CML 3009 COMMERCIAL OBLIGATIONS, COMMERCIAL SALE, AND CREDIT INSTRUMENTS

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Commercial Obligations, Commercial Sale, and Credit Instruments

Written by David Camilleri

Table of Contents

Sources which regulate Commercial Matters & Commercial Obligations

We will discuss the ways in which commercial obligations are considered distinguished from regular civil obligations. Thus we will see how, if at all, commercial obligations depart from civil obligations. A starting point is to note that the general concepts relating to commercial obligations are carried through **articles 110 to 118 of the Commercial Code.** We must first be able to distinguish commercial obligations from civil ones;

We begin with Section 3 of the Commercial Code, which provides the sources of law governing commercial disputes.

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.

Section 3 posits the sources of commercial law in order of applicability. The first and most primary source is **commercial law** itself. In the absence of commercial law in addressing an issue we refer to **usages of trade**. In the absence of any commercial law or usage of trade, we apply **civil law**.

1) Commercial Law - *lex specialis*
2) Usages of Trade
3) Civil Law - *legi generali*

Commercial Law as the lex specialis

Commercial Law refers to any law regulating commercial matters. In Malta, commercial matters are often covered by the Commercial Code, which pertains to traders and to acts of trade done by any person even though not a trader. The Commercial Code refers to the definitions of trader and acts of trade under articles 4 and 5.

Usages of Trade as a source of Commercial Law

A usage of trade is a practice or method of dealing, having such regularity of observance in a place, vocation, or trade. Hence, usages of trade serve to justify an expectation that will be observed with respect to the transaction. Maltese legislators do not define usages of trade.

In **Halsbury's Law of England,** we find that *usage* may be broadly defined as *a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life or more fully as a particular force of dealing or line of conduct which has acquired such authority that where persons enter into contractual relationships, in matters respecting the particular branch of business life, where the usage is alleged to exist, these persons must be taken to have intended to follow the course of dealing or line of conduct unless they have expressly or tacitly stipulated otherwise*. One can also refer to the definitions provided by **Navarrini** and **Vivante**. These definition refer to usage as adopted in **Halsbury's Law of England.** Maltese law

does not provide any requisites that constitute usage. Our Courts, however, have referred to foreign (mostly Italian and English) writers that provide the elements which constitute usage.

Constitutive elements of Usages

1) A usage must be observed over a period of time. The first problem that arises is how to define this period of time. No judgement indicates what we understand by period of time. Judgements tent to assert that the usage must be followed over *a period of time*, without definition. Furthermore, hold that one must look at the *nature* of the usage, rather than the time per se. No definition is given for nature of usage.

2) The usage must be uniform, reiterated, and continuous. To this one must add that Professor Cremona stated that it must be borne in mind that such requirements, in connection with the usage of trade, should be considered from a general point of view. The Criteria to be used should be wide and relative, and each case shall be decided on its own merits, this being a question on fact. Our courts have taken this one step further and add that *there must be an objective and subjective approach for usage*. The **Objective Approach is applied when the subject matter is an act of trade**. The **Subjective Approach is applied when the parties of the transaction are traders**. Defining 'trader' is not completely straight forward (Article 4 vs EU Directive 114/2006, of Comparative and Misleading Advertising).

3) That usage must be followed as if it were law. There must be some sort of obligation to follow the usage. Courtesy or tolerance is not tantamount to usage.

4) The usage must be lawful. In itself, lawful as a term poses difficulties under Maltese law. It also includes public policy and morality. The Civil Code enshrines all of these concepts. *Public Policy* poses a difficulty because such term is not consensually defined. It encompasses rules and guidelines which may become law in the future.

The most referred to example of a usage of trade is the overdraft facility. Legislation in Malta does not regulate the concept of overdraft facilities. An overdraft is different to a loan, for the overdraft provides more leeway with regards to loan repayment, but at a higher risk and at higher interest. A simple loan, in our Civil Code is referred to as *mutuum*. The *locus classicus* for usages of trade pertains to interests - banks normally charge interest twice a year, and a question arose as to the legality of charging interests twice a year.

***Mid-Med Bank vs Teg Industries Limited* -** Locus Classicus re usages of trade
29th November 2001

The court held that *l-obligazzjoni ta' overdraft facilities hija ta' natura kummerċjali, u għalhekk hija regolata skond l-artikolu 3 tal-kapitolu 13, u għalhekk regolata mill-kodiċi kummerċjali. Fin-nuqqas tad-dispożizzjonijet ad hoc mill-użu kummerċjali, tapplika l-liġi ċivili. Fil-ġurisprudenza lokali, is-sistema ta' komputazzjoni ta' imgħaxijiet ta' overdraft facilities, fejn l-imgħaxijiet jiġu miżjuda fil-kapital kull 6 xhur, u għalhekk jiffurmaw parti mill-kapital, ġiet aċċettata bħala użu, u għalhekk hija legali*. It stated that under our laws, it is legal because adding interest twice a year to the capital is recognised as a usage in the case of overdrafts.

Under Civil Law, the charging of interest on loans are only permissible up to a maximum of one time a year, yet in the case of overdrafts, the Bank is permitted to charge interests more frequently, and owing to this repeated practice, the Court ruled that the usage should override Civil Law, owing to the hierarchy established under Article 3.

The Civil Code as the legi generali

The Civil Code contains various sections dealing with obligations. Obligations may arise

- Out of law,
- Out of contract,
- Out of *quasi-contracts*,
- Out of tort, and
- Out of *quasi-torts*.

Apart from these provisions, there are also sections dealing with specific obligations, such as sale, lease, exchange, deposit, and mandate, among other various obligations contemplated by the code.

Obligations arising **out of law** are imposed *ipso jure*, such as the obligation to pay taxes. There is no agreement per se, but the law applies it nonetheless. Such obligations may be positive (i.e - the performing of an act) or negative (i.e - the wilful failure to perform an act).

Obligations arising **out of contract** are imposed through agreement *inter partes*. It is binding solely between the parties, and every right and obligation agreed upon are enforceable. Contracts are barred after 5 years. A contract which may be classified as a commercial contract in one of two ways; **objectively** (in that the contract's subject matter equates to an act of trade) or **subjectively** (in that the contracting parties are traders, as defined under Article 4 of the Commercial Code). Obligations arising out of **quasi-contracts** are governed by the law in 3 instances:

s.1013 - ***negotorium gestor*** (management of another's affairs), which contemplates a situation wherein a person voluntarily undertakes the managing of those affairs until the person on whose behalf he has acted is in a position to take charge of such management himself.

s.1021 - ***indebiti solutio*** (the restoration of payment not due to him), which contemplates the restoration of a payment not due to the receiver.

In 2007, **article 1028A** was introduced to the section of the Civil Code governing quasi-contracts, providing for the **actio de in rem verso**, an action available to recover patrimonial loss suffered against a person who enriched himself unjustly and to the detriment of others.

Tort refers to the obligation arising from one's misconduct. A person who crashes into another, when in the wrong, owes the victim money or compensation. There is no agreement, but there is tort. Tort is time-barred after 2 years.

Quasi tort arises when a person vicariously carries out a tort. For instance, when a parent assumes responsibility over the child's action. Similarly, the employer is responsible for torts arising from the employee. Negligence is also covered by quasi-tort.

Can you have a commercial obligation in tort? Yes. Originally, it was thought that commercial obligations can never arise out of tort, for tort often referred to a person causing damage. However, owing to the developments of the separate legal personality and the corporate veil, and since they are considered traders under s.4, they can cause damage which gives rise to commercial obligations. This idea has evolved over time, whereby in the case of companies, directors (who used to sue in their own name) now sue in the name of the company. It is the company who sues, not the director, today.

Jones vs Mifsud Bonnici was one which initially introduced the idea of commercial obligations arising from tort.

1. That because of the ultra vires rule no corporation can be liable for a tort or crime. Logically, a strong case can be made out in support of this theory … But despite logic and despite dicta in some of the earlier cases, it is abundantly clear that this is not the law for companies are daily made liable in tort and convicted of crime. Indeed, if it were otherwise it is difficult to see how any unlawful act [even a breach of contract] could ever be imputed to a company.

2. That the ultra vires doctrine has no application except to contract and property and never applies to tortuous or criminal liability. This is the view taken by the overwhelming majority of academic writers …

3. **That companies can be liable in tort and crime but only if these are committed in the course of the intra vires activities … In principle this seems to be the soundest view. A Company may be liable for torts or crimes committed in pursuance of its stated objects but should not be liable for acts entirely outside its objects.'**

Commercial Contracts

A party is not obliged to enter into an agreement, but if the party chooses to enter into an agreement, then the party is bound by that contract. Therefore, contract law deals with which agreements are legally enforceable, in turn establishing remedies available for breach of contract. Typically, contracts are formal documents drafted by lawyers. Specific contracts must be in writing, but generally, contracts can be made verbally without legal jargon or formality. There are specific provisions which establish the formalities pertinent to the creating of contracts. However, if the law is silent, then contracts may be carried out verbally.

Every person, whether natural or legal, may enter into contracts. Contracts are merely a method of conducting commercial transactions. Transactional complexity and value vary enormously from one contract to another. Within the Maltese Civil Code, one finds **article 960,** which provides the definition of a contract;

> **960.** A contract is an agreement or an accord between two or more persons by which an obligation is created, regulated, or dissolved.

According to authors such as **Victor Morawertz**, a contract refers to *an enforceable agreement enumerating obligations between the parties*. Despite this, many other legal writers claim that agreements and contracts are to be kept separate because not all agreements are contracts. While such latter assertions may seem tedious to make, the difference between contracts and agreements is that a contract is legally binding while an agreement is not. As we have seen, article 960 does not make any such distinction.

A typical example of an agreement is the quotation by one party to another party. In this case there is simply mutual understanding and trust, with the intent to establish price clarity, with no legally binding force.

Raymond J. Friel, in ***the Law of Contract***, holds that a Contract, by definition commonly accepted, refers to ***an enforceable promise***. He refers to it as such, because he distinguishes between a contract and a promise, in that a promise may in fact contain most of the requisites required to form a contract, but it will never be governed under contract law because it lacks **enforceability**. This distinction is not recognised under Maltese Law, for Article 960 of the Civil Code places *an agreement* onto the same binary as a contract, so long as the **condition that it creates, regulates, or dissolves obligations** is satisfied.

Moreover, **Raymond J. Friel** asserts that a contract intended to produce future effects by means of future promises (such as a future promise to sell) is still enforceable as a contract.

Requisites which validate a Contract

A contract must always be made with the following **requisites**:

1) **The consent of the parties;**
2) **The capacity of the parties;**
3) **The subject matter;**
4) **A lawful consideration; and**

Furthermore, the contract must satisfy the external requirement that the contract must be done either verbally or in writing, with the latter taking the form either of a private writing or else of a public deed.

Maltese law uses the terms contract and agreement interchangeably. It does not distinguish, and where the law does not distinguish, neither should we (***ubi lex non distinguit, nec nos distinguere debemus***). It is paramount that all involved parties intend to enter into an agreement with one another. Maltese law examines the **intention of the parties**, to the extent that it is the intention which establishes whether a contract exists or not. If none of the parties have the intention to enter into a contract, then there is no contract. **Intent is the cornerstone for agreement**.

Adrian Camenzuli vs Mitul Dave and Alpharize Management Limited
78/168 on the 23rd September 2022 FHCC.

This case asserted that a contract can never be legally binding without the intent of both parties.

Skont l-artikolu 960 tal-Kap 16 tal-Liġijiet ta' Malta, il-kuntratt huwa konvenzjoni jew ftehim bejn tnejn min-nies jew iżjed, illi bih tiġi magħmula, regolata, jew maħlula obbligazzjoni. Din id-definizzjoni twassalna biex nifhmu li biex wieħed jara jekk ikunx sar ftehim li jorbot, jeħtieġ li jiġi eżaminat u stabbilit jekk ikunx hemm l-*idem placitum consensus*, jiġifieri r-rieda taż-żewġ partijiet. Dan huwa wieħed mill-elementi meħtieġa sabiex legalment iseħħ kuntratt jew ftehim bejn il-partijiet. Mingħajr dan l-element ir- rabta kuntrattwali ma tinħoloqx (ara Joseph Dalli et v. Mediterranean Film Studios *Limited*, Prim'Awla tal-Qorti Ċivili, 11 ta' Ottubru, 2006 u *Salvu Spiteri et v. Grazia sive Cetta xebba Grima*, Appell Superjuri, 18 ta' Lulju, 2014);

Jurisprudence refers to ***idem placitum consensus***, which refers to the consensual agreement from both parties. This is a requisite to the existence of a contract.

Mary Grech et vs Joseph Chetcuti pro et noe *- a contract is null without consent*

Jigi osservat, in tema legali, li wiehed mir-rekwiziti ghall- validia' tal-kuntratti huwa l-*idem placitum consensus* u cioe' il-fusjoni tal-kunsens tal-kontraenti kollha, essenzjali ghall-holqien tal-vinkolu kontrattwali validu. Ghalhekk "jekk il-kunsens ikun gie moghti bi zball, jew mehud bi vjolenza, jew b' eghmil doluz [fit-test Ingliz: fraud] ma jkunx jiswa" [Art.974] u "L-eghmil doluz huwa motiv ta' nullita' tal-ftehim meta l-inganni maghmulin minn wahda mill-partijiet ikunu tali illi minghajrhom il-parti l-ohra ma kienitx tikkundtratta" [Art.981].

Requisite 1 - Capacity of the Parties to Contract

As a general rule, any person interdicted or incapacitated cannot be party to any legal contract. A minor cannot enter into a contract, saving certain exceptions. An elder person suffering from dementia or some other similar defect of the mind is also unable to contract.

Article 967 Of the Civil Code establishes the capability of contracting.

967. (1) All persons not being under a legal disability are capable of contracting.

(2) The disability of persons sentenced to any punishment whatsoever is abolished

(3) The following persons are incapable of contracting, in the cases specified by law:

(*a*) minors;

(*b*) persons interdicted or incapacitated; and

(*c*) generally, all those to whom the law forbids certain contracts.

967(3)(a) Minors

Article 157 of the Civil Code defines a minor as a person who has not yet reached the age of 18 years. However, there are exceptions to the law - such as **article 969 of the Civil Code**, which provides that where one of the parties is above the age of 9 and under the age of 14, then an offer may still be made if it is for his own benefit or for the benefit of another person. In the case of minors above the age of 14, the provisions of **article 969** apply only if the contract or agreement is endorsed by the persons entrusted with parental authority or with tutorship over such minor. In the case of minors, the law prohibits *ex lege* the ability to contract, despite the minor being fully aware of his actions. This thus brings a distinction between **legal incapacity** and **natural incapacity**, as elaborated upon in ***Tabib Prinċipali tal-Gvern vs Christopher Camilleri***.

Tabib Prinċipali tal-Gvern vs Christopher Camilleri - *natural and legal incapacity distinguished 15th July 2002 Court of Appeal*

Billi dak iz-zmien l-appellat kellu l-eta' ta' sbatax–il sena, l-inkapacita' li tista' tigi konsidrata, m'hijiex l-inkapacita' naturali bazata fuq xi nuqqas assolut ta' kapacita' li wiehed jaghraf sewwa u jikkonsentixxi ghal ftehim, liema inkapacita' tirrendi il-kuntratt kompletament inezistenti. Invece, semmai, si tratta ta' inkapacita' legali cioe' dik l-inkapacita' li tidderiva mid-disposizzjoni tal-ligi stess u li tirrendi il-kuntratt annullabbli. Anzi f'dan il-kaz, si tratta ta' annullabbilita' relattiva, w it-talba ghad-dikjarazzjoni ta' nullita' tal-ftehim tispetta prettament lill-minuri, billi skond l-artikolu 969

Furthermore, the Civil Code allows minors to be emancipated at the age of 16, providing them the capacity to enter into commercial transactions. It is important to understand that such emancipated persons may only make offers in relation to their business. The legal obligation to undertake education in Malta is until the age of 16. Thus the law allows 16 year olds to enter into their own business.

This right to start a business at the age of 16 comes with the right to be emancipated (to be considered as legally valid in the eyes of the law to enter into contracts with a sole signature). There is no need for a parent to sign along with an emancipated minor. This power is tied solely to contracts in connection with the emancipated minor's business, and nothing more. There is a lacuna - for persons between the age of 16 and 18, in which various legal confusion arises - you can vote, you can become a mayor, you can only contract if it ties into your business, etc.

967(3)(b) Incapacity or Interdiction

Thus the only persons who can never place an offer are those persons who are interdicted or who are incapacitated, and minors not emancipated. Thus despite these persons being over the age of 18, they are not legally allowed to enter into contracts, owing to their impediment. The **Code Napoleon** under **article 509** defines *interdiction* as when *a person is legally dead, or more precisely, that the person bares likeness to a minor*. The person therefore cannot place any offers to another person. Having said this, Maltese law has never specifically incorporated a specific definition to define interdiction.

Lawrence Attard vs George Attard et *- incapacity as the legislator's protection*

Skond il-ligi Maltija n-nuqqas ta' kapacita' (minhabba li parti tkun minuri, interdetta jew inabilitata jew dawk kollha li l-ligi timpedihom minn xi kuntratti – Artikolu 967 u wkoll min m'ghandux l-uzu tar-raguni – Artikolu 968), ma tatix lok ghall-inezistenza tal-kuntratt imma ghall- annullabilita'. Dan ifisser li n-nullita' hi wahda relattiva, in kwantu tista' biss tigi eccepita mill-parti inkapaci ghaliex giet stabbilita biss ghall-beneficcju tal-inkapaci. B'hekk jidher li l-legislatur ried li jaghti biss protezzjoni lill- inkapaci"

Frank Cristiano vs Raymond Portelli *- conditions for mental incapacity*

1. Illi l-kapacita' hija r-regola u l-inkapacita' hija l- eccezzjoni, u ghalhekk il-presunzjoni hija favur il-kapacita'; liema presunzjoni hija "juris tantum";
2. Illi huma nkapaci dawk li fi zmien ta' l-att ma jkunux f'sensihom, u illi l-inkapacita' ghandha tigi ppruvata minn min irid jimpunja l-att;
3. Illi biex persuna jkun kapaci jaghmel att ma hemmx bzonn li jkun perfettament u rigorozament san minn mohhu, imma huwa bizzejjed li jkollu l-uzu tar-raguni fi grad tali li jippermettilu jkun jaf x'inhu jaghmel;
4. Illi biex tigi stabbilita' l-insanita' mentali ta' persuna hemm bzonn li jirrizultaw indizji gravi;
5. Illi l-Qorti Taghna dejjem kienu reticenti li jammettu d- domandi biex jigi annullat att minhabba nsanita mentali jekk dik l-inkapacita' ma tkunx irrizultat b'mod cert minn fatti precizi u univoci, u ma jkunx gie pruvat li kienet tezisti fil-mument li persuna kien qieghed jaghmel l-att.

Although the power to determine incapacity is left within the power of the court, there is an element of subjectivity. Although the court may seek expert advise, the prerogative to apply such advice or not is left within the Court's discretion.

967(3)(c) In general any person to whom the law forbids to contract

This residual provision covers all general prohibitions of contract.

Requisite 2 - Consent to Contract

Consent to Contract - Errors of Fact or of Law

OF CONSENT - Civil Code

974. Where consent has been given by error, or extorted by violence or procured by fraud, it shall not be valid.

975. An error of law shall not void the contract unless it was the sole or principal inducement thereof.

976. (1) An error of fact shall not void the contract unless it affects the substance itself of the thing which is the subject-matter of the agreement.

(2) The agreement shall not be void if the error relates solely to the person with whom the agreement has been made, unless the consideration of the person has been the principal inducement thereof.

The Law refers to errors of law or errors of fact. Errors of law may only serve as grounds to nullify a contract if the error of law pertains to the subject matter. With regards to error of fact, a contract may be annulled on the grounds that had a party known of the fact beforehand, he would not have entered into the contract.

Joseph Mifsud vs Justin Mifsud - when mistake of fact vitiates consent + when violence vitiates consent
31st May 2022

Dwar dan ix-xorta ta' żball Artikolu 976 (1) tal-Kodiċi Ċivili jrid li l-iżball dwar il-fatt irid jaqa' fuq is-sustanza nfisha tal-ħaġa li tkun l-oġġett tal ftehim. Jekk ma jkunx hekk, żball ta' fatt qatt ma jista' jwassal għan-nullita ta' ftehim.

Vjolenza li ġġib fix-xejn kunsens trid tkun tali li ġġib biża kbir fir-reċipjent tagħha illi jekk ma jiffirmax ser ikun vittma ta' vjolenza fiżika jew inkella ser ikun vittma billi jsofri ħsara fi ħwejġu.

This judgement held that only a significant fact to the contract may result in a repudiation of the contract. In this case, the plaintiff and the defendant entered into various loan agreements, and the plaintiff requested repayment of these loans. The court declared that only an error of fact should be of such a substantial aspect that the party would not have agreed if it had been aware of this fact in advance. Therefore the court will examine each case on a case by case basis to determine whether the error of fact is substantial enough so as to nullify a contract. From the evidence presented, the court concluded that there was no error of fact.

An Error of Law occurs when a contract refers to a legal provision which does not apply to the contract's subject matter. If such mistake is significant, there will be a repudiation of a contract.

Consent to Contract - Violence

977. (1) The use of violence against the obligor is a cause of nullity, even if such violence is practised by a person other than the obligee.

(2) Nevertheless, an obligation entered into in favour of a person not being an accessory to the use of violence, in consideration of services rendered for freeing the obligor from violence practised by a third party, may not be avoided on the ground of such violence; saving the reduction of the sum or thing promised, where such sum or thing is excessive.

978. (1) Consent shall be deemed to be extorted by violence when the violence is such as to produce an impression on a reasonable person and to create in such person the fear of having his person or property unjustly exposed to serious injury.

(2) In such cases, the age, the sex and the condition of the person shall be taken into account.

979. (1) Violence is a ground of nullity of a contract even where the threat is directed against the person or the property of the spouse, or of a descendant or an ascendant of the contracting party.

(2) Where the threat is directed against the person or property of other persons, it shall be in the discretion of the court, according to the circumstances of the case, to void the contract or to affirm its validity.

The Maltese Civil Code stipulates that while violence on the part of the contract automatically leaves to the nullity of such a contract, a different approach is adopted when violence used is not part of the contract. Therefore the Maltese Civil Code specifies that if a third party uses violence on spouses, descendants or ascendants or on the property, the contract is only null and void if the court decides to be so. Contrary to this, if violence is done on the party to the contract, then in such case the contract can be nullified.

Violence vitiates consent because it results in fear of the intended harm caused.

Maria Francesca Stevens vs Caroline Gatt - violence can be either physical or moral.
31st January 2019, Civil Court of Appeal

Biex vjolenza morali tikkostitwixxi vizzju tal-kunsens li jwassal ghan-nullita` tal-kuntratt, hemm bzonn li dik il-vjolenza tkun il-kawza determinanti tal-kuntratt, u li l-kunsens ikun il-frott tal-vjolenza ezercitata biex jigi ottenut il-kunsens. "**Biex il-vjolenza morali tammonta ghall-vizzju tal-kunsens hemm bzonn li tkun determinanti, ingusta u gravi u tali taghmel impressjoni fuq persuna ragonevoli u li tiggenera l-biza` li tesponi ingustament lill-persuna taghha jew il-gid taghha ghal dannu gravi ... Il-kwistjoni jekk hemmx vjolenza hi ndagini li hi imhollija interament fil-prudenza tal- gudikant**"

A judgement which is frequently cited in relation to violence serving as vitiation to consent is that of ***Edgar G. Soler noe vs H.D. Sir David Campell noe,***

Edgar G. Soler noe vs H.D. Sir David Campell noe - constitution of violence re consent
29th October 1949

Il-vjolenza tikkonsisti f'vie di fatto jew minacci ezercitati kontra persuna biex jigi minnha karpit il-kunsens li hija ma tridx taghti. Hu però necessarju li l-vjolenza morali tkun il-kawza determinanti tal-kuntratt; jigifieri biex kuntratt ikun suxxettibli li jigi annullat minhabba l-vjolenza jehtieg li l kunsens ta' wahda mill-partijiet ikun gie estratt bi vjolenza; fi kliem iehor li l-kunsens ikun il-frott ta' vjolenza ezercitata li tottjeni dak il-kunsens u mhux ir-rizultat accidentali ta' vjolenza ezercitata biex jigi raggunt skop divers. Mhux bizzejjed li l- kunsens jigi moghti u l-kuntratt ikun sar taht pressjoni ta' forza nsormontabbli ghal dak li jkun ta' l-kunsens; ghaliex dik il-forza tista' tkun forza naturali u nkonxjenti, u ghalhekk – proprjament ma jkunx hemm vjolenza mill-punto di vista guridiku. Il- vjolenza trid tkun l-opera ta' persuna li tezercitaha biex tottjeni l-kunsens.

Consent to Contract - Reverential Fear

980. Mere reverential fear towards any one of the parents or other ascendants or towards one's spouse, shall not be sufficient to invalidate a contract, if no violence has been used.

Dr Mark Chetcuti noe vs Franca Pia di Donna - fear towards ascendants or descendants does not vitiate
16th December 2004, Civil Court of Appeal, 1854/2001/1

Hekk kif il-biza biss lejn axxendenti, mhux bizzejjed biex jinnewtralizza l-kunsens ta' dak li jkun (ara artikolu 980 tal-Kodici Civili), il-Qorti thoss li lanqas biza biss lejn dixxendenti ma hu bizzejjed biex jivvizja kunsens. Dak li ghamlet l-omm, ghalhekk, ghamlitu minn rajha, u hija hi li trid twiegeb ghad-danni.

Therefore fear towards an ascendant or descendant, without any coupling violent act, is not alone a ground to vitiate consent, as per **article 980** and as interpreted in **Dr Mark Chetcuti noe vs Franca Pia di Donna**.

Consent to Contract - Fraud

Besides errors of law, fact, and violence, **fraud** may also serve as a ground to invalidate a contract, because there is the implication that the consent was never truly given, owing to deceit.

981. (1) Fraud shall be a cause of nullity of the agreement when the artifices practised by one of the parties were such that without them the other party would not have contracted.

(2) Fraud is not presumed but must be proved

In ***Maria Francesca Stevens***, the court examined the fraudulent element vigorously. In this case, the Plaintiff was living with his brother. The defendant once informed the plaintiff that she would have to sign a contract to allow his siblings to live in the property until death. The defendant was

unaware that the contract actually transferred the right of ownership to the plaintiff. As a result of this deceit, the consent was not given and thus the contract was argued to be void.
4 Elements must concur for fraud to subsist:

1) **Fraudulent Intent;**
2) **Fraudulent Acts which are grave in nature, applying the bonus paterfamilias principle;**
3) **The fraudulent act must be the sole reason that the parties entered into a contract; and**
4) **The fraudulent acts must be committed by the other party either actively or passively.**

These 4 elements demonstrate an aspect of subjectivity, and thus the Court examines the facts on a case by case basis before rendering fraud in the contract. In the Stevens case, the notary testified that the terms of the contract were explained well to the plaintiff, and thus the contract was not invalidated. Furthermore a doctor confirmed that the plaintiff was of sound mind, and so the capacity of the plaintiff could not be contested. The contract remained therefore valid.

David Pace vs Jamie Vella
13th of July 2020

Illi biex id-dolo jirnexxi ma jridx ihalli lill-vittma zmien u hsieb biex jirresisti.

This judgement asserts that the argument of fraud must be brought as soon as the fraud is discovered. As soon as the party realises that an act was fraudulent, then the contract may be argued to be nullified. If, however, the party prolongs the procedure and does not bring up the argument immediately, then the court assumes that the party accepted the fraud and thus does not nullify the contract. When contemplating the 4 elements of fraud, the fraud must determine on a balance of probability whether the adopted methods are tantamount to deception which is sufficient to constitute an invalidation. The court must analyse the behavioural pattern over time to determine whether the person's actions were coupled with intent to deceive. The court applies the bonus paterfamilias principle, in order to determine how a reasonable person would have behaved to ascertain the gravity of the action. It is essential that the measures employed by the offeror has the effect of misleading the party's decision to enter into a contract and thus whether it could have been possible to enter into the contract without using certain gimmicks. Finally, the contracting party must use a fraudulent device.

If a third party engages in unethical behaviour, then the acceptance of the contracting party is vitiated only if the party is unaware of these dishonest practices. While the third party does not lead to acknowledge the use of these devices to vitiate consent, the court ruled in the judgement ***Rita Debono vs Lombard Bank Plc et*** *(Court of Appeal 9th January 2009)* that complicity must exist for the defence to succeed, and not simply awareness or acknowledgement.

Rita Debono vs Lombard Bank Plc et
Court of Appeal 9th January 2009

biex jista' jinghad li hemm vizzju tal-kunsens b'rizultat ta' qerq, l-ingann irid jigi ppratikat minn parti wahda fil-konfront tal-parti l-ohra. Kull agir f'dan is-sens minn terz ma jistax jinfluwenza l validita` tal-kunsens, salv id-dritt ta' risarciment ghad-danni da parti tal-konvenut ingannat kontra t-terz li ngannah. Ghalhekk peress li dak li qed tattakka l-attrici huwa il- kuntratt safejn dan jolqot biss il-ftehim li sehh bejnha u l- bank (l-iskrizzjoni tal-ipotika specjali), kwalunkwe qerq li seta' gie ezercitat minn zewgha huwa immaterjali, ghax ghall-fini ta' dan il-ftehim, ghandu jitqies terz.

Requisite 3 - Subject Matter

Subject matter refers to the object of the contract, which object can only be *in commercio* (extra commercium being those not mine) but mere possession or use is enough to give the right to transfer the thing.

Requisite 4 - Lawful Consideration

The consideration, or *causa,* of a contract refers to the reason behind the obligation and the purpose of the contract. Consideration means that every contract must be legal to be valid. Consideration cannot be **unlawful, contrary to morality, or public policy.** It does not always equate to what is legally correct. The provisions of the Civil Code were enacted in 1865, and so the terms *morality* and *public policy* may be argued to be less applicable, since the main concern is whether the contrary is contrary to law or not. ***Raymond J. Friel***, in *the Law of Contracts*, holds that under Common Law, certain types of contracts which, on the surface, appear to be legitimate have not been enforceable, owing to an underlying illicit cause.

There exists also the notion of **contracts under seal**, in which a contract is enforceable without the need to delve into consideration. They are often referred to as *covenants*. Previously, a contract done under seal would require several formalities, having to conform to certain standards. Today, companies tend to sign a contract using certain officiated seals. Today, in America, a contract under seal with respect to the sale of goods is still subject to consideration and scrutiny.

Article 990 of the Civil Code defines what constitutes *unlawful consideration* under Maltese Law;

> **990.** The consideration is unlawful if it is prohibited by law or contrary to morality or to public policy.

Gratuitous Contracts

Gratuitous contracts seem to lack lawful consideration, yet they are still validly construed, since both parties agree to bind themselves to the contract.

The Offer and Acceptance

According to **Raymond J. Friel**, a Contract is comprised of 2 parts; the **offer** and the **acceptance**. When you accept, you accept a contract in its entirety. When these 2 parts exist, there is a validly construed contract, provided there isn't a lacking requisite such as capacity or formality, as will be hereunder discussed.

A contract thus will not exist if the offer is not accepted by the other party. Maltese law considers an agreement concluded when one party offers a thing which is accepted by the other party. Therefore, contracting involves one party proposing the contractual terms (such as price, delivery date, etc) and express intention to be bound by such terms upon acceptance by the other party. The Civil Code does not refer to the issues of offer and acceptance, and so we refer to the Commercial Code.

Offers and Invitations to Offer

While the Commercial Code discusses the time of conclusion of a contract, unlike the Civil Code, it does not refer explicitly to the words *offer* and *acceptance*. Nor does it define *offer* and *acceptance*. We understand an offer to be *a promise by one party to enter into a legally binding contract on a particular set of terms with another party who is called the offeree*.

Raymond J. Friel defines ***offer*** as ***a manifestation of intent to act or refrain from acting in a specified way, so made as to justify a person in understanding that a commitment has been made***.

One should note that while a contract cannot be validly construed if one of the parties lacks capacity to contract, an offer can be made by and to anyone, albeit without any binding effect.

The Commercial Code refers to *correspondence*, by means of *advertisements*, and by introducing the term *invitation to offer*. This latter term is used to distinguish between an offer to invite a party to negotiate and other types of offers. When an offer is made via a catalogue or advertisements, then that offer may be considered an *invitation to offer*, unless the person presenting the offer expresses otherwise. Such an approach is necessary because catalogues and advertisements must be made without expressly indicating that an offer is made.

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 of the Commercial Code governs the **conclusion of a contract**, holding that an **accepted offer** constitutes a binding contract, so long as the nature therefor is one founded at law.

An offer is a clear and specific proposal made by one party to another party to enter into a legally binding contract, while an invitation to offer, also known as an invitation to treat, is an expression of willingness to negotiate or enter into a contract. A difference is made between an offer and an invitation to offer, in that an invitation to offer is not sufficient to constitute a contract, owing to the lack of acceptability.
A test adopted to determine whether there was a simple offer or an invitation to offer is to analyse the communication between the parties in attempt to ascertain the intentions of the parties. For

instance, one may refer to a series of statements or letters between the parties during the negotiating process. One must add that offers may be made by any person, whether natural or legal, and may be made to any person, group, or even to the general public (as in the case of Government Tenders). An offer may be expressed verbally, in writing, or tacitly. It may be difficult to understand when an offer is made. There may be extensive communication between the parties, during negotiations, to reach a final agreement. In such situation, it may be challenging to determine at what point in time there was an offer and an acceptance. One possible test is to determine whether further bargaining was expected. Notwithstanding this, in practice it is easier said then done to establish the point in which an offer was made.

Arthur L. Corbin defines *offer* and *acceptance* as follows:

An offer is an act on the part of one person whereby he gives to another the legal power of creating the obligation called contract. An acceptance is the exercise of the power conferred by the offer, by the performance of some other act or acts. Both offer and acceptance must be acts expressing assent.

A quote obtained from a retailer or a seller would constitute an offer, and when accepted, that offer becomes binding. On the other hand, an advertisement in a magazine, the test becomes a bit more difficult to satisfy. Various theories exist to ascertain whether an offer is valid to found a binding agreement;

The Theory of Declaration

The theory of declaration holds that a contract is concluded the moment the offeree declares the offer, thus constituting a union of wills. This theory is disfavoured, because it does not hold, as a requirement, that the offeror must necessarily know of the acceptance, so long as the offeree has declared his agreement.

The Theory of Transmission

The theory of transmission is one favoured under English Law, holding that the contract is concluded the moment the offeree transfers his acceptance to the offeror. The argument against this theory is that it is not necessary for the offeror to know of the acceptance, so long as it is transmitted to him by the offeree.

The Theory of Reception

The theory of reception states that a contract is concluded upon reception, by the offeree, of the acceptance. Again, it is not necessary for the offeror to fully have received the acceptance, in the sense that a mere letter sent to the house of the offeror, without the latter having read the letter, would constitute a contract.

The Theory of Information

The theory of information states that conclusion of contract arises upon the knowledge of the offeree's acceptance. Thus union of wills is complete upon information being received and comprehended by both parties. This would normally entail a longer process when compared to the other tests, yet it ensures that acceptances was transmitted, received, and understood by the offeree to the offeror. This theory is that adopted by the Maltese Courts, as does Italian Law.

Intent to Contract

The Subjective Test to determine Intent to Contract

Once there is determination of offer and an acceptance, there is a unification of will. This signifies the intent to enter a contractual relationship with the other party. A contract is thus invalid if there is no intention on one of the parties to create a contractual relationship. One must note that the apparent unwillingness of either party does not necessary amount to a legally binding contract. The most effective method to determine the parties' legal intention is to ask them, directly, about their intent to enter into a contractual relationship (**the subjective test**). This may not be the most appropriate test when one of the parties wishes to exit out of a contract.

Such an objective test appears to hold water only in specific contracts. Courts have sometimes stated that such an objective test shall apply for family agreements where the parties to these contracts are in separation proceedings. In these type of contracts the courts have always concluded that the presumption is that there is no contract formed regardless of the party's desire. This legal intention, from an objective POV has to apply in each and every type of contract. Even in this type of contract the rationale must remain equal for all.

The Objective Test to determine Intent to Contract

Since the subjective test in of itself causes problems in rendering intent existent, an objective test was adopted to apply to various cases in the same manner. This test consists of the perspective of the **bonus paterfamilias**, whereby the court considers all the circumstances before determining whether a reasonable person could believe that the parties carried the intent to bind themselves to the contract.

BOV vs Monica Magro et

In this case the court concluded from the evidence brought forward, the defendants were only communicating with the plaintiff and there was never a final decision between the parties and thus the court concluded that the defendant's did not have any obligation to enter into an emphyteutical agreement with the plaintiff.

Maltese courts have never dealt with these situations however we can look at the English Foreign judgment, ***Balfour vs Balfour – 1919***, whereby the husband promised his wife to pay her maintenance while he was away from home, however although there was such a promise, he alleged that there was no intention to be legally bound by that promise, even though the wide relied on these payments. The judge in this case stated that ''agreements between spouses are generally unenforceable''. He states that is absurd to apply such rigid interpretation in family matters because this can lead to disputes between the parties.

Maltese Courts seem to rigidly apply the theory of information, holding that the **offeree must ensure that the offeror knows of his acceptance to the offer. The objective test must be applied to understand whether such intent to enter into a contractual relationship was possible.**

Acceptance

The same problems that arise under *offer* tend to arise under *acceptance*. Under British Law, a contract done without acceptance is still deemed to be a contract, yet it is not **enforceable**. Under Maltese Law, as per article 110, a contract is not complete unless and until there is acceptance. Furthermore, article 110's use of the words ***acceptance known to the party making the offer*** confirms the Maltese legislator's **theory of information** approach.

Corbin states that acceptance is ***a voluntary act of the offeree whereby he exercises the power conferred upon him by the offer and thereby creates the set of legal relations called a contract***.

An acceptance is a reply to an offer, and thus there can be no valid acceptance if there is no valid offer.

Italian law creates a presumption which states that one is informed of the acceptance when it reaches the destination, which marks the point a contract is concluded.

Delayed Acceptance

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.

Thus when negotiations come into play, the Commercial Code holds that each additional or subsequent term is deemed to be a new offer. The same applies for acceptances which are delayed, in which case the law deems the offeree to have refused the first and original offer.

Revocation of an Offer

According to article **111** of the Commercial Code, an offer may be revoked if it has not been accepted;

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.

According to **Daniel Ryan**, an offer can also be terminated when the offeror dies or becomes incapacitated.

An offer may also be revoked in the case wherein the subject matter is destroyed. Another circumstance in which an offer is nullified is in the case of legal amendment, which would make the offer illegal.

Furthermore, if the offeror has made the offer by written correspondence between distant parties, according to the theory of information which the commercial code embraces, the offeree must inform the offeror of one's explicit intention to accept the written offer.

A fundamental principle underlying contract law is that **upon acceptance, the offer can never be revoked or amended**. The Commercial Code does not specifically regulate offers placed firmly. Still, however, the same theory of information would apply which means that the offeree, must demonstrate their acceptance of the offer. Therefore as a result, acceptance of the offer involves the final expression of consent to the offer through words or actions. To acknowledge formal acceptance, the offeror must do so transparently (clearly) using as well an appropriate method of communication. In addition, the offeree must accept the proposal without altering or adding details because an acceptance that attempts to introduce new terms will be regarded as a counter offer and not as an acceptance.

Capacity and consent of the Offeree

The same rules of capacity which apply to the offeror apply to the offeree. Thus those persons not prohibited to contract by means of Article 967 of the Civil Code are the same people capable to contract. These were the same people aforementioned; those under a legal disability, minors (unless emancipated), persons interdicted or incapacitated, and generally all those prohibited from contracting.

Offers by advertisement

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.

Article 113 of the Commercial Code thus holds that *invitations to offer*, as previously discussed, are not capable of serving the basis to a contract. They are not binding unless they declare themselves to be.

Further, goods demonstrated (such as clothes or shoes put at the windows of a store) are capable of constituting an offer, so long as the other conditions of sale, including the indication of price, are coupled with the goods.

The External Requisite for a valid Contract

As previously mentioned, the external requisite for a contract to be validly construed relates to its form. An agreement may be done verbally and it may be enforced, despite no written agreements being done. However, should the parties wish to reduce an agreement into writing, then they may do so by virtue of article 114 of the Commercial Code. Notwithstanding this, there are certain scenarios in which an agreement **must** be reduced into writing, as will be hereunder discussed.

> **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.

Unless otherwise stipulated by law, a contract need not be done in writing. Nonetheless, reducing a contract to writing is important for 3 main reasons;

1. The clarity of contracts mitigates the risk of misunderstandings between the parties. If the contract does not specify the parties' intentions, then the contract may still be nullified if it is proven that the parties did not consent to the contract's entering into.

2. The second reason why a contract should be put into writing is that the evidentiary standards strengthen the content by protecting it from deception and misrepresentation.

3. The third reason is that formal and evidentiary requirements establish a trustworthy framework for third party assessment and reliance beyond the immediate parties involved.

The Formalities Construing a Contract

We distinguish between contracts under seal and solemn contracts,. Maltese law regulates seal contracts only in the case of secret wills. However, in foreign jurisdictions they are used more frequently than in Malta.

Solemn contracts refer to **public deeds or private writings (and sometimes even verbal agreements).** As a first step it is important to understand that the Civil Code determines which contracts can be carried out verbally. These contracts are **the contract of letting and hiring, payment for rent, and mandate contracts. Having said this, if one rents out a property, there are other laws which hold that this must be reduced to writing** (and *lex specialis derogat legi generalis*).

There are various other contracts which the Maltese Civil Code requires a private writing for their validity. This thus implies that a verbal agreement with regards to such contracts leads to invalidity and nullity. Without such written agreement, these contracts cannot be validly construed. This list is established in **Article 1233 of the Civil Code:**

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.

In ***Mirian Frendo et vs Agatha Agius et***, both the first court and the Court of Appeal held that the written contract is important because it demonstrates the **true intention** of the parties. From **Article 1233** we can understand that assignment of debt shall also be placed in writing.

We must understand the difference between **novation** and **assignment**. In novation, we transfer both rights and obligations (such as a change in debtor), whereas in assignment we are only transferring rights (such as a change in creditor). With a change in debtor, it is important for the creditor to consent, since he may trust the repayment by debtor A but not of debtor B.

Priceclub Operators Limited vs Victor Zammit - *company's intention to defraud*

A proper inference of intent to defraud could be made if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment." In subsequent cases it was decided that the intention to defraud and fraudulent purpose meant "actual dishonesty involving, according to the current notions of fair trading among commercial men, real moral blame

The Civil Code establishes those contracts of extraordinary administration, such as loans. There are also other contracts which are only valid if they are done through public deed. A public deed is only valid if it is drafted by a notary public and which must be registered in the public registry. One may still draw up a public deed without registering it in the public registry, unless the law stipulates otherwise. **Article 1232 (2)** of the Civil Code defines public deed as follows;

1232 (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.

When a contract which regulates immovable property and thus when there is a transfer of title in immovable property, that contract shall be enrolled in the public registry and in the land registry. In cases of conflict between the public registry and the land registry, the land registry prevails. Types of contract which must be registered in the public registry are those dealing with hypothec debts, transfers of immovables, separation of estates or even separation contracts.

Giuseppe Vella Gatt vs Giuseppe Darmanin
23rd November 1956

"L-art 118 tal-Kodiċi tal-Kummerċ joħloq preżunzjoni fis-sens illi, meta ftehim verbali jsir bl-intiża li għandu jiġi redatt bil-miktub, u l-iskrittura mbagħad ma ssirx, il-ftehim mhux validu; għax meta ġie miftiehem li l-ftehim verbali kellu jiġi mniżżel bil-miktub, hu preżunt li l-partijiet riedu jassoġġettaw il-validita' tal-ftehim għat-tħaris ta' dik il-formalita'

Din il-preżunzjoi mhix "juris tantum", imma "juris et de jure", u hija ntiża biex tipprevedi u tiddirmi l-kwistjonijiet fil-kummerċ u għalhekk biex tipprevedi u tiddirimi l-kwistjonijiet fil-kummerċ u għalhekk tipprevjeni l-kawżi; b'mod li dik il-preżunzjoni ma tistax titwaqqa' bi provi testimonjali"

Hardrocks Limited vs Francesco Fenech
1st December 2004

Indubitament, ghal konkluzjoni ta' kuntratt jehtieg li tissussisti dik il-kombinazzjoni ta' manifestazzjoni tal- volonta` tal-kontraenti diretta lejn ftehim unitarju. Ir-raguni hi wahda ovvja. Hi din l-unitarjeta` tal-kunsens li tikkreja, imbaghad, ir-relazzjoni guridika fl-effetti kollha taghha u taghti lill-kuntratt il-forza ta' ligi li jsemmi l-Artikolu 992 (1) tal-Kodici Civili, u, allura, ukoll, "l-effett bejn il-partijiet kontraenti biss" kif jinghad fl-Artikolu 1001, Kodici Civili. Effettivament, kif jissokta jinghad f' dan l-ahhar dispost tali kuntratt la jista' jiggjova u lanqas jippregudika lit-terz li ma ippartecipax tant li ghalih il-ftehim jibqa' *res inter alios* acta;

The obligation of co-debtors

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

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

Article 115 discusses the presumption of the liabilities of co-debtors as being severally liable. The second sub-article extends this presumption even to sureties, even if not a trader, who guarantees a commercial obligation. This must be read in conjunction with **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.

The debtor, who would be compelled to pay, would have the right to compensation from the other debtors. This means that the debtor who actually pays the debt will have a right of action from the other joint and several debtors. Therefore, according to 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.

There exists the benefit of division. Thus if, for instance, there are 3 debtors, and one of the debtors are asked for payment, that debtor may not apply the benefit of division, as per article 1096.

Suretyship is a situation wherein A borrows money from B, with the guarantee that the money will be paid by a third party, if not A. A is thus the debtor. A may bring another person to act as the surety. The creditor shall first go against the principal debtor, and then the surety. However, under Commercial Obligations, the Surety is joint and severally liable, and thus the creditor may go against the surety directly. In civil law, the creditor must first go against the principal debtor before turning to the surety. All of this results from article **1934** of the Civil Code.

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

With regard to joint and several liability, there is 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.

Title 20 of the Maltese Civil Code regulates suretyship. These provisions have never been amended from when they were enacted by Sir Adrian Dingli in 1865.

With regards to suretyship, we look at article 1925, which holds as follows;

1925. Suretyship is a contract whereby a person binds himself towards the creditor to satisfy the obligation of another person, if the latter fails to satisfy it himself.

Therefore, suretyship involves the interests of the parties each of whom stands in a different position with regard to the other. The following article provides that suretyship cannot exceed a debtor's loan to a creditor;

1926. (1) Suretyship can only exist in respect of a valid obligation.

(2) Nevertheless, suretyship may be contracted for an obligation which can be annulled on some plea personal to the debtor, as for instance, that of disability arising from minority or interdiction.

Furthermore, suretyship cannot be assumed, but it must be expressed and cannot extend beyond the contract's term. Such consent has to be done in writing, as discussed in the case ***Miksons Transport Company Limited et vs Anthony Stivala et,*** which held that when the surety pays for the debtor, the surety may sue the principal debtor to recover the amount paid. This was also brought to light in ***Jason John Aquilina pro et noe vs Antoine Camilleri pro et noe et***.

Article 1948 also allows the surety to claim indemnification from the debtor before paying the debt in certain specific circumstances, such as when the surety has been sued for payment.

1948. A surety, even before paying, may proceed against the debtor to be indemnified by him -

(*a*) if he has been sued for payment;

(*b*) if the debtor has become bankrupt or insolvent, or his condition has altered and there is a reasonable apprehension of insolvency;

(*c*) if the debtor has undertaken to release him from the suretyship within a specified time, and such time has elapsed;

(*d*) if the debt has become due by the expiration of the time agreed upon for payment;

(*e*) if the debtor is in default for delay in payment;

(*f*) at the expiration of two years, where no time has been fixed for payment, and the obligation is not, of its nature, such that it cannot be extinguished before a longer time.

Article 1956 discusses the termination of suretyship, holding that suretyship extinguishes the same way as all other obligations.

There may also arise certain instances wherein the law itself, or when the courts require, that a surety be present.

It is crucial to distinguish suretyship from guarantee. In the case of suretyship, the surety is liable to the debtor automatically, while in guarantee, the guarantor becomes responsible only if the principal debtor is in default and the creditor informs both parties in writing that the debtor is in default. Having said that, there may be situations wherein both terms are used interchangeably. Furthermore, the Maltese Civil Code governs suretyship, and not guarantee, yet the difference must still be made for academic purposes.

Article 115 of the Commercial Code and 1941 of the Civil Code speaks of presumptions in relation to co-debtors. Presumptions are either *jure et de jure* (irrebuttable) or *juris tantum* (rebuttable by evidence to the contrary).

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

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

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.

Azzopardi et vs Grech discusses this presumption, which essentially creates the presumption of co-liability between the surety and the principal debtor, unless evidence is brought to the contrary.

Payment

When the subject matter of the obligation is limited to the payment of a determinable sum, the damages arising from the delay of the person's performance thereof shall only consist in the interest of the sum due.

Article 1141 holds that interest rates shall run from the date when the obligation *should have been informed*. Further, S.L 16.06 (interest rate exemptions regulations) that may provide for different interest rates. If the S.L is not applicable, the interest rate is generally calculated at 8% p.a., subject to one exception, governed by the Civil Code under the provisions dealing with Contracts of Sale, wherein the interest rate is of 5% p.a. In a Civil Obligation, the interest rate does not start running immediately, but rather when the debtor is served with a judicial intimation.

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 the case of a legal impediment, we refer to ***Watthen vs Alex Cutajar***, wherein the Court asserted that once notified, there is no excuse not to effect payment. Further, in ***Fenech vs Ciappara***, the Court of Appeal confirmed that in commercial obligations, interest beings to lapse *ipso jure*.

Compound Interest is the calculation *of interest on interest*. This is governed by Article 1142 of the Civil Code, which states the following;

1142. The interest fallen due may bear other interest either, in virtue of the foregoing provisions, from the day of a judicial demand to that effect, or in virtue of an agreement entered into after the interest has fallen due, provided, in either case, interest be due for a period not less than one year.

This is also regulated by Article 3 of the Commercial Code, wherein Article 1142 finds application in the context of overdrafts as banking practices, which are regulated by usage. In these instances, the Court accepts that banks may compound interest twice a year, and that it is only an exception to the banks.

In relation to other contracts regulated by the Civil Code that are considered as loan, one may find the *mutuum contracts,* which is a loan for consumption contracts, pertaining to situations wherein one takes a loan from the bank. Further, there are *commodatum contracts*, which are loans for use contracts, as well as the *precarium contracts*, which are loans similar to commodatum contracts but which may be taken by the lender at any time upon his exigences.

Article 1169 governs appropriation of payments.

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.

The legislator has established that any payment made must first go against the interest, and only in such case can there be appropriation.

With respect to payment for commercial obligations, importance is given to 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.

This article played a larger role prior to 2008, before the Euro was adopted, owing to the reason that under the EuroZone, there were several countries adopting the same currency. Article 116 holds that when money expressed in a contract is not expressed in terms of its exchange, then one must look at the destination of the contract, the place of the performance of the obligation, and then the nearest market, from which one will obtain the exchange rate. There will also be situations wherein it is very difficult to issue rates of exchange. For example, the Central Bank of Malta does not issue rates of exchange with South Korea. In these instances, one must refer to the closest market to Malta which will have an applicable rate of exchange for the currency in which the contract is denominated and in respect of which there would be no exchange in Malta. This is not as applied in Malta as it used to be in the past.

This was discussed in the judgement ***Kris Borg vs Airmalta plc***, decided on the *27th June 2003*.

Article 118 of the Commercial Code discusses the concept of the *litigious right* (il dritto litigioso). A litigious right, per se, can be transferred, and thus a case may be assigned to someone else. This is also confirmed by Article 1483 of the Civil Code.

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.

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.

(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 also states that the right is deemed to be litigious if there is a contested suit as to the existence thereof or if the debt is not liquidated and is difficult to liquidate. When a litigious right is based on a commercial transaction, the debtor does not have the pre-emption right which is given in the case of Civil Obligations, and therefore in Commercial Matters, one is free to transfer his litigious rights at any price that he wants. This is because there is no fear that the debtor must match the offer and buy his way out of litigation. Thus, the whole scope of this difference in Civil and Commercial matters is that in Commercial Matters, a debt is a Commercial Object that can be traded and the parties can make profit, should they choose on that transaction. In fact, in some cases, one may raise finance by transferring debts to bank.

Resolutive Conditions

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.

A resolutive condition is a condition that brings the termination of a contractual relationship which consequently dissolves the matter. The definition of a resolutive condition is provided in **article 1066** of the Civil Code, which states;

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.

Under Civil Law, a resolutive condition may be one of 2 types; the **express resolutive condition** and the **tacit resolutive condition**, with the latter sometimes being referred to as the implied resolutive condition. Article 1067 of the Civil Code deals with the express resolutive condition, which means that if, for instance, a clause was inserted into a contract holding that if the contractor does not turn up after 1 month, then the contract is then terminated.

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.

Article 1068 then deals with the implied resolutive condition. In every bilateral contract, it is implied that if one party does not perform their obligations, then the other party is not bound to perform theirs. Thus, one cannot sue for the performance of a contract by the other party if he himself was in breach of contract. This plea has always been accepted by our courts, as in the case ***Sare vs Ellul*** *(1953)*. The point made in this decision was that a person who is sued may, in his defence, raise the plea that the other party had been in breach before him.

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.

It is not always easy to determine which breach happened before the other. It is equally difficult to determine whether the reaction was proportionate or not. Article 1068 has attached a very important proviso, which holds that in any case, the agreement is not dissolved *ipso jure*, unlike the situation in Article 1067, and which permits the court to grant time to the defendant. Thus where one does not specifically lay down in the contract that a failure to perform an obligation will automatically lead to the dissolution for the contract, it is the court that has the power to determine whether a contract should be dissolved or otherwise in case of failure to fulfil. Thus *tacit resolutive conditions* do not dissolve a contract, with the discretion being vested in the courts. This contrasts to *express resolutive conditions*, wherein a contract is dissolved upon failure to fulfil.

Abela vs Bonello - *unclear express resolutive condition*
31st May 2002

In this case, the condition related to a clause pertaining to a payment of rent which held that *if rent was not paid on time, the landlord will have the right to terminate the lease*. The issue arose as to whether this clause was an express resolutive condition. The Court concluded that since the condition did not state that the contract should automatically terminate upon non-fulfilment of the obligation, then the condition is not an express resolutive condition. The Court thus held that the wording used ***must leave no room for interpretation*** in order for a contract to dissolve by means of a resolutive condition.

It is for this reason that commercial contracts often state that in the case of non-payment, the lease terminates ipso jure. In ***Chetcuti vs Farrugia*** *(6th October 2000)*, the plaintiff and the defendant signed a contract of lease for a shop. The defendant, the owner of the shop, sent a letter to Chetcuti, demanding that anything attached to the windows of the shop be removed. The plaintiff demanded that the Court declare the letter sent by the defendant to be deemed unfounded and unjust. The defendant argued that these conditions were stipulated in the Contract of lease and that both parties agreed to them. The contract held that the lessee would only be able to fix a shop sign onto the outside windows and that he cannot fix other decorations on the outside. It seemed that Chetcuti had attached several other effects to the property which seems to go against the contractual agreement. Chetcuti argued that this was done because the word ***biss*** was not written in the contract. Farrugia, however, held that the wording was sufficiently clear in order for the contract to be declared null and Chetcuti evicted. The first Court ordered the plaintiff to be evicted within 2 months. Among other motivations for the decision taken, the Court quoted that it had been stipulated in the contract the following: "*jekk jikser xi kondizzjoni tal-preżenti lokazzjoni u jibqa' ma jirrangax, il-kondizzjoni li tkun ġiet miksura fi żmien xahar minn meta jkun irċieva avviż b'ittra uffiċjali mill-proprietarju, f'dan il-każ il-proprietarju jkollu d-dritt li jittermina l-lokazzjoni*". The decision was appealed, and the Court of Appeal analysed the violation alongside the conditions. The Court on appeal considered that the lessor and the lessee were in the same business and that they had expressly inserted an agreement so as not to hinder each other's business. Because of this, the Court argued that a violation would be tantamount to financial loss, and thus once again the Court of Appeal held that that Chetcuti's infringement was one of substance, and that the contract thus had to be terminated.

Having said this, one has to keep in mind that if there is a *tacit* resolutive condition, the Court may grant a time depending on the circumstances of the case, as was discussed in ***Brincat vs Mifsud*** *(16th April 2004*). When it comes to Commercial Obligations, there is 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.

Whereas in express resolutive conditions, the conditions are the same, in both commercial and civil obligations, in the case of tacit resolutive conditions, the civil court may grant time, but in the case of the Commercial Court, the Court cannot grant time unless the contract is one of lease or emphyteusis.

Article 117 thus provides that in commercial contracts, the implied resolutive condition produces the dissolution of the contract *ipso jure*, and it shall not be lawful for the court to grant the defendant a time for clearing the delay. This means that in commercial matters, there is no distinction between *express and implied resolutive conditions*. This means that even if it is not stated that a party has arrived to an agreement, if the other party fails to honour his obligations, it is automatically presumed that such failure will lead to the automatic termination of the contract between the parties.

Joseph Vassallo vs Charles Vella
25th November 1954

In this case, the Court specified that Article 3 of the Commercial Code provides for the hierarchy, and in the case of conflict between the commercial code and the civil code, the commercial code shall apply.

Blye Engineering vs Paolo Bonnici
30th March 2001

In this case, the Court held that a contract of works is a bilateral contract which is always subject to an act of agreement. In the case of emphyteusis, if the payment for ground rent is not paid for 3 consecutive terms, the dominus has the right to take action to take it back, wherein the Court has discretion to decide whether to give time to regularise the position or not.

The question thus is how the sections of the Civil Code dealing with emphyteusis are reconciled with Article 117 of the Commercial Code. On this matter, there are conflicting judgements.

Holland vs La Rosa
3rd December 1954

In this judgement, the court made it very clear that the legal provisions dealing with rent shall prevail over article 117. Therefore, unless in the contract of lease there is an express resolutive condition, the Court held that it is entitled to grant a period of time for the defendant to rectify the situation.

Mgr Vincenzo Refalo vs Alfred Cini

This case decided differently. In this case, the court concluded that the Commercial Code shall prevail over the provisions of the Civil Code in all matters, including leases and emphyteusis. This is the reason that the legislator then enacted the proviso to article 117 of the Commercial Code, which holds that it does not apply to contracts of letting of immovable property, or lease, or emphyteusis.

Thus for lease or emphyteusis, there should not be the automatic termination of contract. Therefore, these conditions leads to contracts being referred to as conditional contracts.

Acquisitive Prescription

Acquisitive prescription is possession of a certain type for a defined period of time. Therefore, if for example, one uses a particular passage through a field for a number of years. In that instance, one would have acquired the right over it. Prescription may, however, be interrupted (articles 2127-2136 Civil Code). In order for prescription to be interrupted, there must be a judicial letter or protest, or a warrant, or else upon the filing of a judicial act. In the case of a promise of sale about to expire, one must file a judicial letter in Court for the other person to appear on the contract.

Article 2128 speaks of interruption of prescription by judicial act;

> **2128.** Prescription is also interrupted by any judicial act filed in the name of the owner or of the creditor, served on the party against whom it is sought to prevent the running of prescription, showing clearly that the owner or creditor intends to preserve his right.

There exists also the suspension of prescription, wherein the prescription is paused until an issue is resolved, but without restarting. For commercial matters, prescription cannot be interrupted or suspended, by virtue of 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.

Therefore, it is not possible to interrupt the period of time to exercise actions established in the Commercial Code, rendering their time barres preemptory.

Article 544 holds;

> **544.** The following actions shall be barred by prescription by the lapse of the times stated hereunder:
>
> (*a*) actions for payment of freight, by the lapse of one year from the completion of the voyage;
>
> (*b*) actions for the payment of victuals supplied to seamen by order of the master, by the lapse of one year from the day of such supply;
>
> (*c*) actions for payment of timber and other things necessary for the construction, equipment and provisions of a ship, by the lapse of two years from the date on which such timber or other things have been supplied;
>
> (*d*) actions for payment of wages of workmen and for work done, by the lapse of one year from the completion of their work or the delivery of the work;
>
> (*e*) actions for the delivery of goods, by the lapse of one year from the arrival of the vessel.

United Acceptance Finance vs John Borg
25th March 1989

Under ordinary circumstances, the prescription period is of 5 years. When the plaintiff realises that it cannot bring an action against the defendant, it filed an action in relation to bills of exchange. The plaintiff also argued that it had filed the judicial letters, thus interrupting the prescriptive period. The Court concluded that this was a commercial obligation, and thus by virtue of article 541, the time barre was rendered preemptory, thus not being allowed to be interrupted or extended.

Another point to keep in mind is that in general, prescriptive periods regulating commercial obligations are much shorter than the Civil Prescriptive Periods. By virtue of **2156 (f)** of the Civil Code, actions for payment of debt arising from contractual obligations are barred after 5 years.

2156. The following actions are barred by the lapse of five years:

(*a*) actions for payment of yearly ground-rent, perpetual or life annuities, interest on annuities ad formam bullae created before the 14th August, 1862 and for the payment of fines due upon a sale or other alienation of emphyteutical tenements;

(*b*) actions for payment of maintenance allowances;

(*c*) actions for payment of rent of urban or rural property;

(*d*) actions for payment of interest on sums taken on loan or for any other cause, and, generally, of any other thing payable yearly or at other shorter periodical terms;

(*e*) actions for the return of money given on loan, if the loan does not result from a public deed;

(*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;

(*g*) except as provided for in any special law, actions of the Government of Malta for the payment of judicial fees, customs or other dues:

By virtue of Article 546 of the Commercial Code, prescription runs also against minors, unlike in the Civil Code, wherein Article 2124 precludes prescriptions from running against minors.

Credit Instruments

We will speak about 3 types of credit instruments which are contemplated and governed by Articles 123-236 of the Commercial Code, namely ***Bills of Exchange, Promissory Notes, and Cheques***.

We will firstly dissect what is understood by *credit* and *credit instruments* within the Commercial Sphere. To start, credit refers to a right to obtain or receive a payment at a future date. It is an agreement whereby one person grants another the right to pay or repay later on. One may procure and provide the goods to a person who will pay a week later, for instance, with the expectation and right to receive the money in exchange.

The right to credit is **actionable**, meaning there are remedies at law to enforce the payment promised. It is also transferrable, meaning that you can **assign** the right to another person. The element of **transferability** is one of the most important and valuable characteristics of credit instruments, which have rendered them popular over the years. Credit is important because it is considered to be the backbone of business, for it is of value for the businessman. Today, most of the construction projects financed today are financed by credit from the bank. Many businesses operate using the funds of other people, even within their day-to-day operation.

It is also beneficial to the consumer, for credit allows for the consumer to purchase a product which they do not presently have enough cash to buy it.

One must ascertain the following distinctions;

1. **Credit Agreement -** these instruments take the form of loan agreements, overdraft facilities, etc. Such agreements are bilateral, and require the signing of both parties.

2. **Credit Instruments** - these ***documents of title through money,*** such as bills of exchange, promissory notes, and cheques. They are unilateral documents which **need not be signed by the person entitled to receive the money**. In such cases, it is only the person who is borrowing (debtor) who must sign the document. The person who holds this document is entitled to receive payment.

3. **Guarantee** - i.e, suretyship. Guarantees are not credit related. These take place when a third party steps in and guarantees the payment of another.

4. **Security or Priority** - these take the form of privileges, hypothecs, and pledges. A security is slightly different concept, for it involves the holding of rights over a thing in the case of non-payment. This differs to suretyship because in the latter case, a person is personally guaranteeing the payment of the obligation, whereas in the case of security, there is a thing which is promised as a *compensation* in the case of non-payment.

Documenting Credit

Documentation of credit may take various forms, including loan or facility agreements, deeds of acknowledgement of a debt, overdraft facilities, letters of credit, or credit instruments. A deed of acknowledgement 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 often done through a notarial deed, for these documents are vested with executive title, being as strong as a judgement in its binding. An overdraft facility is a document issued by the bank which allows a person to make use of money over and beyond that which he has in his account, up to certain limits. A credit instrument is another way of documenting credit, being documents of title to money. He who possesses the Credit Instrument is vested the right to receive.

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.

Defining Credit Instruments

Credit instruments are not defined by the Commercial Code. They were developed through **usages of trade**, and thus when they were implemented by the law their respective understandings were already well known.

The proposed definition from **1926** was that they are ***documents in virtue of which the issuer gives to the lawful holder of the right therein literally described which is not issuable or assignable without the document itself***.

Vivante defines them as ***un documento necessario per esercitare il diritto litterale e autonomo che vi e' menzionato***.

Among the various definitions pertinent to credit instruments, one may extract a common set of criteria, being that the credit instrument must be **necessary, literal, negotiable, autonomous, and fungible**.

Necessity

The document itself is necessary to establish the rights stated in or emanating therefrom. Without the document, there cannot be a transfer or enforcement of rights. The exercising of the right requires the presentation of the document. Unlike many types of agreement that can be established verbally, a credit instrument must necessarily be documented **in writing**. Thus, the transfer of rights in terms of the transfer of credit instruments necessitates the **physical transfer of the document in question**. Consequentially, when one loses a credit instrument, they lose and forfeit all attributed rights. Furthermore, the exercise of payment rights on a credit instrument requires the physical presentation of the document. In essence, to receive payment, the holder must surrender the document to receive the funds. Legal action may ensue following non-payment after the presentation of such document, owing to their legally binding force.

Literal

The rights which may be exercised are restricted solely to the rights enlisted on the credit instrument. The creation, existence, exercise and enforcement of the rights in a Credit Instrument cannot be broadened beyond those defined by the credit instrument. The establishment of these rights lies in the same document which allows for the enforcement of those rights.

Negotiability

A bill of exchange is negotiable because there is no need to notify the debtor of the transfer of the instrument. In Civil Law, a debt is subject to certain formalities, as per articles 169 and the ensuing provisions, of the Civil Code. The ease of transfer rendered negotiability into the notion of credit. The payment is always effected towards the holder. For instance, to assign a right of payment to another party, a separate written agreement must be made. There are various legal obligations attributed to the transfer of such payments.

Autonomous

Autonomy is a very important feature of a credit instrument. When a bill of exchange is drawn up, a separate and independent right and obligation is being created, irrespective of the underlying transaction. We will eventually distinguish between strict autonomy (wherein a transfer of the credit is given by one person to another without the use of fraud - fraus omnia corrumpit - which is based on the good faith of the parties, as per article 197 of the Civil Code), and general autonomy. Although avenues may exist to seek the restitution for the damaged goods, the obligation to pay remains autonomous once the credit instrument is issued.

Fungibility

Bills of exchange may be substituted with something else of a similar value. There is a difference between a credit instrument and cash. The delivery of money as payment extinguishes an obligation immediately. With a credit instrument, on the other hand, upon delivery thereof, the obligation is not extinguished until the money is paid. The value and issue of money is ascertained by the Central Bank. Credit instruments are conversely determined by the individuals. Further, money is a legal tender, and thus the person receiving has the obligation to accept the payment, unlike a credit instrument, which need not be obligatorily accepted.

Nowadays, since 2004, the bills of exchange and promissory notes have received further legal strength, since they are attributed the same strength as a judgement, owing to them being classified as a document **of executive title**. Today, cheques have decreased in use. Promissory notes are unilateral declarations, signed by one person, declaring a payment to be made on a future date. A practical example of a bill of exchange occurs when a person wants to buy a laptop without having enough cash to effect the payment immediately. He may either go to a bank to seek a loan, or else he may effect payments over certain periods of time. In the latter case, a credit instrument may be issued, in order to confirm via executive title, that the payment will be made eventually. Furthermore, the seller is able to cash out the bill of exchange, in order to have the cash immediately received and effected. Credit instruments are instruments which **document credit**, thus being documents which vest a right to receive money.

Michael Attard vs Grazia Meilak et

In this case, a cheque was issued by someone before it was effectively cashed. The Court held that since it is a credit instrument, and thus an attestation of payment, the heirs were to effect the payment in lieu of the deceased.

Therefore, from the above mentioned characteristics, one may extract three **advantages** to the issuing of credit instruments.

1) The instrument grants **executive title**;
2) The instrument is **easily transferable and negotiable;** and
3) It may be cashed out at the bank to receive **immediate cash**.

Despite these advantages, credit instruments have seen a decline in use over time. While cheques remain the instrument the most utilised, their applicability is facing new restrictions owing to the newer notions of **money laundering** and **fraud**. Recently, the Central Bank issued new directives further limiting their use. **Cheques** have also seen a decline, owing to the constraints being imposed by the banks owing to the aforementioned risks. This is also to be considered alongside the technological advancements which introduced the concepts of debit and credit cards, electronic payments, and standing orders.

Bills of Exchange

A bill of exchange is an instrument, created by **usage of trade**, which allows the holder to receive payment. A definition may be found under the **UK Bill of Exchange Act of 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"* - UK Bill of Exchange Act

The definition contained in this act can sit very nicely in our Commercial Code, since it shares most of the features contained in **article 123 of the Commercial Code;**

> **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. - **Commercial Code**

Similarly, **Navarrini** defines the instrument as;

> 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" - **Umberto Navarrini**

Navarrini thus speaks of a document of credit used in trade which vests strong rights which are described in it, being construed formally and unconditionally.

Thus, a bill of exchange may be defined as a **document** that evidences an **undertaking** by the person issuing it **to pay**, or to order someone else to pay, **at a certain time,** to the order of that specific person. It serves as a credit instrument and a document of title to money. Through a Bill of Exchange, the holder is entitled to payment, which can be transferred through endorsement and delivery of the document. It functions as a substitute for money, but is distinct from currency. A bill of exchange often contains two dates - the **date of issuance**, and the date **date of maturity**. It also includes the sum of money both in numerical form as well as in writing, and must include the elements outlined in Article 123. Further, it may be done in writing **on any medium**. It must also contain a description which indicates the goods or services received in exchange for the promise of payment. On a Bill of Exchange there is always a person drafting (the drawer) and a person receiving (drawee). The drawee only becomes obliged to pay **upon acceptance**, at which point they become the acceptor. The payee is the recipient entitled to receive payment, often being the first holder of the bill. In a two-party the issuer of the bill of exchange may also be the payee.

Types of Bills of Exchange

The Law (123) does not lay out the formalities required for a bill of exchange to be validly construed, apart from the fact that it must be done in writing, it must contain the place where it was drawn, the sum to be paid, the name of the person to pay and to receive, the value given, the form, etc. The person who is ordered to pay is referred to as the **drawee**. The **payee** is the person to receive the money. Our law contemplates 2 types of bills of exchange; **2 party** and **3 party** bills of exchange. In a 2 party bill of exchange, there is merely a debtor and a creditor, whereas in a 3 party bill of exchange, there is an additional third party involved. **Articles 124-128 of the Commercial Code establish the types of bills of exchange**.

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.

125. A bill of exchange signed by means of a cross or any other mark is null.

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.

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

128. (1) A bill of exchange may be drawn on a person, and made payable at the place of residence of a third party.

(2) It may be drawn by order and for account of a third party.

Articles 124 and 127 delineate the **two forms** of **two party bills of exchange** applicable under Maltese Law. The former provision allows for the **same person to be both the drawer and the drawee**, while the latter provision states that the bill of exchange may be **drawn to a third party or to the drawer himself**.

A practical example of the application of **article 124** is that of Person X, who draws up the bill of exchange (rendering him the drawer) which states that Person Y owes him money in exchange for goods to be delivered to such person Y. In this case, Person X is both the drawer and the drawee, for he created the document which establishes a payment owed to himself. These are often utilised by car dealers.

Edward Vincenti Kind vs Carmelo Abdilla *- types of bills of exchange*

"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"

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 Law, namely Article 123, provides for the formalities which constitute a bill of exchange. Yet, the courts tend to hold that certain formalities are not fundamental, in that a lack thereof would not nullify a bill of exchange.

Article 123 enlists 9 requirements;

1. The Date of Issue
2. The Place of Issue
3. The Sum to be paid
4. The Drawer
5. The Payee
6. The time of payment
7. The place of payment
8. The value given (cash, goods, services, etc)
9. The signature of the drawer/issuer.

Despite the use of the word *must*, certain formalities are not as important as others, in that jurisprudence shows that in the shortcoming of some formalities, the bill of exchange is not nullified. Thus, not all formalities are considered to be *ad validitatem*.

Martyn Attard noe et vs Alfred Cachia pro et noe - not all requirements are ad validitatem

Skond il-liġi u l-ġurisprudenza, iż-żewġ elementi essenzjali għall-validita' ta' kambjala huma l-firma tad-drawer, dak li joħroġ il-kambjala, dak li għandu jagħti, u l-indikazzjoni tal-valura, kemm għandu jagħti. L-elementi l-oħra huma importanti iżda mhux essenzjali għall-validita' tal-kambjala. Mingħajrhom il-kambjala mhiex nulla.

F'dan il-każ kine hemm il-firma tad-drawer - dak li għandu jagħti - kif ukoll il-valur kien indikat. Għalhekk, il-kambjali in-kwistjoni ma kinux nulli.

Għalkemm il-liġi ma tippermettix kambjali "to bearer", iżda kambjali fejn l-isem tal-payee ma jkunx inserit huma użati u l-isem jista' jitniżżel sussegwentement.

Article 123 of the Commercial Code: the Requirements

1. The date of Issue

The date of issue must be distinguished from the date of maturity. The date of issue, as per **article 123,** *must* be included on a bill of exchange. However, the courts have nonetheless accepted certain bills of exchange even if the exact issue date was not enlisted, so long as they had a rough idea of when the bill of exchange was issued. The importance of the date of issue ties into the capacity of the issuer, in that if the issuer was legally capacitated at the time of issue, then the bill is not valid. The same applies if the drawer was a minor at the time of issue, or if the drawer, who is signing in the name of a company, was not a legal representative of the company at the time of issue. Under French or Italian Law, the date of issue is a *sine qua non* for a bill of exchange to be valid. Under Maltese Law, Article 123 holds that the date of issue *must* be included in the bill of exchange. However, ***Martyn Attard noe et vs Alfred Cachia pro et noe*** implies that the date of issue is not a fundamental requirement which invalidates the bill of exchange in its shortcoming.

2. The Place of Issue

Another one of the requirements which the law contemplates to constitute a bill of exchange is **the place of issue**. The reason for this requirement is rather historical, since the place of issue would facilitate international trade. Under Private International Law, the validity of a bill of exchange used to be determined by the place of issue. Today, if the place of issue is not included in the bill of exchange, it may still be subject to validation, since the Courts do not consider the shortcoming as one which necessitates invalidity. This is because bills of exchange are often used in the local context, and thus the place of issue is not as important as before, wherein the place would determine the applicable jurisdiction. **The requirement of a place of payment is not as important today, since the main issue is whether the payment has been effected, and not where it has been so affected.**

> **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. - Civil Code

Article 224 residually prevents a bill from being invalidated on the grounds of lack of place of payment, since it holds that in such shortcoming, the bill shall me presented at the place of business or residence of the person accepting or paying.

3. Sum to be paid

One of the **fundamental requirements which constitute a valid bill of exchange** is the money specified to be paid by the drawee. This is a requisite *ad validitatem*, and a *sine qua non* for the constitution of a bill of exchange.

> **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.

Article 183 of the Commercial Code elaborates on the **form** in which money may be paid. It must be a **legal tender** in the place of payment in order for it to be acceptable, and in the case where it is not a legal tender, or in the case wherein the bill os fictitious or when the value was not stated in the bill, then the payment shall be made in the money which is a legal tender in the place of payment in an amount equal or roughly corresponding to the money specified in the bill at the **time of maturity.** This is unless the drawer expressly stipulates that the money be paid in a specific quantity, without being fictitious.

Furthermore, **Article 126** governs situations of discrepancy, between numbers and words.

> **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.

Thus if the amount in words and the amount are not identical, then **the amount written in words shall prevail**. Further, in the case of discrepancy between repeated figures or words, the **smaller amount shall be payable**.

The **sum of money indicated by the bill is the only thing entitled to by the drawee**. He may not demand or enforce any other right besides the sum indicated. The bill of exchange may indicate only one maturity date, and so in the case of the payment of the sum on different days (i.e instalments), the trader would have to issue various or multiple bills of exchange.

4. The name of the Drawer

Another *sine qua non* requirement for a bill of exchange to be validly construed is the **name of the drawer** (i.e the name **and signature** of the person drawing up the bill of exchange).

Prof V. Caruana Galizia, in *Notes on Bills of Exchange*, comments on this requirement in the following way:

"The signature of the drawer. This is the most important and most essential requisite of a bill of Exchange, and the reasons are obvious. The drawer of a bill must put his signature thereon in order that his intention of binding himself thereby to any holder of the bill may result in a formal and unequivocal manner; without it no action can be maintained against the acceptor either as such or as the maker of a promissory note...The signature of the drawer is usually subscribed in the right hand corner. It is to be noted that what the law requires is that a bill is signed by the drawer, but it does not provide that all the other particulars of the bill should be written in person."

The signature of the drawer is the most important element constituting a valid bill of exchange.

Furthermore, in ***Borg Grace vs Basil Francis,*** in referring to **Prof Felice Cremona**, states that ***the drawer of a bill of exchange 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***.

5. The name of the Drawee

The **drawee** is named on the face of the bill of exchange upon issuing. Once the bill is endorsed, it may be transferred by the payee to someone else. It is the holder of the bill of exchange who is paid. Under Maltese law, as discussed under ***Martyn Attard vs Alfred Cachia***, the bill of exchange cannot be addressed *to bearer* (i.e to he who holds the boe), and thus it must contain a name to whom the money is entitled. The payee must be identifiable as clearly as possible, for a fictitious or unattributable bill of exchange is rendered inapplicable. In the ***Martyn Attard*** judgement, the court held that the name of the payee may be added to the bill of exchange at a later date.

A bill of exchange may feature **multiple drawees**, particularly in cases where **joint and several liabilities are established**. In such cases, both the drawees share the responsibility over the payment.

In the case where the drawee is fictitious, the law deescalates the bill to the level of a promissory note, maintaining the drawer's obligation to fulfil the payment. If the fictitious drawee fails to sign in acceptance, the payee retains a residual right against the individual who issued the bill.

Vincenza Xuereb vs Cecil Pace

In this case, the Bills of Exchange were issued with the name of the drawee who was subsequently also the drawer, albeit without the name of the payee. In this case, the court held that the bill functions merely as an **acknowledgement of the debt owed by the drawee**. While it could serve evidence of the debt's existence, it lacked the capacity to initiate an action on the BoE (actio cambiara).

The bankrupt drawee

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 the drawee is deemed bankrupt between the date of issue and the date of maturity, the bill falls due **immediately**. Thus notwithstanding any agreed date of maturity, upon declaration of bankruptcy, the drawee may present the bill and demand payment. The drawer and endorser, in these cases, may opt to postpone the payment until the day on which the bill shall be due according to the terms in which it was drawn, on giving adequate security.

6. The Place of Payment

The inclusion of the place of issue is included under the requirements of **article 123**, yet this requirement finds minimal important both in terms of legal statues as well as court interpretations. In fact, the law offers a **fallback position** in the case where this requirement is left out of the bill of exchange, governed by **Article 224** of the Commercial Code;

> **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.

The place of payment as a requirement owes its origin to the traditional uses of credit instruments, which would often pertain to intra-national promises or declaration of payment obligations. Its importance would thus pivot around the jurisdiction governing the payment made.

7. The Date of Maturity

The **maturity date** is the date at which one can demand payment of the bill. This is elaborated on by article 172 of the Commercial Code;

> **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.

A bill is payable **at sigh**t when it is paid upon presentation thereof, with the obligation arising out of presentation. This thus indicates that the obligation to pay matures upon presentation. This in turn means that the bill becomes payable immediately upon presentation. A bill may also be made payable **at a certain time** or on a **certain day**. This could include less-specific time frames, such as "mid-May" or "by the end of the next month" It may also be issued **at a certain time after sight** or **after date**, in which the maturity date is linked to the date of issue.

A bill which is expressed at usance is defined as **21 days from when the bill is presented and accepted by the drawee.** While presenting the bill for acceptance is not mandatory, it provides the holder with certainty regarding the obligation to pay.

If date of maturity is not included on the bill of exchange, it is not immediately inapplicable. This is because Article 180 provides for a residual classification of the bill of exchange, holding that;

> **180.** In the absence of any of the indications mentioned in article 172, the bill shall be payable at sight.

Carmel Muscat vs Anthony Micallef

L-attur fittex għall-ħlas ta' kambjali skaduti. Dawn kienu konnessi ma' kuntratt ta' trasferiment ta' azzjonijiet f'soċjeta' liema kuntratt kellu jieħu effett meta jitneħħew garanziji bankarji mogħtija mill-kontendenti.

L-ewwel Qorti laqgħet it-talbiet attriċi u kkundannat il-konvenut iħallas u l-istess għamlet il-Qorti tal-Appell li rriteniet illi l-fatt li l-konvenut iddepożita garanzija bankarja għas-somma dovuta ma jfissirx illi huwa ħallas id-debitu. ***Huwa l-pagament biss li jista' joqtol l-obbligazzjoni u sakemm ma jħallasx huma passabbli d-danni - jiġifieri l-interessi fuq is-somma dovuta.***

8. The Value Given in exchange of the bill of exchange

The value given refers to the value in exchange of the bill of exchange. This requisite for a value given emanates from the Civil Law principle that **an obligation without a consideration is invalid**, as per article 987;

987. An obligation without a consideration, or founded on a false or an unlawful consideration, shall have no effect.

An obligation must only arise in exchange for something else in return. The only exception to this rule is the case of donation. Thus a bill of exchange must state the reason for payment (i.e the reason which is giving rise to the obligation). The value need not necessarily be expressed, so long as there is a consideration which may be proven. The failure to specify the value of the consideration **does not invalidate a bill of exchange**, as per **article 988 of the Civil Code**.

988. The agreement shall, nevertheless, be valid, if it is made to appear that such agreement was founded on a sufficient consideration, even though such consideration was not stated.

The Fundamental Signature of the Drawer

As previously mentioned, the signature of the drawer is **the most important requirement for a valid bill of exchange**. It is deemed a *sina qua non,* and is an **added requirement** to the mere name of such drawer. It is not sufficient for the BoE to merely list the name of the drawer, for it must be accompanied by the signature. This was reiterated by **Prof Caruana Galizia**, as previously cited.

Prof. Cremona (Notes 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".*

UK Law, as stated by **Byles** in *Bills of Exchange*, underscores the importance of this element. Without it, **legal recourse becomes impossible**. One must remember that the drawer, even when nominating a third party to pay, still remains bound on the bill, which is why the law requires his signature thereon.

John Giordimaina et vs Joseph Pace
7th July 2006

Il-ligi trid li l-kambjala tkun iffirmata minn min harigha, u mhux ukoll minn min jaccettaha; l-importanti hu li min ikun obbligat taht kambjala jkun iffirma l-istess bhala forma solenni li hu accetta li jhallas l-ammont indikat." Kienet imbaghad iccitat silta min-noti tal-**Professur Felic Cremona** fejn f'pagna 274 jghid li –

"The drawer of a bill of exchange must put his signature thereon in order that his intention of binding himself quoad any holder of the bill may result in a formal and unequivocal manner."

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 null bhala kambjala u ghalhekk ma jistax jinghata l-forza esekuttiva li jintitola lill-kreditur li jithallas semplicement u unikament bis-sahha tieghu.

There have been some judgements which discuss the situation in which the bill was issued, accepted by the drawee, but signed by the drawer **at a later date**. In the ***John Giordimaina*** judgement, the court held that the fact that the drawee had signed in acceptance before the drawer does not invalidate the bill of exchange, nor did it release the acceptor from his obligation to pay. This position is the same as adopted in the U.K, according to **Byles**. Thus, *a bill may be accepted while incomplete before it has been signed by the drawer*.

There are other judgements which took a contrary approach, asserting that a bill of exchange accepted prior to the signing of the drawer. This was demonstrated in ***Phoenix Domestic Appliances Limited vs Joseph Vassallo***. This conflict of jurisprudence represents the discretion vested in the Courts in this regard, owing to the lack of legal provision for this situation.

The Court, to this extent, tends to apply the doctrine of *ius superveniens firmat actionem et exceptionem*, which states that where there is a change of circumstances during legal proceedings which represents a defect, then the action which was previously defective may be remedied. This was deemed necessary, in judgements, to assert and uphold the **economy of justice**. The prevailing approach is therefore that the signing of the drawer completes the bill of exchange, independently of whether it was accepted prior to the signing or not.

Effects of the Drawer's signature

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 article holds that when the bill is issued, the drawer gives a warranty that at the time the bill will become due, he shall have ensured that the drawee is supplied with the sufficient funds to pay the bills. This is, however, a legal presumption which may be rebutted. The presumption holds that when the drawer signs the bill and nominates a new payer, he is giving a guarantee to the holder to the bill that the obligation remains untouched. The drawer remains liable on the bill because when he issues the bill nominating someone else to pay, he is giving a guarantee that by the date of maturity, the drawee will have the money to pay.

Article 132 places a presumption that if, upon the date of maturity, the drawee owes to the debtor a sum not less than that specified in the bill, then the law considers the obligation stipulated in the bill to be complete.

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.

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 states that the acceptance of the bill of exchange, on the part of the drawee, implies the supply of funds. The document also serves as proof of such supply of funds. In the case that disputers arise, the drawer is bound to prove that the drawee was provided with the necessary funds for the payment of that bill at maturity. This presumption, that the person was provided with the necessary funds for the payment of the bill, may be rebutted with evidence to the contrary. What this essentially means is that **when a bill of exchange is accepted, there is a presumption that the drawee carried the sufficient funds to ensure and effect the payment on the date of maturity.** Further, in the case of dispute between the drawer and the drawee, it is the drawer who must prove that the drawee had such supply of funds. If the drawer fails to effect such proof, then the drawer is bound to warrant the bill.

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.

Article 135 holds that it is possible for the drawer of a bill to prohibit endorsements. This is described, under English Law, as the **destruction of transferability**. This means that the drawer may express a declaration on the bill which prohibits the bill from being transferred between payees. In the case that a transfer is made regardless of this declaration, the law prohibits the endorser from acquiring any rights.

When a bill is drawn ***to the order of*** a payee, it means that the bill may be transferred. If, on the other hand, the bill is drawn and marked as ***pay only***, then the bill is not endorsable.

Endorsement

One of the fundamental features of credit instruments is the element of transferability attached thereto. Such transferability is only made possible through the endorsement mechanism. We have previously seen how **Article 135** allows for the drawer to prohibit a credit instrument from being transferred from one payee to another. The endorsement and transferable nature of credit instruments is captured through articles 136-147 of the Commercial Code.

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

The words *to order* represent the right of the payee to transfer the BoE to another payee, via endorsement. In the absence of this term, the bill may still be transferable. Thus, in the case of a bill of exchange which does not specify whether it is transferable or not, the law presumes that it is capable of endorsement The drawer may block the transferability of a bill of exchange through the use of the term ***only*** in relation to the payee.

Umberto Navarrini defines endorsement as *La girata e' un negozio cambiario* ***accessorio*** *a mezzo del quale il girante con una dichiarazione scritta o sottoscritta nel titoli, e con la consegne del titolo stesso trasferisce nel giratoria la proprieta' della cambiale e tutti i diritti ad essa inerenti, rimanendo, per di piu', il girante solidariamente responsabile per l'accettazione ed il pagamento*.

This explicitly represents the delivery of the document itself. One must remember that credit instruments are **literal** and **necessary**, and thus by signing and delivering it, it transfers the title of ownership to the endorsee and all the rights pertaining thereto. Nonetheless, even though the endorser has transferred the BoE, he remains responsible for the acceptance and payment of the bill. Thus, an endorser will remain liable on a BoE, owing to the fact that a transfer of it represents the transfer of money. The endorser would be deemed joint and severally liable with the drawer or other endorsers.

When a bill is transferred by endorsement, unless the endorser says otherwise, it may be transferred once more, with no limit pertaining to the number of endorsements which a bill may pass through. The first endorser is always the **original payee**.

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.

Article 138 describes the **method of endorsement**, stating that the endorsement must be made on the back of the bill, or on an *allonge* (a slip of paper) which is attached to the bill itself. The endorsement must be signed in writing by the endorser.

There exists 2 types of endorsements, being **specific,** and **blank**.

A **specific endorsement** is one which specifies the name of the person being endorsed and the date of endorsement.

A **blank endorsement** refers to the signature by the endorsement which is subsequently passed on without a new payee being named. This creates somewhat of a *legal lacuna*, since Maltese law does not permit a bill of exchange to be addressed *to bearer*. Thus, in the case of a blank endorsement, the document takes the form of a bill of exchange to bearer, in that the title of ownership is acquired by the person to whom it is passed on.

Dr Alfredo Sultana vs Joseph Lanzon *- blank endorsements*
21st October 1932

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 mobilita' 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 figuri sul foglio.

The question then arises as to the situation wherein an endorser transfers the bill of exchange to a third party, who does not sign the endorsement.

Alfonso Maria Farrugia vs Eduardo Demarco *- not signed by second payee*
6th March 1903

In this case, the plaintiff was the holder of a bill of exchange, which was given to him by the payee against a payment, but which was not endorsed. The bill itself fell true to the conditions laid out under Article 123 of the Commercial Code, and thus the plaintiff sought to declare the bill of exchange valid on the grounds that it was validly construed and that it was purchased by the holder, thus vesting him the original right of ownership. This argument was not upheld by the court, since it asserted that **the only way to acquire the right to sue for the redeeming of a bill is by endorsement**.

One must also consider the **rights of the holder** when the bill is not endorsed to him. Article **147** holds;

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.

This provision holds that if the bill has not yet been accepted by the endorsee, the possessor may present the bill to the endorsee for acceptance. **The holder, however, does not have right to payment, nor does he have title over it.**

Article 192 clarifies that a person who holds a bill which has not been endorsed to him but who proves that the bill was entrusted to him to receive its payment, may demand the payment of the bill. In order for this demand to be successful, the holder must prove that the bill was, in fact, remitted to him by the payee. He must also **give sufficient security** in order for the demand to be made.

> **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.

The endorser may opt to effect ***endorsement for collection only***. This is a specific type of endorsement which allows for the appointment of an **agent or mandatary** to **collect on behalf of someone else**. This is equivalent to a mandate appointed to receive payment on behalf of the endorser. In this case, the endorsement describes itself as useful ***for collection only***. Thus, the endorser is not only transferring title to the person to receive payment, but also to collect it for him. This is stipulated under **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 contrasted with **article 197** in that under article 142, **there is no requirement to give security in the case of endorsements for collection**. So much so, that under **article 197**, the endorsement is **not made to the holder**, while under article 142 the endorsement is made to the holder for the purposes of receiving payment for the endorser. If the person does not collect that payment, when endorsed to collect, he can return the bill to the endorser, who can consequently sue on that bill to the drawee. However, if such person does effect the collection of the payment, the drawee is released from all attached obligations, since they were fulfilled and is no longer liable. This was confirmed in ***Chev. Reginald de M Smith noe vs Thomas Borg et***.

The Effects of Endorsement

The Transfer of the Right to Receive Payment

Endorsement is the **only means** of transferring rights under the remit of bills of exchange. This was reiterated in ***Alfonso Maria Farrugia vs Eduardo Demarco***. The signature of the endorser must accompany the bill, whether specified or blank. The delivery of the bill without endorsement does **not effect the transfer of the payee**, as confirmed in ***Dr Giovanni Sammut vs Ignatio Pecorella***. The Court, in this case, confirmed that **the mere delivery only of the bill of exchange does not constitute endorsement.**

One must distinguish this concept from the transfer on the right of payment from assignment under the law of obligations. In a BoE, no separate agreement is required, and there is **no need to inform the debtor** (drawee), contrary to the assignment of payments under Civil Law.

The Acquisition of Strictly Autonomous Rights

While there are conflicting judgements in relation to the autonomy of a Bill of Exchange insofar as original parties are concerned, there is consistency in case law which holds that Bills of Exchange confer strictly autonomous rights on endorsement in good faith. This is another characteristic exclusive to bills of exchange, and what separates the transfer of rights to receive payment under BoEs and under Civil Law, the latter of which requires notification to the debtor.

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

Article 197 of the Commercial Code states that a distinction must be made between pleas which are effective against the endorser and pleas which are effective against the holder of the endorsed bill. *Endorsers* is to be understood as *the person who held the bill prior to the endorsement*, in most cases being the original payee enlisted on the Bill of Exchange. **Article 197 admits no exceptions**.

> In ***Major Hannibal A. Scicluna noe vs Charles Valletta noe***
>
> "L-iskop ta' kambjala hija li tista' tigi girata malajr u meta tigi girata takkwista karattru awtonimu. 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-obbligazzjonijet li wasslet ghal dak il-kreditu, jibqghu estreneji ghalihm ghax hu, bhala terz akkwirent, jista' jfittex biss fuq il-kambjala"

One of the features which renders the BoE significantly useful in the trading world is that they can be easily transferred, and when endorsed, it acquires an autonomous character. Without a credit instrument, a creditor may enter into a normal assignment of rights under Civil Law, wherein the assignee simply steps into the shoes of the assigner, in turn absorbing all of the possible actions which could have been instituted against the assignor. The Court recognises that this is the reason for which bills of exchange were created. The purchaser or transferee of a Bill of Exchange knows that any underlying issues existing prior to the transfer are owed only against the endorser, and not against the endorsee.

Vivante adds, holding that "*the ordinary endorsement, both in full and in blank, invests the endorsee with an autonomous right. Other exceptional, anomalous forms of transfer only transfer to the holder the title derived from their own author"*

The Transfer renders the Endorser Accountable for the BoE

The endorser remains liable to every succeeding holder of the bill. This is enshrined under **Article 140 of the Commercial Code;**

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

By virtue of article 140 (1), the payee may demand the payment from the endorsers where the drawee refuses to pay or accept the bill of exchange, unless the endorsement is qualified with the words “without recourse”.

Notwithstanding this autonomy, the endorser is permitted to restrict his liability, as per **article 140 (2)**, by qualifying the endorsement with the term *without recourse* or with some other term which implies a like qualification. In such case, the endorser is relieved from all liability subsequent to the endorsement.

Acceptance of a Bill of Exchange

The acceptance of a bill of exchange is governed by **articles 148 to 157 of the Commercial Code**, and are applicable exclusively **to the drawee**. Acceptance is defined as ***the confirmation by the drawee of his assent to the order given by the drawer,*** being the order to pay the payee or holder on the date of maturity.

> **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".

Article 148 lays out the **form of acceptance,** in that the bill of exchange must be accepted by the signature of the acceptor, with or without the words *I accept* or *accepted*. One must note that the drawee is not obliged to sign on the bill, but once he does, he becomes liable for the payment on the date of maturity.

An acceptance may be made **partially**, by virtue of **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.

A conditional payment is invalid, to the extent where a conditional acceptance is deemed to constitute a refusal to accept. It may, however, be **partially** accepted as to the amount to be paid.

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.

Article 151 establishes the **time of acceptance**, in that it must be accepted on presentment, or at the latest **within 24 hours after presentment**. The drawer is thus allowed a whole day to accept the bill, to start running from the moment of presentment. A failure to return the bill accepted within the time frame renders the drawee liable for damages.

The effect of acceptance is governed by the following provision;

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.

Upon the acceptance by the drawee, he becomes liable for the payment to be made on the date of maturity. The obligation must be satisfied by or at the date of maturity, and not on the date of acceptance. The accepted drawer becomes liable **even if the drawer becomes bankrupt**. As previously mentioned, **Article 133** creates the *juris tantum* presumption that when a bill is accepted, the law presumes that the acceptor has the supply to effect the payment at the date of maturity.

Furthermore, by virtue of **article 168**, in the case of multiple drawees and multiple acceptors, all parties are deemed to be **jointly and severally liable for warranty to the holder**.

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.

Article 157 holds that a promise of acceptance is not tantamount to acceptance, but that the promisee may maintain an action for damages and interest in the case that the promisor refuses to perform the promise.

Presentment

The notion of presentment refers to the act of the holder of the Bill of Exchange who presents the bill for acceptance or payment. One must note that the Bill of Exchange as a credit instrument is a **necessary document**, and thus the attributed rights may only be invoked or enforced **upon presentation of the bill**.

The law distinguishes between **two types of presentments,** being the **presentment for acceptance** and the **presentment for payment**.

Presentment for Acceptance

The payee may present the bill to the drawee to accept it through the means of signature. One must note that the drawee is **under no obligation to sign the bill of exchange**, yet upon signature, he assumes all liability attached to the document. The Law creates for certain exceptions wherein a bill **cannot be presented for acceptance**;

> **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.

Article 221 states that where a bill is drawn at a certain time, day, or time after date, the holder is **not bound to present the bill for acceptance**. If the bill is, however, presented by the holder, the holder is bound to protest it in the case of **non-acceptance**, in order to preserve his recourses and remedies applicable against the drawer and endorsers.

> **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.

The endorser is free to specify a time frame for the presentment of the bill to the drawee, in order to protect himself from **indefinite liability,** owing to the fact that an action lies against the endorser for the non-presentation by the endorsee.

Presentment for Payment

The Bill of Exchange may only be presented for the payment thereof on the date of maturity, as per **article 223;**

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

Unless the bill is payable at sight or at a time after sight or at usance, the bill may only be presented at the time it falls due. We have already contemplated the scenario where the **drawee falls bankrupt**, in which case **article 182** abolishes the time frame established on the bill of exchange, and declares that the bill falls due **immediately**. This is the only exception to the rule stipulated under **article 223**.

Conversely, in the case where the bill is presentable on sight, at a time after sight, or at usance, the **bill may be presented at any time**.

Article 173 holds that **where a bill is presentable at sight**, then it becomes payable on presentment;

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

In this case, a **refusal to pay is tantamount to a refusal to accept**, leaving the holder the remedy of action by recourse. With regards to a bill payable **at sight**, if the bill is not accepted within due time, then it is deemed to have been refused by the drawee. In such case, the action of recourse is available by the payee.

One must distinguish between a direct action and an action for recourse. A direct action is filed against the **acceptor of the bill**, only if the bill has been accepted. If a bill is accepted, and the bill is presented when presentable, and the acceptor refuses to pay, a direct action is invokable against the acceptor. On the other hand, an action for recourse cannot be instituted **before a required protest is made**. Thus, if the bill has not been accepted, or if the holder wishes to seek an action against the drawer or the endorser, then the holder must first **protest the bill**, and then he may seek an action for recourse. This is thus deemed a **secondary action**, which may only be invoked after the protest procedure has been effected.

> **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.
>
> **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.
>
> **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.

Articles 218, 219, and 220 establish the time within which the holder of a bill drawn **at sight** may **present the bill for payment**.

The law holds that one may **preserve the right of recourse against the drawer/endorser, by establishing a prescribed time within which presentation may be made.**

The holder may **lose his right of recourse**, as per **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.

Thus, in the case where the bill was never presented for acceptance, where necessary, or where the holder has refused acceptance or payment by a party intervening for the honour of the drawer or any of the endorsers, the holder **loses the right of recourse**. When a person who is primarily liable on a bill, being the drawee, who accepts a bill of exchange, the right of recourse becomes applicable only after the holder attempts to receive payment from the acceptor.

No Opposition to pay the Bill of Exchange

> **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.

Article 199 holds that, except for the case of loss of the bill (owing to the **necessary** characteristic) or the bankruptcy of the holder, no one can oppose the payment of a bill of exchange which was accepted. In the case of bankruptcy of the holder, a curator would be appointed who administers the affairs of the bankrupt. This gives the curator the power to enforce the bill in lieu of the holder.

Actions of Enforcing a Bill of Exchange

We have previously made the distinction between a **direct action** (i.e when the action is directly enforceable against the acceptor) and an **indirect action** (i.e when there is an action of recourse, but which is subject to the protest procedure). The indirect action is available against **all other parties to the bill,** except the holder. This is extended also against the **acceptor for honour** and the **avaliseu** (surety), except against the endorser who signs *without recourse*.

Acceptor for Honour

If the bill of exchange has been presented for acceptance to the drawee, who consequently refuses to accept, then the holder must protest the bill of exchange in order to acquire the right of recourse. At this stage, any third party may intervene to accept the bill of exchange for honour of the drawer or any endorser. The drawer or endorser may introduce an external party to accept the bill **in lieu of the drawee**. This person is not deemed the **drawee**, but rather is signing for a third party, in turn **accepting for honour**. Acceptance for honour must be written on the bill and signed by the acceptor, and consequently returned to the holder. The holder must present the bill for payment **to the drawee who did not accept**, and if the payment is not made, a protest must be done for non-payment in order to preserve the right to sue the **acceptor for honour**. When the bill matures, it is first presented to the acceptor for honour, and if he does not pay, another protest must be made, which vests the holder with the right of recourse, as if the action was issued against the endorser or drawer directly.

Avaliseur - the surety

A third party may guarantee to pay the bill. This guarantee may be done on the bill itself or by a separate act. This person stands in a surety so that if the drawee does not pay, there is a right of recourse against the surety. Indeed, the avaliseur becomes **jointly and severally liable on the bill with the drawer and the endorsers.** The holder must first protest the bill for non-payment by the drawer in order to preserve action for recourse against the avaliseur.

One must note that **the direct action** and **the recourse** are **not mutually exclusive**. The holder of a bill can invoke both types of actions. He may first protest the bill and then opt to file an action against the acceptor (direct action), as well as against other persons on the bill (indirect action). This is made possible by **article 168**;

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

The creditor can thus sue either one or all of the acceptors or endorsers, owing to this provision. This does not mean that each creditor will pay the same amount of money immediately, but rather that the action will result in one or more debtors settling the payment, with the remaining debtors sorting out the shares and payments due between themselves.

How a right of recourse may be exercised

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.

Article 237 lays out that if a holder of the bill, who has received the bill via endorsement, is taking an action of recourse, the holder does not necessarily require to file the action against the predecessor endorser, but rather any preceding endorser which effected the endorsement which resulted in the possession being vested in the current holder. Such holder may also sue all of the previous endorsers together, without being bound to follow the order of endorsements. This is all subject to the condition that the holder has first protested the bill of exchange.

Action Triggers

When the bill is presented for acceptance, but is not accepted

If the bill of exchange is presented for acceptance but is not accepted within the 24 hours of presenting the bill as per **article 151,** then article 153 becomes applicable;

153. (1) A refusal to accept shall be proved by means of a protest termed protest for non-acceptance.

(2) Where the bill is not accepted for the whole amount for which it is drawn, a protest for non-acceptance of the balance shall be made.

The protest procedure is described by **article 233;**

233. (1) The holder of a bill protested for non-acceptance or non-payment shall, without delay, give notice thereof in writing to the endorser immediately preceding him.

(2) Every endorser on receiving such notice shall, without delay, communicate it to the endorser immediately preceding him.

(3) The notice referred to in this article shall be accompanied by the protest.

Article 233 thus states that the holder who protests a bill must **give notice to the endorser immediately preceding him** (i.e the person who effected the endorsement which resulted in the possession of the holder). The notified person must then communicate the notice to the endorser preceding him, until the notice reaches the **first and original payee**. The notice must be transferred **in conjunction with the protest**. **Article 221** holds that there is no obligation to present the bill for acceptance where the bill is drawn at a set date, time, or time after date, but if so presented, and is not accepted, then the holder has 24 hours to begin the protest procedure.

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.

When the bill is presented for payment, but the payment is not made

In this case, presuming that the bill was accepted, the bill is presented to the drawee or acceptor for payment, who then has 24 hours to effect the payment. Assuming the payment is not made, the direct action against the drawer or acceptor becomes available. Alternatively, the bill may be protested to preserve the right to sue other people involved in the bill of exchange.

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

As previously discussed, the bill of exchange may only be presented for payment **on the day it falls due** (i.e - the maturity date). If the bill is endorsed, then the aforementioned protest procedure and action for recourse may be sought out, but not via direct action. **Direct action may only be brought against the drawer or acceptor**.

In the case that the acceptor's financial position deteriorates following the acceptance, in a manner which is **not tantamount to the declaration of bankruptcy,** we refer to **article 155**;

> **155.** Where, after the acceptance of the bill, it is proved that the acceptor's condition, with regard to his commercial affairs, has so changed as to give rise to a reasonable fear that the bill will not be paid at maturity, it shall be lawful to demand against the drawer, the endorsers, and even against the acceptor himself, the same security as that mentioned in the last preceding article.

Article 155 holds that in this case, the holder has the right to demand against the drawer, endorsers, or acceptor, for a **security** from other people liable on the bill. This situation should be distinguished from the provision carried by **article 182**, in which case the drawee is declared **bankrupt** following the acceptance. In the latter case, the bill falls due immediately, and the holder may protest the bill to be able to seek recourse and to preserve his rights against other parties.

Article 155 must be read in conjunction with **article 227 (2)**

> **227.** (1) The protest for non-acceptance, or the death or bankruptcy of the party on whom the bill is drawn, shall not excuse the holder from protesting the bill in case of non-payment.
>
> (2) Where the acceptor becomes bankrupt before the bill falls due, the holder may protest the bill and exercise his right of recourse.

Thus, in the case that the acceptor falls bankrupt after having accepted and before the bill falls due, the holder may protest the bill and exercise the action of recourse. Unlike article 182, there is no reference to postponing the payment, and thus the payment may be demanded immediately.

Action for Recourse

In practice, most bills of exchange are classified as **two party bills of exchange**. Thus, the minute they are drawn up, they are accepted. It is quite uncommon, thus, for the lack of an acceptor which would result in the need for recourse. It is necessary that the action for recourse is directed **towards the drawee or the endorser**, in the case that the bill has been endorsed. This procedure is applied if;

1) The bill was presented for acceptance to the drawee, and it hasn't been accepted (s. 153); or
2) The bill is presented for payment, and the acceptor hasn't paid (or in the case that the drawee has been presented a bill presentable at sight, when the drawee does not effect the payment, thus refusing)

The **formal procedure** is as follows;

- The holder goes to the notary, for the protest must be drawn up by the notary;
- At the place of business or residence of the drawee (for non-acceptance) or other party to whom payment is sought (for non-payment);
- A copy of the BoE, the acceptance, and the endorsements must be attached;
- The name of the protesting party (often the holder) must be specified;
- There must be a formal demand to seek acceptance or payment of the bill;
- The protest must state whether the protested party was present or not;
- It must also state the reason for refusal, if any or if known; and
- It must be dated.

Once the protest is formulated, the document is filed by the holder before the Court, for the action to be formally filed.

Article 154 establishes the effect of the protest for **non-acceptance.**

> **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.

Article 237 establishes the effect of the protest for **non-payment.**

> **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.

The notion of Retour sans Protet

> **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.

It is possible to exclude the formalities of the protest procedure when a bill of exchange is issued. This obligation to protest may also be excluded all together. Thus the bill of exchange, when drawn by the drawer, may declare that it may be returned without protest excuses the holder from this obligation to the formalities, but it does not exclude the holder from making the presentations in due times.

Article 226 holds and establishes **when the protest is to be made**;

> **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 establishes a time frame within which the protest must be made, being;

24 hours following **presentment, in the case of non-acceptance;** and
24 hours following the **date of maturity**, **in the case of non-payment**.

Thus one must ascertain whether the action for recourse pertains to a **non-acceptance** or to a **non-payment**, since the time frames for protest are **significantly different**. This is especially important because **a late protest nullifies and excludes the right for recourse**.

There is an exception to the rule that late protest annuls all actions for recourse. We have previously referred to **article 133**, which creates the presumption that an accepted bill of endorsement creates a presumption that the drawer ensured that the drawee was sufficiently funded to be able to effect payment on the day of the maturity. The second sub-article to this provision holds that the burden of proof in this case lies within the drawer. In the case where the drawer fails to rebut this presumption, the late protest does not nullify the rights of the holder to seek recourse.

Mode of Action

Prior to 2004, the only option available to enforce bill of exchange rights were through the ***actio cambiaria***, an action for payment of a bill of exchange. This was because the bill of exchange did not confer the executive title status, and thus the holder would proceed via the filing of this action. Today, this action still exists, but there is another step which alleviates the burden of seeking judicial recourse.

Whatever action, whether against the acceptor or indirectly, is deemed today to be an ***actio cambiaria,*** an action competent to the holder of the Bill of Exchange. This action is instituted by ordinary mode of commencing judicial action, governed by the **COCP's Article 161**, being instituted by sworn application.

The action may also be filed as a ***special summary proceeding***, coined the **giljottina**, via **article 167 COCP**. In this case, the filed action requires the statement to the **best knowledge of the holder**, with the respondent not being allowed any defences against the payment of the bill.

Claims on Bills of Exchange

Within the actions to enforce bill of exchange rights, the claim may contain;

1. The payment of the bill of exchange (i.e the amount stated on the bill);
2. The expenses of protest (i.e those paid to the notary);
3. The expenses of court action; and
4. The interests on the amount.

The issue of accrued interest has been a controversial subject in judicial actions. The question arises as to the date on which interest begins accruing on an unpaid bill of exchange. We refer to **articles 1139 and 1141 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*.

In this provision, it is established that interest on payments in civil obligations is calculated at 8% per annum.

> **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.

Article 1141 then states that **interest will only start to run from the date of notification that the debtor is in default**, as per **article 1141 (2)** (*in any other case*). This interpretation was initially confirmed in ***Joseph Rutter Gatt noe vs Francis Vella***.

In another case, ***Joseph Rutter Gatt noet vs Edward Galea***, which surrounded a case of non-payment of a bill of exchange, the court held that the interest was due from the **start of the protest, per s.258 of the Commercial Code, and not from the date of maturity**.

> **258.** Interest on the sum specified in the bill protested for non- payment, on the expenses of protest, and on all other lawful expenses, shall be recoverable as from the day of the protest.

The court stated that because the right of action against the other person liable on the bill is not triggered on the date of payment, but rather on the date of protest, the interest should be calculated in the same way.

2004 Amendments to the COCP

These amendments sought to widen the scope of **article 253 COCP,** by including ***bills of exchange*** and ***promissory notes*** within the list of **executive titles.** An executive title is one which gives right to enforce one's claim against a third party. This list is **exhaustive**, and cannot be widened without amending the law. The inclusion of BoE and promissory note is exceptional, because they are **the only executive titles that lack a public or judicial character**. All other titles (i.e *res judicata* judgements, contracts received before a notary public, etc).

One must note that while BoEs and promissory notes fall within the classification of executive title, **cheques do not**.

Enforcing executive titles

> **256.** (1) Any other definitive judgment which does not contain any suspensive condition, and which condemns a debtor to pay a liquidated sum, or to deliver up or surrender a specific thing, or to perform or fulfil any specific act or obligation whatsoever, may be enforced after two days from the day of its delivery.
>
> (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.

S. 256 (2) COCP states that an executive title is enforceable after the lapse of at least two days from the service of a judicial intimation for the payment (demand to be paid). By application of **253 (3),** however, in the case of BoEs and Promissory Notes, the law has granted further leeway. The law thus affords a **20 day period** within which a person who receives the judicial letter may stop the process, with the 20 days beginning to lapse following the service of the judicial intimation.

Regarding BoEs and promissory notes, s.253 carries a proviso specifically catered for these credit instruments;

> 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;

Thus the grounds for enforcing a bill of exchange are very limited:

Ground 1: the signature of the BoE is not that of the respondent. The respondent may be the acceptor, drawer, endorser, or avaliseur. This ground pertains to the absence of a formal requirement for the bill of exchange, as required by **s. 123 Commercial Code**.

Ground 2: where the respondent brings forwards **grave and valid reasons** to oppose the execution. This ground is vaguely described and non-specific. The law tries to preserve the autonomy of a BoE, and thus the law seeks to allow the Courts discretion to ascertain whether something falls under this broad category of fault. In the case where, for instance, the goods exchanged for payment are defective, it is unclear as to whether this would constitute a grave and valid reason to invalidate an actio cambiaria, since there seems to be conflicting jurisprudence.

Defences for the Enforcement of BoEs

Articles 197 and 198 of the Commercial Code establish the pleas which may or may not be raised to combat a demand for the payment of a Bill of Exchange.

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.

These provisions refer **both to personal pleas** (i.e pleas which relate to a relationship between 2 or more parties) and to **real pleas** (i.e pleas which relate to the formalities of the bill of exchange).

Personal pleas are referred to as *exceptio in persona*, and refer to the parties to the bill of exchange. **Real pleas** are referred to as *pleas in rem*, and attack the essential requisites of a valid bill of exchange. Additionally, there are **general pleas**, which attack the bill of exchange itself in a manner which extends beyond the form thereof. General pleas would encompass **consent obtained by fraud or violence**.

Courts need to ascertain whether or not the plea brought constitutes a **grave and valid reason** for invalidating a bill of exchange, as stipulated and governed by **article 256 (2) COCP**.

Real Pleas

Real pleas pertain to the validity of the Bill of Exchange. It may be raised by the party sued on a bill. Moreover, the law does **not prescribe any limitation or exception to real pleas**. The proviso to **Article 253 (e) of the COCP** refers to the signature of the respondent. Contextualising this reference with article 253, if there is a problem with the legal formality (for instance, the non-signing by the drawer), the Court will consider the lack of formality to be a grave and valid reason for its invalidation.

Joseph Mamo vs Joseph Zammit
27/09/2019

L-ewwel aggravju tal-appell jolqot dik il-parti tas-sentenza li tgħid illi l-fatt li l-munita li tissemma fil-kambjali hija l-lira ta' Malta fi żmien wara li l-lira ma baqgħetx valuta legali f'Malta ma jwassalx għan-nullità tal-kambjali. L-appellant igħid illi: »*... dan il-fatt waħdu huwa raġuni "gravi u validu" għas-sospensjoni tal-kambjali de quo u dan għaliex id-dokument esebit bħala kambjali ġuridikament ma jikkwalifikax bħala tali.*« - **The Court agreed, and suspended the BoE**

Fil-każ tallum fuq il-kambjali tissemma l-lira ta' Malta, li llum ma għandhiex kors legali f'Malta; għalhekk il-ħlas isir bil-flus li għandhom kors legali f'Malta, illum l-euro, skond ir-rata ta' kambju ta' lira ta' Malta f'euro.

Personal Pleas

Article 197 establishes that personal pleas against the endorser **may not be set up against the holder of the bill**. This ties in with the notion of **autonomy** as attributed to Bills of Exchange. The holder of the bill acquires an independent and autonomous right to receive payment on that bill, barring any preceding fraud.

Louis Galea noe vs Alfred Bartolo
4th Novembre 1968

In this case, a car was sold to Bartolo, and the BoEs were issued and signed by the seller as the drawer and payee. The BoE was signed by Bartolo as a drawee and acceptor. The BoEs were endorsed by the seller to a Bank which discounted them, so when the date of maturity came, the bank sought Bartolo's payment. Bartolo never received the car in question, and thus refused to pay. The bank sued Bartolo, and Bartolo argued that the underlying agreement for the sale of the car had been rescinded and that the seller should not have endorsed BoEs in which the other party failed to fulfil their obligations. The Court held that once the BoE was endorsed and acquired by the bank in good faith, the payment must have been effected to the bank, notwithstanding the seller's failure to deliver the goods promised. The bank's autonomous right to receive payment, falling in line with the principle governed by **article 197**, was enforced by the Court, for the plea was a personal one against the seller, and not against the bank.

Bank of Valletta p.l.c. vs Carmel Ray Micallef
18th February 2004

In this case, the defendant had signed as a drawee and acceptor around 27 BoEs for payment of works carried out by a company. The company sold the BoEs to BOV, via endorsement. The Defendant failed to pay the BoEs, and thus BOV sued for payment. One of the pleas raised was that the works carried out by the company were defective. The Court adopted the same line of reasoning as the case of ***Louis Galea noe***, holding 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".

Relative Autonomy - s.198

Article 198 holds that a plea which is 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**. Thus while in article 197 the law speaks of a plea personal to the endorser, in article 198 we refer to a plea personal to **the holder**. Another contrasting element between the two articles is that **article 197 sets out a negative obligation** (i.e - the plea against an endorser **cannot be held** against the holder), while **article 198** establishes a **prohibition on delaying the payment** da parti of the drawee. Further, in article 198, the law holds that the plea may be raised, but if it is such that an investigation into the plea will cause delay to the payment, then the plea will not be accepted. Thus a personal plea against the holder **may be raised so long as the investigation does not delay the payment**.

Jurisprudence suggests that two distinct approaches exist in relation to article 198. Some courts tend to dispose of article 198 by applying the principle of strict autonomy (i.e - only pleas pertaining to boe validity are heard and allowed), **while others apply article 198, opting for limited autonomy** (i.e - pleas which do not cause a delay in payment only are heard).

Jurisprudential Approach 1: Strict Autonomy

Charles Gatt noe vs Joseph Vassallo Gatt noe *- strict autonomy*
15th November 1993

Il-legislatur ried li kwazi bbazati fuq kambjali jitmexxew u jigu decizi b'celerita' u heffa insolita. Huwa proprju ghalhekk li l-ligi tillimita l-eccezzjonijiet li jistghu jinghataw kontra l-possessur tal-kambjala.

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

George Zahra vs Alfred Borg *- strict autonomy*
28th April 1995

Il-qorti cahdet it-talba tal-konvenut biex jikkontesta t-talba attrici f'azzjoni kamjarja maghmula bil-procediment sommarju specjali

Il-qorti irraffermat il-gurisprudenza kostanti illi fl-azzjoni kambjarja huma permess biss eccezzjonijiet li jikkontestaw il-validita' formali tal-kambjali in kwantu jallegaw li din fuq il-wicc taghha tkun Monka f'xi wahda mill-elementi kostituttivi taghha kif trid il-ligi.

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".* **Prof Cremona** goes on to state that this does not preclude the plea from being raised regardless, but it does not mean the court will definitely accept to hear such pleas.

Peter Azzopardi vs Raymond Camilleri *- strict autonomy*

"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."

These judgements thus assert a strict distinction between the obligation attached to the bill of exchange and the ***causa obbligationis*** - the underlying obligatory relationship which resulted in the creation of the bill of exchange. This distinction is what renders **autonomy** into the bill of exchange, to the extent that an issue in one obligation (i.e the underlying transaction) is interpreted to have **no effect whatsoever** on the obligation emanating from the bill of exchange. This is what the **principle of strict autonomy dictates**. The courts hold that in the case of an error or fault arising in the underlying transaction (the *causa obbligationis*), then the remedy is to institute a **separate action** to resolve this issue, without interfering with the payment of the bill of exchange. The idea is that the signing of the bill of exchange creates a totally separate contractual relationship, which exists independent of whether the first and underlying obligation is fulfilled or not, to the extent where faults in the underlying transaction are to be tackled in a separate claim to that of the *actio camiaria,* as suggested by the courts.

Jurisprudential Approach 2: Limited Autonomy

John Giordimaina et vs Joseph Pace *- limited autonomy*
16th January 2003

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. Kambjala, kif inhu maghruf, ma tohloqx novazzjoni, meta tibqa f'idejn il-parti kontraenti ma tistax tigi distakkata mill-obbligazzjoni originali.

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

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 therefore, in this case, distinguishes between a bill which has **not been endorsed and a bill which has been endorsed**, to the extent that an endorsed bill is to be construed as totally autonomous, whereas a bill pertinent to the original parties is less autonomous, and an error in one obligation may give rise to a justification in the other.

This judgement referred to the works of **P.S. Atiyah**, who, in ***the Rise and Fall of Freedom of Contract***, stated that;

*An assignment (of credit) was never wholly satisfactory as a method of creating credit. **For the procedure of assignment did not sufficiently detach the debt from the underlying transaction**, the debtor was always entitled to raise 'equities' against the assignee, that is to say the assignee might, when he came to enforce his claim, find that he was met by counter claims arising out of the original transaction of which he had no knowledge. -* ***P.S. Atiyah***

Scicluna vs Vella *- limited autonomy - endorsement creates autonomy*
18th March 1965

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 tat-terz akkwirent, id-debitur xorta jkun jista' jissolleva eccezzjonijiet li jolqtu n-negozju. Ghalhekk, ghall-kreditur, dan id-dritt ta' cessjoni ma tantx hu effettiv ghax ma tantx issib nies lesti jiehdu kreditu ta' haddiehor, u fl-istess hin jibqghu esposti ghall-kwistjonijiet inerenti ghall-obbligazzjoni li ghalih ma kienux parti. Ghalhekk inholqot il-kambjala. Peress li minn jixtri kambjala, qed jixtri titolu ta' kreditu awtonomu, jaf li kwistjonijiet naxxenti mill-obbligazzjoni li wasslet ghal dak il-kreditu, jibqghu estranei ghalih, ghax hu, bhala terz akkwirent, jista' jfittex biss fuq il-kambjala. Bejn il-partijiet, pero', il-kambjala m'ghandux 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 ghal 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 wassalt ghall-hrug taghha

Article 198 may be described as the provision for **relative autonomy**. Under this scenario, **personal pleas against the holder** may be raised, provided that **the investigation thereof does not delay the payment and that the pleas may be easily disposed of in the actio cambiaria**.

Guillaumier Industries Ltd.vs Victor Vella et - *relative autonomy*
4th December 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 *- relative autonomy*
22nd November 1997

"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".

Carmelo Sammut et noe v. Armando Bugeja et *- relative autonomy*
28th March 2008

"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".

Personal Pleas attacking the Validity of the BoE - General Pleas

Despite the idea that a real plea is one which attacks the bill of exchange's validity, the courts have often accepted **personal pleas** which attach such validity. These pleas succeed notwithstanding the fact that the plea is brought **against the holder**. In these particular cases, however, the bill of exchange is not attacked on the grounds of its **formality**, but rather owing to other circumstances which ought to render it null and void, such as the **procurement of consent via fraud or violence**. An underlying principle within the Civil Law tradition is that fraud nullifies any and all forms of consent - ***fraus omnia corrumpit***.

Joseph Cost Chretien vs Joseph Borda - *procurement via violence*
6th November 1961

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

Tabone vs Camilleri - *common pleas, such as capacity, may be raised against the holder*
27th February 1939

"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".

Joseph Lia vs Alfred Dalli - *violently achieved acceptance / acceptance via dolo*
26th January 1989

"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".

Antoine Vassallo pro et noe vs James Anthony Cefai *- recollection of types of pleas*
16th March 2005

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 d-determinazzjoni ta' l-azzjoni kambjarja kellhom jigu skartati" – "**Adrian Busietta *nomine* vs Marco Attard *nomine***";

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". "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"

Jekk il-Qorti ma tinvestix dan il-punt, sollevat b' eccezzjoni jew b' kontro-talba, bhal f' dan il-kaz, il-Qorti ndirettament tkun qeghda tghin lil min ma jisthoqqlux dik l-ghajnuna minhabba d-dolo tieghu. F'dawn il-kazi huma applikabbli z-zewg principji tad-Dritt illi "natura aequum est neminen cum alterius detrimento fieri locupletiorem" u "malitiis non est indulgendum" li huwa principju ta' moralita` u ghandu jkollu l-applikazzjoni tieghu guridiku"

S 253 (e) COCP - Grave and Valid Reason

The question arises as to whether the pleas pertaining to the underlying obligation falls under the remit of **grave and valid reason** in rendering a bill null and void. The Court applies the aforementioned principles, in that in for the purposes of real pleas, such pleas were often accepted as grave and valid.

The principles of autonomy and relative autonomy are also applied before the Court to demand the suspension of a bill of exchange, on the grounds of grave and valid reason for suspension. In the context of endorsed BoEs, the endorsee is deemed in all cases to be vested with **strict autonomy**, and thus the endorsee can never raise a plea pertaining to the underlying obligation between the original drawee and payee, since the endorsement represented detachment from the original transaction, as enshrined under **article 197**, which admits to no exception.

Thus the question which arises in this regard pertains strictly to **article 198**. Where the original parties to the bill and the person who is contesting said bill are referring to the underlying obligation, the Court will consider whether the argument is grave and valid to warrant such suspension. Thus, where the enforcement is sought by the payee, drawer, or acceptor in relation to a grave and valid reason, the Court would likely suspend the bill of exchange if;

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

These two conditions ensure that **article 198 Commercial Code** and **article 253 COCP** are both respected in their entireties. In these cases, the court should be ready to suspend the facts of the case and to reserve the rights of the parties before resolving the accepted pleas.

Giovanni Briffa vs Ronald Azzopardi *- prima facie examination*

"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-dettallji 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"

Daniel Borg vs Mark Casha *- prima facie examination*
17th June 2015

"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."

Motor Inc. Limited vs Christ Scerri *- proof is often not accepted, since the plea must be merited prima facie*
28th March 2022

Din il-Qorti tagħmel tagħha l-insenjament għaqli tal-Prim' Awla tal-Qorti Ċivili fil-kawża appena ċitata u tqis illi r-raġunijiet mogħtija mir-rikorrenti għat-twaqqif tal-eżekuzzjoni tal-kambjali de quo ma' jistgħu qatt ikunu dawk ir-raġunijiet "gravi u validi" li kellu f'moħħu l-leġislatur meta daħħal fil-liġi l-Art. 253(e) u dan għaliex dawn jirrikjedu indaġini fid-dettal li tiżboq analiżi fuq livell ta' prima facie.

30. Il-Qorti tirrimarka ukoll illi sabiex tiġi rispettata r-rieda tal-leġislatur, din il-proċedura ftit li xejn tista' tippermetti li jiġu mressqa provi mill-partijiet. Kwalunkwe prova li tista' titressaq għandha tkun dejjem għad-diskrezzjoni tal-Qorti

Usury

Usury refers to the stipulation for interest **in excess of that permitted by law**. There are certain pleas which attack the validity of the bill of exchange itself and which can always be raised. Our courts have held that when BoEs are used to cover the stipulations of interest in payments due up to 8%, these are not completely invalid. This is rendered a matter of public policy and given strict interpretation by the Courts.

986. (1) Stipulations *quotae litis* are void.

(2) Saving the provisions of article 1852 and of any other provision of this Code or of any other law, any obligation to pay a rate of interest exceeding eight per cent *per annum* is also void in regard to the excess.

Civil Code

Article 986 of the Civil Code states that an obligation to pay a rate of interest exceeding 8% p.a is null and void up beyond the 8% (thus permissible up to the 8%, and anything over and above is null). This article, however, is subject to the exceptions enlisted under the Interest Rate (Exemption) Regulations, which were introduced owing to international trade and because it is considered custom for such trade to charge more than 8% outside of Malta. The 8% limitation was pushing away trading opportunities with foreigners in Malta, and thus these regulations were introduced. However, insofar as the parties to a contract or agreement are Maltese, 8% is the maximum possible charge for interest. **BoEs are often chargeable at an interest rate more than 8%**. The question is thus whether this excess warrants invalidation. As per article **986 (2) Civil Code,** a plea may be raised to combat this excess, however, the party suing may only serve to **invalidate the excess amount**, and not the bill in its entirety.

Catherine Farrugia vs Marcus Lauri et *- usury*
31st January 2018

"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

Procedurally, it is worth noting the prescriptive periods applicable for the enforcement of a bill of exchange. This refers to the time frame in which the action must be brought. Every right for action will expire within a stipulated amount of time, with 30 year and 40 year prescription (the latter in the case of Churches and other Pious Institutions) being the time in which **all real, personal, or mixed actions** is barred completely, as per **articles 2143** and **2144**.

When referring to prescription, we must ascertain the difference between acquisitive prescription and extinctive prescription. For the purposes of bills of exchange we are primarily concerned with extinctive prescription, as governed by **s 2107 of the Civil Code;**

> **2107.** (1) Prescription is a mode of acquiring a right by a continuous, uninterrupted, peaceable, open, and unequivocal possession for a time specified by law.
>
> (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 law also provides for shorter prescriptive periods, which would take precedence over the 30 year extinctive prescriptive provision, owing to their specificity (*lex specialis derogat legi generali*).

We refer to **article 542 of the 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 may be interrupted.** However, the **Commercial Code** creates a rather exceptional rule, that holds that **all prescriptions enlisted and provided for by the Commercial Code are peremptory, and thus they can never be extended, interrupted, or suspended**.

> **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.

Thus, no interruption may be brought in relation to bills of exchange prescriptions. The lapse begins upon the **date of maturity**, in the case of a specified date, or else **upon sight,** or else upon the lapse of the 21 days (from usance). This was confirmed in ***Anthony Sammut vs Joseph Peters et.***

Promissory Notes

Promissory notes are **necessarily comprised of 2 parties**. They are regulated by **2 provisions of the Commercial Code,** being **articles 260 and 261**.

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.

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 law refers back to the rules on Bills of Exchange which consequently apply to promissory notes. The principles may be deemed to be similar, but there are some differences.

As with bills of exchange, the law does not provide a definition for promissory notes. Under English Law, the Bills of Exchange Act does provide a definition;

Promissory Note: "… 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"

Under English Law, bills of exchange may be drawn *to bearer*, unlike under Maltese law. Conversely, under Maltese law, **a promissory note may be issued to bearer**.

A promissory note is often a short document. It is a unilateral contract, being signed by only one party - the person who promises to pay. These are often referred to as 'IOUs'. The document signifies an undertaking to pay. The party forming the document may include a stipulation to interest contained in the promissory note, but this is not popular. **Article 261** establishes the contents of the promissory note. The formalities required for a valid promissory note are;

1) The **date of issue**;
2) The **amount promised to be paid**;
3) The person **to who's order is signed** (the payee);
4) The **maturity date;**
5) The **value supplied in cash**;

Article 261 (2) states that a promissory note can be issued **to bearer**. Unlike bills of exchange, a promissory note cannot be drawn **at usance**. For promissory notes, unlike in bills of exchange, there is no acceptor. The presentment of the promissory note is sufficient for the document to be enforceable.

There are a number of additional formalities required in bills of exchange which **are not required for promissory notes**, such as the place of issue, the name of the drawee, the place of payment, the signature of the drawee, etc. Strangely, the law does not require the promissory to be signed by the issuer, unlike the case of the drawer in the bill of exchange.

Differences & similarities between BoEs and promissory notes

Upon a reading of **article 260**, one immediately notes that **a promissory note is a type of bill of exchange.** It is more akin to a **bilateral bill of exchange** than it is a trilateral one, but some difference emerge nonetheless.

Differences

1) A promissory note is a **promise** by one party to pay another. There is no order to pay. A bill of exchange is one party who **orders** another to pay the drawer or else another party.
2) Unlike a BoE, a promissory note **can be made to bearer** (261 (2)).
3) Unlike a BoE, a promissory note can only be presented for payment, and not for acceptance, since there is no drawee involved.

Similarities

1) Like a BoE, a promissory note may be **negotiated and endorsed**. The element of **transferability** is thus common between the two credit instruments. Further, a third party may step up and guarantee the payment.
2) Like a BoE, a third party can pay for honour and guarantee by aval.

One must note that **the law does not require the signature of the drawer**. Under English Law, the promissory note must contain the **signature of the maker**. Maltese law adopts the same position, leaving the note unenforceable without the signature of the drawer. The signature of the payee is **not required**.

However, **on endorsement, it must be signed by the endorser**. The BoE rules on endorsement apply if the promissory note is made payable **to the order of a specified person**. The endorser does not have to sign if the document is signed to bearer, in which case the holder has a right to payment.

One must note that **the presentment of a promissory note is necessarily required for payment**. This is a *sina qua non* for the enforceability of the note. The promissory note can only be presented for payment, and not for acceptance.

The question of autonomy

Article 260 states that the rules regulating the time of maturity and payment apply the same to BoEs as they do to promissory notes. **Articles 197 and 198**, regulating the rules of autonomy vis-a-vis the maturity and payment of a bill of exchange thus apply also to promissory notes, thus implying that **the same element of autonomy of rights exists to the case of promissory notes**.

Furthermore, the same rules and procedures for **enforcing the rights on a bill of exchange** (i.e real pleas, personal pleas, limited autonomy, etc) apply to the case of promissory notes. Thus, if there is an issue with the underlying transaction, the plea may be raised solely if it does **not delay payment**.

2004 amendments to the COCP vis-a-vis promissory notes

As previously mentioned, in 2004, BoEs and promissory notes were added to the list of documents which vest **executive title.** The grounds for suspension are the same in the cases of BoEs and promissory notes, being the ground of false signature and of grave and valid reason. The same rules and jurisprudence applies, including the rules governing the **protest procedure** and **right of recourse**.

Prescription

The same prescriptive period applies to both BoEs and promissory notes. Again, we refer to **articles 541 and 542** 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.
>
> **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.

The 5 year prescriptive period is deemed **peremptory** by the Commercial Code, thus prohibiting the rules of interruption of prescription as per the Civil Code.

Cheques

Within the realm of cheques, there seems to be a conflicting interpretation between the law and practice. The provisions on cheques fall under the same provisions governing credit instruments, yet **banking practice and directives issued from the Central Bank have shown a different interpretation**. The most recent CBM directive is Directive 20, on cross-boarder payments, with the preceding directive (19) elaborating on **the Use of Cheques and Bank Drafts.**

The most highlighted feature of cheques is their **convenience**. The use of cheques has been in decline in the EU consistently since 2000. While also declining in Malta, the use of cheques is still 10x higher than the EU average. Approximately 18% of payments in Malta are done via cheques.

Like promissory notes, cheques are governed by 2 provisions; **articles 262 and 263 of the Commercial Code;**

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.

263. Where the holder of a cheque fails to cash it within three days from the date thereof, and, after such time, the banker or cashier refuses to pay, the holder who has received the cheque from a third party has no right of recourse against such party, nor against the maker of the cheque, if the latter proves that he had in the hands of the banker or cashier sufficient funds to meet the cheque, and that such funds did not cease to be available through his fault.

The U.K Bills of Exchange Act states that ***a cheque is a bill of exchange drawn on a banker payable on demand***. In this way, the U.K classifies the cheque as a **type of BoE**.

In a cheque, there are three parties, with the drawee being a registered bank. The holder of a chequebook is deemed to be the **drawer**, and the person being ordered to pay is the **drawee**. In the case of cheques, **the bank is the drawee**. The **drawee is ordered to pay a sum of money to the payee**. So long as there is money in the bank account, the law's presumption is that the issue of the cheque represents the drawer has put the drawee in funds, because the drawee (bank) is the holder of the money. Rules relating to BoEs payable on demand apply to cheques when presented to the bank for payment. This is not expressly stated in the law, because the law on cheques does not specify whether any provisions governing BoEs apply also to the case of cheques.

Formalities

Article 10 of Directive 19 of the CBM lays out the formalities required for a valid cheque;

> 10. (i) The drawer is obliged to provide all the following information on the paper-based instrument:
>
> - The date of issue;
> - The payee;
> - The payable amount in words and figures which shall agree; and
> - The signature of the drawer or the authentication as agreed between the drawee institution and the drawer.
>
> (ii) A drawer can issue an instrument only for amounts exceeding twenty euro (€20).

1) The **Date of issue.**

this element is important since it serves to establish whether either of the parties were in a sufficient legal capacity to enter into the agreement or not. **Directive 19** also **prohibits the practice of issuing post-dated cheques,** holding that such cheques in circulation must be transferred to a bank, without the option to endorse them.

2) The **amount to be paid.**

3) The **name of the payee**.

The latter element is overridden with conflict. The law holds that **a cheque may be drawn to bearer or to the order of a person**. However, **directive 19 states and declares that cheques cannot be issued to the order of a person**. This directive thus hinges on the negotiability of the cheque. Our law does not state specifically whether there are any rules governing BoEs which also apply to Cheques. This has raised judicial debate, to the extent that it is unclear as to the **nature** of cheques. The main streams of thought contemplate whether a cheque is based on the law of mandate/agency, or if it is deemed to fall under the category of bills of exchange, similar to the U.K position and akin to the case of promissory notes. This distinction is important because under the law of mandate, **a cheque is revocable**. Should the cheque be classified as falling under mandate law, the drawer is able to call the drawee and order the revocation of the cheque, and thus the non-payment of the money. The *raison d'etre* behind classifying a cheque as a form of mandate is because a cheque represents an **order to pay**.

> ***Anthony Grech Sant vs. Ronald Balani*** *- cheque as mandate*
> *27th October 2017*
>
> "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…"

The court thus made a distinction between endorsed cheques and unendorsed cheques. Further, the Court recognised the legal discrepancies which exist within the remit of cheques, and appeals for amendment.

A running theme in judgements is that Courts tend to uphold the principle that **a cheque is only classified as a type of BoE once it is endorsed**. Until it is endorsed, it is simply an instruction to the bank to order payment held by the payee. Thus the courts, should they uphold this line of thought, are holding that a cheque is a mandate until it is endorsed, at which point it transforms into a bill of exchange.

Enrico Sammut vs Vincenzo Falzon *- cheque as a BoE when endorsable*
15th October 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 ".

This case thus recognises cheques as BoEs when they are endorsable (issued to the order of someone).

Anthony Grech Sant vs Ronald Balani *- cheque as a BoE, applying the same laws, when endorsable*
5th October 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".

This judgement took a step further, asserting that the law of bills of exchange apply to cheques when the cheque is capable of being endorsed.

Anthony Borg et vs Anthony Willoughby et
9th March 2005

"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.

This case confirmed that the relationship between a bank and a person issuing a cheque is not akin to a relationship between a mandator and a mandatary, but rather it is similar to a relationship between a drawer and a drawee in the bill of exchange.

Prof Micallef asserts that; *"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"*

Therefore, the current stream of jurisprudence establishes that **a cheque is a type of bill of exchange**, because it represents an order given to the drawer for the drawee (Bank) to pay the payee. Conversely, a cheque **cannot be drawn on the drawer himself** (i.e the drawer cannot also be the payee), unlike the case of the bill of exchange. Moreover, the **cheque is payable on demand**, at sight, and when presented to the bank, the presentment is only for payment (similar to bills of exchange drawn at sight).

As per **article 263**, cheques are capable of endorsement. Additionally, **the bank will only effect the payment if the drawer has put in funds to the drawee**. The bank is only bound to pay when the funds have been put by the drawer, or when the drawer has afforded sufficient facilities in the case of overdraft.

Non Payment of a Cheque

In the case of non-payment, which may arise either because of the lack of a **formal requirement** or else because the bank was **not put in funds by the drawer**, the bank will refuse to effect the payment, and request the payee to *refer back to the drawer.* In common parlance, the cheque is said to have *bounced*. The payee may then sue the drawer for payment.

In ***Daniel Cremona noe vs Nazzareno Zammit et***, **Article 263** was described to have implied the existence of the right to recourse, in turn implying that the **protest procedure** applicable to the case of bills of exchange applies also to the case of cheques.

A cheque does **not have a maturity date**. Banking practice has suggested that a cheque **older than 6 months from the date of issue** will not be accepted. Directive 19 of the CBM instructs banks to discontinue providing cheques to drawers if, during the preceding 12 months, 6 cheques are presented for settlement and could not be paid either due to lack of funds or if they lacked the formalities.

In practice, the Bank tends to refuse to provide cheque books to a person who has issued 6 bounced cheques within a year. This is not enshrined in law, but in practice, and we know, from article 3 of the Commercial Code, of the importance of usages of trade within the realm of commercial law.

Cheques are not deemed to be legal tender - if a person owes another money, that person is not obliged to accept the cheque. A cheque, like a BoE can be refused. There is never the obligation to accept a cheque.

AML has given rise to amendments within the realm of cheques, to the extent that banks no longer accept cheques of over 5000 EUR beyond deposit (i.e they will deposit the money to the account, but they will not translate it into cash). Furthermore, cheques to companies may not be cashed, but only deposited.

Stop Payment (countermand)

The question arises as to whether the issuer/drawer of a cheque has the right to stop a payment. This is the practice of someone who issues a cheque and subsequently requests the cheque to be nullified, notwithstanding the bank being put in funds by the drawer. Under U.K. Law, Article 75 of the Bills of Exchange Act holds;

"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."

Thus under U.K. Law, countermand is expressly permitted. Under Italian and French law, the doctrine also allows for countermand, subject to certain conditions and limitations (i.e - a cheque cannot be countermanded before the lapse of 8 days from issue).

Under Maltese Law, there is no specific regulation of countermanding cheques. But our courts have recognised that cheques, in producing the same effects of a BoE, warrant the same treatment of a BoE, to the extent that **it cannot be withdrawn, thus prohibiting countermanding of cheques**.

Daniel Cremona nomine vs Nazzareno Zammit et nominee - *no countermanding of cheques*

"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".

The Procedure of Article 253 (e) and its applicability for cheques

We have previously stated that the 2004 COCP amendments widened the scope of executive title to include bills of exchange and promissory notes. Cheques are thus not deemed to carry executive title. One may argue that if a cheque is a type of BoE, as per the aforementioned stream of judgements, then it should be treated the same way. The ultimate conclusion, however, as adopted by the courts, is that once the COCP's list of exhaustive titles are **exhaustive,** then this should not be arbitrarily widened to include cheques. This principle was upheld in ***Anthony Grech Sant vs Ronald Balani.***

Anthony Grech Sant vs Ronald Balani - *applicability of 253 in BoEs*

"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".

Prescription

Articles 541 and 542 of the Commercial Code states that;

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.

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.

We know that the prescriptive periods in the Commercial Code are Peremptory. The 5 year lapse, in the case of cheques, begins **from the date of issue**.