CVL1001
COMMERCIAL LAW

The European Law Students' Association

MALTA

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Basic Notions of Commercial Law

*"That **part of private law** whose principal purpose is the regulation of **juridical relations** which arise from the **exercise of trade**".*

Cesare Vivante

The legal notion of commerce goes beyond the mere exercise of the distribution of trade, as it caters for other industries and sectors which are also, in themselves, *supplementary* to the distribution of trade (ex. banking activities, insurance, bills of exchange, brokerage,).

The common factorial governing all elements dwelling in the sphere of trade is that these activities boast the characteristic of offering goods and services to satisfy the needs of the market. In the business sphere therefore, the people producing *goods* do not do so with the intention of consuming the very same goods they themselves produce, but rather, produce the goods in question for the sole disposition of *others*.

"The commercial law relates to traders and to acts of trade done by any person, even though not a trader."

Art. 2 of the *Commercial Code of Malta*

According to Italian jurist Cesare Vivante, commercial law is closely related to private law. But in order to understand this relationship, we must first draw a clear demarcating line separating commercial law from civil law. Many were the jurists who attempted to attain a single truth regarding this hallowed 'demarcating line', and thus, many different theories were propounded.

One theory claims that commercial law boasts a character which is, in essence, more '**special'** and '**exceptional'** when compared to private law in general; therefore, one might muse that, according to the doctrine of having special law override a more general law, then commercial law takes priority when juxtaposed with general private law (civil law). This follows the Latin maxim of *lex specialis derogat legi generali*.

Conversely, a different theory asserts that civil law and commercial law are **fully autonomous**, and exist solely to *complement* one another.

Moreover, there are certain areas in commercial law which bear particular elements of *public law* (ex. insurance law, banking law, and financial services law). So ultimately, one may figure out which law should apply to which cases depending on the approach the person in question opts to adopt.

These hallowed approaches can be split into **Objective** and **Subjective** subdivisions.

When donning an Objective stance, one primarily heeds those **actions that are commercial in nature**. The main difficulty with this method of thinking however is that this mindset uncovers the notion that there are various activities that are endemic to both the Civil and Commercial spheres; thus leading us to a viciously perennial cycle of depending solely on the person undertaking the activities in question.

When adopting a Subjective approach, it all depends on the **person undertaking the commercial transaction**; meaning that Commercial law would thus be rendered limited to the traders themselves. The most prominent flaw revolving around Subjective approaches is that a problem arises in the manner by which one defines *who* is a trader; because the only way one may rightfully discern between who is a trader and who is not would be to analyse the activities undertaken by the person being analysed (much like the above problem borne by the Objective approach).

Essentially therefore, **both these approaches are defective**; because they both lead to a ceaseless cycle of depending and analysing the person undertaking the activities in question.

And in an admirable attempt at resolving this issue, the Maltese legislator tries to espouse both approaches with each other in Cap. 13 of the Legislation of Malta – the Commercial Code.

Ultimately, **trade is the buying, selling, or exchanging of goods** – of whose nature is stipulated in Art. 5(a) of the Commercial Code of Malta.

Sources of Commercial Law

> **"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."**
>
> **Art. 3** of the *Commercial Code of Malta*

This article establishes the inherent sources of Commercial law and the position they each occupy within an abstract hierarchy.

Positive Commercial Law

This source comprises all that which has been posited and relates to the law of commerce; hence why the Commercial Code of Malta, in itself, discusses many commercial matters such as the Merchant Shipping Act, the Banking Act, and the Insurance Business Act.

Apart from defining what the inherent nature of a trader is, the *Commercial Code* also asserts what begets a **commercial partnership**:

> **"The term "trader" means any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership."**
>
> **Art. 4** of the *Commercial Code of Malta*

Thus, this explains how trade is not, in essence, particularly exclusive to the trader – because it thus extends its reach to partnerships and/or companies.

A **minor** has to exercise trade under the orders and responsibility beheld by his legal guardians; however, the law also provides for instances wherein a minor is **emancipated into trade**. Naturally, this thus envelopes the minor into the duties and obligations garnered by the typical trader.

Despite the prominent position Positive Commercial Law occupies in the hierarchy, sometimes, Civil Law is that which takes precedence. **Art. 1141** of the Civil Code for instance takes precedence over any commercial activities:

> **"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."**
>
> **Art. 1141** of the *Civil Code of Malta*

Therefore, one must cross-reference certain Codes with each other for him or her to know which law is applicable to which situations.

Usages of Trade

This truly exhibits the dynamic nature of commerce, reflecting important developments that happen continuously within the remits of commerce which cannot possibly wait for legislation to occur.

Therefore, if posited law does not tackle a specific action, then Usage shall apply. A 'Usage' is defined as an **unwritten rule of law which is established by the constant and uniform practice of traders**.

> **"[A Usage is] a juridical norm observed when the law is silent."**
>
> **Umberto Navarrini**

For instance, the notion that rules restricting compound interest in the Civil Code become inapplicable to overdraft facilities is a prime example of a commercial Usage.

In **'Mid-Med Bank vs Teg Industries (2001)'**, it was established that charging compound interest in situations appertaining to overdrafts had always been a common exercise of Usage in banking practices. Thus, Art. 1142 and Art. 1850 of the Civil Code of Malta were overridden in this case.

Two characteristics which prove the existence of a Usage are:

1. **Objective External Element**: a uniform and continuous observance of a rule for a stretch of time which ushers persons into feeling compelled to obey it (such as Navarrini's **Norma Giuridica**).
2. **Subjective Internal Element:** the usage must be widely regarded to be a Norma Giuridica; thus meaning that acts done out of courtesy or tolerance do not qualify in being Usages of trade.

Moreover, a Usage cannot conflict with a posited rule of Commercial Law. However, **Usage supersedes Civil Law as long as the Civil law in question is not one of public policy**.

Fundamentally, Usage is law; therefore meaning that rules of legal interpretation apply, the court itself must apply such Usages, and the wrong application of a Usage may lead to arraignment.

Finally, the Latin maxim *of ignorantia lege neminem excusat* can also be applied for Usages, as not knowing them does not absolve a person from criminal liability.

Positive Civil Law

Positive Civil Law acts as a subsidiary source of Commercial Law, thus implying that Usages take precedence *before* the source of Civil Law, albeit EXCEPT in the following circumstances:

1. When a Civil Law provision is a **rule of public policy**.

2. When a Civil Law **expressly regulates a Commercial Law matter**.

3. When a Civil Law provision is **cross-referred to in the Commercial Code**.

Acts of Trade and the Trader

As already stipulated above, there are two strains of acts of Trade: **Objective Acts of Trade** (the generic act of trading between persons) and **Subjective Acts of Trade** (the established status of a trader).

Objective Acts of Trade

Unlike the specific nature of Subjective Acts of Trade, Objective Acts of Trade are quite generic in their description. According to this view, a trader must be fully engaged in a constant act of trade in order for him/her to qualify as a 'trader'.

> **"Every act of a trader shall be deemed to be an act of trade, unless from the act itself it appears that it is extraneous to trade."**
>
> **Art. 7** of the *Commercial Code of Malta*

This provision thus asserts that any act executed by a trader is rendered an act of trade, as long as the act committed is not executed for personal purposes (ex. purchasing furniture for one's private domicile, instead of purchasing it for resale purposes).

The law decrees that it matters not whether one is formally recognised as a trader or not; any actions stipulated in Art. 5 of the Commercial Code of Malta are endemic to the characteristic of being acts of trade regardless of whether the agent carrying them out is a 'trader' or not.

Moreover, Art. 7 of the Commercial Code declares that any act committed by a trader that does not reside within the domain of Art. 5 is still to be regarded as an act of trade – solely because of the agent's status of 'trader'.

> **"Obligations arising from collision of vessels, assistance or salvage in case of wreck, stranding or abandonment, from jettison or average are likewise commercial matters."**
>
> **Art. 6** of the *Commercial Code of Malta*

Art. 6 highlights obligations appertaining assistance and/or salvaging of shipwrecks and the likes – asserting that such matters boast a commercial nature.

Ultimately, no specific definition of an 'Objective Act of Trade' is established. The law simply lists the acts which are declared to be acts of trade ***stat pro ratione voluntas*** (*in proportionality with reason*). This refers to **Art. 5 – 6** in the Maltese Commercial Code. While the list is very varied, there are several common characteristics, despite there being no universal definition.

In sum therefore, Objective Acts of Trade (and other elements of appurtenance):

- **Are Acts of Trade *irrespective of the status of the person who performs them*** (unlike Subjective Acts of Trade – because such Acts come into being only because the agent is of a 'Trader' status).

- The repeated exercise of any of the Objective Acts of a Trader (alongside other requirements in Art. 4), **confers upon the person performing those acts the status of a 'Trader'**.

- The Acts listed are irrefutably presumed to be Acts of Trade (***iure et de iure***).

- The list of categories of Objective Acts of Trade in the Commercial Code is **exhaustive**.

- The categories of the Acts listed in the Commercial Code should be **extensively interpreted through analogical hermeneutics**.

Finally, it is important to note that some Objective Acts of Trade are deemed to be Absolute, while others are considered to be Relative. An example of an *Absolute* Act of Trade is a **banking transaction**. In such a case there is little to interpret: if it falls in the list, it applies. There is no relativity to it.

Other acts (specifically **Art. 5** (**e**) & (**g**) include within them an element of *Relativity*; meaning that they are Relative to **specific circumstances**. Unlike Absolute Acts of Trade, there isn't a sense of absoluteness unless the prospective Act of Trade has been undertaken and completed.

"any purchase of <u>movable effects</u> for the <u>object of reselling or letting</u> them, whether in their natural state or after being worked or manufactured; any sale or lease of movable effects, in their natural state or after being worked or manufactured, when the purchase thereof has been made with the object of re-selling or letting such effects".

Art. 5 (**a**) of the *Commercial Code*

The Purchase: is conducted through a 'sale' or 'lease' of movable effects for the object of *reselling*.

The Sale: of movable effects when the purchase thereof was made for the object of reselling.

Both pertain to an **onerous exchange**, where 2 things of value are exchanged.

Movables are items which are bought with the intention of re-selling (ex. buying shoes with the intention of re-selling them at a profit). The inherent meaning of movables is wide and unrestricted.

> "'**movable effects**' [...] shall include both the things which are movable **by nature** and the things which are generally considered to be movable **by regulation of law**".
>
> **Art. 316** of the *Commercial Code*

What constitutes a movable effect is **widely interpreted** in a court of law.

If the purchase of an item is intended for consumption, then such an act is NOT considered to be an Act of Trade. An Act of Trade with regards to purchasing is pertinent only to the intention of resale, and NOT of consumption.

The intention of purchase is very important. If one purchases a farm animal with the intention of using their organic waste for fertilising plants within the farm, then the intention was not that of resale. If the farmer goes on to then selling those same animals for meat, then the intention to sell becomes *secondary* – because the primary intention was to buy and keep these animals.

Ultimately, a purchase must be of a 'movable effect' and made for the purpose of reselling if it wishes to be deemed to be an act of trade under Art. 5.

The acts of Purchasing and Selling are closely linked, both through objectivity AND subjectivity.

The subjective connection exists by virtue of the fact that **the person who sells is the same person who purchased with the object of reselling**. The objective element **is the actual re-sale of the item which was primarily purchased with the intention of being resold**.

Here therefore, the objective act is the consequence of the subjective act. The two acts seem to constitute *one* transaction: **one speculates with the purchase of a particular item**, and thus **consummates that speculation through the actual materialisation of the resale**.

According to law, 'movable effects' may either be in their '**natural state**' or may have undergone **manufacturing**. 'Manufacturing' entails the process by which an object undergoes a procedure of transformation that might add value to it – but it does NOT connote changing the object *altogether*. **Here therefore, the manufacturing and work must NOT change the nature of the movable but simply add value to it**.

The principal intention must be to resell the movables, NOT to exercise a trade or craft using the object purchased as raw material.

A carpenter does not purchase wood with the primary intention of reselling the wood, but to create objects from that same wood, and thus sell the objects crafted from that wood. Here, **Vivante stipulates that the craftsman who professes a liberal art by selling his productions expressed through things he has bought, does NOT make that act an act of trade**.

Therefore, the activity of manufacture is not an act of trade under **Art. 5** (**a**) but could possibly fall under **Art. 5** (**g**). Note however that not *every* act of manufacture is an act of trade under **Art. 5** (**g**) – the manufacture must be an activity that qualifies as an '**undertaking**' (which is an activity that brings together and organises the factors of production for a specific purpose, rather than an act).

An **undertaking** (**Art. 5 (g)**), which is an activity tying together an **ensemble** of elements (the manufacture, the construction, the purchasing of items, the commissioning of workers), is also deemed to be an Act of Trade – because the end-goal of such an Act is to sell the property produced by such an undertaking (ex. to first purchase the material needed to manufacture shoes, the manufacturing of shoes itself, and finally the selling of the shoes).

The **Cassazione** defines an **undertaking as an activity which transmits its commercial character to all the acts which are related both to its creation and its exercise**.

Bolaffio stipulates 3 requisites for an activity to be deemed as an 'undertaking':

1. The factors needed for production.
2. The end product intended to be sold.
3. The risk involved in the investment.

For example, a carpenter who works *on order* is NOT carrying out an undertaking – because there is no risk involved, as the work he is commissioned to carry out has been ordered by a client already. In fact, such workers may also be paid *before* the work has been finished – thus negating any risk of not gaining money in return for the manufacturing process involved.

In sum, and for remembrance's sake, the objective acts of trade listed in Art. 5 are presumed to be acts of trade, ***iure et de iure***.

If an act falls within the list of acts as outlined by **Art. 5** and **6**, an **irrebuttable presumption** declaring that such an act is an act of trade is created. Thus, one is **unable to bring proof to the contrary**.

The precise wording of the law indicates so:

"the following acts <u>are</u>".

Acquiring the Status of 'Trader'

One attains the status of 'trader' upon (repeatedly) performing the stipulated acts of trade decreed under Art. 5 of the Commercial Code AND by satisfying the requirements asserted in Art. 4 of the Commercial Code.

Once one attains the status of 'trader', he then rightly becomes endowed with the rights and obligations deserving of a trader. Therefore, **his acts now also become Subjective.**

"The term "trader" means any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership."

Art. 4 of the *Commercial Code of Malta*

Many jurists contend that there must be certain continuity in the acts of trader; therefore, a one-off transaction does not necessarily render oneself as a trader. The nature of the act of trade being carried out has to be observed. For instance, a person dealing in property may have the status of a trader even if he performs two or three acts of trade per annum; but if a greengrocer performs two or three transactions per annum, he would hardly be considered to be a trader.

A court, therefore, analyses the act of trade in order to determine whether the agent is a trader or not.

The trader need not perform the act of trade personally, because he may, in fact, perform such acts through a designated agent. What is most important however is the fact that the acts of trade are exercised *in his own name*. Said acts of trade must also be performed with the intent of speculation (***finis mercatorum lucrum est*** – *the goal of trade is lucrative profit*).

The fact that the exercise of an act of trade is carried out in one's own name also implies that the trader must assume full responsibility for the acts performed by him.

The law distinguishes between the trader and the persons auxiliary to trade; meaning that, in practice, an agent, director, manager, commercial traveller, master of a ship, and curator of a minor, are **NOT** traders. An exception to this is with regards to a **Commission Merchant** – a person who transacts business in his own name, but for and on behalf of a principal.

It is also important to note the difference between a **Commission *Merchant*** and **Commission *Agent***.

A commission *merchant* is:

> *"…a person who transacts business* ***in his own name or under a firm name, for or on behalf of a principal****"*.
>
> **Art. 96** of the *Commercial Code*

Therefore, **Maltese law deems a commission *merchant* to be an auxiliary to the principal**. Thus, it is the principal who is held liable in cases of errors made from the commission merchant's behalf.

Jurist **Bolaffio** blatantly asserts that a commission merchant is a trader; however although **Cesare Vivante** argues that the commission merchant, being the ultimate recipient of the profits made, is, in himself, the owner/original trader, the inherent intention of the trade must be taken into consideration (resale vs consumption). Ultimately however, the commission merchant acts without revealing the identity of his principal, and always in his own name.

Conversely, a **commission *agent* is one who trades according to a pre-agreed contract of commission**, and in contrary to the commission merchant, acts in the name of his principal, thus revealing the said principal's identity.

In sum therefore, the <u>commission merchant acts in his own name but on the behalf of the principal</u>, whereas the <u>commission agent acts directly on the behalf of the principal</u>.

In Malta, **Estate Agents** can either be commission agents or traders in and of themselves – because they might buy property with the intention of reselling it; OR they might represent a real estate agency and purchase/resell property on their behalf (ex. Remax).

Notaries and advocates are nowadays allowed to be traders, whereas judges, magistrates, and public servant are NOT allowed to be traders.

Ultimately, the law is not satisfied with the repetition of the acts of trade, but wants the exercise of the acts of trade to be the object of one's **continued activity**. This thus means that the performance of the act of trade must be the trader's **primary source of income**; necessarily implying that an employee that carries out a few transactions annually does is NOT deemed to be a trader.

<u>CASE LAW</u> – '***Dr Edward Amato*** vs ***Spiru Xuereb***':

Here, it was determined that, in order for a person to become a trader, he must devote his services to trade in such a way that it becomes his only, or his primary, occupation.

A person claiming that he is a trader in a court of law must thus also prove said claims (***Onus probandi incubit ei qui dicit non ei qui negat*** *– the burden of proof rests on the person who is alleging a fact, and NOT on the person negating that allegation).*

It is also important to note that **Art. 5** of the *Commercial Code* is **irrebuttable** – meaning that the legislator fully intended the declarations made in that provision, and by no means may be shot down by any form of rebuttal; ***"the following are acts of trade…".***

Moreover, as any and every act listed in **Art. 5** is thus recognised as an act of trade, this renders **Art. 5** as **conclusive** and **exhaustive**. However, even though the list in Art. 5 is exhaustive, the way one might **interpret** it may differ accordingly. For instance, **Art. 5** mentions 'bills of exchange' and does not make any lucid reference to 'cheques'. However, being similar in nature, one might interpret the phrase 'bills of exchange' to encompass thus also 'cheques'.

Related to this, in '**Farrugia vs Piscopo (1956)**', the court ruled out that acts bearing economic and social similarity to the acts posited in Art. 5 may be considered to form part of the list in question. Thus, this connotes **extensive interpretation**. However, it is important to note that such extensive interpretation should not be abused of – as this would defy the inherent principle of having posited law (such as Art. 5 of the Commercial Code of Malta).

Conversely, **Art. 7** of the *Commercial Code* is **rebuttable** – as acts committed by a trader may not necessarily be committed under the conditions and purposes of trade; ***"every act of a trader shall be deemed to be an act of trade unless…"***

The most perfect example of this would be that of purchasing furniture. One might purchase furniture for his own private and personal interest, but the act itself might seem as one borne of trade (when in reality, the buyer is purchasing the furniture for ***consumer*** purposes, and NOT for ***resale*** purposes).

NB: a person dealing in contracts is considered to be a trader unless the law precludes said person from being a trader (**Art. 8** of the *Commercial Code*). A **broker** is a great example to this – because a broker cannot carry out business for his own account).

Art. 966 of the *Civil Code* lays down the requirements for the validity of a contract; the **Four C's**:

1. **Capacity** – the capacity of the parties to contract. Ex. a 10-year-old or an indicted person does NOT have the Capacity to contract.
2. **Consent** – the consent of the parties who bind themselves. If one of the parties in a contract is being pressured to sign said contract, then nullity of the contract will ensue.
3. **Causa** – the constituent of the subject matter of the contract, which is absolute and real at the moment of signing. Contracts cannot be signed for a potential eventuality.
4. **Lawful Consideration** – what is being signed to must be lawful. A contract cannot entail blatant illegalities (ex. to rob a bank).

The Emancipation of Minors

With regards to minors, the aforementioned requisite of **Capacity** is most important. **Art. 967** of the *Civil Code* deals with the capacity of parties:

> ***"All persons not being under a legal disability are capable of contracting."***
>
> **Art. 967** of the *Civil Code*

Sub-article 3 of **Art. 967** asserts that **minors are NOT capable of contracting**.

To this, **Art. 968** then explains that a contract entered into by a minor of the **age of 14 or less** is thus rendered **null and void**.

An agreement entered into by a child aged **9 or less** shall be valid as long as it benefits the child in question.

Art. 973 explains that if a trader knows that a person is a minor, yet still went along with the contract, then the trader in question cannot complain with regards to the eventual nullity of the contract.

A minor who has attained the age of **16** may trade and shall be deemed to be equal to a legal adult with regards to trade**, if and only if** he has been permitted by his legal guardian to perform acts of trade via a public deed. If the legal guardian refuses to sign this public deed, the minor may request the court to give him or her the authorisation to carry out trade instead of his legal guardian.

Once this public deed has been published **publicly**, it can be safely said that the minor has been **emancipated into trade** – which is ***a iuris et de iure*** presumption (irrebuttable presumption that everyone knows that the minor has been emancipated to trade).

> **"Minors who are traders authorized as aforesaid can by reason of their trade charge, hypothecate and even alienate their property, without any of the formalities prescribed by the civil law."**
>
> **Art. 10** of the *Commercial Code*

Once emancipation occurs, the minor assumes **full**, **direct**, and **personal liability** or all contractual obligations undertaken by him, and he must guarantee that liability by all his property both present and future.

Since this minor is deemed to be a major at law, certain consequences arise, implying that **he may be interdicted and incapacitated**, **may sue or be sued**

in his own name (and without the necessity of being represented by his own parents), and **may request a repeal to a contract** signed by himself.

There are **3 types** of emancipation:

1. **General Emancipation**: where minors become free to enter any type of contract.
2. **Special Authorisation**: where minors are permitted to exercise trade belonging to a single and specific branch of trade.
3. **Limited Authorisation**: where minors are permitted to exercise only **1** Act of Trade, or are imposed with a limit on the degree of value befitting the items they are trading.

Ultimately, the fact that a minor has been emancipated to trade **does NOT necessarily make that minor a trader**, as it only allows him to carry out Objective Acts of Trade. Emancipated minors can only acquire the status of 'trader' when satisfying the criteria listed in **Art. 4** of the *Commercial Code*. If such criteria is satisfied (i.e. trading becomes the minor's primary profession), then the emancipated minor thus carries out ***Subjective* Acts of Trade**.

Art. 12 of the *Commercial Code* grants the parents of the emancipated minor the right to **revoke** said emancipation at any moment in time through the publication of a public deed in the Government Gazette, and without the need for any justification.

> **"Such revocation shall in no case injuriously affect the rights acquired by a third party".**
>
> **Art. 12 (3)** of the *Commercial Code*

This provision is there to ensure that **parents do not abuse their right of revocation**. The parents CANNOT undo the emancipation of their minor just because they realise that their child is making mistakes which may lead to profit loss. Thus, and to ensure the protection of rights of third parties in contractual agreement with an emancipated minor, parents' revocation does NOT exonerate the minor from any responsibilities he donned prior to the revocation. This is called **pre-contractual liability**.

An emancipated minor making a promise of sale must also satisfy 2 conditions:

1. The promise of sale must be **in writing**.
2. The promise of sale must be **registered with the Commissioner of Inland Revenue** in due time.

Failure to abide by any of the above results in the nullity of the promise of sale agreement.

Acts of Trade vs Acts of a Civil Nature

Distinguishing between the two is very important. Discerning between both, for instance, **outlines which law ought to apply to which circumstances** (commercial law or civil law).

For instance, the notion of the **law of obligations** is tackled within this context. O**bligations appertaining to the emancipation of minors is tackled differently** in the Civil Code when compared to the Commercial Code. For example, the Civil Code states that minors may be emancipated at age 14 for a civil act, but the Commercial Code stipulates that without emancipation at the age of 16, no minor is capable of entering a contractual obligation until the age of 18.

Interest on certain obligations is also different; in Commercial Law, interest starts to accumulate from the moment the obligation is deemed to take effect. Whereas, in Civil Law, interest accumulates from the moment a notification of a judicial act is carried out.

In Commercial matters, co-debtors and sureties assume the same joint and several liability, whereas in Civil matters, the first obligation is to recover debt from debtors before resorting to collateral.

Implied conditions that have not been satisfied in a Commercial contract leads to the said contract being dissolved; whereas an unfulfilled implied condition in a Civil contract might be extended, as long as the court deems it fit to give the agent more time to fulfil the condition.

Procedurally speaking, in Commercial law, trade books must always be kept as proof; conversely, writing in Civil law does not necessarily prove anything.

Subjective Acts of Trade

A Subjective Act of Trade presupposes the fact that the agent of such an act is a trader. Therefore, a Subjective Act of Trade cannot be committed by a non-trader.

At its simplest definition, Subjective Acts of Trade are those acts which do not participate in the list asserted in Art. 5 of the Commercial Code.

Moreover, **Art. 7** of the Commercial Code explains that **every act made by a trader is to be deemed as an Act of Trade unless such an act lingers outside the domain of 'trade'**. Thus, this also implies that any juridical act may hail from contracts, quasi-contracts, torts, and quasi-torts.

> **"Every act of a trader shall be deemed to be an act of trade, unless from the act itself it appears that it is extraneous to trade."**
>
> **Art. 7** of the *Commercial Code of Malta*

The meticulous choice of words in Art. 7 implies that this provision is **rebuttable**; meaning that it bequeaths the liberty of deliberation unto interpreters trying to discern between those acts which fall under the category of 'trade', and those which do not.

This article connotes that **the act performed is an act of trade depending on whether the agent is a trader or not**. Hence why this article does not entail a list as presented in **Art. 5** and **6**.

The commercial nature of such an act derives from the agent who performs the act. Therefore, its legal basis is the rebuttable presumption that every act of a trader is an act of trade – given that such an act is NOT an act which is alien to trade.

Therefore, Subjective Acts of Trade are rebuttable. Marriage, for instance, is an act extraneous to trade – even though it is contractual in nature. The **intention behind an act** must also be taking into consideration: if an act was not intended to be one of trade, then is cannot be assumed to be so.

In sum therefore, Subjective Acts of Trade (and other elements of appurtenance):

- **The very existence of a subjective act of trade presupposes that the person performing the act is a trader.**

When discussing objective acts of trade, an act is deemed to be an act of trade depending on its very nature, regardless of who performs it. Therefore, the act will remain an objective act of trade whether it is performed by a trader or a non-trader. However, this does NOT apply to subjective acts of trade. If such an act is NOT performed by a trader, then the act CANNOT be considered to be an act of trade.

- **Although Art. 7 of the *Commercial Code* speaks of "*every act of a trader*", it does NOT cover objective acts of trade performed by a trader; since these acts of trade, *iure et de iure*, CANNOT be made to depend on the rebuttal presumption contained in Art. 7.**

- **A subjective act of trade can be any act of any nature.**

Some decree that actions borne of **tort** are NOT appurtenant to trade; however, this mindset is shot down by the fact that if an agent ensues damage unto another party within the climate of 'trade', then such damages reside in a commercial sphere, and not a civil one (ex. a plasterer damages a person's property out of negligence).

- **A subjective act of trade is based on a *rebuttable* presumption.**

According to **Art. 7**, "*every act of a trader*" is to be considered an act of trade. However, the article is dependent on the rebuttable presumption that the above only holds true **as long as the act itself is NOT extraneous to trade**. The words in the law, '***deemed***' and '***unless***', show that it is possible to bring forward evidence to rebut the presumption of having an act performed by a trader deemed to be an act of trade. **The burden of proof is on the person who performed the act**.

To rebut the presumption, it must be shown that the act of the trader is truly 'extraneous to trade'. This does NOT mean that the act is extraneous to the area of trade the trader normally engages in. Instead, it must NOT be related to trade *in general*.

However, this does not connote a *simple* rebuttable presumption (***iuris tantum*** presumption) but a ***presunzione mista***. Therefore, the evidence to rebut the presumption must result '**from the act itself**.' When the act is extraneous to trade (ex. cases of marriage, adoption etc.), NO other evidence is needed. However, various other acts may be commercial or otherwise depending on the circumstance (ex. purchasing an object for the purpose of consumption).

CASE LAW – ***Drago*** **vs** ***Bonavia*** **(1952):**

Drago loaned a set amount of money to Bonavia, but Bonavia did not pay back the debt in full. Therefore, Drago took legal action and sued Bonavia. Bonavia's line of defence was that the loan she was given was not commercial in nature, but was solely personal. The court ruled out however that, at the time of the agreement, Bonavia did not make it clear that the money she was borrowing was being borrowed for personal (and not commercial) reasons – therefore deceiving Drago. Bonavia claimed that she had borrowed the money for personal reasons only when it was opportune for her to do so. Therefore, the court decided that the act was not, in itself, extraneous to trade – as Bonavia was a trader and did not assert a non-trader stance with Drago when requesting the loan.

Accessory Acts of Trade

An Accessory Act of Trade is an act of whose legal nature is derived from the principal Act of Trade.

A great example of an Accessory Act of Trade would be a guarantor who dishes out collateral as a fitting substitute for the repayment of a loan. Therefore, the guarantee here is the Accessory Act, and the loan is the Principal Act of Trade.

The Latin maxim ***accessorium sequitur principale*** describes the fact that an Accessory Act does not lead, but rather, follows that Act to which it is accessory to.

Much like normal Acts of Trade, Accessory Acts are dichotomised into the **Objective** and the **Subjective**.

Maltese legislation does not cater (exclusively) for Subjective Accessory Acts of Trade, but the courts follow, in a religious manner, the above Latin maxim: ***accessorium sequitur principale***. An example of this would be a non-trader father serving as a guarantor for a lease agreed upon by his daughter with another trader. Thus, the father here is exercising a Subjective Accessory Act of Trade.

NB: If the principal act is of a *civil* (NOT commercial) nature, then the accessory act is also considered to be a civil act.

Objective Accessory Acts of Trade:

"any transaction ancillary to or connected with any of the above acts [...]"

Art. 5 (i) of the *Commercial Code*

This lays down the rule that if the principal act is an act of trade, then the accessory act is also an act of trade – thus confirming the above maxim (*accessorium sequitur principale*).

For example, person 'A' acts as a surety in respect of a loan guaranteed by bank 'B' to customer 'C'. The contract of surety between B and A is an objective accessory

act of trade because it is ancillary to an objective act of trade (the contract of loan between B and C).

<u>Subjective</u> Accessory Acts of Trade:

There are no express legal provisions detailing this notion. This rule applies where an act is ancillary to a subjective act of trade.

For example (and assuming that the upcoming act is NOT extraneous to trade), non-trader 'A' acts as surety of a loan granted by person 'B' to trader 'C'. The contract of suretyship between A and B is an accessory subjective act of trade because it is ancillary to the loan between B and C (which is a subjective act of trade).

Mixed Acts of Trade

In commercial law, 'mixed acts of trade' generally refers to transactions that involve both commercial and non-commercial aspects. **Therefore, a mixed act is a *commercial* act of trade for one of the parties, and an act of a *civil* nature for the other party**.

For example, a retailer sells goods to a buyer. From the retailer's perspective, he is carrying out a commercial act of trade since he sold the items he first bought from *another* seller with the intention of reselling. From the buyer's perspective however, the buyer is performing a civil act of trade because he is purchasing the retailer's goods for consumption purposes.

However, this begs the question: **which laws apply**? Commercial? Or Civil?

Such a determination depends on the nature of the situation. An undesirable lacuna in the law here persist; because on such matters, the law is silent, and courts tend to favour the either-or option. Thus, it opts to apply either form of law depending on the facts of the specific case. In the past, they have generally applied commercial law when the defendant was a trader, and civil law when the defendant was a non-trader.

This 'applicable law' rule was adopted on the basis of the jurisdictional rule contained in Cap. 12 of the Code of Organisation and Civil Procedure – which was repealed in 1995. Previously to this however, such a matter depended on where the person sued: either in the Civil or Commercial Courts. Thus, the courts inferred such a rule and applied it to situations pertaining to Mixed Acts of Trade.

The current procedure is based on the following:

> **"If the matter which forms the subject of the cause is of a commercial nature for the defendant only, the actions arising therefrom shall be triable by the Commercial Court; if it is of a commercial nature for the plaintiff only, the actions arising therefrom shall be triable by the Civil Court".**
>
> **Art. 36** (**3**) of the *COCP*

Art. 5 of the *Commercial Code of Malta*

Under Art. 5, all the following are Acts of Trade:

Art. 5 (a)

This deals with **movables** (see prior pages).

Art. 5 (b)

This article deals with **banking**.

Every banking transaction does not necessarily connote a transaction effected by a bank, but may also refer to **a transaction wherein a party disposes of an object at a profit between another party**. The **contract of deposit** whereby a bank accepts money with the intention of giving it on credit is also recognised to be an act of trade.

By and large therefore, a simplified definition of **a banking transaction is one of accepting a transaction of money or otherwise**, or when raising money for the public for the purpose of employing such money by lending it to others.

> *"**'business of banking'** means the business of a person who as set out in article 2A **accepts deposits of money from the public withdrawable or repayable on demand or after a fixed period or after notice or who borrows or raises money from the public** (including the borrowing or raising of money by the issue of debentures or debenture stock or other instruments creating or acknowledging indebtedness), in either case **for the purpose of employing such money in whole or in part by lending to others or otherwise** investing for the account and at the risk of the person accepting such money"*
>
> **Art. 2(1)** of the *Banking Act of Malta*

This article stipulates a condition set out by the Banking Act which asserts that only a licensed company may carry out the business of banking.

Most writers identify **2 aspects of a banking transaction**:

1. The bank as a **borrower** (i.e. accepting deposits)
2. The bank as a **lender** (i.e. granting credits by advancing loans)

The key aspect here is the element of **Speculation** – which is the exercise of endeavouring in high-risk/high-reward exchanges). Therefore, the banker borrows money at a certain interest rate and lends the money at a *higher* interest rate.

CASE LAW: ***Cassar*** vs ***Arrigo***

"il-qorti qalet hekk: il-bank konvenut hu kummercjat, **u l-accettazjoni ta' depozitu hi ghalhekk att kummercjali**."

Therefore the court here explicitly **recognised the bank as a trader**, while also decreeing that **the act of receiving deposits is an act of trade**.

CASE LAW: ***Mallia*** vs ***Bondin***

"…dawn il-kliem ghandhom sinifikat vast: jikkomprendu transizzjoni li ssir fil-bank, u ghalhekk **ma jistax ikun hemm dubju li depozitu f'bank m'huwiex operazzjoni bankarju**. Hija ghalhekk **kwistjoni relattiva ghal dak id-depozitu hija kompetenza tal-Qorti tal-Kummerc**."

CASE LAW: *Tarcisio Cassar* vs ***Galdes***

The primary issue with this case was whether or not the Central bank of Malta qualified to have the status of a trader.

An action was filed before the Commercial Court and the plea of jurisdiction was raised. At first instance, the Commercial Court declared that the jurisdiction of the Civil Court *prevailed* since the Central Bank was NOT deemed to be a conductor of commercial matters (but was simply a *public agent/intermediary*).

The Court of Appeal however adopted a different stance and disagreed with the prior Court. After examining the then-applicable Central Bank Act, the Court of Appeal concluded that the Central Bank was indeed a trader – since (and according to the law) **the inherent and most basic function of the Central bank is to act as the banker of government itself**.

Art. 5 (c)

This provision deals with **Bills of Exchange** (**kambjari**).

A Bill of Exchange is a negotiable instrument which is convertible into money at a specified date; and **all parties involved in Bills of Exchange are deemed to be traders**.

Bills of Exchange are normally connected with a **primary obligation** (ex. credit control).

Some argue that Bills of Exchange have a separate juridical existence from the underlying transaction which they encompass, mainly because of the potentiality that the underlying transaction in question dons a Civil, not Commercial, nature. **Nonetheless however, a Bill of Exchange is always considered to be an act of trade**.

Art. 5 (d)

This provision deals with **Bargain Insecurities**; which are transactions made purely for the sake of Securities at a specified price *and* at a future time.

NB: '**Securities**' are investments in a business; taking the form of shares, stocks, bonds, or other financial instruments.

Art. 5 (e)

This provision deals itself with **Commercial Partnerships**.

Partnerships connote a large accumulation of capital and are established to encourage commercial prosperity. The law states **that partnerships established for the exercise of trade or for any lawful purpose are to be considered of a commercial nature**.

Put simply**, Commercial Partnerships are the vehicle through which business is carried out**. And essentially, a business comprises of the pooling of persons, labour, and the skill required for the purpose of making a desired profit.

"The term 'trader' means any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership."

Art. 4 of the *Commercial Code of Malta*

Therefore, in terms of Art. 4 of the Commercial Code, Commercial Partnerships are considered to be strains of the 'trader' status.

Transactions made by **shareholders** in a company are also considered to be acts of trade insofar as the share is an essential element for a Commercial Partnership with limited liability, and as long as such a transaction is done for Speculation purposes.

CASE LAW: ***Cassar Torregiani*** vs ***Mintoff***

The plaintiffs were ex-shareholders in the National Bank of Malta, and filed a case against Mintoff in the Civil Court. To this, the court expressly declared that:

"M'hemmx dubju li n- 'National Bank of Malta' kien socjeta' kummercjanti."

Ultimately, the court upheld the defence of the defendant and recognised **that any transfer of shares is an objective act of trade**. Therefore, it goes without saying that the Commercial Court had jurisdiction.

Art. 5 (f)

This provision deals with **vessels** (bastimenti) and **navigation**, and is commonly interpreted in tandem with Art. 6 of the Commercial Code.

In transactions related to navigation, no Speculation or the intent to Speculate is necessary – because navigation is already, in itself, a powerful factor of trade. Therefore, **all acts and obligations pertaining to vessels and navigation**, whatever their cause/origin may be *and* independently from the person who performs them/intends to perform them, **are objective acts of trade**.

Commercial Partnerships

In Roman Law, a partnership was known as a ***societas*** which was created in *buona fide*, meaning that it was akin to a contract whereby two or more persons agreed to form a friendly association in pursuit of a common venture for mutual benefit.

"The association of persons for trade appeared in a rudimentary form when society was still in its primitive state and developed with the progress of society".

Felic Cremona

Maltese law strives to assign a juridical personality to ever person. Thus, the law purports how a juridical person *behaves*, and in so trying creates a legal fiction which can operate on the same basis of flesh and blood; but regulating such an abstraction is easier said than done.

"**A commercial partnership has a legal personality distinct from that of its member or members**, and such legal personality shall continue until the name of the commercial partnership is struck off the register, whereupon the commercial partnership shall cease to exist."

Art. 4(4) of the *Companies Act*

Therefore, **a company's own juridical personality bears no ties with the juridical personalities of its partners/members**.

Vivante stipulates that if the law gives a company a separate juridical personality, then the general partner cannot be considered to be partners.

The type of legal structure revolving around a partnership is very important as it impacts the trade it is active in, its partners, employees, creditors, and clients.

CASE LAW – ***Uber Case UK***:

Drivers working for **Uber** claimed that they were '**workers'**, and not '**subcontractors**. However, Uber insisted on deeming them to be akin to the

latter. Thus, drivers under this label would not qualify for rights enjoyed by 'workers' – such as the protection of the **Minimum Wage Act** in order for them to reassure themselves that they will, at least, receive a minimum wage; or the comfort of the **Working Time Regulations Act**, which stipulates that workers are to enjoy a set amount of paid leave, *per annum*.

Ultimately, the Employment Tribunal ruled out that the drivers were 'workers', and not 'subcontractors'; but this case highlights how important the legal structure of a company is to many parties.

Separate Legal Personalities (SLPs)

Determining the foundation of how a company exists and functions is the most profound and steady rule of corporate jurisprudence. This principle was fiercely ignited in the **1897 case of Salomon vs Salomon**, which forms the core of the universal commercial law regime.

CASE LAW: '***Salomon*** vs ***Salomon'*** **(1987)**:

The case was brought to court in 1897 by creditors of Salomon & Co. Ltd, a shoe manufacturing business owned by **Mr. Aron Salomon**. The company had been incorporated as a **private limited company**, with Mr. Salomon owning the majority of the shares and serving as a director. When the company faced financial difficulties, it was liquidated and the creditors claimed that Mr. Salomon should be personally liable for the company's debts.

The court ruled that, as a separate legal entity, **the company was responsible for its own debts and obligations, and the creditors could not hold Mr. Salomon personally liable**. This decision established the **principle of corporate personality** and has since been a foundational precedent in company law, both in the UK and in other common law jurisdictions.

However, the case has also been subject to **criticism**, particularly for its potential to be used for fraudulent or unethical purposes. Nonetheless, the principle of corporate personality remains a fundamental aspect of modern company law.

Ultimately, this case also established the principle of having a **corporate veil** between a company bearing its own juridical personality and its shareholders. Thus, in certain structures, shareholders are seen as having ***only limited liability***.

The concept of limited liability was created to enable groups of individuals to pursue an economic purpose as a single unit, without the risk of having liability extends to an individual's personal assets. Consequently, a company can own property, execute contracts, raise debt, and make investments independent of its

members. Moreover, companies can sue and be sued in their own name. And finally, the most striking consequence of a separate legal personality, is that **a company can survive death of its members**.

An **exception to a corporate veil** occurs only when the courts actively pierce said veil to extend the force of the law on the shareholders; for example, in cases of fraud. Therefore, even if the principle begotten by the Salomon case reigns dominant, it can be said that the courts may, whenever they deem it fit, annul the **Salomon Rule**.

Ultimately, a corporate veil may be pierced if there is ample suspicion that there is **wrongful trading** from a company's behalf. Moreover, the **Price Club judgement** (see later chapters) was a landmark case in Maltese law because it was the first time a corporate veil was lifted, ad the directors were held personally liable for the liabilities of the company.

Finally, a company bearing its own SLP may own property in its own name, enter into contracts, and represent itself in court (in order to sue or be sued). SLP **assets of an SLP company are used only for the aims of the company** in question, and its **liabilities are paid by itself** and NOT from the personal assets of that same company's members/shareholders.

CASE LAW: ***Macaura*** vs ***Northern Assurance Co. ltd.*** (1925)

Macaura was the controlling shareholder of a particular company, and he proceeded to get fire insurance cover **in his own name**, but with the intention of covering his company with it.

Incidentally, Macaura's company was a **timber company**, and unfortunately, all the timber burnt in a fire. Macaura then made a claim to his insurance company, but the insurance company refused reimbursing him, arguing that the **fire insurance he had acquired was in his own personal name, and NOT on the company's name**.

The House of lords agreed that there was no insurance interest to claim.

This greatly highlights the notion of a company having a **separate juridical entity**.

Partnerships *en nom collectif*

"**A partnership *en nom collectif*** [ENC] **may be formed by two or more partners and operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of ALL the partners**:

Provided that no action shall lie against the individual partners unless the property of the partnership has first been discussed;

Provided further that where, and for as long as, none of the partners is either an individual or a body corporate which has its obligations guaranteed by the unlimited and joint and several liability of one or more of its members, the provisions of article 7Ashall also apply to that partnership."

Art. 7 of the *Companies Act*

An ENC is a type of commercial partnership wherein **all partners have unlimited personal liability for the debts and obligations of the partnership**. This means that *each partner* is **jointly** and **severally** liable for the debts and obligations of the partnership, regardless of their individual contributions or involvement in the partnership's activities.

In an ENC, partners are also required to participate in the management of the partnership, unless otherwise agreed upon in the partnership agreement. Each partner has an equal say in the management of the partnership, regardless of their financial contributions or ownership stake in the partnership.

ENCs are commonly used by small businesses, especially those in which the partners have a close relationship and trust each other. However, it's important to note that the personal liability of each partner can be a significant risk, and it's important to carefully consider the advantages and disadvantages of this type of partnership before entering into one.

The aforementioned Art. 7 therefore asserts that an ENC partnership is formed when:

1. There are at least 2 or more partners.
2. The partnership operates under a partnership name.
3. The partnership has its obligations guaranteed by the **unlimited**, **joint**, and **several** liability of ALL its partners.

Therefore, a partnership ENC is a sole juridical entity, but its liability is joint by its partners.

To this, one might note that a potential claimant/creditor may first attack the assets of the company itself, but if those assets are not enough to satisfy the requirements stipulated by the creditor, the creditor may sue the partners themselves – because their liability is unlimited, joint, and several.

NB: if the partners of an *en nom collectif* partnership were to be **limited liability** companies, then this would compromise the concept of them being subject to **unlimited liability**.

In cases of partnerships ENC therefore, if the partnership lacks enough funds to fulfil its debts and dues, the claimant may seek compensation against ALL the partners, because their liability is unlimited, joined and several.

In principle, the proviso in Art. 7 asserts that **at least one partner is expected to be either an individual** OR **a body corporate with obligations guaranteed by unlimited and joint and several liability of one or more of its members**.

This proviso seeks to ensure that the unlimited liability characteristic is not negated by having all partners being limited liability companies. However, an ENC is still permitted to only limited liability enterprises as partners – but such instances are regulated by Art. 7A of the Companies Act. Here, the law is making a **balancing act**, wherein it is flexible in nature, but only to a certain and reasonable extent:

"The provisions of this article **shall apply to a partnership where NONE of the partners is either an individual or a body corporate which has its obligations guaranteed by the unlimited and joint and several liability of one or more of its members**."

Art. 7A (**1**) of the *Companies Act*

Therefore, and in such cases, a partnership ENC is treated similarly to a limited liability company for certain purposes only. However, the law creates a balance wherein it implants important conditions ensuring that a partnership which, in substance, has limited liability *benefits* would thus have similar public accountability requirements as those of a limited liability company.

Moreover, **the status of the partners must be exposed to the public**, so whoever intends to do business with that partnership knows the economic risks involved.

In partnerships ENC, one does not find a formal capital structure in which money is divided into shares are allotted to the partners. Instead, every partner forks in his economic contribution, in kind or in future personal services; and this forms the sum total of partnership capital. Thus, **partners receive an interest in the partnership calculated as a percentage of the total partnership capital**.

> "An agreement to pay a share of the profits of a partnership to a person in total or partial remuneration for his services shall not, of itself, make him a partner."
>
> **Art. 8** of the *Companies Act*

Thus, **Art. 8** stipulates that being a partner connotes having a person wishing to associate himself with one or more others to carry out a trade together under a common partnership name; and therefore agreeing to pay a share of the profits of a partnership does not necessarily render oneself a partner.

Art. 9 of the *Companies Act* claims that a partnership may be designated by *any name*, and that the partnership name emphasises on the distinct personality under which the partnership operates.

However, and for the good of the public, a partnership CANNOT be registered under a name which:

- Is the same as another commercial partnership or so similar that confusion may be created.
- Is, in the Registrar's opinion, offensive or otherwise undesirable.
- Has been reserved for registration by another commercial partnership by notice in writing given to the Registrar not more than 3 months before request.

Art. 10 of the *Companies Act* argues on penalising those advertising the existence of a company whose name has not been approved by the Office of the Registrar – because this falsely implies the existence of said companies; and companies without an approved name do not, in fact, yet exist.

A deceiving name may misinform the public and give the impression that persons doing business with the partnership have protection through the unlimited liability of all the partners when this might actually not be the case.

Art. 11 of the *Companies Act* expresses that things contributed to a partnership are deemed to be transferred in **full ownership**, unless specifically stated otherwise in the deed of partnership.

Art. 12 of the *Companies Act* deals with when a partner contributes a debt to the partnership. In such cases, said partner is not discharged until the partnership obtains full payment with regards to the amount for which the debt was accrued. In cases of non-payment, the indebted partner becomes liable jointly and severally with the debtor for the stipulated amount with interest from the date the debt amount originally fell due. Thus, **Art. 12 offers protection to the creditors**.

Ultimately, irrespective of the amount of partnership capital and how much was contributed by each partner, **each partner is liable for ALL the partnership's debts and obligations**.

Partnership claimants may enforce their claims against all or any of the partners. It is important to note however that, between the partners, each partner is liable for the partnership's holistic debts/obligations within the context of the proportion fixed in the **partnership deed** or by law.

NB: A **partnership deed** is a contract outlining the terms and conditions of a partnership concord between two or more individuals who have agreed to carry on a business together. It sets out the respective rights and obligations of each partner, including the profit-sharing ratio, decision-making authority, and the procedure for admission or removal of partners.

According to Art. 14 of the Companies Act, the deed of partnership must also contain the following minimum requisites without which the partnership cannot even hope to be registered:

"The deed of partnership shall state:

(a) the **name and residence of each of the partners**;

(b) the **partnership-name**;

(c) the **registered office in Malta of the partnership**;

in general or a particular branch of trade, and in the latter case, the nature of the trade;

(e) the **contribution of each of the partners**, specifying the value of the respective contribution of every partner;

(f) the **period** (if any) fixed for the duration of the partnership."

Art. 14 of the *Companies Act*

The partnership deed typically includes other clauses relevant to the partnership, such as the administration and representation of the partnership; and such clauses are binding to the partners involved.

Art. 15 (**1**) of the *Companies Act* is appurtenant to the act of forwarding the partnership deed to the Registrar for registration (as long as it satisfies all mandatory requisites).

Partners joining the partnership later in the day are bound by the original deed of partnership. The partnership deed may be entered into either as a **public deed** or **private agreement** – as long as it is entered to *in writing*:

"Where the deed of partnership is a public deed or a private writing enrolled in the records of a notary public, an authentic copy thereof shall be delivered in lieu of the original."

Art. 15 (**2**) of the *Companies Act*

Art. 16 of the *Companies Act* dictates that on the registration of the deed of partnership, the Registrar must outline **when the partnership comes into existence** AND **when it is authorised to commence business**.

Therefore, the ***certificate of registration*** is that which indicates when the partnership comes into existence. Such is asserted in **Art. 16** (**2**) of the Companies Act, which indicates that the certificate of registration is conclusive and sufficient evidence that the partnership being registered has satisfied all mandatory requirements for it to be authenticated.

Article 17 (**a**) of the *Companies Act* stipulates that persons carrying out business under the name of a partnership which has not yet been bequeathed a certificate of registration will be endowed with the company's assets *directly*, as **the partnership has not yet been furnished with a juridical personality**. Naturally, this also implies that the partners operating under an unregistered partnership become **joint** and **severally** liable, thus protecting third parties.

Article 18 (**1**) of the *Companies Act* goes on to decree that persons claiming to be partners without actually being so shall be held liable **unlimitedly**, **jointly**, and **severally** with the partners for ALL the obligations contracted by the partnership. For instance therefore, **an employee pretending to be a partner will be endowed with full liability as if he really was a partner** (albeit without the benefits enjoyed by a real partner).

Article 18 (**2**) of the *Companies Act* also states that inclusion in the partnership-name of a person who is **NOT** a partner shall be taken into account by the court in determining whether such person is holding himself out as being a partner. However, there may be other reasons as to why a person's name (who is not a partner) features in the partnership-name, hence why the inclusion of a person's name in a partnership-name is not *fully sufficient* evidence for third-party confusion in a court of law.

When a person claims to be a partner, a third-party could be justified in considering the former to be one of the partners, thus relying on the self-proclaimed partner's unlimited lability when considering whether to enter into commercial dealings with the partnership in question.

The partnership deed may be amended at any time, albeit at the discretion of the partners. If the name of the partnership is being amended in the deed, a new name must be provided to the Registrar, who issues a new certificate under that name.

In cases wherein there is a change in partners, a notice must be delivered to the Registrar within 1 month, specifying the new partner's residence.

The Registrar is compelled to publish a notice in the Government Gazette or on the Registrar's online website with regards to such alterations made within a partnership. The stipulated alterations come into effect 3 months after publication.

During this 3-month period, any creditor whose debt existed prior to the publication in the Gazette may object to the alteration being proposed, as long as there is sufficient validity in the reason as to why such an objection is being made. For instance, the court might uphold an objection made by a creditor in order to protect the mentioned creditor; because altering important aspects of a partnership may result in prejudice against a creditor's right to get paid any outstanding dues.

Moreover, the **ENC label is given to partnerships not specific about their status**.

Art. 25 asserts that administration and representation of a partnership vests in each of the partners, in several.

A partnership's accounting records must be kept for **10 years**. However, there is no obligation to prepare or file audited accounts with regards to certain partners' unlimited liability.

Art. 27 purports that **every partner is liable for the partnership obligations** commencing from ***day 2***. Any agreement crossing swords with this provision has no effect on third parties.

But can a partner compete with a partnership he forms part of?

Yes. However, a partner doing so is not allowed to carry out business on his own account, on the account of others, or be a partner with unlimited liability within *another* partnership competing with the partnership he/she already forms part of.

However, this rule may be shot down with the express consent of the other partners within the mentioned partnership, due to the other partners' unlimited exposure to liability.

Therefore, a company's director may be permitted to act in competition with the company he is a director of, as long as express permission is granted unto him by the other partners in the company in a general meeting.

If a partner runs counter to this rule, the partnership may take action for damages incurred by the offending partner, or demand payment of any profit made by the partner in question. Such action would be time-barred after 2 years from the date of contravention.

Art. 31 contends that once a partner dies, the other partners must liquidate the deceased's interest in the partnership, and distribute it to the heirs; unless the living partners unanimously elect either to dissolve the partnership or continue running the partnership with the heirs in question (as long as the heirs accept such a proposition). Not all heirs might agree to this, and those that do not must have their share liquidated and distributed to them accordingly.

A partner may be expelled from a partnership by a decision of the majority of partners. The majority must be that of the *partners*, and NOT of the *contributions* of partners.

A partner may be undressed from his right to be a partner if he is deemed to be bankrupt, or if his partnership interest was liquidated under **Art. 22**. An expelled partner has the right to have his interest in the partnership liquidated, and in such cases, also a right to *pro rata* share of profits and losses on all works in progress up until the moment of expulsion.

An ENC partnership is dissolved if:

a) **Where its period, if any, expires.**
b) **If all partners agree.**
c) **If partnership becomes bankrupt.**
d) **If the court deems a partnership fit to be dissolved.**
e) **If number of partners is reduced to >2, and remains so for 6+ months.**
f) **Where otherwise provided in the partnership deed under Art. 21.**

In cases of bankruptcy/insolvency, the court appoints a **curator** – who is entrusted duty of looking after the failed business. Thus, the curator takes **physical possession of assets**, and can seize trade books in order for him to examine them. Naturally, in cases of insolvency, trading and all other rights become suspended.

Vivante insists that general partners in partnership ENC are NOT traders. His argument is that since commercial partnerships are given a *separate legal personality independent of its shareholders*, then only the partnership itself should be considered to be a trader, and not the shareholders themselves.

CASE LAW – ***Andrew Borg Cardona*** as liquidator of ***Priceclub Operators Ltd*** vs ***Victor Zammit***, ***Christopher Gauci***, and ***Wallace Fino***:

The Court of Appeal held that **a director could not avoid responsibility on the pretext that he did not appreciate the true situation of the company or that he relied on the advice of others**. It was not excusable for a director to plead that he was a 'non-executive director' and/or a minority shareholder. A director shared equal responsibility with other co-directors and was under an obligation to know and to carry out his duties, which were imposed by law.

The liquidator of Priceclub Operators Ltd (PCO) filed legal proceedings against ex-directors of PCO: Mr Zammit, Mr Gauci and Mr Fino – for wrongful and/or fraudulent trading under our Companies Act provisions. Priceclub operated eight supermarkets and stopped trading in 2001.

The issue was whether the ex-directors should be held personally and unlimitedly responsible for all PCO's debts ***in solidum*** (as a whole).

*"**If in the course of a winding up of a company**, whether by the court or voluntarily, **it appears that any business of the company has been carried on with the intent to defraud creditor**… the court may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid be **personally responsible**, **without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct**."*

Art. 315 of the *Companies Act*

Moreover, there was wrongful trading under **Art. 316** of the Companies Act (*"where the company has been dissolved and is insolvent…"*), which showed that the person who was a director knew, or ought to have known, *prior* to the dissolution of the company that there was no reasonable prospect that the company would avoid being dissolved due to its insolvency.

It was stated that its directors should be held responsible for trading when PCO was virtually insolvent. They chose to commence and continue trading, despite of PCO's precarious financial position, to the prejudice of creditors.

From the onset, PCO was saddled with considerable debts, **Lm2.6 million**, and was unable to pay its creditors. It was alleged that they acted abusively, with gross

incompetence, in breach of their duties and fraudulently, to deceive PCO's creditors. Allegedly PCO operated with finance provided by its creditors.

It resulted that:

- **Its directors should have known that PCO was insolvent**;
- **The directors failed to keep proper books of account**;
- **The directors did not act honestly with PCO's creditors**. They made false statements, and misled creditors as to PCO's true financial position;
- **The directors did not draw up any serious business plan to protect creditors**.

In his appeal, Mr Fino argued by saying that the First Court was wrong in its interpretation of the law, in which he also stated that there was no intent to defraud the creditors.

However, the Court of Appeal supported the First Court's judgement, quoting the principles established by the **1984 Grantham Case** – holding that a finding that a person was knowingly party to the business of a company carried on with intent to defraud creditors may be made if the following two conditions are satisfied:

1. If that person realised, at the time the debts were incurred, that there was **no good reason for thinking that funds would be available to pay the debt in question when it became due or shortly thereafter.**
2. There was **actual dishonesty** involving, according to current notions of fair trading among commercial men, **real moral blame**.

Ultimately (and as Fraudulent Trading is not actually defined in the laws of Malta), the court had to decide this issue in the light of the circumstances. The court agreed with the conclusion of the First Court. It felt **that the directors acted dishonestly by continuing trading, to the prejudice of their creditors, well knowingly that the company was insolvent and was unable to pay its debts**. The company was also under-capitalised and burdened by heavy debt.

In this case, the company's financial position was such that the directors should have been aware of the harm to creditors. Creditors should not have been deceived.

Partnerships *en commandite*

A partnership ***en commandite*** (**EC**) (or a '**limited partnership**') requires at least **1 partner with *limited* liability**, and **1 partner with *unlimited* liability**.

Art. 51 of the *Companies Act* stipulates that a partnership EC operates under a partnership name, and **has its obligations guaranteed by unlimited**, **joint**, and **several liability of one or more partners** (general partners), and by **limited liability of one or more 'limited partners'**.

Similar to a partnership ENC, a limited partnership has a separate and distinct personality from its partners. Limited liability is not attributed to ALL the partners, therefore, there is a mix of both limited AND unlimited liability partners.

In principle, at least one general partner must either be an individual or a body corporate with unlimited, joint, and several liability of one or more of its members. However, it is permitted to only have limited liability enterprises as partners). In such cases, **Art. 51A** applies.

Once the partners are registered with the Registrar, the public is assumed to be aware of the level of liability to which the partners are susceptible to.

Art. 52 purports that provisions pertaining to partnerships ENC also apply to partnerships EC, except in cases where the law provides *specifically* for partnerships EC.

Art. 53 also contends that where a *limited* partner holds himself out as being a *general* partner, he thus becomes liable unlimitedly, jointly, and severally alongside all the other general partners for all partnership obligations. The court may take into consideration the possibility of having a non-general partner's name featuring in the partnership name, thus deeming whether such person is holding himself out as falsely being a general partner.

Limited partner liability is limited to his contribution to the partnership.

Unlike general partners, the contribution of limited partners does NOT include personal services.

Moreover, partnerships EC may be one of 2 kinds:

1. An ordinary partnership with **capital NOT divided into shares**.

2. A partnership with **capital divided into shares**.

A partnership deed of a partnership EC must also specify who is a general partner, and who is a limited partner. **Otherwise, the partnership would transform itself into a partnership ENC**.

Unless otherwise stipulated in the provisions catering for partnerships EC, the rights and obligations of general partners in a partnership EC are the same as those in partnerships ENC. And unless otherwise stipulated in the partnership deed, limited partners in an EC bear only the rights and duties asserted by the law.

Art. 58 bestows general partners the right to appoint the general partners deemed to be worthy of administering and representing the partnership EC, and to conversely dismiss from office the partners so appointed – as long as such decisions are reached through **unanimity**. A deed of partnership may also give this voting right to limited partners.

Art. 59 prohibits limited partners from performing any acts if administration, and denies them the luxury of exercising of transacting business on the partnership's behalf. If a limited partner transgresses this boundary, he thus becomes bound unlimitedly, jointly, and severally alongside the general partners for all the obligations of the partnership, with the possibility of being expelled from the partnership.

However, a limited partner breaching this prohibition cannot be expelled if he successfully proves that he was acting on the instruction of a general partner/s.

This limitation does not limit limited partners from supervising and controlling partnership affairs. Limited partners still reserve the right to inspect the partnership's accounting ledgers, and to give advice on all matters concerning partnership management and general conduct.

Art. 60 goes on to say that, at the end of each accounting period, the partnership EC's balance sheet must be prepared by the general partners, and must be communicated to the limited partners, who, for the purpose of ascertaining the ledger's validity, reserve the right of access to the partnership's accounting records.

Art. 62 states that a limited partner shall, in no case, be bound to restore profits received in good faith.

A limited partner has the liberty of assigning interest in a partnership EC; however, the partnership deed may provide otherwise. If a limited partner's contribution is not fully paid up, any assignment of interest does not have effect unless it is made with all the general partner's consent.

Moreover, changes in the partnership deed depriving limited partners of any rights require the unanimous consent of all general AND limited partners.

If a limited partner dies, the partnership continues with all the living heirs. However, this is subject to other provisions possibly stipulated in the partnership deed. This is different from what would happen in a partnership ENC, because by default, the deceased partner's interest would be liquidated in favour of the heirs.

Art. 65 contends that, apart from the same reasons for disbanding stipulated for partnerships ENC, a partnership EC will also be dissolved if no general or limited partners remain, unless substituted within 6 months. This means that both general and limited partners are ***sine qua nons*** for partnerships EC – connoting that every partnership EC only has a six-month time frame within which it is able of finding viable replacements for those departed partners because they are **absolutely necessary** for the vitality of the partnership EC.

Limited Liability Companies

Let us remind ourselves what a 'trader' is:

> **"The term "trader" means any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership."**
>
> **Art. 4** of the *Commercial Code of Malta*

In limited liability partnerships, **each partner cannot be held liable for more than the amount they injected into the partnership in the beginning**. Moreover, **liability cannot extend to the partner's/shareholder's *personal* assets**. This partnership is thus considered to be comforting for its creditors.

The limited liability partnership is regarded to be the **most important** and the **most popular**, despite it being the **most heavily regulated**. This is mainly due to the privileges limited liability provides; as well as for reasons involving *taxation* and the *flexibility of the movement of capital*.