CML3009
COMMERCIAL OBLIGATIONS, COMMERCIAL SALE & CREDIT INSTRUMENTS

The European Law Students' Association

MALTA

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ACKNOWLEDGMENTS

ELSA Malta President: Luke Bonanno

ELSA Malta Secretary General: Jake Mallia

ELSA Malta Director for External Relations: Beppe Micallef Moreno

Writer: Martina Camilleri

INTRODUCTION – TITLE V OF THE COMMERCIAL CODE

So far, we have covered traders, acts of trade, the obligations of the trader, and the persons auxiliary to traders. Now we are going to go onto the other sections starting articles 110 onwards of the Commercial Code. What we will be covering is the general aspects of commercial obligations and how a commercial obligation differs from a civil obligation. What we will be doing is not exhaustive of all commercial obligations because there are a number of other pieces of legislation that cover specific commercial obligations.

For example, if I go to a bank and open an account, that aspect in itself is covered by the Banking Act and by the Malta Financial Services Act and other pieces of legislation. If I issue an insurance policy, that would be covered by particular legislation, if I charter a ship that would be covered by specific legislation and so on. **In this way, there are a number of legislations that specifically lay down rights and obligations to parties within commercial obligations**.

So, keep in mind that what we are doing are the general principles of commercial obligations and what we are going to see is how when the parties to an obligation happen to be traders, a different set of rules apply to those parties which would not be applicable if the parties to that obligation were not traders. It is important to keep in mind that **the law discriminates between civil persons and traders when it comes to commercial obligations**.

<u>Article 3</u> of the Commercial Code

> **3.** In commercial matters, the commercial law shall apply:
>
> Provided that where no provision is made in such law, the usages of trade or, in the absence of such usages, the civil law shall apply.

The point of departure always remains article 3 of the Commercial Code which tells you what law you have to look at in order to solve your problem. Indeed, this article creates a hierarchy of the sources of law with the first source being the Commercial law itself to see whether the legislator has specifically catered for the issue at hand. If this is not so, one has to look at the usages of trade and if the usages of trade are silent, then the last source is the Civil Code. Therefore, civil law ranks third in the sources of law.

When speaking of usages of trade, one example relates to bank overdrafts. No law exists which regulates bank overdrafts. It is a pure usage of trade which banks have developed over the years, and which has become acceptable under our law. Another usage of trade relates to estate agents, and it is that of charging 3.5% and 5% commission on local agency. This does not result from any law and is therefore a usage of trade. Another example is when you buy hatching eggs, it is a usage of trade that 15% of those eggs will never hatch. These usages of trade and many more are more important than what is contained in the Civil Code.

In so far as overdraft facilities are concerned, make reference to the judgement *<u>HSBC Bank Malta Plc v. Teq Industries Ltd</u>* (<u>2001</u>), which speaks of overdraft facilities – **<u>The Court said</u>**

that the system whereby the bank in an overdraft capitalises interest twice yearly is a usage which prevails over the content of the Civil Code.

In this case, the Court held, "*Illi l-obbligazzjoni "de quo" ta' "overdraft facilities" hija obbligazzjoni ta' natura kummercjali, u ghalhekk hija regolata skond l-Artikolu 3 tal-Kap 17, u ghalhekk regolata mill-Kodici Kummercjali, u fin-nuqqas ta' disposizzjonijiet "ad hoc" mill-uzu kummercjali, u fin-nuqqas ta' dan l-uzu, tapplika il-ligi Civili."*

It was through this judgement that **the Court justified the possibility of capitalising interests at a period more frequent than once a year**. If you have a look at the Civil Code provisions, they tell you that you cannot capitalise interest on an amount of money due more often than once a year.

Let's say I borrowed a sum of money – €100 at 8% per annum. That means that after one year I owe 8% in interest and the sum of money itself. After the second year, I would owe €16 interest and €100. The law allows the possibility that the creditor can, not more often than once a year, capitalise that interest. So, the capital sum due will become 108. It makes a difference because now the interest is on the 108 whereby the amount of interest is being added on the capital and interest is being calculated on a larger sum of money. It is charging interest on interest. Under Civil law you can do this only once a year. On the other hand**, in an overdraft the bank practice is that the banks do it every 6 months**. Therefore, the amount due starts increasing at a much faster rate in an overdraft facility. This issue was raised in this case.

THE LAW OF OBLIGATIONS IN THE CIVIL CODE

We have to have a look at the law of obligations found in the Civil Code because notwithstanding the content of article 3 of the Commercial Code, the basis of obligations remains the provisions of the Civil Code dealing with obligations.

Article 959

959. Obligations which are not created by the mere operation of law, arise from contracts, quasi-contracts, torts, or quasi-torts.

Therefore, you have five possibilities how an obligation arises –

1) By operation of the law itself – therefore you have some legal provision that creates a legal obligation on someone else. For example, under the health and safety legislation, there is an obligation to provide a safe environment for your employees;
2) Out of a contract;
3) Out of quasi-contract;
4) Out of tort;
5) Out of quasi-tort.

Contracts

Essentially, contract is where two people get together and agree on something. Contracts can be commercial **objectively** or commercial **subjectively**.

Commercial objectively = the subject matter of the contract is an act of trade. Commercial subjectively = the parties to the contract are traders.

The former is the case when the subject matter of the contract is an act of trade, that is, one of the objective acts of trade mentioned in articles 5 and 6 of the Commercial Code. On the other hand, a contract is commercial subjectively if the parties to the contract are traders. If a party is not a trader, the contract will be commercial for one and not for the other.

Certain contracts are governed by the Commercial Code, others by the Civil Code (contract of sale, emphyteusis, deposit, pledge, lease, loan etc), and you have a number of other obligations that arise by means of specific legislation. For example, the Carriage of Goods by Sea Act, the Insurance Business Act, the Banking Act, the Companies Act and so on.

In order to have a valid contract, there are 4 essential requisites –

1) **Capacities of the parties to the contract** – any person who is interdicted or incapacitated cannot enter into a valid contract. If you are a minor you cannot enter, if you are a person who is a lunatic state you cannot enter into a valid contract, if you are an elderly person suffering from dementia etc. See *Joseph Vella v. Norman Zammit et*.

   Joseph Vella v. Norman Zammit et

   "Il-Qorti hi tal-fehma illi freezing order ghandha l-iskop car li l-assi hekk kolpiti ma jintmessux mill-persuna li kontriha ikun sar l-ordni biex jigu preservati sa tmiem il-proceduri gudizjarji jew sakemm isir ordni ohra mill-istess Qorti li tkun hargitu. Il-konsegwenza ta' trasgressjoni ta' tali ordni hu li tigi dikjarata nulla u bla effett it-

transazzjoni li tmur kontra l-ordni (ara artikolu 6 tal-Kap. 373). L-ordni kienet cara u kienet tolqot lil Joseph Vella personalment milli jiddisponi minn gidu. Zgur li bl-iskrittura tal-15 ta' Settembru 2010 hu kien qed jiddisponi mill-ishma li kellu fis-socjeta Fortudol Limited jew l-interess li kellu fiha. Dan ma setghax jaghmlu u l-parti l-ohra ghandha kull dritt tqis li tali kontrattazzjoni ma kellhiex tibqa' issehh. ***Il-kontrattazzjoni kienet affetta minn att ipprojbit li kien jorbot lil terzi wkoll skond l-artikolu 5 tal-Kap. 373 u ghalhekk ma seta jkollha ebda effettivita..."***

2) **The consent of the party who bind himself** – when consent has been given by error or extorted by violence or precured by fraud, it shall not be valid. So, if you are threatened into signing a contract, that consent is not valid. You cannot rely on it.

3) **You need a certain thing which constitutes the subject matter of the contract** – this relates to the subject matter of the contract, and it must have as a subject matter an '*obligazione di dare o di fare'* – to give or to do or not to do something. Only things that are not *extra commercium* can be the subject matter of an agreement. Things such as the air, the sea, the snow are *extra commercium.* They have to be *in commercium*.

4) **You need a lawful consideration** – the considerations of contracts often referred to as the *causa*. If you have a contract based on something that is unlawful, it is invalid. The *quid pro quo* cannot be based on an illegality.

Quasi-contracts

Article 1012

> **1012.** A quasi-contract is a lawful and voluntary act which creates an obligation towards a third party, or a reciprocal obligation between the parties.

There are two basic forms of quasi-contracts – *negotiorum gestor* and *indebiti solutio.* The former arises in virtue of article 1013 and the latter arises in virtue of article 1021.

Negotiorum gestor

Article 1013

> **1013.** Where a person, being of age and capable of contracting, voluntarily undertakes the management of the affairs of another person, he shall be bound to continue the management which he has begun and to carry it out until the person on whose behalf he has acted is in a position to take charge of such management himself, and to do everything which is incidental to or dependent upon those affairs, and he shall be liable to all the obligations which would arise from a mandate.

In a nutshell this is **when a person voluntarily undertakes the management of somebody else's affairs**. That person is bound to continue managing those affairs until the person on whose behalf he has acted is in a position to take charge of such management himself. For example, my brother has a shop, he gets covid and falls into a coma. This shop is selling things that expire and will be thrown away and I start selling things on his behalf. Once I start doing that, I cannot abandon it. I have to continue managing his affairs until he comes

back. In this case, **there is no consent, whereby I take it upon myself to start managing his affairs.**

Indebiti solution
Article 1021

> **1021.** A person who receives, whether knowingly or by mistake, a thing which is not due to him under any civil or natural obligation, shall be bound to restore it to the person from whom he has unduly received it.

This is when somebody has been paid something which he was not due to receive. I have a bill of €1000 to pay someone and by mistake I pay them €2000. There is an obligation on the part of the person paid to pay back the money which I have overpaid. There was no contract on their part, there was no consent on their part to create that obligation, it was all unilateral created by me but there still is this obligation.

Normally, in a contract situation you need the consent of both parties while in these situations **an obligation arises without both parties giving their consent**.

There is also a third point in quasi-contracts; the ***actio de in rem verso***.

For example, I do a promise of sale agreement to buy an apartment. The apartment is still in shell form. While I am still on *konvenju*, I ask whether I can do certain works in the apartment. When we come to do the contract, we realise there is a problem with title, and I cannot buy the property. Unless you have specifically catered for that scenario in your promise of sale agreement, there is an action that you have against the owner of the property for **unjustified enrichment** since now you have added value to the apartment. Indeed, there was no consent given for that obligation to arise.

Torts
This is when you are negligent and as a result, you have created damage to somebody else. Therefore, there is an obligation on your part to make good for that damage which you have caused as a result of your negligence. See article 1029 onwards of the Civil Code. The most important is **article 1033**.

Culpable negligence
Article 1033

> **1033.** Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting

Originally, it was thought that you could not have commercial obligations arising from tort but then that argument was abandoned. If you have a look at articles 5 and 6 of the Commercial Code, you appreciate right away that not everything is tied to contract in the objective acts of trade. In fact, article 6 speaks of obligations arising from collision of vessels. **If you have an obligation arising from a collision of a vessel, definitely one cannot speak of a contract over there**; it is a pure case of negligence.

Originally, it was thought that a company cannot be held liable in negligence. The point being raised was that a company has no *dolo* so it cannot be negligent itself since as such, it has no brain. This notion that a company cannot be held liable in negligence doesn't apply anymore.

One of the first cases where a company could have been held liable in negligence was in the case *Albert Mizzi nomine v. Reverend Professur George Schembri* (04/02/1992). The idea that evolved in this case was that the company could be held liable in damages **if the persons who are acting for an on behalf of the company and who were entitled to represent the company caused that damage while acting for and on behalf of the company**. On this point, the court held that, *"is-socjeta' kummercjali ghandha personalita' guridika u jekk persuni li skond l-istatut tas-socjeta' kummercjali ghandhom il-fakulta' illi jagixxu f'isem is-socjeta' u jaghmlu atti f'isem l-istess socjeta' u fl-interess tal-istess socjeta' u dawn l-atti jikkostitwixxu spoll, hija s-socjeta' illi tkun responsabbli ghall-ispoll."*

The position nowadays is that when a director (1) **acts for and on behalf of the company** and (2) **does something which falls within the objects of that company**, then in the case of a tort the company will be liable but if a director uses the name of the company to do something which is not contemplated in the objects of the company, or which is illegal, the company cannot be held liable but it is that director personally who will be held liable.

To give an example, in the case of a director of a company that manufactures soft drinks, if the manufacturing process goes wrong and a bottle explodes that injures a worker, the company is held liable. If a truck driver of a company while delivering those drinks crashes, the company is held liable **because it's an act that is done for and on behalf of the company and pertains to the purpose for which the company is established**.

But if I am the director of this company and in one of the rooms of the factory, we have a room where we are preparing fireworks and one of them explodes and injures someone else, it will be the director who will be personally liable **because that activity did not fall within the parameters for which the company was established**.

So, the rule is that if the tort is pertinent to the company, then the company is held liable and not the director personally.

Similarly, **a company cannot be established to commit an illegality**. If the company is used for the purposes of doing something which is illegal, then it is the directors who will be held liable. Nowadays, we even have corporate criminal liability whereby under our Criminal Code, you can even have proceeding against companies. So, the directors will be charged in court not in their own name but for and on behalf of the company. So, you can have a company being held liable in tort as well and you can have commercial obligations arising from tort.

Quasi-torts

Quasi-torts are specific liabilities found in the Civil Code for particular circumstances. For example, falling stonework. There is a specific provision of the law that imposes an

obligation on the owner of the property to make good for any damage caused by falling stone.

Another example is a duty to make good for the damages if you deprive a person of the use of his money. The law tells you that if you do this, that person is entitled to claim interest at not more than 8%. There is another quasi-tort which established the liability of a hotelkeeper if things are damaged or go missing.

In the Civil Code there are various sections that go into greater details insofar as obligations are concerned such as **conditional obligations**, **obligations for a limited time**, if you cannot stipulate a period of time, **joint and several obligations**, **an obligation with a penalty clause** etc.

But then you have articles 110-118 of the Commercial Code which are all modifications to the law of obligations as found. Article 110-113 cover the moment of conclusion of a contract, article 114 deals with the formality in concluding a contract, article 115 deals with the presumption of joint and several liability, article 116 deals with rates of exchange, article 117 deals with a tacit resolutive condition, and article 118 deals with pre-emption in litigious rights.

Read articles 110-118 of the Commercial Code. From article 114 onwards, there is so to say exceptions to the rule. **Departures of how commercial obligations differ from civil obligations** and **the general rules that you find in the Civil Code will not be applicable to these commercial obligations**.

COMMERCIAL OBLIGATIONS VERSUS CIVIL OBLIGATIONS

(1) THE NOTION OF JOINT AND SEVERAL LIABILITY

Article 115(1)

> **115.** (1) In commercial obligations, co-debtors are, saving any stipulation to the contrary, presumed to be jointly and severally liable.

This notion refers to when you have more than one debtor to a particular obligation and if, let's say, there are two debtors, the creditor can either sue them both to pay that sum of money or he can pick and choose any one of the debtors and demand the whole amount from one of the debtors.

Let's say three men go to a bank and borrow €3000. Logic would dictate that they are responsible for €1000 each, unless there is any agreement to the contrary. In a normal Civil Law situation, where you don't have a bank lending the money but Mr Z loaning €3000 to these men, they would all be responsible for €1000.

In a commercial obligation, however, article 115 of the Commercial Code **lays down a presumption that debtors are jointly and severally liable**. Therefore, the creditor can turn on anyone of those three men and demand payment of the full amount from any one of them. This raises a presumption that they are severally and jointly liable. Of course, **one can contract out of this presumption**, but this is not done, the presumption holds whereby each debtor will be responsible for the entire debt.

Keep in mind that later on, that debtor who was sued for the entire debt will have a right of recourse against the other co-debtors to be compensated for the part he would have forked out for and on behalf of the others.

Ultimately, this notion of joint and several liability is a great advantage to the creditor when an obligation is created in the commercial sphere. In point of fact this notion is dealt with in **article 1094** in the Civil Code. Then see **article 1096**.

Joint and several debtors
Article 1094 of the Civil Code

> **1094.** Debtors are jointly and severally liable when they are all bound to the same thing in such a way that each of them may be compelled to discharge the whole debt, and the payment made by one of them operates so as to release the others as against the creditor.

In civil obligations joint and several liability is NOT PRESUMED.

Creditors may sue any of the joint and several debtors
Article 1096 of the Civil Code

> **1096.** The creditor may enforce his claim against any of the joint and several debtors, at his option, and it shall not be lawful for the debtor to set up the benefit of division.

Article 115(2) of the Commercial Code

> (2) The same presumption shall extend to a surety, even if not a trader, who guarantees a commercial obligation.

Surety is when you stand to guarantee the payment for and on behalf of someone else. It is a guarantee. The typical example in this respect is that when a bank is lending money to a company, it will insist that the directors of the company will act as sureties of the company so if the company does not pay, it will turn onto the directors for payment. In this way, the surety guarantees the obligation. So, article 115(2) tells you that the same presumption of joint and several liability also extends to a suretyship, **even if he is not a trader**, who guarantees a commercial obligation.

There is a distinction between article 115 of the Commercial Code and **article 1934 of the Civil Code**.

Article 1934

> **1934.** The surety is only bound to pay in the event of the default of the principal debtor whose property must first be discussed.

In the case of commercial obligations, automatically there is a presumption of joint and several liability whether the principal debtor has paid or not. On the other hand, in the Civil Code, first the debtor must be in default and then you can turn onto the surety. Indeed, article 1934 tells you that the property of the principal debtor "*must first be discussed*."

When we saw article 1096 dealing with joint and several debtors, we saw what is referred to as the "benefit of division". There are these two benefits –

1) **The benefit of division** – in a civil obligation, when you have more than one debtor, and these debtors are jointly liable for the payment of the same obligation, if you turn to one of the debtors to pay the full amount, that debtor is entitled to raise by way of defence the benefit of division. Therefore, in the example of the three different debtors who borrow €3000, in a civil obligation, if you turn onto one of them and ask for €3000, he can say you have to divide the €3000 between three.

   In view of the way article 115 is worded, **in commercial matters, you do not have this benefit of division.**

2) **The benefit of discussion** – In a civil and commercial obligation, the benefit of discussion would arise **only in a suretyship situation**. When you have a suretyship situation, you have a principal debtor and somebody who is acting as a surety for the principal debtor. In a Civil obligation, if you turn onto the surety asking for payment, the surety is entitled to raise by way of defence this benefit – first turn onto the principal debtor. In other

words, you ask for payment from me only once you have not been paid by the principal debtor. So, you must first discuss the property of the principal debtor.

In view of the way article 115(2) is worded, this does not rise in commercial obligations because **joint and several liability is presumed between the surety and the principal debtor**. To the extent the effects of article 115(2) are very wide ranging whereby the **surety can be directly sued without even suing the principal debtor**.

Surety in commercial matters
Article 1941 of the Civil Code

> **1941.** In commercial matters, the surety is always, in the absence of an agreement to the contrary, presumed to be bound jointly and severally with the debtor.

The purport of article 115(2) is echoed perfectly in article 1941. This reflects exactly what the former is saying. You will appreciate how a civil obligation and a commercial obligation are interpreted differently.

Keep in mind that this presumption of joint and several liability in commercial obligations when you have a surety situation will also be applicable if the surety himself is not a trader.

In **article 115(1)** and in article 1941, you have the word '*presumed*'. Is this presumption a *juris tantum* or *juris et de iure*? This makes a difference because if it is the latter, you cannot argue against it and you have to remain bound by that.

It is a *juris tantum* presumption – 'absence to the contrary', 'saving any stipulation to the contrary'. See *Paolo Inguanes v. Joseph Cremona* (25/10/1954). This leads to the notion of surety.

Keep in mind that **article 1233(1)** of the Civil Code contains a list of transactions that must on pain of nullity be done in writing for them to be valid. In turn, sub-section (c) tells you that any suretyship agreement in order to be valid must be in writing.

Transactions which must be expressed in public deed or private writing
Article 1233

> **1233.** (1) Saving the cases where the law expressly requires that the instrument be a public deed, the transactions hereunder mentioned shall on pain of nullity be expressed in a public deed or a private writing:
>
> (*a*) any agreement implying a promise to transfer or acquire, under whatsoever title, the ownership of immovable property, or any other right over such property;
>
> (*b*) any promise of a loan for consumption or mutuum;
>
> (*c*) any suretyship;
>
> (*d*) any compromise;
>
> (*e*) any lease for a period exceeding two years, in the case of urban tenements, or four years, in the case of rural

(2) THE CHARGING OF INTEREST

This does not arise from article 110-118. The charging of interest is the damages payable where an obligation consists in the payment of a sum of money.

Damages payable where obligation consists in the payment of a sum of money
Article 1139 of the Civil Code

> **1139.** Saving any other provision of law relating to suretyship or partnership, where the subject-matter of the obligation is limited to the payment of a determinate sum, the damages arising from the delay in the performance thereof shall only consist in the interests on the sum due at the rate of eight per cent *per annum*.

If someone has to pay a sum of money, the damages that the creditors are entitled to for the **non-payment of that money** is the charging of interest of 8% per annum. 8% has become quite high. Now the situation has changed whereby it suits the creditor not to collect the money since the return of 8% is better than the return of the bank.

From what day does interest become due?
On this point, there is a distinction between civil obligations and commercial obligations.

Article 1141

> **1141.** (1) Where the obligation is of a commercial nature, or the law provides that interest is to run *ipso jure*, interest shall be due as from the day on which the obligation should have been performed.
>
> (2) In any other case, interest shall be due as from the day of an intimation by a judicial act, even though a time shall have been fixed in the agreement for the performance of the obligation.

In commercial matters, interest is automatic. It runs *ipso iure.* If you had to pay on this day, and you haven't paid, then it starts. On the other hand, if it is a civil obligation, section 1141(2) says that it is **due from the day of an intimation of a judicial act**.

In a civil obligation, if we have an agreement stating that at the end of January you have to pay a sum of money, and this has not yet been paid, interest will not run despite the date having expired. For interest to run in a civil obligation, you have to send a judicial act to the debtor. From the wording of article 1141(2), interest doesn't start running from the day of the filing of a judicial act. It isn't sufficient to file the act, but you have to make sure that it has been served on the debtor. **It has to be intimation**.

What are judicial acts?
Any written proceedings filed in court and normally the ones used are *ittra uffiċjali* (judicial letter), *protest judizzjarja,* any warrant, and an application (*'rekors'* – there is one exception, when an application is not needed for a request). Even a note is a judicial note. Before we used to have the writ of summons which no longer exists.

Till 1983 there was a distinction in the rate of interest. Prior to 1983 there was a distinction that for commercial maters, it was 6% and for civil matters it was 5%. Nowadays it has **become a flat rate of 8%**.

In commercial matters, interest runs *ipso jure*. This is in line with the Latin maxim *finis mercatorum lucrum est* since time is money. **The legislator is punishing more because you are depriving the trader from trading since he needs money to trade**.

In commercial matters, the running of interest *ipso jure* is indiscriminate. There is no excuse that he can raise while you have not paid.

Pamela Wathen et v. Alexendar Patrick Cutajar (2001) – Mr Cutajar owed money to Mr Wathen. He had not paid the money which he owed on the basis that he received a garnishee order from someone else not to pay this money. The Court said despite this order, still interest will run.

"Illi, fir-raba' lok, hija haga iebsa biex wiehed jikkonvinci ruhu minn dak li jallega l-imharrek li ma setax ihallas lill-atturi qabel minhabba li kien hemm il-Mandat ta' Sekwestru: dan jinghad ghaliex meta ghamel id-depositu bic-Cedola, il-Mandat kien ghadu fis-sehh."

Fenech v. Chiappara – in this case, they were trading with each other and Fenech said I am owed a sum of money. Defendant said he owes him less and deposited this amount in court. Fenech did not pick up the money. The case was decided, and the Court had awarded a halfway amount, but it charged interest from when the amount had become due 4 years before. On appeal, the Court said the amount should not have been deposited in Court but should have been paid directly to him.

- *Vince Brincat v. Anna Caruana (23/06/2004)*.
- *Mario Mallia v. Francis Bezzina Wettingher (10/10/2003 CA)*
- *John Muscat et v. Major Louis Radmilli (03/10/2002)*.

Usury is what loan shark do – they loan you money at a much higher rate than 8%.

Before, the 8% came about as a reflection of how much interest you would have got if you put that money in the bank. But nowadays, if you put money in the bank, you get 0.05% and if you leave it at your debtor, you get 8%.

The notion of appropriation of payment
Article 1169

> **1169.** (1) The debtor of a capital sum bearing interest cannot, without the consent of the creditor, appropriate the payment to the principal in preference to the interest.
>
> (2) Any part-payment made generally on account of principal and interest shall be first applied to the discharge of the interest.

When you have a sum which is due, and on which interest has accrued, and the debtor affects a payment, unless you have the consent of the creditor, it is the interest which is first set off against the payment and not the capital.

(3) THE NOTION OF RATE OF EXCHANGE

Payment
Article 116 of the Commercial Code

> **116.** Where the money expressed in a contract is not legal tender in Malta and the exchange thereof is not stated, payment may be made in the money of the country according to the rate of exchange at sight at the due date and at the place fixed for the performance of the obligation, and, if there is not at such place a course of exchange, according to the rate of exchange in the nearest market, unless the clause "in cash" or an equivalent clause is contained in the contract.

Today, this article has lost a lot of importance. This section deals with clarifications of issues arising due to rates of exchange. This clause was included because of the different rates of exchange that used to exist until a few years ago. This has diminished immensely with the introduction of the euro since you have one currency which is applicable at large all over Europe.

The idea of the legislator is that of eliminating any doubt as to the amount of money left to be paid. **This section applies where the money expressed in a contract is not legally paid in Malta and the exchange thereof is not stated**. So, (1) the amount of money paid cannot be euro and (2) the European Central Bank does not have a rate of exchange with the currency mentioned in that contract.

If you do not have this rate of exchange, payment can be made in the country according to the rate of exchange at sight at the due date and at the place fixed for the performance of the obligation. If there is no such place to get a rate of exchange, then you have to use the rate of exchange of the nearest market. This does not apply if you have agreed to affect payment in cash. In this case, you simply put the money on the table.

At which point in time is the applicable rate of exchange?
There are different points in time that could be applicable. *Dr Kris Borg nomine v. AirMalta Plc (2003)*: The applicable time, in case of tort, in rates of exchange is the date when the tort was committed.

Facts – Clients Dr Borg exported 10,000 chicks from Milan to Malta. When on the plane, the captain could hear the chicks and this was confirmed, but upon opening the plane once the plane had landed, it became apparent that the chicks had all died owing to the fact that the air vents had not been opened. Italy had the lira as their currency and 2 years later Air Malta was sued for payment for the sum of money in Italian Lira. The judge ordered Air Malta to pay the equivalent amount in Maltese lira according to the rate of exchange. Air Malta appealed.

"Illi dan l-aggravju tas-socjetà appellanti u l-appell incidentali tas-socjetà appellata huma fondati, anke fuq l- iskorta ta' dak illi rriteniet din l-Qorti fis-sentenzi illi ghamlet riferenza ghalihom s-socjetà appellanti fil- paragrafu enumerat tlettax (13) tar-rikors ta' appell taghha b'mod ghalhekk li r-rata tal-kambju certament ma kellhiex tkun dik tad-data tas-sentenza appellata. Però, ghall- finijiet tal-kambju, dina l-Qorti sejra tadotta r-rata tad-19 ta' Lulju, 1994, ***meta qew kagjonati d-danni, u mhux tal-20 ta' Lulju, 1994, meta saret il-claim mis-socjetà appellata****"*

On this point, see *Dr Ian Refalo v. Dr Carmelo Agius (26/041988)* which quotes *Giovanni Grima v. Abel Serra.*

(4) THE PROOF OF OBLIGATIONS & THEIR EXTINGUISHMENT

Proof of obligations and their extinguishment
Article 1232 of the Civil Code

> **1232.** (1) Where the law does not require that an obligation or its extinguishment should result from a public deed or a private writing, such obligation or its extinguishment may be evidenced by means of witnesses or any other means allowed under the provisions of the Code of Organization and Civil Procedure.
>
> (2) A public deed is an instrument drawn up or received, with the requisite formalities, by a notary or other public officer lawfully authorized to attribute public faith thereto.

If someone ever asks whether a contract by word of mouth is binding, the answer is found in this article. Unless the law tells you that an agreement/obligation has to be done either by a public deed or by a private writing, **a verbal agreement will be binding**. With that being said, there are instances where the law itself specifically lays down the form that is required for the conclusion of a contract (**article 1233**).

Transactions which must be expressed in public deed or private writing
Article 1233

> **1233.** (1) Saving the cases where the law expressly requires that the instrument be a public deed, the transactions hereunder mentioned shall on pain of nullity be expressed in a public deed or a private writing:
>
> (*a*) any agreement implying a promise to transfer or acquire, under whatsoever title, the ownership of immovable property, or any other right over such property;
>
> (*b*) any promise of a loan for consumption or mutuum;
>
> (*c*) any suretyship;
>
> (*d*) any compromise;
>
> (*e*) any lease for a period exceeding two years, in the case of urban tenements, or four years, in the case of rural tenements;
>
> (*f*) any civil partnership; and
>
> (*g*) for the purposes of the Promises of Marriage Law, any promise, contract, or agreement therein referred to.
>
> (2) Where, in the case of a private writing, the writing is not signed by each of the parties thereto, it must be attested in the manner prescribed in article 634 of the Code of Organization and Civil Procedure.

So, the above obligations must necessarily be done either by means of a public deed or by means of a private writing and if this is not so, they are considered to be null and void. This is what is meant by *'on pain of nullity'.*

Article 1233(1)(a): This derives in the case where you have a '*konvenju'* to buy a property. For example, you decide to buy a property and agree with the owner to buy it. This is not a deal at all because **if you are going to be bound to sell an immovable property, it must necessarily be done in writing in view of this section**. If you shook hands and agreed, that means nothing because of this section.

As an aside, sometimes you might not have access to a notary when you see a property and you want to make sure that you are going to bind the seller and you sign a '*pre-konvenju*.' This would be valid if in it, you agreed the price, the object and the promise to sell and buy the object. This would be valid since it is in writing, and it has the necessary elements of the sale. Remember that under the law of sale, for a sale to be valid, you need an identification of the object and an identification of the price.

Around 15 years ago, the law changed, including another requirement that for a promise of sale agreement to be binding, within 21 days from when the promise of sale agreement was signed, you had to register that promise of sale agreement with the Commissioner of Revenue and pay **1% of the price**, which is 1/5th of the stamp duty. The primary reason behind this measure, that on the *konvenju* you have to register it with the Commissioner of Revenue and pay 1% of the price, was that it did away with the rampant practice of having a *konvenju* for one price and a deed for a different price. Indeed, in the past the abuse was

rampant whereby you would have a number of people doing a promise of sale for amount X which is the real value and then on contract date, some money shows on the final contract, and some does not. Now this is no longer possible on day one you have to lay down the value and declare it with the Commissioner of Revenue, so it did away with the abuse of undeclared money.

So, apart from article 1232(1)(a) dealing with a promise of sale agreement which must be done in writing, there is **also this requirement of registering a promise of sale agreement**, in the absence of which it is null and void.

Article 1232(1)(b): The second obligation that has to be done in writing is any promise of a loan for consumption or mutuum. For somebody to be **bound by a promise to give a loan**, unless it is done in writing, one is not bound at all. This is why the sanction letter acquires such importance. When you are going to get a loan, you eagerly await the bank to issue the sanction letter where the bank is **making the commitment** that it will actually give you that loan. Only that will bind the bank to give you the loan. If the bank manager merely tells you that it will give you the loan, that in itself is not binding.

Article 1232(1)(c): The third element that makes an agreement binding is the notion of **suretyship**. In order to have an agreement whereby somebody will be bound as a surety, that obligation has to be done in writing.

Article 1232(1)(d): Here, you are agreeing to settle a dispute.

Article 1232(1)(e): This has been superseded by the new amendments in the part of the Civil Code dealing with lease (article 1531) whereby, nowadays, **any lease agreement must necessarily be done in writing**.

Article 1232(1)(f): On this point, make reference to *Sammut v. Sammut*. In this case, the defence being raised is that you cannot have a partnership unless there is a partnership agreement.

Article 1232(1)(g): The agreement of *sponsalia*, betrothal. This refers to when people get engaged. Engagement is a promise that you are going to marry another person, but you give a ring. That is, I am pledging this much money that I will marry you. Unless you do a contract in writing that you will be marrying that person, you cannot be held liable in damages if you then break the bond. There is an agreement, the agreement of *sponsalia*, whereby the husband or the wife binds him/herself that he/she is going to marry that person and if he/she does not, he/she will be liable in damages.

Besides this provision of the law that specifically lays down transactions that on pain of nullity must be done either by public deed or private writing, there are other pieces of legislation that specifically require the written format for a legal obligation to be binding. For example, **emphyteusis** (*ċens*) must be done by a public deed, if you **transfer a car**, under the Motor Vehicle Regulations this must be done in writing, and so on.

Where parties agree to reduce verbal agreement to writing
Article 114 of the Commercial Code

> **114.** Where the parties have agreed that the verbal agreement should be reduced to writing it is presumed that they desire to subject the validity thereof to the observance of such formality.

This is another departure between a Civil obligation and a Commercial obligation.

Two people have met together, and they have agreed to do a particular transaction. It is not a transaction that falls under article 1233, so it does not necessarily require the written format **but notwithstanding, the two people agree to make a written agreement**. In this case, the parties are subjecting the form for the conclusion of that particular obligation to a written format and unless that written format is carried out as agreed, the parties are not bound by that transaction.

Giuseppe Vella Gatt v. Darmanin (CA 23/11/1956) – Mr Vella Gatt went to Court and said that between him and defendant, Mr Darmanin, there was an agreement whereby Mr Vella Gatt would do reconstruction work at Senglea, and he would be paid from the war damage money that was due to Mr Darmanin. Over and above the war damage money, he said there was also an agreement whereby he would get a year and a half rent of the property. Mr Darmanin simply sold the site to somebody else and therefore, Mr Vella Gatt did not make the profit that he was meant to do from this agreement. Mr Darmanin, by way of defence, said that it is true that we agreed verbally but what is also true is that we had also agreed that we would go in front of a notary/lawyer and do a written agreement. This agreement was never concluded.

The Court held that *"skond artikolu* 118 [now article 114] *tal-Kodiċi tal-Kummerċ, meta jiġi miftiehem li l-ftehim verbali għandu jitniżżel bil-miktub, hu prežunt li huma riedu jassoġġettaw il-validita tiegħu għat-tħaris ta' dik il-formalita. Dik il-prežunzjoni mhijiex "juris tantum", imma "juris et de jure", u hija ntiża biex tipprevjeni u tiddirimi l-kwistjonijiet fil-kummerċ, u għalhekk tipprevjeni l-kawżi. U tabilħaqq, li kieku dik il-prežunzjoni kient 'juris tantum', u għalhekk kient tista' titwaqqa' bi provi testimonjali, l-effett kollu tagħha kien jiġi ridott fix-xejn; għax l-iskop li għalieħ saret, li tiddirimi l-kwistjonijiet u tipprevjeni l-kawżi, ma kienx jista' jiġi ridott fix-xejn; għax l-iskop li għalieħ saret, li tiddirimi l-kwistjonijiet u tipprevjeni l-kawżi, ma kienx jista' jiġi raġġunat. Huwa risaput li l-awtur tal-abbozz ta' dik il-liġi, li kien il-Professur Carlo Mallia, allura Ministru tal-Ġustizzja, kien irrispekkja ruħu fuq t-tagħlim tal-Vivante, li fit-Trattat tiegħu ppropona għall-eventwali riforma tal-liġi taljana "il ritorno alla dottrina romanistica per cui l'accordo sulla forma si presumeva condizione per l'esistenza del contratto." U d-dottrina romanistica li għaliha allude Vivante hija preċiżament il-Liġi 17, "de fide instrumentorum", fejn Ġustinjanu kien ippreskriva li meta jkun sar il-ftehim li għandu jsir il-miktub, u ma jsirx, "non aliter vires sancimus habere…ut nulli liceat…quam haec ita processerunt…aliquod jus sibi ex eodem contractu vel transactione vindicare.""*

In brief, the Court held that **if you have agreed to do the transaction in writing and you do not, it is not binding at all**.

Hardrocks v. Francesco Fenech Ltd (01/12/2004) – Hardrocks Ltd was 50% owned by AX Holdings Ltd and Francesco Fenech Ltd owed money to Hardrocks Ltd. AX Holdings Ltd, in turn, owed money to Francesco Fenech Ltd. So, you had a triangulation. The three parties started discussing between them that they would do a sort of 'barter agreement' whereby the debt which AX Holdings Ltd had with Francesco Fenech Ltd would be offset against the debt which Francesco Fenech Ltd had with Hardrocks Ltd. In other words, Hardrocks Ltd and AX Holdings Ltd are sister companies and AX Holdings Ltd owed to Francesco Fenech Ltd who owed Hardrocks Ltd. So, they agreed that Francesco Fenech Ltd does not pay Hardrocks Ltd and the amount Francesco Fenech Ltd owes to Hardrocks Ltd would be deducted from the amount which AX Holdings Ltd owes to Francesco Fenech Ltd and then Hardrocks Ltd and AX Holdings Ltd agree between them.

Finally, Francesco Fenech Ltd instructed the lawyer to prepare what they called a 'barter set off agreement.' Hardrocks Ltd signed it, Francesco Fenech Ltd singed it, but AX Holdings Ltd did not. Eventually, Hardrocks Ltd sued Francesco Fenech Ltd for payment. Francesco Fenech Ltd raised, by way of defence, that we have an agreement whereby we are going to set off this debt against another debt that AX Holdings Ltd has with us, in point of fact Francesco Fenech Ltd and we have signed this. But the position taken by Hardrocks Ltd was that this would have been true **had the third party signed as well**. So, the contract was never concluded. They relied on *Giuseppe Gatt v. Darmanin* and the case was decided in favour of Hardrocks Ltd. The conclusion was that since AX Holdings Ltd has not signed this set off agreement, the formality was not respected and therefore in view of article 114, there was no agreement whatsoever.

The Court held, *"Illi l-Qorti jidhrilha illi l-argument migjub mis-socjeta' konvenuta ma jreggix. Veru illi kienu saru diskussjonijiet bejn il-partijiet dwar "barter agreement". Dawn id-diskussjonijiet ma gewx konkjuzi ghax il-ftehim baqa' ffirmat biss minn Tonio Fenech ghan-nom tas-socjeta' konvenuta u la r-rapprezentant tas-socjeta' attrici u lanqas ir-rapprezentant tas-socjeta' kjamata fil-kawza ma ffirmaw tali ftehim. Ghalhekk ghal kull fini u effetti tal-ligi dan il- ftehim ma jistax jinghad illi kellu xi effett li jorbot il-partijiet u f'dan l-istadju s-socjeta' Francesco Fenech ma tistax tavvanta xi drittijiet a bazi ta' ftehim illi ma giex konkjuz. Kif ighallem id-dritt Ruman "ex nudo pacto non oritur actio".*

(5) RETRATTO LITIGIOSO

Until 1987, in Malta we had the law of *'tal-irkupru'.* This referred to the fact that I come across a property and the sellers of this property have known me for a long time and they want to give me a **bargain**. You do this deal, and you buy the property. The Government had a right for a full year from you purchasing a property to reimburse you the money you paid and take the property. **The Government had the right to intervene in the transaction if thought to be bargain and to buy the property himself**. The idea was to avoid under-declaration in the selling price.

Assignment of litigious right
Article 1483(1) of the Civil Code

> **1483.** (1) Where a litigious right has been assigned, the debtor in the obligation may obtain his release from the assignee by reimbursing to him the actual price of the assignment together with the expenses and interest to be reckoned from the day of the payment of the said price by the assignee.

This speaks of pre-emption in litigious rights. For example, A is suing B for €10,000 and A is desperate for money and cannot wait all those years for the Court case to be decided. C comes along and tells A I will give you €8000 now and I will step in your shoes, and I will continue the Court case against B, knowing that he will win and will make a profit of €2000.

So, **you can sell your litigious right**. The law, in article 1483, tells you that in that scenario, B (the debtor), is entitled to tell C (the person who has acquired litigious rights), I am going to pay you €8000, and I am liberated. The debtor is entitled to pay the person who has acquired that litigious right, the consideration paid by the person who has acquired that litigious right and in so doing, **the debtor will be released from that litigation**.

In brief, A sues B for €10,000, C comes along and offers A €8000 to buy litigious right that A has against B, and B turns onto C saying it will pay the €8000 to C and the case stops here.

What is a litigious right?
Article 1483(2) of the Civil Code

> (2) A right is deemed to be litigious, if there is a contested suit as to the existence thereof or if the debt due is not liquidated and is difficult to liquidate.

Article 1483 is found in the Civil Code and obviously, it applies to civil obligations. So, the question that arises is, how do Commercial obligations differ from civil obligations? This is found in **article 118** of the Commercial Code.

Litigious rights arising from commercial transactions
Article 118 of the Commercial Code

> **118.** The right competent to a debtor under article 1483 of the Civil Code, in the case of assignment of a litigious right, cannot be exercised where the litigious right so assigned arises from a commercial transaction.

Therefore, **when you have a commercial transaction, you do not have the possibility of *retratto litigioso*.** It is **not** possible.

This is because in commercial transactions, *finis mercatorum lucrum est*. That is, **the aim of trade is to make a profit**. A litigious right is something that you can sell to make a profit and if you have bought a litigious right to make a profit out of it, then the legislator specifically wanted you to enjoy that profit. While in civil obligations, the aim is not to make a profit at all. If I have extra cash to make, I may go round purchasing litigious rights against people to make a profit out of it. If I were to allow the notion of *retratto litigioso* to apply for commercial transactions as well, then you are depriving me of making that profit.

On this point, two other considerations –

1) **Pre-emption in the case of transfer of shares**

This idea of *retratto litigioso* leads to another point: **pre-emption in the case of transfer of shares**. Pre-emption is a right that is given to you before the sale takes place. It is like a right of first refusal. If you have a company and one of the shareholders of the company wants to transfer his shares, can he simply transfer them out into the market to anyone else? Unless you have a pre-emption clause in your Articles of Association, then he can transfer his shares to whoever he wants to. If there is this pre-emption clause, then if a shareholder wants to transfer his shares, first he has to offer them to the other shareholders and only if they do not purchase the shares can they transfer them to third parties so as much as possible, the company will remain contained amongst its existing shareholders. So, this is a bit similar to *retratto litigioso.*

2) **Inheritance**

There is another case were *retratto* applies which is in the case of an inheritance, *'l-irkupru tal-wirt.'* I have a share of an inheritance and it is taking long to liquidate this inheritance and I want to cash in. If I sell that inheritance, the other co-heirs in the inheritance have a right to purchase my share of the inheritance themselves at the price for which I sold it. It is the same as article 118 but **instead of applying to a litigious right, it applies to inheritance**. So, if you sell a whole inheritance, the other co-heirs have this right of *retratto succesorium* to buy that share of the inheritance themselves.

Regarding this notion of *retratto litigioso*, see *Joseph and George Grixti v. Emanuele Borg (CA 15/03/1948)*.

The Court held, *"The other plea was based on section 1565 of the Civil Code, which gives the debtor in a litigious claim power to obtain his release from an assignee of the claims by re-imbursing to him the actual price of the assignment with interest and costs. Under section 122 of the Commercial Code, however, this right is not exercisable when the right assigned*

arises from a commercial transaction. In this case, the assigned right arose from a sale of goods. This plea, therefore, also fails."

(6) THE TACIT RESOLUTIVE CONDITION

Definition of resolutive condition
Article 1066(1)

> **1066.** (1) A resolutive condition is that which, on being accomplished, operates the dissolution of the obligation, and replaces things in the same state as though the obligation had never been contracted.
>
> (2) Such condition does not suspend the performance of the obligation, but, if the event provided for by the condition happens, the creditor shall be bound to restore that which he may have received.

For example, I bought a car from X on condition that it arrives in Malta by the end of the month, it did not, and therefore, there is no obligation between us. So, you have agreed that the obligation will be terminated if something is not done, if this condition materialises or does not materialise.

There is what is referred to as an **implied** resolutive condition and an **express** resolutive condition. The former is sometimes also referred to as the tacit resolutive condition. In judgements, one will come across the *pactum commisorium tacitum*. When you have a tacit resolutive condition, **the Court has discretion as to whether it will allow the party in breach to remedy the breach**. While if you have an express resolutive condition, then upon the fulfilment of that condition, the contract will be terminated.

What is the distinction between the two?

Effect of express resolutive condition
Article 1067

> **1067.** Where the resolutive condition is expressly stated in the agreement, such agreement shall, upon the accomplishment of the condition, be dissolved *ipso jure*, and it shall not be lawful for the court to grant any time to the defendant.

Resolutive condition is implied in bilateral contracts
Article 1068

> **1068.** A resolutive condition is in all cases implied in bilateral agreements in the event of one of the contracting parties failing to fulfil his engagement:
>
> Provided that in any such case, the agreement shall not be dissolved *ipso jure*, and it shall be lawful for the court, according to circumstances, to grant a reasonable time to the defendant, saving any other provision of law relating to contracts of sale.

Scenario A: I make an agreement with you that I will buy a car, provided that it arrives in Malta by the end of the month.

Scenario B: I made an agreement with you that I will buy a car provided that it will arrive in Malta by the end of the month and if it does not arrive by the end of the month, this agreement is terminated.

In the first scenario, **I am telling you there is a condition, but I am not spelling out what happens if that condition is not met**. In the second scenario, we are contracting and agreeing that if you do not honour your obligation, the agreement between us is terminated, so it is expressly laid down.

In scenario A, you have an implied resolutive condition while in scenario B, you have an express resolutive condition. In the former case, it should be implied that if the car does not arrive in Malta by the end of the month, the agreement may be terminated while in the latter case, there is no doubt whatsoever that the agreement is terminated.

In fact, article 1067 tells you that where you have an express resolutive condition, the agreement would be dissolved *ipso jure*, so, automatically and the Court cannot give time to the defendant to remedy his breach when you have an express resolutive condition. On the other hand, where you have an implied resolutive condition, article 1068 contains an important proviso. So, where you have the implied resolutive condition, **it is in the Court's discretion as to whether to grant the defendant a period of time to remedy his breach**.

This is Civil Law.

If you see **article 117 of the Commercial Code**

> **117.** In commercial contracts, the implied resolutive condition referred to in article 1068 of the Civil Code produces the dissolution of the contract *ipso jure*, and it shall not be lawful for the court to grant to the defendant a time for clearing the delay:
>
> Provided that this article shall not apply to contracts of letting of immovable property or to contracts of emphyteusis or to contracts
>
> the dissolution whereof, in the event of failure by one of the parties to fulfil his engagements, is specially regulated by law.

Therefore, in commercial contracts, **any breach on any part leads to the termination of the contract automatically**. There is no possibility of you going to Court to grant you a period of time to remedy the breach. This is because **automatically**, any breach leads to the termination of the contract. **So, in all circumstances, it amounts to an express resolutive condition.**

- *Joseph Vassallo v. Charles Vella* (V 38 P111 p/733 CC 25/11/1954)
- *Francis Abela v. Karl Bonello* (09/01/2002)
- *BLYE engineering v. Pawlu Bonnici* (30/03/2001).

Originally, the law did not contain the proviso to article 117. This was introduced in 1976 because if you have a look at the provisions dealing with emphyteusis, and you have a look at the lease provisions as they were existent in 1976, you had specific provisions saying that if you have not paid your ground rent, the Court has a discretion to give the defaulter a period of time within which to remedy that defect. Under the law of emphyteusis, this is referred to as ***'la purgazzione della morra'***. If you do not pay the ground rent for 3 consecutive periods, automatically the landlord has a right to take the property back.

So, if a party is in breach of the ground rent/rent, the Court has the discretion to grant you a period of time top remedy your breach. In terms of article 117, in commercial matters if you are in breach, **the Court cannot give you a period of time to remedy your breach**. So, these are conflicting. Prior to 1976 the situation wasn't clarified, and we had conflicting judgements, in fact, in *Holland v. La Rosa* (CA 03/12/1954), the Court held that the provisions of the Civil Code whereby the Court is entitled to remedy the breach in the case of a contract of emphyteusis prevailed over the content of article 117 because this was a special law, and ***lex specialis deroga lex generalis***. Therefore, if it is a case of contract of emphyteuses, the Court is still entitled to give you a period of time to remedy your breach.

However, on the 4th of October 1955, in *Magistrate Vincenzo Refalo v. Alfred Cini*, the Court decided the opposite and therefore, the legislator intervened to avoid having these conflicting judgements.

(7) PRESCRIPTION

The last point that distinguishes between civil obligations and commercial obligations deals with **prescription**. First of all, prescription can be of two types –

1) Acquisitive and
2) Extinctive.

What are the differences between the Civil obligations and the Commercial obligations?
Prescription, unless it is a period of *decadenza*, can be interrupted in virtue of **article 2128**. The way it is interrupted is either by the filing and service of a judicial act or by payment or by acknowledgement. The trader sending a statement to his client means nothing. Even if you file a judicial letter in Court, that has no effect whatsoever. You need to file a judicial letter in Court and make sure it is **served** on the other side. Without service, it means nothing.

Service can be difficult. You don't always find the people you have to serve, and some people avoid service. The first attempt of service is through Malta Post and if you are not there, it will leave a note saying it is at the post office and many a times, the person will not pick it up. There is service by means of affixation and publication in the Government Gazette and local newspapers. So, this is interruption of prescription.

Times to be peremptory
Article 541 of the Commercial Code

> **541.** All times fixed by any express provision of this Code for the exercise of any action or right of recourse arising from commercial acts, are peremptory; and the benefit of the *restitutio in integrum* by reason of any title, cause or privilege whatsoever shall not apply.

If you have a look at article 541 of the Commercial Code, all the periods fixed in the Commercial Code are considered to be peremptory.

United Acceptances Finance v. John Borg (26/03/1999) – John Borg had bought a luxury car from Mizzi group. Part of the balance of the car was by means of bills of exchange. This car was plagued with problems and one fine day, John Borg took the car to them, left the keys in the car and walked out. United Acceptances Finance did nothing, **what they were doing was they were filing judicial letters to keep their claim alive**. They left enough time so that any possible claim by Mr Borg to them for defects would have expired completely. When enough time had passed, they filed a court case against him. The Court case that they filed was filed after the expiry of 5 years from the expiry of the last bill of exchange. Under the Commercial Code, an action for the payment of a bill of exchange is listed as 5 years. Therefore, using article 541, the lawyer argued this is a commercial matter and not a civil matter, the prescriptive period of 5 years of a peremptory period and therefore**, it is not interruptible**. So, their claim was time-barred. The Court accepted.

The second difference is that the Commercial Law seeks to establish shorter time for prescriptive periods than civil. In point of fact, **article 2156(f)** tells you that all commercial matters in respect of which there is no shorter period, becomes time barred after 5 years.

Article 2156(f)

> (*f*) actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed;

THE NOTION OF COMMERCIAL CONTRACTS

Commercial contracts remain contracts and therefore, the requirements that you have in the Civil Code relating to a contract are equally applicable to commercial contracts. But, at what **point in time is a contract concluded**?

The rule as to when a contract is concluded is when you have the *idem plagitu consensus*, that is, **when you have a union of the wills of the parties**. But that is very simplistic because the contracting parties might not be in each other's presence. Therefore, there is a time lapse between when a person makes an offer and when there is an acceptance to that offer or rather than an acceptance, a counteroffer. What we are going to see is, under our Commercial Law, at what point in time do you have a conclusion of a contract when the parties are **not in the presence of each other**.

Crucial to all this is the notion of **offer and acceptance**. Offer and acceptance are unilateral and independent acts of the contracting parties prior to the union of the wills of the parties. It becomes important to distinguish between what constitutes a valid offer and what constitutes a valid acceptance. You come across certain unpractical difficulties. If you see an object in a shop window, is that a binding offer to sell the object or not? Does it make a difference whether there is a price attached to it or not? If there is an advert in a newspaper, is that a binding offer? At what point in time do you have acceptance? When I inform the other side that I am accepting? When I take concrete action to accept it?

<u>It is important to keep in mind that at law, there are four different theories as to the moment of conclusion of contract –</u>

1) **The theory of declaration** – this tells you that a contract is concluded the moment the offeree declares his acceptance and the argument in favour of this theory is that the moment you have declared, even for yourself, that you are accepting the offer, then objectively speaking, there is a union of the wills of the parties irrespective of whether the offeror knows of your acceptance. This doesn't make sense because the other side does not know I've accepted yet.

2) **The theory of transmission** – this is the theory favoured under English law. This tells you that the contract is concluded the moment the offeree transmits his acceptance. The justification for this theory is that the moment you have transmitted your acceptance you cannot back track and say no I do not accept. The argument against this theory is that the fact that you have transmitted your acceptance does not necessarily lead to the offeror knowing that you have accepted. The offeror might never get to know about your acceptance if your transmission goes astray.

3) **The theory of reception** – tells you that the contract is concluded the moment the offeror receives the acceptance. The argument against this theory is that the fact that the offeror has received the acceptance does not necessarily mean that he is aware of your acceptance. If there is a letter in your letter box saying that he has accepted and you haven't read it yet, you do not get to know.

4) **The theory of information** – tells you that the contract is concluded the moment the offeror is actually informed of the offeree's acceptance. The justification here is that at that point in time, objectively and subjectively, you have a union of the wills of the parties and this theory makes *contracts interpresentas* (in the presence of each other) and *contracts interabsentas* (not in the presence of each other) no different from each other. The arguments against this theory are that it is not commercially expedient since it will take a lot of time to achieve, and it can lead to abuse because the offeror can receive the acceptance and not open it.

These four theories are different theories, and the State will decide which one to adopt. Maltese law adopts **the theory of information**.

When contract by correspondence is perfected
Article 110 of the Commercial Code

> **110.** A contract stipulated by means of correspondence, whether by letter or telegram, between parties at a distance, is not complete if the acceptance has not become known to the party making the offer within the time fixed by him or within such time as is ordinarily required for the exchange of the offer and the acceptance, according to the nature of the contract and the usages of trade generally.

Article 110 was introduced in 1939 by Act XXXVII of 1939. Prior to 1939, we used to have the theory of declaration and you will find this in the case *Parnis v. Hare* where it was held, *"il contratto…"* The contract is concluded between parties who are not in the presence of each other in the place where the offer is accepted, and this showed that it had the theory of declaration. After 1939, we adopted the theory of information. Although 110 speaks of letter or telegram, it is equally applicable to email.

Article 110 can also be applied to the conclusion of a contract between parties who are not absent from each other, so they are physically in each other's presence, but where the **contract is being concluded by means of correspondence**, nonetheless. What happens is that when it is a very complicated transaction, although the parties will be physically in the presence of each other, one party comes up with a draft, passes it on to the other side, it is amended and changed, and they will consult, and they keep coming and going till they come to a final version. Today, Italian law also adopted the theory of information (article 1236 and 1335 of the *Codice Civile Italiano*).

Revocation of contract
Article 111

> **111.** (1) Until the contract is complete, both the offer and the acceptance may be revoked. If, however, the person making the offer declares that he will keep it open till a certain time, or if a time is implied by the nature of the contract, the revocation thereof before the lapse of such time will not prevent the completion of the contract.
>
> (2) If the offer empowers, even impliedly, the other party to carry out the contract without previously communicating his acceptance, the contract is complete as soon as its execution has commenced within the customary or prescribed time.

This article deals with the revocation of the offer and the revocation of the acceptance.

Until the contract is complete, both the offer and the acceptance may be revoked unless the circumstances contained in the same article 111 exist.

Accountant General v. Carmelo Pensa (28/03/2003)

"Huwa indiskuss illi l-accettazzjoni gabet maghha u in forza taghha il-vinkolu kontrattwali u ikkrejat il-ftehim fuq l- elementi kollha tieghu, kemm dawk principali kif ukoll dawk sekondarji jew accessorji. Dan ma jistax jitqies ftehim jew akkordju b'funzjoni preparatorja izda wiehed finali, ghalkemm suggett ghal certi kundizzjonijiet, aktar 'il quddiem trattati. Ghax jekk l-offerta kienet biss l-istadju inizzjattiv versu l-konkluzjoni tal-kuntratt, l-accettazzjoni ghandha b'necessita` titqies bhala adezjoni ghall-kontenut ta' l-offerta. Konsiderati flimkien -* ***l-offerta u l- accettazzjoni - jikkostitwixxu n-negozju guridiku li hu l-bazi u sostrat tal-ftehim****. Jekk l-offerta tirrivesti il-karattru ta' negozju unilaterali, l-accettazzjoni taghha timmanifesta l- volonta` ta' l-accettant illi jghaqqad dan il-karattru unilaterali ta' l-offerent ma' dak unilaterali tieghu, qua accettant, u b'hekk jikkonkludi l-ftehim..."

Delayed acceptance, etc.
Article 112

> **112.** A delayed acceptance or an acceptance subject to conditions, additions, restrictions or alterations shall be deemed to be and shall count as a refusal of the original offer and as a new offer.

Article 112 is extremely important. A counteroffer is for all effects and purposes, a new offer. You have an inversion of the offeror who, at that stage, becomes an offeree.

Offer by means of advertisement
Article 1113

> **113.** (1) An offer made to the public by means of catalogues or other advertisements is not binding unless it has been expressly declared to be so; it only amounts to an invitation to offer.
>
> (2) The exhibition of goods constitutes an offer binding the person exhibiting them if it is accompanied by an indication of the price and all other conditions of the sale.

Why do you think it is important to determine the exact moment of conclusion of the contract?

1) Transfer of ownership.

2) Risk – the rule in risk is hand in hand with ownership, there is risk in the goods, if the goods perish, at whose risk where they?

3) Before you have a contract, which has been concluded, both the offer and the acceptance can be withdrawn, and the party can backtrack.

4) If there is a breach or a party does not perform, if you are going to sue, you need to know whether this is on the basis of **contractual liability** or **pre-contractual liability**.

   Pulim v. Matisick (20/10/1969 – In this case, Mr Pulim had started negotiating to open a clothes shop at the Hilton hotel. He had already bought stock. He came to Malta, and he found that the shop, which was agreed that he would be taking over, but there was no clear agreement, was given to somebody else. There is what is called *culpa incontrahendo* which established, by way of damages, if a party is in bad faith, a reimbursement of the expenses that you incurred as a result of entering into those negotiations and the party on the other side being in bad faith.

   The moment of conclusion of a contract becomes important because prior to conclusion of a contract, your basis is pre-contractual liability, your claim acquires a different nature altogether.

5) What if one of the parties dies at that critical point when you are establishing whether the contract had been concluded or not.

6) What happens if the law changes in the meantime?

What constitutes a valid offer?
Vivante tells you that there are two elements to have a valid offer – (1) it is a unilateral declaration (declaration of one party only) and (2) it is indivisible (once the offer is made, it is either accepted or it is refused).

What are the elements of a valid offer?
1) There must be an **external manifestation**, either express or tacit;
2) It must be made with **an intention to be bound thereby**;
3) The offer must be **complete**; therefore, it must contain all the elements of the contract, (*Emanuele Grech v. Giuseppe Borg* (V 28 PI page 629);
4) The offer must be **directed at another person or persons**. That is why the legislator intervened specifically in article 113 because in this article, you have an offer just being placed out there.

What constitutes a valid acceptance?
1) The **acceptance must correspond fully with the offer**, otherwise you do not have a contract (Article 112);
2) Except with regards to offers to the public, **acceptance must be made by the offeree**;
3) Acceptance must be **directed to the offeror**;
4) Acceptance must be **externally manifested**.

Can you have silent acceptance?
There are two Latin maxims that go against each other –
1) Roman law tells you that silence is not tantamount to consent &
2) Canon law tells you that silence is deemed to be consent.

According to Maltese case law, the rule is that **silence does not amount to acceptance**. In *Salvatore Grech v. Antonia Farrugia* (V 32 PII p 337 18/05/1946) it was held, "*il-kunsess ma jistax jigi prezunt. Hemm bzonn li jkun hemm fatti li juru l-estistenza tal-kunsens...l-estistenza tieghu tkun certa, id-dubbju ghandu jigi interpretat kontra l-konluzzjoni tal-kuntratt. Ghaliex is-skiet, hlief f'xi kazi partikolari, ma jimplikax kunsens."* Similarly, in *Agostino Azzopardi v. Giuseppe Bonnici* (V 33 PI p 778 22/01/1946), the Court held again that acceptance cannot be presumed.

In the first case, the judge mentioned that *"hemm xi kazijiet partikolari fejn l-iskiet jista jammonta ghall accettazzjoni."* Therefore, there are **exceptions** to the rule.

These fall into two broad categories –
1) When there has been **an exchange of correspondence between the parties** and at the end of the exchange, one of the parties remains silent and from that silence, one can construe acceptance;
2) **If an agent concludes a contract beyond his authority**, the silence of the principal could denote acceptance.

- *Dr Alfred Parnis nomine v. Carmelo Arpa* (V 14 page 237),
- *Michelangelo Portelli v. Reas Admirable Kenneth McKenzie* (V31 p31),
- *Avvocato Dr George Vassallo v. Aurelio Mea nominee* (v 35 PIII p 584),

- *Marianna Carabott v. Giuseppe* Farrugia (V 39 PII p 609),
- *John La Rosa v. Carmelo Galea* (30/05/1958),
- *David Ebejer v. John Aquilina* (01/03/1950).

Alfred Parnis v. Carmelo Arpa – Mr Arpa had given instruction to a stockbroker dealing on the Paris stock exchange to invest money in stocks and shares on his behalf. He told him in my investments I do want to exceed amount X. The stockbroker started sending statements of investments that he was doing for Mr Arpa and started exceeding the threshold Mr Arpa established. Mr Arpa stayed quiet, and his defence was that he told him not to exceed amount X and therefore, Mr Parnis can't sue him for more than amount C. The Court held that since he knew he was exceeding the limit and could have potentially benefited from such silence, he had to pay. This is an example where silence can lead to acceptance – where the agent concludes a contract beyond his authority and the silence of the principal could denote acceptance.

Dr Vassallo v. Aurelio – Aurelio had ordered a consignment of potatoes. What really happened was that there was an exchange of correspondence where on the 11th of September 1950, Aurelio had asked the plaintiffs to offer for sale 150 tons of potatoes. The exporting company replied, and it offered 150/200 tons of potatoes at a price of £25 per ton. Aurelio replied and said we can pay you £23 per ton, **without referring to the amount of tonnage**. The exporting company replied by saying that they were accepting the counteroffer of £23 per ton and that they would be loading them on a vessel within a week. The day after, the exporting country sent another telegram to Aurelio saying that they had chartered another vessel and they had chartered it to carry 250 tons and Aurelio on the 13th of September as well, told them we cannot accept more than 150 tons. Eventually, 218 tons were sent by the exporting company and Aurelio paid only for the 150 tons and not the balance over and above. **The point arose as to whether Aurelio, by their silence, had accepted for more than 150 tons to be shipped or not**. The Court entered into this theory of whether silence can amount to acceptance or not.

It held, *"hi ħaġa nuota li z-zewġ massimi kontradittri, wahda ta dritt Ruman (silence isn't enough), u l-ohra Kanonike (silence amounts to acceptance), gew harmonizati minn juristi fil massima (who is silent, and he could have objected, is consenting). L-obbligu tar-risposta u tal-impellenti fil-konsuetudni kummercjali…"*

Whoever is silent, if they could have objected, is consenting. According to a famous Italian author, good faith and commercial convenience have led to a situation that in certain cases, in the correspondence exchanged between traders, **if you are not in agreement, you have to explicitly state that you are not in agreement**. When you have an exchange of correspondence going on between traders, if you are not in agreement with something which has been put out there, you have an obligation to reply because if not, that amounts to an acceptance.

The Italian author Gabba says that silence can imply acceptance if there are the following conditions –

1) That the person who remained silent knew about the circumstances and could have rebutted them;

2) That the fact is not illegal;
3) That the person who remained silent obtained some advantage by his silence.

These are important because they are an exception to the rule of the theory of information as contained in article 110.

INTRODUCTION

Title VII of the Commercial Code (articles 123-236) deals with three types of credit instruments –

1) Bills of exchange;
2) Promissory notes;
3) Cheques.

With that being said, most of the law focuses mainly on bills of exchange.

CREDIT

What is Credit?

Credit can be defined as a **future payment obligation**. It is the right to obtain ore receive a payment at a future date. For example, someone allows you to pay for something which you have bought over time as is the case when someone takes a bank loan, and the bank allows it to be paid in instalments. So, an agreement whereby one person grants to another time for payment (or repayment).

Legally, credit has been defined as 'the exchange of present wealth in exchange for future wealth.' This is because I have a right to receive money in return for what I have given you, typically with **interest**.

Moreover, credit is an **actionable right** because if I have a right to be paid, I have a right to go to Court to enforce that right. It is also an **assignable right** which means that if I have a right to receive payment, I can transfer it to somebody else. That is called an assignment of right. This is quite difficult in credit instruments whereby it is more of a delivery than an assignment.

Why is it important?

Credit is important because it is the backbone of businesses –

1) **It enables traders to transact business without case flow limitations and to make new investments (B2B)** – businesses rely very heavily on the financial aid that they get from the banks, whether it is a start-up or also to make investments.
2) **It facilitates sales to customers (B2C)** – It is also important in commerce because it facilitates trader's ability to sell their goods/services since they are not limited to selling them to people who can pay him immediately, but they can give them credit and sell the goods today.

When we talk about credit and credit instruments, one has to distinguish –

- **A credit agreement** – this is an agreement between two people, so, it is a bi-party agreement. For example, a Loan Agreement and an Overdraft Facility.

- **Credit instruments** – these are particular instruments which document credit in a different way to an agreement. In credit instruments, only one person needs to sign. It isn't your typical agreement where you have two people. This is not a guarantee. For example, a Bill of Exchange, a Promissory Note and a Cheque.

- **A guarantee** – this refers to ensuring or giving added security to the payment of credit. Under the Civil Code we have the institute of Suretyship. But the giving of a guarantee is where somebody steps in to bind himself in favour of someone else to pay a debt. Therefore, an example is suretyship.

- **Security/Priority** – these are typically those institutes which give a creditor a right of first preference over the assets of his debtor. For example, a Hypothec and a Pledge.

Documenting Credit

So, there are various ways of documenting credit –

- Loan/Facility Agreements;
- Deeds of acknowledgement of debt;
- Overdraft Facilities;
- Letters of Credit – International Trade;

] Issued by banks

- Credit Instruments – documents of title to money
    - Bills of Exchange.
    - Promissory Notes.
    - Cheques.

In your typical Loan Agreements, two parties sign.

A Deed of Acknowledgment of Debt is a document drawn up whereby one party acknowledges that he owes money to another party and promises to pay him over a period of time. This is typically done by means of a notarial deed because when you sign this type of document before a notary, it gives it the state of an **executive title** meaning that it gives you the same strength in law as a judgement.

Another way of documenting credit is Overdraft Facilities where the bank allows you to overdraw on your account. So, even if you do not have money in that account, it allows you took overdraw up to a certain limit.

There are also Letters of Credit whereby a bank issues a letter to somebody who is going to buy goods. In this case, somebody is going to buy goods from overseas and goes to the bank and says that he/she needs to pay someone in another country. The bank will issue a letter of credit.

Credit Instruments are another way of documenting credit. These are documents of title to money. So, if I hold the document, I am in possession of the document and therefore, I am in possession of the right to get paid. It is a document of title to money.

History of Credit Instruments

The first credit instrument which originated was the **Bill of Exchange** which was used in the exchange in the trade of goods in the 1400s. The custom of using bills of exchange originated way before our Civil Code was enacted. In fact, historians think that it originated in circa the 1400s in the mercantile cities of Venice, Genoa and Florence which were trading a lot with the Orient.

Back then, what would happen was that if I need to go and purchase goods from the Orient and bring them back to sell them in Florence, I had two problems: Firstly, there is a certain difficulty and risk associated with transporting large sums of money, at the time coins, and secondly, it was likely that the other country wouldn't recognise my money. So, they created a system whereby in my home country I would go to a money changer saying that I need to buy goods from the Orient. He would give me (the trader) a bill which he would issue to the order of somebody he knows in the Orient. So, the money changer would give the trader this Bill of Exchange and the trader would take it to the other country and give it to the person nominated on the bill to pay him back on the currency of that country. So, there are 3 parties involved: (1) the trader who wants to buy the goods, (2) the money changer and (3) the person in the other country. Indeed, this is the **3-party bill of exchange** which exists till today.

Subsequently, **Promissory Notes** (this is an I owe you) were recognised in the UK in the 1700s. These are a piece of paper which says, 'I promise to pay you this amount on this date'. Therefore, it is a unilateral declaration acknowledging a debt. And then, cheques were developed by the Bank of England in the 1700s.

Definition of Credit Instruments
Credit instruments themselves are **not defined in the Commercial Code**; they were developed as a **usage of trade** so, when the law was enacted, it was felt that there was no need for a definition because they were known instruments which were already in use.

With that being said, there is a proposed definition from 1926 which never came into force, *"**Documents** in virtue of which the **issuer** gives to the lawful **holder** the **right** therein **literally described** which is **not issuable or assignable without the document itself**."* So, it is a document which is necessary, and which is issued by somebody, describing the right of payment and delivered to somebody else. Moreover, the only way of passing on that right is by giving over the document itself.

There are also Italian definitions such as that of Umberto Pipia (1913),
*"Un **documento** che attribuisce al suo **legittimo possessore** il **diritto letterale** di conseguire, a **scadenza**, la **prestazione** in esso indicata"*

Also, that of Cesare Vivante (1904),
"*Un **documento necessario** per esercitare il **diritto litterale** e **autonomo** che vi e' menzionato*"

Juridical Characteristics of Credit Instruments

- **Necessary** – the necessity of the document itself.
- **Literal** – what is written on it gives you the beginning and the end of your right.
- **Negotiable** – transferability of these instruments.
- **Autonomous** – when I issue a bill of exchange, I am 'creating' a new right of payment independent from the underlying obligation. So, if I issue this in relation to the purchase of a car, in certain cases, that creates an independent right. Whether the car works or not, for example, is irrelevant.
- **Fungible** – unlike money, if it is lost, it can be replaced.

1) Necessary

When we say that one of the juridical characteristics of a credit instrument that the document is necessary, it means that **the document itself is necessary to establish the rights stated in or emanating therefrom**. So, while many types of agreements can be legally established verbally, this is not possible with credit instruments. There can be no verbal credit instrument since a formal written 'instrument', that is, a document is **always required**.

Similarly, the transferability of the rights in the credit instrument necessitate the transfer and delivery of the document itself. So, the right of payment that comes out of a credit instrument can only be achieved if you deliver the document itself. In this way, technically speaking, if you lose the document, you lose your right to payment, although the law does provide for ways. The actual delivery of the document, both to assign the right and also to get paid, is extremely important.

The exercise of the rights to payment on a credit instrument requires presentment of the document. So, in order to get paid, I have to give you back the document and you will give me the money in exchange. Similarly, if when you present the document for payment, you are not paid, and you need to go to Court to get enforcement of your right to payment, the Court will require that you present the original document. In other words, in default of payment, to enforce the rights emanating from a credit instrument, the holder must produce the credit instrument in the relevant court proceedings.

2) Literal

The rights granted by a credit instrument are limited to what is described in the document. In other words, the rights granted by a credit instrument are those **stated in the document itself**. The creation, existence, exercise and enforcement of the rights in a credit instrument are dependant on **the content of the credit instrument itself** and cannot be subject to interpretation or completion by reference to other documents or agreements.

3) Autonomous

Autonomy refers to the creation of a separate and distinct obligation. Indeed, this separates the credit instrument from the underlying relationship which gave rise to the issue of the credit instrument.

Usually there is going to be a commercial relationship/underlying transaction in exchange for which a bill of exchange has been issued. The minute you issue that bill, **your right to payment is no longer dependant on the underlying transaction**. For example, if a bill of exchange has been issued for the purchase of a laptop, and I take it home and the screen is broken, in certain cases, I still have to pay since the obligation to pay is autonomous once you have issued a credit instrument. That is not to say that you cannot get your money back but in order to do so, you have to file a different action.

This issue of **strict autonomy on endorsement in good faith** is consistent in Court judgments, that when you transfer a bill of exchange to a third party, that third party has a right to get paid irrespective of the relationship that gave rise to that bill of exchange.

But do credit instruments create a new and independent obligation between the parties to the underlying obligation themselves? This does not prejudice the right of the drawer from the underlying obligation.

4) Negotiable

Most rights, including rights to receive payment, are assignable, but the right of assignment is subject to certain rules.

For example, in order to assign a right of payment, if I want to sell that right to somebody else, I have to enter into a separate **written** agreement with that other person, describing the right I am assigning and saying I am assigning that right. Moreover, I have a duty to notify the debtor meaning that I would have to send a judicial letter **informing the person who owes the money** that I have transferred that right or to obtain by acknowledgment. Therefore, there are **formal requirements**.

Furthermore, when I assign a right, the person who acquires my right steps into my shoes (assignee steps into the shoes of the assignor). So, he acquires my right **with all its good and bad features**. It is a basic principle of law that one cannot transfer better title than the title one has himself. For example, if the seller of the laptop has a right to receive payment from the purchaser, and the seller sells that right to somebody else, if there is a problem with the laptop and the person refuses to pay the person who has bought the right, this cannot be done because with respect to credit instruments, an autonomous right is created. The person simply acquires the right to payment, independent of the underlying obligation.

On the other hand, credit instruments are **negotiable, and this refers to the transferability of credit instruments**. Negotiability means the transfer of the right to payment, free from claims. Moreover, it is effected by an endorsement (signature at the back of the credit instrument) and delivery, meaning that you pass on the document. So, unless you hold the document, you cannot receive payment. Also, in the case that you have transferred the right to receive payment, there is **no need to notify the debtor** nor is any assignment agreement required (Art. 1470(1) of the Civil Code). The important thing is that you hold the document and present it when you go for payment.

5) Fungible

Unlike money, which once lost or destroyed is lost forever by the owner thereof, credit instruments are fungible meaning that they can be replaced with an equivalent document, subject to certain conditions to protect the issuer of the credit instrument from the risk of double payment.

Credit Instruments as a Means of Payment

Delivery

Credit instruments are **documenting credit**, that is, they are documenting a right to payment. Some think that because they have issued a credit instrument, they have paid. But there is a difference between a cash payment and the issue of a credit instrument. When you deliver cash by way of payment, you immediately extinguish the obligation. Whilst a credit instrument is saying I will pay you later, on a certain date. Credit instruments are an

attestation of the existence of a debt, or the right of payment, but **they do not constitute a payment itself**.

In *Michael Attar v. Grazia Meilak et* (1959), a cheque was issued by somebody and before it was cashed, the person who issued the cheque died. The heirs said that once you issued the cheque, you received payment. The Court disagreed and it said that since it is a credit instrument, it is an attestation of payment, but it is not a payment, so he had a right to sue the heirs for the payment that was due by the deceased.

Issue and Value

In terms of issue and value, the value of cash is regulated by law, therefore, it is established by a centralised system. On the other hand, credit instruments are issued by private parties and their value depends the credit worthiness of the debtor/payer, that is, on how able the payer on that bill of exchange is to pay you. This is because if he/she goes bankrupt, your bill of exchange isn't worth much.

Legal Tender

Also, of course, **cash is a legal tender** whereby everyone has a right to pay in cash. On the other hand, credit instruments require agreement between the parties that they are going to use a credit instrument. In fact, there are certain debts which the law doesn't allow payment other than cash, such as the payment of wages, taxes and social security.

Fungibility

Unlike money, which once lost or destroyed is lost forever by the owner thereof, credit instruments are fungible meaning that they can be replaced with an equivalent document, subject to certain conditions to protect the issuer of the credit instrument from the risk of double payment.

Credit instruments are **not equivalent to cash**, but they are still a very **effective** instrument. Indeed, they have the characteristics of autonomy and negotiability whereby the former facilitates the latter – the endorsee has a better title than the original holder. Moreover, there is the ability to factor or discount credit instruments for cash immediately.

Also, they are effective because they have been given added strength in the law by virtue of the amendments of 2004 to the COCP whereby two of the three types of credit instruments (Bills of Exchange and Promissory Notes) have been given the status of **executive title** which means they are equivalent to a judgement which says you have a right to get paid. So, they are given quite a lot of strength at law. This reduces the necessity to file court action to receive payment.

Practical Usage of Credit Instruments

The use of these instruments is reducing over time. Cheques are still in common use but as time goes by and because of issues of cheques being used in the context of money laundering and fraud, the use of cheques is always being restricted. In fact, earlier on this year, the Central Bank issued new directives limiting the use of cheques. In this way, cheques are on the decline due to increasing limitations imposed by banks and, not to mention, technological advancements and more effective means of payment and security

such as the use of debit and credit cards, electronic payments, and standing orders/direct debit orders (authorisation to creditor to withdraw funds from debtor's account).

Bills of Exchange are still used occasionally between traders. In Malta, they are commonly used in sale of consumer goods, in particular by sellers of cars for payment over time.

Promissory Notes (IoUs) are also still commonly used to document certain payments due by companies, often large amounts. They are used more outside Malta than in Malta.

Once should also note that a very common way of documenting an obligation to pay in Malta is the Deed/Agreement of Acknowledgment of Debt (these are not credit instruments). So, they are used in lieu of credit instruments. Moreover, as stipulated in Art. 252(b) COCP, a notarial deed constitutes executive title.

Practical Example
Mr X wants to buy a laptop that costs €1,5000 but has no cash at the moment.

<u>So, he has two options –</u>
1) He can take a bank loan (practical difficulties/interest & charges); or
2) He can take the seller's offer to pay him over a number of months (easy access/interest).

The latter option is riskier for the seller because he is exposed to credit risk of Mr X since he isn't getting all the cash in advance. With that being said, he knows that he can secure the sale today and secondly, it is an opportunity to charge and receive interest.

So, it is a win-win scenario whereby Mr X can buy the computer immediately on credit and the seller can secure the sale immediately and he can secure a greater return due to interest. Moreover, Mr X doesn't have to go to the bank which will charge a number of costs. In terms of the issue of negotiability, there is another advantage that there is the **element of security** owing to the fact that the credit instrument is recognised as an executive title, and therefore, it gives comfort to the seller that he will get paid. Moreover, it is easily **transferable/negotiable**. Traders often use these Bills of Exchange so that they can **discount them** meaning they will get all the bills of exchange they have issued to their customers, take them to the bank, endorse them and 'sell' them to the bank. The bank will give the trader the money now, but at a discount. The bank here is assuming the risk. The bank is comfortable because credit instruments create an autonomous right.

So, the advantages for the seller in using credit instruments –
1) The instrument may grant an executive title;
2) It is easily transferable/negotiable;
3) It can be discounted with the bank to obtain cash immediately.

It is clear that credit instruments create opportunities for traders whereby they can secure a sale now and use these credit instruments to get the cash now to be able to continue to generate their business.

BILLS OF EXCHANGE

What are Bills of Exchange?
These are not a creation of the law, but they are an instrument which was created by **usage of trade** which, under article 3 of the Commercial Code, is one of the sources of Commercial Law. In fact, there is no actual definition of a Bill of Exchange in the Commercial Code.

With that being said, Art. 5(c) of the Commercial Code says that any transaction relating to a Bill of Exchange is an act of trade. Of course, this doesn't mean that whoever issues a bill of exchange is automatically a trader since in order to be a trader under Art. 4, one has to perform acts of trade habitually, by profession. In this way, **Bills of Exchange can be used even in private transactions**. For example, if I lend money to someone, I can ask for him to issue a Bill of Exchange in my favour.

A Bill of Exchange is a credit instrument, and it is a **document of title** (to money). Indeed, by virtue of a Bill of Exchange, the holder is entitled to payment, and this may be transferred by endorsement coupled with the delivery of the document. It is used to substitute money, but it is not the same as money.

Definitions
For definitions, we can look at the UK Bill of Exchange Act (1882),
"*An unconditional order in writing addressed by one person to another signed by the person giving it requiring the person to whom it is addressed to pay on demand at a fixed or determinable future time a sum certain in money to or to the order of a specified person or **to bearer***"

The definition contained in this Act can sit very nicely in our Commercial Code, since it includes most of the features of a BoE as included in Art. 123 of the Commercial Code. This with the exception that it can be issued to bearer. Maltese law does not let a BoE to be issue to bearer which is where the name of the person who is entitled to payment is not specified in the BoE, and whoever has it can receive payment. Because they are so exposed to money laundering, bearer accounts have been eliminated over time, but our law never contemplated the issue of BoE to bearer.

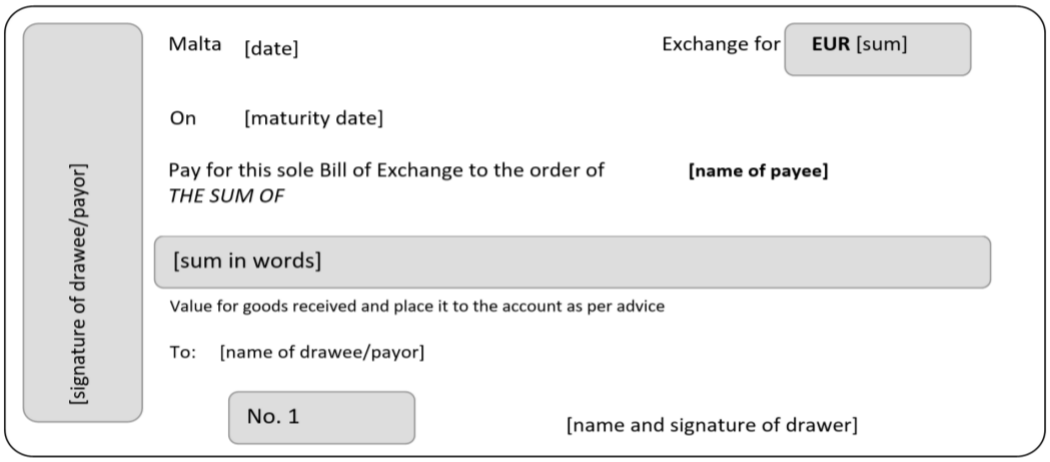
Similarly, the definition of Umberto Navarrini also sits very nicely in our law,
"*Un **titolo di credito** all'ordine essenzialmente commerciale, **munito di particolare forza processuale**, contenente l'obligazione **letterale**, **formale**, astratta, **incondizzionata**, e non sottoposta, a contro prestazione di pagare o di far pagare al portatore **alla scadenza**, in un luogo determinato una somma di **denaro***"

Navarrini speaks of a document of credit used in trade which gives strong rights which are described in it, and it is formal, unconditional and it gives the right to the holder or the order of the holder to get paid on a certain date in a certain place.

With all this being said, a BoE may be defined as, a **document** that evidences an undertaking by the person issuing it **to pay**, or to order another person to pay, **at a certain time**, a **certain sum of money** to a specified person or **to the order of** that specified person

Form of Bill of Exchange

There is no prescribed form in the law of a BoE, it simply says that it has to be in **writing** and must include the **elements** set out in Art. 123. Moreover, it can be in any form and on any medium.



This is a typical BoE. The typical BoE can be used as a 3-party BoE or a 2-party BoE.

One will note that are two dates: the date of issue and the maturity date. You also have the sum in numbers and the sum in words, the name of the person who is entitled to get payment (payee), the description (usually value for goods received), both the name of the drawee (person who is going to pay) and of the drawer (the person issuing the bill) and the signature of the person who is going to pay on the bill.

Parties to Bills of Exchange

Drawer/Issuer – '*Traent*'
The person who gives the order, i.e. issues the bill
Drawee – '*Trattarju*'
The person thereby ordered to pay
Acceptor – '*Accettant*'
The drawee, once he accepts by signing the bill, to pay
Payee – '*Prenditur*'
The person to whom the money is payable
Endorser – 'Girant'
The person who endorses the bill
Endorsee – '*Giranti*'
The person to whom a bill is transferred by endorsement
Holder – '*Prenditur*'
Generic term referring to original payee or to endorsee if it has been endorsed

On a BoE, you always have someone drawing up the bill of exchange (the drawer/the issuer). The drawer is giving an order to someone to pay. He is issuing this BoE and ordering someone to pay, **which may be himself**.

The person who is ordered to pay is called the drawee. **The person who is ordered to pay can only become obliged to pay if he accepts** and the moment he accepts, the drawee becomes the acceptor.

The payee is the person who is entitled to receive payment, that is, the person who will receive payment on that bill. He will also, therefore, be the first holder of that bill. On a 2-party bill, the person who issues a BoE may also be the payee.

If the holder of the BoE (payee) endorses it on the back, he becomes the endorser. There are some residual obligations which come into play. And he gives it to someone else who the new payee and also, the endorsee.

The endorser and the endorsee may be the same person. If there is no endorsement, the holder is the original payee. The holder and the endorsee may be the same person because if I am the person who received it last, I am still holding it, then I am the endorsee and the holder. If there is no endorsement, the holder is the original payee.

Types of Bills of Exchange

Our law talks about 2 types of bills of exchange –

1) The 2-party and
2) The 3-party bill.

With that being said, there are two types of the 2-party bill, so, in total there are 3 types of bills of exchange.

Mr X (debtor) owes money to Mr Z (creditor)

Three Party Bill

- Drawer X issues BoE - Drawer
- Upon Y as Drawee / Payor
- In favour of Z as Payee and Holder of the Bill

Two-Party Bill

- Art. 124 – "*drawn by a person upon himself*"
  - Mr X issues BoE - Drawer
  - Upon himself (X) as Drawee / Payor
  - In favour of Mr Z as Payee and Holder of the Bill

or

- Art. 127 – "*drawn to the order of the drawer himself*"
  - Mr Z issues BoE - Drawer
  - Upon Mr X as Drawee / Payor
  - In favour of Mr Z as Payee and Holder of the Bill.

This is a scenario where Mr X owes money to Mr Z.

On a **3-party bill**, Mr X (the person who owes the money) issues this bill and will order someone to make the payment. Since there are 3 people involved, he is not ordering himself to make the payment but Mr Y (the drawee). So, the drawer Mr X is ordering Mr Y to

pay the bill in favour of Mr X who is the person who has the right to receive payment and is the holder of the bill. Unless Mr Y signs the bill in acceptance, he will not be bound on that bill, but he is still the drawee and the moment he accepts, he becomes the acceptor.

Drawer and drawee may be the same person
Article 124

> **124.** A bill of exchange can be drawn by a person upon himself, and can be made payable at the same place where it is drawn.

May be drawn to or drawer or third party
Article 127

> **127.** A bill of exchange may be drawn to the order of a third party, or to the order of the drawer himself.

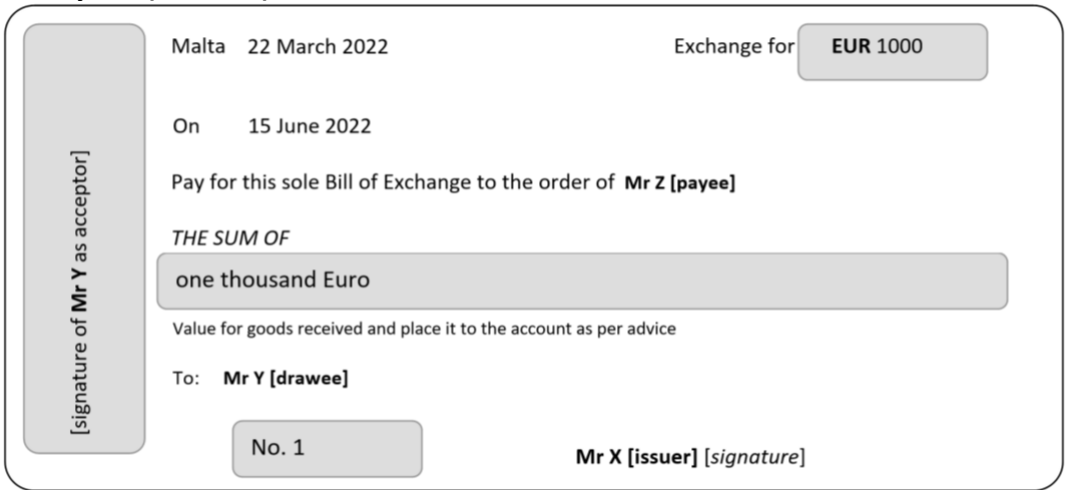
Articles 124 and 127 deal with the 2-party bill and there are two scenarios where the issuer is ordering himself to pay or where the issuer is also the person who is entitled to receive payment. So, with respect to the first scenario (art. 124), Mr X issues a bill of exchange (drawer) upon himself as the drawee, he is ordering himself to pay in favour of Mr Z as the payee. With respect to the second scenario (art. 127), Mr Z who is entitled to receive money, issues the bill of exchange, orders Mr X to pay himself, Mr Z, as the payee. This is very typical of car dealers.

In a 3-party bill, the issuer (Mr X) orders the drawee to pay (Mr Y) in favour of the payee who does not need to sign (Mr Z) since he holds the bill. The issuer needs to sign. The drawee doesn't have to sign but if he does, he becomes bound on the bill, but there is no obligation.

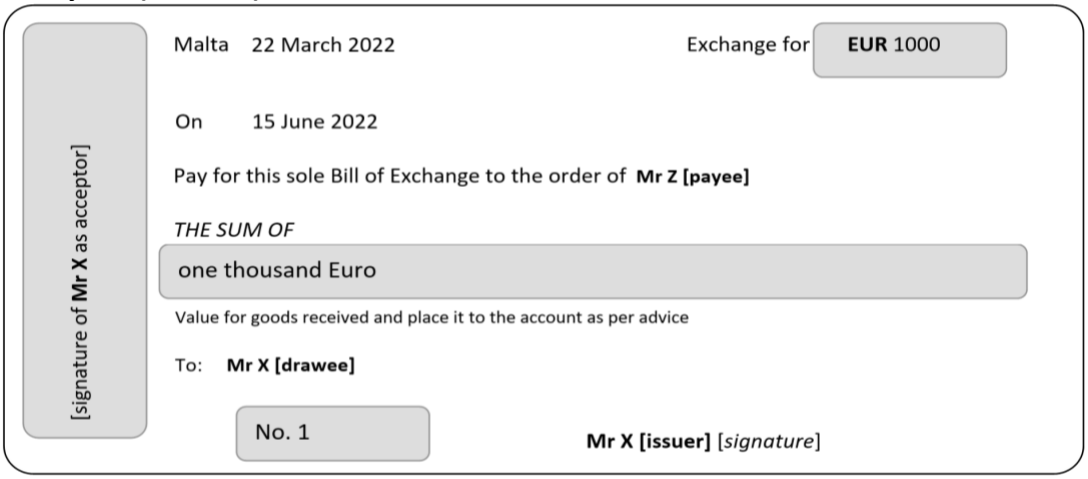
In the case of article 124, the issuer has issued the bill in favour of the payee, but he has put himself down as the drawee. So, he will sign it again in acceptance meaning he is bound on the bill.

In the case of article 127, the person who is entitled to payment is issuing the bill and will put Mr X down as the drawee and gets him to sign as the acceptor which makes him bound on the bill.

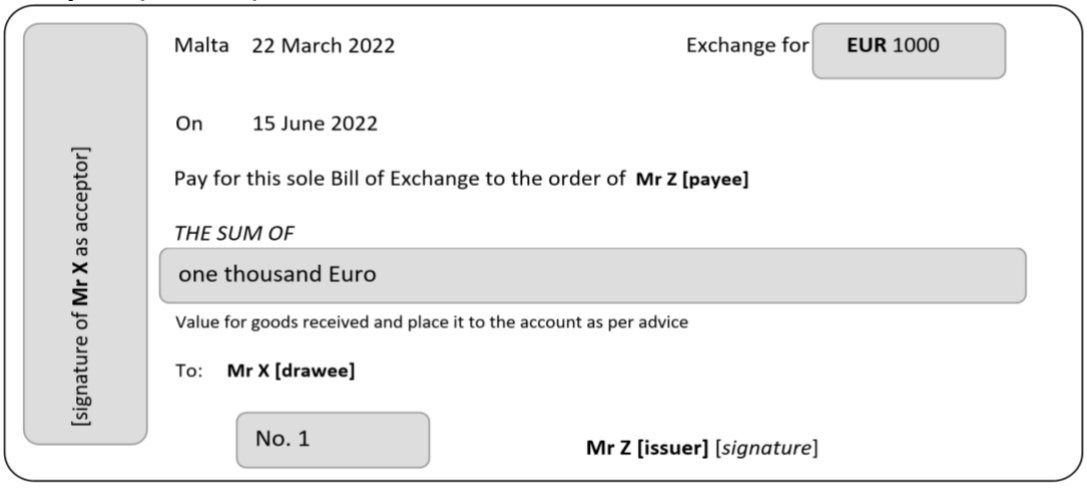
Three-Party Bill (Art. 123)



Two-Party Bill (Art. 124)



Two-Party Bill (Art. 127)



The types of BoE were described in *Edwrad Vincenti Kind v. Carmelo Abdilla* (05/10/1954),

"*Il-kambjala tikkonsisti fl-obligazzjoni ta' xi hadd, imsejjah 'traent' jew 'emittent', li jgieghel li jhallas, jew ihallas hu, lil xi haddiehor, imsejjah 'prenditur', somma determinata lill-pussessur ta' l-istess kambjala fl-iskadenza…*

"Il-kambjala, tista' tigi redatta u koncepita f'zewg forom; min jemettiha jista jobbliga ruhu li jhallas huwa stess, personalment, u allura l-kambjala tkun kambjala proprja… imma tista' tindika terza persuna bhala dik li ghandha thallas u lil min l-emittent jaghti ordni biex ihallas, u allura l-kambjala tkun kambjala improprja, u jghidula 'tratta', ghaliex tigi migbuda fuq haddiehor"

Formal Requirements of Bills of Exchange

There is no definition of a bill of exchange in our law. What the law does in Art. 123 is that it sets out the formal requirements, that is, what has to be included in a BoE for its validity.

Form of bill of exchange
Article 123

> **123.** A bill of exchange must be dated, and must specify the place where it is drawn, the sum to be paid, the name of the person who is to pay, and the name of the person to whom or to whose order payment is to be made, the time and place of payment, and the value given, whether in cash, in goods, in account, or in any other manner; and must be signed by the drawer.

The 9 requirements –
1) The date of issue;
2) The place of issue;
3) The sum to be paid;
4) The name of the person who is to pay (the drawee);
5) The name of the person or to whose order payment is to be made (the payee);
6) The time of payment;
7) The place of payment;
8) The value given (whether in cash, goods, in account or other);
9) The signature of the drawer/issuer.

Art. 123 states that these 9 elements ***'must'*** be included in the BoE which leads us to believe that unless each and every one of them is there, then the BoE is not valid. However, they are not all considered to be required *ad validitatem* which means that some of them, if not included, will not necessarily invalidate the bill.

In *Martin Attard noe et v. Alfred Cachia pro et noe* (13/11/1995), the Court held that only the signature of the drawer and the amount which are *ad validitatem* requirements. One can argue that this can be mean that just these two requirements are enough, which is not the case.

1) Date of issue

The date of issue is to be **distinguished from the date of maturity**.

It is required because there may be issues in relation to the capacity of the person who issued the bill or valid consent at the time the BoE was issued. If, for example, the issuer of the bill was legally incapacitated at the time it was issued, then that bill is not valid. Other examples include when the drawer was a minor at the time of issue of the BoE, or when the person signing on behalf of the company wasn't a legal representative at the time.

So, the time stamp may be important. In certain cases, it may even be required to establish the **maturity date/date of payment. Art. 172(d)** says that *"bill may be expressed to be payable at a certain time after date* [of issue]". In other words, you can say that the bill will be paid after a certain time has elapsed from the date of issue and therefore, the date of issue becomes crucial.

Under French and Italian law, there exist specific provisions stating that a missing issue date invalidates the BoE, but a wrong date does not. On the other hand, under Maltese law, the issue date is a formal requirement of a BoE (**Art. 123** – "must") but there is no particular provision stating that if it is not included, the bill will be invalid. Therefore, it's absence will not necessarily invalidate the bill.

Moreover, there is no local case law dealing with missing issue date specifically. With that being said, *Martyn Attard noe et v. Alfred Cachia pro et noe* implies that it is not an essential requirement.

Similarly, *Louis Galea noe v. Alfred Bartolo* (Appeal 04/11/1968), dealt with a BoE which only had one date and which the Court determined to be the date of issue. But the parties said that it wasn't the real date of issue since the bill had been issued earlier. In following the Italian position, the Court said that as long as there is a date of issue, even if it is wrong, it does not invalidate the bill. Moreover, unless proven otherwise, the date on the bill is presumed to be correct, but "*prova contraria non e' rilevante ai fini della validita' formale."* The Court also had to deal with the fact that maturity date was missing. The Court concluded that its absence doesn't invalidate the bill on the basis that Art. 180 of the Commercial Code says, *"In the absence of any indications* [of the maturity date] *the bill shall be payable at sight."*

2) Place of issue

This is important, it is a historical legacy of BoE since originally, BoE were used for the purposes of facilitating international trade. Today, they are more used in the local context.

Formal requirements that make a bill valid are regulated by the law of the place where the BoE was issued. Therefore, the validity of a BoE is determined by the law of the place of issue. This is a question of Private International Law. So, it is important for this purpose. On this point, make reference to *Salvatore Farrugia v. Travelex Financial Services Limited et* (Appeal 05/10/2018) which in turn refers to *Aristide Psaila noe v. Henri Rouselle noe* (27/02/1936).

The indication of the country, therefore, will suffice because then, the law of that country will apply to that bill. Again, this is less relevant today as BoEs are used mostly in a local context.

Moreover, it is an accepted view that failure to state this will **not** invalidate the bill. This is the same as UK law but different to Italian law.

3) Sum to be paid

Being documents of title to money, the sum to be paid is an **essential** requirement *ad validitatem* for credit instruments. Without the amount being clearly stated in the bill, the bill is not valid. The law requires **certainty**, both in terms of the **amount to be paid** and in terms of the **currency** in which payment is due.

In what money bill is payable

Article 183

> **183.** A bill of exchange must be paid in the money specified therein. Nevertheless, if the money specified in the bill is fictitious or is not legal tender in the place where payment is to be made, and the value thereof has not been stated in the bill, the payment shall be made in the money which is legal tender at the place of payment, in an amount corresponding to the value of the money specified in the bill at the time of maturity, unless the drawer, by the use of the clause "in cash" or other equivalent clause, shall have expressly required payment to be made in the money specified by him, not being fictitious money.

This deals with issues where there is confusion in the amount or currency. This shows that the law makes an effort to ensure that as much as possible, there is certainty both in terms of currency and amount. In brief, it states that if you do not state the currency, you apply the currency of the place of payment, and if it is stated, you give the equivalent amount.

Discrepancy between words and figures

Article 126

> **126.** (1) Where in a bill of exchange the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.
>
> (2) Where the amount is repeatedly expressed in figures or in words, and there is a discrepancy, the smaller amount is the amount payable.

This says that in case of a discrepancy between the amount in words and the amount in figures, the amount in words will prevail. Also, if the amount is repeated (whether in figures or words) and there is discrepancy, the smaller amount will prevail.

The sum that is payable must **result from the bill itself**, not with reference to something else. You are only entitled to claim the amount stated on the bill and nothing else. For example, you cannot refer to a balance of an account current at a future date. So, if two

traders are using bills of exchange between them and there is an account current between them, they cannot say I am issuing this BoE for whatever the balance will be on this date between us. That will not be valid since you have to have a specific amount stated on the bill.

Can the sum be stated to be payable in instalments?
This is where you state on the bill that you owe a certain amount which you will pay on certain dates. Both the law and case law do not contemplate more than one maturity date on a bill. In any case, in practice, if the trader is going to be receiving a series of payments on different dates, a series of BoEs will be issued. So, separate bills for each instalment whereby every month he has a right to demand payment on the bill that is maturing.

Can the BoE include a stipulation for interest?
The law says nothing about this but as long as the amount is clear and determinable, then there is nothing that would invalidate the bill, nor would it deny the right to the payment of the interest. Therefore, a BoE can include a stipulation for interest, provided certainty of the sum is not prejudiced as stated in *Franco Depasquale noe v. Charles Debono pro et noe* (28/06/1973) where interest was indicated as 10%, therefore reduced.

The stipulation of interest on a BoE whereby interest is capitalised and included in the bill is very uncommon. For example, a loan of €1000 for one year at 8% interest, would be a BoE for €1,080. Typically, when the trader gives credit and charges interest, he will issue a BoE for interest, payable at the end for example. So, a bill of exchange for interest will be issued separately.

4) Name of the drawee
The drawee is the person being ordered to pay. On a 2-party BoE, it might be the issuer himself indicating himself as the person to pay.

The law talks about the name and not the signature of the drawee. That is to say, the law stipulates that the person who is going to pay has to be indicated on the bill, but his signature is not required. Indeed, the drawee is not obliged to pay on the bill and **will not be bound on the bill until he signs it** in acceptance. Upon signing, the drawee becomes the acceptor and will becomes bound to pay.

Moreover, it is possible to include **more than one drawee**, where you have two people who are **jointly and severally liable** to pay on the bill. So, if I present it on either one of them, that person has an obligation to pay me.

If the drawee is **fictitious**, the law gives it the effect of a Promissory Note whereby the drawer remains bound. So, if the drawee does not sign in acceptance, the payee still has a residual right against the person who issued that bill and the law is saying that if you indicated a fictitious drawee, it assumes the effect of a Promissory Note. So, the person who issued the bill would be bound to pay.

What if the drawee does not accept?
What if the drawee accepts but does not pay?

Does the drawer/issuer remain responsible in spite of acceptance?

5) Name of payee

This is the person to who or to whose order payment is to be made. **The person who is entitled to receive payment** on the BoE.

The payee is named on the face of the BoE when the bill is first issued. Note that once that person endorses the bill, and passes it on to somebody else, the payee changes. The endorsee then becomes the payee. The original payee will be nominated on the front of the bill and the minute he endorses it and transfers it, the holder becomes the due payee. In other words, the endorsee of the BoE becomes entitled to payment and can also be called 'payee' but is not the original payee.

Can a BoE be innominate, and can it be issued to bearer?

In terms of Maltese law, unlike in English law, a BoE cannot be issued to bearer. BoEs to bearer are not recognised as valid in Malta. But what happens if it is innominate in the sense that they do not write anything on the bill? **Article 123** requires that the name of the payee is included.

In *Vincenza Xuereb v. Cecil Pace et noe* (18/02/1977) and *Carmel Pace v. Franco Attard* (03/03/09), the BoE included the name of the drawee (so the drawer and the drawee are the same person) who signed it but did not include the name of the payee. The Court held that the effect of that bill is merely an acknowledgment that this person owes a debt to somebody. He could merely use it as evidence of the existence of a debt by the drawee (acceptor), but he couldn't use it to file the *actio cambiaria* (an action on a BoE). Consequentially, plaintiff had to prove right to payment (i.e., that he was payee) by reference to an underlying obligation.

So, it is not a valid BoE without the name of the payee, it may have a value as a document to support the payee's claim that somebody owes him money, but he couldn't file an action for payment on the BoE itself because this formal requirement was missing. Therefore, it is a **necessary formal requirement**.

However, in *Martyn Attard noe et v. Alfred Cachia pro et no* (13/11/1995), the Court said that if the name of the payee is added later, the bill is still valid as long as at the time you present the pay for payment, the name of the payee is there. Therefore, absence of the name of the payee on the issue date will not necessarily invalidate the BoE.

In the 2-party bill, the payee may be a person other than the drawer, or he may be the drawer himself. In the latter scenario, the drawer is nominating himself as the payee.

The law tries to ensure that as much as possible, there is certainty as to what is written on the BoE. Therefore, the payee must be identifiable with certainty, resulting from the BoE itself, and not by reference to another document or another agreement. The law wants to ascertain who are the parties involved in that BoE. In this way, a fictious payee would render the BoE invalid and therefore, unenforceable.

6) Time of Payment – Maturity Date

This is the date at which one can demand payment on the bill.

Time of payment

Article 172

172. A bill may be expressed to be payable -

(*a*) at sight;

(*b*) at a certain time or on a certain day;

(*c*) at a certain time after sight;

(*d*) at a certain time after date;

(*e*) at usance.

This provision talks about the different types of **maturity dates**. You do not necessarily need to specify a maturity date, because you could refer to other ends.

At sight

You could write that the bill is payable at sight, which means that when you present it, the obligation to pay matures. Therefore, payable **on presentment**. In order to protect the people responsible for payment, the law creates a limitation on this.

At a certain time or on a certain day

You could have a bill which is payable at a certain time, or on a certain date. Moreover, the law says that a certain time can include "in the middle of the month of February" (**Art. 175**). In this case, the BoE will mature on the 15th day of the month.

At a certain time after sight

You can also write that it is payable a certain time after sight. For example, ten days after sight which means that on the tenth day, counting from the day after the BoE **was presented for payment**.

At a certain time after (issue) date

You could also right at a certain time after the date of issue. Remember that sometimes the maturity date is linked to the date of issue, and this is precisely it. The law is saying that you can indicate as the time for payment a certain time after the issue date. For example, ten days after the issue date when means on the tenth day, counting **from the day after the issue date**.

At usance

Finally, the last option that the law gives is at usance which is defined as 21 days form the date on which the bill is **presented for acceptance**. Remember that in a BoE nominating a drawee, the drawee who is the person bound to pay **only becomes bound to pay once he accepts**. There is a procedure whereby you can, but there is no obligation, to present a bill for acceptance. So, the BoE hasn't matured yet but in order for me as the holder to get certainty that that person is going to be able to pay or is going to bind himself to pay, I can **present it to him for acceptance**. This is saying that if it is issued at usance, it is payable

between 21 days from the date on which the bill is presented for acceptance. If he doesn't accept to sing, one already knows that there is a problem but, if he accepts to sign, he has to pay within 21 days to pay.

Where drawee is adjudged bankrupt
Article 182

> **182.** A bill shall be deemed to be due from the moment the drawee is adjudged bankrupt, and in such case the holder may protest the bill as provided in article 191; but the drawer and the endorsers may, if called upon to pay the bill, postpone payment until the day on which the bill shall be due according to the terms in which it is drawn, on giving the security mentioned in article 154.

This provision talks about what happens if between the issue date and the maturity date (when I can go and ask for payment), the drawee goes bankrupt. Clearly if the drawee goes bankrupt, I know I am not going to get paid.

The law says that in the case of bankruptcy of the drawee, this causes **the bill to fall due immediately** even if not 'mature' yet, because at that point in time, I can go to the other persons responsible on that bill and say that I want payment since the drawee has become bankrupt. With that being said, the law says the other parties on the BoE (e.g., drawer; endorser) can delay payment until the maturity date meaning that they can ask for time until the maturity date.

What happens if the maturity date is not indicated on the BoE?
Absence of indication of time for payment will not invalidate the BoE because **Art. 180** provides a fall back that in this case, it will be **deemed to be payable at sight**. That is, once you present it, it is payable.

In *Carmel Muscat v. Anthony Micallef* (Commercial Appeal 18/01/1993), Muscat and Micallef where shareholders in a company and they entered into a share purchase agreement (SPA) where Muscat agreed to sell his shares to Micallef. Micallef, as an attestation of the amount that he is due to pay, signed a BoE in favour of Muscat for payment, the mature date being 20/09/1989 because they envisaged that by then, the share transfer would have taken place. Indeed, typically when you sign a SPA, the shares do not transfer immediately. It is like a promise to sell.

Sales of shares tend to be subject to a suspensive condition. In this case, one of the conditions in the sale was that Muscat had to be removed as a guarantor from all the bank loans that there were in the company because when a company takes a loan, the bank would typically want the shareholders to give security. Muscat said that he wanted to be released from these loans since he was getting out of the company.

What happened was that by the time the BoE matured, the guarantees were not released and therefore, the shares hadn't transferred yet. Muscat sued for payment anyway under the BoE, claiming he has a right to get paid (autonomy). Micallef argued that the case was filed prematurely because that BoE was issued to a transaction subject to a suspensive

condition which had not materialised. So, he argued that Muscat could only sue for payment once the suspensive conditions in the underlying SPA came into effect.

Muscat argued this is a BoE and you have to pay because of the autonomy that is granted by it. In other words, he argued that BoE create autonomous and distinct obligations between the parties, not subject to a suspensive condition (strict autonomy).

In the meantime, while the case was pending, the guarantees were released, and therefore, the shares could transfer. So, at this point, the defence of Micallef fell away. However, another question arose: Is interest on payment due from the date of maturity or from the date of the release of the guarantees? Muscat argued that he owed Micallef interest from the date that the shares transferred since that it when he was due to pay.

The Court decided that the interest is **due from the date of the release of the guarantees, so, from that date of shares transfer**. The Court ignored the maturity date on the BoE, and the autonomy of the BoE, referring to the underlying obligation. The Court did not confer the autonomy into the BoE. The Court did not treat the BoE as creating strictly autonomous rights between the parties. With all this being said, one needs to keep in mind that in this case, the BoE was not endorsed – when you endorse a BoE, there the principal of autonomy is sacrosanct.

7) Place of payment

This is not given much importance by the law, nor by the Courts. Although it is required in Article 123, it is accepted widely that it is not a formal requirement *ad vilitatem* of a BoE. The fact that omission will not invalidate the BoE was confirmed in *Marilyn Attard noe et v. Alfred Cachia pro et noe*.

Place at which presentment, protest, etc…, are to be made
Article 224

> **224.** The presentment of a bill for acceptance or payment, the protest, the request for a duplicate of the bill, as well as all other acts against a particular party with regard to a bill, shall be made at such party's place of business or otherwise at his residence.

In fact, the law provides a fallback position. So, it is providing a fallback whereby if you do not say anything, you can fall back on this and present the bill at the acceptor's place of residence or place of business. As a matter of practice, it is advisable to indicate the addresses of the parties to a BoE: the drawee and the drawer or any endorser. This is because they remain liable on a BoE.

8) Value Given

This may be *"in cash, in goods, in account, or in any other manner."* This is referring to the **value given in exchange for the BoE**. The BoE is issued for a reason (because there is an underlying transaction) and the law is requiring that you say why it is being issued. This stems from a general principle in the Civil Code that **an obligation without a consideration is invalid** (Art. 987). So, you cannot have an obligation to do something without receiving something in return, with the exception of a donation.

The absence of the value given will not invalidate the bill. This follows from article 988 of the Civil Code which says that an agreement is valid as long as it can be shown that it was founded on lawful consideration even if such consideration was not stated. So, the fact that you have not stated the consideration will not invalidate a transaction as long as there was consideration, and you can prove it. Similarly, in the context of BoEs if you do not state the value given but you can prove that the BoE was issued for value given, then it will be a valid BoE.

The common practice in BoEs is only having the words "for value received" without explaining what the value is. So, simply stating that there was a consideration.

9) Signature of drawer

This is accepted widely to be the **most fundamental requirement of a BoE**, without which a BoE is **invalid**. The law refers to the signature and not the name of the drawer.

Prof. Cremona (Note on Commercial Law): "*The drawer of a bill must put his signature thereon in order that his intention of binding himself thereby quoad any holder of the bill may result in a formal and unequivocal manner; without it no action may be maintained against the acceptor, either … In fact, the endorsement by the drawer of the bill to his order* [as payee] *would not remedy the absence of his signature as drawer. Again, a bill signed by the drawer as such is, though unaccepted by the drawee, a complete and regular bill for all intents and purposes at law*".

The UK law position is the same. Byles, *On Bills of Exchange*: "*The drawer's signature is essential to the validity of a bill; without it no action can be maintained against the acceptor…. An instrument signed by the drawer as such is, though unaccepted by the drawee, a complete and regular bill quoad a holder in due course…"*

Remember that the drawer **even when he nominates a third party to pay**, still remains bound on the bill and therefore, the law requires that his signature is on the bill, otherwise it is not a valid bill. Even if the drawee has signed in acceptance, if the person issuing didn't sign it, it is still invalid. Moreover, even if he signed it as another party to this bill, he **has to sign it as a drawer** for the bill to be valid. Inversely, as long as the drawer signs, **even if it has not been accepted**, it is a valid bill, and he will be bound on it.

This has been confirmed in numerous judgements –

- *Galea v. Delicata* (Appeal 10/01/1866);
- *Gambin v. Garafalo* (24/03/1877);
- *Parnis vs Rutter* (Appeal 10/10/1926);
- *Henry Pace vs Joseph Azzopardi* (13/10/1964).

In *John Giordimaina et v. Joseph Pace et* (CA 07/07/2006), the Court summed up this requirement,

"*l-azzjoni kambjarja ma tistax tirnexxi kontra l-accettant jekk il-kambjala ma tkunx iffirmata mit-traent, kif trid il-ligi, ghax id-dokument ikun effettivament null bhala kambjala u ghalhekk ma jistax jinghata l-forza ezekuttiva li jintitola lill-kreditur li jithallas semplicement u unikament bis-sahha tieghu*."

What if the bill was issued, it was accepted by the drawee, but the drawer hasn't signed it yet but signs it later?

In other words, the drawer signs after the acceptance by the drawee. There have been some conflicting judgements. In *Giuseppe Said v. Raffaele Debono* (13/03/1906), the Court held that the fact that the acceptor had signed in acceptance before the drawer did not invalidate the bill or release the acceptor from his obligation to pay. So, provided always that by the time it matures, it has been signed by the drawer, you can remedy that 'defect' in the bill. So, the drawer can sign it after the acceptor.

This is the same as UK position. Byles, *On Bills of Exchange*: "*A bill may be accepted while incomplete before it has been signed by the drawer."* So, provided always that it is signed by the drawer before the action for payment is instituted

If the drawer who is also a payee (2-party bill), files an action on the BoE before signing the bill, can he remedy the defect by signing during the case?

In *Phoenix Domestic Appliances Limited v. Joseph Vassallo* (20/04/2001), the plaintiff went to Court with copies of the BoEs which hadn't been signed by him as the drawer, although they had been accepted by the acceptor, and the drawee claimed he had no obligation to pay because this wasn't a valid BoE. The plaintiff, in retaliation, signed the originals and gave them in Court. The Court said that at the time plaintiff filed the action, he did so on an invalid BoE and therefore, cannot rectify it now. So, although plaintiff then signed the originals and submitted them in Court, it was held that the *actio cambiaria* failed because at the time the action was filed, an essential element of the BoE was missing.

So, **if you file the action on an invalid BoE**, you cannot rectify it during the case. This is quite rigid. In this case, you are forcing this person to withdraw this action just to file a new action on the same merits on the next day. In fact, in subsequent cases, the Court took a different approach. In *John Giordimaina et v. Joseph Pace et* (Appeal 07/07/2006), when plaintiff filed the case with copies if BoEs which had not been signed, they were contested as invalid by the defendant. However, in this case, the Court granted permission to withdraw the BoE and to sign them during the case. This was done to avoid unnecessary action.

The Court held that the law does not require that drawer signs on issue, so, it can be signed at any time. Moreover, it applied doctrine of *ius superveniens firmat actionem et exceptionem*, i.e., where there is a change of circumstances during the course of an action which rectifies a defect, then the action that was previously defective may also be remedied. This is necessary "*ghall-ekonomija tal-gudizzju"* **Therefore, BoE was held to be valid and enforceable**.

What are the effects of the signature of the drawer?

Supply of funds to meet bill
Article 131

> **131.** (1) The drawer, or, where a bill is drawn for account of another party, the party for whose account the bill has been drawn, engages that at the time when the bill becomes due there shall be on his account in the hands of the drawee a supply of funds sufficient for the payment of the bill, even if such bill is payable at the place of residence of a third party.
>
> (2) Nevertheless, the drawer for account of another person remains personally liable towards the payee, the endorsers, and the holder of the bill.

This says that when issuing the bill, the drawer gives a warranty that at the time the bill will become due, he shall have provided the drawee with sufficient funds to pay the bill. This is a presumption. There is a legal presumption that when the drawer signs the bill and nominates somebody to pay, he is giving a guarantee to the holder of the bill. This is where the **residual liability of the drawer on the BoE** comes out of. The drawer always remains liable on the bill because when he issues the bill nominating someone else to pay (3-party bill), he is giving a guarantee that by the time that bill will become due, that drawee will have the money to pay. So, by signing it he is giving a warranty. **He does not have an obligation to put the drawee in funds on the date of issue but by the date of maturity.**

When drawee is deemed to have been put in funds
Article 132

> **132.** The drawee shall be deemed to have been put in funds if, at the time the bill becomes due, he owes a debt to the drawer, or to the party for whose account the bill was drawn, in an amount not less than that specified in the bill.

Let's assume that the person who the drawer has nominated to pay is a person who owes him money. Because he owes him money, it is as if he has put him in funds. The presumption is that if he is the drawer's debtor for an amount equal or more than that stated in the BoE, at the time the bill becomes due, the drawee will be deemed to be in funds.

Acceptance implies supply of funds

> **133.** (1) An acceptance implies the supply of funds, and constitutes a proof thereof as regards the holders and the endorsers.
>
> (2) The drawer alone, whether the bill be accepted or not, is bound to prove, in case of dispute, that the persons on whom the bill was drawn were provided with the necessary funds for the payment of the bill at maturity; otherwise he is bound to warrant the bill, even though the protest is made after the lapse of the prescribed times.

Article 133(1)

When the drawee signs the bill to become the acceptor, another presumption arises which is that the drawer has put him in funds to pay. In other words, he is deemed vis-à-vis holder to have been put in funds by the drawer. This is a *iuris tantum* presumption. Even if that is not the case, the issue between the drawer and the drawee remains private between them.

Article 133(2)

But as between the drawer and the drawee, in case of a dispute as to whether the drawee was put in funds, it is always the drawer that must prove.

When drawer prohibits transfer of bill

Article 135

> **135.** When the drawer has prohibited the transfer of a bill by an express declaration on the bill itself, and this notwithstanding a transfer is made, the endorsee acquires no rights other than those of the payee.

It is possible for the drawer of a bill to prohibit endorsements. The issuer of a BoE can prohibit further endorsements. Remember that 'to the order of' means that it can be passed on. But the drawer can write 'pay only' or otherwise state that the bill is not endorsable.

Endorsement

One of the fundamental characteristics of credit instruments is their transferability which is achieved through the mechanism of endorsement. Endorsement on BoEs is regulated in **articles 136-147** of the Commercial Code and many times it the means of transfer of property in the BoE (**Art. 136**).

Transfer by endorsement
Article 136

> **136.** The holder of a bill can transfer the property in it by endorsement.

The words 'to order' signify that the payee has the right to transfer the bill and the transfer of a bill is done **only through endorsement.** But **absence of these words will not affect the right to endorse.** So, if you write nothing, so neither 'to order' nor 'to only', the law says the presumption is that it is transferable. It remains endorsable. If you do not want this to be the case, you must write 'only'.

The drawer or endorser can prohibit (further) endorsements. The word 'only' will typically imply that endorsement is not allowed.

Navarrini defines 'endorsement' as, *"La girata è un negozio cambiario **accessorio** a mezzo del quale il girante con una dichiarazione scritta o sottoscritta nel titolo, e con la consegna del titolo stesso trasferisce nel giratario la proprietà della cambiale e tutti I diritti ad essa inerenti, rimanendo, per di più, il girante solidariamente responsabile per l'accettazione ed il pagamento"*.

This explicitly speaks of the delivery of the document itself. Remember that credit instruments are literal and necessary so by signing it and delivering it, it transfers title of ownership to the endorsee and all the rights emanating from it. With that being said, even though the endorser has transferred the BoE, he remains responsible for the acceptance and the payment on the bill. So, as a general rule, an endorser will remain liable on a BoE because typically, when you transfer a BoE, it is as if you are transferring money. So, you have sold it. He is joint and severally liable with the drawer or other endorsers.

When a bill is transferred by endorsement, unless the endorser says no more endorsements, that bill can be transferred again whereby there is no limit on the number of times that it can be endorsed. **The first endorser will be the original payee**. So, the original holder will be the first person who will endorse.

Form – how is the transfer made?
Article 138

> **138.** The endorsement is made on the back of the bill, or on a slip of paper called an *allonge* which, when necessary, is attached to the bill itself.

This says that you can either have a slip of paper writing the name of the endorsee and the signature or else you flip it over and sign it at the back. So, **it must be in writing and signed**

by the endorser. It is perfected by the delivery of the bill to the person you have endorsed it in favour of (endorsee). So, you sign and deliver because the holder will be the person entitled to pay you. You cannot get paid on a BoE unless you present it for payment. Indeed, an essential feature of any credit instrument is that the document is 'necessary'.

Types of endorsements

1) **Specific** – specifies the name of the endorsee (the name of the person I am endorsing to) and the date of endorsement.; or

2) **Blank** – signature of the endorser only whereby he signs it and passes it on. This creates some legal questions of its own because Maltese law doesn't allow a person to issue a bill or endorse to bearer. But if I endorse a bill without specifying the name of the endorsee, can't that bill then be passed on to anyone, therefore assuming characteristics of a document to bearer? In practice yes, but as a matter of law, **the person who first receives the endorsed bill, by just giving it to someone else has not transferred title to it but has simply passed it on**. It is only the person who has received it from the endorser that has actually acquired title to the bill.

   When you endorse a BoE without saying who you are endorsing it to, it kind of assumes the characteristics of a document to bearer. In *Dr Alfredo Sultana v. Joseph Lanzon* (Appeal 21/10/1932), the Court held that although Maltese law recognises a BoE as a document to title, **it still recognises the validity of a BoE which has been endorsed in blank**, so without specifying the name of the endorsee, and it still gives the legal effects to the holder in the sense that whoever holds the bill **legitimately**, meaning that it was endorsed to him, even though his name is not written on the back of the bill, he will still have the right to enforce the BoE.

   The Court held that, "*Sebbene la legge nostra, pari a quella continentale e contrariamente al Sistema inglese, caratterizza la cambiale come un titolo all'ordine, tuttavia tutti gli autori… sono concordi nel riconoscere alla cambiale che venga girata in bianco la mobilità e alcuni degli effetti di un titolo al portatore, nel senso che chi possiede legittimamente [la cambiale] possa alla scadenza esigerne il pagamento senza che il suo nome figure sul foglio*."

So, what happens if the BoE is endorsed in favour of a person and that person delivers the BoE to a third party without formal endorsement, i.e., not signed by second endorser?
This was treated in *Alfonso Maria Farrugia v. Eduardo Demarco* (Appeal 06/04/1903). In this case, plaintiff Farrugia was the holder of the BoE, which was given to him by the payee (against payment), but it was not endorsed. The bill itself was otherwise valid in terms of all the requirements in article 132. Plaintiff claimed that he had 'purchased' the BoE and was entitled to payment. The Court rejected the claim, saying that **the only way you can transfer title to a bill and therefore, acquire the right to sue on the bill, is by endorsement**. So, the person who gave it you had to sign on the back. So, the only remedy he had was to get the bill signed by the endorser. That is to say, the only remedy available to the holder was to oblige the payee to endorse the BoE in his favour. The point is that if the BoE came to someone in the manner different to what is required for a proper endorsement, then there is no legal transfer. Therefore, the person holding it cannot use the *actio cambiaria*.

The Court held that, "*Sebbene la legge nostra, pari a quella continentale e contrariamente al Sistema inglese, caratterizza la cambiale come un titolo all'ordine, tuttavia tutti gli autori… sono concordi nel riconoscere alla cambiale che venga girata in bianco la mobilità e alcuni degli effetti di un titolo al portatore, nel senso che chi possiede legittimamente [la cambiale] possa alla scadenza esigerne il pagamento senza che il suo nome figure sul foglio*."

Rights of holder where bill is not endorsed to him
Article 147

> **147.** The mere possession of a bill of exchange not endorsed to the holder entitles the holder to present such bill for acceptance, and to protest it for non-acceptance.

In fact, article 147 says that if the bill has not yet been accepted, I may give it to somebody and say go to the drawee and get it accepted. So, someone who is holding it but has not received it by endorsement can go and get it signed by the drawee to accept it, but **he cannot demand payment on the bill** because he does not have title to it.

Payment of bill not endorsed to holder
Article 192

> **192.** A person who claims the payment of a bill which has not been endorsed to him, but who, at the same time, proves that the bill was remitted to him to receive payment thereof, may, upon giving sufficient security, demand payment of the bill, and protest it in case of non-payment.

This provision is saying that if you can prove that the person gave it to you to go and collect the payment, you can demand the payment, but **you have to give security** because if it transpires that this wasn't true, you have to give me my money back. This is distinguished form Article 142.

Effect of restrictive endorsement
Article 142

> **142.** Where the endorsement is made with the order "for collection" or any other expression implying an order by the endorser, such endorsement does not pass the property in the bill, but merely transmits to the endorsee the order therein contained, and in such case the endorsee can only transmit to other parties the same order by a similar endorsement.

This is the type of endorsement called '**endorsement for collection only'**. This is a special type of endorsement which is appointing someone as an agent/mandatory to **collect payment on behalf of someone else**. Indeed, this is equivalent to a mandate to receive payment on behalf of the endorser.

In this case, I am signing on the back of the bill while saying 'for collection only'. So, I am not transferring title to the person to receive the payment, but to collect it for me. That person can also endorse it to somebody else but only for collection.

Unlike Article 192 where you have a bill which you hold but wasn't endorsed to you, in this case you do not need to ask for security because you have an endorsement for collection. In a normal endorsement, if I have transferred/endorsed the bill, I don't have a right to enforce the bill whilst in the case of an endorsement for collection, I can still enforce my rights because I am still the person who is entitled to payment. I only entitled someone to collect the payment. If that person doesn't collect that payment, he can give me back the bill and I can still sue on that bill to the person entitled to pay me. So, the endorser himself can still act on the bill and this was confirmed in *Dr Alberto Magri noe v. Emmanuele Gauci et* (01/02/1932).

However, if that person collects the money, the drawee is released from the bill since he satisfied his obligations on that bill and is therefore no longer liable. This was confirmed in *Chev. Reginald de M Smith noe v. Thomas Borg et* (06/05/1939). This applies even if the person who collected the money doesn't pass it on to the endorser. The endorser loses his right on the bill and therefore, then it becomes an issue between the endorser and the endorsee for collection.

Effects of endorsement

1) Transfer the right to receive payment

Endorsement is the only legal means of transferring property in a BoE. Moreover, it is important to note that there must always be the signature of an endorser, whether specifying name of endorsee or not, that is, whether the BoE is specific or in blank.

The delivery of bill without endorsement does not transfer right to payment (**Art. 147**). In *Dr Giovanni Sammut v. Ignazio Pecorella* (Appeal 28/02/1936), it was stated that "… *la legge non riconosce come mezzo di trasferimento della proprieta' di una cambiale la consegna materiale della stessa per parte del possessore, ma tale trasferimento deve seguire mediante girata, almeno in bianco*". Here the Court is confirming that **the mere delivery only of the BoE does not constitute an endorsement**. But the endorsement requires a signature, even if it is an endorsement in blank.

One must distinguish this from the transfer on the right to payment from assignment under general Civil Law rules. In a BoE, no separate agreement required and there is no need to notify the debtor

So, this is what you would have to do to transfer any right of payment under Civil Law. In order to transfer a right to payment if you do not have a BoE, you have first of all have to draw up an assignment agreement, and you also have to notify the debtor by judicial act. So, if I owe Mr X money and Mr X wants to transfer his right to receive payment to Mr Z, they have to enter into an agreement between them and notify me, otherwise the assignment is not valid. On the other hand, once there is a BoE, all these formalities are gotten rid of.

2) Endorsee acquires rights that are strictly autonomous

While there are conflicting judgements regarding autonomy of BoE in so far as original parties are concerned, there is consistency in case law in the sense that BoEs confer strict autonomous rights on the endorsement. So, once there is an endorsement on the bill, it

creates an autonomous and independent obligation which is a distinguishing feature of BoEs. In this way, one can distinguish between assignment of debt under civil law rules

The endorsee/holder of a bill receives an **autonomous right to receive payment** on that bill, irrespective of whatever happened between the underlying parties to the original transaction in virtue of which that BoE was issued. This is the principal of strict autonomy under Article 197 and is fundamentally important. Keep in mind that fraud corrupts everything, *frans omnia corrupit.* So, if something is done with fraudulent intent, then you cannot use this particular mechanism of endorsement. But, in your typical ordinary transactions, once a BoE has been endorsed, the holder of that BoE has acquired an independent right to get paid, irrespective of the underlying transaction between the parties.

Pleas personal to endorser
Article 197

> **197.** Pleas which are personal to the endorsers may not be set up against the holder of a bill.

For 'endorser', think previous holder/payee. If the drawer/drawee has a defence not to pay which is personal to his relationship with the endorser, the drawer/drawee **cannot use that defence against endorsee/holder**. This is the rule of strict autonomy whereby there exist no exceptions in Art 197. It is an essential characteristic of BoEs and credit instruments in general

For 'pleas' think of 'defences'. The endorser is the person who was holding the bill before he passed it on. if I have a plea which is personal to me because it relates to my relationship with the person who issued the bill in my favour, I cannot use that defence against the holder of the bill when he comes and asks for payment.

In *Major Hannibal A. Scicluna noe* vs *Charles Vella noe* (18.03.1965), the Court held, "*L-iskop ta' kambjala hija li tista' tigi girata malajr u meta tigi girata takkwista karattru awtonomu. Minghajr kambjala, kreditur jista' jaghmel kuntratt ta' cessjoni ta' dritt taht il-ligi civili, pero' fil-konfront ta' terz akkwirent, id-debitur xorta jkun jista' jissolleva eccezzjonijiet li jolqtu n-negozju…. Ghalhekk inholqot il-kambjala. Peress li min jixtri kambjala qed jixtri titolu ta' kreditu awtonomu, jaf li l-kwistjonijiet naxxenti mill-obbligazzjoni li wasslet ghal dak il-kreditu, jibqghu estraneji ghalih, ghax hu, bhala terz akkwirent, jista' jfittex biss fuq il-kambjala*"

One of the features which makes BoEs so useful in trade is that they can be transferred easily, and when it is endorsed, it acquires an autonomous character. Without a credit instrument, a creditor can enter into a normal assignment of rights under Civil Law. In a normal assignment of a debt, the assignee simply steps into the shoes of the assignor. So, the issue of pleas personal to the assignor falls away; there is no benefit of this rule. Once I step into the shoes of the person who has assigned the right to me, I step into the shoes whether they are clean or dirty. The Court recognises that this is why BoE were created. Because the acquirer is buying an autonomous right to get payment, he knows that if there

were any issues in the underlying transaction, those are extraneous to him and do not concern him because his right to payment emanates from the BoE itself.

Also, on this point, Vivante said, "*La girata ordinaria, sia in pieno, sia in bianco, investe il giratario di un diritto autonomo. Le altre forme eccezzionali, anomale di trasferimento non trasferiscono al possessore che il titolo derivantogli dal proprio autore*."

3) Renders endorser liable on BoE

The endorser remains liable to every succeeding holder of the bill. So, the endorser remains liable on the bill in the same way the original drawer does.

Liability of endorser

Art 140(1)

> **140.** (1) The endorser is liable to every succeeding holder for the acceptance and payment of the bill.

The endorser is placed in same position as drawer. This warrants solvency of drawee since there is joint and several liability with drawer and acceptor and prior endorsers (Art. 168). With that being said, the endorser may restrict his liability (Art 140(2)).

So, another effect of endorsement is that the endorser remains liable on the bill, together with the drawer. These are the parties who remain liable on the bill in addition to the acceptor; the drawee. The acceptor is the first person that you will go to for payment since he is the person who is nominated t pay and who has obliged himself to pay. But if that acceptor doesn't pay, I have residual rights over the BoE as the holder. So, I can go to the drawer and any endorser for payment.

The procedure is different. One of them is a direct action so if the bill has been accepted and there is an acceptor on the bill, I can go for payment straight to the acceptor and file directly against the acceptor. If that acceptor doesn't pay, I have residual rights against the other people on the bill, including the drawer and the endorser or any endorser. Before I can go to them, I have to **protest the bill**.

The endorser remains liable on the bill, and he remains liable jointly and severally with the drawer and the acceptor. This means that the holder of the bill can sue any one for the full amount. You can choose who to sue for the full amount.

Qualified endorsement

Article 140(2)

> (2) Nevertheless, where the endorsement is qualified by the words "without recourse" or by some other form of words implying a like qualification, the endorser who has so qualified the endorsement is exempted from all liability on his endorsement.

This says that if an endorser doesn't want to remain liable on the bill, when he is endorsing it, he can restrict his liability. In that case, the endorsee (the person who is buying the bill) is going to know and will either accept to take the risk or not. If the endorser says I am sending

it to you without recourse, he is saying that if the bill isn't accepted or is accepted but not paid, go to somebody else but not to me.

Presentment

This refers to the act of the holder of the BoE presenting the bill for acceptance and/or payment. Remember that the BoE as a credit instrument is a 'necessary document' so, in order to exercise your rights on a BoE, you need to physically present the original BoE.

The law distinguishes between two types of presentments –

1) **Presentment for acceptance** of the bill (at a time that there is a drawee who has been nominated but who has not yet accepted);
2) **Presentment for payment** on the maturity date.

Presentment for Acceptance

This is presentment of the bill to the drawee to accept the BoE by signing it. So, the drawer issues the bill, and nominates the drawee as a person who is going to pay in favour of the payee. Upon presentment, the drawee has not yet signed. One has to keep in mind that the drawee has no obligation to sign, but once he sings, he becomes liable.

As the holder of the bill, if the BoE has not yet been signed by the drawee, I can but I am not obliged, present bill for acceptance in order to get certainty as to whether or not that drawee is going to accept. So, it is not due yet, but I want to make sure that the drawee is going to accept it. The holder is not obliged to present the bill for acceptance; **he can choose to wait to the maturity date and then just present it for acceptance and payment**.

Certain bills need not be presented for acceptance

Article 221

> **221.** The holder of a bill drawn at a certain time or at a certain day, or at a certain time after date, is not bound to present the bill for acceptance, but if he elects to present it, he is bound to protest it in case of non-acceptance.

But according to **Art. 221**, if he presents it for acceptance and it is not accepted within 24 hours, he must protest the BoE **to preserve right of recourse against the drawer and endorsers**. So, he would have to go through this protest formality to confirm his eventual right to sue the endorser or drawer on the BoE.

Note that when there is an endorsement of a bill which has still not been accepted, the endorser can impose a time within which the bill has to be presentment for acceptance.

Where endorser specifies time for presentment of bill

> **146.** Where the endorser has in his endorsement specified the time for the presentment of the bill to the drawee, the liability created by the endorsement ceases, if the bill is not presented for acceptance within the time so specified.

Remember that the endorser is going to remain liable on the bill. So, in the case that he says he doesn't want to remain liable indefinitely and he does not know what is going to happen,

he imposes a time within which the person he is going to give the bill to has to go to the drawee and present it to him for acceptance. In this way, **he will know whether or not it has been accepted**.

Presentment for Payment
Here you have to assume that you either have a **bill which is payable at sight** or a **bill which has matured**, so the time for payment has arrived.

This is presentment to the acceptor or if there is no acceptor, to any other person who is liable on the bill. If the drawee has accepted the bill, **it is an obligation to first present the bill to the acceptor**. If it has not been accepted, you will then present it to the other persons liable on the bill.

Presentment for payment to be made at maturity
Article 223

> **223.** The holder of a bill shall present it for payment on the day it falls due.

The BoE can **only be presented for payment on maturity** (**Art. 223**), unless the bill is payable at sight or at a time after sight or at usance. Of course, if it is payable at sight, there is no maturity which means that once you present it, it is deemed to be presented for payment and if it is a time after sight or at usance, the law stipulates the time. So, there is no maturity date, but you still have to present it for payment.

Where drawee is adjudged bankrupt
Article 182

> **182.** A bill shall be deemed to be due from the moment the drawee is adjudged bankrupt, and in such case the holder may protest the bill as provided in article 191; but the drawer and the endorsers may, if called upon to pay the bill, postpone payment until the day on which the bill shall be due according to the terms in which it is drawn, on giving the security mentioned in article 154.

If at any time before the maturity date, the drawee becomes bankrupt, the BoE becomes due immediately and can be presented for payment. So, this is an exception to the rule that you have to present the bill on the maturity date. I can present it before if the drawee has gone bankrupt.

Distinguish between a direct action and an action of recourse. Direct action is filed against the **acceptor** of the bill, so only if the bill has been accepted. So, if a bill has been accepted, on the date for payment I will present it for payment and if he does not pay me, I can take a direct action against him. So, I do not have to do anything before.

If the bill has not been accepted or it has been accepted but the acceptor hasn't paid and you want to take action against someone else on the bill, the drawer or the endorser, then you first have to protest the bill and you then take an action of recourse. It is a secondary action. So, you have to go through the protest procedure first before you can take the action against the other people who are liable on the bill.

At sight
Article 173

> **173.** A bill expressed to be payable at sight is payable on presentment.

With regard to bills payable at sight or at a time after sight or at usance, where the BoE is payable at sight, it is payable on presentment. Therefore, **presentment is deemed to be a presentment for payment**. If the bill hasn't been accepted yet, it will be deemed to have not been accepted by the drawee. So, **refusal to pay is tantamount to refusal to accept**. This means that the holder has to take the action of recourse. **If the bill is not accepted, you do not have a direct action, so the only remedy is the action of recourse**.

In *Alberto Magri noe* v. *Emmanuele Gauci et* (01/02/1932), the defendant **pleaded the nullity of the BoE because it was not accepted**. The Court confirmed that acceptance is not an essential requirement of a BoE. Non-acceptance does not invalidate BoE. On presentment of a BoE payable at sight, it is always deemed to be presented for payment. If it has not been accepted, it is deemed not to be accepted, and therefore not paid. In that case, **the bill is still valid**, but I only have an action of recourse against the drawer, or if it has been endorsed, against the endorser. So, **non-acceptance does not invalidate the bill.**

The presentment of a BoE payable at sight or at a time after sight or at usance (without maturity date) **can be made at any time**. BUT, when you issue a bill payable at sight, the drawer is left 'exposed' for a period of time. It is indefinite and this creates an **element of uncertainty**. So, what the law says is that to preserve right of recourse against drawer and/or endorser, the BoE must be presented within a prescribed time (one month in case of BoE issued and payable in Malta) – **Arts 218 – 220.** This is archaic but **the intention was to avoid leaving persons liable on bill exposed indefinitely**. So, it creates a system whereby you can obtain certainty for how long you are going to remain exposed on the bill.

Holder to present bill for payment or for acceptance
Article 218

> **218.** The holder of a bill of exchange payable in Malta at sight, or at a certain time after sight, or at usance, is bound to present it for payment or for acceptance, within the times prescribed in the next following article, to be reckoned from the date of the bill, under penalty of forfeiting his right of recourse against the endorsers, and even against the drawer, if the latter has provided funds to meet the bill.

Times within which presentment is to be made
Article 219

219. The times referred to in the last preceding article are-

(*a*) six months, if the bill is drawn at a place in Europe, Asia Minor, Syria, Egypt, Tripoli, Tunis, Algiers or Morocco;

(*b*) one year, if the bill is drawn at any other place;

(*c*) one month, if the bill is drawn and made payable in Malta:

Provided that in time of maritime war, the times mentioned in paragraphs (*a*) and (*b*) shall be doubled.

Bill payable outside Malta
Article 220

220. The same forfeiture mentioned in article 218 shall be incurred by the holder of a bill drawn in Malta, and payable, whether at sight, or at a certain time after sight, or at usance, in any of the countries mentioned in the last preceding article, if the holder shall not present it for payment or acceptance within the times stated in that article.

When holder loses his right of recourse
Article 235

235. It shall not be competent to the holder of a bill, in case of non-payment, to exercise his right of recourse against the drawer or the endorsers -

(*a*) if the bill was not presented for acceptance, where necessary, or for payment, to the drawee or the parties mentioned in articles 228 and 229;

(*b*) if the holder has refused acceptance or payment by a party intervening for the honour of the drawer or of any of the endorsers.

This is very important. Since you have the person who is primarily liable on the bill who is the drawee, who becomes the acceptor once he accepts, before you can exercise your right of recourse, you have to first attempt to get acceptance and then payment from the drawee, the acceptor. So, first you go to the drawee asking to accept it, or else you simply present it on maturity date for payment, and only if he doesn't pay you have your right for recourse. So, first you go to the acceptor, the drawee and only if he doesn't pay, you can sue the other parties who are liable on the BoE. And to do so, you have to protest the bill.

Acceptance

Articles 148 – 157 of the Commercial Code

Acceptance applies to the drawee. It is defined as **the confirmation by the drawee of his assent to the order given by the drawer, i.e., the order to pay the BoE on maturity date to the holder thereof**.

Keep in mind that -

- The drawee is not obliged to sign BoE (think a 3-party bill where the drawee and the drawer are two different people). He only becomes bound once he signs it on acceptance.
- The drawee becomes bound on BoE only on acceptance. Moreover, a mere promise to accept at a future date is not sufficient – **Art. 157**. You only have the right that is confirmed on the bill, so he has either accepted or he has not. It is a necessary and a literal document whereby all the rights have to emanate from the bill itself.

Promise to accept bill
Article 157

> **157.** A promise to accept a bill of exchange does not amount to an acceptance, but the promisee may maintain an action for damages and interest against the promisor if the latter refuses to perform the promise.

Form of Acceptance
Article 148

> **148.** The acceptance of a bill of exchange must be made on the bill itself by the signature of the acceptor, with or without the words "I accept" or "accepted".

The fact that the law says that acceptance of the bill must be made on bill itself by signature of drawee with or without the words "*I accept*" means that the signature alone is sufficient.

When acceptance is to be dated
Article 149

> **149.** The acceptance must be dated, if the bill is payable at a certain period after sight or at usance. The omission of the date of acceptance renders the bill payable at the time specified in the bill, such time to run from the date of such bill.

The date of acceptance has to be noted, if the BoE is payable at a certain time after sight or at usance (21 days after presentment for acceptance). We need to have the date because **nuisance means 21 days from the date it is presented from acceptance**.

But **the absence of the date will not invalidate acceptance**. This was confirmed in *Dr G.Rapinett* v. *A.Terreni* (Appeal 26/01/1874) which held that the bill will be deemed to be

payable on the maturity date if stated or by reference to the issue date. So, they do not need to include the date when the bill was accepted.

Conditional / In Part

Acceptance cannot be conditional but may be partial
Article 150

> **150.** (1) An acceptance cannot be conditional, but it may be partial as to the amount to be paid.
>
> (2) A conditional acceptance shall be deemed to be a refusal to accept.

Article 150 deals with a conditional acceptance or an acceptance for only part of the bill. So, a conditional acceptance is invalid, it is tantamount to refusal, and this is because there is an **element of uncertainty** as to whether that condition will occur or not. So, one cannot accept on condition that for example, a future event will happen.

With that being said, acceptance for **part only of the amount** in the bill is allowed. There is nothing uncertain about this. The holder of the bill will have a direct action only for the amount that has been accepted. For the rest, he will have an action of recourse against the other people liable on the bill.

Time for Acceptance

When bill is to be accepted
Article 151

> **151.** (1) A bill of exchange shall be accepted on presentment, or at the latest within twenty-four hours after presentment.
>
> (2) Where, after the expiration of the said time, the bill is not re-delivered, accepted or unaccepted, the party who retained the bill shall be liable in damages and interest to the holder.

There is no obligation to present a bill for acceptance, but if it presented and it is not signed for acceptance within 24 hours, it is deemed to not have been accepted and then you have to **protest the bill to preserve your right against the other persons liable on the bill**. The law also says that if you present the bill to the acceptor and the acceptor doesn't return it to you within 24 hours, he will become liable on the bill. This is because the document is important to the holder. So, failure to return accepted bill within this time renders drawee liable for damages

Effect of Acceptance

Obligations of acceptor
Article 152

> **152.** (1) The acceptor of a bill by accepting it engages that he will pay the amount thereof, and cannot be relieved from such engagement, even though the drawer, or the party for whose account the bill was accepted, may, without his knowledge, have become bankrupt previously to the acceptance of the bill.
>
> (2) Nevertheless, when the acceptor has not been put in funds, he may resort to the drawer or to the party for whose account the bill was accepted; in any such case the acceptance raises only a rebuttable presumption against the acceptor, who shall have the right to prove the contrary.

It renders the drawee liable for payment (he becomes the acceptor). Moreover, it is an obligation to pay on maturity date, not on date of acceptance. Very often the acceptance is signed on the date of issue so, that's not the date that the amount is due. Once the drawee signs, and becomes the acceptor, **he becomes the first person liable on that BoE**. That is an **irrevocable liability to pay**. So, the acceptor remains liable even if the drawer becomes bankrupt.

Parties to a bill jointly and severally liable
Article 168

> **168.** All parties who have signed, accepted, or endorsed a bill, are jointly and severally liable for warranty to the holder.

All the parties on the bill are jointly and severally liable. So, although you have to go to the acceptor first, if he doesn't pay, I have a right to sue anyone then on a BoE.

Opposition to payment of bill
Article 199

> **199.** No opposition to the payment of a bill shall be allowed except in case of loss of the bill or bankruptcy of the holder.

This provision dealing with this irrevocable liability to pay says that **no opposition may be made to the payment of a bill except in case of loss of the bill** (you cannot demand payment on a bill which has been lost) **or the bankruptcy of the holder**. In the latter case, a curator in bankruptcy steps in. This is because if the holder is bankrupt, through the bankruptcy procedure in the Commercial Code, the Court will have appointed a curator and it will then be the curator who will be administering the affairs of the bankrupt and therefore, it is the curator who will be able to enforce the bill. So, if the holder is declared to be bankrupt, then he cannot enforce the bill.

Presumption of supply of funds versus proof of supply of funds

Acceptance implies supply of funds
Article 133

> **133.** (1) An acceptance implies the supply of funds, and constitutes a proof thereof as regards the holders and the endorsers.
>
> (2) The drawer alone, whether the bill be accepted or not, is bound to prove, in case of dispute, that the persons on whom the bill was drawn were provided with the necessary funds for the payment of the bill at maturity; otherwise he is bound to warrant the bill, even though the protest is made after the lapse of the prescribed times.

Article 133 speaks of the presumption that the acceptor has been put in funds. The minute the drawee signs and becomes the acceptor, there is a legal presumption that the acceptor has been put in funds by the drawer to pay. This is a rebuttable presumption. The acceptor as a right to prove the contrary. If the acceptor has not been put in funds, and he pays on the bill because he is bound to, he can go onto the drawer to pay him back.

As between the acceptor and the holder, acceptance is proof of supply of funds. The acceptor cannot raise the plea that he has not been put in duns against the holder since this is an irrevocable liability to pay. On this point, see Giovanni *Scicluna noe* v. *Giorgio Borg Barthet noe* (20/03/1931).

- As between acceptor and drawer, acceptance = presumption that acceptor has been put in funds by drawer:

- As between acceptor and holder, acceptance = proof of supply of funds:

What if the acceptor signs but the drawer doesn't?
The bill is still invalid. Even though somebody has accepted to pay on the bill, if it wasn't signed by the drawer, that bill is not enforceable. What happens is that the document has a different value. It doesn't have the value of a BoE, **but it can be used as evidence** whereby it simply records in writing that somebody owes a debt to somebody else.

So, here we are referring to essential characteristics of BoEs **that absence of signature of drawer invalidates the BoE**. So, in the absence of the signature, it constitutes evidence of acknowledgement of debt by acceptor as confirmed in *Gaetano Gambin* v. *Capt Apostoli Garofalo* (24/03/1877)

Moreover, the drawer may sign after the acceptor whereby the BoE will be valid as confirmed in *Giuseppe Said* v. *Raffaele Debono* (31/03/1906).

Actions Arising in Bills of Exchange (Direct Action vs Indirect Action)

Direct Action
This is an action against acceptor. So, the direct action can only be brought against an acceptor.

When talking about direct action, you have to **assume that the drawee has accepted the bill for payment**. The action against anyone else is the action for recourse.

Indirect Action / Action of Recourse
This is an action against any or all other parties liable on BoE. So, the drawer, the endorser, the acceptor for honour (**Arts. 158-167**), and the *avaliseur* (surety) (**Arts. 169-171**), except endorser 'without recourse'. Moreover, the action of Recourse subject to Protest Procedure.

Acceptor for Honour – If BoE has been presented to drawee for acceptance but drawee refuses to accept, holder must protest BoE to acquire right to sue the other people liable on the bill (the drawer or endorsers on BoE). At this stage any third party may intervene to accept the BoE for honour of the drawer or any endorser. So, the drawer or endorser might introduce somebody to accept the bill in lieu of the drawee. **He is not the drawee** but is signing for a third party and accepting for honour. Acceptance for honour must be written on bill and signed by acceptor and returned to holder. Holder must present bill for payment to drawee (even though he did not accept) and if payment not made must protest the bill for non-payment in order to preserve right to sue acceptor for honour.

When the bill matures, I will present it first to the acceptor for honour and if he does not pay, I will protest the bill and have a right of action against him, as I will have the same right of action against the drawer or any endorser.

Surety *par aval* – This is a third-party guarantee to pay bill which can be given on bill itself or by separate act. In other words, this is somebody who stands in a surety so if no one else pays on the bill, he will pay. Again, if somebody has stood in to grant security that the bill is paid, there is a right of recourse against this person. Indeed, the *Avaliseur* becomes jointly and severally liable on the bill with drawer and endorsers. The holder must protest the bill for non-payment to preserve action of recourse against the *avaliseur*.

Direct Action and Action for Recourse are not mutually exclusive
The direct action and the action for recourse and not mutually exclusive. So, the holder of a bill can go with both. He can protest the bill and then decide to file an action against the acceptor, if there is one, and against the other people liable on the bill. This is due to Article 168 which says that all parties are jointly and severally liable on a bill which implies that **the creditor can sue either all of them together**, or any one of them for the whole amount. So, by inference, it also means that I can sue the acceptor but that does not exclude my right also to sue the others. This doesn't mean that I will get paid more than once. The people will sort it out between them afterwards.

How right of recourse may be exercised
Article 237

> **237.** The holder of a bill protested for non-payment may exercise his right of recourse against all the obligors jointly, or against only one or some of them, without forfeiting his right of recourse against the others not sued on the bill, and he shall not be bound to follow the order of the endorsements.

So, in this article the same principle applies. If I am the holder of the bill and have received it from an endorser who received it from someone else, if I am taking an action for recourse, I do not have to sue first the person who gave me the bill but anyone down the chain. It is my choice who to sue, or I can sue all of them.

Of course, owing to the fact that it is an indirect action, the is protest required for recourse action against parties other than acceptor.

Action Triggers

What happens if the BoE is presented for acceptance but is not accepted?
Again, make a distinction between presentment for acceptance and presentment for payment. The former can be done at any time, you do not need to wait for the bill to mature. In fact, it assumes that the bill is not yet due because otherwise, if it is due, the minute you present it, it will be deemed to be presented for payment.

If you present the bill but it is not accepted, then Article 153 comes into play. At that point in time, within 24 hours, you need to go through the protest procedure to protest the fact that the bill was not accepted because that means to the holder that the drawee is not willing to pay so to persevere my right against the other parties liable on the bill, then I have to make the **protest procedure** to preserve my right – Article 233. So, you protest the bill, and you notify the person who has given you the bill. The person who has given you the bill, if he has received it from someone else, will then notify that other person. In this case, the endorsers and the drawer are bound to give security for payment on the maturity date – art. 154. So, they can either pay at that point in time or they can provide security that it will be paid on the date. What that does is it preserves the right of action of recourse against the drawers and endorsers on maturity. Again, subject that on maturity, you have to present the bill for payment first, if it is not paid, you protest the bill for non-payment and then you sue.

- Art. 221 and 226 – No obligation to present bill for acceptance but if presented and not accepted bill must be protested for non-acceptance within 24 hours
- Art. 153 – "*A refusal to accept shall be proved by means of a protest*…"
- Art. 233 – Holder must give notice of non-acceptance and protest to his endorser; endorser must then give notice to prior endorser and so on
- Art 154 – Endorsers and drawer bound to provide security for payment on maturity
- Preserves right of action of recourse against drawer and endorsers on maturity
  - Subject to protest for non-payment – art. 227(1)

What happens if the BoE is presented for payment, but payment is not made?
So, in this case the bill is presented for payment not for acceptance.

If it was accepted, you must first present it to the acceptor. When a BoE has been accepted, or if it is not accepted there is a drawee, first you present it to the drawee or acceptor for payment because only then will you know where or not that bill is going to be paid. If he doesn't pay within 24 hours, that triggers your options **either the direct action against the acceptor** or else, **you protest the bill to preserve your right to sue the other people on the BoE**. To preserve your right of recourse, you go through the protest procedure.

- Art 223 – "The holder of a bill shall present it for payment on the day it falls due"
  - Note – If payable at sight or at certain time after sight or at usance and payable in Malta, must be presented within 1 month
- If accepted, must be presented for payment to acceptor (see Art 235)
- If acceptor does not pay within 24 hours:
  - Direct action against acceptor (if accepted)
  - Right of recourse against other parties bound on BoE
    - Subject to obligation to protest BoE for non-payment

What if BoE is accepted (the drawee signed it) **but acceptor's financial position deteriorates?**
So, before the maturity date, the drawee's financial position deteriorates. Here, the law in Article 155 isn't referring to bankruptcy. The latter arises through a court judgement where someone is declared bankrupt by a Court.

But in the meantime, the holder of the bill might realise that the financial position of the acceptor, so the person who is supposed to pay him when the bill matures, has materially deteriorated. In that case, **Article 155** states that he has a right to request security from the other people liable on the bill.

This should be distinguished from a situation where the drawee or if he accepted, the acceptor, is declared bankrupt before the date that the bill matures. In that case, the law says that immediately the holder may protest the bill for non-payment because **Article 182** says that if the acceptor or the drawee is adjudged bankrupt before the maturity date, the bill is deemed to have fallen due, no matter what the maturity date was. At that point in time, you have to protest the bill to reserve your right against the other people on the bill however, they can say to wait for the maturity date for payment.

What happens if drawee becomes bankrupt before the maturity date?
So, according to Article 182, if the drawee is adjudged bankrupt, the holder may protest the bill for non-payment (to preserve action of recourse). It is for non-payment' because Art.182 says that the bill shall be deemed to have become due if drawee is adjudged bankrupt. Moreover, the other parties bound on bill can postpone payment until the maturity date.

What happens if the <u>acceptor</u> becomes bankrupt before the maturity date?
On the other hand, **<u>Art 227(2)</u>** states that if the acceptor becomes bankrupt before the bill falls due, the holder may protest the bill and exercise the action of recourse. Here, there is no reference to right to postpone payment in this case.

To recap, Article 182 is talking about the bankruptcy of the drawee. So, the drawee who becomes bankrupt. The drawee has not accepted the bill. If he becomes bankrupt, it means that even if he accepts, he won't be able to pay it. So, there I can protest to preserve my right and the other parties can say that they will pay on maturity.

If, however, the acceptor who has accepted becomes bankrupt, the law doesn't speak about their right to postpone the payment whereby you protest the bill and can demand payment immediately. When somebody accepts the bill, there is a legal presumption that that acceptor has been put in funds to pay the bill. A drawee doesn't have the obligation to accept the bill; it is only when he signs that he becomes the acceptor and becomes obliged on the bill and at that point in time, he is presumed to have received the money to pay the bill from the issuer.

Protest
Actions for Recourse (<u>Art 247-251</u>)
In practice, most of the bills that are issued are two-party BoEs so the minute they are drawn up, they are accepted. So, it is quite uncommon for there not to be an acceptor.

This is a **pre-requisite to an action of recourse**; the action **<u>against the drawer and/or the endorsers</u>**, in case the bill has been endorsed.

<u>You apply this procedure if –</u>
a. You have **presented the bill for acceptance to the drawee, and it hasn't been accepted** (Art 153 – *A refusal to accept shall be proved by means of a protest termed protest for non-acceptance*); or
b. You **presented it for payment, and the acceptor hasn't paid** (or drawee of bill payable at sight) (Art 191 – *A refusal of payment of a bill shall be proved by means of a protest termed protest for non-payment*).

Formal Procedure
- The holder goes to the notary since the protest must be drawn up by Notary.
- At the place of business or residence of drawee (in case of non-acceptance) or other party from who payment is sought (in case of non-payment).
  - If not known or found Notary must state this in protest (which is a document drawn up by the notary)
- Must include copy of the BoE, of acceptance (if accepted) and of endorsements.
- Must specify name of protesting party (this is typically the holder, but it could be endorsee for collection – somebody who receives the bill merely for collection)
- Must include formal demand to accept or pay the bill.
- Must state whether the protested party was present or not
- Must state reason for refusal (why it is not being accepted or paid), if any
- Must be dated.

And then a document will be given to the holder which he will then use in Court when he files his action.

Effect of Protest for Non-Acceptance

Article 154

> **154.** Upon notification of the protest mentioned in the last preceding article, the endorsers and the drawer are respectively bound to give sufficient security for the payment at maturity of the amount of the bill or of the amount for which it was not accepted, or to pay the bill together with the expenses of protest and of re-exchange.

Remember that an acceptor cannot accept with conditions, but he can accept for part of the amount.

Effect of Protest for Non-Payment

Article 237

> **237.** The holder of a bill protested for non-payment may exercise his right of recourse against all the obligors jointly, or against only one or some of them, without forfeiting his right of recourse against the others not sued on the bill, and he shall not be bound to follow the order of the endorsements.

This establishes the right of action of recourse

Retour sans protet

Article 232

> **232.** A request or direction contained in a bill that it shall be returned without protest (*retour sans protêt*), excuses the holder from the obligation of protesting the bill, but shall not excuse him from the obligation of presenting the bill in due time.

Note that it is possible to exclude this formal, archaic protest procedure when you issue a bill. So, the **obligation to protest may be excluded**. If you are the endorsee of a bill, you will want to insist that it is signed without protest. But if there is nothing stated on the bill, then in order to preserve the right of recourse, then you need to protest the bill.

When protest is to be made

Article 226

> **226.** (1) The protest for non-acceptance shall be made on the day next succeeding that on which the bill was presented for acceptance.
>
> (2) The protest for non-payment shall be made on the day next succeeding that on which the bill becomes due.

The law also establishes a time within which you must exercise this protest procedure.

In the case that you presented the bill for acceptance, but drawee hasn't accepted, you have to file the protest within 24 hours from the time you presented the bill for acceptance.

In the case that the bill is presented for payment but not paid by acceptor, you have to protest it on the day after the maturity date. In the case that the bill is presented for payment but not paid by the drawee in the case that it is payable on sight, then the protest it on the day after the presentment for payment to the drawee. Because when you present a bill payable at sight, it is deemed to be presented for acceptance and payment.

Late protest (or failure to protest) nullifies right of recourse, except where the drawer has not put the drawee in funds - **Art 133(2)**. This is something that you would have to prove since the assumption is bad faith, he never intended to pay. See *Giuseppe Spiteri* vs *Filippo Farrugia et* (Appeal 28/06/1909). So, that nullifies the necessity of going through the protest procedure.

Article 133(2)

> (2) The drawer alone, whether the bill be accepted or not, is bound to prove, in case of dispute, that the persons on whom the bill was drawn were provided with the necessary funds for the payment of the bill at maturity; otherwise he is bound to warrant the bill, even though the protest is made after the lapse of the prescribed times.

Also, the law says that this does not annul your right to sue the *avaliseur* since he stepped in and gave a guarantee to pay the bill. See *Michele Magro* vs *Reginald Bernard et* (24/04/1912).

The holder once he protests the bill, has to give notice that he protested the bill from the person he received the bill from (the endorser who preceded him). Such endorser must communicate same to the endorser preceding him. In other words, he must notify the person whom he received it from.

Moreover, the notice must include copy of protest and in default, the holder cannot exercise right of recourse against the endorser.

Mode of Action

How do you exercise your rights on a BoE? How do you enforce your rights?
This is a situation where the bill has matured, or the bill which is payable at sight has been presented, and it is not paid.

Before 2004, your only option was to go to Court and file an *actio cambiaria* which is an action for payment on a BoE. In other words, BoEs did not confer the executive title status so the holder would proceed by filing the *actio cambiaria.*

This still exists today but you can avoid this full-blown action. There is another step where you can avoid going directly for a Court case.

Going back to the *actio cambiaria*, whatever action, whether direct against the acceptor or indirect against the other persons liable on the BoE subject to prior protest, it is still an *actio cambiaria.* The action is **competent to the holder of the BoE** and the BoE is necessary for the prosecution of the action.

Moreover, the *actio cambiaria* is instituted by ordinary mode of commencing judicial action. Today, it is by application or sworn application (**Art. 161 COCP**) depending on the amount. The ordinary application is in the Court of Magistrates for claims up to €15,000 and the sworn application is in Superior Courts.

You are also able to file it as a special summary proceeding; *giljottina* (**Art. 167 COCP**) whereby when you file the action you state that to the best of your knowledge, the respondent doesn't have any defences against payment on this bill. Then the respondent will have to make an appearance at the first hearing and there, he will have to convince the Court that he does have a valid reason to contest the claim, in which case it becomes the normal process.

Claims on BoE

If you had to protest the bill, you can include in your claim –

1) For Payment of BoE (the amount on the bill);
2) For Expenses of protest (if any) (expenses paid to the notary);
3) For Expenses of court action;
4) For Interest on the amount.

The issue of interest has raised legal questions in the sense that when does interest start to accrue on an unpaid BoE? So, if I have presented my BoE for payment and it hasn't been paid, when do I start calculating default interest? Date of maturity? Date of Protest? Date of filing of Judicial Action?

In terms of Article 1139 of the Civil Code, interest on payments do in civil obligations is calculated at 8% per annum. Article 1141 then says that *"where the obligation is of a commercial nature interest runs from the day on which the obligation should have been performed. In any other case it shall run from the date of intimation by judicial act."* Here, 'in any other case', refers to a civil debt and in this case, interest will only start to run from the day that I notify you that you are in default, so I have to send you a judicial intimation, which is a judicial letter or a judicial protest.

According to **Art. 5(c)** of the Commercial Code, any transaction related to a BoE is an act of trade ergo, it should be seen as a commercial obligation which means that from the maturity date, interest will start to run automatically without have to send a judicial intimation. This was confirmed in *Joseph Rutter Gatt noe v. Francis Vella* (28/02/1944).

But then in the other case, *Joseph Rutter Gatt noe* v. *Edward Galea* (30/03/1944) where bill had been protested for non-payment, and it was said that interest was due from date of protest as per Art. 258, not from the date of maturity. Therefore, the court said that because your right of action against the other person liable on the bill is not triggered on the date of payment, but on the date, you protest the bill, you have to start calculating interest

from the date of the protest. In other words, an action of recourse against drawer or endorser, interest can only be claimed from date of protest. It is a bit of a mood point because what the law says is that commercial interest starts to run from the date the action should have been performed. Now, this is an action for non-payment and payment should have been made by the acceptor first on the date that it was due. I had to protest the bill because you didn't pay. In my opinion, interest should be due from the date of maturity of the BoE but in this case, the Court didn't say so.

2004 Amendments to COCP
With these amendments, Bills of Exchange and Promissory Notes were included in the list of 'executive titles' – Art. 253(e) COCP.

This Code involves article 253 which lists **executive titles**. An executive title gives right to enforce one's claims against a third party for example, by suing out executive warrants over his property. A judgement of a court which has become a *res judicata* is final and binding and can be enforced. This gives the holder of that judgement an executive title, it gives somebody the right to enforce his claims. So, the judicial process is complete, and I can now proceed to enforce my claims. If someone continues to refuse to pay despite a judgment or another executive title, then you sue warrants, you seize his assets and so on.

A Court judgement is the most obvious executive title, but the law recognises others so that the same rights as a judgement are given without the need to file a court action.

Art 253 COCP - exhaustive list of Executive Titles
This is a powerful tool which enables you to sue out warrants enforce your rights. One should note the distinguishing feature of the inclusion of BoEs and Promissory Notes within this title.

a) Judgments and decrees of the courts of justice of Malta

b) Contracts received before a notary public in Malta, or before any other public officer authorised to receive the same where the contract is in respect of a debt certain, liquidated and due, and not consisting in the performance of an act

   This is because notaries have a public function. We spoke about the famous deed of acknowledgment of debt. Many times, it is an alternative to using a BoE. When a person owes another person money, they go before the notary and confirm that X owes Y money, and the notary publishes that acknowledgment and that gives it executive title status. So, if the payment is not made on the date stipulated in that deed, the holder can go to court without filing a court case to get paid without filing a court case on this provision.

c) Taxed bills of judicial fees and disbursements, issued in favour of the Registrar, any advocate, legal procurator, notary public, *perit*, judicial referee or witness, unless such taxed bills are impugned according to law. These are the fees which the Registrar of the courts issue after a court case. They are related to the judicial process.

d) Awards of arbitrators registered with the Malta Arbitration Centre. These are similar to judgements.

e) Bills of exchange and promissory notes issued in terms of the Commercial Code.

f) Mediation agreements made enforceable by the parties thereto in accordance with the provisions of the Mediation Act.

g) Decisions of the Consumer Claims Tribunal.

h) Decisions and awards of the Arbiter for Financial Services in accordance with the provisions of the Arbiter for Financial Services Act. This is anything relating to investments, funds and so on.

i) Decisions of the Adjudicating Panel for Private Residential Leases.

The inclusion of BoEs and Promissory Notes in list of executive titles in Art 253 COCP is quite exceptional because they are the only executive titles that lack a public/judicial element. All the other items on this have an element of publicity in them; they are all regulated by law, whilst **BoEs and Promissory Notes are private instruments**. It is the only one of those executive titles which is a private instrument, all the others are public. This shows how much the law was recognising the importance of these instruments in facilitating trade.

In other words, all other executive titles are either judicial instruments (e.g., court judgements, decisions and awards of tribunals constituted by law) or quasi-judicial (e.g., arbitral awards, mediation agreements in terms of Mediation Act, deeds received by Notary Public). On the other hand, BoEs and Promissory Notes are <u>private</u> instruments – drawn and received by private parties **without judicial intervention or public scrutiny**.

Note as well that although when we speak about credit instruments, it takes about promissory notes, BoEs and cheques, **cheques are not given the status of executive title**. So, while enforcement of Executive Title is granted to BoEs and Promissory Notes, cheques are not included.

How do you enforce an executive title?
<u>Art 256(2)</u>

> (2) The enforcement of any other executive title may only take place after the lapse of at least two days from the service of an intimation for payment made by means of a judicial act.

[Judicial intimation = judicial letter or judicial protest served on respondent/s – acceptor in case of direct action or drawer or endorser in case of action for recourse.]

As we said, an executive title is enforceable, meaning that it gives you the right to proceed to enforce your rights. The way you do that is, if you have a judgement, for example, you wait for 2 days and then you file a judicial intimation saying I have the judgement pay up or I am proceeding. If you do not receive payment within two days, you start filing your warrants. So, two days start to lapse from time of service.

But by application of Art. 253(e), in the case of BoEs and Promissory Notes, the law has granted more leeway. Probably in recognition of the fact that it is giving so much power to a private instrument, and the fact that there was no judicial protest involved, the law is affording a different procedure. It is affording a **20-day period** within which the person who receives the judicial letter **has a right to try and stop that process**.

The law provides 2 grounds upon which you can ask the Court to stop that BoE or Promissory Note from becoming an executive title.

So, the process in order to get your executive title status is that you must first send a judicial intimation or a judicial protest. 2 days after the person receives it, if he does nothing, I can enforce my rights. With BoEs, it is different whereby I have to wait 20 days. Within those 20 days, the person has a right to ask the Court to stop him.

So, by application of art. 253(e), the term two days is extended to 20 days from the judicial intimation AND, by application of same Art 253(e), the judicial letter must include certain specific wording – formality.

Special Procedure for Bills of Exchanges
Art 253(e) Proviso

> Provided that the court which is competent according to the value of the bill of exchange or promissory note may, by decree which shall not be subject to appeal, suspend the execution of such a bill of exchange or promissory note in whole or in part and with or without security, upon an application of the person opposing the execution of such bill of exchange or promissory note, to be filed within twenty days from the service of the judicial letter sent for the purpose of rendering the same bill of exchange or promissory note executable, on the grounds that the signature on the said bill of exchange or promissory note is not that of the said person or of his mandatory or where such person brings forward grave and valid reasons to oppose the said execution and in such case any person demanding the payment of the bill of exchange or promissory note shall file an action according to the provisions of the Commercial Code.
>
> The judicial letter referred to above in this proviso shall, under pain of nullity, notify the debtor of the right given to him by this proviso;

So, he receives the judicial letter, if he doesn't do anything for 20 days, the bill will be enforced against him. if within these 20 days, he can ask the Court not to allow him to get executive title and enforce the bill. BUT there are limited grounds that he can do this.

Grounds to object to enforcement of BoE are very limited

Ground 1: That the signature on the BoE is not that of the respondent

- Respondent may be acceptor, drawer, endorser and/or avaliseur
- Refers to absence of formal requirement
- Implies false signature or fraud – does not refer to lack of signature

Let's assume someone has accepted the bill, the payment date hasn't arrived, and I haven't been paid so I file the judicial letter. Within those 20 days, the acceptor goes to Court says it is not my signature. If it isn't, he can stop the execution of bill. The law is saying 'forgery', 'fraud'. The law is saying that fraud corrupts everything.

Ground 2: Where the respondent brings forward "grave and valid reasons" to oppose the execution.

- Non-specific, vague provision – subject to interpretation / discretion of Courts - "grave and valid reasons" not defined by the law.

'Grave and valid reasons' is unclear and vague. If the Court has suspended the executive title either because of the signature not being of the person sued or grave and valid reasons, I as the holder of the bill file the *actio cambiaria*. I cannot use this simplified speedy procedure.

Because this right to stop somebody from getting an executive title is so important, when you send the judicial letter, you have to inform the person of his right of 20 days. Otherwise, that letter will not be valid.

The issue is: what is a "*grave and valid"* reason?

The law has always tried to preserve autonomy of a BoE so if as part of this grave and valid reason. Let's say the person who receives the letter says but that was a BoE issued for, for example, the purchase of a car which was defective, would that be a grave and valid reason? Does it stay the execution, or should the Court say that the BoE has autonomy? There is conflicting case law on the matter.

You have to assume that if there is a problem with the BoE itself, such as when it is not signed by the drawer, that is likely to be approved by the Court as a "grave and valid reason since it attacks the validity of the BoE itself. So, absence of mandatory formal requirement for validity of BoE, e.g., absence of signature of drawer or of uncertainty of amount to be paid would constitute grave and valid reason. But when the defence speaks of the underlying relationship that give rise to the BoE, so the autonomous rights of BoEs, there are conflicting judgements.

Steps summarised:

1. Bill has matured, presented and not paid.
2. Send judicial letter or judicial protest.
3. As the holder, wait 20 days from date of service.
4. If no application filed by respondent, right to proceed to enforce executive title.
5. If respondent files application, right to proceed to enforce executive title is **provisionally stayed**.

6. Court will give time to claimant (holder) to file a reply to contest his reasons.
7. Court may or may not (but usually will) **hear the parties**.
8. Court decision:
   a) If Court is satisfied that grounds exist to stay enforcement of executive title, claimant (holder) must file action for payment
      - New application or sworn application - *actio cambiaria*
   b) If Court does not stay enforcement, claimant (holder) can proceed to enforce payment
      - Issue of executive warrants
      - Rights of respondent are reserved in relation to underlying relationship that led to the issue of the BoE.

Pleas on Bills of Exchange

What defences can someone who has been sued on a BoE raise?

Arts. 197 and 198 of Commercial Code regulate what pleas (defences) can (or rather cannot) be raised on a demand for payment on a BoE.

They both refer to personal pleas (pleas relating to a relationship between two (or more) parties). So, they are personal to two people on a BoE. By regulating what defences are not allowed to be raised, the law is protecting the integrity/enforceability of a BoE. It is protecting the person claiming on the BoE, thus separating his rights to claim payment on the BoE from the personal underlying relationship – autonomy.

Make a distinction between **real pleas**, which are pleas which refer to the formal validity of a BoE, **personal pleas** which refer to the underlying relationship between parties to a BoE and **general pleas** that attack the validity of BoEs. Not because there is a problem with the formality but because there is underlying problem, such as **fraud** or an **illegal *causa*** such as a BoE for drugs. Again, fraud corrupts everything.

Pleas

Real pleas
(a.k.a. 'objective pleas' or 'pleas *in rem*') refer to the essential and formal requisites of a valid BoE or the essential and formal requisites of a valid action. E.g., absence of signature of drawer; absence of amount to be paid; absence of signature of endorser; absence of protest in action of recourse

Personal pleas (a.k.a. *exceptio in persona*)
Those that refer to the relationship between the parties on the BoE

General pleas that attack the validity of the BoE itself (i.e., for reasons other than its form)
E.g., consent obtained by fraud or violence
E.g., illegal causa

Courts required to decide whether or not pleas (objections) relating to the underlying obligation (*causa obligationis*) can constitute "grave and valid reasons" to stay enforcement

given that bills of exchange confer autonomous rights. I.e., should the courts always refuse to stop execution of the BoE if the plea raised relates to the underlying obligation? Or are there cases where issues arising in relation to the underlying obligation can constitute a grave and valid reason?

Real Pleas
Real pleas, pleas relating to the formal validity of a BoE, can always be raised, by a party sued on a BoE. Moreover, the law does not prescribe any limitations on real pleas. In fact, Proviso to Art 253(e) refers to signature of respondent. Putting this in the context of art. 253, if there is a problem with the legality formality, such has not been signed by the drawer, the Court will consider it to be a *"grave and valid reason"*. So, the existence of a real plea does constitute a *"grave and valid"* reason **to suspend the enforcement of BoE** because such plea relates to the validity of the BoE itself.

In *Joseph Mamo* vs *Joseph Zammit* (FH, Civil Court 15/07/2014), somebody requested suspension of enforcement of BoE because it was drawn up in LM not EUR, arguing LM was not legal tender at the time. The Court agreed, confirming that questions relating to validity of BoE are 'grave and valid' and must be considered by the Court

It held that, "*skond il-gurisprudenza, il-Qorti ghandha tinvestiga eccezzjonijiet li jolqtu l-ezistenza stess tal-kambjala".*

This was also confirmed in *Integrated Electronics Limited* vs *Goldkraft Limited.*

Personal Pleas (Arts. 197-198)

Art 197 (Strict Autonomy)

> **197.** Pleas which are personal to the endorsers may not be set up against the holder of a bill.

Article 197 gives rise to the principle of strict autonomy when a bill has been endorsed, when it has been passed on to someone. The holder of the bill acquires an independent and autonomous right to get paid on that bill, barring any fraud.

This is because the holder of the bill has an absolute right to get paid once the bill has been transferred to him.

For example, the original payee on the BoE endorses bill and passes it on to X. X sues the acceptor for payment. The acceptor cannot raise a defence personal to the original payee, i.e., referring to his relationship with the payee. So, BoE (assuming formal validity) will give endorsee absolute right to payment (except where endorsee/holder is in bad faith – *fraus omnia corrumpit).*

In *Louis Galea nomine (obo Barclays Bank)* v. *Alfred Bartolo* (Appeal 04/11/1968), a certain Mike Cini had sold a car to defendant Bartolo and the BoEs were issued and signed by Cini as the drawer and payee. The BoE was signed by Bartolo (defendant) as drawee and acceptor. The BoEs were endorsed by Cini to Barclays Bank which discounted them, so when

the bills matured then, the bank went to Bartolo for payment. Bartolo said he never received the car, failed to pay, so Bank sued (direct action). Bartolo argued that underlying agreement for sale of car had been rescinded and that Cini should not have endorsed BoEs as they should have been returned to Bartolo.

The Court held that once the BoEs were endorsed and the bank acquired them in good faith, it had no idea that there was a problem with the underlying relationship, you have to pay the bank. That BoE in the hands of the bank gave it an autonomous right to get paid. So, in line with art. 197, the relationship between Cini and Bartolo could not affect bank's rights. **Please personal to endorser (Cini) cannot be set up against holder (Bank).**

In *Bank of Valletta p.l.c. vs Carmel Ray Micallef* (18/02/2004), the defendant had signed (as drawee/acceptor) some 27 BoEs for payment of works carried out by a company called Rainbow Mix Limited (RML). RML 'sold' BoEs to BOV, i.e., endorsed and transferred to BOV. Defendant failed to pay on the BoEs, so BOV sued for payment. **One of the pleas raised by defendant was that the works carried out by RML were defective**. However, the Court rejected this plea on basis of art 197 stating that,

"*Din il-Qorti tinnota li din l-eccezzjoni tolqot il-meritu tal- "underlying obligation" li tat lok ghal hrug tal-kambjali, izda peress li din l-azzjoni hija azjoni kambjarja, bazata fuq kambjali girati favur il-Bank attur, mhux lecitu li l-possessur tal-kambjali jigi rinfaccjat b'eccezzjonijiet li jolqtu transazzjoni li fihom hu ma kienx parti. Meta tigi girata, it-terz possessur ghandu dritt jagixxi fuq dak li jidher "on the face" tal-kambjala; kambjala girata takkwista ezistenza awtonoma u titqies bhala obligazzjoni fiha nfisha indipendenti mill-obbligazzjoni li wasslet ghal-hrug taghha*".

Art 198 (Relative Autonomy)

> **197.** Pleas which are personal to the endorsers may not be set up against the holder of a bill.
>
> **198.** (1) Pleas which are personal to the holder of a bill cannot delay the payment thereof, unless the pleas are such as can be conveniently and speedily disposed of in the pending action.
>
> (2) Where such pleas require a prolonged enquiry, the examination thereof shall be referred to an independent action and, meanwhile, the judgment ordering the payment of the bill, with or without security, as the court shall deem fit, shall not be delayed.

Whilst in article 197 we are talking about plead personal to the endorser, so, we are assuming there is an endorser, in article 198, we are dealing with pleas personal to **holder** (original payee or endorsee). It refers to underlying relationship between two parties on a BoE

Moreover, unlike in article 197 which states *"may not be set up"*, in article 198 you have *"cannot delay".* The law isn't saying that you cannot raise them, you can raise them but if they are such that an investigation into that plea will cause me to delay payment, then they will not be accepted. So, the party will have the right to sue on the underlying obligation.

So, here we have to put ourselves in the context of the original parties to a BoE: your issuer, acceptor and payee. So, if that BoE was issued because there was an underlying transaction and there is a problem with it, between the two original parties, you can raise a plea which refers to the underlying obligation so long as that plea can be easily disposed of, not requiring a lengthy investigation that would delay payment. The law isn't saying that the BoE isn't autonomous. There is an element of autonomy, but only if an investigation into the underlying problem is going to require time to be resolved. This would also apply between an endorser and an endorsee but to understand it, think of the original parties to a BoE.

The law is saying that if for the Court to decide whether the plea is a valid plea, it has to conduct an investigation, then the Court will preserve the autonomy of the bill and order payment of the bill and sort out the underlying issue in an independent action.

This could also apply between an endorser and an endorsee since there is a direct relationship. Whilst the original payee's personal relationship is with person bound to pay on bill, the endorsee's personal relationship is with his endorser.

So, unlike art. 197, autonomy not absolute. So, in this case Personal pleas are not excluded completely

The interpretation of art. 198 has been subject to some conflicting views regarding the degree of autonomy granted by a BoE to its holder.

Some cases ignore art. 198 and still apply the principle strict autonomy whereby no pleas relating to the underlying relationship will be allowed and only pleas that would put into question the validity of the BoE are allowed.

Approach 1 (applying strict autonomy in the context of the original parties to the BoE)

In *Charles Gatt noe* v. *Joseph Vassallo Gatt noe*" (15/11/1993), a BoE issued for payment for works, in particular, the installation of a/cs. A plea was raised that installation was defective however, the Court rejected the plea saying: "*appena kambjala tigi ammessa, tigi krejata obligazzjoni 'ad hoc', ghal kollox indipendenti u separata minn kwalunkwe obligazzjoni li seghtet ipprecedietha. Ghalhekk f'kawza bhal din, l-eccezzjonijiet ammissibbli huma generalment limitati ghall-kambjala nnifisha* [so, on the formal requirements] *u bhala regola m' ghandhomx jigu permessi eccezzjonijiet li jikkoncernaw obligazzjonijiet precedenti"*

This judgement isn't entirely correct. The law is saying you can only raise pleas which attack the formal validity of the bill. It is saying that you can only raise pleas which are easily disposed of.

In *George Zahra* v. *Alfred Borg* (28/04/1995), the plaintiff sued for payment of BoE – special summary proceedings. The defendant appeared at hearing and asked to contest action not based on validity of BoE but with reference to other relationships between the parties as a result of which defendant was owed money by plaintiff. The Court ordered payment of BoE, stating that, "*fl-azzjoni kambjarja huma ammissibbli biss eccezzjonijiet li jikkontestaw il-*

validita' formali tal-kambjala in kwantu jallegaw li din tkun fuq il-wicc taghha monka f'xi wahda mill-elementi kostituttivi essenzjali taghha kif trid il-ligi."

In *Charles Pool* v. *Carmelo Mercieca* (29/05/2013), a BoE was issued as payment for stocks sold to defendant. The defendant raised the plea that he had already paid substantially all of amount due. The Court noted that there were payments made but also that there were other transactions between the parties, so it was not clear whether payment was on account of the BoE or otherwise. The plaintiff was still in possession of BoE so had right to claim payment. In this case, the Court applied principle of strict autonomy and made reference to Prof. Cremona Notes: "*the moment a person signs the bill of exchange… …the obligation arising from that signature is considered to be complete in itself; it acquires a juridical existence which is considered separate, distinct and independent from the original and fundamental contract entered into between the parties concerned. The law identifies the obligation created or evidenced by the bill with the signatures placed thereon. Accordingly, a party to a bill would be liable thereon, not because of any pre-existing obligations, but merely because he did actually sign the bill".*

It is true but Cremona goes on to say that it doesn't mean they cannot be raised. This was a selective quote to justify the Court's reasoning. Cremona goes on to say that this doesn't mean that cannot raise pleas which can be disposed of by the Court.

In *Adrian Busietta noe* v. *Marco Attard noe* (Appeal 09/02/2001), the Court held, "*l-oggett ta' l-azzjoni kambjarja ma setax u m'ghandux ikun konfuz ma l-oggett li kien jifforma l-obbligazzjoni naxxenti minn negozju u li ta lok ghall-hrug taghha. Il-ligi stess, proprju bl-insistenza fuq l-awtonomija tal-azzjoni kambjarja u bil-limitazzjoni tal-eccezzjonijiet li setghu jinghataw ghaliha, kif ukoll bl-insistenza fuq l-ispeditezza fid-determinazzjoni tal-azzjoni, kienet tiddistingwi u ssalva n-negozju originali li jibqa' soggett ghall-verifika u kontestazzjoni, anki wara li tkun giet determinata l-azzjoni kambjarja u anki wara li tkun giet onorata l-kambjala b'konsegwenza tal-esekuzzjoni ta' sentenza fuqha moghtija"*

Note the emphasis on reservation of rights vis-a-vis payor to file action on basis of underlying obligation

In *Peter Azzopardi* v. *Raymond Camilleri* (Appeal 18/11/1987), the parties exchanged vehicles – subject to extra payment of LM200 due by defendant to plaintiff and the BoE issued for this amount. Subsequently, the agreement was rescinded BUT plaintiff sued on BoE anyway – BoE had been validly drawn. The defendant argued that the action was null due to inexistent 'causa'. The Court held that **as long as there was an existent and legal causa at time of the issue of BoE, then the BoE was valid**. It said, "*din l-eccezzjoni* [the plea raised] *m'hijiex fondata peress illi l-obligazzjoni naxxenti mill-kambjala hija ndipendenti mill-*causa obbligationis *li minhabba fiha nharget l-istess kambjala…. Infatti hu risaput illi fost il-kwalitajiet specjali li ghandhom il-kambjali hemm dik li l-obligazzjoni naxxenti mill-kambjala hija min-natura taghha stess obligazzjoni astratta… dana ma jfissirx li l-kambjala tista' tkun mehtiega minghajr konsiderazzjoni jew ghal xi konsiderazzjoni li tkun illecita ghaliex hu risaput illi fraus omnia corrumpit. Ifisser illi sakemm kambjala tinhareg ghal xi raguni li tkun lecita u legali, l-causa obligationis… rimane fuori dal titolo."*

If the Courts had to take such a strict approach, the question of the difference between article 197 and 198 arises.

Approach 2: limited autonomy
These cases took the more correct approach.

In *John Giordimaina et* v. *Joseph Pace et* (16/01/2003), the BoEs were issued for repayment of loans granted by plaintiff to defendant. So, the underlying transaction was a loan and to attest the right to repayment of that loan, he signed BoE. The defendant did not pay on the BoEs and plaintiff filed *actio cambiaria*. The defendant raised various pleas, including that those loans had already been repaid (similar to plea in Charles Pool v. Carmelo Mercieca where this plea was not allowed). The Court allowed an examination of this plea in this case.

It held, "*meta kambjala tibqa fil-patrimonju tal-krediturі tal-obbligazzjoni (cioe` ma tigix girata), ma takkwistax natura awtonoma indipendenti mill-obbligazzjoni li tat lok ghall-istess kambjala. Fil-fehma ta' din il-Qorti, hu biss meta l-kambjala tkun girata li din takkwista valur "on the face of it", u allura ikun dipendenti fuq dak li johrog u jidher mill-kambjala stess*".

Also, "*minn jixtri kambjala, qed jixtri titolu ta' kreditu awtonomu, jaf li kwistjonijiet naxxenti mill-obbligazzjoni li waslet ghall-dak il-kreditu, jibqghu estranei ghalih, ghax hu, bhala terz akkwirent, jista jfittex biss fuq il-kambjala.* ***Bejn il-partijiet, pero`****, il-kambjala m'ghandiex ikollha din in-natura ghax il-kambjala tkun biss prova tad-dejn li inholoq bejn l-istess partijiet, u allura l-obbligazzjonijiet reciproci tal-istess partijiet huma rilevanti ghall-kull kawza li ssir ghall-hlas. Fi kliem iehor, azzjoni fuq kambjala bejn il-partijiet li hargu l-istess, ma tistax timxi wahedha minghajr riferenza ghall-ftehim li wassal ghall-hrug taghha*"

Also, "*eccezzjonijiet personali ghall-pussessur (u mhux personali ghall-giranti biss) jistghu jinghataw. Fi kliem iehor, jekk il-kambjala ma tkunx girata (u ghalhekk tkun ghada fil-fazi kuntrattwali u ma tkunx dahlet fil-fazi kambjarja) it-traent-konvenut jista` jaghti kontra l-beneficjarju-attur eccezzjonijiet personali ghalih"*

The Court is distinguishing between a bill which has not been endorsed and a bill which has been endorsed.

Other Cases
- *Portelli* v. *Schembri* (Commercial Court, 1935, Vol XXIX. III. 80);
- *Scicluna* v. *Vella* (Qorti tal-Kummerc, 18 ta' Marzu, 1965).

Art. 198 can be described as providing for Relative Autonomy
Personal pleas **can** be raised BUT they must not delay payment, i.e., they must not delay the action and they can be entertained only if they can be conveniently and speedily disposed of in the *actio cambiaria.*

Cases

In Guillaumier Industries Ltd. V. Victor Vella et (04/12/1998), "*l-iskop tal-ligi huwa carissimu. Il-kawza proposta a bazi ta' kambjala ghandha tigi mill-Qorti trattata bl-akbar celerita' possibbli … l-kambjala hija proprju l-istrument kummercjali nventat biex appuntu jassigura din il-heffa u l-ghaggla fic-cirkontrazzjoni tal-krediti u d-dejn u sabiex tirrispetta u kemm jista' jkun tiggarantixxi li l-processi kummercjali jkunu animati mill-istess esigenzi. Biex tassigura din ic-celerita', l-ligi tiffrena l-eccezzjonijiet li jistghu jinghataw kontra l-possessur tal-kambjala biex dawn ma jittardjawx il-kanonizzazzjoni ta' mport ta' kambjala. Tammetti eccezzjonijiet biss meta dawn ikunu ta' facli soluzzjoni*".

Prof. Carlo Mallia noe v. Mariano Accarino noe (22/11/1937), "*Infatti l-artikolu [181] tal-Kodici Kummercjali jistabbilixxi illi l-eccezzjonijiet personali ghal possessuri tal-kambjali ma jistghux idewmu l-pagament tas-somma jekk mhumiex likwidi u "di pronta soluzione". Jekk imbaghad huma ta' ndagini twila, dawk l-eccezzjonijiet ghandhom ikunu riservati ghal kawza separata, u l-kundanna tal-kambjali ma tistax tkun differita, b'garanzija jew minghajr garanzija skond il-prudenzjali arbitriju tal-Qorti*".

In *Carmelo Sammut et noe v. Armando Bugeja et* (28/03/2008), the defendant raised the plea that the vehicle sold to him was older than agreed and that the logbook had been manipulated. So, in this case, it was not the validity of the BoE that was in question. There was no fraud since the manipulation had not been done by plaintiff. The Court ordered payment on the basis of Art 198. It held, "*Illi in konkluzjoni l-Qorti tirrepeti li l-kambjala ghandha natura awtonoma u indipendenti mit-transazzjoni li minnha tohrog. In oltre fin-natura taghha stess hija strument kummercjali mahluq biex jassigura heffa u ghagla fic-cirkostanzi tal-krediti u d-dejn u kwindi ladarba l-kambjali in kwistjoni gew iffirmati u ma giex ppruvat sodisfacentement li kien hemm hlas, lanqas in parte fuqha, t-talbiet attrici ghandhom jigu milqugha*".

In *Prof. Carlo Mallia noe* v. *Mariano Accarino noe* (22/11/1937), the Court held, "*Infatti l-artikolu [181] tal-Kodici Kummercjali jistabbilixxi illi l-eccezzjonijiet personali ghal possessuri tal-kambjali ma jistghux idewmu l-pagament tas-somma jekk mhumiex likwidi u "di pronta soluzione". Jekk imbaghad huma ta' ndagini twila, dawk l-eccezzjonijiet ghandhom ikunu riservati ghal kawza separata, u l-kundanna tal-kambjali ma tistax tkun differita, b'garanzija jew minghajr garanzija skond il-prudenzjali arbitriju tal-Qorti*."

Personal Pleas that Attack Legal Validity of the BoE itself

Courts have typically allowed these pleas, even though they are personal to holder. This is because they put in question the validity itself of the bill. We are not talking about the lack of formal requirements required *ad validitatem* (real pleas), but issues of validity arising from other circumstances. For example, if the signature of acceptor is procured by violence, his consent is vitiated/ invalid and therefore, although the formal requirement is satisfied, the manner in which the signature is attained is unlawful. Another example is when the BoE issued to pay for illegal transaction – unlawful causa.

In *Joseph Cost Chretien* v. *Joseph Borda* (Appeal – 06/11/1961), the defendant pleaded that **his signature on the BoEs had been extorted by violence**. The Court noted that this was a

plea personal to the holder and that it was a plea that required examination that would delay payment which technically, should not be allowed. However, because this plea attacked the validity of the issue of the BoE itself, the Court accepted to consider it. It held, "*L-eccezzjoni ma hijiex ta' pronta soluzione… prima facie ghalhekk jista jidher li f'dan il-kaz ghandu jigi ordnat il-pagament… izda f'dan il-kaz hemm il-fattezza specjali illi l-eccezzjoni tolqot l-ezistenza tal-kambjala stess…meta hu hekk, dan il-principju ma jibqax applikabbli meta l-eccezzjoni hi fis-sens li ma kienx hemm obligazzjoni kambjarja*"

The Court is recognising that this a serious plea which attacks the very validity of the issue of the BoE.

In *Tabone* v. *Camilleri* (27/02/1939), the Court held, "*Illi huwa veru illi skond dana l-artikolu tal-ligi [art 198], meta l-eccezzjoni ma tistax tigi definita malajr ma hijiex ammissibbli meta biha jkun ritardat il-pagament. Pero' hemm eccezzjonijiet tant assoluti kemm relattivi, li jistghu jigu moghtija u ghandhom ikunu ammessi. Dawna l-eccezzjonijiet ghandhom il-bazi taghhom fid-dritt komuni u fid-dritt kambjarju. Per ezempju, l-inkapacita' li hija regolata mid-dritt komuni tifforma wahda mill-eccezzjonijiet assoluti, u l-pagament huwa wiehed mill-eccezzjonijiet relattivi jew personali li huma regolati mid-dritt kambjarju. Hemm ukoll eccezzjonijiet li gejjin minn fatti posterjuri ghad-data ta' l-emissjoni tal-kambjali*".
In *Joseph Lia* v. *Alfred Dalli* (26/01/1989), the Court held, "*hemm eccezzjonijiet permessibbli meta din tolqot l-ezistenza tal-kambjala stess bhal meta l-kunsens tal-accettant tal-kambjala jkun vizzjat minhabba vjolenza jew dolo*".

In *Daniel Zerafa pro et noe* v. *240 Contracting Limited* (19/09/2013), the Court held, *"… jekk kemm il-darba jintwera mad-daqqa t'ghajn li l-kambjala tkun inharget bi vjonlenza fuq il-persuna li gibditha jew jekk tkun saret ghal ghanijiet li jiksru l-ligi, dawn ic-cirkostanzi jistghu jitqiesu bhala gravi biex iservu halli titwaqqaf l-esekuzzjoni taghhom*…."

Personal Pleas summed up
In *Antoine Vassallo pro et noe* vs *James Anthony Cefai* – Appeal (16/03/2005), the Court held,

- *L-azzjoni kambjarja, skond gurisprudenza pacifika, ghandha r-regoli proprji taghha. "B' dan illi l-obbligazzjoni f'kambjala hija astratta u kompluta, jigifieri indipendenti mill-causa obligationis li minhabba fiha l-kambjala tkun giet mahruga. Id-debitu kostitwit f'kambjala huwa tali mhux ghax hemm obbligazzjoni pre-ezistenti imma ghaliex id-debitur iffirma il-kambjala" – "Henry Petroni -vs- Bernard Farrugia", Appell Kummercjali, 23 ta' Novembru 1994;*
    - Principle of autonomy
- *Issa huwa minnu li l-Kodici tal-Kummerc jahseb ghal kaz ta' xi eccezzjonijiet, inter alia, dak provvdut fl-Artikolu 198 tieghu. Eppure, korrettement intiz, dan id-dispost tal-ligi "jimplika illi eccezzjonijiet li kienu ta' natura personali ghall-possessur u li allura setghu joriginaw minn negozju li ta lok ghall-hrug tal-kambjala u li setghu idewmu ddeterminazzjoni ta' l-azzjoni kambjarja kellhom jigu skartati" – "Adrian Busietta nomine -vs- Marco Attard nomine", Appell, 9 ta' Frar 2001;*
    - Relative autonomy
- *Hemm pero` eccezzjonijiet ohra li jistghu jinghataw u fost dawn il-kazijiet hemm dak meta l-kunsens ta' l-accettant ikun vizzjat b' dolo jew vjolenza. Ghaldaqstant, kif drabi*

ohra affermat, "meta l-eccezzjoni hija tad-dolo, il-Qorti ghandha tezamina l-kwestjoni sollevata, ghaliex diversament il-Qorti tkun qeghda tiffavorixxi lil min, kieku l-eccezzjoni tkun provata, ikun agixxa dolozament" (Kollez. Vol. XXXIV P III p 845). "Kwindi l-provi dwar l-allegat dolo jew l-allegata vjolenza jinstemghu fl-istess gudizzju fejn tigi mitluba l-adempjenza ossija l-hlas tal-kambjali" (Kollez. Vol. XLV P I p 478).

- Personal Pleas that attack validity of BoE

Article 253(e) – "*Grave and Valid Reason*"

Can I raise a plea which relates to the underlying obligation as a grave and valid reason to stop the bill? Art. 253 doesn't go there. So, the Court had to apply the aforementioned principles. In terms of real pleas (formal validity) the Courts have always accepted them as a grave and valid reason – if you don't have a valid bill, you don't have a right to enforce that bill.

In determining whether an application to suspend the enforcement of a BoE for a 'grave and valid' reason is justified, the Courts have had to consider whether the application is permissible in terms of Arts 197 and 198 and the principles of autonomy or relative autonomy established by the courts.

Also, in the context of BoEs which are being enforced by an endorsee (the bill has been endorsed), the endorsee has strict autonomy, an independent and valid right. So, as long as the bill is valid, **anything relating to the underlying transaction** which gave rise to the BoE will not be accepted as a grave and valid reason. The Court will respect the autonomy of the BoE. In other words, Where the enforcement is sought by an endorsee and the alleged grave and valid reason relates to the underlying relationship the Court will generally <u>not</u> suspend – Art 197 – absolute autonomy.

That leaves the situation where art.198 applies where the original parties to the bill and the person who is trying to stop the enforcement of the bill is referring to the underlying obligation. If the Court can easily decide that matter, and if that matter is justified, it can suspend. If, however, the Court sees that it is something that requires investigation and will therefore delay, then that shouldn't be accepted as a grave and valid reason because it would destroy the autonomous nature of the BoE. It would go against the principle in art. 198.

So, where the enforcement is sought by the payee and the drawer/acceptor's grave and valid reason relates to underlying contractual relationship between the parties, Court should only suspend if –

1) The facts are conveniently and speedily determinable by that court; or
2) The reason given attacks the validity of the issue of BoE itself, e.g., fraud or violence

If not, it should choose to stay refuse to stay the execution.

***<u>Motor Inc. Limited (C75758) v. Christ Scerri</u>* <u>(28/03/2022)</u>** – this is a recent and very good judgement. In this case, a plea was raised relating to the underlying relationship. The Court considered that that plea could not be disposed of easily.

See

Motor Inc. Limited (C75758) vs. Christ Scerri – 28.03.2022
Nello Micallef vs *Pater Finance Co. Ltd* – Appeal 11.01.2006
Baketech Supplies & Services Ltd vs *CaterGroup Limited* – 09.03.2016

In each case, on an application under art 253(e) COCP the Court should consider the application to suspend on the face of the facts (*prima facie*) without going into the merits. The rights of the applicant are reserved even if his application to suspend is thrown out.

The Court says 'do I think there is grave and valid reason' prima facie, so without investigation the matter itself. This is because if the Court decides to suspend, the *actio cambiaria* will need to be filed and then, the defences on it will be decided by that Court. If the Court decides not to suspend and orders payment, the underlying issue will be debated by the Court where the person who has to pay will try and get his money back.

Cases re. *Prima Facie* Examination
In *Giovanni Briffa v. Ronald Azzopardi*, the Court held "*Il-ligi ma tispecifikax x'inhuma r-ragunijiet gravi u fil-fehma tal-Qorti dan ma sarx b'nuqqas tal-legislatur izda intenzjonalment ghax il-legislatur ried ihalli fid-diskrezzjoni tal-Qorti f'liema kazijiet ikollha quddiemha l-Qorti ghandha tilqa' t-talba jew le. Certament li raguni valida m'ghandhiex tkun wahda frivola ghax kif tghid il-ligi stess, hlief fil-kaz tal-firma r-raguni trid tkun gravi u valida u dan jaghmilha cara li persuna ma tistax kapriccosament topponi ghall-ezekuzzjoni.*

"Izda min-naha l-ohra l-legislatur ma eliminax ir-ricerka li ssir f'kawza skont id-disposizzjonijiet tal-Kodici tal-Kummerc, izda l-Artikolu 253(e) u l-proviso tieghu gie rez bhala procedura (prima facie) diskrezzjonali f'idejn il-Qorti, bazat naturalment fuq ragunijiet gravi u validi. Huwa veru li mkien fil-ligi ma jinstab il-kliem prima facie izda ikun bla sens li l-Qorti tidhol fid-dettalji kollha tal-proceduri soliti meta hekk jew b'hekk il-proceduri ma gewx eliminati mil-legislatur, b'mod li jirrendi l-applikazzjoni gusta tal-ligi ttiehed f'dan is-sens"

In *Daniel Borg vs Mark Casha* (17/06/2015), the Court held, "*Tqis illi din hija proċedura preliminari ta' stħarriġ u verifika fejn il-Qorti tista' tordna s-sospensjoni tal-eżekuzzjoni ta' kambjala jew promissory note bħala titolu eżekuttiv f'każ li minn din il-proċedura preliminari jirriżulta prima facie (i) illi l-firma fuq il-kambjala jew promissory note ma tkunx ta' min ikun qed jopponi għall-eżekuzzjoni tagħha jew tar-rappreżentant tiegħu; jew (ii) ikunu jeżistu raġunijiet oħra gravi u validi biex issir oppożizzjoni għal dik l-eżekuzzjoni*."

See also *Motor Inc. Limited (C75758) v. Christ Scerri* (28/03/2022).

Usury

Usury means a stipulation for interest in excess of that permitted by law

There are certain pleas which attack the validity of the BoE itself and which can always be raised. Our Courts have held that when BoEs are used to cover the stipulations of interest in excess of what the law allows (in terms of art. 968 of the Civil Code, interest on a loan or on payments which are due up to 8%) these aren't completely invalid. This is deemed to be a matter of public policy and is given strict application by the Courts

The rule in art. 968 is subject to exceptions in the Interest Rate (Exemption) Regulations. These regulations were brought in because of international trade and because it customary for them to charge more than 8% outside of Malta, it was a limitation which was becoming unpopular with foreigners. So, there are exemptions that when a contract is regulated by a foreign law and it is customary in that other jurisdiction to charge more than 8%, then it is allowed. Other than this, insofar as Maltese parties are concerned, you cannot charge interest more than 8%.

BoEs are commonly used to mask interest in excess of 8%. Does this invalidate the BoE?

Art. 968(2) says that if you charge interest in excess of 8%, the contract is not invalid but will be valid up to 8%. So, the interest in excess of 8% is invalid, i.e., obligation is valid up to rate of interest of 8%. On this principle, the Court said if you use BoEs to charge interest of more than 8%, it will be invalid in excess of 8% but not totally invalid. So, **you can only sue for the amount that corresponds to interest up to 8%.** So, you can raise a plea on a BoE on the principle that it is a stipulated of interest of more than 8%, but that will not invalidate the bill, it will invalidate the excess amount.

Franco Depasquale noe v. Charles Debono pro et noe (28/06/1973).

In *Catherine Farrugia v. Marcus Lauri et* (31/01/2018) the Court held, "*Illi minghajr pregudizzju ghas-suespost, jekk il-Qorti, jidhrilha li ghandha tidhol fil-mertu dwar jekk l-kampjala tkoprix element ta' uzura, l-unika konsegwenza li dan jista' jwassal ghaliha, hija n-nullita` ta' "dak li hu zejjed", u dan kif jipprovdi l-Artikolu 986(2) tal-Kap. 16, kif ukoll kif jipprovdi l-Artikolu 1852 tal-Kap. 16 tal-Ligijiet ta' Malta*."

Prescription

A.k.a. Time Bar. This is the time within which an action must be brought. Every right of action will expire with the effluxion of time. If you do not bring that case within a certain time, your right to sue falls away. This can be raised as a plea. This is on the basis that over time, evidence starts to become more unreliable.

Art 2107(2) Civil Code

> (2) Prescription is also a mode of releasing oneself from an action, when the creditor has failed to exercise his right for a time specified by law.

The general rule is that all actions, whether real, personal or mixed, are barred by the lapse of **30 years**, as stated in art. 2143 of the Civil Code.

Art. 2137 Civil Code

> **2137.** Subject to any other provisions of the law, the prescription of an action commences to run from the day on which such action can be exercised, irrespective of the state or condition of the person to whom the action is competent.

- *i.e., from date of maturity or*
- *From date of presentment for payment (at sight)*

The law provides for shorter prescriptions in Civil Code itself and in other laws relating to particular actions.

Art. 542 of Commercial Code

> **542.** Saving the provisions contained in articles 238, 239 and 263, actions arising from bills of exchange or from promissory notes shall be barred by prescription by the lapse of five years from the day of their maturity, and actions arising from drafts or cheques on bankers or cashiers shall be barred by prescription by the lapse of five years from their date.

As a general rule, prescription can be interrupted but Art. 541.

Art. 541 of the Commercial Code

> **541.** All times fixed by any express provision of this Code for the exercise of any action or right of recourse arising from commercial acts, are peremptory; and the benefit of the *restitutio in integrum* by reason of any title, cause or privilege whatsoever shall not apply.

So, no interruption possible and therefore, once 5 years pass from the date of maturity of a BoE, your right to sue falls away.

Anthony Sammut vs *Joseph Peeters et* (02/10/2002).

In *Bryan's Tyre Services Limited vs Raymond Scicluna et* (02/05/2011), the Court confirmed that this prescriptive period applies also in relation to the actions contemplated in Art

253(e) of the COCP, i.e., judicial letter to render BoE enforceable must be filed within 5 years

PROMISSORY NOTES

Promissory notes are a 2-party instrument. Moreover, they are regulated in only 2 sections of the Commercial Code – Art. 260 and Art. 261.

Provisions relating to bills of exchange applicable to promissory notes
Article 260

> **260.** The provisions applicable to bills of exchange, and relating to endorsement, joint and several liability, *aval*, time of maturity, payment, payment for honour, protest, duties and rights of the holder, and re-exchange, shall apply to promissory notes.

So, the law simply refers back to the rules on BoEs stating that most of them apply to Promissory Notes. With that being said, whilst the principles are similar, there are some differences.

As with BoEs, our law does not give a definition of a Promissory Note but if we look at English law, the UK Bills of Exchange Act does give a definition,

"*… an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of, a specified person or to bearer*"

Whilst under English law you can issue BoEs to bearer, under Maltese law this isn't so. However, under Maltese law, Promissory Notes can be issued to bearer.

Sample Promissory Note

[No. [NUMBER IN SERIES]]

[AMOUNT AND CURRENCY]

Dated: [DATE OF ISSUE]

[FULL COMPANY NAME], incorporated and registered in Malta with company number [NUMBER], whose registered office is at [REGISTERED OFFICE ADDRESS] (**Promisor/Drawer**) for value received promises to pay to [DETAILS OF PAYEE] (**Payee**) or to order the principal amount of [AMOUNT AND CURRENCY] (**Principal Amount**) on [demand **OR** [DATE] (**Due Date**)].

Interest shall not accrue on this promissory note, save that if the Promisor fails to pay under this promissory note on the Due Date, then the Promisors shall pay interest accruing at the rate of [RATE]% per annum on the Principal Amount from and including the Due Date until the date of actual payment in full of the Principal Amount and all interest accrued under this promissory note. Such interest shall accrue on a daily basis and shall be payable immediately on demand.

All payments shall be made in [CURRENCY] in immediately cleared funds in full and without any deduction or withholding.

The Promisor hereby waives presentment, demand for payment, notice of dishonour, protest and any and all other notices or demands in connection with the delivery, acceptance, performance, default or enforcement of this promissory note.

This promissory note shall be governed by, and construed in accordance with, the law of Malta. The Promisor irrevocably agrees that the courts of Malta shall have exclusive jurisdiction over any dispute or claim arising out of or in connection with this promissory note.

Executed by [NAME OF PROMISOR] acting by [NAME OF DIRECTOR], a director

[SIGNATURE OF DIRECTOR]

A Promissory Note is typically a one-pager. It is like a unilateral contract which means it is a declaration signed by only one person; the person promising to pay. These are often referred to as IOUs since a person owes money to another person. It is an undertaking to pay.

In the sample Promissory Note above, there is a stipulation to interest. Although not precluded by law, they are unusual. But because Promissory Notes are more fluid as a form, you will find these.

Moreover, it is only signed by one person and in this sense, it is similar to BoEs which for its validity, only has to be signed by the drawer.

Contents of promissory notes
Article 261

> **261.** (1) A promissory note shall state the date, the amount to be paid, the person in whose favour or to whose order such note is signed, the time when payment is due, and the value supplied in cash, goods, in account or in any other manner.
>
> (2) It may also be drawn payable to bearer.

The formal requirements for a valid PN –

1) **The date of issue**

We can establish whether the person who made the Promissory Note was entitled to do so/had the capacity at the date it was signed.

2) **Amount to be paid**

It is a credit instrument and therefore, a document of title to money. Certainty of amount is not required.

3) **Person to who's order such note is signed (payee)**

Except if made to bearer which is allowed under art. 261(2).

Art. 261(2) says a Promissory Note can be issued to bearer. Conversely, what doesn't apply here is nuance, so, within 21 days from presentment for acceptance. In terms of BoEs, we said there are two types of presentments – a bill which has not yet been accepted can be **presented for acceptance** and the other type is **presentment for payment** on maturity date. Because this is a unilateral declaration that I am going to pay, the issue of presentment for acceptance doesn't exist since **there is only one type of presentment**. Typically, it is issued payable on demand or on a particular date.

4) **The time when the payment is due (maturity date)**

There are various types, as per BoEs (at sight [on demand], certain date after sight [demand] or certain date after issue date). Usance does not apply since usance is 21 days from presentment for acceptance which is N/A here. It is typically, 'on demand' (at sight) or on specified date.

5) **The value supplied in cash, goods in a company (you have to say for what it was supplied)**

Refer to general rules re. obligation without consideration. 'Value given' sufficient.

There are additional requirements under art. 123 catering for BoEs which are not referred to in art. 261 for a valid Promissory Note –

1) Place of issue;
2) Name of person who is to pay – drawee (this is not a 3-party bill);
3) Place of payment;
4) Signature of drawer/issuer **(but this is a legal requirement ad validitatem).**

Very strangely, the law does not say that the Promissory Note has to be signed by the issuer. It is obvious that it has to be signed by the person undertaking to pay. In BoEs it is specified because there can arise a situation where it is signed by the drawee but not by the drawer. So, here it is taken for granted.

Differences and similarities between a BoE and a Promissory Note

As emanates from art. 260, a Promissory Note is a type of BoE. It like a two-party BoE. So, all the rules applying to BoE also apply to Promissory Notes.

There are some similarities and some differences between Promissory Notes and BoEs.

Differences –

1) A Promissory Note is a **promise** by one party to pay another, there is no order to pay, it is an undertaking to pay. On the other hand, a BoE is one person **ordering** another person to pay. It is an order to someone else (drawee) to pay. It is fundamentally a 3-party type of document. A PN is simply a promise to pay

2) Unlike a BoE, a Promissory Note can be made payable to bearer – art. 261(2).

3) Unlike BoEs, a Promissory Note can only be presented for payment (not acceptance), since there is no drawee involved.

Similarities –

1) Like a BoE, a Promissory Note can be negotiated/endorsed. So, it can be transferred and for it to be valid, it has to be **signed by the person nominated on the bill and by every subsequent endorsee**. Like a BoE, a third party can step in and guarantee the payment but unlike a BoE, a PN can be issued to bearer. And because there is no drawee, there cannot be a presentment for acceptance, it is always a presentment for payment.

2) Like a BoE, a third party can pay for honour or guarantee by aval.

Would a Promissory Note be valid without the signature of the drawer?
Going back, because the law does not explicitly require the signature of an issuer, would a Promissory Note be valid without it?

English law specifically says that it has to be *"signed by the maker."*

Maltese law, on the other hand, is silent. But the document cannot and will not be valid/binding in its absence. In fact, the only signature needed is that of the drawer/promisor, so, the person issuing it undertaking to pay. Moreover, it doesn't need to be signed by the payee.

On endorsement, must be signed by endorser
BoE rules on endorsement apply if the Promissory Note is made payable to order of a **specified person**. But a Promissory Note can be issued to bearer. In this case, negotiability is by mere delivery of the document. So, for a valid endorsement, the Promissory Note has to be signed by the endorser **except if it is issued to bearer** which means that the holder of the note has a right to payment. If there is no one to endorse, the holder can simply pass the Promissory Note on. If you are passing it on as a new bearer but if it was issued to a nominated payee, the only way you can legally and validly transfer that Promissory Note to a third party is by the rules of endorsement.

Also, the endorsability of a Promissory Note can be excluded as per rules regarding the endorsement of BoEs – 'only'.

Presentment of a Promissory Note is required for payment
Finally, the presentment of the document is necessary in order to receive payment because it is a credit instrument, and the document is always **necessary**.

Of course, in the Promissory notes can only be presented for payment whereby the rule of presentment for acceptance are not applicable.

Does a Promissory Note give autonomous rights to its holder?
Art. 260
This states that the rules regulating time of maturity and payment on BoE apply in the same way to Promissory Notes.

Arts. 197 and 198 of the Commercial Code regulating what defences can be raised against claim for payment and which therefore regulate the level of autonomy are found in that part of the rules regulating BoEs entitled 'OF MATURITY AND PAYMENT.' Therefore, Promissory Notes do give autonomous rights to its holder, in the same manner as a BoE does.

So, Promissory Notes are Credit Instruments and as such have the same characteristics, including autonomy.

<u>If I am suing for the payment of a Promissory Note, the same principles apply –</u>

1) Real Pleas can always be raised;
2) Personal pleas **cannot** be raised against an endorsee of a Promissory Note. So, if it Promissory Note has been endorsed, then I cannot raise personal pleas because that has created an autonomous obligation;
3) Personal pleas **<u>can</u>** be raised between original parties or between endorser and endorsee **but**
   - They must not delay payment;
   - They can be entertained only if they can be conveniently and speedily disposed of.
4) Personal pleas attacking the validity of the Promissory Note can also be raised (e.g., fraud).

Between the original parties to the underlying transaction, if there is a problem with the goods, the same rules apply. It can raise the plea but only if it will not delay payment. There are certain personal pleas with attack the validity of the instrument such as if it was issued in relation to an illicit *causa* such as for the purchase of drugs. In that case, that is a personal issue, but it attacks the validity of the Promissory Note because there are elements of fraud and criminality which corrupt everything.

The 2004 amendments to COCP apply to Promissory Notes

Similarly, the 2004 amendments in the COCP which gave **executive title status** to BoEs also refer to Promissory Notes. So, they are treated in the same way – **<u>Art 253(e)</u>** COCP.

If I need to enforce a Promissory Note or if I presented it for payment and the person doesn't pay, I can go through the same procedure as that of enforcing a BoE.

<u>Same procedure applies –</u>

1) Payee/holder sends judicial letter
2) If no application filed within 20 days, payee could proceed to enforce payment
3) If application filed, right to is stayed
4) Payee will be given time to file a reply
5) Court may or may not (but usually will) hear the parties
6) Court decision:
   a) If Court is satisfied that grounds exist to stay enforcement of executive title, payee must file action for payment
   b) If not, payee can proceed to enforce payment

The grounds to request suspension are the same as for BoEs. So, if the person does nothing, I can enforce my rights. But if he files an application in Court, the Court has a right to stay the payment on 2 **grounds** – if it results that his signature is not of the defendant or if there is a *"grave and valid reason."* So, exactly the same rules apply.

Protest rules apply to Promissory Notes

- Action against endorser requires protest;
- No protest required against drawer who is equivalent to acceptor on BoE

Note also that the rules of protest, unless protest is excluded, also apply. Remember that in this case, we have an issuer, but he is also the acceptor. If the issuer has not paid, I have a direct action against him, there is no right of recourse here. But if in the meantime the Promissory Note has been endorsed, the endorser remains jointly and severally liable on the note, unless he has excluded that. But if I want to sue the endorser rather than the acceptor, then I have to protest the Promissory Note.

Prescription

Finally, the prescriptive period is the same. Once a Promissory Note matures, you have to bring your action within 5 years (**art. 542**), otherwise you lose the right. Also, this is a peremptory term; it cannot be interrupted.

CHEQUES

There is a bit of a conflict between law and practice. The provisions on cheques fall under the same sections of other Credit Instruments but **banking practice and directives issued from time to time by the Central Bank** have varied what the law says. The most recent is directive is Directive 19 of CBM, relating to the use of cheques.

To put the situation on cheques in context, in spite of long clearing cycle and labour-intensive processing when compared to other forms of payment cheques are still very popular in Malta due to their **convenience**, **not charged** as well as **custom**.

To give some statistics, the use of cheques has been in decline in the EU consistently since 2000. Moreover, while declining also in Malta, the use of cheques is still 10x higher than the EU average. In fact, approximately 18% of payments in Malta are still done by cheque.

Like Promissory Notes, Cheques are regulated by 2 provisions – Art. 262 and Art. 263 of the Commercial Code. Moreover, the Commercial Code doesn't provide a definition.

The UK Bills of Exchange Act (1882) states that, "*A cheque is a bill of exchange drawn on a banker payable on demand*". In this way, UK law treats cheques as a type of BoE.

So, the holder of the cheque book is the drawer and the person being ordered to pay, the drawee, is the bank. **As long as I have money in that account, the legal presumption that I have put the drawee in funds exists because the bank is holding my money**. Rules relating to BoEs payable on demand apply to cheques when presented to the bank for payment.

Our law does not say this. In fact, it is not even clear whether the rules applying to BoEs apply to cheques. Because unlike section 260 which specifically states this with respect to Promissory Notes, we do not have a similar section for cheques.

Drafts or cheques
Article 262

262. (1) Drafts or cheques on bankers or cashiers shall be dated, and shall specify the sum to be paid, and shall be made payable to a person therein named, or to his order, or to bearer.

(2) They shall be payable on presentment.

Requirements –

1) **Date of issue**

This is to determine capacity, etc. The practice of post-dated cheques is being discontinued. The directive 19 also stops the practice of issuing post-dated cheques. It is saying that if there are any post-dated cheques in circulation, they can only be transferred to a bank; you cannot endorse them.

2) **Amount to be paid**
A credit instrument is a document of title to money so, certainty of amount is required.

3) **Name of the payee**
While the law says one thing, the directives of the Central Bank have, to a certain extent, changed the law. Cheques issued to bearer have not been accepted and, as of now with Directive 19, one cannot issue cheques 'or to his order'. So, the negotiability is being discontinued. In other words, a cheque will be issued to pay Mr X only, so, you cannot endorse it. Only a bank can 'negotiate' a cheque, i.e., it can 'purchase' a cheque which was post-dated from the payee by cheques are not endorseable to this parties.

In this way, while the law is saying that cheques are negotiable and can be issued to bearer, banking practice has changed that.

Are Cheques a Mandate or a type of BoE?
Strangely, our law does not state specifically that the rules applying to BoE shall also apply to cheques as it does with Promissory Notes. This has raised debate in our Courts in the sense that what is the nature of a cheque; is it based on the rules of mandate/agency, or is it based on the rules regulating BoEs?

The debate relates to mandate because a cheque is issued by a customer **ordering his bank to pay**. He does this because there is an existing relationship between him as the customer and the bank; the bank recognises me as a client. So, this school of thought says, 'this is me instructing my bank to make a payment', 'I am giving a mandate to my bank to make a payment.'

Why is the distinction important?
In terms of our law, mandate is also **revocable**. So, if a Cheque is based on mandate, then at any time, I can call the bank and say, 'don't pay Mr X who is coming to cash the cheque.' This is called '**stop payment'**. If it was not a Credit Instrument, then you should be able to stop the payment because mandate is revocable, if I have given an instruction, I can revoke that instruction. **But if it is a type of BoE, a drawer cannot redraw the issuing of it** since BoEs are **not revocable**. So, the distinction is important.

Our courts haven't been too consistent because the law isn't clear. On the other hand, Promissory Notes and BoEs are regulated in the same section in the Commercial Code.

Cheques as a Mandate
In *Anthony Grech Sant* v. *Ronald Balani* (Appeal 27/10/2017), the Court concluded that a Cheque is a mandate and not a BoE. It recognised that they are similar but do not give equivalent rights,

"*Il-Qorti tifhem li bejn cheques u kambjali hemm hafna similaritajiet, pero' ma jistghux jitqiesu li joperaw bl-istess mod… mhux kemm tghid li kambjala tfisser ukoll cheque. In natura vera ta' cheque hi wkoll differenti minn dik ta' kambjala. Cheque ghandha n-natura ta' **mandat**, li ma japplikax ghall-kambjala. Hu minnu li, maz-zmien, beda jigi accettat li certu elementi tal-kambjala ghandhom japplikaw ukoll ghal cheque, pero', din mhux biss*

holqot ftit ta' konfuzjoni, izda l-assimilazzjoni ma gietx accettata bhala stat ta' fatt… cheque mela huwa 'negotiable instrument' bhal kambjala, pero', it-tnejn mhux l-istess, u kif inghad, "it is still not altogether clear" kemm il-principji tal-kambjala japplikaw ghac-ceque u sa fejn. Jinghad per ezempju, li kambjala ghandha ezistenza awtonoma u indipendenti min-negozju li wassal ghall-hrug taghha, izda ma jidhirx li intqal l-istess dwar cheques…. Wiehed, forsi, jista jargumenta li cheque jigi jixbah kambjala jekk jitpogga fic-cirkolazzjoni bl-endorsjar tieghu…".

Thus, Court made distinction between cheques that are endorsed and cheques that are not.

At the same time, in this case, the Court recognises the deficiencies in the law regulating cheques and calls for amendment. In other words, it said that the law isn't clear and should be clarified in this respect.

A running theme in the judgements is that the Courts say that **a cheque only becomes a type of BoE once it is endorsed**, and not before. Until it is endorsed, it is simply an instruction to the bank to pay and it is held by the payee, so, it is simply a mandate. This isn't a clear position.

In *Enrico Sammut* v. *Vincenzo Falzon* (Appeal – 15/10/1875), "*…e' certo che anche i cheques sopra banchieri o cassieri, quando all'ordine e sono stati negoziati per via di girata, come nel caso, l'atto della girata si converte in cambiale ".*

It recognises cheque as BoE when it has been issued to order (endorsable) and when endorsed.

In *Anthony Grech Sant* v. *Ronald Balani* (05/10/2016), "*Mill-gurisprudenza ghalhekk huwa evidenti illi fil-ligi cheque huwa ekwiparabbli ghal kambjala, tant illi l-ligi applikabbli hija l-ligi tal-kambjala. Dan dejjem meta cheque jkun 'to order' u allura strument ta' kreditu u mhux 'only' ghaliex meta cheque isir only jitqies bhala metodu ta' pagament u mhux strument ta' kreditu*".

Cheques as a BoE

In *Daniel Cremona noe v. Nazzareno Zammit et* (Appeal 03/04/1992), the Court overturned decision of First Instance which held that the cheque represents a mandate. It confirmed that the relationship between customer and bank is not that of a mandator and a mandatory but that of drawer and drawee. Moreover, it confirmed that cheque is essentially a BoE, without making a distinction between cheques to order or cheques to payee only.

Similarly, in *Anthony Borg et* v. *Anthony Willoughby et* (Appeal 09/03/05), the Court held, *"ic-cheque ... intrinsikament mhuwiex hag' ohra hlief dokument ta' kreditu… F' idejn il-pussessur ic-cheque ghandu l-vantagg konsimili ghal dak li ghandu titolu kambjarju. In kwantu tali, r-relazzjoni kif emergenti minn wicc ic-cheque, hi allura ekwiparata ghar-relazzjoni bejn it-traent u t-trattarju kif emergenti minn wicc il-kambjali stess. Hu dan l-apsett li jaghmel l-azzjoni kambjarja azzjoni awtonoma."*

Professor Micallef on cheques

"*cheques are very similar in legal form to bills of exchange… the juridical nature and character of a cheque or of a draft or cheque to bankers or cashiers, as our Code terms it, is very similar to that of a bill of exchange… in certain cases credit instruments are made to circulate as documents containing 'abstract' rights, that is a right which derives from the document itself independently of the causa obligationis or the original contract which had given rise to it. Consequently, the credit instrument is issued even though the original contract which gave rise to it is not mentioned in the body of the document consisting of the credit instrument… Not all credit instruments possess this quality of giving rise to abstract rights but only those which are recognised by the law, either expressly or impliedly and such an attribute is implied in bills of exchange, promissory notes and cheques*"

Which is the correct position?

The more correct interpretation is that **cheques are in fact a type of BoE** because essentially, it is an order given by the drawer to his bank as the drawee to make the payment of the amount stipulated in the cheque. The drawee is always the bank and cannot be an individual. Also, it cannot be drawn on the drawer himself (as with a 2-party BoE) whereby it is always the bank being ordered to pay. Moreover, the cheque is payable on demand, i.e., at sight when presented to the bank and presentment is always for payment (same as BoEs payable at sight).

Endorsement/Negotiability

Also, cheques are inherently endorsable (art. 263) like a BoE, but as of the 1st of January 2002, the Central Bank issued Directive 19 on the Use of Cheques and Bank Drafts which prohibits banks from issuing endorsable cheques – arts. 8-9 of the Directive.

Bank not bound to accept/pay – same as drawee of BoE

The bank is not obliged to accept/pay on the cheque. This is the same as the drawee on a BoE. When a cheque is issued, there is a presumption that the bank is in funds. However, if the bank does not have money in the account, it will not accept to pay; **it will only accept/pay if it has been put in funds by the drawer,** meaning that it holds sufficient funds on the drawer's account with the bank (or has afforded sufficient facilities in case of an overdraft).

But the bank will be bound to pay if sufficient funds are available. So, once the cheque is valid, the bank will be obliged to pay. The obligation is vis-à-vis the drawer and not the payee. This applies, provided there is no impediment to payment, e.g., garnishee order on accounts of drawer.

Cheque is not subject to acceptance

As with a BoE payable at sight, presentment is always for payment. A cheque is not subject to acceptance, so it always presented for payment. Therefore, in case of non-payment there is no direct action versus the bank (remember that with BoEs payable at sight, one only has an action of recourse).

In case of non-payment
If a bank doesn't pay either there is **a formal requirement problem** or because the drawer did not put the bank in funds (the person has no money in his account). The bank will typically write 'refer to drawer' instructing the payee to take it back to the person who issued it (drawer). In common parlance, the cheque 'bounced'. Then the payee will have to sue the drawer for payment.

Before, when cheques were endorsable, if the cheque was endorsed, the endorsee/holder could sue the endorser or the drawer who were jointly and severally liable on the cheque.

Does the protest procedure apply?
It was held 'yes' in *Daniel Cremona noe* v. *Nazzareno Zammit et* (03/04/1992). **Art. 263** refers to the 'right of recourse' so, by implication, it applies rules relating to right of recourse on a BoE which requires protest.

So, in Daniel Cremona where it recognised that a cheque of BoE it said that he rules of protest also applied but **none of this applies anymore**.

A cheque will not have a maturity date – so, how long can I keep a cheque before going to deposit it? Banking practice has consistent been that a cheque older than 6 months will not be accepted. Now directive 19 actually says that cheques will not be accepted if older than 6 months. So, while the law does not give a term of validity to a cheque, there is this Directive and banking practice.

Directive 19 of CBM instructs banks to discontinue providing cheques to drawers if, during the preceding twelve (12) calendar months, six (6) cheques presented to it for settlement could not be paid out either due to lack of funds or if lacking formal requirements, i.e., Art 10 of Directive which requires all cheques to include date of issue, name of payee, amount in figures and words (must match) and signature of drawer.

Directive 19 also says that if somebody who has a cheque book has issued more than 6 cheques in a year which have bounced, the bank can stop issuing cheque books to that person due to abuse. Again, this is practice and not law.

The Central Bank which operates as the regulator of all the banks in Malta issues these Directives which are also affecting what the law says.

Cheques are not legal tender – if you owe someone money, that person is not obliged to accept a cheque
Another thing to note is that cheques, like BoEs, can be refused. There is no obligation to accept a payment by cheque.

Directive 19 has stopped the use of cheques for payments under €20. While the law allows cheques issued to bearer, the practice of issuing cheques to bearer has also been discontinued whereby you have to nominate a payee.

Others –

- Banks will not cash cheques in excess of EUR5,000 – deposit only.

  Today, if you go to the bank with a cheque of more than €5000 it will only deposit the money in your account but will not give you money. This is all driven by anti-money laundering legislation since money is often used for illicit purposes. Cheques made to companies can only be deposited and cannot be cashed.

- Cheques made out to companies cannot be cashed – deposits only.
- Cheques made out 'Pay Cash' no longer accepted.
- Cash and cash equivalents are being phased out slowly.

Stop payment (Counterman)
Does the issuer/drawer of a cheque have a right to stop payment?

This is the practice of somebody who has issued a cheque and subsequently, writes to or calls the bank asking it not to deposit that cheque, even though the bank has the money.

In the UK Bills of Exchange Act, art. 75, "*the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (i) countermand of payment; and (ii) notice of customer's death*." So, stop payment is specifically permitted

Italian and French law permit stop payments but subject to certain limitations, e.g., cheque cannot be countermanded before the lapse of 8 days from issue.

Maltese law does not regulate the countermanding of cheques. But our Courts have recognised that cheques produce the effects of a BoE so, if a cheque is a type of BoE, then once it is issued, **it cannot be withdrawn which means that you shouldn't be able to stop the payment of a cheque**.

In *Daniel Cremona nomine* v. *Nazzareno Zammit et nominee*, the Court held,"*in materja ta' cheques, ghal dak illi jirrigwarda stop payments fil-ligi Maltija, wiehed ghandu jhares lejn il-ligi tal-kambjalijiet peress li ma tezisti ebda disposizzjoni ad hoc u li partikolarment f'kaz ta' cheque to order dan ghandu jigi kkunsidrat bhala soggett ghal-ligi kambjarja… dwar l-usanza ta' stop payments, ghalkemm certament prattikata, din il-Qorti ma thossx li tista' tikkunsidraha bhala li tammonta ghal uzu kummercjali, anke ghaliex tmur direttament kontra d-disposizzjonijiet u n-natura tal-ligi kummercjali nostrana li ghandha tipprevali*".

So, the Court is saying to the extent that a BoE is a BoE, once issued it cannot be stopped. If the bank is in funds, it has to be paid. Following this case, as a rule, the banks started not to accept stop-payment instruction except in very limited cases such as if the bank was informed that the cheque was lost or destroyed.

See also *Bank of Valletta plc v. Doreen Grima* (SCT 24/062002) which includes an interesting discussion regarding stop payment practise

Does procedure in art. 253(e) COCP apply to enforcement of payment for cheques?
If I present the bank with the cheque and the bank has no money, do I get executive title? (No)

Art. 253 refers to BoEs and Promissory Notes but **doesn't mention cheques**. But the Courts have actually dealt with this since the argument is that if it is a BoE shouldn't it be given the same executive title status. The Court said no. Once the COCP includes a finite list and has not included reference to the cheque, then it must have been the intention of the legislator not to include it.

In *Anthony Grech Sant v. Ronald Balani*, Balani filed judicial letter to render cheque executive title under art 253(e) COCP. Grech filed application saying that art. 253(e) COCP does not refer to cheques. The Court of First Instance discussed similarities between cheques and BoEs and concluded that the provisions of Art 253(e) and the procedure in art 256 COCP apply also to cheques even though they are not mentioned there. The Court of Appeal reversed this decision noting that while there are similarities, cheques and BoEs are not the same (see previous slide). It held that special procedure in COCP does not apply to cheques,

"*Din il-Qorti, kwindi, ma tarax li l-kliem kambjala jew promissory note uzata fl-artikolu 253(e) jistghu jigu estizi biex jinkludu cheques li, kif intwera, ghandhom natura differenti u japplikaw ghalihom regoli differenti…. Il-ligi in kwistjoni ma titkellimx dwar titoli ta' kreditu in generali izda specifikatament dwar il-kambjala u promissory note. Cheque, f'xi aspetti tieghu, jixbha lil dawn izda mhuwiex wiehed minnhom*".

The Court took a rigid approach – if you have a cheque which hasn't been paid, you have to open a case and don't have the right to this procedure.

Prescription
Article 542
Cheques do not have a maturity date, so 5 years from the issue date. But practice says that in any event, once 6 months have expired from the issue date, the bank is not going to cash that cheque for you.

Distinguish from term within which bank will accept to cash/deposit cheque
A cheque does not have a maturity date. Directive 19 of CBM now specifies that cheques are only valid for 6 months from date of issue. Directive 19 in conflict with art 542. Which prevails? *Lex specialis derogate generalis,* but is Directive equivalent to a law?

Extra resources
- https://www.maltabankers.org/wp-content/uploads/2019/11/Dishonoured-Cheques-Code-of-Conduct-1.pdf
- https://www.centralbankmalta.org/site/About-Us/Legislation/Directive-19.pdf