

Malta

Trusts and Trustees Act 1989 (as amended, 2004)

To make provision with respect to Trusts and to provide for matters ancillary or incidental thereto.

30th June, 1989

ACT XXXV of 1988, as amended by Acts XIV of 1989, XX of 1994 and XIII of 2004 (see transitory provision at end of Chapter).

Short title. 1. The short title of this Act is the Trusts and Trustees Act.

Interpretation. 2. (1) In this Act, unless the context otherwise requires -

"the Act" means the Malta Financial Services Authority Act;

"approved jurisdiction" means a jurisdiction which has been approved by the Authority for the purposes of this Act;

"approved person" means a person of good reputation possessing experience and qualifications in financial, fiduciary, accounting or legal services and approved by the Authority as being fit and proper to carry out the duties of a trustee;

"the Authority" means the Malta Financial Services Authority;

"beneficiary" means a person entitled to benefit under a trust or in whose favour a discretion to distribute property held in trust may be exercised;

"body of persons" means any company, fellowship, society or other association of persons, whether vested with legal personality or not;

"breach of trust" has the meaning assigned to it by article 4;

"charitable purpose" means any charitable and philanthropic purpose, and without prejudice to the generality of the aforesaid, includes in particular:

(a) the advancement of education, including physical education and sports;

(b) the advancement of religion;

(c) the advancement of health;

(d) social and community advancement;

(e) the advancement of culture, arts and national heritage;

(f) the advancement of environmental protection and improvement;

(g) the promotion of human rights, conflict resolution and reconciliation;

but does not include a political purpose.

For the purposes of this definition "political purpose" means the promotion of the interests of a political party or a political candidate, whether at local, national or international level, or to seek or oppose changes in the law or government policy or decisions except when such law or government policies or decisions directly concern the achievement of charitable purposes;

"commercial transaction" means the following transactions and any transactions connected or ancillary thereto:

(a) securities offerings, whether to the public or for private placement, portfolio management and custody of investment instruments;

(b) the securitisation of assets;

(c) the grant of real or personal security interests including hypothecs, mortgages, privileges, pledges and guarantees;

(d) collective investment schemes;

(e) employee benefit or retirement schemes or arrangements;

(f) syndicated loan agreements and other multi-creditor banking facilities;

(g) insurance policies and the payment of proceeds thereunder;

(h) timeshare and multi-property structures, and

(i) such other commercial transactions as may be prescribed in a Notice issued by the Minister;

"company" means a limited liability company duly formed and registered under any law for the time being in force in Malta, and includes a similar body corporate incorporated or registered abroad;

"the Convention" means the Hague Convention on the law applicable to trusts and on their recognition, which was adopted by the Hague Conference on Private International Law on the 20 October 1984, and which came into force on the 1 January 1992 set out in all material parts in the Schedule;

"corporate trustee" means a trustee which is a legal person wherever incorporated;

"Court" means the Civil Court in its voluntary jurisdiction unless otherwise indicated or unless the context refers to any court seized of a matter in which case it is the court where the matter arises;

"foreign trust" means a trust the proper law of which is not the law of Malta;

"Malta's international commitments" means Malta's commitments, responsibilities and obligations arising out of membership of, or affiliation to, or relationship with, any international, global or regional organisations or grouping of countries or out of any treaty, convention or other international agreement, however called, whether bilateral or multilateral, to which Malta is a party;

"Maltese trust" means a trust whose proper law is the law of Malta;

"Minister" means the Minister responsible for finance;

"operating in Malta" means the existence of an office, branch, or other centre of professional or commercial activities of a regular nature in Malta and does not include one or more unconnected and sporadic acts;

"person" includes a body of persons;

"prescribed" means prescribed by regulations made under this Act;

"property" means 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;

"recognised investment exchange" shall have the same meaning assigned to it by the Financial Markets Act;

"register" includes any kind of record;

"remuneration" means any compensation or reward for acting as a trustee to be paid out of trust property in accordance with the terms of trust, or otherwise, other than the reimbursement of expenses of the trustee or the indemnification in favour of the trustee for expenses, liabilities and other claims;

"resident in Malta" shall mean, in case of an individual, a person whose habitual residence is in Malta and in case of a company, a company registered in Malta;

"settlor" means the person who makes the trust and includes a person who provides trust property or makes a disposition on trust or to a trust;

"terms of a trust" means the written or oral terms of a trust, expressed or implied, and any other terms made applicable by the proper law;

"trust" has the meaning described in article 3, and includes the trust property, the rights, powers, duties, interests, relationships and obligations under a trust;

"trustee" in relation to property, means the person or persons holding or in whom the property is vested on terms of trust in accordance with the provisions of this Act or is otherwise deemed to be a trustee under this Act;

"trust instrument" means the instrument whereby the trust is created and includes any instrument varying the terms of the trust and also a unilateral declaration of trust;

"trust property" means the property for the time being held on trust;

"unilateral declaration of trust" has the meaning assigned to it by subsection of article 7(3);

"unit trust" means any trust established for the purpose of, or having the effect, or providing, for persons having funds available for investment, facilities for the participation by them as beneficiaries under the trust, in any profits or income arising from the acquisition, holding, management or disposal of any property whatsoever, being a collective investment scheme as defined in the Investment Services Act.

(2) Any reference in this Act to any law, or provision thereof, shall be construed as a reference to that law or provision as from time to time in force, and shall include a reference to any enactment replacing such law or provision, and to any subsidiary legislation made thereunder.

(3) Words and expressions used in this Act with reference to any other law shall, so far as necessary to give effect to this Act and consistently with the provisions thereof, have the same meaning as they have in the law with reference to which they are used in the Act.

(4) In this Act and in any regulations made thereunder, if there is any conflict between the English and Maltese text, the English text shall prevail.

TRUSTS

Meaning of trust. 3. (1) 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.

(2) The trust property 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.

(3) The trust property is held by or in the name or under the control of the trustee who shall have full power as well as the duty for which he is accountable, to administer, employ or dispose of the trust property in accordance with the terms of the trust and any special duties imposed on the trustee by any law applicable thereto, to sue and be sued in respect of the trust and otherwise to act in all matters concerning the trust.

(4) The holding of property under trusts shall have the following legal effects:

(a) that personal creditors of the trustee shall have no recourse against the trust property;

(b) that the trust property shall not form part of the trustee's personal estate upon his insolvency or bankruptcy; and

(c) that the trust property shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death.

(5) A trustee shall be entitled to appear or act in his capacity as trustee before any court, any notary or any person acting in an official capacity. Where the trustee desires to register property, movable or immovable, or documents of title to them, he shall be entitled to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed.

(6) Trusts create fiduciary obligations upon the trustee in favour of the beneficiary of the trusts. The settlor of trusts shall have no rights in relation to trust property except as provided by this Act.

Breach of trust. 4. Any breach of duty imposed on a trustee by this Act or by the terms of the trust or by the proper law of the trust, and any act or neglect on the part of the trustee which is not authorised or excused by this Act, or the proper law of the trust or the terms of the trust, shall be and is by this Act defined a breach of trust.

Proper law of trusts. 5. (1) Subject to the provisions of this Act, a trust shall be governed by its proper law and shall be interpreted and be enforceable accordingly.

(2) The proper law of the trust shall be determined in accordance with this Act.

(3) The terms of a trust may provide for the proper law of the trust to be changed to the law of another jurisdiction.

Applicability of Convention. 5A. (1) The provisions of articles 1 to 12, 14, 15, 16 (the first paragraph only), 17, 18 and 22 (the first paragraph only) of the Convention as set out in the Schedule shall have the force of law in Malta.

(2) Those provisions shall, so far as applicable, have effect not only in relation to the trusts described in article 2 and 3 of the Convention but also in relation to any other trusts of property arising under the law of another country.

(3) In article 17 of the Convention, the reference to a State includes a reference to any country or territory (whether or not a party to the Convention) which has its own system of law.

(4) Article 22 of the Convention shall not be construed as affecting the law to be applied in relation to anything done or omitted before the coming into force of the Recognition of Trusts Act.

(5) Nothing in the Convention shall have any effect on the interpretation of the laws of Malta relating to fiscal matters.

Validity and recognition of trusts. 6. (1) When the proper law of a trust is the law of Malta as the chosen applicable law of the trust or as determined in accordance with article 7 of the Convention, 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 other provisions of Maltese law on trusts.

(2) When the proper law of a trust is a foreign law as the chosen applicable law of the trust or as determined in accordance with article 7 of the Convention, 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.

(3) The administration of a trust may be regulated by a law different from the proper law of the trust.

(4) Trusts created or recognised in accordance with this Act are not prohibited by articles 331, 757 to 761 and 1776 of the Civil Code.

(5) Article 586 of the Civil Code 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 effect after the death of the settlor.

(6) Subject to the provisions of article 11 and article 21(7), when a commercial transaction includes the appointment of a trustee to hold property under trusts in relation to such transaction, the trust shall operate in accordance with the express terms of the trust instrument.

Mandatory rules to prevail. 6A. (1) Subject to the provisions of subarticle (2), in the case of a trust governed by Maltese law, where the law of Malta contains provisions with regard to the following matters -

(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 respects, of third parties acting in good faith,

which cannot be derogated from by voluntary act, such laws 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.

(2) To the extent that there exist rules of mandatory application the courts shall apply such mandatory rules subject to the provisions of article 6B.

(3) When a trust is governed by Maltese law and has no connection to Malta by reason of the domicile of the settlor at the time of settlement of the property on trust or the situs of the property, when immovable, the trust shall be governed by the provisions of this Act except that the provisions of subarticle (1) shall not apply in any manner. In such cases no regard shall be had to:

(i) the domicile, habitual residence, registration, authorisation or place of business in Malta of the trustee or any protector or any person rendering administration, accounting or other services to the trustee, or

(ii) the fact that the proper law of the trust is Maltese Law; or

(iii) the situs of property in Malta, when movable; or

(iv) the place of execution of the deed of trust, any documents relating to the trusts or the trust property or other transaction documents is Malta.

(4) In the case of a foreign trust, the provisions of subarticle (1) shall only apply to such trust when the settlor is domiciled in Malta at the time of creation of the trust, subject always to the rules stated in article 6B.

(5) In the case of a foreign trust, when the settlor of such a trust is not domiciled in Malta at the time of the creation of the trust, the provisions of this Act shall apply only in so far as they regulate the recognition or otherwise in Malta of the effects of such trust.

(6) To the extent that there exist rules of mandatory application in the law applicable in the circumstances in terms of Maltese private international law, the courts of Malta may apply such mandatory rules subject to the provisions of article 6B.

(7) When a court is requested to recognise a foreign judgement which enforces any rules of mandatory application as referred to in subarticle (6), the court may accede to such request subject to the provisions of article 6B.

Management of conflict provisions. 6B. In order 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 following rules shall apply:

(a) 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. Subject to any order of the court, the affected property shall be held by the trustee in trust for the settlor absolutely, or if he is dead, for his heirs;

(b) the trustee shall be empowered to -

(i) vary the terms of the trust in so far as relates to the nature or the extent of benefit, or

(ii) do such acts as are necessary and legally permissible,

so that the beneficiary derives the benefits in accordance with the intentions expressed by the settlor in the trust instrument in a manner compatible with the mandatory rules and any property which becomes free from trusts for any reason shall be held by the trustee in trust for the settlor absolutely, or if he is dead, for his heirs;

(c) for the purposes of resolving conflicts between the trust relationship and any mandatory provisions and to enable the continuance of the trust as specified in paragraphs (a) and (b), the terms of the trust, where silent, shall be deemed to include:

(i) the power, without any obligation to do so, of the trustee to reduce the trust assets and return all or part of them to the settlor or the estate of the settlor so as to achieve compliance with such provisions of law;

(ii) the power of the trustee to enter into arbitration and mediation agreements and to reach a compromise to disputes and claims by third parties; and

(iii) the power to seek directions from the Court on such matters;

such powers being exercisable notwithstanding any contrary provisions of the trust and, provided the trustee acts honestly, in good faith and reasonably, such acts shall not constitute a breach of trust.

(d) the property of the settlor which is not settled in trust should first be utilised, to the extent possible, to meet the claims of any person seeking to invalidate or reduce a trust;

(e) notwithstanding any other applicable law, the trustee may meet a valid claim being made against the trust property, whether voluntarily or as a result of a court direction, order or judgement, by a payment of value in money and shall not be obliged to return property settled in trust in kind;

(f) any person who succeeds in reducing the property under trusts or obtains a court order to invalidate a trust in part or who enjoys the benefits of an arrangement with the trustee as provided in paragraph (c)(i), shall forfeit the benefits under the trusts, unless the terms of the trust expressly state otherwise or the trustee considers it unreasonable in the circumstances and obtains the consent of the Court to maintain in force trusts in favour of such person subject to such conditions as the Court may consider appropriate;

(g) in any event and notwithstanding any provision of law, a trustee shall not be subject to an obligation to pay or return more than the trust property held by him under trust, after deducting any fees and costs, and he shall not be subject to any obligation to account for any distributions made by him in good faith prior to having written notice of any claim.

Creation of trust. 7. (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.

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.

(3) A unilateral declaration of trust is a declaration in writing made by a trustee stating that it is the trustee of a trust, containing all the terms of the trust as well as the names or the information enabling the identification of all the beneficiaries.

(4) A unit trust shall be created by a written instrument.

Jurisdiction of the Maltese courts. 8. (1) The Courts of Malta shall have jurisdiction where -

(a) the trust is a Maltese trust; or

(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.

(2) Notwithstanding the provisions of the Code of Organization and Civil Procedure, when the trust instrument contains a provision granting jurisdiction to the courts of the country the law of which expressly governs the trust, the Courts in Malta shall, on demand of any party to the proceedings, provided it is made in *limine litis*, stay proceedings which may be instituted in Malta in favour of the chosen forum.

Provided that the court may in any case issue such interim orders for the protection of any interested party as it considers appropriate, and provided further that the court shall enjoy a discretion on whether to stay the proceedings if the trust property consists of immovable property in Malta or the settlor or the beneficiaries are domiciled and resident in Malta.

(3) Subject to the above, the provisions of Sub-title III of Title II of Book Third of the Code of Organization and Civil Procedure (Of Pleas to the Jurisdiction) shall apply.

Rights of beneficiaries. 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.

(2) Rights of a beneficiary are personal to him and, subject to any applicable laws and only as stated in the 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 trusts and have no other rights in relation to the trust property or the trustee.

(3) The interest of a beneficiary under a trust shall be deemed to be movable property, even if the trust property includes immovable property.

(4) A person shall not be entitled to benefit under a trust unless he is -

(a) identifiable by name; or

(b) ascertainable by reference to a class or to a relationship to some person, whether or not living at the time which under the terms of the trust is the time by reference to which members of a class are to be determined;

and if there are no beneficiaries identifiable or ascertainable as aforesaid the trust shall, unless the purpose of the trust is a charitable purpose, fail.

(5) Persons who are not yet conceived at the time of the settlement of property under trusts may be named as beneficiaries or form part of a class of beneficiaries but their rights arise only once they are born viable.

(6) A settlor of a trust may also be a beneficiary under the trust.

(7) The terms of the trust may provide for the addition of a person as a beneficiary, the exclusion of a beneficiary from benefit, or the imposition on a beneficiary of an obligation as a condition for benefit.

(8) When the trustee is granted the power to add a person as a beneficiary such power shall be valid on condition that such person is identifiable by name or forms part of a class of persons the members of which are reasonably individually identifiable, such identification to be given either in the trust instrument or in any other written instrument, signed by the settlor, whether binding or not on the trustee.

(9) A person who may be added as a beneficiary in terms of a power granted to the trustee shall not enjoy any rights in relation to the trust property or against the trustee and shall not be considered a beneficiary in any manner until appointed as a beneficiary by the trustee.

(10) It shall be lawful for a trustee to be granted the discretion as to which beneficiaries are to benefit, the quantity of any benefit, at what time and in what manner beneficiaries are to benefit and such other powers relating to the appointment, application or advancement of trust property.

(11) A beneficiary in whose favour a discretion to appoint or advance property may be exercised shall have no rights in or to specific trust property until such time as such discretion is exercised by the appointment, application or advancement of such trust property in favour of such beneficiary:

Provided that nothing in this subarticle shall be construed as excluding the duty of the trustee to properly and fairly consider all such beneficiaries in the exercise of his discretion.

(12) A beneficiary may, by instrument in writing, disclaim his whole interest and such a disclaimer shall be irrevocable.

(13) Subject to the terms of the trust, a beneficiary may disclaim part of his interest, whether or not he has received some benefit from his interest; in any such case, but subject to the terms of the trust, a disclaimer may, by the instrument by which the interest is disclaimed, be made revocable, and shall then be capable of revocation in the manner and under the circumstances therein mentioned or referred to.

(14) Subject to the terms of the trust, a beneficiary may, by instrument in writing, sell, charge, transfer or otherwise deal with his interest in any manner.

(15) The provisions of this article shall apply to testamentary trusts notwithstanding the provisions of articles 688, 693 and 695 and any other provisions of the Civil Code.

Additional trust property. 10. (1) Subject to the terms of the trust, a trustee may accept the settlement of any additional property under the same terms of the trust.

(2) The trust property shall be such property as is settled in trust by the settlor, that subsequently added, all fruits therefrom and property which represents the original or added property.

Failure of a trust. 11. (1) A trust shall fail -

(a) if it requires, purports or encourages the doing of any act which is a criminal offence under the laws of Malta or would be such offence if done in Malta;

(b) if it has income accruing to, or derived by it, which originates from an operation, transaction or other activity which is a criminal offence under the laws of Malta or which, if carried out in Malta, would be such an offence, or comprises property the receipt, ownership or control of which is or would be such an offence as aforesaid.

(2) Trusts shall fail if any court declares that their purpose or the terms of trust are not possible, or illegal, immoral or contrary to public policy, or otherwise tainted by error, fraud or violence, or any other reason which invalidates legal acts according to the laws of Malta.

(3) The Court may declare the failure of all or of only one or more purposes or terms of the trust and shall have the power to direct that the purposes or terms which can be properly separated from the failed purposes or terms continue to be valid and enforceable subject to any directive it may give.

(4) Where the trustee of a trust is of the opinion that the trust is or may be wholly or in part invalid he shall seek directives from the court as to the validity or otherwise of the trust and as to any matter concerning the property subject to that trust and his obligations in relation thereto.

(5) Directives as provided in subarticle (4) may also be requested by the settlor, and by any of the beneficiaries.

(6) Property as to which a trust has wholly or partially failed shall, subject to any order of any court or a direction issued in terms of article 38C, be held by the trustee in trust for the settlor absolutely, or if he is dead, for his heirs.

Duration of trusts. 12. (1) A trust may continue until the one-hundredth anniversary of the date on which it came into existence and, unless sooner terminated, shall then terminate.

(2) Subarticle (1) shall not apply to a trust for a charitable purpose or to a unit trust.

Protective trust. 13. (1) The terms of a trust may make the interest of a beneficiary -

(a) liable to termination; or

(b) subject to restriction on alienation or dealing; or

(c) subject to diminution or termination in the event of the beneficiary becoming bankrupt, or insolvent, or any of his property becoming liable to seizure for the benefit of his creditors; or

(d) not liable to attachment under a garnishee order issued against the trustee or to termination without the prior consent of the Court, when the interest is expressed to be for the maintenance of the beneficiary or as a pension.

(2) In the case of a testamentary trust and where the benefit to the beneficiary consists in an annuity or pension or the use and enjoyment of property and the enjoyment of fruits therefrom, the terms of the trust may make the interests of the beneficiary -

(a) subject to restriction on alienation or dealing;

(b) not liable to attachment under a garnishee order served on the trustee as garnishee; or

(c) not liable to termination without the prior consent of the Court.

Variation of terms of a trust. 14. Where the terms of a trust provide for the variation of its terms such power to vary shall be without prejudice to the power vested by this Act in the court for the variations of the terms of a trust.

Revocation of a trust. 15. (1) Where a trust or a power exercisable under a trust is by the terms thereof, expressed to be -

- (a) revocable, whether wholly or in part; or
- (b) capable of variation,

no such revocation or variation shall prejudice anything lawfully done by a trustee in relation to a trust before he receives notice of such revocation or variation.

(2) Subject to the terms of the trust, if a trust is revoked the trustee shall hold the trust property in trust for the settlor absolutely.

(3) Where a trust is partly revoked subarticle (2) shall apply to the property affected by the revocation.

(4) Where trusts have been settled by more than one settlor and are expressed to be revocable, such trusts may only be revoked with the express consent of all settlors.

(5) Unless the terms of a trust expressly provide that the trust is revocable or capable of variation, the settlor may not revoke or amend the trust instrument.

Lapse of interest or termination. 16. (1) Subject to the terms of a trust and to any order of the court, where -

- (a) an interest under a trust lapses; or
- (b) a trust terminates; or
- (c) there is no beneficiary and no person who can become a beneficiary in accordance with the terms of the trust,

the interest of the property affected by such lapse, termination or lack of beneficiary shall be held by the trustee in trust for the settlor absolutely or, if he is dead, for his heirs.

(2) Where an interest or property is held by a trustee for a charitable purpose which has ceased to exist or is no longer applicable, that interest or property shall be held for such charitable purposes as the court may declare to be consistent with the original intention of the settlor, or as the court may otherwise determine.

(3) In this section "settlor" means the particular person who provided the interest or property affected as mentioned in subarticle (1).

(4) An application to the court under this section may be made by any of the persons mentioned in article 37(3).

Termination of a trust. 17. (1) On the termination of a trust, the trust property shall be distributed by the trustee within a reasonable time in accordance with the terms of the trust to the persons entitled thereto.

(2) Notwithstanding the provisions of subarticle (1), the trustee may require to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise before distributing trust property.

(3) Subject to the provisions of this section and notwithstanding the terms of the trust, where all the beneficiaries are in existence and have been ascertained and no one of them is interdicted or a minor, they may require the trustee to terminate the trust and distribute the trust property among them.

(4) The court may, on the termination of a trust, or at any other time -

- (a) require the trustee to distribute trust property;
- (b) direct the trustee not to distribute trust property; or
- (c) make such other order as it thinks fit.

(5) In this section "liabilities" includes contingent liabilities.

(6) An application to the court under this section may be made by any of the persons mentioned in article 37(3).

TRUSTEES

Appointment of trustees. 18. (1) Trustees are appointed by, or as provided in, the trust instrument, and in such number as may be so provided.

The fact that there may not be a trustee in office at any time shall not operate as a cause of invalidity or termination of any trusts and in such cases the matter shall be determined by the terms of the trust and the provisions of this article.

(2) A trustee may be a natural person provided he is of full age and legal capacity and not under any legal impediment to so act. A trustee may also be a juridical person the objects of which include acting as a trustee.

(3) Where there is no trustee or there is a vacancy among the trustees which cannot otherwise be filled, the last former trustee or any trustee, or any beneficiary or the Attorney General may apply to the court for the appointment of a new trustee.

(4) The court -

(a) upon being satisfied that an application made by beneficiary has been served on the last former trustee or on at least one of the other trustees, if any; and

(b) having heard the representations made by the said trustee or trustees, or by any beneficiary; and

(c) having ascertained that the trustee indicated for the purpose in the application or otherwise intended for appointment as the new trustee is willing to act,

may make an order appointing a new trustee.

(5) Subject to the terms of the trust, a trustee appointed as a new trustee under this section shall have the same powers, discretions and duties as if he had originally been appointed trustee.

(6) On the appointment of a new trustee anything requisite for vesting the trust property in or under the control of the trustee for the time being shall be, and may be required by the trustee or any beneficiary to be, done.

(7) In the case of death of a trustee, his heirs or testamentary executor shall be bound to immediately transfer all trust property to a successor trustee appointed in terms of the trust instrument or by the Court. In the case of the insolvency, dissolution or winding up of a corporate trustee, such obligation shall be performed by any person having authority to bind the corporate trustee being, a director, liquidator, provisional administrator or similar functionary and this irrespective of any proceedings or formalities applicable upon such events. Until such time as such obligation is performed, all persons in control of trust property shall be obliged to preserve the trust assets and shall be bound by fiduciary obligations towards the beneficiaries.

Acceptance of trust. 19. (1) No one is obliged to accept an appointment as trustee, but if any person who is so appointed does any act or thing in relation to the trust property consistent with the status of a trustee of that property, such person shall be deemed to have accepted the appointment as trustee.

(2) A trustee who has not accepted and is not deemed to have accepted appointment as trustee may disclaim such appointment within a reasonable period of time after becoming aware of it by notice in writing to the settlor or to the other trustees.

(3) If the settlor is dead or cannot be found and there are no other trustees, the trustee to which subarticle (2) applies may apply to the court for relief from the appointment and the court may make such order as it thinks fit.

Resignation and removal of trustees. 20. (1) Subject to the provisions of subarticle (2), a trustee may resign as trustee by notice in writing to his co-trustees and in the case of there being no other trustee, to the beneficiaries or, if impracticable, to at least one beneficiary, or if there are none to whom notice can be given, to the settlor or to the trustee's duly appointed successor and the resignation shall take effect on delivery of the aforesaid notice.

(2) A resignation -

(a) given in order to facilitate a breach of trust; or

(b) which would result in there being no trustee,

shall have no effect.

Provided that a trustee may resign office notwithstanding the provisions of paragraph (b), if, before the resignation takes effect, application is made to the court for the appointment of a new trustee and a new trustee has been so appointed.

(3) A trustee shall cease to be a trustee immediately upon -

(a) the removal of the trustee by the court; or

(b) the coming into effect of a provision in the terms of a trust under which the trustee is removed from office or otherwise ceases to hold office; or

(c) steps are taken for the winding up of, or declaration of bankruptcy, of the person acting as trustee.

(4) A trustee ceasing to be a trustee shall concur in executing all documents necessary for the vesting of the trust property in or under the control of the new trustee and such obligation of the person ceasing to be a trustee shall be capable of forced execution by the court.

Duties of trustees. 21. (1) 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 and observe the utmost good faith.

(2) Subject to the provisions of this Act, trustees shall carry out and administer the trust according to its terms; and, subject as aforesaid, the trustees shall ensure that the trust property is vested in them or is under their control and shall, so far as reasonable and subject to the terms of the trust, safeguard the trust property from loss or damage.

Provided that the granting of security by assignment or pledge as authorised by the terms of the trust is permitted.

Provided further that the transfer by the trustee of trust property to a legal entity wholly owned or controlled, directly or indirectly, by the trustee or to another trust of which he is the sole trustee or to another trustee under trusts for the sole benefit of the trustee, shall be permitted and in such case the duties and liabilities of the trustee under this Act or the deed of trust shall not be diminished or otherwise affected in any manner whatsoever.

(3) Except as permitted by this Act or as expressly provided by the terms of the trust, a trustee shall not, without the authority of the court -

(a) directly or indirectly profit from the trusteeship; or

(b) cause or permit any other person to profit directly or indirectly from the trusteeship; or

(c) on his own account, with a person related to him by affinity or consanguinity in the direct line or up to the third degree in the collateral line or with a partner in any partnership, enter into any transaction related to trust property.

(4) Trustees shall keep accurate accounts and records of their trusteeship and shall, upon a request by any beneficiary, disclose such accounts and records to such beneficiary and shall, subject to the terms of the trust, provide a copy of such accounts within a reasonable time of a request.

Provided that it shall be lawful for a beneficiary to suspend such rights in favour of an independent third party in cases where the beneficiary is required to do so by any agreement or by law as a result of any existing or potential conflict of interest, and this for such time as the said conflict of interest subsists and under such conditions as may be agreed or are otherwise applicable.

(5) Trustees shall keep trust property distinct and separate from their own property as well as from any other property held by them under any other trust or title, and separately identifiable therefrom.

Provided that trustees may, if expressly permitted by the terms of the trust, or in any case where the trust property consists of fungible things, place and keep trust property in a common pool of identical assets or in a clients' or common account.

(6) Trustees shall not enjoy any benefits under any trust of which they are the sole trustee without the prior authority of -

(a) the Authority, in case of a trustee authorised in terms of article 43 or not required to be authorised in terms of article 43(6); or

(b) the Court, in any other case.

Provided that in case of an express fixed trust in favour of the trustee, only prior notification in writing to the Authority shall be required.

Provided further that a transfer of property by the trustee to another trust of which he is the sole trustee or sole beneficiary, shall not be deemed to be a benefit under this subarticle.

Provided further that remuneration for acting as a trustee or indemnification for expenses, liabilities and other claims shall not be treated as a benefit under a trust.

Provided further that this subarticle shall not apply to a trustee holding property in relation to a commercial transaction.

(7) Notwithstanding the provisions of this Act and other provisions which cannot be derogated from by voluntary act, when a commercial transaction includes the appointment of a trustee to hold property in relation to such transaction, the duties and liabilities of trustees as stated in this Act may be varied by the terms of the trust and shall be regulated exclusively by the express terms of the trust or any applicable legislation.

Provided that nothing in this subarticle shall permit a trustee to be exonerated from the effects of, or be indemnified for, his own fraud, wilful misconduct or gross negligence.

Co-trustees. 22. (1) Where the trustees are more than one they shall, subject to the terms of the trust and except as otherwise provided therein -

(a) act jointly in the performance of their duties and the exercise of their powers, unless in urgent cases it is not possible for any one or more of them so to act;

(b) not exercise any power or discretion unless all the trustees are in agreement;

and where the terms of the trust empower the trustees to act by a majority, a trustee who dissents from a decision of the majority, shall cause his dissent to be recorded in writing.

(2) Trust property shall at all times vest in the co-trustees in possession between them pro indiviso.

Impartiality of trustees. 23. Where the trust provides for more than one beneficiary, or more than one charitable purpose or for at least one beneficiary and at least one charitable purpose, trustees shall be impartial and shall not execute the trust for the advantage of one and to the detriment or at the expense of another, except to the extent that they are so authorised or required by the terms of the trust.

Powers of trustees. 24. (1) Subject to the terms of the trust and to the provision of this Act, a trustee shall, in relation to the 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.

Protector. 24A. (1) The terms of a trust may provide for the office of protector of the trust.

(2) Subject to the terms of the trust, the protector shall have the following powers:

(a) to appoint a new or additional trustee;

(b) to remove a trustee;

(c) to require the trustee to obtain his discretion.

(3) In the exercise of his office the protector shall not be deemed to be a trustee.

Delegation by trustees. 25. (1) A trustee may not delegate his powers unless permitted to do so by this Act, or by the terms of the trust, or by the court.

(2) Except where the terms of the trust specifically provide to the contrary, a trustee -

(a) may delegate management of trust property to and employ investment managers whom the trustee reasonably considers competent and qualified to manage the investment of trust property;

(b) may employ accountants, advocates, attorneys, bankers, brokers, custodians, investment advisers, nominees, property agents, solicitors and other professional agents or persons to act in relation to any

of the affairs of the trust or to hold any of the trust property.

(3) A trustee who in good faith and without neglect makes a delegation or an appointment in accordance with the provisions of this section, shall not be liable for any loss arising to the trust in consequence thereof.

(4) A trustee may authorise a person referred to in subarticle (2) to retain any commission or other payment usually payable in relation to any transaction.

Accumulation, advancement or appropriation of trust property. 26. (1) Where the terms of the trust direct or authorise the accumulation for a period of all or part of the income of the trust, the trustee shall distribute the income of the trust which is not accumulated as required or authorised by the terms of the trust.

(2) Subject to the terms of the trust, and subject to any prior interest or charges affecting the trust property, where a beneficiary is a minor and whether or not his interest is a vested interest or an interest which will become vested on attaining the age of majority or a later age or upon the happening of any event, the trustee may -

(a) accumulate the income attributable to the interest of such beneficiary pending the attainment of the age of majority or such later age or the happening of such an event; or

(b) apply such income or part of it to or for the maintenance, education or other benefit of such beneficiary; or

(c) advance or appropriate to or for the benefit of any such beneficiary such interest or part of such interest.

(3) The receipt given by a parent or the lawful guardian of a beneficiary who is a minor shall be sufficient discharge to the trustee for a payment made under subarticle (2).

(4) Subject to the terms of the trust, and subject to any prior interest or charges affecting the trust property, the trustee may advance to, or apply for the benefit of, a beneficiary part of the trust property prior to the date of the happening of the event upon the happening of which the beneficiary becomes entitled absolutely thereto.

(5) Subject to the terms of the trust, a trustee may appropriate trust property in or towards the satisfaction of the interest of a beneficiary in such manner and in accordance with such valuation as the trustee may think fit.

(6) Any part of the trust property advanced, applied or appropriated as aforesaid shall be brought into account in determining from time to time the share of the beneficiary in the trust property.

(7) No part of the trust property advanced, applied or appropriated as provided in this section shall exceed the presumptive, contingent or vested share of the beneficiary in the trust property.

Appointment or assignment of trust property. 27. Where the terms of the trust confer on the trustee or on 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, such power shall, subject to the terms of the trust, have effect whether or not such person was a beneficiary of the trust immediately prior to such appointment or assignment.

Remuneration and expenses of trustees. 28. (1) Unless authorised by the terms of the trust, or by the consent in writing of all the beneficiaries or by any order of the court, a trustee shall not be entitled to remuneration for services rendered.

(2) A trustee may reimburse himself or pay out of the trust all expenses properly incurred by him in connection with the trust.

Duty of trustee to provide information. 29. (1) A trustee shall, so far as is reasonable and within a reasonable time of receiving a request in writing to that effect, provide full and accurate information as to the state and amount of the trust property, including the accounts of the trust, and subject to subarticle (2), the conduct of the trust administration to:

(a) the Court;

- (b) subject to the terms of the trust, the settlor;
 - (c) the protector of the trust;
 - (d) subject to the terms of the trust, any beneficiary of the trust who is of full age and capacity, or if a minor, to his lawful guardian or representative;
 - (e) subject to the terms of the trust, any charity referred to by name for the benefit of which the trust was established; and
 - (f) in case of a trust established for a charitable purpose, the Attorney General or the relevant authority under applicable law.
- (2) Subject to the terms of the trust and to any order of the court given for special reasons, a trustee or any other person shall not be required to disclose to any person any document or information which -
- (a) discloses the trustee's deliberations as to the manner in which a power or discretion was exercised, or a duty conferred or imposed by law or by the terms of the trust was performed;
 - (b) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason will be or might have been based;
 - (c) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty.
- (3) Unless the terms of the trusts expressly determine the time when and the method how beneficiaries are to be informed of their entitlement under a trust, the trustee shall be obliged to inform any beneficiary of his entitlement, in writing, within a reasonable time of his accepting to act.
- (4) When the terms of the trust grant a discretion in terms of article 9(10), the terms of the trust may suspend until such time as a discretion is exercised in their favour the duty of the trustee to inform such beneficiaries that they may benefit under the trust or that they form part of a class of beneficiaries which may so benefit. The terms of the trust may also indicate the time when and the method of how such beneficiaries are to be informed.
- (5) If the trust instrument expressly prohibits notification of information to beneficiaries or to those persons that form part of a class from among which beneficiaries may be appointed, without reference to any point in time, ascertained or ascertainable, such term shall be construed as implying a duty of the trustee to inform such beneficiaries within a reasonable time after the death of the settlor.
- (6) Should the trustee consider providing information as required by the preceding subarticles to be prejudicial to the beneficiaries of the trust or any of them, the trustee may apply to the Court and the Court may release the trustee from the obligation to inform under such conditions as it may consider appropriate.
- (7) The duty to inform as above provided shall not arise if the trustee is in possession of information which reasonably demonstrates that those entitled to such information have already been informed or are already aware of such information.
- (8) In the case of a trust established for charitable purposes, the duty to inform either unnamed beneficiaries forming part of a class or persons forming part of a class of persons who may be appointed as beneficiaries in terms of a power of the trustee, shall not arise notwithstanding the terms of the trust unless, in case of the unnamed beneficiaries the trustee establishes that there exist less than ten beneficiaries appertaining to such class of beneficiaries. Furthermore, in the absence of any indication to the contrary, the unnamed beneficiaries or persons who may be added as beneficiaries in terms of a power shall be assumed to be persons who carry on relevant charitable activities principally in Malta.
- (9) The trustee shall carry out the duty to inform to the best of his abilities and at the expense of the trust and in the event it appears to the trustee that such exercise will be too costly or burdensome, the trustee may apply to the Court for directions and the Court shall be empowered to release the trustee from such duty under such conditions as it considers appropriate.

(10) The suspension of the duty of a trustee to inform beneficiaries as provided in this article shall not reduce the rights of beneficiaries or the duties and liability of the trustee towards such beneficiaries in terms of this Act.

(11) Persons who may be added as beneficiaries in terms of a power referred to in article 9(7) shall have no right of information until such time as they are appointed beneficiaries by the trustee pursuant to such power.

(12) In the case of a trust to hold property in relation to a commercial transaction, the duties of the trustee relating to the provision of information and the rights of beneficiaries to such information may be determined by the terms of trust, in which case the preceding subarticles of this article shall not apply.

Liability for breach of trust. 30. (1) A trustee committing or concurring in a breach of trust shall without prejudice to any other liability be liable for -

(a) the loss of 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.

(2) A trustee may not set off a gain from a breach of trust against a loss from the same or some other breach of trust.

(3) A trustee shall not be liable for a breach of trust committed prior to his appointment, if such breach of trust was committed by some other person. It shall, however, be the duty of the trustee on becoming aware of it to take all reasonable steps to have such breach remedied.

(4) A trustee shall not be liable for breach of trust committed by a co-trustee unless -

(a) he becomes aware or ought to have become aware of the commission of such breach or the intention of the co-trustee to commit a breach of trust; and

(b) he actively conceals such breach or such intention or fails within a reasonable time to take proper steps to protect or restore the trust property or prevent such breach.

(5) Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, wilful misconduct or gross negligence.

(6) Where two or more trustees are liable in respect of a breach of trust, their liability shall be joint and several.

(7) A beneficiary may, in respect of a liability to him for a breach of trust already committed, relieve a trustee of, or indemnify him against, such liability, but only if the beneficiary -

(a) has legal capacity; and

(b) has full knowledge of all material facts; and

(c) has not been improperly induced by the trustee to give the relief or indemnity.

(8) The court may relieve the trustee either wholly or in part from liability for a breach of trust where it is satisfied that the trustee has acted honestly and reasonably and ought in fairness to be excused in the circumstances.

Trustees acting in respect of more than one trust. 31. (1) A trustee acting for the purposes of more than one trust shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust if the trustee has obtained notice of it by reason of acting or having acted for the purposes of another trust.

(2) A trustee of a trust shall disclose to any co-trustee any interest which he has as trustee of another trust if any transaction in relation to the first mentioned trust is to be entered into with the trustee of such other trust.

Dealings with third parties. 32. (1) Where in any transaction or matter affecting a trust a trustee informs a third party that he is acting as trustee, a claim by such third party in relation thereto shall extend only to the trust property.

(2) Where in any such transaction or matter a trustee fails to inform a third party that he is acting as trustee, and that party is otherwise unaware of it, the trustee -

- (a) shall be personally liable to such third party in respect thereof; and
- (b) shall have a right of recourse to the trust property by way of indemnity against such liability, unless the trustee acted in breach of trust.
- (3) In this section "third party" means any person not being a settlor, a trustee or a beneficiary of the trust.

Constructive trustees. 33. (1) Subject to the provisions of subarticle (2), where a person (in this section referred to as a "constructive trustee") makes or receives any profit, gain or advantage from breach of trust he shall be deemed to be a trustee of that profit, gain or advantage; and the beneficiary of such trust shall be deemed to be the trust, or the beneficiary, or other person, to the detriment of whom or at the expense of whom the profit, gain or advantage was made.

(2) Subarticle (1) shall not apply to a person acquiring property under an onerous title in good faith.

(3) A person who is or becomes a constructive trustee shall deliver up the property to or in favour of the beneficiaries thereof.

Position of outgoing trustee. 34. (1) A trustee who resigns or is removed or otherwise ceases to be a trustee shall duly surrender trust property in his possession or control.

(2) A trustee who resigns or is removed or otherwise ceases to be a trustee and has complied with the requirements of subarticle (1) shall be released from liability to any beneficiary, trustee or person interested under the trust for any act or omission in relation to the trust property or his duty as a trustee, except in respect of actions arising from breach of trust to which such trustee was a party or to which he was privy.

(3) A trustee who resigns or is removed or otherwise ceases to be a trustee shall continue to be liable to any beneficiary, trustee or person interested under the trust for the recovery from such trustee of trust property or the proceeds of trust property in the possession of the trustee or converted to the trustee's own use or not surrendered as required by subarticle (1).

REGARDING TRUSTS

Class interest. 35. (1) Subject to the terms of the trust, the following rules shall apply where a trust, or an interest under a trust, is in favour of a class of persons:

- (a) a class closes when it is no longer possible for any other person to become a member of a class;
- (b) a woman who is over the age of fifty-five years shall be deemed to be no longer capable of bearing a child;
- (c) where any class interest relates to income and for any period there is no member of the class in existence, the income shall be accumulated and, subject to article 12, shall be retained until there is a member of the class in existence or the class closes.

(2) In this section "class interest" means a trust or an interest under a trust which is in favour of a class of persons.

Variation of terms of trust by the court and approval of particular transactions. 36. (1) Subject to the provisions of subarticle (2), the court may, if it thinks fit, by order approve on behalf of -

- (a) any person incapacitated at law having directly or indirectly, an interest, whether vested or contingent, under the trust; or
- (b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trust as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons; or
- (c) any person unborn; or
- (d) any person in respect of any interest of his that may arise to him by reason of any discretionary power given to any one on the failure or determination of any existing interest that has not failed or determined,

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 trustees of managing or administering any of the trust property.

(2) The court shall not approve an arrangement on behalf of any person coming within subarticle (1)(a), (b) or (c), unless it is satisfied that the carrying out of such arrangement appears to be for the benefit of that person.

(3) Where in the management or administration of a trust, any sale, lease, pledge, charge, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction is in the opinion of the court expedient but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the terms of the trust or by law, the court may confer on the trustee, either generally or in any particular circumstance, a power for that purpose on such terms and subject to such provisions and conditions, if any, as it thinks fit, and may direct in what manner and from what property any money authorised to be expended, and the costs of any transaction, are to be borne.

(4) An application to the court under this section may be made by the trustee or by any beneficiary.

Other powers of the court. 37. (1) A trustee may apply to the court for directives concerning the manner in which he may or should act in connection with any matter concerning the trust; and the court may make such order, if any, as it thinks fit.

(2) The court may also, if it thinks fit -

(a) make an order concerning -

(i) the execution or the administration of any trust; or

(ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and any payments into court; or

(iii) any beneficiary or any person having any connection with the trust;

(b) 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 a trust;

(c) rescind or vary any order or declaration made under this Act, or make any new or further order or declaration.

(3) An application to the court for an order or declaration under subarticle (2) may be made by the trustee or by any beneficiary or by the Attorney General or by any other person having a lawful interest.

Provided that in cases where the duty to inform a beneficiary of his interest in a trust has been suspended in terms of article 29 and until such suspension is in force, and in the absence of a protector of a trust, the settlor of a trust may also make an application to the Court in terms of this subarticle. Whilst dealing with such application the Court may determine whether the suspension of rights to information as aforesaid be maintained in force in full or in part for all or some of the beneficiaries.

(4) Where the court makes an order for the appointment of a trustee it may impose such conditions as it thinks fit, including conditions as to the vesting of trust property.

(5) Subject to any order of the court, a trustee appointed by the court under this section shall have the same powers, discretions and duties as if he had been originally appointed a trustee.

Order as a result of bad faith. 37A. (1) Where any court makes an order 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 a trust relationship or in relation to trust property, the court shall have the power to restore the position to what it was had the action complained of not been taken or otherwise to protect his interests.

(2) When a person domiciled in Malta is obliged to pay maintenance in terms of the Civil Code and is a beneficiary under a discretionary trust, the court shall have such powers as are necessary to review the exercise of discretion by the trustee and give due consideration to the rights of persons entitled to claim

maintenance.

Applications, enforcement and hearings. 38. (1) There shall be no appeal from any decree, order, declaration or direction of the Civil Court in its voluntary jurisdiction given under the provisions of this Act.

(2) Such decrees, orders, declarations or directions shall remain in force until they are substituted or varied by the Civil Court in either its voluntary or contentious jurisdiction.

(3) During the hearing of an application before the Court the trustee or applicant shall at the earliest opportunity disclose to the Court all material facts known to him which may be relevant to the application including the existence of any *res judicata* or pending judicial action given or commenced in Malta or before a foreign court.

(4) All applications to the Court shall be notified to the trustee and the applicant shall furthermore notify all persons who he considers having an interest in the subject matter of the application. The Court shall have the power to order notification to all other persons who it considers may have an interest as it deems fit.

(5) The Court shall hear the trustee and any interested parties as it considers appropriate.

(6) Without prejudice to any other power given to the court by virtue of the foregoing provisions of this section or of any other law, where a trustee neglects or refuses to perform any duty or to comply with any order of the court, the court may, on such terms and conditions it may deem appropriate, order that the required action be executed, made or done by such person as the court may appoint for the purpose, at the cost of the trustee in default, or otherwise as the court may direct; and anything so executed, made or done shall operate and have effect for all purposes as if it had been executed, made or done by the trustee.

Confidentiality. 38A. (1) All proceedings under these articles shall be held *in camera* and only the parties to the proceedings, the trustees, the beneficiaries, if they prove they have an interest in the proceedings to the satisfaction of the Court, and their respective advocates and legal procurators shall be allowed in court during the hearings.

(2) Any decree or judgement of the Court shall preserve the confidentiality of the proceedings and shall only reveal such facts as may be necessary to make the same intelligible and enforceable by the parties and the trustees.

(3) All applications, responses, affidavits, opinions, statements and other documents or evidence shall be kept by the Registrar of the Court in a confidential manner and no access shall be given thereto except with the written consent of the Court.

(4) The Court may order the notification of any order to the depository notary as is referred to in article 43A if it considers it appropriate in the circumstances.

Rules of Court. 38B. The Board established under article 29 of the Code of Organisation and Civil Procedure may make Rules of Court concerning applications made under or in terms of this Act.

Directions from the Authority. 38C. Without prejudice to any other obligations arising under any other law, a trustee may apply to the Authority for directions concerning the manner in which he may or should act in connection with any matter concerning the trust or its property when such matter relates to the fulfillment of his obligations relating to the prevention of money laundering. Any bona fide communication or disclosure made in terms of this article shall not be treated as a breach of the duty of professional secrecy or any other restriction, whether imposed by statute or otherwise, upon the disclosure of information and any information disclosed in terms of this article shall be used only in connection with investigations of money laundering.

Payment of costs. 39. The costs and expenses of and incidental to an application to the court under this Act shall be paid out of the trust property or be borne and paid in such other manner or by such other person as the court may order.

Protection of persons dealing with trustees. 40. (1) A person acquiring trust property from a trustee in good faith and under an onerous title acquires a good title thereto as if 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.

(2) No person paying or advancing money to a trustee shall be concerned to see that such money is required for the purposes of the trust, or that no more than is required is raised, or otherwise as to the propriety of the transaction or the application of the money.

(3) A person dealing with a trustee in relation to trust property need not -

(a) enquire into the terms of the trust; or

(b) obtain the consent of the beneficiaries or any other person,

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.

(4) The trustee may furnish to any person a certificate containing the following information without being in breach of any confidentiality obligations:

(a) that the trust exists and the date the trust instrument was executed;

(b) the identity and address of the current trustee;

(c) that the trustee is duly authorised and empowered to carry out the relevant transaction and has obtained all necessary consents, if any;

(d) the revocability or irrevocability of the trust and, if revocable, that the trust has not been revoked.

(5) When there is more than one trustee, a certificate may be signed and authenticated by any trustee.

(6) Any trustee who issues any certificate containing any statement which he knows or ought to know is false shall be guilty of an offence and shall on conviction be liable to the punishment of imprisonment for a term not exceeding two years or to a fine (multa).

Following trust property and bankruptcy of trustee. 40A. (1) Without prejudice to the personal liability of a trustee, trust property which has been alienated or dealt with in breach of trust, or the property into which it has been converted, may be followed and recovered unless it is in the hands of a bona fide purchaser for value without notice of the breach of trust.

Provided that an alienation of immovable property by the trustee as provided by article 958A of the Civil Code shall not give rise to the rights provided in this article in favour of any person claiming a right of legitim.

(2) Where a trustee becomes bankrupt, or insolvent, or upon his property becoming liable to seizure or similar process of law, his creditors shall have no right or claim against the trust property except to the extent that the trustee himself has a claim against the trust.

(3) The court may make an order or directive as it deems fit in the circumstances of the case upon an application made under this section by any beneficiary or creditor as the case may be.

Limitation of action. 41. (1) An action brought against a trustee -

(a) in respect of any fraud to which the trustee was a party or to which he was privy; or

(b) for the recovery from the trustee of trust property in his possession or control or previously received by the trustee and converted to his use,

shall not be barred by prescription except by the lapse of thirty years.

(2) Without prejudice to the provisions of subarticle (1), no action may be brought against a trustee by a beneficiary for breach of trust after the lapse of three years -

(a) commencing from the date of the delivery of the final accounts of the trust to the beneficiary; or

(b) commencing from the date on which the beneficiary first had knowledge of the occurrence of the breach of trust,

whichever is the earlier date.

(3) Where the beneficiary is a minor the periods referred to in this section shall not begin to run until the day on which the beneficiary ceases to be a minor.

(4) The periods mentioned in this section shall be interrupted if a judicial act or demand is filed in the competent court and served on the trustee before the expiration of the said period.

REGULATION OF TRUSTEES

Trustees. 42. Persons may carry on the activities as trustees either in a professional or in a private capacity and, as the case may be, shall be subject to the provisions of articles 43 and 43A.

Requirements for authorisation of trustees. 43. (1) Except as provided in terms of subarticles (6) and (7), any person, resident or operating in Malta, or a corporate trustee, who receives property upon trusts or accepts to act as a trustee or co-trustee of a trust and who -

(a) receives or is entitled to remuneration for so acting, or

(b) does so on a regular and habitual basis, or (c) holds himself out to be a trustee,

shall require authorisation by the Authority in terms of this Act irrespective of the proper law of the trusts they hold and whether or not all or part of the trust property is in Malta.

Provided that in the event of reasonable doubt as to what constitutes acting as a trustee on a regular and habitual basis, the matter shall be conclusively determined by the Authority.

(2) The Authority may issue rules to establish when trustees are considered as receiving remuneration, when activity is done on a regular or habitual basis and when a person holds himself out as a trustee.

(3) Any person, whether an individual or a company may apply in writing to the Authority to be authorised as a trustee and the Authority may grant authorisation upon being satisfied that the conditions laid down in this article have been met and such authorisation may be general or may be restricted to particular specified activities.

(4) The conditions referred to in the preceding subarticle are that:

(i) in the case an applicant is a company:

(a) its objects include acting as trustee and carrying on activities ancillary or incidental thereto, and does not include objects which are not compatible with the services of a trustee; and

(b) its actual activities are compatible and connected with the services of a trustee; and

(c) the directors of the company are not less than three in number and are individuals who are approved persons; and

(d) the company has established adequate systems for maintaining proper records of the identity and residence of beneficiaries, the dealings and the assets in connection with trusts and compliance with applicable law; and

(e) every person who has a direct or indirect interest in the company, is an approved person; and

(f) the name of the company is not inconsistent with its trustee activity; and

(g) where the company is not registered in Malta, that company must be constituted or incorporated in an approved jurisdiction;

(ii) in the case of an applicant who is an individual that such individual -

(a) is resident in Malta or operating in Malta;

(b) is an approved person; and

(c) has established adequate systems for maintaining proper records of the identity and residence of beneficiaries, and of the dealings and the assets of trusts and compliance with applicable law.

(5) A trustee shall notify the Authority of any change or circumstance which would have a bearing upon his status as an authorised person and in the case of a corporate trustee, of any change in its charter, statute, memorandum or articles of association or other instrument constituting the company, directors or members, and in case of companies registered in Malta such changes shall not be registered unless and until they are so notified to and approved by the Authority.

(6) (a) The following persons shall not be required to obtain authorisation in terms of this Act to act as a trustee in the course of carrying on the activities for which they are licenced:

(i) a person who is in possession of a valid licence issued in terms of the Banking Act; or

(ii) a person who is licenced in terms of the Investment Services Act to hold clients' monies or assets; or

(iii) a person who is authorised in terms of the Insurance Business Act or enrolled in the Brokers List under the Insurance Brokers and Other Intermediaries Act to hold clients' monies or assets; or

(iv) a person with an equivalent licence to (i) to (iii) issued by the relevant regulatory authority in an approved jurisdiction.

(b) A person approved by the Malta Maritime Authority to act as a trustee of a shipping trust or a shipping foundation as defined in article 84Z of the Merchant Shipping Act shall not require any further authorisation in terms of this Act.

(7) Without prejudice to the obligation of any person to obtain authorisation in terms of any other law which may be applicable, the provisions of this article and article 43A shall not apply -

(a) to a person when acting as a trustee under trusts created for the purpose of holding security in the form of hypothecs, pledges, assignments, mandates or otherwise, granted in relation to any financial transaction for the benefit of lenders or other creditors in such transaction;

(b) to a person when acting as trustee of any movable property held as security and for the benefit of persons whose entitlement is conditional or determinable in terms of the trust or the contract in relation to which the holding was created;

(c) to a liquidator, curator in bankruptcy or court appointed administrator acting in the course of the liquidation, bankruptcy or administration;

(d) to a person in possession of a warrant to carry out the profession of an advocate, notary public, legal procurator or certified public accountant but only if acting as a trustee is limited to what is necessary and incidental in the course of carrying out his profession and does not otherwise hold himself out as a trustee to the public; provided he shall be obliged to maintain proper records of clients' assets for a period of not less than five years or longer period as established by any other law governing his profession;

(e) to persons when acting as trustees of a unit trust which is a collective investment scheme which is recognised in terms of the Investment Services Act or which is exempt from licensing in terms of the said Act and the establishment of which is notified to the Authority;

(f) to an individual acting as a trustee under charitable trusts provided he is not remunerated and does not hold himself out as providing such services;

(g) any person acting as a co-trustee when another trustee or, if more than one, the majority of the trustees are authorised in terms of this article;

(h) to companies or other legal entities, established in an approved jurisdiction, the directors of which must be approved persons, and which are wholly owned, including as trustees, and controlled by authorised trustees in terms of this article and which are established solely for the purpose of holding trust property and ancillary acts, the details of which are notified in writing to the Authority by an authorised trustee;

(i) to a party to a contract who agrees to receive or hold property as trustee in the context of or ancillary to the performance of a contract provided that the trustee does not otherwise hold himself out as a trustee to the public and is not remunerated therefor;

(j) to a person holding one or more shares in a company registered in Malta when such shares do not have any special voting rights and their individual nominal value does not exceed one Maltese lira or its equivalent in any other currency.

(8) A person herein referred to may apply to the Authority and the Authority shall authorise in terms of this article:

(i) a person with a licence or authorisation equivalent to subarticle (6)(a)(i) to (iii) issued by the Authority or the relevant regulatory authority in an approved jurisdiction and who will be acting as trustee not in the course of its ordinary business for which they are licensed; or

(ii) a person having a licence or authorisation to act as a trustee issued by the relevant regulatory authority in an approved jurisdiction.

Provided such person whether Maltese or foreign notifies the Authority, in writing, of its intention to act as a trustee in Malta at least forty-five days prior to commencing activities in Malta, and who receives a confirmation from the Authority that it does not object thereto.

A notification under this subarticle shall outline the proposed activities and shall be accompanied by such information as may be required by the Authority from time to time.

To the extent that the Authority lays down any restrictions or conditions for such activities, on initial response to a notification or at any other time, such restrictions and conditions shall come into effect as stated in the response or by subsequent notice of the Authority.

(9) (a) The holding upon trust of -

(i) securities or interests in or issued by a Maltese legal entity, other than securities which are listed on the Malta Stock Exchange or other recognised investment exchange; or

(ii) immovable property in Malta (hereafter referred to as "relevant property") by trustees who are not authorised shall be permitted only if a person -

(aa) authorised in terms of subarticles (3) and (8), or

(bb) not required to be authorised under subarticle (6)(a) and (7)(e), (g) and (h),

(hereafter referred to as a "qualified person") is engaged in writing by the trustee to carry out the compliance functions referred to in paragraph (b) on an indefinite basis with specific reference to such relevant property and such agreement is notified to the Authority prior to any acquisition of such relevant property taking place and shall be accompanied by such information as may be required by the Authority from time to time.

(b) The qualified person shall ensure due compliance with all fiscal, prevention of money laundering and other legal obligations in connection with relevant property and shall notify the Authority in the event that he resigns, has his engagement terminated or is otherwise hindered in performing his duties hereunder.

(c) Paragraphs (a) and (b) shall also apply to the holding of relevant property by a mandatory for another person.

(d) If at any time there is no qualified person to carry out the functions as required by this subarticle, the Court may appoint a qualified person on the application of the Authority or any interested person.

(e) The Authority may issue rules from time to time prescribing the form and conditions of such notification and functions of qualified persons.

(10) No transactions in relation to relevant property, including assignments of beneficial interests in a trust, shall take place without the prior written consent of a qualified person.

Provided that nothing in this article shall imply that a qualified person is himself a trustee or that he is jointly and severally liable for the performance of obligations of the trustee in relation to relevant property or related transactions.

(11) The requirement for a qualified person shall not apply -

(a) to the holding of one or more shares in a company when they do not have any special voting rights and their individual nominal value does not exceed one Maltese liri or its equivalent in any other foreign currency; or

(b) to the holding by trustees named and appointed by a will creating the trust in respect of the initial period of six months from the date of acceptance by the trustee in respect of the estate of the testator unless it is necessary to enter into any transaction in relation to relevant property, other than the initial transfers or declarations by the trustee to assume ownership and control of the trust property, in which case a qualified person shall be appointed prior thereto.

(12) Without prejudice to the nature of the legal relationship in any particular case, for the purposes of this article, any person who -

(a) acts as a mandatory in the holding of property for another person; or
(b) acts as an administrator, a trustee, director or similar functionary, exercising control over the assets, by whatever name he may be called, of a private foundation, shall, not being a person referred to in subarticle (6), require authorisation in terms of this article, irrespective of the extent of his activities, whether remuneration is payable therefor or whether he holds himself out as providing such services or not.

For the purposes of this subarticle a "private foundation" is a foundation established or operating in Malta for the benefit of a private interest or purpose which is not charitable.

(13) Every person who acts as a director of a legal entity as referred to in subarticle (7)(h) and (8)(b), who receives property by way of trust from a trustee to retain it on behalf of such trustee, shall be an approved person.

(14) Nothing in this article shall imply that a person held to be a trustee under a constructive or resulting trust or as a result of any statutory provision or judicial declaration has acted in breach of this Act during any period prior to his becoming aware of such trusts and in such a case it shall be a defence against prosecution under this Act to prove that the said person was unaware of his duties hereunder.

Private trustees and notarial procedure. 43A. (1) In this article the term "Notarial Law" means the Notarial Profession and Notarial Archives Act.

(2) An individual who agrees to act as a trustee because -

(a) he is related to the settlor, by consanguinity or affinity in the direct line up to any degree or in the collateral line up to the fourth degree inclusively, or

(b) he has known the settlor for at least ten years and, in both cases,

(i) is not remunerated, even indirectly, except as permitted by any rules issued by the Authority;

(ii) does not hold himself out as a trustee to the public, and

(iii) does not act habitually as trustee, in any case in relation to more than five settlors at any time,

(hereafter referred to as a "private trustee") may act as a trustee without the need for authorisation in terms of the preceding article, subject to the conditions stated in subarticle (3).

(3) A private trustee shall be permitted to act as trustee under the following conditions which shall apply as the case may be:

(i) in the case of a testamentary trust, that within six months of accepting to act as trustee, he shall draw up an inventory by notarial deed in terms of Part IIIA of the Notarial Law and shall declare in the deed that the inventory includes all the property under the trust and an extract of the will containing all the terms of the said trust shall be annexed to the said notarial deed;

(ii) in the case of an inter vivos trust, the trust must be created by a notarial trust deed;

(iii) where property, other than immovable property, is added to the trust by a settlor or any other person, in terms of article 10 or by declaration of the trustee, such addition shall be recorded by a notarial trust deed on delivery of the additional property to the trustee, if practicable, but in any case not later than fourteen working days of receipt of such property by the trustee. In the case of immovable property the addition of property shall be carried out by a notarial act, an authenticated copy of which shall be delivered to the depositary notary for safekeeping and registration with the trust documents within such time;

(iv) records of meetings with beneficiaries, advisors or protectors, the exercise of discretion by the trustee in appointing or removing a beneficiary, in reducing, distributing or advancing trust property, in the termination of the trust for any reason, or other material events shall be rendered in writing and shall, together with any annual accounts and Court decrees, orders, declarations or directions which may be issued in relation to trust property, be delivered to the depositary notary;

(v) in all cases, the trustee shall declare the facts applicable to himself to show that he does not require authorisation to act as a trustee in terms of this Act and is not disqualified in terms of article 53, after the notary has warned him as to the importance of the truthfulness of such declarations;

(vi) in the case of a trust relating to relevant property for the purposes of article 43(9), the depository notary shall ascertain that the provisions of article 43 are observed by the trustee.

(4) Where the trustee is a private trustee, the notary public who publishes a will containing a testamentary trust or receives a notarial trust deed inter vivos shall be the sole depository of all acts referred to in the preceding subarticle and such notary shall be known as the depository notary.

Provided that if such notary public is appointed as a trustee in the deed creating the trust and accepts to so act, such notary shall ensure that the deed of trust names another notary public to carry out the functions of the depository notary.

(5) Notwithstanding any other law relating to the profession of notaries public, a notary who receives a will or notarial trust deed shall not be precluded from being appointed as the trustee in such deed but if a notary is a trustee he may not act as the depository notary or the notary keeper.

Provided that should the depository notary be appointed trustee subsequent to the creation of a trust, his acceptance to act shall be conditional on such notary delivering all trust documents to another depository notary to the satisfaction of the Authority and as provided in subarticle (9).

(6) All documents relative to a trust shall be submitted to the depository notary within fifteen days of coming into existence or of coming into possession of the trustee or of the date of relevant event to which the document refers, as the case may be. On receipt of any such document the notary shall declare in writing on the document the date, time, and place of receipt. Such declaration shall, until the contrary is proved, be evidence of its content. All such documents shall be held for safekeeping and registration in the manner as may be laid down by the Authority from time to time.

(7) The trust deed and all documents relative to a trust filed with a depository notary shall be confidential. The depository notary shall not be obliged to provide information on the trust deed or any other document relative thereto except as provided by this Act and with the written consent of the trustee or upon an order of the Court.

(8) Where in terms of Notarial Law a notary keeper has been appointed instead of the depository notary, the notary keeper shall be the depository notary relative to the trust and a reference to the depository notary in this or any other law shall be construed accordingly.

(9) The trustee may, by notice in writing to the notary and to the Authority, substitute the depository notary or the notary keeper in his capacity as the depository notary and the latter shall deliver to the substitute depository notary all documents in his possession in the preceding subarticles and, in case of public deeds, authenticated copies thereof and this within thirty days from the date of the receipt of such notice, unless otherwise ordered not to do so by the Authority. The substituted notary may request a written receipt and keep copies of the documents delivered to the appointed depository notary but shall keep such copies secure and in strict confidence and shall not provide access to any person other than the serving depository notary, the trustee or the Authority.

(10) A notary who fails to observe the provisions of this article shall be guilty of an offence and shall on conviction be liable to a fine (ammenda) of not less than fifty liri and not more than one hundred liri.

Provided that no proceedings shall be instituted where the notary, upon a notice in writing by the Authority admits liability to pay such fine at its maximum amount.

(11) When a trust is created in accordance with the provisions of this article, the trustee shall remain subject to the requirements set out in relation to the depository notary until the termination of the trust even if the trustee becomes authorised or is substituted by a trustee authorised or not required to be authorised in terms of article 43.

(12) When a trust is not created in accordance with the provisions of this article and a private trustee is subsequently appointed to office, it shall be a condition to his acceptance to act that a notarial deed of acceptance be executed in such manner that the provisions of this article are observed as far as possible

at that stage, reference being made to the settlor for the purposes of the note of enrollment and a full inventory, of the trust property being transferred to the trustee, being attached.

(13) If any person wishes to create a trust and appoints a trustee other than a private trustee and also wishes that the provisions of this article apply, such person may choose to do so by notifying the notary public that it is his wish that the provisions of this article apply and that the notary act as depository notary under the provisions of this article. In such case the notary shall request the trustee to declare, in lieu of the declaration in subarticle (3)(v), that he is authorised, or not required to be authorised, in terms of article 43 and is aware of his obligations under this article. In such cases the requirement of article 50 of the Notarial Law to the effect that the Notary registers a note of enrollment relating to the creation of the trust shall not apply if the settlor expressly exempts him from such duty.

(14) In all cases the Court may exercise the power to appoint, remove, substitute and give directions to a depository notary on the application of the depository notary, any interested person or the Authority.

APPLICATION, GRANT, REVOCATION, ETC., OF AUTHORISATION

Application for authorisation. 44. An application for authorisation in terms of article 43 shall be made in the form and manner required by the Authority and shall furthermore:

- (a) contain or be accompanied by such information and particulars, in addition to those required by this article, as the Authority may require or as may be prescribed;
- (b) be verified in the manner and to the extent required by the Authority, or as may be prescribed;
- (c) contain the address in Malta for service on the applicant of any notice or other document required or authorised to be served on him by or under this Act;
- (d) be accompanied by such fee as may be prescribed in respect of the authorisation applied for.

Power to refuse or grant authorisation. 45. (1) The Authority may grant or refuse to grant authorisation applied for under this Act.

(2) In granting authorisation the Authority may subject it to such conditions as it may deem appropriate, and having granted authorisation it may, from time to time, vary or revoke any condition so imposed or impose new conditions.

(3) When considering whether to grant or refuse authorisation the Authority shall, in particular, have regard to:

- (a) the protection of settlors and beneficiaries; and
- (b) the protection of the reputation of Malta taking into account Malta's international commitments; and
- (c) the promotion of competition and choice.

(4) Without prejudice to the provisions of article 43(8), the Authority shall notify any applicant of its decision whether to grant or refuse to grant the licence applied for within three months from the receipt of a complete application made in compliance with the applicable provisions of this Act.

(5) Any requirement in this Act that a person be an approved person to carry out certain activities or functions shall be interpreted as a requirement that, in the case of a legal entity, any director or officer of such person, and, in the case of a trust, each one of its trustees, be an approved person to carry out such activities or functions.

Power to cancel or suspend authorisation. 46. The Authority may at any time cancel or suspend an authorisation in accordance with the provisions of this Act:

- (a) if it considers that the holder thereof is not or is no longer an approved person to act as a trustee; or
- (b) if it considers that the holder thereof does not fulfil the requirements of, or has contravened, any of the provisions of this Act or of any rules or regulations made thereunder, or has failed to satisfy or comply with any obligation or condition to which he or the authorisation is subject by virtue of or under this Act; or

- (c) if the Authority has been furnished by or on behalf of the authorised trustee with information which is false, inaccurate or misleading; or
- (d) if the authorised trustee has not commenced activities within the term which may be provided for in the authorisation or has ceased to provide such service; or
- (e) if it considers it desirable to cancel or suspend the authorisation for the protection of the general public or the reputation of Malta taking into account Malta's international commitments; or
- (f) at the request of the authorised trustee; or
- (g) in any other circumstances under which the Authority would have been precluded from issuing an authorisation under this Act or where it would have been entitled to refuse the grant of such authorisation.

Notification of proposed refusal, variation, cancellation or suspension of an authorisation. 46A.

(1) Where the Authority proposes -

- (a) to vary any condition to which the authorisation is subject or to impose a condition thereon; or
- (b) to refuse an application for an authorisation or to cancel or suspend an authorisation,

it shall give the applicant or, as the case may be, the authorised trustee notice in writing of its intention to do so, setting out the reasons for the decision it proposes to take.

(2) Every notice given under subarticle (1) shall state that the recipient of the notice may, within such reasonable period after the service thereof as may be stated in the notice, being a period of not less than forty-eight hours and not longer than thirty days, make representations in writing to the Authority giving reasons why the proposed decision should not be taken, and the Authority shall consider any representation so made before arriving at a final decision.

(3) The Authority shall as soon as practicable notify its final decision in writing to the applicant or the authorised trustee, as the case may be.

REGULATORY AND INVESTIGATORY POWERS

Power to require information. 47. (1) Notwithstanding any other provision of this Act, the Authority may, by notice in writing, require any person who is or was acting, or who appears to be or to have been acting as trustee, or who was providing services which require authorisation according to this Act, and any other person who appears to be in possession of relevant information to do all or any of the following:

- (a) to furnish to the Authority, at such time and place and in such form as it may specify, such information and documentation as it may require with respect to any such activities as aforesaid;
- (b) to furnish to the Authority any information or documentation aforesaid verified in such manner as it may specify;
- (c) to attend before the Authority, or before a person appointed by it, at such time and place as it may specify, to answer questions and provide information and documentation with respect to any such activities as aforesaid.

(2) The Authority may take copies of any documents furnished or provided under this article.

(3) Where the person required to provide information or documentation under this article does not have the relevant information or documentation, he shall disclose to the Authority where, to the best of his knowledge, that information or documentation is, and the Authority may require any person, whether indicated as aforesaid or not, who appears to it to be in possession of that information or documentation, to provide it.

(4) A statement made and documentation provided in pursuance of any requirement under this article may be used in evidence against the person making the statement or providing the documentation as well as against any person to whom they relate.

(5) Except as provided for in article 642(1) of the Criminal Code and of article 588(1) of the Code of Organization and Civil Procedure, the provisions of this article shall apply to all information or documentation notwithstanding the provisions of the Professional Secrecy Act.

(6) The power to require the production of documentation under the provisions of this article shall be without prejudice to any lien or charge claimed by any person in relation to such documentation.

(7) Where the Authority has appointed a person under subarticle (1)(c), such person shall, for the purposes of carrying out his functions under his appointment, have all the powers conferred on the Authority by this article and a requirement made by him shall be deemed to be and have the same force and effect as a requirement of the Authority.

Power to issue directives. 48. (1) Without prejudice to any of the powers conferred on it by this Act, the Authority may, whenever it deems it necessary, give, by notice in writing, such directives as it may deem appropriate in the circumstances; and any person to whom or to which the notice is given shall obey, comply with and otherwise give effect to any such directive within the time and in the manner stated in the directive.

(2) Without prejudice to the generality of the foregoing provisions of this article, a directive under this article may -

(a) require anything to be done or be omitted to be done, or impose any prohibition, restriction or limitation, or any other requirement, and confer powers, with respect to any transaction or other act, or to any assets, or to any other thing whatsoever;

(b) require that any person having functions of a trustee be removed or replaced by another person acceptable to the Authority;

(c) require a trustee to cease operations and to wind up its affairs, in accordance with such procedures and directions as may be specified in the directive, which may provide for the appointment of a person to take possession and control of all documents, records, assets and property belonging to or in the possession or control of the trustee.

(3) The power to give directives under this article shall include the power to vary, alter, add to or withdraw any directive, as well as the power to issue new or further directives.

(4) Where the Authority is satisfied that the circumstances so warrant, it may at any time make public any directive it has given under any of the provisions of this article.

Exchange of information and collaboration. 49. (1) In relation to trustees, the provisions of article 17 of the Malta Financial Services Authority Act shall apply *mutatis mutandis*.

(2) The Authority may exercise the powers granted to it by virtue of this Act at the request of or for the purposes of assisting an overseas regulatory authority:

(a) where the assistance is required by the overseas regulatory authority for the purposes of the exercise of one or more of its regulatory functions; or

(b) where so required within the terms of Malta's international commitments; or

(c) where so required within the terms of undertakings assumed in bilateral or multilateral agreements for the exchange of information and other forms of collaboration with overseas regulatory authorities including a request under a memorandum of understanding concluded with the Authority.

Right of entry. 50. (1) Any officer, employee or agent of the Authority, on producing, if required, evidence of his authority, may enter premises occupied by a person on whom a notice has been served under this Act for the purpose of obtaining the information or documents required by that notice, or otherwise for the purpose of the investigation, and of exercising any of the powers conferred upon it.

(2) Where any officer, employee or agent of the Authority has reasonable cause to believe that if such notice as is referred to in subarticle (1) were served it would not be complied with or that any documents to which it could relate would be removed, tampered with or destroyed, such person may, on producing, if required, evidence of his authority, enter any premises referred to in subarticle (1) for the purpose of obtaining from there any information or documents specified in the authority, being

information or documents that could have been required under such notice as is referred to in subarticle (1).

(3) For the purposes of any action taken under the provisions of this article, the Authority may request the assistance of the Commissioner of Police, who may for such purpose exercise such powers as are vested in him for the prevention of offences and the enforcement of law and order.

SANCTIONS

Offences. 51. (1) Any person who contravenes or fails to comply with any of the provisions of this Act, or contravenes or fails to comply with any authorisation, condition, obligation, requirement, directive or order made or given under any of the provisions of this Act, shall be guilty of an offence.

(2) Any person who for the purposes of, or pursuant to, any of the provisions of this Act or of any rules or regulations made thereunder, or any condition, obligation, requirement, directive or order made or given as aforesaid, furnishes information or makes a statement or declaration which he knows to be inaccurate, false or misleading in any material respect, or recklessly furnishes information or makes a statement which is inaccurate, false or misleading in any material respect, shall be guilty of an offence.

(3) Any person who with intent to avoid detection of the commission of an offence under this Act, removes, destroys, conceals or fraudulently alters any book, document or other paper, shall be guilty of an offence.

(4) Any person who intentionally obstructs a person exercising rights conferred by this Act shall be guilty of an offence.

(5) Any person who acts or purports to act as a trustee in Malta without being authorised to do so by the Authority, when so required in terms of this Act, shall be guilty of an offence.

(6) Any person who is guilty of an offence under subarticles (1), (2), (3), (4) and (5) and, saving any higher punishment which may be provided under any other law, shall be liable, on conviction, to a fine (multa) not exceeding two hundred thousand liri or to a term of imprisonment not exceeding four years, or to both such fine and imprisonment.

(7) Where a trustee contravenes or fails to comply with any of the conditions imposed in an authorisation issued under article 43, or the conditions imposed in article 43A, or contravenes or fails to comply with any directive, obligations or other requirement made or given by the Authority, the Authority may impose an administrative penalty which may not exceed forty thousand liri.

(8) A breach or non-observance by any person of any provision of this Act relating to the authorisation of such person to act as a trustee or otherwise shall not in any manner prejudice the validity or enforceability of a trust or affect the duties and responsibilities of such person in terms of this Act.

RULES

Power to issue rules. 52. (1) The Authority may issue rules governing trustees, whether authorised or not required to obtain authorisation in terms of this Act, the operations of trustees in Malta, and on the qualifications to act as trustees. The rules shall be binding on the trustees and other persons as may be specified therein. The rules may lay down additional requirements and conditions in relation to the activities of trustees, their responsibilities to the Authority, a code of conduct, and any other matters as the Authority may consider appropriate, including the form and content of accounting records to be kept by trustees.

(2) The Authority may also issue rules to establish which activities constitute administrative services in relation to trusts and to establish the criteria for the conduct of these activities.

Disqualification orders. 53. (1) The court, upon the application of the Authority, may make a disqualification order against any person who is found guilty of an offence under this Act or any other law, other than an offence punishable only with a fine, or who has infringed any requirement of this Act.

(2) The court, upon the application of the Authority or any interested person, may also make a disqualification order against any person if it is satisfied that his conduct as a trustee of a trust, either taken alone or taken together with his conduct as a trustee of any other trust or trusts, makes him unfit to be a trustee.

(3) A disqualification order made under this article may be for a minimum period of one year and a maximum period of fifteen years.

(4) For the purposes of this article, a disqualification order is an order whereby a person shall not, without leave of the court -

(a) be a trustee of a trust or a private foundation; or

(b) be delegated any functions, duties or powers of a trustee; or

(c) perform or exercise any functions or otherwise act in a fiduciary capacity in relation to a mandate, trust or a private foundation.

(5) A notice of a disqualification order made under this article shall -

(a) be delivered by the Registrar of Courts to the Authority;

(b) be furthermore recorded in a register to be kept for this purpose by the Authority and which shall be open for public inspection.

(6) Any person who, while being subject to a disqualification order, acts in contravention thereof, shall be guilty of an offence and liable on conviction to a fine (multa) of not more than twenty thousand liri or imprisonment for a term not exceeding three years or to both such fine and imprisonment.

(7) The provisions of this article shall be without prejudice to any other offences or remedies which may exist under any other law.

Persons not qualified to act as trustees. 54. A person shall not be qualified for appointment or to hold office as trustee if -

(a) he is interdicted or incapacitated or is an undischarged bankrupt;

(b) he has been convicted of any of the crimes affecting public trust or of theft or of fraud or of knowingly receiving property obtained by theft or fraud;

(c) he is a minor; or

(d) he is subject to a disqualification order under article 53.

APPEALS

Appeals. 55. (1) In this article, the "Financial Services Tribunal" means the Tribunal established in terms of article 21 of the Malta Financial Services Authority Act, and the term "Tribunal" shall be construed accordingly; and the provisions of the said article 21 shall, except in so far as any of them is incompatible with the provisions of this article, apply to appeals made to the Financial Services Tribunal under this Act.

(2) Any person who is aggrieved by a decision of the Authority -

(a) to refuse the issue of an authorisation;

(b) to impose or vary any condition of an authorisation;

(c) to impose or vary any restriction;

(d) to revoke an authorisation;

(e) to make any order under this Act,

may appeal against the decision to the Financial Services Tribunal within such period and under such conditions as are established under the Malta Financial Services Authority Act.

(3) An appeal against a decision of the Authority shall not suspend the operation of that decision.

Meaning of term trustee. 56. For the purpose of articles 44 till 55 the term "trustee" shall be construed as including those persons referred to in article 43(12).

GENERAL PROVISIONS

Power to make regulations or rules. 57. (1) The Minister may, on the advice of the Authority make regulations or rules for the better carrying out of any of the provisions of this Act, and may, in particular, but without prejudice to the generality of the foregoing, by any such regulations or rules -

(a) provide for the returns, statements, and notices to be made or given for any of the purposes of this Act, and the form and contents thereof;

(b) regulate the conduct, duties and other obligations of trustees, including the returns, statements and other information they are to submit to the Authority, and establish the maximum amount which, notwithstanding any provision of this Act, may be charged as fees by such trustees;

(c) alter any fees established by any provision of this Act, and amend any such provision accordingly to reflect changes in the cost of living or in the value of currencies, and establish such other fees as may be deemed appropriate in respect of any matter for which a fee is not provided by this Act.

Provided that no alteration of any fees shall have effect before the expiration of one year from the publication of such alteration in the Gazette;

(d) make rules of court for any purpose of this Act and of proceedings thereunder, providing by such rules for any matter referred to in section 29 of the Code of Organization and Civil Procedure;

(e) to further regulate the activities of trustees as well as the services provided and activities carried on or in conjunction therewith or in relation thereto, providing for any matter he may deem expedient including the creation and exercise of rights by or for the benefit of the beneficiaries or settlors and the imposition of duties and obligations on persons authorised to act as trustees;

(f) to establish the requirements relating to the books of account to be maintained by trustees, the form and content of accounts which trustees are obliged to prepare, which accounts have to give a true and fair view of the assets under trusts, the requirements of review or audit on such accounts, the duties of auditors who may be engaged and related matters;

(g) to exempt any activities or classes of persons from the requirements of articles 43 and 43A and to impose conditions he may deem fit for eligibility for exemption;

(h) without prejudice to any rules which may apply in terms of the Investment Services Act, to establish rules applicable to the responsibilities of trustees of unit trusts under this Act, the issue of units, the rights and responsibilities of unit holders and any other matters which may need to be regulated relating to unit trusts;

(i) to regulate any matters in connection with the use of trusts in commercial transactions, to establish conditions for such use including the prohibition of such use, and to amend the definition of commercial transactions in the Act;

(j) to regulate any matter in relation to security trustees and security trusts, including the definition of what constitutes fair and reasonable actions in relation to enforcement of security trustees;

(k) to regulate trusts which provide for maintenance of persons or for the provision of annuities or pensions;

(l) to regulate the accumulation of income and distribution of income and capital by trustees and ancillary matters;

(m) to regulate the duties of private trustees and the duties and functions of depository notaries, procedures to be adopted for the safekeeping and registration of all documents filed with such notary in relation to a trust and all ancillary matters;

(n) to regulate matters in relation to trusts created by holders of public office and such other persons as may be prescribed, including the qualifications of the trustees, the powers of appointment of such trustees, the powers and duties of such trustees, the rights of beneficiaries and third parties in such cases and all ancillary matters;

(o) prescribe any matter that may or is to be prescribed.

(2) Regulations made under any of the provisions of this Act may be made in the English language only.

Transitory provisions - Act XIII of 2004.

Transitory provisions. 35. (1) The following provisions in this Part shall apply in relation to registered trusts, trustees of unregistered trusts, licensed nominees and nominee companies as referred to in the principal Act (Cap. 331) as in force immediately before the coming into force of this Part and the Malta Financial Services Centre Act as retained in force by Act XVII of 2002 (hereinafter referred to as "the applicable law").

Registered trusts.

(2) Upon the coming into force of this Part no further trusts shall be registered in terms of the principal Act as in force immediately before the coming into force of this Part.

(3) All trusts registered prior to the coming into force of this Part shall continue to be regulated by the principal Act as in force immediately before the coming into force of this Part for a maximum period of ten years from the date of their registration and they shall continue to enjoy the rights and exemptions and other privileges due as provided by the principal Act as in force immediately before the coming into force of this Part.

(4) A trustee of a registered trust in relation to which the period of ten years has expired prior to the coming into force of this Part shall amend the trust deed in consultation with the settlor, any protector or other interested parties so as to achieve compliance with the principal Act as amended by this Part within a maximum period of two years from the coming into force of this Part.

(5) A trustee of a registered trust in relation to which the said period of ten years is due to expire on or after the coming into force of this Part shall amend the trust deed in consultation with the settlor, any protector or other interested party so as to achieve compliance with the principal Act as amended by this Part within a maximum period of two years from the expiry of the said period of ten years.

(6) Notwithstanding the provisions of subarticles (4) and (5), a trustee of a registered trust may at any time prior to the lapse of said period of ten years amend the trust deed as aforesaid to achieve compliance with the principal Act as amended by this Part and such amendment shall imply a waiver of all rights and exemptions and other privileges contemplated by the provisions of the principal Act as in force immediately before the coming into force of this Part.

Trustees of unregistered trusts.

(7) The trustee of any trust, other than a registered trust, which is in existence on the date of the coming into force of this Part, and to which the provisions of article 43(1) of the principal Act as amended by this Part applies, shall, within two years of such date, do all such acts as may be necessary to comply with the provisions of the principal Act including:

(a) applying for and obtaining authorisation as a trustee in terms of article 43 of the principal Act as amended by this Part; or

(b) making the relevant declarations and preparing such inventory of trust assets as required by article 43A of the principal Act as amended by this Part; or

(c) notifying the Authority of his activities to the extent necessary; or

(d) cease to act as a trustee in Malta unless he obtains authorisation as required by the principal Act as amended by this Part.

(8) Nothing validly done in relation to a trust prior to the coming into effect of this Part shall be affected hereby and no action carried out prior to the coming into force of this Part and, without prejudice to any trust regulated by a foreign law and the provisions of the Recognition of Trusts Act, no relationship in existence prior to the coming into force of this Part shall be treated as a trust relationship unless it unambiguously appears from the relationship that it was intended to create a trust relationship.

Licensed nominees.

(9) On the coming into force of this Part, no further licences to act as a licensed nominee shall be issued in terms of the applicable law and all existing valid licences issued up to such date shall expire upon the lapse of two years from the coming into force of this Part.

(10) (a) Upon the lapse of six months from the coming into force of this Part and until the expiry date referred to in subarticle (9), no licensed nominee shall undertake any new nominee activities and licensed nominees shall only continue to service existing arrangements.

(b) A licensed nominee shall, prior to the lapse of two years from the coming into force of this Part -

(i) either apply for authorisation under article 43 of the principal Act as amended by this Part;

(ii) or cease its business activities.

Provided that if such licensed nominee does not obtain authorisation to act as a trustee under article 43, such licensed nominee shall be obliged to ensure that all rights of property held under trusts or other arrangements are transferred in the form required by law to a person who is duly authorised to act as trustee in terms of article 43 or that the provisions of article 43A are fully complied with, as the case may be.

(11) Notwithstanding any limitation in any memorandum and articles of association of any licensed nominee company in terms of the applicable law, any such company may at any time apply for and may be granted authorisation to act as a trustee in terms of the principal Act as amended by this Part.

(12) Upon the issue, in terms of article 43 of the principal Act as amended by this Part, of authorisation to any such company to act as a trustee in terms of article 43 of the said Act, any licence issued pursuant to the applicable law shall expire and be cancelled and shall be surrendered to the Authority.

Nominee companies.

(13) Upon the coming into force of this Part no further warrants to act as a nominee company shall be issued in terms of the applicable law.

(14) (a) Where upon the coming into force of this Part, a nominee company is solely performing the functions of liquidator of offshore companies, it shall immediately submit its warrant to the Authority for modification and such warrant shall continue to be renewed only in relation to the functions of liquidator and until such time as the nominee company completes the winding up of such offshore companies, whereupon the nominee company shall immediately surrender its modified warrant to the Authority for cancellation.

(b) A nominee company solely performing the functions of liquidator as aforesaid shall not act as trustee in any manner and shall not be entitled to apply for authorisation to act as trustee in terms of the principal Act as amended by this Part.

(15) (a) Where upon the coming into force of this Part, a nominee company is solely performing the functions of trustee of registered trusts, the warrant of such nominee company shall be renewable for a maximum period of two years from the coming into force of this Part and such nominee company shall, during the said period, continue to be regulated by the principal Act as in force prior to the coming into force of this Part and by the relevant provisions of the applicable law.

(b) A nominee company solely performing the functions of trustee as aforesaid shall, prior to the lapse of the period of two years from the coming into force of this Part:

(i) either apply for authorisation to act as trustee under article 43 of the principal Act as amended by this Part,

(ii) or cease to act as trustee.

Provided that where such nominee company does not obtain authorisation to act as trustee under article 43, it shall be bound to ensure that all the rights of property under trusts and all other arrangements are transferred in the form required by law to a person authorised to act as trustee in terms of article 43 or that the provisions of article 43A are fully complied with, as the case may be.

(16) Where upon the coming into force of this Part, a nominee company is performing both the functions of liquidator of offshore companies and also the functions of trustee of registered trusts, the provisions of subarticle (12) shall mutatis mutandis apply to such nominee company in respect of its functions of trustee and the provisions of subarticle (11)(a) shall mutatis mutandis apply to such nominee company in respect of its functions of liquidator, and the modification of its warrant as provided for in subarticle (11)(a) shall be required only in respect of any period following the lapse of two years from the coming into force of this Part, during which the nominee company continues to act as liquidator of offshore companies.

(17) The Authority shall have the power to require such changes to the memorandum and articles of association of any licensed nominee or any nominee company applying for authorisation, including a change in name to the extent considered necessary, so as to more suitably reflect its status, provided that any such changes shall not affect the authorisation of the company to act as a trustee in terms of the principal Act as amended by this Part or the functions as liquidator of a nominee company under the applicable law.

SCHEDULE

(Articles 2 and 5A)

CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND ON THEIR RECOGNITION

CHAPTER 1- SCOPE

Article 1

This Convention specifies the law applicable to trusts and governs their recognition.

Article 2

For the purposes of this Convention, the term "trust" refers to the legal relationship created - inter vivos or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics:

- (a) the assets constitute a separate fund and are not a part of the trustee's own estate;
- (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- (c) 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. The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

Article 3

The Convention applies only to trusts created voluntarily and evidenced in writing.

Article 4

The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.

Article 5

The Convention does not apply to the extent that the law specified by Chapter II does not provide for trusts or the category of trusts involved.

CHAPTER II - APPLICABLE LAW

Article 6

A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.

Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply.

Article 7

Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected. In ascertaining the law with which a trust is most closely connected 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.

Article 8

The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects, and the administration of the trust.

In particular that law shall govern -

- (a) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;
- (b) the rights and duties of trustees among themselves;
- (c) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;
- (d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;
- (e) the powers of investment of trustees;
- (f) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust;
- (g) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;
- (h) the variation or termination of the trust;
- (i) the distribution of the trust assets;
- (j) the duty of trustees to account for their administration.

Article 9

In applying this Chapter a severable aspect of the trust, particularly matters of administration, may be governed by a different law.

Article 10

The law applicable to the validity of the trust shall determine whether that law or the law governing a severable aspect of the trust may be replaced by another law.

CHAPTER III – RECOGNITION

Article 11

A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust. Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity. In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular -

- (a) that personal creditors of the trustee shall have no recourse against the trust assets;
- (b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;
- (c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death;
- (d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third

party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.

Article 12

Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed.

Article 14

The Convention shall not prevent the application of rules of law more favourable to the recognition of trusts.

CHAPTER IV - GENERAL CLAUSES

Article 15

The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters:

- (a) the protection of minors and incapable parties;
- (b) the personal and proprietary effects of marriage;
- (c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;
- (d) the transfer of title to property and security interests in property;
- (e) the protection of creditors in matters of insolvency;
- (f) the protection, in other respects, of third parties acting in good faith.

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.

Article 16

The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws.

Article 17

In the Convention the word "law" means the rules of law in force in a State other than its rules of conflict of laws.

Article 18

The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (*ordre public*).

Article 22

The Convention applies to trusts regardless of the date on which they were created.