustained injuries in an accident while holidaying in Malta. The Court of Appeal recognized and ordered an enforcement of a judgement of the Central London County Court awarding compensation against the insurers.[497] In proceedings related to on-line gaming,

[492] J Harris, "Understanding the English response to the Europeanisation of private international law (2008) 4 J Priv Int L 347.
[493] Civil Court, *Wells v Borg,* XXXIX.II.749, 25th October 1955.
[494] Commercial Court, *Fenech v Clark*, 6th February 1992.
[495] Appeal, *Calleja v Curators*, 31st January 1996.
[496] Appeal, *Harvey v Curators*, 8th January 2003.
[497] Appeal, *Refalo v Garden of Eden Limited*, Court of Appeal 13th March 2007; *Refalo v The Motor Insurance Pool,* 28th May 2010. Similarly, the Court of Appeal classified as a consumer contract the booking of a Mediterranean cruise and recognized a judgement of the regional court

the Court of Appeal declined to recognize a judgement of the Paris Court of Appeal imposing a fine on Malta-registered on-line betting companies. The basis for this refusal was that although it seemed formally, a civil or commercial matter, it was in reality a matter within the ambit of public law and therefore excluded from the operation of Regulation 44/2001.[498] A *decreto inguntivo* of the Italian court of Udine against a company registered in Malta was classified on the basis of the jurisprudence of ECJ as a judgement capable of recognition and enforcement.[499] A judgement of the County Court of St Albans ordering the transfer to the trustee in bankruptcy of immovable property in Malta was upheld through an order for publication of the Notarial Deed accordingly.[500] The Civil Court dismissed a plea that it lacked jurisdiction to be seised with a judicial claim for recovery of sale price of merchandise, holding that defendant had not succeeded in establishing a Distributorship Agreement with an exclusive jurisdiction clause.[501]

The sense and rationality, in this context and the emerging scenario of trust jurisdiction in Malta, is the key question to be addressed. Has any lesson been learnt from the Jersey model? Not much, it is suggested: strangely, it comes across as *prima facie* nothing more than a copy and paste exercise. Of course, it is not seriously suggested, that a trust legislation purporting to be comprehensive and systematic can avoid regulating trust jurisdiction. Rather the question should be whether it would have been better to build and graft on the existing jurisdiction provisions of the code of civil procedure. This may raise a second different question, namely whether we are speaking of jurisdiction or of competence. The distinction is material since historically this was one of the important bases of the code. Jurisdiction means the general power of the court to hear a dispute, and when this has been established, then the measure or division of such power is competence.[502] Does the MTTA therefore purport to define rules of jurisdiction,

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of Dresden against a Malta-registered company on the basis of the Regulation – *Muscat v Express Tours,* 3rd December 2010.

[498] Appeal, *Gie Pari Mutuel Urbain (PMU) v Bell Med Limited*, 28th September 2007; Appeal, *Gie Pari Urbain (PMU) v Zeturf Limited*, 28th September 2007.

[499] Appeal, *Peralta v ZET Limited*, 31st January 2011.

[500] Appeal, *Mizzi v Day*, 11th July 2011.

[501] Civil Court, *Debono v No Stop Technology Limited,* 9th January 2012.

[502] The Roman-Civil law tradition in civil procedure, then identifies various categories of competence, including *ratione materiae*, *valoris*, *temporis*, and sometimes *loci*.

conferring authority on the courts or, is it also a matter of competence? The response is that it had done both, meaning that the special trusts law has created power for the courts to act both on the basis of territorial sovereignty and also on the basis of the specialized subject-matter. The territorial basis, perhaps more akin to jurisdiction, is evident in the basis of Malta residence, regulation or administration. On the other hand, *ratione materiae*, a Maltese trust creates competence.

The question naturally lingers, whether it would have been a more rational choice to take as a starting point the traditional time-tried-and-tested provisions of the code of civil procedure, and then extend their specific application in the case of trusts, with the trust law prevailing in case of conflict or ambiguity. This situation may now require refinement to take into account two important bases of jurisdiction being the contracting of an obligation or the carrying out of an obligation in Malta: this could reasonably be extended to trust obligations. A more difficult question to determine is, whether this basis of obligation includes only questions between trustee and beneficiaries, in which case the trust law articles serve their purpose, or whether it includes settlor and trustee questions, for example an obligation to settle in trust an asset in favour of a Maltese trust.

(ii) Brussels I and its Recast

In context, EU Brussels I Regulation[503] and its Recast[504] deserve more than a cursory mention.[505] The general principle in the Regulation is that a person domiciled in a member state is to be actioned in the state of domicile: domicile being determined according to the internal law of the member state, excluding therefore *renvoi.* Article 5.6 of the Regulation and 7(6) of the Recast provide as follows:

[503] 44/2001

[504] Regulation 1215/12 applies to proceedings commenced on or after 10th January 2015; the Brussels I provision has been reproduced in the *Recast* in substance, with slight variation in language. Article 7(6) reads "as regards a dispute brought against a settlor, trustee or beneficiary of a trust..." and thereafter in identical language.

[505] P Stone, *EU Private International Law* (2014) 29.

> "A person domiciled in a Member State may, in another Member State, be sued:
>
> ... 6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;"[506]

This provision increases widely and dramatically the breadth of potential jurisdiction on trust matters in any member state of the Union.[507] The Malta European Union Act, passed pursuant to the 2004 accession, establishes that the treaty and act of the Union shall be part of the domestic law of the island and shall prevail in the case of inconsistency with domestic law.[508]

The question arises whether article 5.6 of the Regulation confers exclusive or non-exclusive jurisdiction on the member state where the trust is domiciled. The court of the member state seised of the matter is to apply its own rules of private international law to determine the domicile of the trust.[509] The term '*may*,' seems to suggest that proceedings in the place of domicile of the trust remains an option at the choice of plaintiff. It is also logical to conclude that a trustee can also be sued in its place of habitual residence, since it was not the intention to overwrite the other general provisions of the Regulation. There is nothing in the Regulation to suggest the conclusion of exclusive jurisdiction on the courts of the domicile of the trust.

Once jurisdiction in another member state has been grounded, then any judgement obtained therein is enforceable in any and all member states. The jurisdictional basis therefore is significantly wide: potential defendants being settlor, trustee or beneficiary as the three essential parties in a trust relationship.[510]

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[506] M Lehmann et al, "Special Jurisdiction" in A Dickinson and E Lein (eds) (2015) *The Brussels I Regulation Recast* 180. The editors suggest that the Recast does not apply to trusts having their subject matter wills, rights in property consequent to matrimonial relationships, since these are excluded by virtue of Art 1 (2) (a) (b) and (f). There may be something to be said here.
[507] D Hayton, "Jurisdiction over trust disputes under article 5 (6) (2008) 14(6) *T&T* 384.
[508] Article 3 Chpt 460.
[509] Art 60.3.
[510] *Webb v Webb*. C-294/92 decided on the 17th May 1994. In a reference from the UK, the response given by the Court of Justice (EU) was that an action, for a declaration that a person holds immovable property as trustee and for an order to execute documents to vest the legal

There is no definition of trust, it being therefore understood that its meaning is a matter for domestic law. But which domestic law? The view is expressed that it is the *lex fori*, a conclusion based on the principle that, absent a governing law, characterisation by default falls by the law of the court seised. Nevertheless, there remain minimum constitutive criteria of the trust, being either created by statute, writing or evidenced in writing.[511]

However, a difficulty is identified in the provisions of article 60.3 of the Brussels I, kept in art 63 of the *Recast* in identical terms which read thus:

> "In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law."

It is therefore not clear whether the rules of *renvoi* are excluded. Those jurisdictions, such as Malta, where English private international law applies as a default law, or in the case of a *lacuna*, include *renvoi* in their definition of a particular national law. There is no reason why the English private international law rules should not continue to apply in Malta in those situations which are not provided for by EU legislation. The problem with this provision is that it may unwittingly introduce through *renvoi* the application of the domestic rules of another jurisdiction to determine the domicile of the trust, and not the domestic law of the court seised. It may be more correct to identify this matter as a choice of law question, but, at the same time, the domicile of the trust is a connecting factor to ground jurisdiction of the particular member state: this leaves the door wide-open to unpredictable and unexpected results. Another question is whether the Brussels I Regulation conferring jurisdiction to a court on the basis of defendant's domicile, will oust completely the *forum non conveniens* doctrine. It will be recalled that the judgement of the Court of Justice EU in *Owusu v Jackson*, here precludes the application of the doctrine by virtue of the rule that

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ownership in the plaintiff, does not constitute an action *in rem* conferring exclusive jurisdiction in terms of article 22 (1) Brussels I, since the declaratory action in question did not qualify as an action having as its object right *in rem* over immovable property.

[511] It is only in so far as trusts are required to be "evidenced in writing" that EU Regulation 44/2001 shows affinity, but not identity, to the definition in the Hague Convention, which simply refers to "trusts created voluntarily and evidenced in writing", whereas the Regulation refers to trusts "created...by written instrument or created orally and evidenced in writing."

defendant, in terms of Brussels I, is to be sued in its domicile.[512] It is likely that the court of Malta will follow this jurisprudential line.

How satisfactory is the position? Certainly, a civil law jurisdiction may have had less difficulty to receive certain EU provisions in so far as these codify received and applied civil law traditions. For example, the rule that jurisdiction is conferred by habitual residence or domicile is familiar to the domestic civil procedure of Malta, but not to its private international law: between the various Maltese islands, through the application of the historic rule of *privilegium fori* in terms of the code of civil procedure, a defendant has the right to be judicially pursued in the island of its residence. The traditional English private international law rule grounding jurisdiction on presence and submission was adopted in Malta. Likewise, the sometimes artificial rules of connection of actions, whereby the first action by date of filing or registration number, simply determined, that the second connected action be heard by the same court hearing the first filed writ, are part of domestic civil procedure.[513] This Maltese domestic civilian doctrine carried the term *litispendentia* in domestic proceedings, and stood comfortably with the English doctrine of *lis alibi pendens*, obviously here carrying a different meaning referring to litigation in different jurisdictions, and *forum non conveniens*. Likewise, as in all other civil law jurisdictions, the notion of legal interest is known and carries a specific meaning, generally direct, personal, legal and actual to the party involved in the procedure.[514]

The philosophy of the Regulation looking towards a common judicial area, is, all told, positive. However, the construction of a common judicial area should not serve to conceal or avoid problems of characterization. It is reasonably concluded that the court of the first state will recognize by its own internal domestic law, the concept of trust, and settlor, trustee and beneficiary relationship – it matters not that this may in some legal systems assume a proprietary character, whereas in others an obligational nature. Therefore, anyone of the settlor, trustee or beneficiary can be sued in the state of their domcile, as defined by the domestic

[512] C-281/01.
[513] Art 792 of the Malta Code of Civil Procedure
Ibid art 793（1）.
[514] Art 33.2, 38.1, 54 and 58 of Brussels I.

law of the forum where proceedings are instituted. The initial problem of characterization could arise in the state where an action is commenced. Assuming that this hurdle is overcome, it is true that in terms of the Regulation, recognition in another member state should take place "without any special procedure being required,"[515] a position retained in the Recast.[516] While this should open the way to a more seamless procedure of recognition and enforcement, it should not serve to mask the problem that enforcement in a second or a third state could present serious difficulties. Consider this hypothesis. Plaintiff A is domiciled in a state which recognizes trusts as part of its domestic law, and actions Defendant B in a second state *civilopia*, which does not acknowledge trust as part of its domestic law, such as the Netherlands or Spain. The Hague Convention is, for the moment, not relevant. Assuming that the courts of *civilopia* do assume jurisdiction, they then apply the law of the trust, favourable judgement is obtained and recognition is sought in either the state of *civilopia* or a third civil law jurisdiction. The procedure for enforcement should be, in theory at least, reasonably straightforward. If the judgement were a money award, enforcement and execution should not present unnecessary difficulties. The process appears less clear if the judgement were for say the disgorgement of profits or the setting aside of the contract: will the domestic rules of the forum where enforcement is sought, be applied on the default principle of *lex fori* or perhaps *locus regit actum*?

Returning to the question of attempting to assess the extended trust jurisdiction in Malta, the present writer's assessment remains positive. The traditional common law rules on jurisdiction in Malta have been applied over two centuries and more: typically, several elements of jurisdictional rules and even disparate strands from different traditions, have been woven well and flexibly together. The jurisdictional difficulties on trust law and the possible attendant uncertainty in some areas are not welcome, but they are seen as necessary steps towards the creation of an efficient European judicial area. Predictably, the EU trust jurisdictional rules will displace those of the MTTA. At the same time, the Maltese courts typically respond with a pragmatic common-sense approach to

[515] *Ibid*, art 33.1.
[516] Art 36.1; A Dickinson, "In the EU, we trust? A new European framework for jurisdiction and judgements" (2011) 17 (4) *T & T* 280.

favour an application in a manner they consider fairest. The Jersey jurisdictional rules on the one hand, not having to deal with the pan-European jurisdiction, may have an advantage of a less complicated jurisdictional net.

E. Trust Jurisdiction Clauses in Jersey

This section of the chapter will attempt to map the current state of Jersey law on exclusive jurisdiction clauses. The difficulties relating to the precise meaning of certain key terms will be examined: specifically whether *the forum for the administration of the trust*, that is the place of administration, includes, or is the same as, *the forum for litigation*, that is the jurisdiction for resolving disputes, or indeed vice-versa. Moreover, a tension is apparent between the expressed will of the parties and that of the Jersey forum, to extend the reach of Jersey jurisdiction: how do the Jersey courts respond to clauses conferring jurisdiction on the courts of other states, when they themselves could otherwise assert jurisdiction in terms of the TJL? The view will be developed that while Jersey typically treads a finely nuanced balance between principle and pragmatism, it has been only partially successful. It will be argued that an excessively "zealous" and inward-looking interpretation to retain jurisdiction in Jersey, notwithstanding a foreign trust jurisdiction clause, is a wrong move. Rather, in the light of current legal international developments, such positioning in the market may require re-thinking.

The broader scenario remains the hypothesis that the distinction between domestic and foreign trusts is the critical, hinging note behind the trust laws examined: this analysis inevitably has to involve and call in exclusive jurisdiction clauses.

The account begins with a review of the more significant and widely-cited judgements of the Jersey courts. In this context, we enquire, as did Matthews, about the precise meaning and extent of a trust jurisdiction clause as understood and applied by the Jersey courts.[517] The reason is that this process may shed light on whether a clause is purely contractual as in any other commercial contract, or

[517] P Matthews, "What is a trust Jurisdiction Clause?" (2003) 7 (3) *JLR* 232.

a trust-specific clause.[518] This analysis is also relevant to identifying which parties are to be regulated and bound by the clause – the settlor, original trustee and beneficiaries, or later successors? Answers to these questions also require an assessment of historical perspectives of jurisprudential developments.

(i) Jurisprudential sources

An earlier judgement of the Royal Court ruled on an application to stay proceedings.[519] The proceedings involved three contractual claims against defendant, a Jersey company, both in its capacity as former trustee of the Tramp Trust and as current trustee of the Time Trust. The Tramp Trust contained a jurisdiction clause providing that any dispute covering the trust was to be subject to exclusive jurisdiction of the Guernsey courts and to be governed by Guernsey Law. Defendant applied for a general stay of the allegations of breach of trust or, failing that, a stay pending determination of contractual claims on the basis of the Guernsey jurisdiction clause. The Jersey Royal Court found that it had jurisdiction to hear a claim for breach of trust under article 5 (b) of the Jersey Trust Law. It held that an exclusive jurisdiction clause in a trust deed should not be given the same weight as in contract, but should not be lightly ignored.[520] The original parties, and by implication subsequent trustees, had fully agreed to this previously, while beneficiaries may have not. Therefore where a plaintiff sued in breach of an exclusive jurisdiction clause and defendants applied for a stay, a stay should normally be granted – unless plaintiff, with a heavy burden of proof upon him, shows good reason for the stay to be declined. In exercising its discretion, the court should take into account various factors, including in which country was evidence more readily available, whether the law of the foreign court applied and whether it was materially different from Jersey law, and the connection of either party with the respective countries. In the case, the only connection to Guernsey found by the court was this clause and choice of law. All evidence and documents were in Jersey and once the breach of contract claims were held in Jersey, there

[518] Briggs A, The subtle variety of jurisdiction agreements [2012] *L.M.C.L.Q*. 364.
[519] *E.M.M. Ltd v Compass Ltd* [2001 JLR 205].
[520] *Ibid*, 205-206, 212-213.

was a clear advantage for the breach of trust claim to be decided by the Jersey courts.

The next landmark judgement is *Koonmen v Bender*.[521] It was this ruling which prompted Matthews' pen to ask the question about the precise meaning of an "exclusive jurisdiction clause." The context was a request by the defendant to set aside an order for service out of jurisdiction and a declaration that Jersey was *forum non conveniens* for the trial of the action. The clause in the trust document read as follows:

> "(k) 'the Proper Law' means the law to the exclusive jurisdiction of which the rights of all parties and the construction and effect of each and every provision of this settlement shall from time to time be subject and by which such rights, construction and effect shall be construed and regulated."[522]

The proper law was that of Anguilla and the trustees had the power to declare that henceforth "the settlement shall from the date of such declaration take effect in accordance with the law of such other state or territory" and that "As from the date of any such declaration the law of the state or territory named therein shall be the law applicable to this settlement and the courts hereof shall be the forum for the administration thereof." The Royal Court dismissed defendant's application. The Court of Appeal however disagreed: reversing the judgement, it held that a Court possesses a discretion to override a forum which has been agreed to by the parties, but should only do so in exceptional circumstances. The reasoning of the appeal judgement is not publicly available except for a brief note in the reported judgements. The misgiving on this judgement is that the forum of administration was equated with forum for litigation.

A later development is seen as a step in the right direction. This is the Royal Court judgement "*In the matter of the representation of AA*."[523] In language strikingly similar to that of *Koonmen,* clause 3 of the trust instrument thus reads:

[521] Court of Appeal [2002] JCA 218, Noted at [2002] JLR *N*45, on appeal from the Royal Court [2002] JLR 407.
[522] As reported at 420 of the judgement of the Royal Court referred to.
[523] [2010] JRC 164.

> "3.1 Subject to Clause 3.2 this Trust is established under and shall be governed in all respects by the Laws of the Island of Jersey which shall be the proper Law of the Trust and the courts thereof shall be the forum for the administration of this Trust."

Clause 3.2 of the trust instrument provided that the Trustee was empowered to declare at any time that:

> "this Trust shall be governed in all respects by the Law of a jurisdiction specified in the instrument and thereafter that Law shall be the proper law of this Trust and the courts of that jurisdiction shall be the forum for the administration of this Trust."

As in *Koonmen*, part of the difficulties were compounded by the drafting. The matter related to litigation instituted before the Guernsey court by former trustees, companies registered and regulated in Guernsey, against creditor companies of the trust for a determination of whether loan arrangements to the trust were still due and payable. The creditor companies counter-claimed demanding payment of the loan. The newly-appointed trustee brought a Representation before the Jersey court requiring various directions including requiring the former trustees to provide the new trustees with information and documentation relating to the trust, and was granted leave to serve out of jurisdiction.[524] The former trustees appeared under protest as to jurisdiction of the Jersey court, issued a summons to have the service set aside and to stay the Representation. The Jersey Royal Court acknowledged that on the face of the matter, both the Jersey and Guernsey courts, in accordance with their respective laws, had jurisdiction.[525] The hinging factors of this judgement were that there was no reference to "exclusive jurisdiction" as in *Koonmen*. Perhaps more significant is the reasoning that it was intended to administer the Trust from Guernsey, that no connection with Jersey at all existed, save for adoption of Jersey law as the proper law, and the Jersey courts as the forum of the administration. Therefore, it was held that for the Jersey court to seek to assert jurisdiction would "in our view be exorbitant and would lead to confusion and uncertainty." Service of proceedings out of Jersey was accordingly

[524] R Macrae and A Saunders, "In the matter of the representation of AA – trust jurisdiction clauses in Jersey trusts" (2011) 17 (4) *T &T* 302.

[525] The Jersey court claimed jurisdiction on the basis of article 5 of its trust law, since the proper law was Jersey Law.

set aside and the Representation stayed. The Royal Court here made the distinction between administering and disputing the trust, subtly distinguishing *Koonmen* on the basis of a construction of the particular trust deed before it.

The latest word comes from the Privy Council in *Crociani v Crociani*,[526] where the question was whether the substantive issues were to be determined by the Courts of Jersey or of Mauritius.[527] This was an appeal from the Jersey Court of Appeal[528] confirming previous orders of the Royal Court from (i) staying proceedings in the Mauritius court pending the decision of the challenge to the Jersey Courts on the ground of *forum non conveniens* and (ii) the refusal of the Royal Court to stay proceedings in Jersey.[529]

The current Jersey trustees had transferred trust assets in dispute to Mauritian trustees. The Trust Deed empowered the current trustees to transfer the assets to trustees resident in other jurisdictions, whereupon the proper law would change to that of the country of the newly appointed trustees. It was provided that upon such appointment

> ".... thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trust."

The Privy Council confirming both prior judgements accepted the submission that forum of administration meant the "place where the trust is administered in the sense of its affairs being organized" as distinct from "the country whose courts were to determine disputes."[530]

[526] [2014] UK PC 40.
[527] E Rajah and A Robinson, "Jurisdiction clauses in trusts" (2015) 21 (5) *T & T* 557.
[528] [2014] JCA 089.
[529] [2013] (2) JLR 369.
[530] *Crociani*, fn 526, 6-7.

(ii) Various Implications

There are distinct but linked questions here. The first is whether the term forum for administration means the same as the forum for litigation. Logic and right reason suggest that they are different. They serve two different functions. Administration, as the Matthew's article rightly records, has its distant roots in Chancery practice.[531] Forum for litigation is where competing and adversarial interests have to be determined, and no reason is seen to necessarily identify one with the other – they are different *fora.* A widely cited judgement, taking the contrary view, is, in fairness, recorded: the Supreme Court of British Columbia held that the reference to Nevis being "the forum for the administration thereof" was intended to make the Courts of Nevis the exclusive venue for legal disputes under the deed. In addition, the law of Nevis was the proper law and the deed conferred jurisdiction on the Courts of Nevis for the settlement of disputes.[532] The view taken in *Crociani,* it is suggested, is the correct approach.

(iii) A general principle?

A second important reflection is whether the discretion to displace a trust jurisdiction clause is particular to trusts, or indicative of a general principle. The view is expressed that in the case of trusts, a Court in Jersey would be more inclined to intervene: this may be due to change in circumstances or that the original settlor and trustee are no longer involved. The question is therefore what is the nature of the discretion and in which circumstances will a court be inclined to use it? The general lines were set out in *E.M.M*[533]- a trust jurisdiction clause is generally respected, but the courts show sensitivity to changed scenarios. This is therefore to a considerable degree fact-specific. It may be translated into the basis of Equity or *Equité* – the unwritten rule where a court feels in fairness it should step in, and later cloaks its decision in a principle. The evaluation therefore is that the Jersey courts will show a typical mix of principle, fairness and common-sense.

[531] Fn 517.
[532] *Green v Jerigan* 2003 BCSC 1097.
[533] Fn 519 at 212.

(iv) Are trust exclusive jurisdiction clauses treated as in commercial contracts?

The third question follows: should the general rules of commercial contracts relative to exclusive jurisdiction clauses find the same application in the case of trusts? This point is controversial, with distinguished views on either side. The critical views of Matthews of the strictly contractual position are well known and also expressed elsewhere.[534] On the other hand, Hayton has argued that the settlor can, through clear and appropriate language act as agent for the beneficiaries, thereby contracting on behalf of, and for future beneficiaries, including therefore also acceptance of the exclusive jurisdiction clause.[535] The editors of the eighteenth edition of *Lewin* acknowledge both views: however, they seem to incline in favour of the contractual view stating that "there seems to be no policy reason why the jurisdiction clause should be regarded as ineffective or irrelevant in trust cases, still less be ignored by the court..."[536] In favour of this view, they cite certainty, reduction of scope for interlocutory litigation and associated costs as to which the appropriate forum for trusts litigation is. However, they do concede that it "remains controversial whether a jurisdiction clause should carry the same weight in a trust case as in a contract case." In the 19th edition, they did not specifically address the point: the editors rather focus on the distinction, in context, between (i) essential validity, construction, and effect and (ii) matters of administration.[537] It is however acknowledged that a trust jurisdiction clause "can be binding on and enforced by all those claim rights under the trust or who have assumed duties or powers in respect of such matters.[538]" The same view is put forward, albeit not in the context of any in-depth discussion, by *Underhill*. The discussion arises in context of 23(4) of Bussels I, a trust-specific article: the authors state that (art 23(4)) is "intended to extend the effect of jurisdiction clauses in the trust context beyond the scope of expressly consenting parties. Accordingly, a jurisdiction clause must also bind the beneficiaries of a trust."[539]

[534] *Jersey Law Institute* (2012) 171; (2015) 197.
[535] D Hayton in Atherton (ed) *Papers of International Academy of Estates and Trust Law* (2000) 11.
[536] 18th edition (2008) 372.
[537] *Lewin*, 19th edition (2015) 477- 481.
[538] Fn 516, 484.
[539] 1382. The editors cite in support of this view the explanatory report of the Brussels Convention, the "Schlosser Report." In fairness, the Matthews criticism is also acknowledged.

Harris expresses reservations on whether a trust jurisdiction clause should be treated as less than one contained in a contract, holding that the correctness of this view is debatable.[540] The view expressed herein is that trust jurisdiction clauses, although carrying clear affinity to commercial clauses, merit a different treatment: a trust contract cannot be put on the same bar as a bargain. Therefore, trusts merit softer, nuanced, and more fact specific treatment, partly on principle and partly on the different realities between trusts and commercial contracts.

(v) Deriving exclusive jurisdiction from choice of law?

The fourth question relates to the peculiar derivation of an apparently exclusive jurisdiction clause from the governing law: its peculiarity does not lie in that exclusive contentious jurisdiction, and proper law may, by clear choice, be the same, since this is totally understandable and widespread practice. The ambiguity lies in the language of a particular article, with widespread use, of the trust document. In *Koonmen*, this read "'the Proper Law' means the law to the exclusive jurisdiction of which the rights of all parties...." How correct is the assumption that a reference to the governing law of the trust will, or should, create an exclusive jurisdiction article? The Royal Court had its views on this, stating in *Koonmen* that, "We take it as axiomatic that clear words are required to create an exclusive jurisdiction provision in a trust deed" and that "The definition is not a model of good drafting."[541] This conclusion can only be right.

(vi) Assessment

How is the resulting scenario assessed? There are various factors at play: the need to create certainty and predictability, the respect for the rule of law and the will of the parties, the sometimes unclear inter-relationship between jurisdiction and choice of law: all these have to be weighed against the need for, at least, some flexibility. In context, it has been aptly asked whether trust jurisdiction clauses do

[540] Fn 451, 101.
[541] *Ibid*, Fn 521, at 420-421.

indeed after all create certainty.[542] Needless to say, each situation, particularly in context of litigation, has its own history and interpretation of the particular trust deed. The intention of parties is seen as a fundamental factor. It is difficult in practice to eliminate entirely choice of law from jurisdiction questions. Therefore, the difficult task is to assess their relative importance and attempt to arrive at a balanced solution. Of course, this does not answer the question "the intention of which parties?" There is without question more than a measure of sense in doubting whether the settlor should continue to rule jurisdiction questions in a settlement which may have happened a long time before: beneficiaries at the time of settlement could have been unnamed or unascertained.

The jurisprudential line taken by the Jersey Royal Court in the *AA Representation* and the Privy Council's in *Crociani* is laudable. The earlier judgement diplomatically distinguished the Court of Appeal's position in *Koonmen* on the basis of different language and absence of the term "exclusive jurisdiction." The merit of *AA* is that it shows deference and respect to the contractual will of the parties, the source after all of the trust. It is suggested that an acceptance of the distinction between a clause creating a forum for administration and that for hostile litigation is clearly implied. Indeed, the Matthews article is cited with approval. Perhaps the major merit of the judgement is that the Royal Court showed awareness and sensitivity to the realities of the situation, stating inter alia that "the situation in relation to the Trust is fast moving and complex."

Various factors are relevant in arriving at conclusions. The first is the bedevilled distinction between forum of administration, and that of litigating disputes. With great respect to the Equity and Chancery tradition, this distinction serves no useful purpose, and may be a source of contradictory results. Rather, the primacy of principle lies with certainty and predictability, which gives effect to the will of the parties. This is in line with the civil law tradition of autonomy of will of the parties, where *la convention fait la loi des parties*. This is also a constitutive factor of the civil law trust.

[542] L Luttermann, "Jurisdiction in trust instruments – creating certainty or muddying the waters?" (2011) 17 (4) *T & T* 293.

At the same time, it is acknowledged that rigid and extreme positions in this day are dangerous – skirting around, and avoiding the question, whether a trust is, and should be treated in the same way as, a contract. Therefore, the discretion of the court to move with pragmatism is laudable. The adoption of the doctrine of *forum non conveniens* and stay of proceedings as a procedural mechanism, are a necessary, if sometimes welcome, evil. They may militate against the primacy of certainty, but have the merit of avoiding results which may be palpably unfair or bizarre, even though in technical literal line with the trust deed. The retention of this discretion, to be used wisely and sparingly, is to be preferred.

The concluding thoughts are therefore that if there is a trust administration clause at all, it should mean no more than that, and carry no further consequences such as choice of law implications. This will serve to remedy the current clearly unsatisfactory, in so far as uncertain, situation. Above all, and this comes from the pen of a practitioner, there is a need to balance principle, with common sense and pragmatism. Here the Jersey courts have excelled, notwithstanding some variations in their position. The concluding words of the separate judgement of LJ Martin, in the *Crociani* Jersey Appeal, sums this up:

> "In my view, it would be better if the expression *"exclusive jurisdiction*" were reserved for cases where it is genuinely intended to confer exclusive jurisdiction over all trust disputes on the courts of a particular country; and better if the expression "*forum for administration*" were abandoned altogether."[543]

F. Trust Jurisdiction Clauses in Malta

The context of trust jurisdiction clauses within the MTTA will be assessed. It will be argued that within the sphere of operation of the Brussels I and its *Recast*, articles 23 and 25 respectively, have all but completely displaced the conflict rules on trust jurisdiction clauses.

[543] Fn 528, para 155.

A brief reference to exclusive jurisdiction clauses in commercial contracts is relevant to draw the perspective. The validity of clauses attributing jurisdiction to a foreign, non-Maltese court has in general been recognized: the question often arises in connection with disputes over short-delivered or damaged cargo in the case of maritime or trailer/container transport, where it is common for the Bill of Lading to confer exclusive jurisdiction to the courts of the shipper or transporter. In another context, the Civil Court in a dispute related to a franchise granted by an Italian fashion house, upheld the validity of the jurisdiction clause declining jurisdiction in favour of the Courts of Milan.[544] Nevertheless, the Maltese courts always retained a discretion to override this clause and assert their own jurisdiction: this happened when appropriate, as facility of ascertaining damages, evidence for maritime average and proximity of witnesses. Often, such jurisdiction as retained by the Maltese courts was limited to assessment of damages, while deferring jurisdiction in favour of the non-Maltese court indicated as possessing exclusive jurisdiction. In other cases, the courts have disregarded the foreign exclusive jurisdiction clause holding Malta as the more appropriate forum.[545]

The MTTA does not formally or directly state that exclusive trust jurisdiction clauses are valid. Nevertheless, their validity, in the light of this background, cannot be reasonably doubted. There is an indirect acknowledgement of their validity at art 8 (2): it is mandatory on the Maltese court to stay proceedings where the trust instrument provides for the exclusive jurisdiction of the courts of the state whose law is also the governing law. However, subject to this mandatory rule, the court is granted a discretion to issue interim orders. It is also entitled to override such mandatory foreign jurisdiction, if the trust property consists of immovable property in Malta or the settlor or the beneficiaries are domiciled and

[544] Civil Court, *PWA Co Ltd v Louisa Spagnoli SpA,* 12th April 2013.

[545] Appeal, *Micallef v Mifsud* 26th November 1991. In this case, there was specific reference to, stopping short of, a formal adoption of the doctrine of *forum non conveniens*. Civil Court, *Brockdorff v Mediterranean Shipping Limited* 29th May 2001. The court decided the merits holding that the container transporting the wood was defective; Civil Court, *Said v Sullivan*, 3rd October 2003. This was a claim for short-delivery against the ship's agent, with the Bill of Lading providing for the exclusive jurisdiction of the German Courts in Bremen and according to German Law. The court limited its involvement to ascertaining the facts and extent of losses and deferred in favour of the German court; Gozo, *Casafunghi Ltd v Veenpro-Ducten,* 1st February 2011. The Court, here applying Brussels I Regulation, ordered a stay until the prior proceedings, before the Dutch court, became *res judicata*.

resident in Malta. There is no known experience of exercise of discretion in trust proceedings subject to an exclusive jurisdiction clause: therefore this leaves entirely open the question whether a trust jurisdiction clause will be treated in the same way as a commercial contract term, or differently. This unresolved question may assume critical importance, given the trend of practitioners to widely adopt English forms and precedents. It is suggested that outside the operation of Brussels I and its *Recast*, the Maltese courts will generally look at the experience of comparable jurisdictions. It remains difficult to predict whether they would look to the Jersey position, having to distinguish, between *Koonmen,* the *AA Representation* or *Crociani*. Alternatively, they could look at the meaning given by the English Chancery tradition to forum of administration, or the application of the *forum non conveniens* doctrine to trust jurisdiction clauses. The writer's inclination is that colonial habits will die hard: certainly, the dichotomy between administration and litigation, will be given weight, if not necessarily finally adopted.

Even so, the question is whether articles 23.4 of Brussels I, and 25.3 of the *Recast*, have effectively eliminated any room for exercise of discretion by the courts in trust jurisdiction clauses. The pattern set by this Regulation is, that within its scope of operation between the EU member states, an agreement by parties choosing a court to decide on their disputes, is binding and must be given effect to, independently of the requirements of national law.[546] The relevant sub-article, in identical terms for the two Regulations, provides that:

> "The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved".[547]

There is no known judgment of the EU Court of Justice specifically on a trust jurisdiction clause. Articles 23 and 25 overrule even national law of the Member State. Apart from the general requirements such as the written form, the particular

[546] A Briggs, *Agreements on Jurisdiction and Choice of Law* (2008) 238.
[547] Brussels I art 23(4), *Recast* 25 (3).

requirement is that "relations between these persons or their duties or obligations under the trust are involved." This therefore includes even jurisdiction relative to the constitution of the trust, since it involves relations or rights and obligations between settlor and trustee. The articles are therefore drawn rather widely: they exclude however enforcers or protectors. At the same time, between settlor-trustee-beneficiary, the term "relations, rights or obligations" encompasses the breadth of most disputes. There is no distinction between contentious proceedings, or those which are administrative or where surrender of discretion to the court may be involved. This could raise the delicate question as to the exact scope of the clause. The presumption is *ubi lex non distinguit nec nos debemus distinguere* and that it therefore includes the different categories of proceedings.

The English Court of Appeal judgement in *Gomez v Gomez-Monche Vives* acquires in context a double significance.[548] The question was the determination of the residence of a trust to determine jurisdiction in terms of article 5 (6) of the Brussels I Regulation. First, the Court of Appeal held that the choice of law was not necessarily conclusive to determine the legal system with which the trust had the closest connection, and hence resident there. However, it was very difficult to see which legal system would displace the chosen law. Secondly, therefore, since the chosen law was English, the trust was held to be resident in England and therefore the English courts had jurisdiction.

(i) Assessment in context

It has been attempted to trace the wider canvas of exclusive trust jurisdiction in the Maltese legislation. The history and background is (i) the civil law tradition in jurisdiction *in personam*, (ii) English rules applying in the case of a *lacuna* and in cases of jurisdiction *in rem*, (iii) a trust law which, at least, indirectly recognizes the validity of exclusive jurisdiction clauses, and then (iv) the Brussels I Regulation and its *Recast*.

[548] [2008] EWCA Civ 1065; *vide* also fn 590.

Will a Maltese court apply the mandatory provisions of the Regulation, abandoning the accumulated experience of more than a century on exclusive jurisdiction clauses? It is very much doubted how far it can retain any choice at all, although this remains to be seen. Will it consider the validity of the creation of the trust severable from the rest of the trust instrument? Would it be prepared to assume jurisdiction to decide also on the validity of the existence of the trust, even though the trust jurisdiction clause may refer to disputes arising after the creation of the trusts? Nor is it clear whether a court in Malta would be prepared to draw a distinction between a forum for the administration of the trust and a forum for litigation.

It is difficult to predict with certainty the implications of trust exclusive jurisdiction clauses. Clearly, the choice of forum for litigation may be different from residence of trustees, or place of administration of the trust and choice of law. That settlor and trustee feel confident about a clause choosing a different jurisdiction for resolving judicially or by arbitration contentious disputes, is a positive sign of the maturity of the jurisdiction where the trust is administered. No reason is seen why the MTTA cannot flexibly accommodate this, subject to the safeguards referred to.

(ii) Interaction between various sources

In a sense, the conundrum reflects the groping steps of Maltese private international law, emerging from the English tradition, somehow grafted onto a civil law culture, and now the EU framework. While assessments without the benefit of judicial pronouncements are inevitably risky, it is suggested that the Maltese courts will finally embrace the more stringent rules of the Regulation, naturally in its sphere of applicability, even to bind future beneficiaries who had no say or consent in the trust instrument. This conclusion is based partly on an educated assessment, perhaps a 'prediction,' on how a Maltese court would apply Brussels I, and also on the known attitude of the courts to consider the perceived will of the parties as the decisive factor.

(iii) Non-exclusive jurisdiction clauses

Another question is the approach towards "non-exclusive" jurisdiction clauses. The view expressed here is that the Maltese courts will follow the English courts in upholding their validity, even in trusts context.[549] Another unanswered question is whether the Maltese courts would consider compatible the doctrine and plea of *forum non conveniens* with choice of exclusive jurisdiction clauses, following therefore *Spiliada*? Needless to say, this is to be distinguished from *lis alibi pendens*, where, as seen, the court retains a discretion whether or not to stay proceedings, when there are concurrent actions. Outside the sphere of Brussels I, the Maltese courts may be inclined towards a more flexible approach, but the Regulation and its Recast, hardly leave any discretion, if at all, in the face of an exclusive jurisdiction clause, to accept the *forum non conveniens* doctrine, even in trust instruments. This view is re-enforced by the content of both Regulations providing that any provision in the trust instrument is void in so far as it purports to exclude the exclusive jurisdiction of the Court in terms of the Regulation.[550] The basis here is to entrench the strength of exclusive jurisdiction clauses, whether *ex voluntate* or *ex lege.*

The precise jurisprudential line therefore to be taken, given the English background to private international law, the relative late entry of the trust in the Maltese legal system and the interface with the EU *régime*, remains an unquantified factor. The reading, by contrast, of the Jersey cases, unshackled by the EU Regulation on jurisdiction, seems to suggest that the court in Jersey may be prepared to show more pragmatism and malleability: this is assessed as being in some ways preferable to, because it allows flexibility, the rigid approach imposed by Brussels I and its Recast; but then of course that questions the entire *régime* and the wisdom of the European Union common judicial area, an enquiry not limited to Malta.

[549] *Insured Financial Structures Ltd v Elektrocieplownia Tychy SA* [2003] ECWA Civ 110.
[550] Brussels I, art 23(5), Recast 25 (4).

(iv) Hague Convention on the Choice of Court

Before leaving the discussion, a brief mention of the Hague Convention of 2005 on Choice of Court Agreements.[551] This is relevant for Malta because the European Union is a contracting party, and because the *Recast* was fashioned to harmonize with the Convention. The European Union has deposited two instruments on the 11th June 2015, paving the way for the Convention to come in force on the 1st October 2015.[552] Its signatories already include the US. Trusts are not excluded from its scope, so this could become an important choice of jurisdiction instrument.

G. Choice of Law: some preliminary reflections

The first reflection is the recurring question whether choice of law is entirely a matter of the parties' choice or whether it is also a question of public policy. This problem becomes more particular where the law has been chosen by the parties, as distinct from situations where the application of a particular law is inferred by the court. The next question is that of severability. If a party decides to impugn either the validity of a contract or the choice of law provision, which law shall judge the validity of either? For example, if B has entered into a contract with C with *jus civilopiae* the chosen law to govern the contract, is it open for C to ask that it is for *jus utopiae* to determine the validity of the choice of law provision or indeed the validity of the contract? What happens if the choice of law provision is finally held invalid? Does it invalidate the entire contract or is it severable? Briggs has suggested that, in general terms, "a series of sub-rules serves to identify whether the parties were contractually bound and that is preferable to a monolithic rule, no matter how well drafted."[553] This leads to another question, being whether the general rules of contract choice of law apply to trusts. It may also be reflected that the characterisation of an issue, generally a matter for the *lex fori*, is an essential starting point to the proper approach to the point under

[551] www.hcch.net.
[552] http://www.hcch.net/index_en.php?act=status.comment&csid=1044&disp=resdn.
[553] Fn 546, at 381.

discussion.[554] It is on this basis that the process of identifying the relevant conflict rule commences.

Another often-overlooked question is what exactly do we mean by a choice of law article? Intuitively, we understand the law which confers rights and obligations on the parties. There are however other fine lines: does choice of law include the applicable law disputing the contract or indeed the administration thereof? This question then comes back to trusts. The link between choice of jurisdiction and that of law also requires flagging. The reason is that the chosen jurisdiction may have its own important policy considerations, eg legitimary rights, protection of third parties in good faith, which can shed light on or impact the applicable law, whether chosen or determined by default. Nor can the question of recognition and enforcement of a judgement be entirely disassociated from the applicable law. Take for example a situation where a party requests the recognition and enforcement in Spain or Holland of a judgement of the Jersey Courts in connexion with a Jersey Trust: it will be recalled that the courts of Jersey will always possess jurisdiction where it is a trust governed by Jersey law. At that point it will be difficult to advise or predict with confidence the reaction of the Spanish or Dutch Courts: they could possibly decline to recognize the trust as unknown to their law or characterize it and enforce it as a contractual obligation. In the case of the Netherlands, the Hague Convention may chime in. There is then the finer line between a forum not granting recognition to the effects attributed by the chosen law in the case of a trust, because they do not match exactly the remedies offered by the enforcing forum, as against refusing recognition outright on the basis that the creature is unknown. There is for example always the risk that a trust governed by a foreign law may run against a wall not acknowledging any domestic effects of perceived division of ownership or *numerus clausus* of real rights. The concerns just addressed are part of a larger canvas on choice of law questions, yet, they can also be trust-specific and therefore relevant.[555]

[554] Briggs, Fn 491 at 106.
[555] This is indirectly acknowledged by art 3 of the Jersey Law that "Subject to this Law, a trust shall be recognized by the law of Jersey as valid and enforceable."

Important communalities and differences between Jersey and Malta choice of law rules, including trusts, now become relevant. Both systems somehow retain English rules of private international law as a default law where a *lacuna* exists, and this includes the authoritative weight given to writers such as *Dicey* or *Cheshire*. The two jurisdictions have through their own mechanisms adopted the Hague Convention on the Law Applicable to Trusts on their Recognition.[556] The UK extended the applicability of the Convention to Jersey with entry in force on the 1st March 1992. Malta ratified with effect from the 1st March 1996.[557] The Convention is also part of domestic law, the operative parts enacted as a schedule to the Malta Trusts and Trustees Act. Neither the 1980 Rome Convention on the law applicable to contractual obligations, nor Rome I Regulation, has been extended to Jersey,[558] whereas both are applicable in Malta.[559]

It is true that the Convention and Regulation provide that they "shall not apply to the constitution of trusts and the relationship between settlors, trustees and beneficiaries."[560] Nevertheless, it is possible to think of a situation where a trustee engages an investment advisor, or has to litigate on contractual liability of a financial or investment institution for the purchase of investment securities, or assigns trust assets to a third party. Here there is no reason why the Regulation or Convention should not find application, either by express recognition of the choice of law or by the applicable law in the absence of choice.[561] The Rome II Regulation on Non-Contractual Obligations, applicable in Malta but not in Jersey,

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[556] Generally, J Harris, *The Hague Trusts Convention: Scope, Application and Preliminary Issues* (2002); E Gaillard and D Trautman, "Trusts in non-trust countries: conflict of laws and the Hague convention on trusts" (1987) 35 *Am.J.Comp.L.*307; D Hayton, "The Hague convention on the law applicable to trusts and on their recognition" (1987) 36 *ICLQ* 260; P Matthews. "Constructive trusteeship: proprietary claims, personal claims and the Hague Convention" (1995) 1 (7) *T &T* 25; J Harris, "Constructive trusts and private international law: determining the applicable law" (2012) 18 (10) *T &T* 965; M Lupoi, "Effects of the Hague convention in a civil law country (1998) *T & T* 4 (7) 15; D Waters, The Hague Convention twenty years on", in M Graziadei *et al* in *Commercial Trusts in European Private Law* (2005) 56; M Lupoi, "The Hague convention, the civil law and the Italian experience" (2007) 21 (2) Tru. L.I. 80.

[557] http://www.hcch.net.

[558] Contracts (Applicable Law) Act 1990. The Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009.

[559] Chapter 482.

[560] Art 2(h) of Rome I Regulation and 2(g) of the Rome Convention.

[561] The commentary on the DCFR Trust provisions, illustrate how the provisions thereof do not operate in isolation from general rules of contract – ibid, DCFR X.1.103. Therefore outside the specific exclusions, trust provisions do not operate separately from the relevant choice of law rules.

excludes from its purview "non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily,"[562] for example, a claim in delict or quasi-delict or unjustified enrichment.[563] The trust choice of law analysis in either jurisdiction therefore has to be seen in this scenario.

H. Choice of Law in the Jersey Trust Law

The choice of applicable law is perhaps *the* defining, albeit controversial, feature of the Jersey Trust jurisdiction. The law constructs a deliberate architecture on the proper law of trusts, which includes choice of law or applicable law provisions. The first stone thereof is the distinction between a "Jersey trust", a trust whose proper law is that of Jersey, and a "foreign trust," meaning "a trust whose proper law is the law of some jurisdiction other than Jersey."[564] "Subject to *this* law, a trust shall be recognized by the law of Jersey as valid and enforceable."[565]

In principle, Jersey law acknowledges the validity of a choice of law provision, and failing that, attempts to provide a mechanism for determining the proper law of the trust. Article 4, clearly modelled on art 7 of the Hague Convention, provides that:

> "(1) Subject to Article 41, the proper law of a trust shall be the law of the jurisdiction –
>
> > (a) expressed by the terms of the trust as the proper law; or failing that
> > (b) to be implied from the terms of the trust; or failing either
> > (c) with which the trust at the time it was created had the closest connection
> >
> > .....

[562] Art 2(h) of the Rome II Regulation.
[563] L Barnard, "Choice of law in equitable wrongs: a comparative analysis" (1992) 51(3) *CLJ* 474; R White, "Equitable Obligations in private international law: the choice of law" (1986) 11 *Syd L.R* 92. These two contributions emphasize the fragmented nature of Equity's treatment of choice of law rules.
[564] Art 1, on Interpretation, TJL.
[565] Art 3, italics supplied.

> (3) In ascertaining, for the purpose of paragraph (1)(c), the law with which a trust had the closest connection, reference shall be made in particular to –
>
> > (a) the place of administration of the trust designated by the settlor;
> > (b) the situs of the assets of the trust;
> > (c) the place of residence or business of the trustee;
> > (d) the objects of the trust and the places where they are to be fulfilled."

The acknowledgement of validity of choice of law clauses is subject to a term in the trust deed allowing change of the proper law. Curiously, article 41 speaks of change of "proper law of the trust to be changed from the law of Jersey to the law of another jurisdiction." Reasonably, therefore, this means that Jersey law will also acknowledge, subject to the TJL, the change from any non-Jersey law to other governing law.

Contemporary trust deeds invariably have an express chosen applicable law. Nevertheless, there is nothing in principle which prevents the applicable law being determined as that with which the trust had, at time of creation, the closest connection: there are however no recorded cases which offer such an example. While therefore the applicable law can be determined on the basis of, both the chosen law, or, that of the considered closest connection, the impact of JTL on the applicable law is essentially on the law applicable chosen by the terms of the trust. It is here that, in practice, its provisions claw in and may block rights and obligations flowing from a foreign applicable law.

(i) Bases for choice of law policies

The terms relative to the recognition and application of foreign trusts carry therefore a central role. The first objective was to position Jersey as a safe haven from unwelcome challenges under foreign law. This was achieved by blocking the application and effect of any foreign law, claim or judgement in so far as inconsistent with Jersey internal law. To this end therefore, whether a trust be

domestic or foreign, the law of Jersey retains the central overarching position, defeating or striking down anything incompatible. The initial process of reasoning was that geared to transform Jersey into a safe and attractive jurisdiction, where assets or bank deposits could be placed or held. This would be a safe haven from the clutches of a taxman, spouse or succession claims. Therefore, the cornerstone philosophy was the supremacy of Jersey law.

The second objective was a reaction against the attempt by the English Courts to vary the terms of the trust, or to consider the trust assets as available for distribution in divorce ancillary relief proceedings. The practice of the English Courts was generally resisted by the Jersey Courts, which sometimes exercised their discretion or jurisdiction, to give effect to the 'orders' of the English Courts.

The foundation is article 9 of the TJL. Its relevant parts, since they are of the essence and for ease of reference, are reproduced, in their current version:

> "**Extent of application of law of Jersey to creation, etc. of a trust**
>
> (1) Subject to paragraph (3), any question concerning –
>
> > (a) the validity or interpretation of a trust;
> > (b) the validity or effect of any transfer or other disposition of property to a trust;
> > (c) the capacity of a settlor;
> > (d) the administration of the trust, whether the administration be conducted in Jersey or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal;
> > (e) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment and the validity of any exercise of such powers;
> > (f) the exercise or purported exercise by a foreign court of any statutory or non-statutory power to vary the terms of a trust; or
> > (g) the nature and extent of any beneficial rights or interests in the property,
>
> shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question.

(2) Without prejudice to the generality of paragraph (1), any question mentioned in that paragraph shall be determined without consideration of whether or not –

(a) any foreign law prohibits or does not recognise the concept of a trust; or

(b) the trust or disposition avoids or defeats rights, claims, or interests conferred by any foreign law upon any person by reason of a personal relationship or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognize, protect, enforce or give effect to any such rights, claims or interests.

(2A) Subject to paragraph (2), paragraph (1) –

(a) does not validate any disposition of property which is neither owned by the settlor nor the subject of a power of disposition vested in the settlor;

(b) does not affect the recognition of the law of any other jurisdiction in determining whether the settlor is the owner of any property or the holder of any such power;

(c) is subject to any express provision to the contrary in the terms of the trust or disposition;

(d) does not, in determining the capacity of a corporation, affect the recognition of the law of its place of incorporation;

(e) does not affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property;

(f) does not validate any trust or disposition of immovable property situate in a jurisdiction other than Jersey which is invalid under the law of that jurisdiction; and

(g) does not validate any testamentary disposition which is invalid under the law of the testator's domicile at the time of his death.

(3) The law of Jersey relating to légitime shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled in Jersey.

(3A) The law of Jersey relating to conflict of laws (other than this Article) shall not apply to the determination of any question mentioned in paragraph (1).

(4) No –

(a) judgment of a foreign court; or
(b) decision of any other foreign tribunal (whether in an arbitration or otherwise), with respect to a trust shall be enforceable, or given effect, to the extent that it is inconsistent with this irrespective of any applicable law relating to conflict of laws. .....

(7) Despite Article 59, this Article applies to trusts whenever constituted or created."

This article was twice amended since 1984. It was substantially overhauled in 2006,[566] with significant amendments in 2012.[567] Article 49 of the Act recognizes within its terms that "foreign trust shall be regarded as being governed by, and shall be interpreted, in accordance with its proper law." It is moreover, in the same article, provided that a "foreign trust shall be unenforceable in Jersey – (a) to the extent that it purports – (i) to do anything the doing of which is contrary to the law of Jersey, (ii) to confer any right or power or impose any obligation the exercise or carrying out of which is contrary to the law of Jersey, or (iii) to apply directly to immovable property situated in Jersey; (b) to the extent that the court declares that the trust is immoral or contrary to public policy."

Article 49 is an essential tool to place within the general canvas. Placed under Part 3 of the TJL which refers to provisions applicable to a foreign trust, the key term is the uneforceability of a foreign trust in so far as it is contrary to Jersey Law. This article is the building block upon which article 9 rests. While article 9 imposes the supremacy of Jersey Law, article 49 creates an entry obstacle to any provision of a foreign trust incompatible with Jersey Law – these two provisions must therefore be read together.

Jersey law here means domestic internal law, excluding therefore international private law, *renvoi.* This view is defended on two grounds: the first is the sense and meaning of 'foreign trust' as conferred by article 49. It stands in direct

[566] Trusts (Amendment No 4) Jersey Law 2006.
[567] Trusts (Amendment No 5) Jersey Law 2012.

contrast with the heading "Provisions Applicable to a Foreign Trust", where it is positioned. Therefore, it is pleaded, the civilian methods of interpretation *a contrario sensu* and *ubi voluit dixit* apply – had it been intended that Jersey Law included its conflict provisions, it would have simply stated so. The second basis is that the next link in the chain, article 9 (3A) expressly excludes the international private law rules. This view almost certainly excludes *dépeçage*: it is true that the Hague Convention on Trusts is applicable to Jersey and does permit this. It is however submitted that the gates to entry to foreign law in trusts in Jersey do not allow the enforceability of non-domestic provisions.

It has been argued in favour of the narrow approach. Authoritive views, which have convincingly pleaded to the contrary, are acknowledged. These hold that the Jersey Law has opted for a more tempered, even-handed approach, albeit perhaps exceptionally so.[568] If this view be accepted, it would raise the question whether foreign law, to the extent accepted or enforced by the Jersey jurisdiction, would have to be proved. The suggested answer is that the Jersey Courts would apply the accepted English rules and require that foreign law be proved as a matter of evidence – a view based on the general trend, as observed, of the Jersey Courts to adopt, selectively it is true, as default positions, English conflict rules.

On a balance, while unhesitatingly acknowledging the strength of contrary views, and the unquestioned intention to allow a measure of recognition, of foreign trust law provisions, as to be seen *infra*, the effect remains a heavy-handed approach: the gates of Jersey enforceability remain, as is the clear policy choice, firmly locked and impenetrable to foreign law forays.

Article 9 (7) makes applicable the 2012 amendment even retroactively, applying "to trusts whenever constituted or created." The 2006 amendment was clearly motivated by the imperative that the Jersey courts and Jersey Law were to have the last, overriding, word. The purpose of the law was to render a Jersey trust

[568] D Hochberg, "Enforcement of foreign judgements and firewall legislation" (2015) 21(9) *T & T* 1006.

impregnable from attacks or challenges by foreign legal systems or courts.[569] The later amendment attempted to improve in the light of experience the exercise, and to temper some excesses in the first amendment.[570] This section will assess the reasonableness and soundness of these choices, and whether the second amendment really achieved its purpose. It will be asked whether the Jersey trust law has got the balance wrong and also whether these, no doubt well-intentioned changes, can have a counter-productive effect. The compatibility of the current Jersey trust law with the Hague Convention will be questioned. Finally, serious doubts will be raised about the long-term viability of this legislative stance.

(ii) Supremacy of Jersey Law

Any question in art 9 (1) is therefore to be determined solely according to Jersey Law. The width of the provision superimposing Jersey law regulates not only its extent, but the very existence of the trust. This includes powers, obligations, rights and liabilities of trustees, exercise of powers, powers of variation and revocation. One could understand that this could be a default rule: however, it is rather unlikely that this is not regulated in detail by the trust deed. The provision also provides for the sole regulation by Jersey law "of the exercise or purported exercise by a foreign court of any statutory or non-statutory power to vary the terms of the trust." This amendment has given the Jersey courts a clear statutory basis to disregard judgements of foreign courts. Is this simply an attempt to ward off any attempts out of jurisdiction to modify Jersey trusts? Alternatively, it could be vesting the Jersey courts with extra-territorial jurisdiction – is it telling the English courts what to do? A not-so-tongue-in-cheek response would be, '*yes why not'*? The English courts have been at it for so long! Equally particular is the term "statutory or non-statutory power" – is this therefore a broad hint, that powers exercised by foreign courts were arrogated by them without a statutory basis? The concluding words of art 9(1) carry in them a ring of finality – "and no rule of foreign law shall affect such question."

[569] J Harris, "Jersey's new private international law for trusts – A retrograde step?" (2007) 11 (1) *JGLR* 9; D Hochberg, "Jersey's new private international law rules for trusts – A response (2007) 11 (1) *JGLR* 20.
[570] J Harris, "The re-amendment of Jersey's firewall legislation: all right now?" (2013) *T & T* 19 (7) 766; D Hayton, "Trusts (Amendment No5) (Jersey Law) 2012" (2012) (3) *PCB* 102.

(iii) Art 9 (2A) – Rigours somewhat tempered, perhaps

In fairness, amendment No 5, has at art 9 (2A) attempted to introduce two factors: first, a sense of measure and balance, and secondly, a degree of respect and recognition to vested rights or express dispositions in trusts or other instruments. The regrettable, deliberately imposed, limitation, is that while art 9 (2A) qualifies 9 (1), it is overridden by, and subject to, art 9 (2).

That it was felt necessary to temper the rigour and absolutes of art 9(1) is significant. A particular concern appears to have prompted the need to state that the impenetrability of art 9 (1) construct, does not in itself validate acts or dispositions, otherwise invalid in terms of a foreign law. For example, art 9 (2A) does not validate any settlement where settlor, neither owns, nor has power of disposition of the asset. Likewise, it does not validate the trust or disposition of immovable property situated in a foreign jurisdiction, which is invalid by the *lex situs*. Nor does the determination whether settlor has such entitlement, affect any recognition of applicability of the law of any other jurisdiction "in determining whether the settlor is the owner of any property or the holder of" the power to dispose or settle. Article 9 (1) does not "affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property."[571] In these instances, the Jersey law takes a neutral stance: the acknowledgement of a foreign law *ut sic*, expresses no view on the validity or otherwise of an act done under the recognized foreign law.

These provisions seem *prima facie* odd. Why should the TJL bother, or feel the need, to state that the supremacy of Jersey law neither validates, nor has any bearing, on any act done in another jurisdiction? Does is show hesitation in its policy choices? Conceivably, had art 9 (1) showed a degree of recognition to any other act or trust provision under foreign law, then the rationale could have been more clear. But the blocking of a foreign law or Jersey-Law-incompatible-provision remains absolute and, in truth, unqualified. The same reasoning applies to the provision which does not validate a testamentary disposition, otherwise

[571] Art 9(2A)(e).

invalid under the law of testator's domicile at death.[572] It was felt necessary to clarify that the determination of the capacity of a corporation does not affect the recognition of the law of its place of incorporation. Significantly, art 9 (1) "is subject to any express provision to the contrary in the trust or disposition." Is this last provision a contradiction in terms? Let us say that a trust provision is otherwise contrary to Jersey law. Would this validate it? The question is probably unfair: it is far more likely that the meaning is, that subject to the overriding of Jersey Law, there is saving of trust deed provisions.

The logical overall conclusion is that while Jersey intended to preserve the primacy of its law, an intention is displayed to respect rights acquired under foreign law. All the concern and pain to state that art 9 (1) does not validate an act or acknowledge any foreign law, can only mean that it was intended to give a measure of effect, or at least some effect, to foreign law, acts or dispositions done thereunder. The amendment is seen as an admission that the absoluteness of art 9(1) can produce undesired results – it is not without good reason that it is made subject to an express disposition in the trust.

(iv) Was it a good job? Are the amendments consistent with Art 9 (1)?

It is suggested that the TJL may have overstepped its sphere of logical competence when it purported to regulate not only the validity of a trust, but also the capacity of the settlor, and the validity and effect of any transfer or other disposition of property to a trust.[573] Say a settlor domiciled (by English or Jersey private international law) in Italy settles through a *trust interno* an apartment in the south of France to a Jersey trust, the beneficiaries being his family. There are no apparent difficulties of characterization to this straightforward disposal of property in favour of family members. Reasonably, capacity can be governed by either the law of domicile of settlor or by the *lex situs*, even if the governing law of the trust may be Jersey law. This discussion however is not to assess the rules

[572] 9(2A)(g).
[573] P Matthews, "Capacity to create a trust: The onshore Problem, and the offshore solutions" (2002) 6 *Edin LR* 176; B Albertazzi, "The law applicable in Italy to the capacity of natural persons in relation to trusts" (2008) 14 (2) *T & T* 111; J Glasson, "Capacity to create an international trust" (1995) 1(2) *T & T* 11.

of capacity in private international law to create a trust, but rather the Jersey Act provisions, whose implications are indeed far-reaching.[574] They could include testamentary trusts, declaration of trusts or a pure and simple transfer on trust to a trustee. No objection has been unravelled why foreign law should be unable to govern the validity of the transfer and, more so, capacity. Likewise, no principled reasoning has been made apparent why Jersey law should take it all, for example testamentary capacity to create a trust or transfer by legacy a movable situate out of Jersey: there is no obvious connexion with the Channel Island's jurisdiction. The same reasoning applies to the transfer of immovable property situated in another jurisdiction to a Jersey trust, where the *lex situs* should at least have something to say.

The principle was unequivocally stated by the Royal Court.[575] The context was an application to set aside the assignment, governed by English law, of an asset to a Jersey trust on the ground of mistake. The Court held "whenever the validity of a transfer or other disposition to a trust by a Jersey law is in question, the issue must be determined in accordance with the domestic law of Jersey."

(v) Compatibility with the Hague Convention

This may also raise questions as to its compatibility with the Hague Trusts Convention. The "launcher of the rocket" is expressly excluded by art 4,[576] while the principle of severability applies.[577] It would nevertheless seem that in the event of a conflict between the Trusts (Jersey) Law and the Hague Convention, the domestic law of Jersey would prevail. The reason is that the Hague Convention was never extended to Jersey (as was the case of Scotland and Northern Ireland) under the UK Recognition of Trusts Act 1987. Ratification on behalf of Jersey came later in terms of art 29 of the Convention. The Trusts (Jersey) Law 1984 is the domestic law, whereas the Convention represents only an international legal obligation entered into by the UK on behalf of Jersey: it is

[574] Briggs, fn 546 at 396 states that capacity should not be a question of a party choice of law, but concedes that there could be a "far stronger case" for this where the chosen law denies capacity.
[575] *CC Limited v Apex Trust Limited* [2012] JRC 071.
[576] Von Overbeck, *Explanatory Report* (1985) para 53.
[577] Art 9 – "In applying this Chapter a severable aspect of the trust, particularly matters of administration, may be governed by a different law."

at least debatable whether the 1984 Law should prevail over the Convention (and thus the UK would be in breach of its international legal obligations). The Jersey trusts law therefore does not sit entirely comfortably with the Convention, and may well prevail over it in the case of a conflict.

The point is that the question of validity of the act of transfer is distinct from the internal obligations of the trust. If anything, this can make settlement in a Jersey trust more vulnerable or indeed uncertain or unpredictable. Imagine the act of transfer, "the rocket-launcher" or *causa mortis dispositio*, valid by say Kuwaiti or French law at the moment of transfer: why expose the act to an additional risk of the test according to Jersey law? An advisor, structuring a Jersey trust which carries also the jurisdiction of the Jersey courts (very likely sole jurisdiction in the eyes of St Hélier), has to examine not only the terms of the internal domestic law relative to the validity of creation of the trust and capacity of settlor creating the disposition, but also the provisions of Jersey law.[578] This, it is submitted, is an unsavoury and unnecessary complication, which should be reviewed.

(vi) Jersey law rules the trust all the way

Where Jersey law is the proper law of the trust, such law applies exclusively even if the administration thereof is conducted "elsewhere" from Jersey. The difficulty here is that there is no mechanism to distinguish or harmonize the rules of the forum which are mandatory or otherwise, both in Jersey or "elsewhere." An example of this would be the procedure that trustees should follow in connexion with a routine matter or a hostile challenge relating, for instance, to an exercise of settlor's retained powers or, to the extent of information requested by beneficiaries. It is trite that either jurisdiction could have a legitimate interest in enforcing its substantive law. This is not to mention that *lex fori* generally regulates matters of procedure: therefore additional complications can arise due to characterization "elsewhere" of an aspect of the trust administration as one of procedure, for example variation thereof or removal of trustees. Inflexible rules

[578] Article 8 of the Convention does provide that the chosen law governs the validity of the trust, but this does not make the law governing the law relative to the validity of transfer necessarily irrelevant or inapplicable.

hardly make good law, and this situation in Jersey law is seen in this respect as rather unsatisfactory.

The trend continues: art 9(2) determines according to Jersey law any question raised in the preceding paragraphs, "without consideration of whether or not" any foreign law prohibits or does not recognize the concept of a trust or whether the trust defeats or avoids heirship or legitimary rights or measures to protect such interests. This is entirely consistent with Jersey, but simply "shutting out" a foreign legal system is not the best example of a principled solution based on a choice of law rule. There is a significant difference between providing for mandatory or public policy rules of the forum and, simply to state legislatively that, the substantive rights created by any other law or even the terms of the trust relative to "the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment and the validity of any exercise of such powers, shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question."

Amendment no 5 added article 3A, partly re-writing the former article 9 (3), stating that the Jersey conflict rules (other than article 9 itself) shall not apply to the determination of any question in subarticle (1) – this means that Jersey domestic law alone will apply to questions in subarticle (1). This replaces the former provision that the conflict rules of Jersey do not apply unless settlor was domiciled in Jersey, which was subject to criticism.[579] The Royal Court, Bailiff Bailhache presiding, commented that the former subarticle, "seems rather circular because the rules set out in para (1) must themselves be conflicts rules" and found "both these paragraphs of the amended art. 9 rather obscure, but we do not need to decipher their meaning..."[580] This is a much welcome clarification that article 9 (1) refers to domestic rules, excluding conflict rules.

Finally, art 9 (4) unremittingly closes any entry-door to a foreign judgement which is unenforceable "to the extent that it is inconsistent with this Article irrespective of any applicable law relating to conflicts of law." Brussels I or its

[579] Harris, fn 570 at 776.
[580] *B Trust* [2006 JLR 562].

Recast have not been extended to Jersey, so that there is no reciprocal obligation of recognition and enforcement, otherwise applicable. But the question inevitably arises: could not Jersey have achieved its desired effect by simply stating that mandatory or public policy rules of the forum exist? These would include the domestic provisions of Jersey trust law, which after all would be permissible in terms of articles 15 and 16 of the Hague Trusts Convention. It is remarkable that a similar provision in Guernsey law is wider, since this prohibition extends to "recognition and enforcement"[581] and not merely "shall be unenforceable" as is the case of Jersey.

(vii) Resistance to the English Courts

In fairness, it has to be conceded that there is much to be stated in defence of the choice made by the Jersey trust law. The context therefore is also the resistance of the Jersey courts to attempts by the English courts to vary the terms of Jersey trusts.[582] It was stated by the Royal Court:[583]

> "With some diffidence, we express the hope, however, that the English courts might in future exercise judicial restraint before asserting a jurisdiction to vary a Jersey trust. This court has shown itself sensitive (long before the enactment of the Trusts Law amendment) to perceived interference with its jurisdiction to supervise Jersey trusts."

A history of similar attempts by the English courts is recorded.[584] The Jersey courts on various occasions, particularly before the 2006 amendments to the trust law, invoked "comity" as a basis for recognizing the judgements of the English Courts. A declaration that a Jersey trust was a sham, *re the Fountain Trust*, was recognized by the Royal Court and given effect on the basis of comity.[585] It should be added however that here, the court also cited with approval the reservations made in *Rabaiotti*, where it was stated that it was seen as unlikely, on

[581] Art 14 (4).
[582] N Francis and J Harris, "Trusts and divorce" (2012) 18 (2) *T &T* 132.
[583] *B Trust,* fn 580 at 575.
[584] *Re Rabaiotti* [2000 JLR 173]; *H Trust* [2006 JLR 280]; *Representation of HSBC Trustee International Limited* [2011] JRC 167 and [2014] JRC 254A.
[585] *Lane v Lane* [1985-86 JLR 48]; *Compass Trustees Limited v McBarnett* [2002 JLR 321]; *Fountain Trust* [2005 JLR 359].

the basis of comity, that an English court would vary a Jersey Trust.[586] This basis of comity as adopted by the Jersey courts has faced criticism because it is inconsistent with the obligation which lies at the basis of modern recognition and enforcement of foreign judgements.[587] The scenario is the effect and acknowledgement in Jersey of orders of the English courts, and this has been the subject of much discussion.[588] This came in the wake of a spate of high-profile judgements on matrimonial property,[589] not all specifically linked to the variation of Jersey trust by the English courts, yet still relevant to trusts or matrimonial property in cross-border litigation.[590] In two landmark judgements, of both the Jersey Court of Appeal and the Royal Court, *Re Mubarik v Mubarak*,[591] it was authoritatively stated that an order by the Family division of the English High Court could not be enforced in Jersey pursuant to article 9, since it purported to vary the Jersey trust. Nor could the court give the trustee directions under art 51 to comply with it. It was held by the Court of Appeal, confirming the judgment of the Royal Court, that all the adult beneficiaries should be treated as having consented to the variation and that the Court should approve and give consent on behalf of the minor and unborn beneficiaries pursuant to art. 47. The principle was therefore very clearly stated that an English order, varying a trust or ordering beneficiaries to make payments in matrimonial ancillary relief, was not enforceable in Jersey. This rule was later re-stated in the terms that unless a Jersey trustee had submitted to a foreign court, such order could not be enforced against the trustee without a fresh hearing on the merits in Jersey. Nevertheless, it

[586] *Fountain Trust*, fn 585 at 370.
[587] J Harris, "Comity overcomes statutory resistance: in the matter of the B Trust (2007) 11 (2) *JGLR* 184.
[588] P Matthews, "Trusts and divorce: the enforcement in Jersey of English nuptial settlement variation orders" (2008) *Tru. L.I.* 63.
[589] *Trusts and Trustees* (2011) 17 (9) devoted entirely to divorce, matrimonial property and trusts.
[590] *Charalambous v Charalambous* [2004] EWCA Civ 1030. The English Court of Appeal holding that once the parties had invoked, as they were entitled to do, English jurisdiction, it would not recognize the variation by the husband of a Jersey trust; *Chellaram v Chellaram* (No 2) [2002] EWHC 632 (Ch): the High Court held that England was a *forum non conveniens* and declined jurisdiction; *Charman v Charman* (No 2) [2007] EWCA Civ 503. The principle was confirmed that trusts will be taken into account as matrimonial assets for purposes of ancillary relief; *Gomez v Gomez-Monche Vives* [2008] EWCA Civ 1065. This case considered the meaning of domicile of a trust for the purposes of Brussels I, holding *inter alia* that appointors or protectors did not fall within the meaning of "sued as trustee or beneficiary" within the meaning of art 5(6). *Vide* also Hayton, fn 507.
[591] [2008 JCA 196], [2008 JLR 250], [2008 JLR 430]; S Meiklejohn, "Mubarak v Mubarik" (2009) 15 (4) *T & T* 228; M Renouf, "Welcome clarification from the Jersey courts on enforcement against trusts: Mubarak v Mubarik" (2008) 14 (9) *T & T* 659.

was open to the Jersey court, not as a matter of enforcement, to exercise its discretion to give directions to the trustee. It could not however exercise its discretion to order an act not within the trustee's power.[592] All this judicial flurry, with the background of the English courts outlined, created such reverberations of concern in the Jersey trust industry as to prompt the intervention of the then Bailiff to calm the waters and make extra-curial statements of principle to give assurances and strive towards certainty.[593]

(viii) The 'Firewall' philosophy as a key to Jersey Trust Law

Jersey trust law has therefore made the 'firewall' protection as a fundamental choice. Apart from its civil law orientation, the trust legislation is constructed to prevent the entry of claims based on foreign law, inconsistent with domestic Jersey law. This is achieved through two mechanisms: first, the rigours of article 9, and the other is the rendering unenforceable in Jersey, by virtue of article 49, of a foreign judgement to the extent of incompatibility with Jersey domestic law. A simultaneous allied factor is the breadth of jurisdiction of the Jersey courts. While this is of course, different from the choice of law provisions, the moment the Jersey courts are called into action, the rules of unenforceability take effect. Therefore, Jersey law reigns supreme due to the combined action of the choice of law and jurisdictional rules. This attributes to the Jersey trust, its specific character and identity.

It has been asked whether the hypothesis that the distinction between domestic and foreign trusts is the essential feature of Jersey law of trusts. The suggested conclusion is, yes: this fundamental divide permeates and defines the Jersey trust: the moment, it is created, this distinction springs into action. The extent of response by the Jersey courts and lawyers is testament to this foundational construct.[594] The distinction between domestic and foreign trusts is the pivotal design of the firewall philosophy, cutting across the entire board of the Jersey trust law. The consequence of the domestic trust is it attracts Jersey jurisdiction,

[592] [2010 JLR Note 35] *Hsu v Barclays Private Bank*; *Otto Poon* [2011] JRC 167; [2014] JRC 254A.
[593] M Birt, Trusts and divorce courts – an offshore perspective (2009) 13(1) *JGLR* 6.
[594] P Matthews, "The impact on onshore and offshore trusts of English matrimonial litigation" (2006) 11(1) *JGLR* 27.

while the foreign trust, while retaining some freedom of choice, is still subject to restrictive provisions of the TJL.

This leads to two concluding questions on choice of law. First, has Jersey gone too far? Secondly, does this policy find sense and consistency? The assessment of the first question is similar to, and indeed symmetrical with, the comments on jurisdiction. With respect, Jersey is seen as having tipped the balance excessively in favour of a protectionist and isolationist attitude. The concern to protect one's international industry on the market place by "ring-fencing" or creating a citadel against further challenge, needs no further comment. However, and this addresses the second question relating to consistency, to invoke "comity" on the one hand, but then refuse, on the other, any enforcement of judgements contrary to Jersey law is, respectfully, contradictory. There is a sense of incongruity in allowing on the one hand the choice of foreign law, but then subjecting it to the final word of Jersey law: it is either a foreign trust or it is not. As is likewise an antinomy, the disregard of widely accepted rules such as the regulation of capacity by the law of domicile, imposing instead the Jersey applicable trust law. It has been seen that some provisions of art 9 do not sit comfortably with the Hague Convention: indeed they have been dubbed by the Royal Court as "rather obscure."[595] It may not have been necessary to take such extreme, possibly draconian, measures since alternative remedies such as rules of public policy were available to protect the forum. In defence, the Jersey courts have characteristically responded by pragmatic and fair solutions, which are not unprincipled.

A further point is the familiar question whether Jersey should, or indeed can continue, in its present "offshore" model. It is suggested that other jurisdictions such as the Cayman Islands, Bermuda, the BVI, Cooke Islands may still be able to retain their function; however Jersey needs to evolve. Various factors indicate this: proximity to Europe where its neighbours are all EU members. Its excellence of services and legal system, all prompt towards a more open and less unwelcoming system to anything contrary to Jersey trust law. Above all, a danger exists that it could become a byword that it is inflexible and applies, even within the choice of law context, exclusively its own rules: this is not positive on the

[595] *B Trust,* fn 120, 572.

international trust marketplace. A writer, hailing from a comparable small island-state jurisdiction immediately identifies the risk that one's own shores are perceived as the world. Jersey should buck the trend of various offshore jurisdictions which regularly sprout. There are various ways to protect the primacy of Jersey law, without having to resort to the incongruous distinctions made in article 9. Nor should, modifying them towards a more flexible and receptive approach to non-island choice of law, imply a loss of any taxation advantages. Neither is exclusive of the other.

This point was prophetically made by Matthews quite some time ago.[596] Citing what the Red Queen said to Alice in "Through the looking glass" as having to run twice as fast to get somewhere, the message is that Jersey cannot sit back in complacency, but has to evolve. This address came on the eve of the introduction of the Euro in 1999 in various EU member states; the risk was identified that "courts in onshore jurisdictions are more ready to detect shams and artificial devices." The Jersey law and trust structures, with their attempt to create impenetrable walls, may manage to send the wrong message: while this is not always a fair assessment, that of being home to such 'devices', may manage to do just that.

I. Choice of Law in the Malta Trust Law

This section will (i) briefly trace by way of background the general principles of choice of applicable law in the private international law of Malta and (ii) focus on the provisions of the Trusts and Trustees Act. It will be argued that the Malta trust law has chosen to position itself as an open, balanced and generally receptive jurisdiction for international trusts. The Hague Convention has been ratified as an international treaty, but has also been incorporated as part of the MTTA. Avoiding, or keeping to a minimum, instances of conflicts with the mandatory rules of the forum, is a clear priority in the policy choices made. For example, a framework of workability is provided with the domestic rules of legitimary succession claims, attempting to balance and harmonize trust settlements with

[596] P Matthews, "Jersey: the way we were" (1999) 5 (3) *T & T* 14.

potentially competing claims for the reserved portion. The Trusts Law has gone to demonstrable lengths to provide directions to manage antinomies in the potential application of different choices of law. It has therefore opted to move away from the model adopted by Jersey which has striven towards the creation of Jersey trusts unassailable from foreign challenges. Again, the question is whether the hypothesis that the distinction between domestic and foreign trusts, the basis of the applicable choice of law rules, works as a defining factor in this jurisdiction.

(i) General principles of choice of law

The MTTA has to be seen and interpreted in context of the traditional rules of choice of law and the Hague Convention. The limited experience of Maltese jurisprudential authority clearly justifies the conclusion that even before the Rome I Regulation, a choice of contractual proper law or, in its absence, the law of closest connection was upheld, subject to any mandatory rules of the forum. This is generally derived from the civil-law consensual tradition in contract law, and side-by-side through the application of the traditional English common law rules on applicable law.[597] It is suggested that where the Rome instruments do not find application, the English conflict rules will remain valid, for example, in the traditional definition of domicile. Even where the EU rules are applicable, it is most likely that English comment and scholarly interpretation regarding such rules or the judgements of the Court of Justice, will retain unimpaired their hold on the Maltese legal system. This background is relevant since it is against these rules that the various scenarios of the Malta trust legislation is to be viewed: consistently, with the method adopted in this chapter, jurisprudential sources are identified.

An example from the judgements is a claim by a Maltese lady married to an English serviceman and later separated requesting refund of rent overpaid.[598] On an incidental question, whether by Maltese domestic law at the time, a married woman, even if separated, had *locus standi* in civil proceedings, the court applied

[597] Briggs, fn 546 at 381.
[598] Civil Court, *Chalker v Brincat*, XXXVI.II.67-68, 30th October 1952.

the English rule then in force that a married woman carried a domicile of dependence of her husband and gave effect to the Married Women's Property Act 1882. In another instance, a Maltese citizen acted against an "offshore company" registered in Malta which carried out petroleum operations in Libya.[599] The court confirmed the choice of Malta as the forum for litigation, holding however Libyan Law to be the proper law of the employment contract, since this had the closer connection than Maltese law. In the event, the court received evidence as proof of foreign law and decided the case on that basis of Libyan law.

In determining a claim for legitim, a court in Gozo applied English rules of private international law.[600] The heirs of an Italian national resident in Gozo, his children from his first marriage, demanded their reserved portion. Legitim applying Italian law was computed on two-thirds of the estate, while according to Maltese law it was one-third thereof. The principle was stated that the choice of applicable law for legitim was domicile at time of death. Citing with approval *Cheshire,* the court invoking the traditional English rules of domicile, found a domicile of choice in Gozo at time of death. Maltese law was accordingly applied to the claim even in the case of assets situate in Italy, such as deposits in a Turin bank account. A choice of law question arose in a maintenance demand for a minor child born in Russia to Russian nationals, married and divorced in Russia, but "habitually resident" in Malta.[601] The court applied the law of Malta since it was there that the minor was brought up, and habitual residence defined lifestyle and needs. In another instance, the court applied English conflict rules in a matrimonial dispute context.[602] The court found that the wife, a Dutch national, and the husband, an English citizen, had established their domicile of choice in Malta and therefore applied the domestic law of community of matrimonial acquests. Another example is the order by the Court of Appeal granting recognition and enforcement in Malta of a judgement of a court in Bremen Germany, awarding payment on the basis of a contract governed by German law.[603] The distinction between choice of forum, or arbitration, and choice of law

[599] Civil Court, *Briffa v Voest-Alpine*, 15th April 2002.
[600] Superior, *Aquilina v Sultana*, 8th October 2010.
[601] Civil Court, *A v B*, 27th November 2003.
[602] Civil Court, *C v Caruana*, 30th November 2005.
[603] *Schoeller v Modern et*, 10th May 2005.

was upheld by the Civil Court.[604] The matter related to a claim for payment arising out of logistic and pipeline assistance to an Italian oil company in Western Libya. The Court of Appeal held that the fact that English Law was the governing law of the agreement did not confer jurisdiction on the English courts, and the jurisdiction of the courts of Malta upheld.[605] This brief *détour* may be concluded by referring to another principle of English conflict rules related to foreign law. The Court of Appeal accepted, as proof of foreign law, the expert testimony of an Australian law professor on the formal validity of a will made in Queensland and applied the rule that form was determined by the *lex loci actus*.[606] The Civil Court, again citing *Cheshire*, held that unless parties plead the application of foreign law and prove its content, the court will apply the *lex fori*, in this case Maltese law.[607] *Xerri vs Zejt Marine Services Limited* concerned a claim for damages following a collision of two ships with a Maltese flag, in the port of Sousse, Tunisia.[608] Again quoting *Cheshire*, and applying Rome II Regulation, the Court held that while there was no doubt that the courts of Malta had jurisdiction over defendant as a Malta-registered company, the applicable law was the *lex loci delicti* and therefore Tunisian law. This background is relevant, and has been referred to, since the MTTA conflict provisions are placed within its context.

(ii) Provisions of the Malta Trusts and Trustees Act

First, can a hierarchy of sources be identified? The reason for asking this question is that issues related to choice of law arise in the Maltese experience principally, although not exclusively, in context of contractual choice of law, whether expressed or otherwise determined: moreover, in the island's legal and judicial practice, the terms "proper law", "governing law" or "applicable law" are generally held to have the same meaning ascribed to them, without much distinction. It is relevant to state here that the law of Malta has understood – although never expressly, but only intuitively – the particular applicable law as, that which both creates rights and obligations between parties and also, that

[604] *Caruana v Medoffshore*, 28th November 2011.
[605] Appeal, 30th November 2012.
[606] *Zammit v Zammit,* 20th May 1968.
[607] *Fenech v Cassar*, 5th July 2007.
[608] Civil Court, 12th December 2013.

applicable to resolve disputes. More subtle questions such as which law is to determine the validity of a contract if this is disputed are not known to have arisen, although it is suggested that the chosen law will decide on questions of annullability or challenge to validity. There is in other words a unitary approach whereby the governing law decides all contractual issues. It is therefore logical to assume that even in trusts, choice of law will carry the meaning received and applied over the years, even though in a particular context. That stated, there is, however, no obvious hierarchy of sources. Most of the substantial provisions of the Hague Convention are, as seen, part of domestic law.[609] The MTTA makes the Convention applicable, through its art 5A (2), not only to trusts within its own meaning, "but also in relation to any other trusts of property arising under the law of any other country." The breadth of imaginative reach of this provision is self-evident. Nevertheless "subject to the provisions of *this* (italics added) Act, a trust shall be governed by its proper law and shall be interpreted and be enforceable accordingly."[610] The landscape therefore predicates, at horizontal level, three sources: the first is the commercial and contractual choice of law principles, generally meaning here as derived from English law, since trusts are excluded from the operation of Rome I. The other two sources are obviously the Hague Convention and the Trust Law Act. The conclusion that the *lex specialis*, the domestic law, carries primacy is easy to reach. It is equally demonstrably true that its application is heavily conditioned by the inevitable intertwining with the other sources. To this end, therefore, the trusts choice of law carries its own distinct, composite character. At the same time, the civil law tradition of autonomy of will of the party, here the settlor, is evident.

It has been observed that a principal policy objective in the choice of law provisions of the Malta Trusts Act is to provide an open platform, capable of accommodating non-domestic governing law. More specifically, a *desideratum* identified, is the encouragement of constitution of trusts in Malta or administered

[609] Art 5A MTTA excludes as part of domestic law, art 13 of the Convention which grants a contracting party the power not to recognize a trust. Likewise excluded is art 9 of the Convention which provides that "Nothing in the Convention shall prejudice the powers of States in fiscal matters." Looking at this creatively, this was possibly excluded so as not to prejudice a possibility of a tax incentive opportunity, since no international obligations have been contracted to recognize tax provisions of the other parties to the Convention.

[610] Art 5 (1).

in Malta by local trust-professionals with the governing law of the trust being foreign law. An example would be a settlor *cum* beneficiaries with no connection with Malta and settled assets situate outside the jurisdiction, administered in Malta by local trustees.

(iii) Provisions specifically related to choice of law

Article 6 of the MTTA provides that the applicable law of the trust, whether that of Malta or foreign, comes either as a consequence of an express choice, or through a determination made in accordance with article 7 of the Hague Convention, as part of domestic law – the law with which the trust has closest connection. In the case of a Malta trust, "notwithstanding the provisions of any other law, the validity of the trust, its construction, its effects and the administration of the trust shall be governed by this Act and by other provisions of Maltese law on trusts." In the case of a foreign trust, "notwithstanding the provisions of any other law, the validity of the trust, its construction, its effects and the administration of the trust shall be governed by such foreign law and shall be recognised and given effect to in Malta in accordance with the Convention and this Act."[611] The distinction and difference of treatment are here manifest, and clearly emblematic of the different policies applicable.

The clear consequence is that the MTTA does not purport to govern the "rocket-launcher." As distinct from the Jersey law, in the case of foreign trusts, question of capacity, validity of transfer or settlement in trust, may be governed by any other foreign law. Recognition of this validity comes on the basis of both the Trusts Act and the Hague Convention. From the language of the articles employed, there is a degree of symmetry of treatment since "validity, construction, effects and administration" are a common matrix. The question which therefore follows is whether Maltese private international law has any role in this process of recognition of validity. An obvious example is settlement in a trust governed by the law of Malta, with Maltese trustees, where settlor and beneficiaries are neither domiciled nor habitually resident in the island and

[611] Art 6 (1) and (2).

without any connection of the trust property with the island. The implications are that any involvement of domestic private international law could raise issues such as characterisation and the troublesome *renvoi.* For example, should the domestic law characterization figure at all in a challenge to a settlement in trust by heirs claiming excess of the disposal portion and their legitim where matrimonial property is concerned?[612] The suggested short answer is no. It is acknowledged that one could plead, in favour of the application of Maltese conflict rules, article 9 of the principle of the Hague Convention, that is the principle of severability, with a different law governing separate aspects of the trust. The preferable approach, it is strongly suggested, is to eliminate domestic conflict rules entirely from the equation. By parity of reasoning, the Hague Convention at art 17 expressly states that the word law "means the rules of law in force in a state other than its rules of conflict of laws." A purposive interpretation would tend to avoid the distinction between domestic law and conflict rules, and therefore makes for an adoption of the foreign law, without any subsequent classification, with the domestic forum applying the foreign law. This is also consistent with the distinction between domestic and foreign trusts, involving the substantive not the conflict provisions of the governing law. It is also fair to add that the introduction of Malta conflict rules could potentially lead to an unwitting "Jersey effect", that is, subjecting a foreign choice of law and the preliminary effects in the creation of the trust to the rules of domestic law – a choice it was clearly intended to avoid. Finally, it is worth remarking that the MTTA does empower, without obliging, the court to apply mandatory rules of private international law where these apply.[613] However, this article is viewed as inapplicable to questions prior to the constitution of the trust, which should remain governed by their applicable law, free from any scrutiny of the law of Malta.

[612] The incidental question could here arise where the status of a legitimary or an heir is challenged.
[613] Art 6A (6).

(iv) Mandatory rules of the forum

A remarkable aspect of the MTTA is its evident concern to avoid systemic antimonies, and perhaps also to look for consistency between various potentially conflicting principles, possibly the most important examples being the rules of reserved potion and community of property in marriage. There are no comparable provisions in the Jersey, nor indeed, in the Guernsey, law. The first step is that the parameters of mandatory policy are drawn in sharp edge. In a copy and paste exercise of art 15 of the Hague Convention, in the case of Maltese trusts, the particular mandatory provisions "shall prevail over the terms of the trust unless otherwise expressly provided in this Act or in other provisions of applicable law relating to trusts and related matters."[614] In line therefore with the spirit of partial flexibility generally displayed in the choice of law provisions, the door was left half-ajar. The mandatory provisions may even be displaced, where expressly provided in the MTTA.

A peculiar, possibly distinguishing factor, in the Malta Trusts Act is the policy decision to attribute decisive connecting influence to domicile of settlor at the time of settlement. This likewise finds no mirror in the Jersey law, except possibly art 9(3) where the law relating to *légitime* applies where settlor is domiciled in Jersey. This is relevant in three instances. The first is a Maltese trust, which has no connection to Malta by reason of (i) *situs* of immovable property or (ii) domicile of settlor at time of settlement. In this event, the mandatory provisions referred to, do not find application: the general provisions of the Act, however, do apply and this conclusion is based on a logical deduction from this provision. One can readily understand that the fact of immovable property situate in Malta settled in trust should attract the mandatory rules of the forum. The thinking behind the other part of the provision relating to domicile of settlor at time of settlement, may have been, perhaps nervously or lacking self-confidence, an exercise to avoid scaring-off prospective settlors due to the potential

[614] Art 6A – these mandatory provisions are "(i) the protection of minors or incapable parties; (ii) the personal and proprietary effects of marriage; (iii) succession rights, testate and intestate, especially the indefeasible shares of spouses, ascendants and descendants; (iv) the transfer of title to property and security interests in property; (v) the protection of creditors in matters of insolvency; (vi) the protection, in other aspects, of third parties acting in good faith."

application of the mandatory provisions of Maltese law as the governing law. The second scenario is connected to a foreign trust: here the mandatory provisions only apply, notwithstanding the choice of foreign, non-Maltese law, if settlor were domiciled in Malta at time of settlement. The third instance is a foreign trust where settlor was not domiciled in Malta, at time of creation: the provisions of the Trusts Act shall apply only in so far as they regulate the recognition or otherwise in Malta of its effects.

Why has such fundamental importance been attributed to domicile in Malta at the time of settlement? An educated guess or hypothesis might surmise that the bright line was drawn since this was considered a sufficiently strong link to the mandatory rules of the forum. Another plausible justification could be to counter an easy avoidance of the mandatory rules of the forum: it would otherwise be rather easy for a Maltese domiciliary to simply choose a foreign law and skirt round the rules of legitim or good faith protection to third parties. Domicile at the time of settlement could be seen as an ascertainable marker to fix the link with those provisions from which the jurisdiction allows no derogation. Perhaps this choice could be defended on the basis of certainty, or at least some certainty, to establish the connection referred to. On the other hand, this choice is viewed as difficult to apply in practice and tormented with risks. Simultaneously with ordinary residence, generally for tax purposes, and habitual residence in EU instruments, Malta still applies the traditional common law definition of domicile: instances are not unknown when this concept produces unpredictable, indeed startling, totally unintended, effects – say an unexpected revival of domicile of origin, or a controversial determination of domicile of choice or indeed of dependence. For example, what further justification to link the trust can be pleaded if the original domicile of settlor changes after settlement? It is difficult to make a case for retaining the link to the mandatory provisions where the settlor may have lost or abandoned his link with the island. The choice of domicile as a connecting factor, with its inherent unpredictability, may be seen as an unfortunate, ill-considered choice.

Only a foreign trust where there are no links to Malta by reason of immovable property settled, or domicile of settlor at time of settlement, can be sure to escape

the risk of the net of the mandatory provisions. This leads to the original question – was such a link to the forum necessary at all? It is certainly a significant limitation to the policy choice made by Malta to respect choice of foreign law – indeed this may have an unwitting "Jersey" effect of extending the long arm of the rules of the Maltese jurisdiction. How will this tally with the provision expressly granted by the Act, that the terms of the trust may provide for the change of its proper law?[615] On the other hand, it is in fairness conceded that the choice may have been targeted precisely to encourage foreign settlements with no domestic connection, with the corollary that the slightest link with the domestic forum risks attracting its inderogable rules.

(v) Management of Conflict provisions

The MTTA underlines its further, almost obsessive, concern with the forum's mandatory rules through an *ad hoc* article, designated in its side note, as "Management of conflict provisions."[616] Its declared aim is "to ensure that the provisions of applicable law which cannot be derogated from by voluntary act are applied in a manner which preserves the trust relationship as far as possible." The directory principle enunciated is that "the application of the mandatory rules shall not produce the failure or invalidity of the trust, and where possible, the trust shall continue under the same terms in relation to property which is unaffected by such mandatory laws." The implication is that it gives the courts a broad discretion to interpret the trust provisions and the law, so as to save a trust which is at risk due to the 'mandatory provisions.' To this end therefore, with zeal characteristic of this article, various powers were conferred on the trustee: these include the power to return assets to the settlor, to act where legally possible so that the beneficiary receives the benefits intended through an alternative method, to reduce the benefits and to vary the terms of the trust. It is likely, that the different degrees of mandatory applicability are designed to reflect a spectrum of moral correctness or acceptability intended, in a jurisdiction which is relatively new to trusts.

[615] Art 5(3).
[616] Art 6B.

(vi) Gilding the lily?

Has the Malta Act attempted to gild the lily? The spirit and motivating factor behind the detailed conflict management provisions is to allow and as far as possible give effect to the applicable law of the trust, and avoid imposing the stamp of its mandatory principles and values. The question that springs to mind is whether all this detail was actually necessary. It may seem "a more Catholic-than-the Pope" syndrome: in its effort to achieve the desired objective referred to, the technically laudable provisions may have gone into unnecessary lengths, details and regulation. There may be solid, albeit not irrebuttable reasons, to justify this extent. Nevertheless, the length and detail are excessive.

A second related question is whether Malta is chasing some sort of rainbow with its particular choice of law provisions. It is possible to contemplate a scenario where a particular foreign law is chosen to govern the trust in an otherwise unconnected jurisdiction, as is the case apparently intended by the Malta Trusts Act: all the parties in the trust, present and future, as well as the trust assets have no connection with the jurisdiction except that the trustees and its administration operate from Malta with the chosen law also to be a foreign law. Knowledge and application of foreign law are never easy at best. On the other hand, it is acknowledged that the Italian experience of the *trust interno* may suggest otherwise. Evidence however suggests that 95% of trusts created and administered by a leading trust player, who has to remain anonymous, are governed by the law of Malta. Not surprisingly, because of the well-known affinity, the remaining 5% chose Jersey law.[617]

These are only, albeit important, indicators of the success of the market position taken to attract trust business. This of course is a different statement from whether the jurisdiction has been generally successful in attracting foreign non-resident parties creating a *domestic trust*. While the general tendency points towards a

[617] The information was given and received in professional confidence and the source has to remain undisclosed.

significantly growing curve in domestic trusts settled by local domiciliaries, the effort to attract *foreign trusts* has been largely a holy grail quest.

J. Concluding Reflections

It has been posited that that the relationship between a Jersey or Maltese trust with a foreign applicable law is a defining feature of the respective trust laws. It is therefore submitted that this policy choice made by both jurisdictions hue its trust law to an extent which is all-pervasive, and will be a critical factor in a decision to choose trustees resident in the jurisdiction or the governing law of the trust. More importantly, the sharply edged distinction between domestic and foreign trusts, allied with the response to the governing law, displays the mind and philosophy behind the different trust laws.

This concluding assessment inevitably also raises the question of the viability of the direction towards which either jurisdiction is heading. This is not simply because of the manner in which the jurisdictional net is spread, but perhaps more importantly, because of the measure of application and recognition of a foreign law. Jersey has been seen to have opted to align itself with the cluster and current of jurisdictions, generally thought to be flag-shipped by the Cayman, that are resistant to any foreign influence. Malta has attempted to tread the fine line between being faithful to its internal civil law tradition and public policy, while together with its application of the Hague Convention, striving to provide a viable mechanism for foreign trusts.

It is nevertheless suggested that either jurisdiction has lessons to learn from each other. Jersey should, in the respectful view of the writer, seriously consider reviewing its isolationist, apparently inward-looking stance. Its Trusts Act should align more unequivocally with the Hague Convention. While it is acknowledged that in terms of the Convention, a trust may be refused recognition on the basis of the mandatory or public policy rules of the forum, the Jersey grounds for refusal are wider to include even domestic, not necessarily public policy, law. The case for providing a safe-haven for assets and trusts is seen: this carries nevertheless two clearly identified risks. The first, perhaps perceived as an

occupational-risk, is the quality and provenance of the assets. The second is that this approach outside the shores of Jersey may carry adverse risks and perceptions. These are consequences which the Malta Trusts Act has sought to avoid.

The Mediterranean jurisdiction nevertheless has much to learn from its counterpart. The flexibility and malleability of its trust law is appreciated. It should, following Jersey here, adopt a more assertive confident position, without undue and indeed excessive concern, to accommodate beyond a healthy measure, non-domestic trusts. This may well sometimes smack of a regenerated colonialism. True, this feature may be the very essence and hallmark of the marketability of the Malta trust law. Flexibility, or a tendency towards excess of it, may produce uncertainty. The approach therefore should be more robust, to create greater predictability.

It is important for Malta to question its rule that domicile of settlor in the island at time of settlement attracts the mandatory rules of the forum. This may be an artificial connecting factor and may produce adverse or unintended results. The presumption is, that those principles from which derogation cannot happen by consent of the parties, includes therefore both the domestic law and Hague Convention, mandatory or public policy rules. Malta here would do well to look away from Jersey, since the connecting factor under discussion may seek to unreasonably extend or impose domestic mandatory rules. A more consistent connecting factor policy would be appropriate: Malta is at the moment caught in the tension between the EU habitual residence applicable in the case of the Brussels and Rome Regulation, the – traditional – English domicile applicable, apparently, in the Trusts Act, and residence (art 7) and habitual residence (art13) in the Hague Convention. Uniformity is here essential.

Asking which is the better policy choice underpinning the respective laws is probably sterile, since either position will find backing and detracting arguments. Malta's endeavour for a flexible and open trust law may in the end prove a futile dream. On the other hand, it remains to be seen how far Jersey can purport or aspire to continue to wander alone, lonely as a cloud.

CHAPTER VI - CHALLENGES TO TRUSTS

A. Scope of the Chapter

The critical problem is to assess the tension between the possibility of a successful challenge of a trust and the certainty of trust settlements. The context is in many ways similar to *res judicata*: every system develops methods whereby even a final judgement can, for exceptional reasons, be set aside, for example by retrial. On the other hand, a legal system has to find internal consistency, and cannot lightly permit what should be final and definite to be reversed.

This chapter will therefore consider, under the Jersey and Malta legal systems, possible challenges to trusts – broadly, these are shams and the *actio simulatoria*, the Pauline action, and legitim. The question will be asked whether actions and remedies, traditionally received by the legal system find application to impugn trusts or acts done by trustees. On the other hand, the consistency of remedies with trusts specifically known to trust law with civilian systems, will be analysed. The assessment will extend, beyond trust settlement, to consider exercise of discretion or powers by a trustee. It will be enquired whether a general principle of challenge to trusts or trustee action can be identified, beyond the grounds indicated, or whether it will remain an *ad hoc* exercise.

B. Sham Trusts in Jersey Law

That Jersey Law, principally through the court judgements, acknowledges sham as a basis to challenge trusts, is perhaps unsurprising.[618] However, why should it?

[618] On sham trusts generally, vide J Mowbray, "Shams, pretences, blackmail and illusion" pI (2000) (1) *PCB* 28, and pII (2000) (2) 105; J Fordham, "Sham trusts: attack and defence" (2005) 11 (8) *T & T* 19; P Matthews, "The sham trust Argument and how to avoid it" (2007) 21 (4) *Tru.L.I* 191; J Palmer, "Dealing with the emerging popularity of sham trusts" (2007) *N.Z.L. Rev*. 81; M Conaglen, "Sham Trusts" (2008) 67 (1) *CLJ* 176; T Hang Tey, "Settlor's reserved powers" (2009) 23 (4) *Tru.L.I.* 183; S Kempster "Mistakes and trusts: when and how can the slate be wiped clean" (2009) 15 (8) *T &T* 651; R Hunter, "The Fraudulent Use of Trusts" (2013) 19 (3) *T & T* 312; K Lawrence and N Sanders, "Jersey" in Collins et al (eds) *International Trusts Disputes* (2012) 425; *Underhill*, 88; Thomas and Hudson, 57; Thomas and Hayton, "Shams, Revocable Trusts and Retention of Control" in D Hayton (ed), *The International Trust* (2011) fn 450 at 597; N Buhagiar, *The Sham Doctrine in the context of Maltese Law Trusts and Foundations* (2011) Thesis, University of Malta; P Matthews, *Contribution on Trust Law*, Institute of Law Jersey (2012-2013) 24; A Braun, "Quando un trust è sham: Brevi riflessioni su recenti sviluppi giurisprudenziali in Inghilterra e sull'isola di Jersey" (2006) *Trusts e attività fiduciarie* 346; M Conaglen, "Trusts and intention" 122, and N Le Poidevin, "Trusts: a practitioner's perspective"

Why was not the civil law doctrine of simulation, which is a parallel action to the Pauline fraud, adopted instead? A review of the more significant cases is necessary.

(i) Jurisprudence of the Jersey Courts

The Royal Court in *Rahman v Chase Bank (C.I.) Limited* considered sham trusts.[619] Plaintiff challenged the validity of a settlement made by her late husband. The court held that the maxim *donner et retenir ne vaut* was part of the current customary law of Jersey, but here there was a *don* but no *traditio* of the gifted assets in the trust settlement. Settlor did not divest himself of the power to control the ultimate destination of the gifted asset and the settlement was consequently wholly invalid. The Royal Court also considered the trust null on an alternative ground that it was a sham, stating that:

> "The settlement was a sham in the sense that it was made to appear to be what it was not. The *don* was a *don* to an agent or a nominee. The trustee was never made master of the assets."[620]

The landmark development came in the wake of a string of colourful proceedings involving Sheik Fahad Al Sabah, (Fahad), in *Esteem Settlement (Abacus (C.I.) Limited v Sabah.*[621] Plaintiff Grupo Torras (GA) was owned by the Kuwaiti Investment Office (KIO) in London. Fahad was chairman of both GA and KIO. He defrauded plaintiff of USD 430 million of which his personal share was USD 120 million which he paid into his bank accounts. Prior to the fraud, Fahad had established (a) the Esteem Settlement, a discretionary settlement governed by Jersey law, of which Abacus (C.I.) Ltd. was the trustee and the defendants were the main beneficiaries; and (b) Ceyla, a Liechtenstein Anstalt administered by Abacus, the founder rights of which were held for Fahad. The Settlement incorporated a wholly-owned company in Jersey known as Esteem Ltd. The income earned by these structures was periodically distributed to Fahad and then resettled by him as capital. Moreover,

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141, in E Simpson and M Steward (eds) (2013) *Sham Transactions*; P McGrath, "Sham Trusts" in *Commercial Fraud in Civil Practice* (2014) 481; T Pagone, "Sham trusts revisited" (2014) 20 (10) *T & T* 1081.

[619] 1991 JLR 103]; an earlier judgement, *Re Knights (Jersey) Ltd* (1962) JJAT 210 is unpublished.

[620] *Ibid* at 168.

[621] [2003 JLR 188].

> "In an earlier action, the plaintiff company had sought to recover the proceeds of the first defendant's fraud, and pursuant to the judgment of the Royal Court (reported at 2002 JLR 53), allowing the plaintiff company to trace the proceeds of the fraud into various assets administered by the trustee and allowing its Pauline claim in part."[622]

Plaintiffs then sought to recover the "clean assets" that were unaffected by the fraud or the Pauline action. They advanced five causes of action, contending that the trust was invalid and therefore assets should be divested from the trust and made available to Fahad's creditors, amongst which were sham and that the settlement offended the maxim *donner et retenir ne vaut*. The Royal Court followed essentially the two well-known judgements of the English Court of Appeal in *Snook v London and West Riding Investments Limited*[623] and *Hitch and others v Stone*.[624] The Jersey court cited with approval the well-known dictum of Lord Diplock in *Snook* that a sham exists where parties "intended to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the legal rights and obligations (if any)" they intended to create. It held that the doctrine of sham is not specific to trusts, but can likewise find application on the case of contracts or property transfers, adopting the view that a common shamming intention between settlor and trustee at time of creation of trust was required. The court concluded that to be successful, plaintiff would have to establish that "as well as Sheik Fahad, Abacus intended that the assets be held on terms otherwise than as set out in the trust deed." The rule *donner et retenenir ne vaut* was also in context considered. The court relied on the traditional Jersey sources such as Le Geyt's *Privilèges,* (1958) and Le Gros *Traité* (1943).[625] On the evidence of the case, the court rejected the contention that the trust was a sham, "whether it was put as a case of bilateral sham, unilateral sham or transaction sham" concluding that "the court is in no doubt that Sheikh Fahad was not in control (or substantial or effective control) of this Settlement."[626] *Rahman* was distinguished: here sham was indeed

[622] *Ibid*, 188.
[623] [1967] 2 Q.B. 786.
[624] [2001] EWCA Civ 63.
[625] 223.
[626] *Ibid*, 223, 293 and 385.

pleaded, but the point in *Esteem* was whether a subjective intention of both parties to create a sham trust was required or whether such intention of settlor was sufficient: on this point *Rahman* was not of much assistance, since it was "primarily concerned with the principle of *donner et retenir ne vaut.*"[627] The question of sham arose indirectly in other situations: in *MacKinnon v Regent Trust Company*,[628] an appeal application by the trustee was upheld to strike out the relevant passages from an Order of Justice: plaintiff alleged inexistence of the trust due to sham. However, since an intention to mislead or deceive on the part of the settlor was not pleaded, the allegation that the trusts were shams did not disclose a reasonable cause of action.[629] *In Re Fountain Trust*,[630] the Royal Court, clearly stated its reluctance to enforce the variation of a Jersey trust ordered by the English High Court, which declared a Jersey trust sham. Sham had to be determined by Jersey and not by English Law. In the event, the English judgement was recognized and acknowledged.

(ii) Assessment

There is therefore no question that Jersey has indeed adopted substantially the English and Commonwealth sham doctrine, applying it not only to trusts, but beyond. The first question is therefore whether this assumption of sham makes sense in a context of Jersey trusts and indeed its entire legal system. Why was the entire tradition of contract law relating to *causa obligationis* and civil law doctrine of simulation, apparently jettisoned or not adopted? It will be difficult of course ever to know the legal reasoning and thought process which went on in the mind of the Royal Court to adopt the English sham, adopting an alien doctrine and shying away from a traditional civil law principle. No reason was given, and it may well be that it was considered important to move along with a well-known doctrine developed by larger, possibly more important, jurisdictions. Moreover, why was the doctrine of *causa* and simulation not considered, while the *donner et retenir ne vaut* principle was? Both are important legal pillars. Pothier for example, an acknowledged source, holds that:

[627] 221.
[628] [2004 JLR 477].
[629] M Preston, "Sham Trusts" (2006) 12 (2) *T & T* 22.
[630] Fn 585.

> "Mais lorsqu' un engagement n'au aucune cause ou ... lorsque la cause pour laquelle, il a été contracté, est une cause fausse, l'engagement est nul et le contract qui le renferme est nul."[631]

Le Geyt makes the same point: "une obligation ne vaut quand elle est faite sans cause, qui doit ester exprimeé our verifieé par des circonstances"[632] Is not this thought and language strikingly similar to that of Lord Diplok in *Snook* being that of conveying intentionally to third parties the creation of rights and obligations different from those intended by the parties? It is arguably correct to conclude that the civil law simulation is wider than the sham doctrine: simulation apart from a contractual *mise en scène* also encompasses any illegal or immoral purpose; sham requires that the words of the deed state something different from what the parties intended – dishonesty, improper purpose, illegality or fraud may, or may not, flow from sham, but are not grounds *per se*.

It may have been a choice entirely prompted by pragmatism. Since TJL is not a codification of trust law**,** this could mean that the door was left open to the reception of other influences**.**[633] The choice of sham is not viewed as much consistent with the tradition and writings referred to. Consistency has however given way to pragmatism, which is not unprincipled. This is also consistent with the general drift of Jersey law away from its original Norman sources in favour of English law.

In fairness, the *Al Sabah* judgement has not merely been an internationally cited and acclaimed landmark judgement: the decision has prompted Hayton to coin the maxim "once a true trust of property, always a true trust."[634] The consequence is, that if what was initially a valid trust, becomes a sham along the line, this does not change its nature as a true trust: that there cannot be, on this view, a *quasi-sham* -

[631] R Pothier, *Traites de droit civil et de jurisprudence* (1781) PI, Ch I, 21. In substance, where an obligation or commitment is without a *causa* or demonstrates a false *causa*, the engagement and resultant contract is null.
[632] P Le Geyt, *Privilèges,* (1953) 68. "An obligation without *causa* is of no legal validity: the *causa* has to be expressed or verifiable."
[633] Art 1 (2).
[634] D Hayton, "Shams, Piercing Veils, Remedial Constructive Trusts and Tracing" (2004) 8(1) *JLR 6.*

a situation "where the veil of the true trust can be pierced so that the trust assets can be regarded as beneficially owned by the settlor." Jersey has laudably made its very significant contribution to the law of sham trusts.

(iii) Concluding thoughts

Has the development of sham doctrine in Jersey served its purpose? Given the resounding response by the Royal Court in *Esteem*, the reply is a foregone positive conclusion. Shamming will remain controversial, and the extent of judicial power and discretion at concluding that a sham has been established is considerable, perhaps too much for comfort. At the same time, it is a necessary tool within the system: this much, the doctrine has usefully served its function. This leads to another question, being the risk of pitfalls. Shamming involves an inevitable degree of subjective assessment by a court. Matthew warns that "there is more to sham trusts than meets the eye."[635] He suggests that, the *Snook* formulation notwithstanding, the concept of an unilateral sham can exist: one party, for example the settlor, does not intend to create a trust, while the other party, a trustee, is taken in. Another risk is a partial sham, where "the settlor does not intend the entire effect of what he is purporting to do"[636] or where a trust is mis-recorded - for example, the classical offshore "blind" trust, where the nominated beneficiary is an international charity, such as the Red-Cross, with discretionary trusts created on the basis of a letter of wishes. This may not be Jersey-specific, but underlines the hidden pitfalls in the application of, and challenges to, sham trusts.

How far will a trust be classified as sham in a situation where the settlor reserves to himself powers to control or recall the property settled, or simply also because the trustee "goes along"? It may be suggested that *Rahman* addresses this question, even though prior to the 1984 Jersey Law. It adopted, even if indirectly, the view expressed by the English High Court in *Midland Bank plc v Wyatt*, that a sham trust may arise even if the settlor alone had no intention to part with the

[635] P Matthews, "How many shams make three?" (1988) 4 (7) *T & T* 11.
[636] Matthews, fn 623 at 11.

beneficial ownership.[637] It may be a question of extent to which trustees act independently, this being the criterion adopted in *Esteem* and *Shalson v Russo* both of which required the concert of intentions of both settlor and trustee to create a sham trust.[638] The position remains unsettled.

What would be the effect of a finding of sham? Presumably, a declaration that any settlement of assets is invalid. But would that be *ex tunc,* from the outset, or *ex nunc*, from moment of declaration? It would seem that a presumption of validity exists, but what would be the fate of property transferred say, through an exercise of discretion of a trust subsequently declared to be a sham and therefore voided? This may clearly raise questions of third party acquisition in good faith or even possibly constructive trusts imposed on subsequent acquirers, with potentially very unfair results in the case of innocent or unwitting third parties.

In *Esteem*, DB Birt made this telling postscript: "There is an important public interest in the ability of persons to rely upon apparently valid transactions... the law has to be very clear when trusts and gifts into trust can be set aside."[639] This brings us back full-circle to the opening statement in the chapter, namely the tension between stability of contracts, trusts included, on the one hand, and on the other the grounds for setting aside. The difficulty as Birt observes can only be observed through clarity and consistency, particularly in attributing appropriate weight to public faith in the certainty of transactions.

C. Malta – The *Actio Simulatoria* and Trusts

Malta has no comparable acceptance of sham. The analogous challenge is identified as the simulation doctrine. If a trust can be classified as a contract, then it should follow that the *actio simulatoria* finds application. Nevertheless, it does not follow that once absent a categorization of trust as a contract, the action should be not available. One needs not necessarily follow Langbein's view on the

[637] [1997] 1 BCLC 242.
[638] [2005] Ch 281.
[639] Fn 621at 389.

contractual aspect of trusts:[640] the question is whether the *actio simulatoria* can be extended to the law of trusts.

(i) Causa Obligationis in Trusts?

Given the familiar dearth of jurisprudential guide, a researcher has to go by the fundamental sources – the articles of the code, doctrine and the general principles.[641] Starting from very basics, the Roman-Civil Law tradition identifies four substantial requisites for a contract: capacity, consent, object of performance and *causa*.[642] This fourth requirement is the justification or *raison d'être* of the contract, hence the *causa obligationis*. The contemporary English text of the MCC misleadingly translates *causa* as consideration: the contract requirement carries the traditional civil law meaning and bears no affinity to the term known to English law as consideration.[643] The unfortunate choice of term is a quirk of bad legal translation during Malta's colonial period.

The Civil Code at article 958A however anticipates the point and provides, in connexion with trusts, that:

> "The sole consideration for the validity of such transactions may be the imposition or assumption, the performance or the termination, as the case may be, of legally enforceable obligations on or by a trustee in relation to the trust property."

This, it is suggested, unequivocally replies to the question: a trust requires, and has, a *causa*, which is the performance of the trust obligation by the trustee *vis à vis* the trust property. It follows that the various remedies consequent to *causa* should be applicable.

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[640] J H Langbein, fn 362.
[641] Generally, A Butera, *Della Frode e della Simulazione* - Vol II – *Della Simulazione* (1936). This has been a standard reference for the Maltese Courts.
[642] Art 1108 French c*ode civil*; art 1325 Italian c*odice civile*; art 966 of the Malta civil code which provides that "an obligation without a consideration, or founded on a false or unlawful consideration, shall have no effect."
[643] This was not always so: the original English version adopted the term "cause." The civil code was consolidated by Ordinance VII of 1868, and the original Italian term, as it was published in Italian and English, was "*causa*." The sources are the original Ordinance published in 1870 and the consolidated version published in 1932 - both volumes consulted are deposited in the National Library in Valletta.

The *actio simulatoria* has a long history or recognition and application by the Maltese courts.[644] It was sometimes held that simulation was a form of fraud.[645] Doctrine with jurisprudential approval has distinguished between absolute simulation, that is where a contract is entirely fictitious, and relative simulation, where parties intend to enter into a contract under the guise or appearance of another.[646]

Can simulation, as a basis to impugn a contract, find application in the case of trusts? There are clear communalities between contract and trusts, independently of the question as to whether a trust is a contract, nominate, innominate or *sui generis*. Capacity, consent and lawful object immediately stand out as common features. Would the distinction between absolute and relative simulation apply to trusts? Would the rule known to the MCC at article 988 be applicable?[647]

> "The agreement shall nevertheless be valid if it is made to appear that such agreement was founded on a sufficient consideration even though such consideration was not stated."

There is, no doubt, merit in the argument that the transplant from contract to trust can be carried out with relative ease and analytical logic. Yet the critical question is whether a trust has a *causa obligationis* identical to contract. It is also true that both contract and trusts have to justify their existence and function, their *causa causans*. Nevertheless, notwithstanding the strong analogy, it is suggested that the identity is not complete: it is difficult to argue that contracts and trusts are identical, even if it could be conceded that a trust can be classified both as a nominate or innominate contract.[648] Their nature, function and origin tend towards two distinct categories of legal situations and *negotia* – a contract to be performed in its terms, and the trust model of settlor, trustee and beneficiary. Therefore, the

[644] *Saliba v Mangion*, Appeal, 15th June 1866, Vol IIIB. The court here referred to the Neapolitan sources of the then Kingdom of the Two Sicilies; *Gaffiero v Despott*, Civil Court (1860), Vol IX 289; *Glendayer v Gatt*, Appeal, (1945), Vol XXIE.I.244; *Debono v Debono*, Civil Court, (1953), Vol XXXVII. I-II.797; *Vassallo v Vassallo,* Appeal, 13th July 2001; *Carabott v Calamatta*, Appeal, 25th February 2011; *Vassallo v Micallef*, Civil Court, 30th July 2012.
[645] *Gatt v Tonna*, Appeal, 19th February 1973.
[646] *Debono v Camilleri*, Appeal, 5th October 2010.
[647] Art 1132 is the corresponding article in the French c*ode civil*.
[648] Dig. 2, 14, 7, 2.

effort to apply the contractual model to a *causa* in trusts is not entirely satisfactory.

Beyond the question of extension from contract to trusts, is, or can be a general principle of simulation applicable to the law of trusts? The analysis here is, whether, there is indeed a general principle, of wider application than the strict contractual confines, of *causa* and simulation. The concept of general principles in civil law, as also the *actio simulatoria*, is of distant origin.[649] Like the Pauline fraud, general principles wax and wane, but never go away.[650] The point made is that rules, principles, *maximae juris*, expressed or latent but intuitively present in the system, have retained their strong presence. Examples include general principles of possession, good faith and unjust enrichment, which not coincidentally have been identified for further study by scholars of contemporary European private law.[651]

(ii) Simulatio as a general principle

Therefore, on the basis of the above, it is argued that *simulatio* exists as a general principle. Moreover, it stands and operates independently from the well-defined role in contracts. This seems a more consistent and satisfactory conclusion on two grounds: first, *simulatio* as a potentially defeating ground in the case of any property, obligational or testamentary disposition is implied and sometimes expressed as a general principle of civil law. Secondly, this conclusion is, moreover, derived from, and is consistent with, the acknowledgment of the existence of a *causa* in trust settlements - the disposition of the property being the underlying reason for the transaction.

On these two bases, it is therefore posited that the *actio simulatoria* finds application to challenge a settlement in trust precisely on the basis of simulation: the content of the action is similar to that in the context of contract, but with a

[649] Gaius I.I de origine juris – "Cuius rei potissima pars principium est" – the principle is the fundamental part of everything.
[650] Alpa, *I Principi Generali* (1993) 3.
[651] Other examples of well-known and important *maximae juris* include *fraus omnia corrumpit, in pari causa turpitudinis, melior est condicio possidentis.*

broader reach of application. One can think of various examples: settlement in trust with the intention of evading creditor or spousal rights, or possibly to guise donations to circumvent rights of legitim.[652] The essential conclusion therefore is, that where the reason or apparent reason declared or purportedly demonstrated is false, or states one thing when intending to perform or achieve another, the remedy of annullability or voidability in a trusts' context can be argued. As always, the *actio simulatoria* serves to unmask the truth in the trust or fiduciary disposition or act: the parties' conduct, as uncovered by the *actio*, is then re-assessed. An obligation may be null, or stand as valid, but may be re-defined in the light of the true findings.

It has been analytically concluded that simulation exists as a general principle to challenge the validity of an obligation, with wider extent of application than its traditional contractual confines. This is another decisive argument in favour of the existence of an autonomous civil law trust. The parameters of the action can properly be extended to challenge any act or deliberate act or omission of the trustee, where the truthfulness is otherwise than represented or stated. For example, a purported exercise of discretion, or a power, can be questioned on the basis that it attempts to improperly deprive otherwise deserving objects or beneficiaries, particularly when the purported exercise is carried out on grounds which may have been fabricated. This could stand alone as an action or could be pleaded in conjunction with other remedies.

Who would have the *locus standi* to challenge a disposition or act on the basis of simulation? A potential litigant would have to show legal interest, and establish a sufficient link between right claimed, and the impugned, allegedly simulated, disposition. Some instances of clear *locus standi* are straightforward to contemplate: a disappointed beneficiary, an aspiring heir, a party claiming an interest in property settled in trust or otherwise disposed of by exercise of power or discretion. A challenge on the basis of simulation has to satisfy the threshold of immediate and direct interest, with a benefit potentially accruing personally to the claimant.

[652] Fn 645 - sometimes simulation can be a form of fraud.

There are no jurisprudential marker-buoys provided by the courts of Malta. The above was therefore a sortie into uncharted, indeed unchartered, territory and is to a degree a speculative assessment. Whether or not the points made will be taken up by the courts in Malta remains to be seen. Persuading a court to break fresh ground is rarely easy. Jurisprudence in civil law jurisdictions has formally a persuasive not a binding value: nevertheless, the "comfort" that a court derives from former judgements or precedents cannot be overstated. Nevertheless, the view suggested is that a Maltese court will incline towards familiar ground and apply traditional rules of simulation, even to trusts.

Asking perhaps an imponderable: would a court in Malta consider sham? Of course, one can imagine a thundering response along the lines that such pernicious doctrines should be banned from ever crossing the shores of Malta – the civil law, so the imagined response would go, does not need such "contaminations." Perhaps a more rational analysis would be that trust law is a *lex specialis* overriding therefore the *lex generalis*. This would possibly justify the contention that remedies known to trust law, perhaps by origin "alien", should be applicable.

The second view is supported, being that Malta, can receive the sham doctrine in trusts, but on different grounds. Trusts are creeping gently into mainstream civil law, applied as a part thereof in context of traditional notions of property, obligations, succession and guarantees. This is also consistent with the view taken herein, that the Maltese and Jersey trusts are a particular civil law breed, with derivations from the English trust, but "trusts without equity." Therefore no necessary heresy is seen with a court in Malta flirting with, or indeed embracing, sham trusts. This view is held whether a trust is governed either by foreign law or by the law of Malta. If anything, this view supports the existence of an autonomous creature, the civil law trust. At the moment, this remains entirely speculative.

D. The *Actio Pauliana* – Jersey

The opening note is a brief reference to the Pauline principle: traditionally linked to a statement attributed to Julius Paulus Prudentissimus, better known as Paul – "*Quae in fraudem creditorum facta sunt ut restituantur.*"[653] The general principle well known to civil law systems is that acts done in fraud of creditors are subject to annulment, through the *actio pauliana* also referred to as the *actio revocatoria*.

The landmark Jersey judgement has confirmed not merely the existence in Jersey law of the *actio pauliana*, but also its applicability to trust situations – *Grupo Torras S.A. v Fahad.*[654] This judgement is also remarkable in so far as it held that a proprietary tracing claim and a remedial constructive trust are part of Jersey law. English law was not followed in the case of restitutionary remedies. Where property, in which a beneficial interest existed, was transferred to an innocent volunteer, Jersey law recognized a personal claim against the recipients. The 'guilty state of mind' known to English law was not required. If a third party were responsible for fault, the beneficiary's remedy was proprietary and recipient a constructive trustee.

Plaintiff acted to annul certain transactions by defendant *Fahad*. The judgement reflected that a transfer, in fraud of creditors, could be set aside if the debtor's intention to defraud his creditors could be established: the link is that the act leads to insolvency or deterioration of a debtor's patrimony.[655] A challenging party becomes 'a creditor' the moment a cause of action arises, while insolvency or otherwise is fixed at the date of the action. An important distinction is between *transactions lucratives* and *onéreuses*. In the first case, a transfer can be either in the nature of a gratuitous transfer or against insufficient consideration. The action requires both actual prejudice and the transferor's intention to cause such

[653] D 42.8.1; Vide also generally, M Radin, "Fraudulent Conveyances at Roman Law" (1931) 18 Va L. Rev 109; R de Weijs, "Towards an Objective European Rule on Transaction Avoidance in Insolvencies" *International Insolvency Review* (2011) 20 (3) 219; L Sautonie-Lagauionie, *La Fraude Paulienne* (2008); I Pretelli, "*Actio Pauliana* in the Conflict of Laws" (2011) 13 *Yrbk Priv Intl L* 589.

[654] Fn 18, and background noted earlier. An earlier case on Pauline fraud is *Golder* v *Société des Magasins Concorde Ltd* [1967 J.J. 721].

[655] *Ibid*, 115-132.

prejudice. *Transactions onéreuses* are those where the transfer is against sufficient or commercial *quid pro quo* and moreover, the *partecipatio fraudis* also of the other party to the transaction, is to be established. The Royal Court found that *Grupo Torras* was entitled to have set aside payment of various amounts of money, income resettled and founder rights in Ceyla, the Liechtenstein *Anstalt*, all transferred to Esteem Settlement.[656] This judgement raised important questions and understandably provoked a torrent of comments and reactions, particularly from practitioners.[657] It is seen as a masterly contemporary re-statement of the Pauline principles as applied to trust law, wherein the Royal Court intertwined traditional civil law principles with other rules known to English law such as proprietary tracing, constructive trusts and restitution. It is a clear hallmark of the civilian identity of the Jersey trust.

(i) Debtor's state of mind

The judgement reveals a refined analysis of the state of mind of the debtor. The question is whether the knowledge, that a transfer could potentially prejudice creditors, but without a particular specific intention to do so, is sufficient for the action. For example, a trust settlement is carried out for tax reasons, with an indifferent state of mind whether or not the transaction could harm creditors, when potentially it could. Current French thinking suggests that a debtor is under a general duty to avoid any act or even possibly an omission which can prejudice a creditor's right or guarantee.[658] The Royal Court acknowledged this development, however it adopted the view that "in order to succeed in a Pauline action, it must be shown that the transaction in question was undertaken by the debtor with the intention (object) of defeating his creditors."[659]

[656] *Ibid*, interim summary 164.
[657] N Journeaux and R Vibert, "Attacking offshore trusts in the light of the Grupo Torras/Esteem Litigation" (2003) *T & T* 9(5) 27; J Wheeler and G Kleiner, "Grupo Torras: claims attacking the validity of a trust: the failure of novel claims" (2003) 9 (10) *T & T* 12; A Keltie and M Morrison, "Attacking offshore trusts: Jersey Grupo Torras – in Re Esteem Settlement" (2003) 10 (1) *T & T* 10; William Richmond-Coggan, "Attacking the assets of a trust: the courts use of freezing orders" (2007) 13 (1) *T & T* 18.
[658] Sautonie-Lagauionie fn 653 at 73.
[659] *Esteem*, fn 18 at 133.

One may respectfully question the reasoning of the Royal Court, also in trusts context. The reasoning is that the fact of settlement in trust *qua* diminution of patrimony of a potentially insolvent debtor, should be sufficient to set aside the transaction. The specific *animus nocendi* finds its origins in the mist of tradition, perhaps the Digest: this made sense in a context where transfer of assets was a slower process. Nowadays, the facility and speed with which assets can be spirited away, even settled in trust, makes the burden of proof to show the intention to harm a creditor excessively burdensome. It is therefore here argued that the current French position, that is to say a debtor is under an obligation not to diminish its patrimonial state, is more realistic and reflects contemporary application of the Pauline tradition. The corollary to this is that any act or settlement in trust, which in any way can diminish the patrimonial capacity of settlor, to the potential prejudice of even future creditors, may be subject to Pauline revocation. The Royal Court also held, entirely understandably in context, "that a person is deemed to become a creditor when the facts giving rise to his cause of action occur, even if the validity of the cause of action is not established until later."[660] This makes sense in the context of the *consilium fraudis* as required by the court, in that the credit or obligation has to tally with the specific intention required. Also, the credit has to predate the challenged act: here, however, too narrow a view may have been taken of the realities of the day. *Quid*, if a person who has at the time of settlement no known creditors, but intends to undertake a risky venture with potential ruinous liabilities, and settles all his assets on express trust where he is settlor, one of the trustees and sole (or together with his family) beneficiary? There is a strong argument to suggest that this was done *in fraudem* of future potential creditors, even if the liability postdates settlement. The spirit of the Pauline action is that any act to the prejudice of creditors should encompass even transfers where there is reasonable possibility that future creditors are to arise. It arguably also encompasses transfers which could operate to prefer creditors fraudulently. In defence of the stance of the Royal Court, challenges based on future events can create uncertainty. To this extent, apart from principle, the Royal Court was justified in being careful not to open floodgates to challenges to trusts on the Pauline basis.

[660] *Esteem*, fn 18 at 124.

(ii) Exercise of Discretion

The next question is whether there could be overlapping with sham in the same way that simulation could be a form of fraud. Both sham and Pauline actions annul, if successful, the transaction challenged. A sham could well veil a transaction *in fraudem*: there could be common ground to the extent therefore, that a sham transaction is in appearance created, but which in substance has the intended effect of prejudicing creditors. Whether a *cumul* - such as a combined action in contract and tort - of sham and the Pauline principle can be exercised remains another matter, and untested in Jersey to the knowledge of the writer. Imagine a situation of a trustee "going along" with the settlor's requests. The question may arise whether a chain of transfer of assets following an exercise of a 'discretion' is either a sham, or decisions *in fraudem*, or both. Another relevant example is a settlor dictating to a discretionary trustee the precise manner of the exercise of a discretion.

It is therefore argued that an exercise of discretion may be caught within the ambit of the Pauline fraud. But whose intention is relevant – that of the settlor, that of the trustee or that of the recipient beneficiary? First, where the trustee is the *alter ego* of the settlor, who merrily goes about transferring assets as directed by the settlor, a common intention may be attributed. Secondly, what if the intention of the settlor is to water down assets when this is unknown to the trustee who legitimately moves within the four squares of the trust deed. While it may be possible to challenge settlement, the proper execution of the unwitting genuine trustee may be more difficult to get to. Thirdly, what about the *partecipatio fraudis* of third parties, which it is necessary to establish? One point which is central in *Esteem*[661] is that it was Fahad moving assets. This is not to state that the trustees 'went along' or were unaware of the actual substance of the transactions. In fact, the absence of criticism or censure of the Trustee's actions by the Royal Court is remarkable. The court focused on the moment of insolvency and prejudice to third parties. It seems to have been implied – not perhaps clearly so – that in the transfers between the various trusts controlled by Fahad the requisite

[661] Fn18 at 153.

intention of third parties was satisfied. The judgement does not shed any light on the question whether professional trustees, acting properly, can be held to have formed the necessary intention of third party knowledge. There should nevertheless always be a strong presumption that a trustee, acting correctly and within the remit of the trust document, has no guilty knowledge.

(iii) Partecipatio Fraudis

It has been held by the Royal Court that, in a *transaction lucrative*, the intention of the settlor to prejudice creditors is sufficient.[662] Very often, either directly through settlor's disposition or exercise of power or discretion by trustee, a beneficiary or object is the recipient of bounty. Does this therefore avoid the necessity to establish knowledge of fraud or prejudice to creditors in the case of the recipient beneficiary? The answer may depend on the characterization of the act. The view expressed is, that receipt by a beneficiary is likely to be classified as a liberal donative transaction. The implication is that there is of course a much lighter evidentiary burden than having to prove that the third party beneficiary was aware of the settlor's intentions. True, it can be argued that settlement in trust with nominated beneficiaries or discretionary objects does not fit within the traditional category of a donation. Nevertheless, it is pleaded that the mechanism whereby a settlor settles in trust an asset for a beneficiary is very similar to actually donating the proprietary object to the beneficiary. This clearly falls within the Pauline spirit, and trust settlement by an insolvent settlor should reasonably be open to challenge for a diminution of assets.

(iv) Change of Position Defence

The Royal Court acknowledged change of position as a valid defence to a Pauline challenge to trusts. The court in *Esteem* put its enunciation thus:

> "Accordingly, once a creditor has established that all the other conditions of a Pauline action are satisfied, the court must

[662] *Esteem*, fn 18 at 130.

> consider whether, in reliance upon the receipt, an innocent recipient has so changed his position that it would be inequitable to require him to make restitution or to make restitution in full..... The burden of showing that it would be inequitable to order restitution lies upon the recipient."[663]

This is a bold, innovative direction, displaying an ability to acknowledge the realities of Jersey's peculiar mixed system, and demonstrates a judicial ability to take a 'broader view.' One can of course chide the Royal Court for an inconsistent approach, suggesting that it should make up its mind. Nevertheless, it is proper that the court should feel sufficiently sure of its generally cautious position to 'pick and choose' to achieve what it considers relevant principles to arrive at its conclusion. There was moreover no judicial sleight of hand here: the Royal Court was open about its choices and did not attempt to hide them behind long and convoluted reasoning. The Court was straight, had the courage of its convictions, and three cheers for that.

E. The *Actio Pauliana* – Malta

Unsurprisingly, Malta has to date one precedent on the *actio pauliana* and trusts. The sources related to the analysis remain the civil code articles and the jurisprudence, which embraces the civil law tradition and doctrines. This section will argue that with the current legal tools, the action can be extended with relative ease to trusts. It will be argued that the *actio* in Malta has extended further a general principle present in the system, to embrace also trusts.

The *actio pauliana* in Malta has been long with us: the first published judgement traced by the author is 1882.[664] The relevant articles of the civil code read as follows:

> "1144. (1) It shall also be competent to any creditor in his own name to impeach any act made by the debtor in fraud of his

[663] Fn 18, at 136.
[664] *Fenech v Piottt*, Civil Court, Vol IX; *Gauci v Caruana*, Civil Court (1884), Vol X.The locus classicus of the Maltese Courts for many years was again A Butera, referred to at footnote 629 this time Vol I – *Dell'Azione Pauliana o Revocatoria* (1934).

> claims, subject to the right of the defendant to plead the benefit of discussion...
>
> (2) Where such acts are under an onerous title, the creditor must prove that there was fraud on the part of both contracting parties.
>
> (3) Where such acts are under a gratuitous title, it shall be sufficient for the creditor to prove fraud on the part of the debtor..."

Related, is article 1994 of the MCC which establishes the rule of *par condicio creditorum,* saving a lawful cause of preference. What is relevant reads as follows:

> "(2) Property is lawfully transferred by way of security, if made in accordance with article 2095E or articles 2095F to 2095I and such transfer shall not be subject to re-characterisation as any other contract.
>
> (3) Creditors of the transferor may impeach any transfer by way of security as aforesaid if the transfer is made in fraud of their rights. For the purposes of article 1144 such transfers shall be considered to be onerous and in case of a security trust, the creditor must prove fraud on the part of both the transferor and the transferee but it shall be sufficient if he proves fraud either on the part of the security trustee or on the part of the beneficiary whose interest is being secured thereby."

The context is transfer by security trust to a security trustee or a creditor in trust, being the codification of the *fiducia cum creditore*.

(i) Requirements of the Pauline action

The term creditor has been given a jurisprudential wide meaning, to include "any obligation" and not merely money claims attempted to be avoided by the creditor.[665] Where an immovable property, in respect of which a promise of sale existed, was subsequently transferred – not merely promised to be transferred – to a different alienee, this was held to be potentially within the parameters of the action.[666] The

[665] *Tabona v Silmer Ltd,* Civil Court 13th March 2003.
[666] *Bongailas v Magri et,* Court of Appeal 15th January 2002.

action is personal even though a real right may be involved, and finds its basis on the principle that all the assets of the debtor are the guarantee of the creditor.[667] Its requirements are as in the traditional Roman Law – *consilium fraudis* and *eventus damni.*[668] Fraud is required to be objective and substantial: its manifestation may be direct or indirect. No specific *animus nocendi* is required, and the knowledge that the act can prejudice creditors is sufficient.[669] The burden of proof lies on the party alleging bad faith, since this cannot be presumed. The damage must be such that it demonstrates with evidential certainty, a prejudice to creditors, for example lesser solvency.[670] As in the case of Jersey, *partecipatio fraudis* of the third party is required in onerous transactions, but not in gratuitous acts.[671] As a rule the credit should exist prior to the transfer challenged, but this is not viewed as an absolute rule if the fraudulent act was made with the specific intention to defraud future creditors.[672] The possibility of a simultaneous challenge of a deed by means of the *actio simulatoria* and the *actio pauliana* has been acknowledged by the jurisprudence.[673]

(ii) Pauline Fraud and Trusts

It is argued that the *actio pauliana* finds a strong basis to challenge both settlement in trust, and also, exercise of a trustees' discretion. This is based on the view that a general principle against fraud exists within the system - *fraus omnia corrumpit*, similar to the *exceptio doli* in Roman Law[674] – a view further supported by the general principle against any patrimonial reduction to the detriment of creditors. On the strength of the jurisprudence, the term "any act of the creditor in fraud of the creditor" should be wide enough to encompass trust settlement. The provisions relative to security trust also confirm this reasoning. A security trust is significantly

[667] *Sciortino v Vella*, Civil Court, 27th June 1961.
[668] *Gravina v Gravina*, Civil Court, 17th January 2013; *APS Bank v HD Holdings Ltd*, Civil Court, 26th March 2015.
[669] *Camilleri v Borg*, Civil Court, 21st October 2004.
[670] *Magri v Mixer,*, Civil Court, 17th June 2005; *Bellia v Grech* Appeal, 6th October 1999.
[671] *Pullicino v Pace*, Civil Court, 15th October 2003.
[672] *HSBC v Fenech Estates Ltd*, Civil Court, 19th January 2000.
[673] *Coleiro v Coleiro*, Civil Court 26th February 1934; *Caruana v Calleja*, Civil Court, 19th October 1939.
[674] P Bianchi, *The Theory of Fraud in Civil and Commercial Law* (1973) Thesis, The Royal University of Malta 63.

considered to be onerous: this is followed by the statement that fraud of both the transferor and transferee has to be established. This is not surprising, all told. Is however, the statement that a transfer in trust being a security trust, odd? In principle, "where each of the parties undertakes an obligation, the contract is termed onerous."[675] While it is clear that in a security trust, both parties owe each other obligations, the fundamental assumption is a contractual scenario. The drafters could have possibly classified settlement in security trust as a contract. What is certainly more telling is the language of the article. Unpunctuated and separated by the preposition "but", it continues "it shall be sufficient if (the creditor) proves fraud either on the part of the security trustee or on the part of the beneficiary whose interest is secured."

Is it a *volte-face*, implying that the principle that fraud of both parties is to be established, in the case of an onerous transactions, is abandoned. The drafting is not the happiest here. One *may* assume that the fraudulent motive by the settlor is still required, although this is not necessarily borne out by the language. This is viewed as the likely and the correct conclusion. There is also however logical sense to require the *simultaneous* bad faith of the security trustee – consonant, if nothing else, with principle. The possibility however to challenge a security trust settlement by showing the *mauvais* intention of the beneficiary is more difficult to rationalize. First of all, what does it mean? The standard position of the *fiducia cum creditore* is that debtor A transfers to creditor B an asset for B to hold in trust as creditor, security trustee and beneficiary in the event of a default of the underlying credit obligation of A towards B. The sense made of this provision is that B is the beneficiary whose interest is secured by transfer in security trust. However, this does not explain the connection between the Pauline action and creditor B acquiring an asset in security trust. If anything, B has to fear that A could dispose of an asset otherwise in guarantee of B's credit. An alternative explanation could perhaps be seen where B owes C, and therefore B takes away from the potential clutch of C an asset by settling in security trust his own asset, being B's claim against A. But this is hard to see how it can work, since the law of Malta acknowledges the *actio surrogatoria*, sometimes referred to as the *actio debitor debitoris mei*. This means

[675] Art 962 MCC.

to get paid, C would be able to exercise B's right against A. What is harder to see is the Pauline principle involved: if it is at all, then only by a rather long stretch.

Nevertheless, notwithstanding drafting ambiguities, it should not only be clear that the Pauline principle is alive and well, but that it should find almost un-hesistating application even to challenge and set aside trusts. In any action for Pauline revocation, the question arises whether discretionary beneficiaries, as distinct from settlor, trustee and nominated or vested beneficiaries, should have *locus standi*. Following the jurisprudential patterns herein examined, and this applies to both Jersey and Malta, it seems that only those beneficiaries with an actual vested right are proper parties since the object of the Pauline challenge is to annul a transaction in favour of an identified party. A contingent or conditional beneficial interest does not appear to justify inclusion as a party in the *litisconsortium*.[676]

(iii) Maltese Judgement on the question

The only judgement considering the *actio pauliana* and trusts is *Vossberg v Equinox* decided by the Malta Court of Appeal on the 9th November 2012. Plantiff, 'W' acted against her former husband 'H' and a trust company registered and operating in Malta. W claimed maintenance arrears. H settled on trust a Villa, the only significant asset in Malta – parties were non-Maltese nationals – nominating himself sole beneficiary. W exercised the *actio pauliana* contending that the transfer in trust was fraudulent, demanding the annulment of the deed. The Court of Appeal acknowledged that the settlor-trustee relationship was contractual and onerous in nature, but characterized the settlement in trust as gratuitous. It was held in the judgement that plaintiff did not challenge the constitution of the trust, but rather, using the words of Langbein, "the underlying deed" of transfer by settlement to the trust. This was classified as donative and therefore the *partecipatio fraudis* of the counter-party trustee was not required. The publication of a deed was ordered

[676] In this context, a judgment delivered by the Italian Court of Reggio Emilia on the 26th April 2012, *Copelli c Gruppo Ceramiche Gresmalt S.p.A. e altri*, has suggested that all potential beneficiaries should be necessary defendants. The context was a Pauline action by a creditor *(azione di revocazione* in Italian law) by a creditor of the settlor; Michele Lupoi, "Aggiungi un posto a tavola: azione revocatoria in ambito di trust e litisconsorzio necessario" (2013) Trusts e attivita' fiduciarie 12.

rescinding the transfer in trust of the immovable.[677]

The comment on this judgement is that it was properly decided. Apart from its fairness in context for Pauline purposes, settlement in trust for a beneficiary is correctly classified as gratuitous. While it is obvious that there are intrinsic distinctions between a donation and trust settlement, between settlor and beneficiary no *quid pro quo* is exchanged. It can be validly argued that acts or dispositions which take place between settlor and beneficiary tend, in either case, towards being gratuitous acts. This view is likely to be extended also to the exercise of a power of discretion by a trustee: the essential moment is the donative-like act of transfer to the trustee. It must nevertheless be emphasized that this statement is valid in context of the Pauline rules, since, a trust has its particular *causa obligationis*, being the act of transfer in settlement, as distinct from that of a classical donation which is the liberality of the donor. Of course, if it can be established that even the trustee, or even perhaps the nominated beneficiary, was aware of such prejudice, this makes a stronger case and naturally *cadit quaestio*. One may add that W could have directed an enforcement attack against the beneficial interest held by H in the trust. This would not have been however a classical Pauline *revocatio.* It could, nonetheless, have achieved a similar effect of placing an asset in H's patrimony and therefore available to her as a creditor.

Power or discretion should be given a wide application, to include situations where a beneficiary with potential liabilities is deliberately excluded. Typically, this could be a situation where, through combined knowledge of trustee and potential recipient, an object is intentionally excluded to avoid having assets potentially targeted by creditors. This conclusion is nothing more than an application of the general principle against the diminution of a debtor's assets to the prejudice of creditors, and is made here to include both settlement and exercise of discretion. While only time can tell future jurisprudential development, it is likely that this judgement will authoritatively set the direction. It certainly illustrates the seamless method with which the trust fitted, within a traditional civil law action, militates as

[677] A demand for retrial was dismissed by the Court of Appeal by judgement of the 28th April 2014.

another argument in favour of the autonomous civil law trust.

F. Privy Council judgement

As a postscript, it is relevant to mention a judgement by the Privy Council as a final Court of Appeal in the Cayman Islands in *Tasarruf Mevduati v Demiril*.[678] Plaintiff (TMSF) was a judgement creditor in Turkey against Demiril to the amount of USD 30 million and sought the appointment of receivers in the Cayman over Demeril's power to revoke the trusts in the islands and to take possession of the trust assets. The reasoning of the Privy Council was that a power of revocation, which could be exercised at will by the settlor without any consideration to any party's interests, was akin to property, and granted the request. The judgement has been assessed as a "a decision of policy, in an increasingly creditor-friendly environment, to ensure that judgement creditors are not defeated by the simple ruse of a judgement debtor establishing a trust, with a right of revocation to himself."[679] The relevance of this judgement is to show that even Equity sometimes moves within a direction analogous to the Pauline principle, and has shown the ability to revoke, as does the *Pauliana*, acts *in fraudem creditorum.*

G. The reserved portion and Trusts

The reserved portion remains both a defining and tormented area in civil law. Deriving its origin from the Roman-Civil law tradition,[680] trusts are an obvious method which a testator considers to circumvent the legitim. At the same time, la *réserve héréditaire*[681] may be an undermining, possibly fatal, challenge to a disposition in trust. The underlying philosophy is that family property, or at least a

[678] [2011] UKPC 17.
[679] C Russel et, "How safer from judgement creditors are the assets of a trust established by a judgement debtor with a right to revoke the trust" (2011) 17 (8) T & T 771; also in the same issue at 784 by T Molloy, "The vulnerability of asset protection trusts revocable by settlor."
[680] Gaius, Institutiones, 9-17.
[681] A Duckworth, "An offshore view of forced heirship – global conflict and its planning implications" PI to III. (1995) 4 *PCB* 270; 5 *PCB* 334; 6 *PCB* 408; T Wach, "Forced Heirship and the Common Law Trust" I (1996) 2 (5) *T& T* 16; II 2 (6) *T &T* 21; N Naef, "Forced heirship rules and matrimonial property rights in the context of a trust" (2004) 10 (8) *T & T* 18; JM Tirard, "Succession and Forced Heirship (France)" (2009) 15 (8) *T & T* 692; D Waters and L Hemmings, "Succession and Forced Heirship (Canada)" (2009) 15 (9) *T &T* 739.

part thereof, should be kept within the family. Moreover, legitim has been traditionally based on a perceived need for a testator to provide for surviving family. Freedom of testation is therefore significantly limited in the civil law tradition between the disposable and non-disposable portion.[682]

H. Jersey – Légitime and settlement in trusts.

The central importance of *légitime* in Jersey has diminished gradually over the years[683] and was drastically whittled down by the Wills and Successions (Jersey) Law 1993, 'the Law'.[684] Historically, Jersey embraced the traditional rules of the reserved portion, including the bringing back in *rapport à la masse* where the testator has gifted the heirs in excess of *la partie disponible*.[685] The States have however inclined over the years towards freedom of testation and since 1960 this recall of the donated object to the inheritance has been limited only to movables. Customary law here still plays an important role.[686]

The Law devotes only article 7 to provisions relating to *légitime*. Where testator leaves a spouse without issue, survivor shall be entitled in any case to the household effects, and to two thirds of the net movables and one third where *decuius* is survived by issue. Descendants are entitled to one third of the rest of the movable where deceased is survived by a spouse, and two thirds where there is no such survivorship.

The only relevant jurisprudential marker identified is *Best v Caprea*.[687] This related to a claim for a will to be reduced *ad legitimum modum*, the term in Jersey law for a reduction of a testamentary disposition, since it exceeded the *partie disponible* and

[682] D Hayton, "Forced Heirship and the Trust" in D Hayton (ed), *The International Trust* (2011) fn 267 at 711.
[683] K Dixon, "Légitim: a time for reform?" (2002) 6 (3) *JLR* 247.
T Hart, "Difficulties encountered with the Wills and Succession (Jersey) Law, 1993 (1999) 3 (2) *JLR*.
[684] A.J. Dessain, "The Forced Heirship issue and Jersey Trust law" (1998) *T & T* 5(1) 23.
[685] P Matthews, "The Impact of Matrimonial Property on Inheritance Law" (2010) 14 (3) JGLR 258.
[686] T Hanson and B Corbett, "Forced Heirship: Trusts and other problems" (2009) 13 (2) *JGLR* 174.
[687] JRC 100A, 14th May 2007.

for any *avances de succession* to be brought into account. The Royal Court concluded, DB Birt presiding, that "the question of these gifts to the trust is relevant, in the sense that they are put firmly in issue and the issue will have to be resolved as to whether they are *avances* and whether they should be taken into account." But this is all Jersey domestic law.

The first overriding consideration therefore is that the above applies only to Jersey domiciliaries. As seen, article 9 (2)(b) of the TJL provides that any question mentioned in the wide-reaching article 9 (1) shall be determined without consideration whether

> "the trust or disposition avoids or defeats rights, claims, or interests conferred by any foreign law upon any person by reason of a personal relationship or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognize, protect, enforce or give effect to any such rights, claims or interests."

This provision has therefore effectively blocked any application of, or challenge based upon, a foreign law which recognizes legitim. It also applies in cases where Jersey law is the governing law, except where, the settlor is domiciled in Jersey.[688] This non-recognition likewise finds application in the case of a foreign trust. The exclusion of legitimary claims will be unquestionably valid in Jersey, but it remains to be seen whether it would be upheld if challenged in other jurisdictions.[689]

(i) Unenforceability in the case of a foreign trust of legitim claims

The provisions of article 49 (2) (a) provide that "a foreign trust shall be unenforceable in Jersey to the extent that it purports to do anything, the doing of which is contrary to the law of Jersey." This provision is at the centre of the board in Jersey's trust law – it was intended to create an impregnable fortress to ward off challenges from spouse or family, claiming that assets forming part of a trust are part of the disposable portion.

[688] Art 9 (3).
[689] P Harris, "A small step for Pothier – a leap forward for Jersey" (2001) 5 (3) *JLR* 234.

This provision also occupies pride of place, but the island may here have been excessive and heavy-handed, where claims for the reserved portion may be unenforceable in the case of a foreign trust, governed by a foreign law. The basic question however remains: this is fine where the chosen law, or applicable by default, is Jersey law. Was it however necessary, or indeed so much of a rational choice, where a settlor or indeed a testator in a testamentary trust, has chosen a particular non-Jersey law to be applicable? If nothing else, it remains a demonstration of the interaction of the Jersey trust, with its historic civil law memory, and a customary reminder of the primacy of Jersey law as a, perhaps its, defining factor.

(ii) Conclusions on légitime in Jersey

All told, Jersey could have been more sensitive on two counts: the first is the broad-brush, near to total abolition of the principle, of *la partie disponible* and its consequent application to *rapport à la masse.* Jersey has a sufficiently strong civil law tradition, particularly in property and contracts, to justify the continued, albeit updated application of the principle, even where Jersey law is the governing law.[690] By contrast, Lupoi suggests that in Italy, even in situations of "*trust interno*" which is governed by a foreign law, heirs generally still respect the wishes of the Italian testator and the reserved portion, independently of the provisions of the chosen foreign law.[691] In reply therefore to the earlier question, Jersey, yes, has been iconoclastic and the passing of *légitime* is respectfully rued as a step in the wrong direction. It is after all not a pure common law jurisdiction, and therefore has to come to terms with its history. The abolition of the reserved portion is also seen with some regret in other mixed jurisdictions such as Louisiana.[692]

The second concern, where Jersey could have made more sensitive choices, is of significantly wider application, and applies where by way of example, a settlor, has

[690] M Thomas and B Dowrick, "The future of légitime – Vive la différemce" (2013) 17 (3) *JGLR* 305.
[691] Lupoi, "Trusts in Italy: a living comparative law laboratory" (2012) 18 (5) *T & T* 383.
[692] K Shaw Spaht, "Forced Heirship changes: the regrettable revolution completed." (1996) 57 *La. L. Rev*. 55.

chosen a foreign law, with Jersey resident trustees. No good reason is seen to exclude *a priori* the other reserved portion provisions of the chosen law. While it is acknowledged that this may be the trend of other offshore jurisdictions, Jersey could have achieved its market positioning, while showing deference to its civil law heritage. The current scenario is seen principally as utilitarian and consequently, the policy decision not to acknowledge a foreign law, chosen by an act of a party's will, which foreign law also recognizes forced heirship provisions, stands to be criticized. Jersey would have lost little, had it tempered its absolute exclusion of any legitimary claims, even where the governing law was Jersey Law, or at least adopting such exclusion as a default position.

I. Legitim Challenges to Trusts in Malta

The relationship between succession rules and trust law has been treated with great attention in the Malta Civil Code.[693] There has been not only an attempt to graft the trust rules to the traditional principles, but also an effort to harmonize the two.

The necessary background is the philosophy of succession and reserved portion. Where a natural person is survived by spouse or descendants, the estate of such person is divided between the disposable and the non-disposable portion at time of decease. There is no inherent obligation to conserve one's patrimony during lifetime: in other words, a testator may spend and consume all personal wealth and leave nothing at all to the heirs. However, what a *decuius* leaves at death, in the case of testate, but not intestate, succession[694] is subject to division between a disposable and non-disposable portion: this latter portion is that reserved to legitimaries.[695] Any disposition by donation *inter-vivos* or by legacy *causa mortis*, unless exempted, is subject to collation, whereby what was received by heirs, or others, is notionally imputed to the estate.[696] If what was donated exceeds the disposable portion, there is proportional abatement between heirs and legatees of their share of

[693] *Vide* generally, articles 958A to J.
[694] *Montalto v Borg*, Civil Court, 19th April 1961.
[695] Arts 615-639; *Lombardo v Lombardo*, Civil Court 4th January 1881; *Vassallo v Mallia*, Civil Court, Court of Appeal, 24th February 1930; *Fava v Camilleri*, Civil Court 10th December 1954; *Zammit v Meilak,* Civil Court, 15th October 2003.
[696] Arts 913-938; *Wismayer v Wismayer*, Civil Court, 22nd May 1950; *Vella v Bezzina*, Appeal, 20th November 1988; *Cutajar v Cutajar*, Civil Court, 3rd October 2003.

the inheritance to make up the reserved portion as recomputed.[697]

It is appropriate to commence this analysis by reference to article 958G of the MCC. The reason is that this tends to draw a line between purely domestic trusts and those where a foreign element is involved. It is remarkable that the distinguishing factor is the foreign, that is to say, non-Maltese domicile, at time of settlement, and not the applicable law. This is generally in consonance with article 6A of the MTTA, where a non-Maltese domiciliary at the time of settlement, is generally exempt from the application of the mandatory rules of the forum. The article in question, 958G, reads as follows:

> "(1) Where movable or immovable property situated in Malta has been settled in trust, under the laws of Malta or otherwise, by a person who is not domiciled in Malta at the time of settlement -
>
> (a) such person shall be deemed to have had capacity to do so if at the time of such transfer or disposition he was of full age and sound mind under the law of his domicile and the law of Malta; and
>
> (b) no provision in this Code relating to inheritance or succession to such property including, but without prejudice to the generality of the foregoing, rights to a reserved portion or similar rights applicable under this Code shall apply to such trust property, at such time or subsequently; and
>
> (c) the beneficiaries shall be deemed to have capacity to benefit.
>
> (2) Once property has been settled in trust it shall not be affected by a change of domicile of the settlor, even if the settlor subsequently becomes domiciled in Malta.
>
> (3) For the purposes of this article "reserved portion" means the legal rule restricting the right of a person to dispose of his property during his lifetime so as to preserve such property for distribution at his death, or having similar effect."

[697] Arts 647-653; *Scicluna v Meli*, Civil Court, 7th January 1967; *Caruana v Caruana*, Civil Court 1st March 2004; *Said v Abela*, Appeal, 28th May 2010.

The assumptions therefore are (i) settlement of trust assets, movable or immovable, (ii) which are situated in Malta and (iii) by a person who is, at the time of settlement, not domiciled in Malta. Governing law is irrelevant. Full capacity in the Civil Code article has to satisfy requirements of age and sound mind both with the law of domicile and that of Malta. The reasoning behind this choice may be a difficult compromise to avoid choice of law questions. Or, it may be viewed as an easy, 'play-it-safe' route to avoid such conflict question.

This double test solution seems hardly satisfactory. It is true that the *situs* of the assets is Malta and this may have been a consideration carrying, at least, some weight. Domicile, as the connecting factor to determine capacity to settle movables, would have been a solution, both principled and elegant. There is an argument to support the *lex situs* as determining capacity to settle immovables. One can think of a situation where the simultaneous double test of the law of testator's domicile, and that of Malta, conflict, or are not in perfect harmony. The easy, but proper response, in this event is that capacity fails.

The relevance of all this is, that within the limits circumscribed by the governing paragraph, the succession provisions including those related to reserved portion are inapplicable to trusts. The particular context is therefore that a '*non-dom'* is entitled to settle assets situate in Malta, independently of choice of law, free from legitim challenges: in terms of subarticle 2, settlement is unaffected with a change of domicile, even if the new domicile is Malta.

Does subsequent acquisition of Maltese domicile raise the spectre of a party's assets being partly subject to legitimary claims, while those settled in trust avoid the reserved portion because of non-domicile in Malta at time of settlement? The possibility is seen to exist, and creates opportunities as much as problems. The eyes of a litigator immediately identify an argument challenging the validity of a trust settlement on the basis of contradictions in the applicable law and public policy. Additional difficulties can be envisaged in the case of a testamentary trust, where domicile of settlor-testator may have changed, or, the *situs* of the assets trusts indicate a different conflict rule or connecting factor. A more consistent approach

should have been desirable: in principle, a testator's patrimony whether in trust or by inheritance should be governed by the same law. A relevant consideration is also that Malta still applies the Common law notion of domicile: the unpredictability in its application is well known and is an added, unwelcome, obstacle to certainty.

The statement at the concluding subarticle, that legitim means the "legal rule restricting the right of a person to dispose of his property during his lifetime so as to preserve such property for distribution at his death...", could raise serious concerns. It is respectfully suggested that this statement is wrong: as seen, there is no obligation on a testator to save in order to leave to spouse or heirs. The restrictions apply as to what a testator disposes by will, and the non-disposable portion factors in donations made to various parties; such limitations only come into operation when a succession is opened. This is more likely, a case of clumsy drafting which may carry unintended and unworkable implications.

(i) Testamentary Trusts

A moment of reflection about testamentary trusts is here appropriate. There are a handful, mostly regulatory, provisions in the MTTA.[698] The only specific references in the Civil Code are a statement that a testamentary trustee is distinct from a (civil law) testamentary executor,[699] and a reference to the application of rules of reduction, to those incapable of receiving by will.[700] Do the rules of legitim and reduction apply in the case of testamentary trusts? The response inferred, absent any express provision in the Civil Code, is in the affirmative. The basis for this conclusion is that application of rules of legitim by testament, where deceased exceeds in legacies or donations the disposable portion, also extends to disposition by trusts. Another question is how far a testamentary trust by a non-Maltese domiciliary is caught by legitim rules? Suppose an instance where a '*non-dom'* settles in testamentary trust governed by a non-Malta law, assets situate in Malta, appointing say Jersey or Scottish trustees. This could raise potential questions as to applicability of the *lex situs* to immovables and the law of last domicile to

[698] Art 43A.
[699] Ibid, art 958F.
[700] Art 958B.

succession of movables. More critically perhaps, it could potentially raise questions of classification: is the testamentary trust simply a question of trust law, or does it involve succession rules? It will be recalled that article 958G of the Civil Code provides that if a non-Maltese domiciliary settlor has capacity and is of full age both by law of its domicile and that of Malta at the time of settlement, then this will avoid the rules of legitim in the case of Malta-based assets. In this context, the language of article 958G (1)(a), referring to "a transfer or disposition" could be a possible clue to a solution. The deliberate distinction between the two words and the association of the term "disposition" with testamentary language and practice, indicate the applicability of the rule in art 958G also to testamentary trusts. This rule indicates therefore a direction for the scenario contemplated. Hence, it also seems that the relevant moment is domicile at the time of the will, and neither at death nor at vesting of the beneficial interest. Such a position, albeit perhaps implied, is consistent with *inter vivos* trusts and legitim.

(ii) More detailed assessment

The broader canvas on the relationship between trusts and legitim is drawn in the articles immediately preceding the one just examined.[701] First, the provisions apply in a domestic context to Maltese trusts that are governed by the law of Malta. Secondly, the clear effect of the provisions is to avoid a situation where trusts can avoid legitim. Rather, even if a trust is created, the rules of reserved portion will not only, *not* be avoided, but legitim will prevail over trusts. Thirdly, the core notions of the reserved portion are fully present and given effect to: these are the collation of legacies and donations, and the abatement of any excess in the disposable portion.

Attention now turns to a more detailed analysis of the articles in the title viz "A trustee may validly dispose of and transfer trust property to third parties notwithstanding any right of reserved portion... and any other provision of this Code relating to reduction of trust property."[702] The significance is that it allows the trustee freedom to manoeuvre and dispose of trust assets, and eliminates any

[701] Art 958A to F.
[702] Art 958A (3).

property so transferred from the purview of any possible legitimary claim, in favour of certainty and stability. This is consistent with the contemporary view that the reserved portion is a money claim.[703] In this event, the trustee is to hold on trust for the benefit of any claimant a sum of money based on the sale price, until the claim is either settled or otherwise lapses.

A trustee who is formally notified of a claim for reserved portion, where trust property is to be sold, is to hold in trust for the benefit of any claimant a sum of money based on the sale price until the claim is settled or otherwise lapses.[704] The significance here is the imposition of a trust by law, almost a constructive trust on the portion of sale proceeds to meet the legitim claim.

The various articles in the subtitle mirror parallelisms between trusts and the general rules of succession law in its relation with legitimary claims. Where, therefore trust property has been distributed or its proceeds sold, the party claiming the reserved portion may act against the "beneficiary as though he were an heir, legatee or donee as the case may be, and if there remains any property under such trusts, [may claim][705] proportionately between the trust property and the beneficiary."[706] This is a reflection of the civil law principle that on a successful legitimary claim, dispositions are reduced, after deducting proportionately between heirs and legatees, any donations therefrom,.[707] A settlor, with his future succession *causa mortis* in mind, may have settled its patrimony, partly in trust, possibly multiple trusts, dividing in advance of decease certain assets, and bequeath the remaining portion of the estate by the regular rules of succession. These dispositions in the writer's view are correctly treated *quid unum*, consistently with the civil law tradition of the quasi-personification of the *haereditas jacens*.

The rules of reduction are likewise adopted and the relative Civil Code provisions are expressly made applicable to trusts. Abatement can only be demanded by

[703] Art 615 (2).
[704] Art 958A (4).
[705] Words in brackets added.
[706] *Ibid*, for the last paragraphs Art 958A (3) (4) and (5).
[707] Art 651.

those entitled to a reserved portion or those claiming under them, excluding therefore donees, legatees and creditors.

(iii) Power of variation

An exception is specifically acknowledged "where the trustee exercises a power of variation or otherwise acts so as to be in conformity with the provisions of this Code."[708] The reading of this provision is that a variation, most likely also to include a revocation of trusts, or change in beneficiaries' entitlement, is likely to require a re-alignment of all calculations of portions and abatement where applicable. The safest moment in time therefore remains that of the passing away of settlor-testator: at that point, trusts cannot be further varied or revoked, although donations may still be challenged or reduced. What remains less clear is the effect of an exercise of discretion. Some powers may require the exhaustion of the trust fund, and, at the moment of final distribution, the emerging equation of what has been received by the beneficiaries under trusts, *causa mortis* and donations, can be quantified with reasonable certainty. Other powers may require periodic consideration whether or not to exercise and/or distribute. The difficulty here is that there is no apparent final moment of reference on the basis of which computations and adjustments may be carried out. It can only be partly addressed by analogy taking the death of settlor-testator as the relevant moment, since distributions may continue to take place after that event. The position remains unclear and may be identified as a *lacuna*.

(iv) The European Union Regulation on Succession

The EU Regulation 650/12 on jurisdiction, applicable law, recognition and enforcement of decisions, and the enforcement of a European Certificate of Succession, is only marginally relevant, but not totally irrelevant, to trusts. It is only applicable in the case of Malta, particularly in view of the opt-out of the United Kingdom, and therefore of Jersey. Article 2 (j) of the Regulation excludes from its scope "the creation, administration and dissolution of trusts." Nevertheless, article 13 of the preamble clarifies that "this should not be

[708] Art 958(B)(2).

understood as a general exclusion of trusts. Where a trust is created under a will or under statute in connection with intestate succession, the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries." This means that the pan-EU rules of jurisdiction, choice of law, recognition and enforcement apply to testamentary trusts or in the case of intestacy. By implication, therefore, it could be potentially relevant to challenges to trusts on the basis of legitim according to the applicable law. The Regulation is to apply to the successions which open after the 17th August 2015. It will be interesting to see how it will interact in practice with the Hague Convention. In the case of Malta, both instruments will be part of domestic law.

(v) Summary

All told, in the author's view, the drafters have done a rather good job. It is known that trusts and legitim remain uneasy bedfellows. The MCC has taken a clear position on this: the reserved portion remains, and unremittingly so, at the heart of succession law. It is also resoundingly clear that trusts are not, and cannot be used as a mechanism to bypass legitim. It may be debatable whether legitim in Malta is a matter of public policy, but it can be stated with confidence that it occupies a central and fundamental role in popular and professional consciousness. Trust settlements have also been correctly treated as similar, or analogous to, donations and legacies by particular title. While they are obviously intrinsically different in nature, their aggregation in one similar category, even if perhaps only functionally so, is seen as proper. After all, trust beneficiaries, donees and legatees are all recipients of generosity.

The decision to retain the primacy of legitim over trusts, and by implication therefore to allow trusts to be challenged on the basis of the reserved portion, is seen as correct and difficult to question. It is probably inappropriate even to consider comparing Jersey's choice with that of Malta, which has treated its civil law heritage more sensitively and respectfully. But in either case, different considerations may apply.

J. Concluding Reflections

Concluding thoughts go back three hundred and sixty degrees to the question posed at the opening statement of the chapter – the tension between challenges and certainty. There are various factors operating simultaneously in the creation and the life of a trust. This is particularly true in the case of transnational trust jurisdictions – choice of law, *situs* of assets and hostility or receptivity of a legal system to the trust. The central questions are not merely challenges to trusts, but also their survivability. For all the granted possibilities of challenge, certainty and predictability of the intention and effect of the trust settlement, remain the strongest *desiderata* and perhaps the most elusive. It is however this characteristic which distinguishes the quality of a trust jurisdiction. Consistency in results is the hall-mark and gold-standard of excellence. Challenges may be fine, but reliability is far more important. The soundness of a trust jurisdiction hinges on this critical balance.

There are therefore two areas of priority in the treatment of challenges to trusts. The first is that the limits should be clearly defined, militating strongly in favour of a consistent approach. The second, echoes once again the words of DB Birt referred to earlier in *Esteem*, being the point that jurisdictions should move slowly and with extreme caution to allow those transactions, to which citizens, investors or settlors attribute faith, to be set aside. Once the rules of what is a 'no-go' have been clearly spelt out, beyond and outside their four corners, challenges should be restrictively viewed. There is no dissonance with the Rule of Law as long as the rules of the game are clear. Indeed, it is suggested that this should be an unwritten judicial policy.

On this last count, both jurisdictions score well. Jersey, with its destructive approach to foreign challenges, has achieved clarity and negative certainty. Malta has opted for a more balanced receptive approach. It is true that it has avoided systematically stamping-out any foreign intrusion. It has at the same time however made a significant effort not only to respect foreign created-or-vested rights, but the sanctity of the will of a disponer.

CHAPTER VII - VARIATION AND TERMINATION OF TRUSTS

A. Scope of the Chapter

Variation raises questions about property and contractual essentials of trusts. Other overlapping aspects include change in the proper law, migration of trusts, discretionary appointments and changes to testamentary trusts. In some sense, a revocation is also a variation, with the question being whose will is to prevail, that of the original settlor, or current trustees or beneficiaries.[709]

Intuitively, a civil lawyer will ask whether a trust variation is consistent with respect for property rights and the sacredness of contractual obligations. If a beneficial entitlement is categorized as a property right, would not a variation be an intrusion thereof? If a settlor can validly tinker with the terms of the trust and therefore with those under which the trustees and the beneficiaries hold, questions about the ownership of the trust fund are legitimate. Not that revocable transfers in civil law – such as sale with a right to redeem or call back the transfer – are unknown. Where the interest is not yet vested in the beneficiary, the matter should be clear enough. The possibility of variation or revocation of transferred beneficial interests – forget for the moment, discretionary trusts, since they are generally a *spes* – does not sit comfortably with the characteristics of absoluteness, exclusivity and perpetuity of civil law *dominium*.[710]

Just as tricky may be the obligational perspective of trust variation: if it is true that '*obligatio est juris vinculum quo, necessitate adstringimur...*', it should then follow that the *'alicuius solvendae rei*'[711] should not be subject to mutation. It is very likely a perfectly correct assertion that a variation, possibly even if unilateral, is the creature of contract, whose hallmark is the creation and certainty of rights and obligations.

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[709] On Trust Variation generally, *Lewin* (18th ed) 1867, (19th ed) 2211; Underhill 668; Thomas and Hudson, 675; E Campbell, *Changing the Terms of Trusts* (2002); P Matthews, *Trusts: Migration and Change of Proper Law* (1997); S Evans, "Variation Clarification" (2011) 2 *Conv* 151; M Pawlowski, "Informal Variation of Express Trusts" (2011) 3 *Conv* 245; D Hyde, "Variation of Private Trusts in response to unforeseen needs of Beneficiaries" (1967) 47 *B.U.L* Rev 567.

[710] P Birks, "The Roman Law Concept of Dominium" (1985) 1 *Act Juridica* 1.

[711] J Inst 1.3.13.

B. Operational Basis

The functional justification for trust variation is plain and strong: changes in circumstances, over long periods of time, or in family asset trusts. The more difficult question is whether fundamental changes – within its terms, of course – transmute the trust: for example, the possibility to add otherwise excluded persons to the list of potential beneficiaries or the settlement of sub-trusts with potentially different categories of beneficiaries. Is this re-writing the trust? The justice of the case may so require, for example in the case of vulnerable or unborn persons. It may be mandated due to the confiscatory clutches of the tax-man. Political circumstances or instability may impose the "flight" of the trust to a safer haven.

Trust variation may also potentially disturb vested patrimonial rights. Express vested trusts clearly do not receive the same treatment as other trusts. Again this goes to the heart of a value, deeply entrenched and dear, to the civil law tradition, namely the protection of *droits acquis*. Allied, is a delicate human rights issue, namely whether variation of a trust can offend the right to peaceful enjoyment of property protected by the European Convention on Human Rights. Other related issues could be denial of access to a court in terms of article 6 or even article 8 on the right to enjoyment of private life, as demonstrated by the *Marckx* matter.[712] This is not to mention a lurking applicability of article 14 on discrimination, which, while not enjoying an autonomous meaning, may be grafted as an ancillary ground to any other violation, for example to the loss of peaceful enjoyment of possessions.

Of course, against all this, it can be argued that as long as any variation is within the terms of the trust, then all is perfectly legitimate. It is also acknowledged that a judicial response is likely to be a clear and unhesitant 'no' to any doubts over trust variation – if nothing else because of judicial reluctance to disturb trust functioning.[713]

[712] Marckx v Belgium (1979) ECHR 6833/74.
[713] P Matthews, "Trustees' applications for directions and the European Convention on Human Rights" (2004) 8 (2) *JLR* 201.

Should variation only be a judicial creature or should extra-judicial variation be possible?[714] Other considerations, beyond the scope hereof, point to the dangers of property being indefinitely out of economic circulation, militating therefore in favour of changes to the terms of the trust.

The position taken is casting a critical eye at the excessively 'easy' variation of trusts. It is nevertheless acknowledged that such variation is a necessary functional evil. While flexible arrangements or rules averse to rigidity are generally positive, such variation can attack the very heart of property and contractual obligations. While these may be justified on utility, fairness and indeed contractual terms, this does not justify re-defining property or obligational rights.

C. Variation of Trusts - Jersey

The TJL mentions variation specifically in five instances.[715] The notorious article 9 (1) (c) provides that "powers of variation or revocation...shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question." 9A (2) includes among the powers that may be reserved by settlor, those to "revoke, vary or amend the terms of the trust, or any trusts or powers arising wholly or partly under it." The next reference is article 37 stating that "a trust may be varied in any manner provided by its terms." Article 40 acknowledges that "a trust and any exercise of a power may be expressed to be ...(b) capable of variation." Finally, article 47 contemplates a trust variation by the court to include the power to approve particular transactions.

The application of these articles has developed into two general directions: the first is the variation of a trust for a beneficiary's needs, the second reflects the response of the Jersey courts to the exercise of a power of variation, almost invariably by an English court, in context of matrimonial proceedings. Existence and extent of powers of variation or indeed any variation are regulated solely by Jersey Law.[716] This shall therefore prevail over the terms of the trust, even a

[714] B Christov, "Extra-judicial Variation of a Civil Law Trust" (2008) 28 *Est Tr.& Pensions J* 151.
[715] *Contribution on Trust Law*, Institute of Law Jersey - P Matthews, (2012-2013) 217; Trusts Study Guide (2015) 261.
[716] Art 9 (1) (e), *supra* 215 *et seq.*

foreign trust.[717] Suppose governing law, beneficiaries and *situs* of assets are out of Jersey while assets are held by a Jersey trustee, Jersey law will still apply, regardless of category and location of assets, choice of law and jurisdiction, or administration of the trust. A minimum connecting factor is likely to be sufficient to trigger this barrier. One may question the sense of a provision which tends to impose its law on variation: while in harmony with the TJL, it is excessive.

(i) Variation by its terms

Article 37 acknowledges in clear terms the possibility of a trust variation, providing that:

> "Without prejudice to any power of the court to vary the terms of the trust, a trust may be varied in any manner provided by its terms."

The terms of the trust are understood as a reference to the parties' autonomy.[718] The article is couched in the widest language. No limitation to "its terms" is seen, and the maxim *"ubi lex non distinguit nec nos debemus distinguere*" should find application. On the other hand, there is no apparent limit to the extent of variation permitted: such modification can therefore extend far beyond the letter and spirit of the trust, provided it is within the literal terms of variation powers or possibilities. This therefore returns to the original question – whether a trust can trans-mutate and re-invent itself indefinitely. Recall that "unless the terms of the trust otherwise provide, a trust can continue in existence of an unlimited period."[719] Once the trust "rocket" is launched, such wide powers of variation will render the processing of controlling its direction difficult. Nor is the extent of application of the trust "substratum" doctrine, if at all applicable, clear.

The variation context is again dealt with in context of powers of revocation, where it is acknowledged that:

> "A trust and exercise of any power under a trust may be expressed to be .... (b) capable of variation."[720]

[717] Art 49(2)(a).
[718] P Matthams, "Variation of Jersey law trusts using Express Powers" (2003) 9 (5) *T & T* 11.
[719] Art 40.
[720] Art 40.

Protection of vested or acquired rights is clear in that the following sub-article provides that no revocation or variation shall prejudice anything lawfully done by a trustee before notice of revocation or notification. While it should be clear that vested rights cannot be prejudiced, the question is rather whether the variation can be applied with retrospective effect. For example, can a change in power of appointment be exercised to be effective say, two years back, validating therefore an otherwise unauthorized appointment, or one which was potentially a fraud on power? A negative reply is indicated, based on the civil law presumption that changes in the law are prospective not retroactive, invoking the maxim *lex non habet oculos retro*.

(ii) Judicial Variation of Trusts

Art 47 refers to (i) variation of the terms of a Jersey trust and (ii) approval of particular transactions, in either case by the court. This provision has taxed the Jersey courts on two counts: the first is the approval of trust variation for beneficiaries, such as minor or even unborn children. The second is the response to variation of Jersey trusts, generally by English courts.

The first two sub-articles cast the power of the court to approve a transaction on behalf of minors, interdicts, any person born or unborn who may in the future become interested in the trust - mandatorily directed not to approve any arrangement unless it is for the person's interest. Other powers conferred on the court are perhaps wider and refer to

> "any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the terms of the trust or enlarging the powers of the trustee or managing or administering any of the trust property."[721]

These terms are clear enough in their meaning: a careful look at this part of the article will not only reveal the breadth of the court's remit. It will also pointedly raise familiar questions: can or should the court re-write the trust? Beginning from basics, what about the *locus standi*? The crux, in this widely sweeping article, lies on "by whomsoever proposed." The civil law mind will assume, as a

[721] Art 47 (1).

basic pre-requisite, legal interest of a party for *capacitas standi judicio*. An indication is provided in that an application to the court for an order may be made by the Attorney General or by the trustee, enforcer or a beneficiary or, with leave of the court, by any other person.[722] There is therefore here no rigid link that applicant has to demonstrate a personal benefit: rather the benefit criterion refers to the person whose interest is being varied. This is seen as a positive provision not to hamper on technical grounds any potential improvement deriving to a party involved.

The wide powers conferred on the court can remain a concern, since they could potentially reek of excessive discretion. On a balance however, the conclusion weighs towards such a provision to be in place, with all but unbridled powers to the courts, rather than narrow technical limitations. Comfort is given through the requirement imposed on a court at art 47 (2) which precludes any court approval "unless the carrying out thereof appears to be for the benefit of that person."

The Jersey jurisprudence reveals the criteria considered in determining "benefit." It was held that the court should consider, on behalf of potential beneficiaries, such as the children and remoter issue, as yet unborn, of a specified person, whether "it would be 'for the benefit of' that class of persons, taking into account all relevant matters and not only the financial aspects of the arrangement."[723] The landmark judgement, laying the foundations for future interpretation, is *re Osias Settlements*.[724] The representation sought court approval of an arrangement varying the trust of two settlements governed by Jersey Law, so that all trusts would be constituted under Jersey Law and the funds transferred to trustees resident in the US. It is remarkable that in this seminal judgement, the Jersey court had "a close regard to English authorities" and to those Canadian provinces which had Jersey-similar legislation. The distinction between variation and re-settlement of trusts was very clearly present before the court's mind, referring to the principle developed judicially by the English courts that "if an arrangement changes the whole substratum of the trust, it may well be that it cannot be

[722] Art 47(4) referring to art 51 (3).
[723] *Munro Settlement* [1995 JLR 30b].
[724] [1987-88 JLR 389].

regarded as merely varying the trust."[725] It saw "no justification for implying any limit on the scope of the arrangement to which the Court can give application beyond the terms of the article itself." The only limitation imposed was that the court had to be satisfied that the variation appears to be for the benefit of the person on whose behalf approval is sought.[726] While tax considerations may be relevant, the basis of the court's reasoning in granting the application was the far stronger connexion with Florida than with Jersey, and that the variation was for the benefit of minor and potential beneficiaries, unascertained and unborn. The court left open the question whether it had jurisdiction to re-settle, as distinct from varying a trust. The comment on this seminal judgement is that the Royal Court approached the matter with characteristic fairness and pragmatism, showing however acute awareness of the tension between variation and re-settlement.

(iii) Other Jurisprudential criteria

Apart from fiscal advantages, the undesirability of allowing a person to acquire a significant capital sum at a very young age is a powerful reason for varying a trust.[727] The Royal Court in another instance acknowledged likewise that minimisation of tax could be a benefit: in this latter case, the court accepted to vary the terms of the trust to avoid UK tax and depletion of the assets.[728] A variation for tax avoidance is a benefit,[729] but also includes a wider interest in maintaining assets for the entire family, and harmony therein.[730] Benefit to a minor was held to include the discharge of a moral obligation: in this case, settlor, her children, their spouses and remoter issue were beneficiaries of a Jersey trust. Subsequent legislation imposed capital gains on her in the event of a disposal of

[725] *Ball's Settlement Trusts* [1968] 1 W.L.R. 899. The substratum doctrine was considered but rejected by the Royal Court because of the practical difficulty of its application and also on principle: since all beneficiaries can together change the substratum of the trust, the court is simply supplying its consent on behalf of some beneficiaries who are not *sui juris* or unborn, and the substratum principle consequently inapplicable.
[726] *Ibid*, 403, 408-9.
[727] *Gates Estate Trust* [2000 JLR 68a].
[728] *Douglas* [2000] JLR 73.
[729] *Neil Ashely (1990) Settlement* [2003 JLR N9].
[730] *N & N* [1999 JLR 86].

trust settlements. The Court inferred that just as the moral obligation to provide for the settlor was unanimously accepted by the adult beneficiaries, it was also accepted by the minor, and would be accepted by the Court on behalf of unborn beneficiaries.[731] The Royal Court put it that tax avoidance is not necessarily an improper purpose.[732] Moral obligation, provided it meets an objective test, along with tax considerations, were considered sufficient grounds to constitute "benefit" required for variation.[733]

(iv) Trust Variation in Matrimonial Proceedings

The questions, coming to the Jersey Courts relating to trust variations consequent to matrimonial proceedings, are normally twofold. These can be a request to give effect to a variation of a Jersey trust by a foreign, normally an English, Court.[734] A second possibility is a representation requesting a change, not as a result of a Court order directly varying the trust, but rather citing as its basis the judgment of a foreign Court. The intervention of the Jersey Courts is sought since, it is they who, in the final instance have to order or endorse a judicial variation: this is applicable, it seems, even when a Jersey trustee has submitted to, and pleaded before, a non-Jersey Court. The more subtle question involved is the extent of power, if at all, of the Court to vary a trust in these circumstances.

'Comity' is the basis often invoked by the Jersey Courts to justify recognition of foreign judgements, not only in matrimonial proceedings.[735] This can be a convenient tool, or maybe, a panacea, as required by the expediency or justice of the case. The Royal Court in *Re Compass*, on an application for directions by trustees, varied the terms of the settlement to allow trustees to make a capital payment to the wife.[736] The specific context is that the Jersey court should follow the doctrine of comity of courts and exercise its discretion "to vary a Jersey trust

[731] *T Settlement* [2002 JLR 2004].
[732] *Sangle-Ferriere Children's settlement* [2007 JLR N8].
[733] *Re DDD 1976 Settlement* [2012 (1) JLR N12]; S Warnock-Smith and J Speck, "Is a person ever really excluded" (2013) 19 (1) *T & T* 86.
[734] J Harris, "Variation of Trusts governed by Foreign Law upon Divorce" (2005) 121 *L.Q.R.* 16; P Matthews, Trusts and Divorce: the enforcement in Jersey of English Nuptial Settlement Variation Orders" (2008) 22 (2) *Tru.L.I.* 63.
[735] *Lane v Lane* [1985-86 JLR 48].
[736] Fn 585.

to give effect to a financial settlement agreed in foreign divorce proceedings which has been properly considered and approved by the foreign court."[737]

The Fountain Trust is a good example of a trustee's dilemma on how to respond to a judgement given in another jurisdiction.[738] The trustees submitted to matrimonial proceedings in England, which declared a post-nuptial Jersey settlement to be a sham. The Royal Court held that the English Court had erred in its conclusion since it should have applied Jersey and not English criteria in finding a sham. Nevertheless, once the trustees had submitted to the jurisdiction of the English Court, it was not held unfair to enforce the judgement against them, since the justice of the case so demanded. Moreover, the English judgement could be recognized by the Jersey Courts on the basis of comity, since the husband had every opportunity to defend himself. In *the B Trust*, the Royal Court accepted, again on the grounds of comity, the variation of a Jersey trust giving effect to an order of the English High Court.[739] What is significant is that it was stated by the Jersey Court that the English order was not inconsistent with Jersey law and consequently unenforceable under art 9 (4); however, this article did not remove its power to give effect to the English order on the basis of comity.

This stance of the Royal Court may be contrasted with two significant judgements. The first is *Turino* in which the Royal Court formulated the clear limits of its powers to vary a settlement.[740] Parties, in divorce proceedings, were joint beneficiaries of a Jersey trust. On the basis of a letter of wishes, a Dutch Court had ruled that the proceeds of the matrimonial home, the principal asset of the trust, were to be shared equally. On an application by the trustees for directions, the Royal Court confirmed that since all beneficiaries in existence had been ascertained and were *sui juris*, they could require the trustees to terminate the trust. Significantly, however, the Court held as follows:

[737] *Re the Bald Eagle Trust* [2003 JLR N16].
[738] Fn 585; also, *the H Trust* [2006 JLR 280] and [2007 JLR 569] – the Royal Court holding that it would only interfere with the decision of a trustee, who had not surrendered its discretion, if it were one, at which no reasonable trustee could have arrived. The context was a trust variation and division of matrimonial assets; also *Y Trust* [2015] JRC 059.
[739] Fn 580.
[740] [2008 JLR N 27].

> "The Royal Court had no power to vary a fixed trust of its own volition and its general supervisory power under art. 51 of the Trusts (Jersey) Law 1984 did not confer a power to vary the terms of a trust (save in the limited administrative respect mentioned in the article itself)..... Furthermore, the court could not enforce or give effect to a judgment of a foreign court purporting to vary a fixed trust but could only give effect to it to the extent that the trustees had a discretionary power under the trust to act in a manner that would achieve that objective."

Now this is startling. Nowhere, in the judgements previously analysed, did the Royal Court give effect to a foreign judgement, and vary a trust on the express pre-condition that it was a discretionary trust and not otherwise. It may have been implied, but in this case it is coupled with a significant statement that the Court cannot vary fixed trusts. This is a rather positive development, since the clear meaning is that express fixed trusts are beyond the reach of variation by a Court.

This reasoning was further developed in *IMK Family Trust*.[741] The scenario was here again an order of the Family Division of the English High Court, altering a Jersey trust. The Family Division had applied English law to vary trust: this rendered the judgement unenforceable in Jersey since any trust variation had to be carried out according to Jersey law, even though the trustee had submitted to the English Court. With a masterstroke of legal ingenuity and justice, the Royal Court clarified the English order as an alteration consented to by all adult beneficiaries. Applying *Saunders v Vautier,*[742] it re-instated the wife as a beneficiary. It confirmed that it had no general power to alter a trust under article 51 or in its general supervisory jurisdiction, such as for example possessed by the English Chancery Court.

The civil law influence, particularly the contractual characteristics of the trust are clear here. The Court may give directions to the exercise of trustee discretion which are not a variation of the trust: however it was careful to distinguish those trust variations which are within the parameters of the trust document from those outside the four corners thereof. The strong message of the judgement is that the

[741] [2008 JLR 250].
[742] [1841] 4 Beav 115.

contractual provisions of the trust are binding and all those involved have to operate within them.

The Jersey Court of Appeal confirmed the judgement.[743] It is remarkable that it did not attribute any significant emphasis, as distinct from the Court below, on the contractual feature of the trust. The point was put thus:

> "In my opinion, therefore, art. 47 empowers approval of an arrangement even though the arrangement might be so extensive as to leave little of the existing trust provisions extant; but so long as those benefiting were within the ambit of the settlor's expressed bounty."[744]

This beautiful writing recalls Mozart's works: so elegant in form and deep in content, yet sometimes so elusive in meaning and spirit. On the one hand, leaving all but nothing extant of the existing trust provisions seems, *prima facie*, to avoid and leave behind the trust provisions and contractual principles. On the other, the ambit of the "settlor's expressed bounty" means acting within the trust corners. While the Court of Appeal did not place reliance four squarely on the civil law principle of contract, yet it achieved a harmonious result of fairness and pragmatism, leaving the interpreters guessing on the unwritten principle. Questions of vested rights, fixed trusts, and legitimate expectations are left hanging.

The review of Jersey cases on trust variation is concluded by the latest known judgement on the matter.[745] If a trustee has not submitted to a foreign court, then the foreign order is not enforceable without a fresh hearing on it, although the Jersey Court may give directions to the trustee to achieve its purpose. It stated that "the Royal Court clearly cannot exercise its discretion under art. 51 of the Trusts Law to order a trustee to do something he does not have the power to do." There is however no distinction between a trustee's discretion and fixed trusts.

[743] [2008 JCA 196], also cited as [2008 JLR 430].
[744] *IMK* Appeal, fn 743 at para 83.
[745] *HSU v Barclays Private Bank* [2010 JLR 35].

D. Trust Variation in Jersey – An Assessment

Jersey trust variation has developed along two broad jurisprudential lines: variation by way of enforcement of foreign matrimonial proceedings and approval of those meritorious or entitled, including vulnerable or unborn persons.

In the first case, 'comity' was sometimes invoked to somehow justify recognition of a trust variation in matrimonial proceedings by a foreign court. One sometimes asks whether this was *a posteriori* reasoning, where the justice of the case was acknowledged. More recent cases have distinguished situations where a trustee has or has not submitted to a foreign court. Of major importance is the frank admission by the courts that they have no power to vary fixed trusts. 'Comity' - even in this day and age of international conventions and cross-border rules - still enjoys widespread respect by the Jersey courts, perhaps a "*deus ex machina'* status. Article 9 naturally casts its shadow on the entire spectrum. This is particularly true where a trustee has not submitted to a foreign court. At all events, any variation to be recognized and more so to be enforceable in Jersey has to conform with the Island's law. Therefore, the truth is that the efficiency or effectiveness of a variation of any Jersey trust ultimately lies in the lap of the Jersey courts, which remain the defining 'firewall' to ward off attacks from Courts or legislation of other jurisdictions.

As to the other jurisprudential development – approval on behalf of vulnerable or unborn - the Jersey Courts to their credit have flexibly and fairly worked the law to vary trusts. Where a clear case for 'benefit' is made, they have responded positively: examples include migration of a trust, tax mitigation or avoidance, acknowledgement of moral obligations, or a trust variation in furtherance of family harmony. All told, they have on both counts distinguished themselves as simultaneously fair, sensitive, pragmatic yet principled. Their resistance to the quasi-paternalistic attitude of some English Courts purporting to vary extra-territorially a Jersey trust is fully understood and justified. There should, moreover, be no doubt that a variation within the terms of the trust should be

possible and enforceable: this was wisely stated by DB Birt in the *IMK Family Trust* [746] and is acknowledged by art 37 of the Jersey trust law.

E. Testamentary Trusts

An area which generally seems to have escaped much attention is the variation of testamentary trusts.[747] In principle, a variation of testamentary trusts *durante vita* should be valid, since no vesting of beneficial rights has taken place: the expectation of a testamentary or inheritance benefit is, as is trite law, *a spes.* The more delicate question refers to variation in testamentary trusts when these have, *mortis causa*, come into effect and assets transferred to trustees. Any such variation is seen as being a possible source of controversy. As a hypothesis, testator S, a non-Jersey resident, has created a testamentary trust, whose proper law is that of a civil law jurisdiction, appointing Jersey trustees. The settled assets include both immovable situate in Malta or Scotland, with movables and liquid investments. S appoints in his testamentary trust his wife W as usufructuary/liferenter, and three children as to the *nuda proprietas*. S subsequently revokes by disherison the testamentary beneficial entitlement as bare-owner and subsequent heir to one of the children, on the grounds, say, of cruelty. How will Jersey look at this variation?

In principle, the law of the domicile or habitual residence of testator at the time of will regulates succession. Assuming that the will is both formally and substantially valid, the question is how Jersey would react to a testamentary trust and its variation, *durante vita* by settlor, or after its demise by the trustee, made under a law which is not that of Jersey. Art 9 will severely test such trust creation and indeed variation. It is pertinent to add that the Hague Convention excludes from its operation the act of transfer creating the trust: therefore one cannot rely on the Convention recognition to argue for the validity of variation.

Another related question – also acknowledged by DB Birt in *IMK* – is the inter-relation between a trust variation and the Hague Convention which at article 8 (h)

[746] Fn 741 at 270.
[747] Trusts are excluded from the provisions of the EU Regulation on Succession 65/2012: art 2 (g) makes inapplicable the Regulation to "the creation, administration and dissolution of trusts.

includes "variation and termination of the trust."[748] The question is whether the Jersey Trusts Law will override the law otherwise applicable by the Convention. Significantly, the Royal Court left the point open.

F. Variation of Trusts – Malta

(i) Variation by its terms

When the trust is regulated by the law of Malta, the not unfamiliar difficulty, in the case of variations, is its characterization, since Malta is significantly, and more than Jersey, steeped in the civil law tradition. The MTTA mentions directly variation on five occasions. Article 14 states that the power to vary a trust within its terms shall be without prejudice to the power of the court to vary such trust. The subsequent article provides that variation or revocation of a trust shall be without prejudice to any act lawfully done by the trustee prior to notice thereof. Article 36, in terms almost identical to the Jersey (also) article 36, grants power to the court to vary the terms of a trust and approve particular transactions. Article 6B of the Malta Law in context of management of conflict of applicable law provisions gives some limited leeway to the trustee to vary the terms of the trust. There is finally article 8 of the Hague Convention which is part of the domestic law.

It is suggested that a Maltese Court or lawyer will characterize a variation within the terms of the settlement, as a contractual incidence. The objection, that it is difficult to conceive of a trust simply as bilateral contract, or indeed a gratuitous contract, remains valid. The justification for this view is, that the contractual term is written in the trust document or a power conferred on the Court by law. No functional difficulty should arise for the application of trust variation: the Maltese Courts and practitioners will follow English, maybe Jersey or Scottish practice,[749] without many questions asked or eminent eyebrows raised. Such direction is then imbued and clothed in the civil law culture and language, with generally then mainstream, routine application.

[748] Fn 741 at 277.

[749] Scottish Law Commission, *Report on Variation and Termination of Trusts* (2007) SE/2007/42; *Report on Trusts Law* (2014) Scot Law Com 239, 202.

The next question is whether a trust variation can be classified as a novation.[750] However imaginative an analogy or stretch of legal reasoning, it seems difficult to categorize trust variation as an innovation. True, a trust variation may be so far-reaching so as to "substitute" or "novate" new rights, duties and interests. Nevertheless, the link, however tenuous, of the power to vary – whether by settlor, trustee, protector or beneficiary – exists within the initial vesting of the trusts. Novation as a definition or classification of a variation can hardly be satisfactory and should be discarded.

The next question is whether a trust variation is a transfer or assignment of a property interest. The circular, maybe tautological reply, is, yes, there could be a transfer of a proprietary right by trust variation. How does this stand with the previous assertion that trust variation fits in a contractual category? Where a trust is varied, there could be indeed a re-alignment or creation of property rights, but within the existing obligational framework. The essential point remains that there is a transfer, by reason of contractual obligations undertaken, within their terms, and the *causa obligationis* is the trust variation.

The provisions relating to management of conflict provisions empower a trustee to "vary the terms of the trust in so far as relative to the nature or extent of the benefit."[751] While the intention behind the granting of this power is unquestionably laudable, it is also clear that any exercise thereof could seriously, potentially and prejudicially, affect property interest. This provision illustrates both the limits to the contractual explanation to trust variation, and its tension with property rights. In line with the ways of the legal world, it has been attempted to provide a working justification, even if not always entirely consistent, to trust variation by its terms.

(ii) Judicial Variation of Trusts

There is little doubt that the Malta Civil Court of Voluntary Jurisdiction will take to this role of trust variation, even if this power has been conferred by the Trusts Act, therefore only relatively recently. Historically, this court had the role of

[750] Art 1179 Civil Code.
[751] Art 6B (b) (i) MTTA.

supervision of administration of estates, inventories, property of minors, and working of tutors or curators. Its function, particularly in assessing "benefit", will be intuitively understood. There are no known or reported judgements on this matter since proceedings are generally *in camera.* However, in matters of benefit, the court will draw on its own experience harking back to the period of the Order of St John.

Some judicial reluctance to vary significantly a trust interest is anticipated. While no hesitation is seen to approve measures for the benefit of vulnerable persons, the strong civil law culture of vested rights and fundamental rights related to property claws-in. Moreover, orders and decrees of this court are always subject to challenge before a contentious Court. Therefore, the moment a Judge of the Voluntary Civil Court gets the slightest whiff of tension or litigatory climate, the likely response is to refer the matter to a contentious court: here arguably there may be the full benefit of article 6 of the European Human Rights Convention in adversarial proceedings. It would be of course different if all parties in Voluntary proceedings showed the same mind before the Court.

The meaning of "benefit" in terms of article 36 still requires judicial development and clarification in Malta, due to the limited experience to date of the trust law. Its language is identical to that of Jersey, with the exception of *locus standi* of applicants to the Court: this article provides that an application "may be made by the trustee or any beneficiary." It is suggested that the Court would be ready to consider other applications for example from settlor, protector or enforcer, or even a curator of an interdict, provided sufficient interest to justify standing is established.

G. Trust Variation in Malta – An Assessment

The reflections made in the case of variation of Jersey trusts relating to vested rights and fundamental human rights remain valid and applicable in the case of Malta, being here perhaps more pronounced due to a stronger civil law substratum. As distinct from the Jersey Law, the Malta Law specifically refers to

testamentary trusts.[752] Claims in legitim, following a variation, could also be a relevant factor. This could be an added basis of uncertainty, on the grounds that any variation could offend such mandatory rules. In conclusion, the dominant theme here will remain the tension between the will of the settler and potential therewith, in the case of variation, over contract, property and succession entitlement.

H. Termination of Trusts

This is the natural end-cycle of the trust process. There may be various reasons for a trust to be terminated: its purpose may have been fulfilled, the trust fund exhausted, beneficiaries may apply the *Saunders v Vautier* principle. Other instances may include the operation of resulting trusts[753] or a Regulator's order dissolving the trusts.

The questions considered in this part will enquire about the process and nature of trust termination. Have the jurisdictions here considered generally, followed the English and Commonwealth patterns, or have they tried to shape their own distinct identity?

I. Termination of Trusts - Jersey

The TLJ is generally scant in its specific references to termination. The most likely inferred explanation is that the Act implies and assumes general principles of termination.[754] Revocation is mentioned in context of powers reserved by settlor and the exercise of a power.[755] The terms of a trust may provide for the termination of a beneficial interest, as distinct from the trust, or restricted dealings in the case of a spendthrift or protective trust.[756] It is but article 43 which specifically acknowledges termination.

[752] Arts 9(15), 43, 43A.
[753] *Underhill*, 437; *Lewin,* (18th ed) 232, (19th ed) 979; *Thomas and Hudson* 727; Trusts Study Guide (2015) 44.
[754] On termination, *Underhill* 413; *Lewin* (18th ed) 850, (19th ed) 979; *Thomas and Hudson* 1483.
[755] Arts 9A and 40.
[756] Art 35.

A settlement and beneficial interests flowing therefrom, can be an essentially revocable act, either through a settlor reserved power, or through the exercise of a power by any other donee, not merely trustees. This carries the familiar ring of the tension encountered in variations. If an interest is assigned or transmitted *causa mortis*, it can be burdened with a power of revocation. Article 43 focuses exclusively on trust termination, imposing the duty to distribute trust assets within a reasonable time.[757] The provisions of the Jersey Trust Law do not present any noticeably striking or particular feature: the question therefore is how this fits with the Jersey tradition, bearing particularly in mind that the 1984 law is not a codification. English practice has been closely followed – with the corresponding obligations of trustee to seek indemnification or retain sufficient assets prior to distributing the trust fund. All told, the published sources of Jersey Law on termination are generally sparse, as the judgements and the States' law journal reveal. The particular features of trust termination are identified as first, the possibility of the settlor reserving power to terminate the trust, and second the power to terminate a beneficial interest: the second case, on the basis of *ubi lex non distinguit* principle, is reasonably interpreted as meaning that the power can be granted to settlor, trustee, protector or perhaps a simple donee of a power. It is asked whether these two methods of trust termination impinge on security of title or free economic circulation of assets. A vested beneficial interest which is subject to revocation can hardly qualify as a basis for transferring good and marketable title, or security to a lender. This defines the quality and value of the *res* transferred. It is in some ways a living will, for example a settlor who confers a power to a trusted family member or advisor to revoke trusts or beneficial interests after death of settlor. Does this smack of entails, or indeed, perpetuities? An answer might be yes, but, controlling or limiting use or circulation of property for long or indeed excessive periods, might possibly be a legitimate use of a Jersey trust – just go back to the Roman and medieval *fideicommissum*.

[757]J Goldsworth, "Conditions for variation of a trust: distinction between a variation and the application of the *Saunders v Vautier* principle" (1996) 3 (1) *T & T* 7; S Riley, "The Rule in *Saunders v Vautier* and its recent application under Jersey Law" (2009) 15 (3) *T & T* 152.

J. Civil Law methods of termination in the Jersey law?

A remarkable feature of Jersey's trust termination law – an absence replicated in the case of Malta – is the total lack of any reference to the traditional civil law methods of termination of obligations: these are generally, payment, subrogation, novation, remission, set-off, merger, loss of object and rescission.[758] Clearly, they cannot all be applicable to trusts, such as remission. The merger in the person of a trustee and beneficiary *causa mortis* is however a possibility. For example, a Husband and Wife create a trust with a beneficial life interest to each other, with children in the remainder – very similar to civil law usufruct. If the life interest is revoked, its effect could be a merger of the two categories of settlor and beneficiary. Where original trusts are settled in sub-trusts, with or without new trustees or beneficiaries, a creative civil law mind can identify this situation as a novation, applicable in the case of a termination, not a variation of trusts, even if cast in trust terms and language.

Assume a trustee paying a debt of a beneficiary in lieu of future advancements or appropriations of entitlements - trustee should be subrogated in the creditor's right against the beneficiary, whose entitlement against the trust fund is *pro tanto* extinguished. There could therefore be a case to argue that although not expressly contemplated by Jersey trust law, the traditional grounds of termination of obligations could find application: nowhere is there any formal abrogation of the traditional civil law methods.

While this may all be true, the assessment remains that TJL has inclined more definitively towards English law, tending therefore to avoid application of civil law termination modes. No formal or explicit rule or jurisprudential marker has been here identified, but this view is based on a broad assessment made on the trend and application of Jersey trust law, and the general adoption of English standards and practice – even if the civil law consciousness is not lost entirely. There is nevertheless in this context a clear reference and assumption of the

[758] R Zimmermann, *The Law of Obligations* (1996) 748.

resulting trust. In so far as assets, 'jump back' to the settlor, there is a termination or failure of trusts. [759]

In this vein, there is however a clear reference to the resulting trust, referred to at article 40(3)(4) in context of revocation of trust, and at article 42 relating to failure or lapse of interest: the trustee shall hold trust property in trust for settlor, who is defined as the "particular person who provided the property as to which the trust is wholly or partially invalid."[760] The Jersey Court of Appeal considered with approval the English view of the resulting trust.[761] Parties had been business partners and in a personal relationship for several years. Respondent Mrs Plane (W) was a beneficiary of a trust which Appellant Mr Jones (M) had settled from the net proceeds from the sale of three plots of land, situated in England. M had purchased plot 1 with the assistance of a loan from his father and obtained a mortgage to fund purchase of plot 2. Plot 3 had been purchased with partnership funds and registered in parties' joint names. The Royal Court finding for a constructive trust, awarded W £220,000 subject to a loan in favour of the trust alleged. The court thus considered the resulting trust:

> "Since it is accepted that the legal title to Plots 1 and 2 vested in Mr. Jones, Mrs. Plane can only establish the necessary beneficial interest by relying on the two separate but associated concepts of — resulting trust or — constructive trust, which, from the point of view of English law, were explained in the evidence of Mr. Brightwell, in relation to which there is no real dispute."

This conclusion was reversed by the Court of Appeal holding that the requisite common intention had not been established. While the distinction made by the Court between a constructive and resulting trust may be open to some comment about its conceptual clarity, it should be plain that Jersey law and practice look to English law to define a resulting trust as a mode of trust termination.

Two final thoughts: first is the statement that the Jersey Trusts Law does not derogate from the powers of the Court, which exist independently, to "set aside or

[759] Generally, R Chambers, *Resulting Trusts* (1997); C Mitchell ed, *Constructive and Resulting Trusts* (2010).
[760] Art 11 (6) and (7).
[761] *Jones v Plane* [2006 JLR 438].

reduce any transfer or other disposition of property" and to "vary any trust."[762] This therefore includes the Court's power to terminate a transfer of property to trust. The second is the all-pervasive familiar policy concern of Jersey Trust Law to subject almost anything under trust settlement to its own law: this includes a foreign trust.[763] Once again, also in the case of termination, it is recorded that the tension between the long reach of article 9, the 'fire-wall' provision and the Hague Convention remains unresolved.

K. Termination of Trusts – Malta

The MTTA affords a trifle more generous treatment than its Jersey counterpart in express mention of termination. Property, in respect of which a trust has failed, terminated, lapsed or where there is no beneficiary, subject to any Court order or directive by the Financial Regulator relative to prevention of money laundering, is to be held by the trustee in trust for settlor or its heirs.[764] A beneficiary's interest may be liable to termination, and the trust revocable by its terms or by the exercise of a power.[765] In terms almost identical to the corresponding Jersey article 43, the Malta Act dedicates a specific article to termination:[766] the *Saunders v Vautier* principle is codified and the Court is given wide powers to issue orders relative to distribution of trust property. There is a specific reference to resulting trust: the context is that, where a person is held to be "under a constructive or resulting trust or as a result of any statutory provision or judicial declaration", there can be no imputation of acting in breach of trust prior to becoming aware of such trust.[767]

The first question is whether the MTTA provisions carry any distinctive features. There is little doubt that compliance with generally accepted international standards, particularly prevention of money laundering, occupies a central role. A trust fails if, in clear civil law language, "any court declares that their purpose or the terms of trust are not possible, or illegal, immoral or contrary to public policy,

[762] Art 59(2) (a) and (b).
[763] Art 49.
[764] Art 11(6), 16(1) MTTA.
[765] Arts 13 (1), 15 (1).
[766] Art 17(1).
[767] Art 43 (4).

or otherwise tainted by error, fraud or violence, or any other reason which invalidates legal acts according to the laws of Malta."[768] While money-laundering and illegal acts are trite bases to invalidate a trust, the significance lies in the civil law grounds for rescission of contract.[769] In a clear reference to a resulting trust, it is provided at article 38 that trust property on its failure shall be held in trust absolutely for the settlor or its *ayants-cause*.

The key term here is "the terms of the trust." All the concerns expressed before, relative to the ambiguity of the relationship between acquired rights, and variation or termination, stand. The dominant emphasis is on the consensual aspect of the trust. In the thinking of the MTTA, termination, and, indeed, variation, are traced back to the will of settlor.

Beyond the specifically tailored grounds of revocation, it is likely that drafting will follow English structure, forms and precedents, then recast in simpler and more general civil law language. For example, a family trust can provide that it is the wish of the settlor, expressed in the settlement, that certain assets can only be enjoyed, not necessarily in full ownership vesting, by family members residing within jurisdiction – that, would be the general principle, bordering, no doubt, on entail-like or perpetual successive-usufruct situations. Subsequent articles may then empower senior family members or a college of protectors to terminate certain beneficial interests – on the ground of misbehaviour or prodigal living. The terms could provide that in exceptional circumstances, the trustees may terminate trusts and dispose of prized 'family silver.'

It may legitimately be asked whether, the general grounds of extinction of obligations in the Civil Code[770] apply to trust termination. The context here is not the 'contractual' terms imposed by the settlor and their subsequent operation, but rather those grounds which operate *ex lege*, independently of the will of parties. There is no reason why these grounds of general application in the law of obligations should not be extended to trust termination. Payment of an amount

[768] Art 11 (2).
[769] MCC arts 958-990, 974-981.
[770] Arts 1145-1231.

due by way of beneficial interest, or set-off of an interest with a debt owed by a settlor to the beneficiary, are examples thereof. Is not a consensual rescission by all involved capable parties, a civil law expression of the *Saunders v Vautier* rule? Can a sub-trust created within the terms of a trust operate as a *nova obligatio*? The answer, in the writer's judgement, is yes, provided it operates 'contractually.' Merger of personal capacities such as settlor-beneficiary through inheritance, or merger of usufruct held on trust with the *nuda proprietas* retained by the settlor or trustee, are situations which come to mind. These grounds of termination are implied in all trust settlements, superimposing therefore the traditional civil law within the trusts. Whether they overwrite the trusts is another question, and difficult to answer in abstract: various factors are seen as relevant, whether for example the trust document has a *lacuna* in its conception and drafting, or whether the general causes of termination can operate with the terms of the trust, or whether the cause of termination is supervening and unforeseen by its terms.

One wonders whether *change of circumstances*, the vigorously debated ground for termination of obligation in European Private Law, can be relevant to trust termination in Malta.[771] Historically, change of circumstances has been classified by the Maltese Courts as *force majeur*, and applied according to the Napoleonic tradition.[772] In the same way that impossibility and illegal *causa* were grafted to the trust law, this then, can embrace *vis major* and indeed a contemporary version thereof. A radical variation of circumstances can therefore 'frustrate' the trust and lead to its termination.

A recurrent figure in the Malta Act, linked also with termination, is the resulting trust, mentioned sometimes indirectly[773] and at other times specifically.[774] The writer identifies the reason behind this frequent and not unimportant mention, the intention to avoid a gap within continuity of property and obligational interests, or indeed a property vacuum, when trusts terminate and 'result' back. This is seen as in keeping with the general systematic approach deriving from a codification, aspiring – chasing a rainbow, of course – towards completeness. No definition of

[771] E Hondius and H Grigoleit, *Unexpected Circumstances in European Contract Law* (2011).
[772] M Pace, *Change of Circumstances in Contract Law*, Thesis University of Malta (2011).
[773] Arts 11(c), 15(2) and 16(1).
[774] 37(2)(b) and 43(14).

a resulting trust is given, but again in line with the codification tradition, the drafters assume a widespread knowledge of the terms of art. Therefore, any definition of a resulting trust will be invariably mainstream, reflecting English or maybe Jersey and Scottish[775] law and practice to assist interpretation.

L. Closing Thoughts

The dominant concern in this chapter has been the potential threat to, or even the undermining of, vested rights consequent to trust variation or termination. One's imagination may be teased by a final question: does unjust or – in civil law language – unjustified enrichment, enter into the equation at all? Whether it is an Equity-based response, or a contemporary application of the *nemini locupletari* principle, there is little doubt that advantage, gained without *causa* or consideration, is critically viewed in most systems. Can the principle of unjustified enrichment be used to justify, or indeed oppose, trust variation or termination, on the basis of interference with acquired rights? For example, can unjustified enrichment be relevant in the exercise of a discretion varying or terminating a beneficial entitlement? Can a disappointed beneficiary invoke the rule against another beneficiary or settlor, exercising a power to vary within the terms of the trust? The question is, therefore, whether a trust variation or termination amounts to an unjustified enrichment – and a corresponding unjustified prejudice - in the appropriate circumstances. Or is the question totally irrelevant?

There is, in some sense, a link to a role of resulting trusts, consequent to failure thereof, and unjustified enrichment. The reason is that the *risaltare* back is the response to a situation where the legal order feels it should intervene to avoid unjust enrichment. There could be more than a point to this in civil law systems.

[775] Scottish Law Commission, Discussion Paper on the Nature and Constitution of Trusts, DP 133 (2006).

CHAPTER VIII – CONCLUSION

A. Scope of the Chapter – the two fundamental questions

Two fundamental questions were posited: the first is whether the trust legislation of Jersey and Malta were correctly identified as examples of a civil law trust. This naturally involved an assessment of the point whether a civil law trust exists or makes sense. The second question considers the validity of the assertion that the choice of law provisions, for various reasons, are a, if not *the*, defining characteristic of both trust laws. The closing reflections evaluate the various strands, within the ever-present context of 'mixed' jurisdictions.

B. The first hypothesis – the civilian trust

(i) Right of beneficiary is obligational

The analysis carried out demonstrates that a civil law trust is not a contradiction in terms. The civil law tradition and both legislations do not repel the notion of the trust: it is not a contract of agency, mandate, deposit or usufruct. A beneficial interest is correctly classified as proprietary, while the right against the trustee is obligational.

The intelligence of the Jersey drafters, and the sharp perception of their Malta counterparts in taking it up, was to re-cast the essential settlor-trustee-beneficiary relationship in civilian property-obligational-contractual concepts and language. While this may be nothing new to Equity, the jurisdictions under review have the merit of engaging with, and casting trusts within, these three civil law categories. This has moved in parallel with, and maybe borrowed from, the seminal Scottish analysis and maxim 'trusts without equity.' This naturally calls the trustee various-and-separate-patrimony explanation in response to the single and unitary traditional French approach.

In more specific terms, a trust settlement can breathe comfortably with the contractual framework, although it is not a contract. The reservation of certain

powers of revocation, appointment and retention of some influence over the trustee discretion, do likewise. These are wider in the case of Jersey than Malta. Article 11 of the TJL on failure or invalidity of trusts, echoed by a corresponding article in its Malta counterpart, harks its attention, *inter alia,* to the civil law vices of consent of fraud and mistake.

(ii) Bonus Paterfamilias and Good Faith

Nevertheless, the casting and defining features in either trust law are two: first, the diligence, prudence and attention of a *bonus paterfamilias*, and secondly, the overarching role of good faith. It is suggested that these two concepts give both trust laws their specific, particular character. More than the specific mention at articles 21 of both statutes, they are the basis and substratum on which the culture, unwritten but ubiquitous, on which the civilian trust is built. An example is the way breach of trust is categorized as damage, indicating that the civilian concepts are made use of across the entire board.

It has been argued, and the point here repeated, that civilian trust is traced back to the Roman *fideicommissum*, this link leading to the treatment of fiduciary obligations, and the corresponding *fiducia*. These carry conceptual overlapping and linguistic ambiguity between the Roman-Civilian and the Equity fiduciary duties. Most obligations from the different traditions are broadly identical, characterized by the *fides*, the belief and loyalty in the trusted party. There is an important distinction that the *fiducia* and civilian fiduciary obligations do not require, but of course do not exclude either, the *vestitura* of the asset in the *fiduciarius*. This is however explainable by the obligational character of the beneficiary's right. While it is not a civilian trust, there are clear conceptual intertwininngs: the reality of the civil law trust is in many ways a consequence of a development from the *fiducia*. Lupoi's contrary views are respectfully disputed.

(iii) Challenges

The context of challenges interweaves with and underlines the major concerns of civil law. Sham and simulation are a corollary of the sacredness of contractual will. The Pauline fraud needs no further explanation as to its ever-present role in tradition and practice. Legitim remains as central as it is controversial, with its

historic link with (nowadays) the much-maligned entails and perpetual usufruct. These defining civilian notions are further underlined as fundamental policy considerations of the MTTA: at article 6A, these are stated to include personal and patrimonial rights flowing from marriage, transfer of title and secured interests of creditors, succession and legitimary rights, and of course, "the protection in other respects of third parties in good faith." It is, needless to say, clearly demonstrative of the character of the trust, that these values of the system, "the General Principles", have been placed in the same *milieu* as the basic notions of the civilian trust.

(iv) What is written and unwritten

Language almost invariably reveals the *forma mentis* of the drafter or writer: so is the case in the trust laws here considered. They are cast in a contemporary version of the elegant and simple civilian method of drafting, as distinct from the 'umbrella' writing known to English law. It is of course not without some irony here that civilian jurisdictions, including in the case of trusts, have come to terms with the English "Representations and Warranties." But these are the ways of the Law, with English having very clearly won the day over French as the language of international contracts and instruments.

This cultural affinity to the civilian method is also clearly reflected in the judgements and legal writings, even the contemporary Jersey and Guernsey Law Review. While no doubt, the English influence is all pervasive and perhaps growing, the culture retains a strong civilian substratum. In Malta, the particular mix is that of the strong and unabated 'soft' influence of colonial tradition and English, with its civilian history and the southern Mediterranean culture. The interaction of law, language and legal thinking as borne out in action is another feature in the hybrid civilian trust.

To the attentive observer, there is a civilian intuition - unwritten, unspoken perhaps, but clearly present, cast in its particular language and drafting. This remains so even though English, with English Forms and Precedents, as developed by high street practice, is widely adopted. The interaction of the trust with tradition, reveals the way the civilian trust has adopted this intuition – property, obligations, *ex contractu* and *ex delicto*, the fundamental classifications

and possibly the rational stream of the natural law tradition. This cannot be formally proved, but is seen, understood and perhaps felt by those familiar with the civilian history and identity. This is a clear unwritten reality in the trust laws of both jurisdictions.

(v) Contra

True there are arguments, some valid, against the case of a civilian trust. Does the civil law trust go against one of the fundamental characters of civil law ownership – its unity and indivisibility? The 'trusts-without-Equity' response and different patrimony analysis, however, address this. The distinction between legal and equitable ownership does not therefore remain a relevant factor in the civilian trust. Both trust laws assume this, since there is no express mention of such a possible division, also underlined by the obligational nature of the beneficiary's rights.

Constructive trusts, tracing and fault-based receipt or assistance, may likewise pose riveting questions. It will be difficult to dispute that they find no bases in the civilian tradition, although the *Pauliana* and *surrogatoria* action are in a sense comparable. At the same time, within the overall design and scheme, they are absorbed, without disharmony, within the broader canvas. The perception and insight of Birt in *Esteem* was to identify proprietary remedies as not incompatible with Jersey Law, rejecting, however fault-based restitutionary remedies, allowing them against an innocent recipient. This is a masterly example of the almost-seamless adaptation of chosen and identified Equity remedies to a civilian system.

(vi) Closing reflections on the first question

The role of unjustified enrichment should not be overlooked. The principle is not trust-specific. However, it is relevant since it could occupy common ground with following and tracing, or a remedy-of-last-resort in the case of breach of trust or other violation of fiduciary obligation. It is recalled that this is the basis of the North American remedial constructive trust, which category is not received in the jurisdictions reviewed. Unjustified enrichment is a principle which can acquire relevance even in the trust laws.

That the civilian trust and trust-like-devices are alive and flourishing should come as no surprise. From jurisdictions such as Québec, France, South Africa, and Scotland to the more recent codes of Romania[776] and the Czech Republic, all these have adopted trusts or fiduciary mechanisms. This is further strengthened by the Hague Convention, DCFR and initiatives such as the 'Nijmegen principles.'

The case for the existence of an autonomous, distinct civilian trust, has been strongly established.

C. The second hypothesis – the policy choice of the governing law as the defining feature

(i) Jersey – is the distinction between domestic trusts and foreign trusts quite what it seems?

Is this therefore some form of extended or different forum shopping? The basic distinction lies between a Jersey/Malta trust, where the 'proper law' of the trust is that of the home jurisdiction, and a foreign trust, where the proper law is that of another jurisdiction. Not strictly related, but still relevant, is the consideration that the choice of proper law is indicative of the intuitive affinity to contract - this in deference to the central role of the will of the parties. In the case of Jersey, the question is why is it *the* defining feature? The reason is that it underlies and bares the policy behind the Jersey trust law, extending to every facet thereof. Apart from its civilian character, no other feature in the law is so dominant. The reasons, judged as excessive and over-zealous, have been seen principally as the intention to create a 'firewall-protection' legislation and to provide the Jersey courts a statutory basis to resist foreign judgements and the application of foreign law. This is the legislative and marketing position adopted by Jersey, bolstered by the codification of the Hastings-Bass rules granting wide powers to enable the courts to correct trustee mistakes. That is the key to unravelling this essential aspect of Jersey law, whose heavy handedness sets it apart from other

[776] L Tuleasca, "The concept of trust in Romanian Law" (2011) 6 (2) *Romanian Business and Economic Law Review* 150.

jurisdictions who show far more respectful treatment to foreign law and notions alien to them.

In a sense, the question may be futile, since in practice there may be no real choice whether it is Jersey or non-Jersey law. It is a situation of Jersey-law-takes-it-all, to the critical extent of validly asking whether there is, in practice, any real possibility of having any recognition of a foreign governing law. The perspective of the analysis is therefore rephrased, and recast to state that, the choice of Jersey law as the sole governing law is the defining feature.

(ii) Malta's deference to the will of the settlor and the civilian tradition

Malta has opted for a different choice. This attempts to ensure the simultaneous operation of the civil code and civilian tradition, the EU conflict Regulations and Hague Convention. The underlying theme is the supremacy of the settlor's will and translated into the provisions relative to the governing law.

The choice of law provisions therefore are an extension of the policy choice to respect and give effect as far as possible to the will of the settlor, to the extent that there is also a particular provision, as seen, relating to conflict management.[777] The reason why this philosophy is *a* defining factor is that it intentionally allows freedom of manoeuvre to foreign laws and culture, subject to the mandatory rules of the forum. An assessment of choice of MTTA as the governing law therefore should identify this feature, which, within the conflict perspective, remains in harmony with the civilian tradition of the jurisdiction.

D. Metamorphosis

The traditional Latin maxim "*tempora mutantur et nos mutamur in illis*" originally linked to Ovid's Metamorphosis[778] applies to Jersey: it needs to change and adapt to changing times. On the other hand, the merit of the Jersey jurisprudence is the delicate mix of pragmatism, fairness, common-sense and above all a respect for the Rule of Law. Malta has to change through sharpening

[777] 6B.
[778] XV, 165.

its experience, analysis and practice of the civil law trust: there are all the good reasons for this to flourish.

E. Conclusions

The first hypothesis is fully established – a vigorous civilian trust exists in either jurisdiction. The second hypothesis is partly proved. In the case of Jersey, there may be no real significance in the distinction between a domestic and a foreign trust, due to the all-pervasive and over-riding of Jersey law. Turning to Malta, the second fundamental question is proved, since the jurisdiction's trust law allows a foreign trust and law significant respect, space and sphere of operation. The defining figures of the *bon père* and *bonne foi* remain ever present, even in civil law trusts.

Quod Erat Demonstrandum.