CVL3000 LAW OF OBLIGATIONS

The European Law Students' Association

MALTA

ABOUT ELSA

ELSA Malta is a distinguished member of the ELSA International network, comprising over 50,000 students from more than 350 law faculties across Europe. The organization is deeply committed to upholding the values enshrined in its motto - "A just world in which there is respect for human dignity and cultural diversity" - and strives to achieve this mission in all its activities.

Founded in 1986, ELSA Malta is recognized as a prestigious student organization by the Senate of the University of Malta. Its primary aim is to represent all law students in the University and provide them with a diverse range of opportunities.

ELSA Malta offers various events throughout the academic year that cater to the needs of law students of all ages, providing them with an excellent opportunity to expand their legal knowledge across various topics in the Law Course. Additionally, these events can prove to be of great value to students from other faculties as well.

Furthermore, ELSA Malta also strives to promote international understanding and cooperation by fostering cultural exchange and encouraging students to participate in international projects, conferences, and competitions. By engaging in such activities, ELSA Malta seeks to equip its members with valuable skills and experiences that will help them become responsible and active citizens of the global community.

DISCLAIMER

Please note that the student notes provided by ELSA Malta are intended to supplement your own notes and independent study. These notes may contain errors or omissions, and we cannot guarantee their accuracy or completeness. While these notes may act as a tool to enhance your understanding of the material covered in class, we advise against relying solely on them in preparation for examinations or assignments. It is crucial to attend all classes, review the assigned readings, and take your own notes.

ELSA Malta cannot be held responsible for any consequences that may arise from the use of these notes, including poor academic performance or misunderstandings of course content.

By accessing and using these notes, you acknowledge and agree to these terms and conditions.

ACKNOWLEDGMENTS

ELSA Malta President: Jack Vassallo Cesareo

ELSA Malta Secretary General: Beppe Micallef Moreno

Writer: Luca Camilleri

Luca Camilleri

The Law of Obligations

Mr Justice Lawrence Quintano
Mr Justice Tonio Mallia
Dr Mattia Felice
Dr David Zammit
Dr Max Ganado

Introduction

In Malta we do not use case-law because the courts do not issue binding decisions. Malta is a civil law country because our civil law is based on a Code. The courts interpret the law but have no authority to bind future courts. The Common Law countries, on the other hand have case-law because it is the judges who law down the law. When the Supreme Court declares a principle, it is the law which all future courts must follow. The Maltese Civil Code is Roman in origin and Roman Law remains an important primary source in the Maltese legal system today. The British sought the introduce a Common Law system in Malta but faced steep opposition from the local legal profession. The former insisted on the Codification of local law rather than basing decisions on the Code of Justinian. Therefore, a commission led by Sir Adriano Dingli was appointed and entrusted with the formation of a Civil and a Commercial Code. Prior to this Napoleon had himself sought to codify French law which was also based on Roman Law. As a result, the Code Napoleon was created and imposed on most of Europe as Napoleon's conquests swept Europe. When Sir Adrian Dingli, attorney general at the time, came to draft the Code, he found the Code Napoleon and was liberally inspired. He had the advantage of its wide application and copied that in Italy. Originally, it was very much a carbon copy of the Napoleonic Code as amended by Italy and Austria.

The Maltese Code is therefore based on the Code Napoleon, which is itself based on Roman Law, which is why it was so easily accepted in Malta by the legal profession. Today, if there is an issue which is not covered by the law, reference is made to Roman Law. There are still judgements which state this fact quite clearly. When it comes to interpret principles as found in the Code the courts will return to the origins of the particular section in Roman Law and examine how the Romans interpreted the particular rule, modelling their own interpretation thereon. Therefore, the Maltese Code is Roman Law as changed by the legislator. To that end, jurisprudence is not binding in the same way in which a Common Law judgement is binding as case-law, but they retain great persuasive value and illustrate the way in which the courts have chosen to interpret a particular principle in the past.

Another feature of the Common Law system which is not carried over into the Civil Law system of Malta and continental Europe is that of precedent, wherein lower courts are bound to follow the same line as the superior courts above them. In Civil Law systems each court is free to reason as it wishes. Consistent reasoning in similar cases is often followed, but there is no obligation to do so.

An important change made by Napoleon is freedom of contract, i.e., the right to create any contract. Under Roman Law people were only allowed to enter into those contracts

expressly catered for under the law. The power and validity of a contract was given to consent whereas prior to this a contract was valid because the State said so. The fundamental basis of contract is consent and this is created by the will of the individual alone. A contract is valid only if one gives one's consent, which leads to the *pacta sunt servanda* rule, that is to say one has given one's consent which one was free to do and as such one is bound by what one has agreed to do. The emphasis on consent is as such because one must follow the contract created freely. In Germany in 1900 the author Savigny created a rule based on good faith, *viz.,* a contract is to be interpreted according to good faith, not the literal meaning of the contract or the *pacta sunt servanda* rule. In Italy in 1944 they changed their Code from a basis in the *voluntà* theory into that of good faith. When entering into a contract we do so with the assumption that both parties are entering into it with a degree of trust that the literal word of the contract would not be spun in such a way that the spirit of the contract would be broken. We find this distinction between consent and good faith routinely cropping up in the Maltese law of contracts. The Maltese law is based on the *voluntà* theory as distinct from the good faith theory found in modern Italy.

An obligation is when one promises to do something for someone else; or a duty of one person to give, to do, or not to do something for the benefit of another person. the Maltese system still has the fourfold division created by Gaius who divided the law of obligations into contracts, quasi-contracts, torts, and quasi-torts. This is no longer the system in Italy, but it is as it remains in Malta. Take, for example, precontractual liability, where is it to be classified? It does not fit neatly into this fourfold system, and this is where problems with classifications arise. For the creation of a contract, the law imposes four essential, cumulative requisites:

1. Capacity,
2. Consent,
3. Object,
4. Consideration (*causa*).

Consideration exists in English Common Law but it is not equivalent to the Maltese consideration and so we have the same name meaning two different concepts. Therefore, to avoid confusion, the Italian word *causa* is often used. Once these four essential conditions are there then a contract has been formed. Capacity shall be explored further as well as the grades of capacity according to one's age. The law does not speak of what consent is, but what consent is not by making reference to defects in consent and the like. Here we find another distinction between *voluntà* and good faith. A contract must refer to an object. *Causa* is a very critical element of a contract and is briefly the contract's purpose. The Code Napoleon granted full power to contract to individuals. One can contract anything so long as its purpose is not contrary to law, morality, or public order. Changes in time to morality have made the concept fluid and dynamic. Morality is not to be confused with religion. The Italian Code has since dropped the requirement of *causa* as it was considered to have been caused too many problems.

The modern Italy Code moves towards appearance rather than intention, but it still insists on the question of the latter. The Maltese Code is in cases moving towards the

good faith theory, as can be noted in the local Consumer Law which is pushed by the European Union. England also follows the good faith theory. In the case of ***Smith and Hughes*** [1871] LR 6 QB 597:

> *"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."*

Topic I. Natural Obligations

Natural obligations are a creature of Roman Law that retain a certain degree of importance today. They are not contracts and have no enforceable value in Maltese law but do have one important aspect: if a natural obligation is performed one cannot retract one's performance. One cannot force an extra obligation on someone but if they chose to do so one cannot retract one's performance. Naturally, the inverse, i.e., that if someone receives something in fulfilment of a natural obligation then he is not obliged to restore it to the person from whom he got it, also holds true.

A typical example is an obligation which is barred by prescription. If a loan is given and five years elapse from the day when the loan should have been re-paid, the creditor cannot sue the debtor for payment as the action is time- barred. If, however, after the five year-period lapses, the debtor goes to the creditor and pays him the amount lent to him, then the debtor may not later on seek to have that payment reversed, because even though there was no enforceable obligation, there still existed a natural obligation to pay the creditor the amount which he had originally lent the debtor. Thus, if the debtor mistakenly pays the creditor, thinking that he is under an enforceable obligation to do so, and later on learns that he was under no obligation to do so, he may not go to Court to get his money back and plead that the payment was made erroneously and that upon submitting payment, he was acting under a mistaken frame of mind. In fact, the intentional element has nothing to do in these situations.

Another example would arise in the payment of ground-rent (in emphyteusis). Payment is barred by the same prescriptive period of five years. But if the emphyteuta pays ground-rent which has become time-barred, he may not later on seek to have that payment reversed.

This is so because in these situations, one would feel a natural duty to do something (in the cases above, pay), even though he is not legally bound to do so. Thus, whereas the general rule is that if a person pays something by mistake when there is no natural obligation to do so, he is entitled to get his money back, in the case of natural obligations, this is not so.

The Types of Natural Obligations

Carbonnier classified natural obligations into the following three types:

1. **A civil obligation which degenerates into a natural obligation:** A civil law obligation that has lost its enforceability (e.g., extinctive prescription which cancels the possibility of enforcement but *not* the obligation, or an obligation taken on by a minor). The notion of a legal link between the parties which the law does not want to recognize becomes clearer in these given examples. Initially, these were the only natural obligations that existed (under Roman law). Through time jurists developed other areas of natural obligations.

   E.g.: Here, one may mention an obligation which required some form, and there was some defect in this form. For instance, certain obligations require the written form (at least a private writing – see Article 1232 of the Civil Code).1 If

the agreement is only made verbally, then it cannot be enforced, but if one chooses to enforce it, either because he thinks that he is obliged to do so, or because he feels that he should do so, then the action may not be taken back.

E.g.: Another example would be when one of the parties to a contract was a minor under 7 years of age and therefore, the contract is null. Yet the other party may perform the obligation arising out of this null contract – here, we would also have a natural obligation.

2. **Duties of conscience transformed into a natural obligation:** A person who does something not because one is bound to do so, but because one feels in one's conscience that he ought to. In the law of tort if one is not at fault, one is not responsible for damages, but if one pays damages if one is not at fault, one cannot recover the sum paid. One has to bear in mind that the effect of a natural obligation is that the law initially does not recognise that legal obligation but if notwithstanding this you perform that obligation, then the law intervenes to stop you from retracting what you did.

   The classical example is that of a driver who runs over a child. However, it is not his fault as the child crossed the street negligently. Legally speaking, the driver is not responsible to pay any compensation or contribution to the child as he was not at fault (there is no action for tort). If, however, he feels duty bound by conscience to pay a contribution and he does so, then he cannot later on change his mind and claim re-payment. Once again, ignorance of the law, or the belief that one is bound to do something when in fact he is not, are irrelevant.

3. **Debts of honour:** These are illegal, apart from those organised by licensed betting and gambling providers. No one can force one to pay the debt but if one chooses to do so one it creates a natural obligation to pay. *Vide* the case of ***Bartoli v. Chetcuti*** (First Hall Civil Court, 13/06/2013). Some authors do express reservations about the possibility of an obligation arising out of an illegality.

   These arise in the field of gaming and betting. Generally speaking, in order for gaming and betting to be organized in Malta, a license is required from the Lotteries and Gaming Authority (LGA). This means that if two persons unofficially, even with written agreement, make a bet, and the losing party fails to fulfil its obligation under the bet and pay up the winner, such winning party may not go before a Court to have that obligation enforced. This is because such games are illegal.

   Carbonnier argues, however, that, as in the case of the other natural obligations, if the losing party pays the bet, then he cannot at a later stage change his mind and request repayment. This notion of debts of honour is not accepted by all jurists due to the fact that the origins of the obligation remain illegal. They argue that illegality comes before honour.

Up until recently, ***Grech v. Bennetti*** (27/01/1961), was the only court to discuss this issue:

> *"Fil-gurisprudenza taghna giet ammessa l-obligazzjoni naturali ghar-rigward tal- imhatra, u ghalhekk ma jidherx li jista` jkun hemm raguni biex ma tkunx ammessa anki f'kaz ta` loghob projbit mil-ligi. Il-legislatur, mbaghad, jirrikonoxxi l-figura tal-obligazzjoni naturali, u sahansitra jirregola l-effetti taghha, billi jiddisponi illi ma hemmx jedd ta` azzjoni ghal hlas lura jekk dak li thallas kellu jinghata bis-sahha ta` obligazzjoni naturali.... Izda, biex ikun hemm dan l-effett, jethieg li l-pagament ikun sar b'effett ta` att guridikament validu, b'mod illi l-irrepetibbilita` tal-pagament tippresupponi illi l-loghob ikun genwin u minghajr qerq".*

In France the situation is not clear whether they follow Carbonnier or consider the situation as illegal. Recent local judgments have cleared up any doubt.

Mifsud v. Dragonara Casino Ltd. (First Hall Civil Court, 24/09/2010):

> "... il-kreditu ghal-loghob jew ghal self ghal-loghob ghadu xorta sprovvist b'azzjoni, salv naturalment li d-debitu jekk ma jorbotx fid-dritt jitqies mill- interessat li jorbot fl-unur."

The debt, if it is not enforceable by law, is enforceable by honour.

Bartolo v. Chetcuti (First Hall Civil Court, 13/06/2013):

> *"...il-loghob u l- imhatri huma illegali, ghalkemm l-awturi kontinentali jsostnu li jinholoq obbligazzjoni morali jew naturali b'mod it-tellief ma jkunx jista' jitlob ir- restituzzjoni tal-ammont mitluf".*

The Court quoted some continental authors. It was quite clear that bets/games are illegal, but they do give rise to a moral/natural obligation. The loser who pays has no action to recover what he paid.

There are a few issues which must be discussed. First, when one pays a natural obligation, must the debtor be aware that he is fulfilling a natural obligation or is it immaterial? Take, for example, the case of a creditor who approaches his debtor to repay him who agrees to do so in spite of the prescriptive period having elapsed, as he has chosen to do so he cannot ask for the money back. The courts have declared that this is immaterial and objective. Article 1021 states that:

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

Since Sir Adrian Dingli did not reproduce the word 'voluntarily' from the Italian Civil Code, it means that under our system the person who pays cannot recover from a civil or natural obligation whether he knew it was natural or not.

In ***Parascandolo v. Lanzon*** (Court of Appeal, 17/04/1925) one sought to recover money paid under a national obligation, but the court rejected it stated that whether he knew or not it was a natural obligation. In this case Lanzon was a legal procurator who rendered services to Parascandolo, charging Lm15 for the said services on the basis of the tariff used by lawyers. Plaintiff paid the amount believing it was due under a civil obligation, which was not the case, and thus made an action to recover the amount paid.

The Court of Appeal made the following considerations:

1. Although legal procurators do not have a right to be compensated for consultations or examinations of minutes of public acts published at a notary, they are not acting contrary to any express prohibition of law by carrying out such authorised services and further charging for them. A legal procurator's tariff is not enforced by law, unlike a lawyer's, meaning they work at their own risk.

2. According to Article 1021 of the Civil Code, one is bound to restore an amount which was paid knowingly or by mistake, unless the amount was received under a civil or natural obligation. In this case, although the plaintiff may have thought that the fee was due under a civil obligation, and paid it for that reason, there still existed a natural obligation, and was thus unable to recover the amount paid. The Court of Appeal distinguished between the Maltese and Italian legal systems; the latter, unlike the former, allows one to recover an amount paid in relation to a natural obligation if it was paid by mistake. The Court thus held that natural obligations exist independently of whether one is ignorant of the law as to the nature of his obligation or otherwise. Hence, although the legal procurator's bill was not enforceable, there still existed a natural obligation between the parties in relation to the work done by the legal procurator, and Lanzon was not going against the law in charging his fee.

The court said that natural obligations exist independently of whether one is ignorant of the law as to the nature of his obligation or otherwise.

Acknowledgement

Another issue is whether one can acknowledge a natural obligation before payment. Can one acknowledge something which does not exist? Authors say that it is indeed possible and would transform the natural obligation into a civil one. We see this in the case of prescription, wherein this acknowledgement revives the obligation, meaning it went from a civil obligation to a natural one to a civil one again. If one recognises and accepts one's debt and promises to pay it a natural obligation is transformed into a civil one.

Natural Obligations Arising Out of Illegal Acts

Another issue is whether a natural obligation can arise out of an illegality. Some jurists insist that natural obligations cannot arise from a breach of the law. Even so, a distinction is normally made between laws which are a matter of public policy and other laws. For instance, take, for example, the scenario of a lease agreement under the old laws. These laws say that a tenant cannot pay rent which is higher than the fair rent. What if the tenant pays a higher rent? Can he later on recover that amount? Here we have a situation where the payment of the rent was made against the law. We have seen in the case of bets that they are classified as debts of honours and so a natural obligation will arise. But in the case of other illegal activities a natural obligation can still arise.

In the case of ***Muscat v. Vella*** (First Hall Civil Court, 25/02/1950) the court held that in the circumstances of the old rent laws a natural obligation can arise. At the time, one was not able to be charged more than the fair rent as set by the Rent Regulation Board with any amount charged above capable of being recovered. In such a case, plaintiff's action to recover the difference was barred by the court on the grounds of the tenant's natural obligation after having agreed to pay the higher rent, his enjoyment of the premises, and the principles of equity, honour, and morals.

In the case of ***Gio Maria Muscat v. Carmelo Vella*** (First Hall Civil Court, 25/2/1950) the parties agreed on an amount of rent which the tenant duly paid for the first few years. He subsequently took legal advice, and proper workings were carried out and discovered he was paying more than the fair rent. He made an action to recover the extra amount he had paid. Court said he was unable to do so. The landlord was indeed breaking the law, but the tenant was not entitled to recover. The Court stated:

> *"Il-kerrej li jaccetta l-gholi, ihallas, igawdi l-fond, u mbaghad wara zmien idur kontra s-sid ghar-ripetizzjoni, imur kontra kwalunkwe principju ta' ekwita', ta' unur u ta' morali; u hekk il-kerrej li jaccetta l-gholi tal-kera minghajr awtorizzazzjoni tal-Board, u jhallas il-kera hekk awmentat, ikun qieghed jezegwixxi obligazzjoni naturali, u ghalhekk ma ghandux dritt jirrepeti dak il- gholi ta' kera hekk imhallas".*

This was also referred to in the case of *Cachia v. Debono*. The tenant who pays the high rent and enjoys the tenancy, then seeks to recover the amount, goes against all principles of equity, honour, and morality.

Matters of Public Policy

Another issue is that of usuary, i.e., the illegal charging of interest at a rate higher than 8%. Many people charge interest higher than 8% (banks are specifically catered for by legislation to permit them to do so despite it being illegal for all others). If one agrees to a rate higher than 8% and indeed pays it, can one recover the excess? Or is this a natural obligation? The courts have answered with an emphatic no. The payment of usuary can never create a natural obligation. If the illegality is of a private nature, say

the payment of rent, then the natural obligation can come into play. Our Courts have decided that since this law is in the interest of public policy, then a natural obligation is not created and therefore the extra interest paid may be recovered. This point was confirmed in a recent judgement.

In the case of ***Farrugia v. Direttur tas-Sigurtà Socjali*** (Court of Appeal (Inferior Jurisdiction), 19/10/2005) plaintiff applied for unemployment benefits but was turned down since he had received Lm16,000 from the Malta Drydocks upon his retirement. Plaintiff argued that he used the Lm16,000 to pay third parties who had lent him money with extremely high interest rates (usury) but failed to provide any further information. The Director for Social Security was not satisfied, and the unemployment benefits where thus not granted. Plaintiff appealed.

The Court of Appeal made the following considerations. It stated that the allegation of usury on its own without adequate proof could never produce the juridical effect the plaintiff was asking for, and hence rejected the plaintiff's appeal. The Court dismissed the plea saying that usury cannot form the subject of a natural obligation since it is prohibited by law and thus the amount paid over 8% could be recovered. The victim can always recover since it is a criminal offence going beyond honour and equity, and breaking a law of public order requires a remedy. The Court also stated that one may not place himself in a situation of insolvency in order to benefit from the rights granted by law to persons in such a situation. This cannot be considered the behaviour of a *bonus paterfamilias* which plaintiff was constrained to observe.

The Court stated the following:

> *"Il-konvenzjoni affetta b' uzura hija, ghal dak li jirrigward l-uzura, nulla b' mod assolut, jigifieri inezistenti, billi illecita ghaliex projbita mil-ligi, u hija illecita fil- konfront tal-mutwant ... Ghalhekk is-somma mhallsa bhala uzura ghandha tigi restitwita lil min hallasha, u ma tista' qatt tifforma oggett ta' obbligazzjoni naturali".*

Topic II. Pre-Contractual Liability

Essentially, can one be held liable for damages for actions done during the negotiation stage before the contract is signed? Under the Civil Code nothing is found and given that it follows the *voluntà* theory, unless consent is given then no party is bound. At this stage the parties have not given their consent but are merely discussing. Pre-contractual liability now exists as section 1327 of the Italian Code, which states that if a person unjustifiably interrupts negotiations when they would have reached a stage where a contract seems likely, then he will be responsible for damages. This not only results from this case of interrupted negotiations, but also in other situations where there is about to be a contract but there is none yet.

Comparative Analysis

In France, there was a case where a person publicised that he was to hold an auction for old and rare books for which a large number of people came. On the day of the auction the person cancelled without giving any particular reason. There was not yet a contract, only an advertisement that on a particular day the auction will be held. Many persons who travelled to the town where it was to be held sued for damages and the court offered them the amount in damages because he had not acted fairly. This is the result of the theory of good faith, or *affidamento*: if one advertises something and then cancels it, he is responsible for damages caused. The most common scenario is a contract where parties are discussing, have entered into negotiations, have reached a stage where finalising the contract seems close, and cancel the contract. This is typical pre-contractual liability. The courts were initially reluctant to offer damages through pre-contractual liability based on the Italian Code.

Establishing Jurisprudence

The first case where this was tried involved Italians and was ***Giufrida v. Borg Olivier*** (05/05/1967) in which an Italian consortium led by Giufrida sought to develop Manoel Island and had contacted the government to reach an agreement to do so. Discussions were held and the government requested bank guarantees which were provided. After months of discussions the government halted the discussions as another party sought to develop Manoel Island itself. The Italian consortium sued for damages on the basis of pre-contractual liability which the First Hall of the Civil Court struck out immediately, whilst the Court of Appeal discussed it at length before rejecting it, arguing that it was alien to the Maltese system.

The court of first instance ignored the notion of pre-contractual liability. It dismissed the claim since the government had not yet bound itself by signing any preliminary agreement and could not therefore be forced into a final agreement. The Italian company argued that the government should pay for damages after abruptly ending negotiations considering that an agreement was virtually reached amongst the parties. The Italian company appealed.

Before the Court of Appeal, the Italian company changed its line of reasoning. It argued that whilst it realised that a Court could not force the Maltese government to sign the contract, it could however grant it damages. However, the Court of Appeal said that the government had not signed any form of promise of sale or promise of transfer and

therefore there was no case of liability. The Court even said that the government's discretion should not be challenged or questioned by the Court, and that good faith should be presumed vis-à-vis the government. Whilst the Court of appeal discussed pre-contractual liability, it did not determine whether it exists or not, but said that either way it would not apply vis-à-vis the government. To this effect, the Italian author Renetti was quoted. Apart from the issue of liability, the case was also dismissed on a procedural ground as once a demand is made it cannot be changed in the course of an action.

In another case, that of ***Pullen v. Matysik*** (Court of Appeal, 26/11/1971), the court did not decide the case on pre-contractual liability, although it did share its characteristics. This case revolved around the lease of a boutique in a hotel, and the latter's decision not to renew the rent of this particular shop. To that end, the hotel began negotiations with someone else to take the lease until the hotel broke off negotiations with this prospective tenant and renewed the lease of the incumbent tenant. The prospective tenant sued for damages on the basis of pre-contractual liability.

The court held that there was an understanding that the lease will be granted but they did not put the matter under pre-contractual liability, but under breach of promise instead. The Court said that it is obvious that whatever the defendant had in mind, the plaintiffs were surely justified in understanding that they were going to have the concession without any difficulty. The court said therefore that there was close to a promise and so they offered damages, although not what the law provides as there was no contract, simply an understanding. Therefore, it did not issue the full amount for breach of contract. Even in Italy, the Code states that damages are the profit one would have made had he not wasted his time in the fruitless discussions, *abritrio et boni viri.*

In this case, the Court did grant damages as the plaintiffs were justified in understanding that they would obtain the concession without any difficulty. However, the Court's decision was based on tort and not on the acceptance of the pre-contractual liability doctrine. In fact, the Court stated that since the negotiations were nearly completed and that there was no justified reason for not granting the lease to the plaintiff, the defendant was liable for damages. Thus, the defendant was found liable for its pre-contractual behaviour without the Court acknowledging the concept of pre-contractual liability. The Court reached its conclusion by applying the *affidamento* theory and based its decision on the notions of negligence, good faith, and trust. Defendants' actions of assuring the plaintiffs of the concession yet abruptly terminating negotiations without a justified reason amount to bad faith on their end. The damages granted to plaintiff were those of actual losses incurred and not of loss of future earnings, thus *damnum emergens* were granted not *lucrum cessans.* The judgement was anomalous as on the one hand the Court accepted liability on the basis of tort but at the same time inexplicably ignored *lucrum cessans.* Thus, in effect the Court applied pre-contractual liability.

In the case of ***Cassar v. Campbell Preston*** (Commercial Court, 19/11/1971), negotiations were entered into between Cassar and the representative of British Petroleum Malta (i.e., Mr Campbell Preston) to open a service station. Plaintiff claimed

that there was an agreement in place in which the defendant would construct a petrol station on the plaintiff's property. After negotiations had reached an advanced stage, and after plaintiff had incurred expenses in order to prepare the land for construction, the defendant abruptly and unilaterally withdrew from the negotiations and hence no agreement was entered into. Cassar sued for damages on the basis of unjustified termination of negotiations (pre-contractual liability). The defendant however claimed that the company had assumed no obligations, and any agreement made between the parties had been made subject to being put in writing.

According to the Commercial Court, when negotiations broke off, a proper agreement between the parties had not yet been reached and the construction of the petrol station depended on permits which had not yet been issued. Thus, at this stage of preliminary negotiations, neither party could be held responsible for damages. The Court dismissed outright the principle of pre-contractual liability as it felt that it would be prejudicial to local trade by discouraging negotiations and agreements. This was a strange assertion given that pre-contractual liability had been accepted in France, Italy, and Germany with no such negative impact on trade. The Court concluded that the plaintiff could not be awarded compensation for damages suffered as these were not a direct and immediate effect of defendant's failure to perform his obligations. The plaintiff was not bound by any time period by which he had to finalise the agreement nor was he bound to carry out the project dealt with in the ongoing negotiations.

Another such case is ***Caruana v. Vella*** (First Hall Civil Court, 28/01/1983) where plaintiff claimed that defendant, the general manager of Oilfield Services Co. Ltd., had promised him employment on an oil rig. For this reason, plaintiff proceeded to close down his shop, which happened to be his main source of income. Unfortunately, the job failed to materialise, and plaintiff sued for damages. Defendant claimed that he should not be held personally liable since he was acting in his capacity as the general manager of the company, which company should thus be liable.

The Court dismissed the action, saying that the negotiations between the parties had not reached an advanced enough stage to allow Caruana to form a legitimate expectation. The Court did not say that pre-contractual liability does not exist but rather seemed to suggest that had the circumstances been otherwise it may have awarded damages on that basis. The Court distinguished between obligations arising from contract as opposed to those arising from tort. In the latter case, the defendant could be held personally liable. However, plaintiff clearly based his claim on the failure to fulfil a contractual obligation, and thus the Court had to decide on whose behalf defendant had acted, concluding that it had acted on behalf of the company. This meant that plaintiff had to proceed against the company. The Court also noted that the necessary link of cause and effect between the damages and the acts of the defendant was not present and that they were still far from reaching an agreement. The Court further insisted that one should do everything in one's power to minimise damage, something plaintiff had not done, and went on to quote the principle *qui sua culpa damnum sentit non videtur damnum sentire.* The Court therefore rejected plaintiff's claims but reserved him the right to an action against the company.

In the case of ***Grixti v. Grech*** (First Hall Civil Court, 03/04/1998) the court for the first time expressly accepted pre-contractual liability. Here, defendant represented an estate agency which had a client who was interested in buying property in Birzebbuga. Plaintiff, a broker, was approached to find a suitable property in that area. Plaintiff found suitable premises and began negotiations exchanging his property for the property in Birzebbuga, so as to be able to transfer it to the defendant's client. However, such defendant had already found the same property separately and concluded a deal with the client. Plaintiff sued for damages, claiming that defendant fraudulently frustrated negotiations.

It is clear that for a promise of sale to be valid, it must be done by public deed or private writing. In this case, this formality was *in absentia* and thus there can be no actin for the execution of the promise. The Court needed to consider whether plaintiff had the right to receive compensation on the basis of the pre-contractual liability theory. It examined previous judgements and went on to draw up three essential requirements for pre-contractual liability to exist:

1. Expenses incurred in good faith with the expectation of concluding a binding contract between the parties,
2. The termination of negotiations was carried out capriciously and almost in bad faith,
3. Negotiations must have reached an advanced stage where there was an agreement on all essential terms and conditions of the contract.

The court went on to discuss what it meant by capriciousness, and by the advanced stage required, *viz.*, when the only remaining action to be done was to put the agreement in writing and sign it. All that should be left is for an agreement to be drafted and put in writing. The Court went on to dismiss the action as the above conditions were not fulfilled. This was the first time that a court was willing to apply pre-contractual liability and moreover set clear guidelines as to when this should be applied. However, in this case the Court did not enter into the awarding of damages.

Recent Judgements

In the case of ***Busuttil v. Muscat*** (First Hall Civil Court, 28/10/1998) plaintiff's grandfather had acquired land from the Church on temporary emphyteusis and built a shop on that land. the emphyteusis was about to expire so plaintiffs asked for an extension. The Church refused, although it had granted extensions to others in similar situations. All this notwithstanding the fact that negotiations and discussions had commenced, and that an architect had been appointed to value the property. Thus, the emphyteusis expired and the land and shop reverted back to the defendant. Plaintiffs held that the Church had acted in bad faith and that they suffered damages as a result. The Church claimed that there was no imposition of a contractual legal obligations to renew the emphyteusis. It further said that since it cannot be accused of *culpa in eligendo*, plaintiff could only bring an action against those persons who had caused the damage, and not against the Church.

The Court considered Article 1521 of the Civil Code which states that a temporary emphyteusis ceases on the expiration of the time expressly agreed upon, and the

tenement, together with any improvements, reverts back to the *dominus ipso jure.* Furthermore, any action for the renewal of the emphyteusis, except by virtue of an express covenant in the emphyteutical grant or in any other public deed, is abolished. On that note, the Church had a right to refuse to renew the emphyteusis, and the Court in turn referred to Article 1030 where a person shall not be liable for any damage which may result from making use of a right within its proper limits. The Court is said to have applied the *teoria della voluntà*, where there is no liability in damages since one is not bound by anything which he does not consent to. The Court agreed with the Church that there was no proof of *culpa in eligendo* with regard to the Church and thus it could not be held responsible for damages. The Court ruled in favour of the defendant.

In the case of ***De Tigne Ltd. v. Micallef*** (Court of Appeal (Inferior Jurisdiction), 10/01/2007), defendant rented premises at De Tigne complex from plaintiff. The parties had reached an agreement regarding the price of rent, but not the duration of the lease. They had entered into a preliminary agreement with the intention of signing a definitive contract in three weeks' time. The defendant had already begun using the premises and paying the agreed rent.

The court of first instance considered that the burden of proving that the full amount has been paid lies with the person alleging it. The court acceded to the plaintiff's request and ordered the defendant to pay the arrears in rent owed, including maintenance expenses and utilities.

The defendant appealed stating that there was no agreement between the parties and thus could not be obliged to pay for maintenance and electricity as these were not even regulated by the preliminary agreement. It is generally accepted that where the parties have not concluded the actual contract, the only source of rights and obligations is the preliminary agreement, but since the parties had already given effect to the lease agreement in practice, one has to consider more than just that agreement. The Court of Appeal confirmed the first court's judgement. The question of *affidamento* came into play since the parties had put trust in the conclusion of the contract and only the formality of the document was missing. The Court said that good faith is not only to be present at the execution stage of the contract, and outlined three situations where good faith must be shown: First, in *contrahendo*, i.e., in the conclusion of negotiations and reaching an agreement; second, in the execution of the contract itself; and third, the Court also referred to Article 993 of the Civil Code saying that good faith exists not just in the execution of a contract but also during the pre-contractual stage. On the basis of the above, the Court felt that when signing the preliminary agreement, the parties had accepted that they would eventually sign a proper lease agreement which would include the usual terms and conditions that are normally attached to such agreements, including the *pro rata* payment of common expenses. The Court felt that the parties had acted in a manner which gave rise to a legitimate expectation that the lease agreement would be signed on this basis and ordered the defendant to pay a *pro rata* share of the water and electricity bills and maintenance expenses.

In the case of ***Debattista v. JK Properties Ltd.*** (Court of Appeal, 07/12/2005) plaintiff, acting as a mandatary for spouses Erickson, entered into discussions with defendant company to purchases immovable property on their behalf. A sum of Lm1000 was paid

prior to the conclusion of any preliminary agreement. Plaintiffs no longer wished to purchase the property and sued for the return of the amount paid. The Small Claims Tribunal, on the 15th of April 2005, held against plaintiffs, saying that the sum of money was not paid on account of the price but to take the property off the market and reserve it for plaintiffs.

This judgement was overturned by the Court of Appeal. Plaintiffs argued that the sum of money was paid *"on account pending promise of sale"* and not paid exclusively to ensure that the property is taken off the market. Defendant claimed that he made it clear that the deposit would be forfeited if the promise of sale was not concluded, and this was the case as both parties failed to agree on certain points. The Court had to determine whether plaintiffs were shown the promise of sale agreement prior to the meeting at the notary's office and whether they were justified in not going through with the agreement, as well as on what basis the Lm1000 was paid.

The Court held that the sum of money paid by the plaintiffs was unmistakably paid *"on account pending promise of sale"* and although the defendants might have felt that they deserved something for taking the property off the market, it does not change the nature of the payment. Furthermore, it was determined that plaintiffs were not given a copy of the promise of sale document prior to the parties' meeting at the notary's office and on this note the Court mentioned the concept of good faith which must be present in all stages of the conclusion of a contract, including the stages preceding the conclusion of the promise of sale agreement. Defendants should have provided plaintiffs with a copy of the promise of sale document or at least with enough information as to the terms and conditions within the document. Since the plaintiffs did not have the opportunity to examine the document beforehand, they were justified in receding from the agreement when it became known to them that many of the points contained in the agreement were prejudicial to them. The Court therefore accepted the appeal and held for the plaintiff.

In the case of ***Seguna v. Kunsill Lokali Zebbug*** (Court of Appeal, 03/10/2008) the Zebbug Local Council issued a call for tenders for the collection of refuse and cleaning. Two entities applied and Seguna had the most affordable bid. However, the competitor exercised undie pressure on the Local Council to award the tender to it and not to Seguna, and the Local Council did so, causing Seguna to sue for damages.

Although pre-contractual liability is not expressly regulated by law, it is not extraneous to our system. The court of first instance went on to state that damages in pre-contractual liability are limited to actual damages incurred, i.e., *damnum emergens*, and do not extend to the loss of future earnings, i.e., *lucrum cessans.* In this context reference was made to the aforementioned judgement in *Pullen v. Matysik.* The Court awarded Lm1000 in damages for expenses incurred but not for loss of future earnings.

The Court of Appeal countered the court of first instance's decision, stating that this was a case of abuse of administrative discretion under administrative law and not of pre-contractual liability since it was a tender and there were no negotiations involved, let alone negotiations at an advanced stage. There was an abuse in the awarding process which resulted in a loss of profits. This would fall under the law of tort or quasi-

tort and thus the injured party is entitled to all damages. Had the case been classified as one of pre-contractual liability, the case would have been dismissed without any compensation being awarded.

The Court awarded Seguna the full amount of compensation, totalling €26,788 in damages. Even though this case was decided in this manner, the Court seemed to accept the notion of pre-contractual liability, as long as there is the existence of the necessary circumstances leading to it, i.e., the negotiations must have reached an advanced stage. The Court noted that accordance to Italian jurisprudence, in order for liability to arise following an unjustified halt in negotiations, three requirements must be satisfied:

1. Reliance of one party on another regarding the conclusion of a contract (there should be agreement on almost all elements of the contract),
2. Recession without just cause, and
3. Damages had arisen.

In the case of ***Scicluna v. Cauchi*** (Commercial Court (Gozo), 04/02/2009) Judge Micallef held that parties must act in good faith in the negotiating and contractual stage. In these judgments, the Courts are much clearer. Good faith is a principal which applies in all stages of the agreement. Therefore, if in a pre-contractual stage, it is disrupted in bad faith, there should be pre-contractual liability. If one is to accept good faith in the contractual stage, then one should accept pre-contractual liability.

In the case of ***Fenech v. Dipartiment Tal-Kuntratti*** (First Hall Civil Court, 14/02/2012) the Court held that if pre-contractual liability exists, the prescriptive period is 2 years. It is an action for damages and since contractual remedy is 2 years, it should be the same for pre-contractual liability if it exists. It sticks to 'if it exists'. The Court expresses the current situation. It is not part of our law as in Italy and Germany. There were cases where the Court went into the matter but there is no clear and unequivocal acceptance of this doctrine. Thus, we still have to develop the issue further.

Conclusion

The affidamento theory means that parties must always act in good faith before and after negotiations. This has been set up in Italian law. In the Maltese scenario, there are judgments delivered by Philip Sciberras. He noted that the affidamento theory is wider than pre-contractual liability. Good faith requires that he who has knowledge must pass on the knowledge to the other contracting party.

THE CONTRACT

THE ESSENTIAL ELEMENTS OF A CONTRACT

ARTICLE 966 OF THE CIVIL CODE STATES:

966. The following are the conditions essential to the validity of a contract:

(a) capacity of the parties to contract;
(b) the consent of the party who binds himself;
(c) a certain thing which constitutes the subject-matter of the contract;
(d) a lawful consideration.

Topic III. Consent
Vices of Consent

Consent is the second requirement for a contract. The law does not define consent, but tells us when there is none, namely the vices or defects of consent. The basis of the *voluntà* theory is that the parties to a contract must give their consent in order to be bound. This consent must not be vitiated in any manner – if it is, then the contract may be null or annullable. This is the basic idea behind the Napoleonic Code which is still largely reflected in our Civil Code. Article 974 states as follows:

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

These are the three vices of consent. The most complicated and the one most used in court is error. When one is sued to perform a contract or for damages there is always an attempt to declare the contract null through the vice of consent, namely error. It must be known that for a contract to be valid the consent of at least two parties to the contract is required. The only unilateral contract valid without mutual consent is a will, i.e., a unilateral declaration which must be accepted. Error is divided into error of person, error of law, and error of fact (the most important of the three).

If a person wants to attack a contract on one of the vices of consent, then one must bring an ad hoc action to that effect. It is only available to the person whose consent is defective. The contract is not absolutely null but annullable. It is not possible for a third party to bring an action for rescission. It can be brought by:

- the minor on the ground of lesion,
- by an incapable person on the ground of his incapacity or
- by a person whose consent has been vitiated.

One may not seek to annul a contract on the basis of error, violence or fraud as a defence in an action – for instance, in an action where has been sued for the performance of his obligations. This was clearly explained in ***Gera de Petri v. Direttur tal-Akkomodazzjoni Soċjali*** (27/01/2003) wherein the Court said that: *"Meta att irid jiġi attakkat, imħassar jew revokat, trid issir kawża ad hoc".*

In the case of ***Gourmet Company Ltd. v. Mariano Vella*** (Court of Appeal, 19/11/2001), plaintiff had leased a premises from defendant and claimed that he was unaware of the amount of rent stipulated in the lease agreement since he was illiterate and since the contract was not fully read out to him before being signed. He therefore alleged that his consent was vitiated by mistake, fraud, or violence, and went on to ask the Court to declare the lease null and without effect.

The court of first instance held that plaintiff failed to bring sufficient proof that he was unaware of the amount of rent stipulated in the contract, as he had in fact paid the amount on a number of occasions, and regardless of his illiteracy, he was capable of

carrying out his affairs as a *bonus paterfamilias.* The court therefore affirmed the lease agreement.

The Court of Appeal determined that in this case the burden of proof lies with the plaintiff in proving that his consent was vitiated by mistake, violence, or fraud. Furthermore, the plaintiff's illiteracy was irrelevant since the contract had been read out to the parties prior to its being signed. Additionally, the agreement was detailed, clear, and unequivocal. It was also noted that plaintiff had legal assistance throughout the formulation of the lease, making it less likely that his consent was vitiated by mistake. The Court also said that it is up to the individual who alleges something to bring clear, unequivocal proof and in the absence of this the action would fail. Since the plaintiff had not brought any determining proof, the Court of Appeal confirmed the first court's judgement.

Topic III.II: Mistakes of Error or Fact

Error of Person

Error of person is found in article 976(2):

> (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.*

Normally the person per se in a contractual relationship is not too important. Whoever enters into the contract is unimportant so long as whoever is being dealt with agrees to the terms. This does come into play when one wants to deal with a particular person and not others, i.e., one only entered into the contract because he believed he was contracting with a particular person and no one else. That is to say, it must be shown that one has entered into the contract specifically with that one particular person. Normally, if one wants to deal with a particular person, he makes sure he is dealing with that person only.

For e.g., X sells an apartment to Y at a reduced price because he thinks that Y is his partner's son. Later on, he realises that this is not so. Had it not been for the error relating to the person, X would not have sold the apartment at that price. Thus, the error of person was in this case the principal inducement for the conclusion of the contract. This contract is thus annullable.

However, recently there was a case which opened up the notion of consideration, that of ***Roth v. Abela*** (Court of Appeal, 11/10/1993), as before it, the Court identified the consideration of the person as the identity of the person. Under the old rent laws Maltese tenants were protected, i.e., when the lease was terminated, he had the right to continue under the lease with the same terms and conditions. However, foreigners were not such protected. A lot of owners would therefore want to lease their properties to foreigners only, meaning the law had the paradoxical effect of spurring the rental market for foreigners. Plaintiff, a landlord, rented out his property to the defendant on the belief and on the condition that the said lessee was foreign due to the fact that under the old rent laws, Maltese persons had a right to the automatic renewal of the lease agreement. In this case, the landlord found out that the person was in fact a dual citizen and the defendant demanded to stay in the property as he had a right of renewal.

The court of first instance stated that for the notion of error of person to subsist, the mistake must have been made concerning the identity of the person. Since the nationality of the person was not considered to be an issue of identity, the Court stated that the tenant had a right to remain in the building.

The Court of Appeal pointed out that the principal object of the case is vitiation of consent, which is regulated by Article 976(2) of the Civil Code. The Court overturned the judgement of the first court and the landlord was given back possession of the property on the basis of this provision, which states that an error regarding the person

one is contracting with does not annul the agreement, unless the choice to contract with that particular person is the main cause of the agreement. The Court held that the notion of error of person includes both the identity of the person as well as his/her characteristics. The Court concluded by reasserting that the personal quality of the defendant, his nationality, was a determining factor for consent to be granted. Since the landlord only rented the property to the tenant on the belief that he was foreign, the contract had to be annulled since this had been the principal reason behind the landlord's agreeing to the tenancy. The Court said that *"person"* relates not only to the identity of the person but also to certain important characteristics of a person. Thus, the error may also be based on some quality or characteristic of a person, as long as that character/quality was the principal inducement for the conclusion of the contract.

Error of Law

Error of law is found in article 975:

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

What we mean is not that the individual does not know the law, which remains no excuse, but rather it is the false belief that the law forced an individual into a contract. The law must be a primary inducement in the contract. Especially in rent laws, there were cases were individuals believed that under the rent laws they were forced to accept a certain rent despite it falling well below the market rate. *Vide* the case of ***Borda v. Borg*** (1946) in which the owner reduced the rent because he felt that he was obliged to do so because of the laws governing rent at the time.

Error of law does not mean ignorance of law but error of law. One cannot cancel a contract because one did not know the law, but only because one's error of the induced one to enter into that contract. The fact that a person did not know the law is no excuse.

- One cannot use one's error of the law to hide one's inaction. E.g., One did not know the loan was subject to a 5-year prescription.
- It can only be used positively. One did this because one thought the law made one do it, e.g., lower the rent of his property.

For instance, X enters into contract with Y thinking that he is obliged by law to do so. Eventually he realises that this is not so. He may seek to have that contract annulled by bringing a rescissory action within 2 years from the discovery of the error. If he has already started fulfilling his obligations, he will most likely not be able to recover his actions on the basis that a natural obligation would have most likely arisen (assuming that there is a legal link between X and Y that the law does not want to recognise). Nevertheless, the rescissory action can at least get him off the hook from having to continue performing the obligations entered into as a result of a mistaken belief of law.

In the case of ***Frendo v. Newcombe*** (10/10/1932) the court made it clear that we are not speaking of ignorance of the law but of error of the law. The action in this case of error (whatever type it is whether of person, fact or of law) gives rise to a relative nullity

not absolute nullity so the contract is valid until it is annulled by the party whose consent is vitiated. The other party cannot bring the action. It is only the person who is in error who can bring the action for the nullity of the contract that is why it is the case of relative nullity, and the prescriptive period is that of 2 years from when you discover that mistake.

Why is the prescriptive period so short?

An important consequence of rescission is that it effects third parties also, such that if one were to sell one's house to another, who in turn sells it to a third party in good faith, and within the stipulated two year prescriptive period one brings forward an action for rescission which results in the cancellation of one's original sale on the basis of error, then it is not only that act which is cancelled but any subsequent act therefrom, in this case the sale to a third party, in spite of his being in good faith. As a result, the *status quo ante* is returned to. Hence the need for a short prescriptive period of two years.

Error of Fact

The error of fact is the more problematic of the three. We note from jurists that there are three types of error of fact: first, error *in negotio*; second, error *in corpore*; and third, error *in substantia*. The Maltese law deals only with the last. The first two are both errors which can give rise to nullity of contract. Here, dealing with the vices of consent as established in the Code, if there is a defect it is not that the contract is null, but it is annullable. Error, violence, and fraud, as defined in the Code, give rise to relative nullity, meaning the contract is valid until the person who claims his consent is vitiated manages to annul the contract. All vices of consent are subject to relative nullity. In the aforementioned case of *Roth v. Abela,* the plaintiff claimed her consent was vitiated and she brought the action. Because it was a question of relative nullity only the person who claims their consent was vitiated can raise the vices of consent. However, error in corpore and error in negotio, which are not mentioned in the law, give rise to absolute nullity. As such, any interested person may raise the plea of nullity in this situation. The Code does not deal with cases of absolute nullity.

Error in negotio

Error in negotio occurs when there is no agreement on the type of contract that the parties are discussing or whose discussions the parties have entered into. Take, for example, a scenario in which one party thinks money is being granted by way of loan whilst the receiving party believes the money is being donated. This would give rise to absolute nullity in the contract which can be raised by any interested party. This is a principle established by doctrine.

Error in corpore

Error in corpore is an error with regard to the object being discussed. Take, for example, a scenario in which a person believes they are purchasing flat no. 4 whilst the seller believes they are selling flat no. 5. This often arises in cases where persons purchase property on plan. These two errors give rise to the absolute nullity of the contract, and neither are discussed in the law.

Error in substantia

Error in substantia, on the other hand, is an error on the substance of the thing. There would be agreement on the contract and on the object, but there would be a mistake on the substance of the thing. Article 976 states as follows:

> **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.*

This has created a lot of issues, namely, by raising the question as to what the substance of a thing is. Are we to determine it subjectively or objectively? Is the substance of a thing the same whatever the circumstances of the contract or person may be? Or is it subjective, namely that the substance is related to the contracting party. There were various theories in the past. Some jurists leaned in an objective direction. For example, the objective substance of a car would be the parts that compose it. According to this theory if one determines in an objective way the substance of the thing is always the same. Other jurists agreed with this but added the fact that we must accept that the substance may refer to something else of the object that the parties agree is the substance, i.e., agreement on what consists of the substance of the thing. A purchaser may only agree to purchase a car on the basis that it has a particular quality, therefore making that quality part of the substance of the thing.

However, other jurists promote the subjective view of substance, with the leading ones being Giorgi and Ricci. This means that the substance is how the contracting party was looking at the object. The former writes that substance is that quality of the object, which was the determining motive of the contract, that is to say the reason as to why the parties entered into the contract. The example most used is that of a ring which is both gold and antique. One may purchase the ring because it is gold, making it subjectively the defining substance. If the ring is not gold he can annul the contract, but if it turns out to be new, he cannot. Contrastingly, another individual can agree to buy the ring purely because it is an antique, meaning whether or not it turns out to be gold being immaterial. As such, the substance of the ring changes in a subjective manner between the individuals who agree to purchase the ring.

The subjective view is how the contracting party looks at the object and that quality which makes him enter into the contract. If the case is taken to court, it must be proven which was the subjective substance for the purchaser. On the other hand, the objective substance is invariable and must be determined by the courts. In Malta we take the substantive view.

The leading case is ***Cutajar v. Petroni*** (Court of Appeal, 15/06/1969) because here, the Court of Appeal discussed the issue, referred to the various authors on the subject,

referred to the Maltese and Napoleonic Codes, and declared the substantive view to be the predominant one. The Court took a clear stance in an attempt to settle the issue once and for all as to whether we follow the objective or subjective rule. The Court accepted Giorgi's reasoning and said that the substance of the thing is to be decided subjectively, stating:

> *"...zball ta' fatt li jivvizzja l-kunsens u jinvalida l-kuntratt ta' bejgh, ghandu jkun zball "in substantia" u dan l-izball jirrikorri mhux biss meta jaqa fuq u l-haga fiha nnifisha, imma wkoll meta jirrigwarda xi kwalita' principali jew essenzjali taghha; u l-kriterju biex jigi stabbilit jekk kienx hemm dan l-izball ghandu jkun subbjettiv, jigifieri li wiehed ghandu jhares lejn il-mod li bih il-kontraent li tqarraq kien qieghed jikkunsidera l-oggett tal-konvenzjoni: l-izball bizzejjed li jkun unilaterali: basta li jkun determinanti u skuzabbli".*

This is how we look at the matter when there is a mistake in substance of the thing. If one claims their consent is vitiated, they must prove that they saw a particular substance that determined their consent. This particular quality must be linked to the basis on which the consent is claimed to be vitiated. *Vide* the case of ***Cachia v. Vassallo*** (Court of Appeal, 20/10/1961).

In the case of ***Spiteri v. Associated Supplies Ltd.*** (Court of Appeal, 20/10/2003) plaintiff wanted to buy air conditioners for his residence. Since he lacked knowledge about which air conditioner to choose, he left the decision to the salesman. After their installation, it resulted that two of the air conditioners were too powerful and disproportionate in comparison to the size of the rooms they were needed in. plaintiff sued, requesting the court to declare that the two air conditioners were too big, that the sale should be null and rescinded, and that the sum paid should be returned.

The Court of Magistrates declared the *actio redhibitoria* and *actio aestimatoria* irrelevant as there were no latent defects which render the product unfit for the use for which it was intended. It went on to say that the defendants were obliged to provide plaintiff with the correct technical information and advice, therefore acting in good faith during negotiations (i.e., during the pre-contractual stage). Due to the lack of good faith on the part of the defendant company, at the moment of completion of the contract there existed a *"zball essenzjali"* which renders the contract null and without effect.

The Court of Appeal's decision was based on the good faith which should be shown throughout negotiations by all parties involved. The Court referred to Article 976 of the Civil Code which states that an error of fact shall not void the contract unless it affects the substance of the thing itself which is the subject matter of the agreement. Such error of fact must be:

1. Determining: i.e., *"… minghajru l-parti li tkun ikkuntrattat dak l-izball ma kinitx taghtu l-kunsens taghha kieku kienet taf fil-verità"*,
2. Substantial,

3. Excusable.

The Court noted that an error was deemed to be excusable *"meta jkun kawzat mill-fatt tal-parti l-ohra"*, noting however that *"m'huwiex skuzabbli dak li wiehed jaqa' fih meta l-fattijiet li ghalihom jirreferixxi dak l-izball kiertu facilment accertabbli".* It agreed that it was easy for plaintiff to be under such error. The contract was subsequently rescinded, and the plaintiff refunded.

Another issue dealing with substance, other than whether or not is subjective, is whether it is to be unilateral or bilateral. That is, should the person who claims his consent is vitiated have declared to the other party what he believes the substance is to be. Here we find a fundamental change between our position and the Italian position. According to Giorgi and Ricci the position was that it was enough if it was unilateral, meaning the substance need not be declared to the other contracting party. This is in line with the will theory prevailing at the time. Today, the modern Italian Code no longer accepts this view, using the bilateral view of error instead. It is said that it is not fair to annul a contract on the basis of an error which the other party could have corrected had he been made aware of what the other party considered to be the substance.

Under the Maltese system it is not necessary to disclose one's subjective view of substance. The Italian view is based on the theory of good faith where both parties are honest with each other. In Italy the position is that substance is subjective but must be made known to other parties. In Malta the view is still held that the error is enough if it is unilateral because according to jurists a unilateral error vitiates consent in which case the contract is null. In *Cutajar v. Petroni* a declaration to this effect was made. Some courts have tried to modify this unilateralist view, arguing that it is unfair, but as far as consent is concerned the substance of the thing is to be determined subjectively and it need only be disclosed unilaterally. This is the traditional will theory of error. There are some judgements which have cast doubt on the unilateral theory in Malta, but the authoritative view continues to uphold it.

In the case of ***Pisani v. Mamo*** (First Hall Civil Court, 11/11/1933), plaintiff made a purchase from the defendant and claimed that when the time came for him to buy the object, he was asked for a sum that was higher than what they had previously agreed upon. It was claimed that this amounted to an error of fact regarding the substance of the thing which was agreed upon.

The Court did not enter into the merits of whether the error was excusable or not. On the contrary, it stated that the nullity of the contract cannot occur when the error of fact does not concern the substance of the thing which is the object of the contract. What must therefore be established is whether or not the quality of the thing lacking was so necessary that without it the contract would not have been concluded. Should the error, however, be the result of gross negligence which would have been avoidable if slight diligence was used, then the error cannot be regarded as excusable.

In the case of ***Cachia v. Dr Frank X. Vassallo*** (Court of Appeal, 20/10/1961) plaintiff bought two pieces of furniture from the defendant, believing them to be genuine

antiques. The defendant's wife had misled the plaintiff into believing that they dated back two-hundred and ninety years. it eventually transpired that the furniture was not truly antique. Plaintiff argued that had he been aware of this, he would not have bought the furniture.

The Court said that in order for error to vitiate consent, it must constitute an error *in substantia*, which includes not just errors of the object itself, but also errors relating to the principal or essential characteristics thereof. In order for error to be established, one must use a subjective criterion and must look at the way in which the deceived party claiming error was perceiving the object being the subject of the contract. An error must be determining and excusable, nonetheless. It was explained that even if in the contract itself the adjective "antique" was not used, if that was the obvious sense of the agreement (that it was an antique) then the contract could be annulled. The court said that if the plaintiff had purchased the furniture with the uncertainty of whether it was an antique or not, he could not later raise the plea of error *in substantia*; however, in this case the Court ruled in favour of the plaintiff.

Excusableness

Another element in error was not accepted by Giorgi and Ricci but which other authors accepted to determine the effect of subjective unilateral errors on trade. Therefore, the error must be excusable, i.e., not an error which can be easily corrected through minimal investigation. The Courts hold that one must protect his interests, and if one does not probe any bones of contention, the error cannot be considered excusable. A person should exercise the diligence of the bonus paterfamilias. Would the bonus paterfamilias check out some things before buying a particular object? One should not annul a contract on the ground of mistake that could easily be checked and thus avoid falling into error.

In the case of ***Borg v. Grima et*** (Commercial Court, 03/06/1994) Grima and another person, Edmond St. John, had personally acted as sureties *in solidum* for the plaintiff. When the principal debtor failed to pay the debt, the bank brought an action against them both to recover the sum loaned. St. John argued that he was not aware of what was written on the contract, as he had not read it. He alleged that when he had signed the bank guarantee form, he thought he was simply giving the bank a specimen signature. He thus sought to annul the contract on the basis of error. The Court dismissed this assertion, explaining that even if there was an error on his part, this error was brought about by his negligence and was certainly not excusable. One should always read the contents of a document before signing it. It was also stated that should he have read the document and not understood it, he should have requested that it be explained to him.

Recently, with regard to the alienation of immovable property, it has been said that once someone has made the necessary searches, they cannot make claims that they were unaware of any burdens on the property. One should be prudent and take the necessary steps to avoid surprise after the contract.

In the case of ***Piscopo v. Filetti*** (First Hall Civil Court, 15/06/2003) it was declared that mistakes of fact must be excusable and that if one can discover the facts of the

thing in an easy manner then the mistake would not be excusable. In the aforementioned case of *Bog v. Grima* it would have been easy for Grima to ascertain what it is he is signing but he failed to do so. In *Piscopo v. Filetti* plaintiff purchased a second-hand car and was told by the owner that the car was two years old when in actual fact it was older. He instituted an action for mistake of fact, but the court declared that he could have easily ascertained the true age of the car by checking its logbook. Therefore, the court refused to annul the sale on the grounds that the mistake was inexcusable.

In the case of ***Gourmet company Limited u Domenico Savio sive Savio Spiteri v. Mariano Vella*** (19/11/2001) Plaintiffs and defendant had entered into a lease agreement. Four years after the agreement had been reached, the plaintiff started alleging that he was not aware of the conditions (the amount of rent) that had been agreed upon, and he brought forward the argument that he had not read the second agreement they had entered into as he was illiterate. Thus, the agreement had an error which dealt with the substance of the agreement.

Both the Court of First Instance and the Court of Appeal dismissed his plea as they were satisfied that the plaintiff had consented willingly to the second agreement. The court of appeal stated that agreements which are entered wilfully create binding obligations between the parties. Moreover, the Courts insisted that the fact that the contract had been read to the parties and that the plaintiff had legal assistance continued to confirm that he was indeed aware of what was stated in the contract. The Court also said that it is up to the person who alleges something to bring clear unequivocal proof and in the absence of this, the action would fall. For these reasons, the Courts saw no reason to decide that there had been any error or lack of consent on the part of the plaintiff.

In the case of ***Charles u Mary Kunjugi Spiteri v. Associated Supplies Limited*** (20/10/2003) plaintiffs had gone to the defendant in order to purchase a couple of air conditions, knowing very little about the subject. The plaintiff left everything in the hands of the defendant. The latter had initially informed the plaintiffs that the company would have sent over a specialized individual to calculate the exact size required. Yet just a couple of hours after he had visited the shop, the plaintiffs received a call by the defendant telling them to go and pay a deposit in order to secure the appropriate units. Later on, the defendant supplied the Spiteri spouses with air conditions which were too powerful for the rooms they were placed in and as a consequence they created a multitude of inconveniences. The plaintiffs eventually sued the defendant not only for the annulment of the sale, but also for the full reimbursement of the money paid.

One of the claims brought forward by the plaintiffs was that the units they had been given were different in quality and power from what they had agreed upon. The Court went into the fact that the salesman who was in charge of the sale made to spouses Spiteri was acting on behalf of the company and thus any intention the salesman reflected the intention of the company. Thus, the Court declared that it had acted in bad faith by not disclosing proper information, and thus misguiding the plaintiffs into purchasing something different from that requested and needed. The Court thus accepted the plaintiff's assertion that the agreement was vitiated by an error in

substantia, saying that owing to the nature of the sale, it was easy for the plaintiffs to be deceived, leading them to purchase objects which were not of the required quality.

Determining Factor

The fourth element is that it must be shown that one enters into the contract as the result of the error, i.e., one would not have entered into the contract were it not for that error, as shown in the case of ***Micallef v. Dimech*** (Court of Appeal, 06/12/1990). Any case based on *error in substantia* must show the presence of all four of these errors. Once there is an error of fact then the contract can be rescinded. However, it was worth remembering that in this case it is relative nullity which applies. *Error in substantia* is regulated in the Code and is a case of relative nullity, as is error of person and error of law. Cases based on error are extremely common.

A case in point is ***Cassar v. Pace*** (First Hall Civil Court, 02/11/1986) in which plaintiff bought a particular Land Rover with various accessories and modifications. When he bought it and applied for the license to drive it, he was told that he could not drive it on the road on account of those accessories and a lack of specific licensing. This person had specifically bought it because of the said accessories and modifications, and therefore he sought to annul the contract on the ground of error *in substantia.* Defendant held that there was nothing in the agreement which indicated that the sale was conditional on the car passing a test for the issuance of the license to drive it with the said accessories and modifications; arguing that the grounds on which the plaintiff was basing his argument did not give rise to the nullity of the transfer.

In considering what the substance of the car was, the Court claimed that the subjective theory should be applied, meaning that consideration had to be given to what the buyer expected to find in the thing bought and for what he bought it. Therefore, if for the buyer, the extras were what made him decide to buy the car, an error of fact occurred as he believed he could drive the car with such extras. The Court placed the responsibility on the seller to have explained the situations. Despite the Court not finding bad faith on the part of the seller, the contract was nevertheless annulled.

In the case of ***Zarb v. Xuereb*** (First Hall Civil Court, 13/10/1998) plaintiffs had contracted with the defendant to acquire a property under a title of emphyteusis for a period of twenty-one years. Some time later, they were informed that a substantial part of the property was going to be expropriated. They therefore called on the defendant to annul the agreement; however, the defendant refused. The plaintiffs pled that the agreement was vitiated by an error *in substantia.* Plaintiffs argued that had they known that parts of the property were going to be expropriated, they would not have entered into the contract. The defendants held that the expropriation had not yet taken place and therefore the plaintiffs' case was built on a hypothesis. It was also held that it should have been the plaintiffs' responsibility to check that there were no burdens on the property before contracting. The Court concluded against the defendant, stating that the contract was concluded in bad faith. The Court therefore agreed that the error was excusable, and that the defendant should have warned the plaintiffs of the possible expropriation. The contract was vitiated and therefore was rescinded.

Conclusion

To recapitulate, we can say that there are four essential elements in order to have an error in substantia. The error must be: (a) unilateral, (b) subjective, (c) excusable and (d) determining.

Generally, it is the excusable element that fails in this action. Through these elements, the Courts have arguably managed to create a fair balance between the rights of both parties involved in a contract. From a comparative perspective, one will find differences. The French courts do not interpret the unilateral theory literally. They are also moving towards the affidamento theory for it seems to be fairer.

If I succeed in having a contract annulled on the basis of error, am I liable in damage? For instance, am I am liable in damages to the seller for the for the fact that the time wasted during which he would have been able to sell the object to someone else? Although jurists disagree, our Courts have always followed Giorgi who says that since I have a right to have a contract annulled on the basis of error, then I cannot be held to be responsible in damages for exercising that right.

Topic III.III: Violence

The law deals with violence as a case of relative nullity, not physical violence which gives rise to absolute nullity. The law here speaks of threats of violence rather than violence itself. The law, in article 977, states:

> **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.*

It is different from fraud which must come from the other contracting party. Violence can cancel the contract even if the other party is in good faith and the threat of violence is made by a third party. We are referring to moral violence, i.e., threats which makes a contract annullable, i.e., valid until annulled by the party who claims to have a defective consent. Hence, this is a situation of relative nullity because for all intents and purposes the contract is valid unless and until the injured party seeks to annul the contract.

The Elements of Violence

Unjust

Something which goes beyond the exercise of one's rights. There have been cases of people trying to annul contracts on this ground as they claim that they were threatened with judicial action, but this is not violence. Therefore, the exercise of one's rights does not give rise to unjust violence.

In ***Terranet Ltd. v. Linknet Ltd.*** (11/03/2003) defendant's company was an internet service provider who had sold its services to the plaintiff. The defendant failed to render the agreed upon service and, as a result, plaintiff's company begun incurring losses, including reputational losses. Consequently, plaintiffs stopped paying the defendant from November 1997 to May of 1998 due to the breach of a contractual obligation. Furthermore, in October 1998, a meeting was set up for an agreement to be reached regarding the debt in question, and to extend their contract for internet access services. However, the defendant declined to give a copy of the contract unless the plaintiff signed a different contract confirming the debt owed and giving a personal guarantee in its regard. Thus, defendant company was unwilling to extend its services.

Although the plaintiffs agreed to sign the contracts, the presence of their wives was required in the signing of the contract for personal guarantee due to the rules governing extraordinary acts of administration of their respective communities of acquest. Therefore, it was agreed that the contract would be signed the following day,

signing only the contract of service. Consequently, the plaintiffs were not given a copy of the contract since the other contract still had to be signed. Later, plaintiff argued that the notary had not read aloud and explained the contract and, therefore, brought an action to rescind it. They also held that their consent was vitiated by violence, since the defendant threatened the plaintiff that if they did not sign, establishing the debt they owed, their service would cease. The defendant held that these were unfounded allegations. When the plaintiff did not repay the debt, defendants affixed a time period during which the plaintiff company had to be sold. The plaintiffs never denied the debt, and when the sale was not concluded, the plaintiffs provided for a way in which the payment could take place through a period of time, including interest, since the company had closed down. It was only at this point those allegations of a null and void contract arose.

The Court held that the requests by plaintiff were *messa in xena*, having found themselves in financial troubles and, as a result, trying to escape their obligations. The Court also concluded that the defendant's threat to stop providing their services did not amount to moral violence, since it was their right to protect their own interest in ensuring that the payment is guaranteed. The Court noted that in the internet service access contract it was clear that, should the other party not fulfil its obligations, no automatic renewal of the contract would take place. It also resulted that the contract constituting the debt was not signed on the same day as when the alleged violence took place. therefore, the plaintiffs could have easily decided not to go through with the publishing of the contract. Lastly, the Court noted that the evidence for the other allegations was conflicting. Moreover, the affidavits presented by the plaintiffs were all identical, and therefore thought to be planned purposely to support their claims. In contrast, the notary and the defendants both testified that the contract was explained and read to the parties. the Court concluded that the plaintiffs did not have any respect for the truth; therefore, ruling against them and mandating that they pay all expenses incurred by the defendant. The threat to institute legal proceedings is not violence for purposes of the law.

In the case of ***Eurobridge Shipping Services Ltd v. Scicluna*** (First Hall Civil Court, 30/04/2001) Eurobridge rendered various services and was paid by cheque by Scicluna. On numerous occasions the cheques bounced. Eventually Eurobridge told Scicluna that this was tantamount to fraud and said they would not continue offering services unless Scicluna signs bills of exchange as guarantee. Scicluna did so but again he did not pay and so Eurobridge sued him. Scicluna pleaded that the agreement was null as it was tainted by violence since he had only signed after being threatened. However, the Court determined that it was within Eurobridge's rights to stop providing services against non-payment and make the defendant sign a bill of exchange.

Similarly, in the case of ***Zammit Cutajar v. Debattista'*** (Commercial Court, 27/07/1989) there was a situation where a person had issued a series of dishonoured cheques. The other person had told him *"You either pay up in cash now or I will report you to the police"*. Consequently, he did so. Later, he claimed that he had only paid because he had been threatened. Nevertheless, the Court said that this threat was not unjust and therefore his claim to have the contract annulled was not accepted.

Grave

Here the law gives us an indication of what it means by a grave use of violence in article 978 and invokes the reasonable person standard:

> **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.*

As such, this creates a subjective test for the courts. Article 978(2) tells us that the age, sex, and condition of the person should be taken into account, marking a departure from the typical standard of the reasonable man. Violence must be grave according to the reasonable man test. Not all forms of threats shall be considered serious enough to constitute violence which can potentially lead to the nullity of a contract. One must consider whether the violence was grave enough to induce a person to do something out of this fear. Thus, there is both an objective and subjective test. It is for the Court to decide if there is violence as required by law.

Article 979 indicates that one need not threaten violence against the contracting party *per se*, but that violence can also be threatened against the contracting party's spouse, descendants, or ascendants:

> **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.*

Article 979(2) gives a discretion to the court to void the contract or affirm its validity if the threat is directed against the person or property of persons not listed in article 979(1). Threats against those listed in article 979(1) give rise to a *juris et de juris* presumption that the contract is void whereas in article 979(2) the law gives the court the discretion to decide whether or not the threat actually had a determining effect on the victim's consent.

Article 980 states that:

> **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."*

There are cases were persons sign out of fear for of parents but unless violence is used this shall not invalidate the contract. Reverential fear is fear of respect for a person like a parent. This is not violence. As a general rule, fear on its own is not enough, unless that fear was induced by violence consisting in threats towards your (or someone else's) person or property.

In ***Camilleri v. Vella*** (Court of Appeal, 9/06/2003) it was established that no threats of violence were used against an old woman in spite of the fact that banging on a table and shouting took place at a meeting, due to the fact that no threats of physical violence were used.

In the case of ***Timothy Borg v. Dolphin Supermarkets Ltd.*** (First Hall Civil Court, 13/06/2003) plaintiff was a floor manager who was employed with the defendant company. He signed a resignation letter noting that he was responsible for the payment of a missing sum of Lm400. Plaintiff claimed that the contract was null as his consent was vitiated due to moral violence at the time of his appearance on the contract and that he was forced to sign against his will. Defendants claimed that there was no undue pressure and therefore the agreement was legally valid and binding.

The Court did not uphold the plaintiff's claims. The plaintiff had admitted that he had actually written the agreement; writing what was dictated to him by two managers. The fact that the two managers were shouting and making a commotion did not amount to a threat as claimed by the plaintiff, despite his timid and reserved nature. It could not be said that the conditions were such that the plaintiff could not resist such pressure. He was working in a familiar environment, where he had been working for a number of years and had a good rapport with his managers. The Court added that Borg had claimed that he had been threatened by the managers that a police report would be filed if he did not admit to the accusations of misappropriation. The Court held that it was normal in such circumstances for reference to be made to a police report. One could not conclude that the circumstances were such that Borg had been under irresistible pressure to sign the document and Borg had himself confirmed that no physical threats had been posed to him. Therefore, the claims of the plaintiff were not considered sufficiently proven.

Violence Arising out of a Natural Cause or Economic Duress

Article 977(2) refers to an instance in which violence is practised by a third party, which constitutes violence for the purposes of the law. This refers to a situation where a person is a victim of violence by a third party and enters into a contract with a good faith party to free himself from the violence. Here, the contract is valid subject to a reduction of the corresponding obligation. This is in line with the Roman Law principle of average. Essentially, under Maritime Law, when a ship is in danger of sinking and another ship goes to help it, the latter ship is entitled to compensation based on what it deserves (based on the extent of the danger, the effort invoked, the size of the ship, etc.). If violence is caused by natural causes and one enters into the contract to be free of those causes, the Court shall determine how much the individual deserves by

having helped free the person from violence. For this to take place the person must have entered into the contract to help free the person from violence, even if such violence were natural.

The example typically given is one where an individual helps another to leave a burning house in exchange for €10,000. The Court would invalidate the agreement and instead give the individual compensation based on what it feels he deserves. What the English call economic duress is not violence in the sense of the law in the sense that just because one has his back against the wall and must enter into a contract to relieve his business it is not rise to violence. However, the contract would be void if the cause of the economic duress is the result of actions or omissions by the second contracting party.

In the case of ***North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.*** ([1979] QB 705) a ship was ordered to be built in South Korea under an agreement for the payment of a sum in dollars. During the running of the contract the dollar was devalued with the consequence that the sum promised in the agreement did not have the same value that it did at the time when the agreement was signed. Therefore, the construction company wanted to increase the price to reflect this change, but North Ocean refused. The construction company insisted on an increase in price and went on strike. Plaintiff insisted on the delivery of the ship but due to other contractual obligations it paid the increased price to avoid the strike and took delivery of the ship before citing economic duress. The court agreed that this violence practised by the other contracting party. Legally, Hyundai had no right to insist on the increase in price. If one agrees to deliver on an agreed price, then it is that price which must be paid.

In ***Soler v. Campbell*** (FH CC, 1949) it was held that economic duress does not vitiate consent because moral violence must come from a particular quarter.

Determining

It must be proven that the violence is the determining factor and that without it the individual would not have entered into the contract.

Third Party Involvement

Violence can be produced by not only the obligee (the party in whose favour the contract was made) but also a third party. Even if the contracting party is in good faith, even if there is violence by someone else, there is still error of violence.

- If the obligee was an accessory to the violence exerted by this third party, it shall be sufficient to lead to the nullity of the contract.
- If the obligee was unaware of the violence that had been exercised by the third party, the contract may not be annulled but the Court may re-consider the terms and conditions and may alter them if it finds that these terms were excessive and to render them fairer and just.

E.g., X threatens Y to sell his house to Z for a ridiculous sum of money. Y does so. All along Z was unaware of X's doings and grabs the opportunity to buy Y's house. That

sale may not be annulled but the Court may order that the price be re-adjusted to reflect market values. Here, one can note that the law seems to strike a fair balance between the rights of the victimised party and the rights of the other party who was acting in good faith.

In the case of violence occasioned by a natural cause, in Art.977(2), the law holds that "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." The law says that the contract is valid, but saving the reduction of such sum where it is excessive. This is the Roman law principle of salvage, whereby if one saves a ship from wreckage, he is to be given compensation.

E.g., X threatens Y to do something and if he fails to do so, X will burn Y's house. Y goes to a lawyer and the lawyer sends a letter to X telling him that Y will take legal action against him and report him to the police unless he stops harassing him. The lawyer then charges Y for the services rendered in freeing Y from the violence exercised by a third party (X). Y cannot refuse to pay the lawyer by saying that this obligation towards the lawyer is the result of a violence exercised by a third party. Nevertheless, if the lawyer takes advantage of Y's fragile and helpless state and charges him an exorbitant amount of money, then such amount may be reduced (if the price had been agreed upon prior to the lawyer's intervention).

Topic III.IV: Fraud

The third vice of consent, article 981 states:

> **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.*

The fraud must be practised by one of the parties to the contract and it must be determining such that the defrauded party would not have entered into the contract had the fraud not taken place. Frauds inevitably leads to error, and it is found that the two vices of error of fact and fraud are claimed together. It is possible as fraud leads to error of fact, but the error derived from fraud need not derive from the substance of the thing so long as it is the fraud which gives rise to the error.

If I am deceived, then I am mistaken. Fraud and error are often brought together, and the former leads to the latter. Error alone does not amount to fraud. If A deceives B, then B subsequently enters into a contract under a mistaken frame of mind. Nevertheless, the difference is that whereas an error is independent of the other party to the contract, fraud relates to those situations where the error is induced by the machinations of the other party. When fraud is involved, the error need not regard the substance of the thing but may be related to other aspects. Therefore, discussions on the substance of the thing are superfluous when dealing with fraud.

In situations when fraud is exercised, the contract may be annulled. So here we are referring to relative nullity and not absolute nullity. Unless a Court is satisfied that fraud was really exercised (and satisfying the conditions outlined below), the contract shall be valid. Moreover, the maxim *probandi incumbit ei qui agit* applies here (he who alleges, must prove), and therefore to annul a contract on the basis of fraud, one must have a solid case- mere allegations/assertions are not enough.

The prescriptive period to bring an action to annul a contract on the basis of fraud is that of 2 years, starting from the time when the fraud was discovered.

The Elements of Fraud

1. **Intent to deceive on the party of the other party:** There is an intentional act by the other contracting party. Thus, an innocent mistake or omission by the other contracting party does not amount to fraud. It must be shown that the other wilfully and intentionally wanted to deceive you. It is not easy to prove intention especially by direct evidence. The other party will obviously deny any intention. From the facts and circumstances of the case, the Court will come to a conclusion.

2. **The fraud must be grave:** The fraud must be such as to have an impression on a reasonable man, taking into account the age, sex, and condition of the

party who claims that his consent was vitiated. Furthermore, it must be of a serious nature. Tricks of the trade are generally accepted and not considered fraud. *Vide* the case of ***Cachia v. Cachia*** (1957) and ***Elaida v. FXB Ltd.*** (Court of Magistrates, 7/12/1998)[1]. In the latter, the wood of a furniture was described as solid oak when it was not with the court declaring this as a generally accepted trick. In ***Cauchi v. Borg*** (Court of Appeal, 11/06/1992) a tenant insisted with the landlord to repair the rooves of the tenement. The landlord knew that whatever expense he may have to incur could not be recovered through a rental increase, so he tried to avoid incurring any expenses. The tenant threatened that if the roof were not repaired, she would bring a niece to live with her, and so he agreed to sell it for a small price. Eventually the landlord learned that the niece never intended to live with the tenant, and he opened a case against her in order to have the sale cancelled on the ground of fraud. The court, however, refused, saying that the deceit was not that grave but was to be expected of her as a tenant.

In the case ***Piscopo v. Filetti*** (First Hall Civil Court, 16/06/2003), prior to purchasing a second-hand car, a buyer asked for its age and was informed that it was around two years old. After the purchase, he subsequently realised that the car used to be rented and that it was four years old and therefore sought to annul the purchase. The buyer said that he had bought it due to the fact that it was recently manufactured and therefore claimed that he had been deceived by the defendant on the grounds of error because he would not have purchased the car otherwise. The Court stated that although this was an error, the buyer was expected to take precautions prior to purchasing, such as checking the logbook, inspecting the car, etc. Since the buyer had failed to inspect the car

[1]Plaintiffs Mohammed and Doreen Elaida bought two pieces of furniture from the defendant, a furniture company. Plaintiffs claimed that the salesman had assured them that the two pieces of furniture bought were made of solid oak. After the sale and delivery, plaintiffs discovered that certain parts of the furniture were made of chipboard. The plaintiff sued for damages, stating that the furniture was made of a different material than that agreed upon. The arguments put forward were:

- The reason he had bought the furniture was due to the fact that the furniture was made out of solid wood,
- The defendant acted fraudulently by not being upfront about the material during negotiations.

Therefore, the plaintiff brought an action to annul the contract and recover damages. The defendant argued that the plaintiffs could have easily checked and inspected the furniture in the showroom, and that the object had been delivered in the same condition as it was then.

The Court of Magistrates decided that this was not a serious case of deceit. it was held that the *"raggiri"* used by the salesman were not of a sufficient degree of gravity to annul the contract. It was further pointed out by the Court that plaintiffs could have easily inspected the furniture to check whether it was made of solid wood or not as a precaution prior to purchase. The Court further noted that tactics used by salespersons to make a sale were normal practice.

This case is in line with the judgement made in *Piscopo v. Filletti*, where the Court stated that error (fraud) is not a valid argument to raise where the true facts were easily ascertainable through inspection. Where this may be done, the error is still excusable. Through these judgements, the Court have further weight to the stability of contracts, seeking a fair balance between protecting people from fraud whilst at the same time not undermining the strength of a contract.

himself, he was buying at his own risk and, therefore, the Court determined that the error was not a sufficient ground to annul the contract. Courts often dismiss actions based on an error of fact *in substantia*, not due to the elements of unilaterality or subjectiveness, but due to a lack of excusableness of the error.

The judgement of ***Mifsud v. Bonnici*** (Court of Appeal, 04/06/1910) is often quoted for its statement that every reasonable person entering into a contract must take the necessary steps expected from him in order to ascertain the facts given to him. If he fails to do so, he cannot be given the protection of the law.

3. **The fraud must be determining:** It must be determining in the sense that one enters into the contract because of the fraud. If one would have entered into the contract anyway even if under different conditions, then one is not entitled to claim fraud to vitiate one's consent. In this case one can sue the party who deceived him for damages but would not be able to claim fraud.

4. **The fraud must have taken place with the participation, active or passive, of the other party:** Fraud, unlike violence, must be carried out by the counterparty in the agreement. Violence would take effect even if carried out by a third party, but this is not the case for fraud. Likewise, a person subject to fraud from a third party can claim damages but cannot claim fraud for the purposes of vitiating one's consent.

5. **The fraud must be excusable:** In the case of ***Piscopo v. Filletti*** it was held that it is true he told a lie, but it was one which could have been easily ascertainable by asking for the logbook. In the case of ***Germani Mifsud v. Bonnici*** (Court of Appeal, 04/06/1910) it was held that every prudent and reasonable man, before he enters into a contract, has to ascertain the facts of the deal into which he is entering. If he does not take these measures, the law doesn't not offer protection for defence: *legis vigilantimus prossimus.* You must look after your interests.

Can silence amount to fraud?

This concept of fraud by silence cannot be excluded and is possible in certain situations. In the past, the stance taken was more rigid and tended to exclude this possibility. Today, the Courts are more willing to find deceit in silence, especially when what is going on in the minds of two persons is different, and this is brought about by one of the parties' wilful intent to deceive the other party through his silence. This is especially given due importance in those relationships where the parties are deemed to be on an unequal playing field, most noticeably a trader-consumer relationship. The position in French law is that "failure to disclose a matter which the other party has an interest in knowing and which the other party has a difficulty in finding out for himself constitutes fraud by silence". Most Italian authors agree that silence can constitute fraud but do not give a lot of details.

Jurisprudence

In violence there is the knowledge that what one is doing is not what one wants to do, whilst in cases of error and fraud one is unaware of the fact that one is mistaken. These are the three vices of consent mentioned in the law and the only such vices, as decreed in ***Micallef v. Micallef*** (22/02/2006) where it was stated categorically that no further instances in which consent can be vitiated exist, saving of course the vitiation of consent given by minors. In our Code lesion of minors is an objective form of contract nullification which results if, on an objective balance of probabilities, that a contract entered into by a minor may prove harmful to the said minor.

In the case of ***Anthony Hammett noe v. Vincent Genovese pro et noe*** (Commercial Court, 31/01/1991) the plaintiff's son had purchased disco equipment from the defendant whilst still under parental authority. The equipment was bought for work purposes; however, the minor was not emancipated to trade. A dispute arose when, after having partially paid for the equipment, plaintiff's son demanded the annulment of the sale after returning it to the defendant. The plaintiff's son wanted a full refund, stating that the equipment sold to him was defective. His argument was also based on the fact that he was a minor and that therefore he did not have the mental capacity to understand the nature of the transaction.

Whilst the Court considered the Civil Code's Articles on lesion, it stated that Article 1217(2) applied to the situation. This Article states that the notion of lesion cannot be relied upon when the minor had deceived the other party by misrepresentation. It was stated that the boy had presented himself as a fully-grown adult. The Court explained that the plaintiff's son had been working since the age of 14 and was paid weekly for his services. He had driven his car to the defendant's store and boasted that he owned considerable sums of money. The Court did not accept the argument made that the minor was 16 when the transaction took place and refused to annul the contract.

In the case of ***Petroli v. Mifsud*** (FH CC, 02/12/2022) plaintiff based his case on error and fraud but both were dismissed. The case was an unusual one as plaintiff had sold the *directum dominum* of a house subject to emphyteusis to his sister for one thousand euros. He later said that he discovered that there was a servitude on the house, the *altius non tollendi*, claiming that, had he known, the price would have been far higher. Parties who were buying to develop the house wanted to eliminate the servitude and so the direct owner was requesting a high amount of money to renounce the servitude to allow development. The court argued that if plaintiff did not know what rights he had over his own property it is his fault alone. This is interesting as one is never excusable for not properly carrying out searches. One cannot say one has been deceived either. Although the sister knew of the servitude, she had no obligation to inform the brother who should have known himself. The Court quoted various authors and previous cases in its reasoning. It stated that a mistake is inexcusable when the proper facts could have been ascertained with little due diligence. The case also went into the distinction of recission and annulment of contracts.

In the case of ***Spiridione Cauchi v. Amelia Borg*** (Court of Appeal, 11/06/1992) defendant lived in a house rented from plaintiff. Under the old rent law regime, once the property is rented out to the lessee, it is possible for that same lease to be passed

to another family member of the lessee through inheritance, without the lessor being able to object. Borg needed repairs to be done in the house which, under the rent regulation, were to be carried out by the landlord if they were of an extraordinary nature. Plaintiff did not wish to carry out the repairs and was told by the defendant that if he does not want to pay, he should sell her house to her. He offered a high price, which the defendant refused and countered with a lower one, which plaintiff in turn refused. The defendant informed the plaintiff that if he did not sell the house to her, she would bring her granddaughter to live with her, so that when she died the lease would pass on to her and her own children in turn. After considering this, the plaintiff gave in and sold the house at the lower price.

It transpired that the defendant's granddaughter had no intention of ever moving in, and the defendant's intention was not to keep the house for herself but to sell the house at a profit, which she did three days after acquiring ownership of the property by sale. Plaintiff requested that the sale between him and Amelia Borg be declared null on the basis of fraud and error *in substantia*, rendering the subsequent sale null also.

The court of first instance raised the fact that for a contract to be valid, it had to have valid consent, capacity, and *causa*. It stated that the plaintiff was fully aware of what was happening and had willingly signed the contract. On the basis of the fact that the plaintiff had been induced to believe the story that the granddaughter was about to move in, the First Hall of the Civil Court ruled in favour of the plaintiff and ordered the sale to be annulled, as the plaintiff had been defrauded. Upon appeal, the Court remained unsatisfied that the fraud was grave enough to merit the annulment of the sale. Such tricks were commonplace for tenants at the time. Furthermore, the Court pointed out that the other options were still available to the landlord, as he could have still decided to simply pay for the maintenance and stop there. The Court of Appeal reversed the judgement of the court of first instance.

In the case of ***George Grixti v. Eurostat Malta Ltd.*** (Court of Appeal, 10/01/2000) plaintiff bought a "SkyCard" from the defendant company, to be used for watching television programmes via satellite. After installation, the SkyCard was noted to be defective, with bad quality transmission. The plaintiff took the SkyCard in question to the defendant company, who charged him Lm8 to send it abroad for recoding. It later transpired that such card was not sent abroad, as it was a "pirate card", as SkyCards were only to be used for television transmission in England and Ireland. The plaintiff stated that this was not brought to his knowledge, but the defendant company argued that the plaintiff was aware of the nature of the card and possible effects. To that end, plaintiff brought suit on the basis of latent defects and fraud.

The court of first instance found for the plaintiff, stating that Eurostat Ltd. was not justified in offering a defective product. The SkyCard was affected with latent defects which, in turn, made it insufficient for the purpose for which it was bought. Quoting Italian jurists and jurisprudence, the Court highlighted the necessity for a latent defect to be determining in order for it be considered as such, such that the buyer would not have bought it had he known about it. The company could not be exonerated for responsibility for latent defects simply due to an exemption clause.

The Court of Appeal affirmed the judgement of the First Hall of the Civil Court, although different grounds were used to reach the same conclusion. It was held that the defendant company was fully aware that it was carrying out illegal commercial activity. It considered the testimony of representatives from the company as well as an advert which described SkyCards as "original subscription cards for SkyTV packages". Therefore, the contract of sale was vitiated through bad faith on behalf of the company. Furthermore, the importance of the consequence of the plaintiff not contracting if the fraudulent behaviour was upheld (Article 981(1)). The Court held for the plaintiff, rejecting defendant's appeal.

In the case of ***Camilleri v. Vella*** (Court of Appeal, 09/06/2003) plaintiff and defendant had signed a promise of sale concerning a garage in Luqa, which should have been transferred to the ownership of the plaintiff within six months of signing of the contract. After numerous attempts to contact the defendant, the defendant failed to appear on the contract of sale. Plaintiffs requested the court to order defendant to appear on contract of sale as well as compensate for damages resulting from the delay in the transfer of ownership. Defendant argued that the promise of sale agreement was vitiated by fraud and moral violence, and that the contract was therefore null and void.

The Court of first instance ruled in favour of the plaintiff. It ordered the defendant to appear on the final contract of sale as well as finding her liable for damages amounting to Lm2,500 due to the delay in performance of the contract. Defendant appealed, arguing that:

1. Under Article 1357(1) of the Civil Code, it was impossible to pay damages as well as perform a contract, as according to this article, damages are only payable if the contract is not fulfilled,
2. The consent of the contract was vitiated due to fraud and moral violence, and
3. The expenses were incurred by the plaintiffs willingly and not through any fault of the defendant.

The Court of Appeal confirmed the first judgement and ruled in plaintiff's favour. It stated that plaintiff was still entitled to damages under general law, which was outside the remit of Article 1357(1). Furthermore, although the defendant was an elderly woman, she was mentally sane and capable of expressing her will, and therefore, the Court did not consider the contract to have been vitiated by moral violence.

In the case of ***Eurobridge Shipping Services Ltd. v. Scicluna*** (First Hall Civil Court, 30/04/2001) plaintiff sued for the payment of two bills of exchange, which were accepted and had expired, amounting to Lm1020.70. Defendant argued that the bills were null since his consent was vitiated due to threats and moral violence by the plaintiff, and that he had never contracted any business with him. Defendant also argued that the bills were signed for prior services which was not personally bound to pay.

The Court considered the essential elements of moral violence and that in order for a contract to be annulled on this basis:

1. The violence must be the determining cause of the contract,
2. The consent must be a result of the violence exercised to obtain such consent and for no other purpose,
3. It must have been the other party, or a third party, who exercised the violence,
4. The violence must be determining, unjust, and grave, and leave both an impression upon the reasonable man as well as fear of grave harm to his person or property, and
5. It must not be the exercise of a right.

Defendant was fully aware of the effect of such bills of exchange, and it could not be said that the pressure exercised was of the gravity required by the Court. Given that the defendant was a businessman, he should also know how to deal with such situations, and he had previously carried out business with the plaintiff. In order for violence to be grave enough to vitiate consent, the threats or pressure made on the other party cannot consist of a simple exercise of the other party's right. The law relating to bills of exchange is intended to have payments effected as quickly as possible in commercial transactions. Therefore, the Court held for the plaintiff.

In the case of ***George u Miriam konjugi Portelli v. Ivan John Felice*** (First Hall Civil Court, 28/07/2004), in August 1999, plaintiff sold a van to the defendant for Lm6000, with Lm2000 being paid upfront and an agreement in place for the rest to be paid in monthly instalments. Defendant failed to pay, and thus plaintiff brought an action to this effect, asking the court to declare plaintiff as the creditor of the amount of Lm3598, or an inferior amount which the Court will liquidate. Moreover, plaintiff petitioned the Court to order the defendant to pay the outstanding amount, with 8% interest. In contrast, defendant asked the Court to refuse the plaintiff's requests, as the sale of the van was vitiated by fraud in relation to the object and its quality. It resulted that plaintiff had sold the van as a nine-seater, when, in reality, it was a seven-seater. Therefore, the defendant asked the Court to declare the contract null and void, and for the plaintiff to repay the amount of Lm2486.

The Court made reference to Article 974 of the Civil Code and held that for consent to be vitiated by fraud, it requires that misleading acts or means were used, are grave and determining, and such means or acts should have been carried out by the other party. Additionally, it noted that for fraud to be grave, a reasonable person would have been deceived by it. Also, for it to be determining it is necessary that the individual would not have entered into the sale if he was aware of the fraud. The Court held that the burden of proof lies on the party who alleges fraud, in this case the defendant. Moreover, fraud cannot be alleged when the facts can be easily established by who is alleging the fraud because, in such a case, it would be simply an excuse for one to escape his contractual obligations.

The number of passengers the van was capable of carrying was never specifically mentioned in the agreement and the documents shown to the defendant made it appear to be capable of carrying up to nine passengers. Moreover, it never arose during negotiations. It resulted that a request to the Public Transport Authority could have been made in this regard for the van to be given the possibility of carrying up to nine passengers, should the criteria established by the Public Transport Authority be

attained. In conclusion, the Court held that the defendant did not prove fraud in regard to the plaintiff. From the documents in possession of the defendant, it appeared that the van was capable of carrying nine passengers and, to that end, plaintiff was also under the same impression. The Court accepted the plaintiff's requests and ordered the defendants to pay the remaining balance.

Topic III.V: *Rebus sic Stantibus*

This rule means that when a person enters into a contract, he is basing himself on the conditions and circumstances that exist at that time. If the circumstances so change that performance of the contract would render it onerous, then he may not perform and rescind the contract. Here we have a situation where the contract is carried out normally with no other vice of consent, the parties have agreed, but in the meantime the circumstances of the case have changed drastically such that the contract will become too onerous to be performed. The English call this the doctrine of frustration, as the contract is frustrated by the change in circumstances brought about onerous terms prejudicial to the party who seeks to perform the contract.

Lord Radcliffe in ***Davis Contractors Ltd v Fareham UDC*** stated, *"Frustration occurs when, without default of either party, a contractual obligation has become incapable of being performed because circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract".* In German law, frustration occurs if circumstances have changed to such an extent that honouring the contract would lead a business to ruin or the brink thereof. However, the French follow the autonomy of the will theory and does not accept this rule, arguing that if one wants to cover oneself against such changes, they shall agree to the necessary provisions during the negotiation process.

In Malta, this rule had been first raised after the War when contracts entered into or before the War to be performed after would have created trouble. The Court of Appeal, in three cases, accepted this rule of *rebus sic Stantibus*: first, ***Falzon v. Darmanin*** (07/06/1940); second, ***Fenech v. Carabott*** (17/11/1941); third, ***Raymond v. Busuttil*** (16/11/1942). Collectively, these are known as the War cases. In one, it was intended by the contractors to make a profit of Lm£50 but circumstances changed such that if the contract were performed, he would make a loss of Lm£400.

Jurisprudence

In ***Direttur tal-Kuntratti v. Office Electronics Ltd.*** (FH CC, 22/10/2004) a tender to offer goods to the government at a certain price was made which the government accepted. However, the price of the material rose from the supplier's end and so the defendant argued that, if sold at the agreed price, it would have made a loss. The court argued that the change was so fundamental and that an increase in price from a foreign supplier was to be expected. The defendant did not sell the paper to the government and was sued for damages for its failure to perform its contractual obligations. The Court pointed out three conditions for this principle to be applied. In order to excuse non-performance, the defendant should prove that:

(i) The obstacle results from an external cause,
(ii) It must be independent of the acts of the disadvantaged party,
(iii) The obstacle must have been unforeseeable.

Another recent case is that of ***Farrugia v. Mazzini*** (Gozo, 07/01/2008) the court discussed the issue head-on. Here, a person wished to buy land from the Gozo Curia and the emphyteutical concession had various conditions. When the purchaser was

going to buy the emphyteutical concession he approached the Curia and asked for a price to remove the conditions. Satisfied, he bought the land and applied to the Curia to have the conditions removed but he was told that to have them removed he would have to pay Lm£67,500, as opposed to the Lm£1,000 he was previously told. He sought to annul the contract on the basis that the conditions changed significantly. The court went into the merits of *rebus sic Stantibus* and examined the situation in Italy and France and argued that it is not part of the Maltese system as it goes against the *voluntà* theory. In multiple cases the courts have been pushed to accept this principle. Interestingly, the EU, in its draft of a European Civil Code, there is the *rebus sic Stantibus* principle if the exercise of the contract has become excessively onerous.

Topic III.VI: The Manifestation of Consent

As we have seen both parties require consent, and there must be an offer and an acceptance too. A call for offers has no legal binding affect, that is to say, it is not the first stage of the contract. A call for tenders is not the initiation of the contract process, but a response is. Tender offers as a result can be withdrawn at will. Lawyers often engage notaries to sell assets of an inheritance and in the papers, they announce the sale and call for offers. The notary on behalf of her clients will accept the best offer but is not bound to accept any. At times a disclaimer reserving the right to refuse an offer is added but this is unnecessary as legally speaking a call for offers is merely an expression of interest. An offer must be carefully distinguished from an invitation to treat (call for offers).

The best illustration of this distinction is in the case of person asking for tenders to do certain works or to purchase certain goods. The invitation to tender has of itself no operation at all, but it is the tender which is the offer, and this must be accepted before there is any binding contract. There is no prima facie undertaking that the best offer would be accepted by the person issuing the invitation to tender. A call for offers has legal effect at all, but what follows it, i.e., the offer, does.

There are four stages for consent to come into being:

I. It must exist internally (*voluntà*),
II. It must be externally manifested,
III. There must be an identity between the two acts of consent of the contracting parties,
IV. There must exist the concourse of the acts of volition.

There is another stage which may sometimes precede the offer and acceptance. This is the proposal. The proposal is not an offer, but it is a call or an invitation for offers. A typical example would be when the Government (or some other private entity) issues a call for tenders. This is a proposal and not an offer, and therefore this proposal on its own has no legal effect, as the person making the proposal is not bound to accept any offer. Such person may refuse any offer, even the most advantageous of offers.

Stage I – Consent as an Internal Act

This is of lesser importance, but it means that there must be the intention of the contracting party, that is it must be shown that he who gave his consent wanted to do so. As a general rule, the theory of *voluntà* does not derive consent from behaviour, but instead bases itself on the will. The court must deduce that one really intended to give one's consent, and that is why the intention must be serious, definitive, and free.

Stage II – The External Manifestation of Consent

The person must manifest his intentions, otherwise there is no consent. This leads us to discuss the form of consent. The law, for certain areas, insists on a particular form of consent. it is important to note that where the law insists on a particular form consent does not exist if not manifested in the proper form.

Written Manifestation: Some contracts must be written, i.e., in the form of a private writing. The classic case is the promise of sale. Hence, one cannot promise to sell his house unless he puts it down in writing. This is required for the consent to *be ad validatem*. Examples in this category include a promise of sale, a civil partnership, a promise of loan, a compromise, and a suretyship agreement. All leases now require the written form as well (Article 1531A).

Solemn Manifestation: The solemn form of consent is consent manifested on a public deed in front of a notary and attested to thereby. The law stipulates that when one is dealing with real rights, there consent must be manifested in a solemn form. Unless manifested in such a deed, the contract would not exist. In this category, one finds the transfer of immovable property, the creation of real rights such as servitudes over immovable property, the hypothecation of property, the creation of emphyteusis and a consensual deed of personal separation.

Free Manifestation: The law sometimes does not impose the requirement of the public deed, in which case there is the free form. This is subdivided in the express and the tacit forms. The former refers to the oral form, which the law is satisfied in most cases. The presumption is that all contracts can be concluded in this form unless the law requires otherwise. The express form itself is subdivided into the oral and the written forms. The express written form refers to a private writing, not necessarily done in front of a notary, which may be required by law, such as in the case of a promise of sale of an immovable property, contracts of lease, and rent agreements. The sale of a car used to require a written form, but this has since been repealed.

The free tacit form is accepted in the Maltese system and essentially refers to silence. Silence as a form of manifestation of consent is more readily accepted on the Continent. Here, it is difficult to accept as we are tied to the will theory. It must be shown that when one said nothing one intended to consent and this is difficult, although it does happen. In such cases usually one would have said nothing when one should have said something. This is often used in cases of the renunciation of a right. If someone acts contrary to one's rights and one does nothing when one could have done something, the court often rules that one would have given tacit consent to the abuse of one's own rights. This derives from the *Code Napoleon.* This concept began in the law of trademark, wherein if someone uses one's trademark and one does not object when one could have, the court can presume that as a result one has consented to the use of the trademark. Tacit renunciation can arise in other issues too, such as in cases where retailers do not formally accept an offer but take the money and send the product. Depending on the circumstances the court will derive consent from silence, but they must always return to the intention.

Tacit Consent

In ***Sammut v. Azzopardi*** (Court of Appeal, 29/11/1993) the court said that the tacit renunciation of a right is valid and that in order to presume consent there must be the will to renounce and the fact must be irreconcilable with the conservation of the right. In this case, the defendant had leased a property from the plaintiff. The agreement stated that after the first 5 years, the rent could be increased according to the value of the Maltese Lira. Sometime before the 5 years lapsed, the plaintiff received and

accepted a cheque (for the same rent) covering the next 6 months (after the lapse of 5 years). The dispute was: "by accepting the cheque, had the plaintiff renounced the right to increase the rent according to the agreement and in terms of law existing at the time?"

The Court said that in order for silence to amount to some form of consent, there are two conditions.

1. **The act or omission can only mean that one is renouncing his or her rights:** One wants to change his or her legal position.
2. **The intention and will to renounce your rights:** One will not find this on the continent. Analysis is made from behaviour. On the continent it is interpreted objectively, but here the behaviour is interpreted subjectively. Did his behaviour suggest he had the intention to renounce his rights?

It was decided that the accepting of the cheque was not to be interpreted as a renunciation that the rent could be increased, as such a renunciation had to be clear and unequivocal. Such renunciation could not take place by a mistake on the part of plaintiff. Defendant himself admitted that he had paid because he had not realized that the 5 years had lapsed. The Court of Appeal thus confirmed the decision of the Rent Regulation Board in favour of the plaintiff.

In ***Attard v. Attard*** (Court of Appeal, 31/10/2015) it was held that the act must be irreconcilable with the conservation of the right and the omission must demonstrate the precise will to renounce. The Court held that silence can be a form of consent when an oral consent is sufficient and where the law does not require an express consent. This depends on the circumstances of the case which show that the inactivity cannot be interpreted but being a manifestation of intent to give consent. The following was stated:

> *"Ir-rinunzji huma di stretto diritto, u ghandhom jirrizultaw minn fatti assolutament inkonciljabbli ma' konservazzjoni tad-dritt, u li juru l-volonta` preciza ta' rinunzja".*

In ***Gauci v. MCL Ltd*** (Court of Appeal, 20/10/2003) the court made reference to this point. Here, plaintiff held that extraordinary structural alterations took place and that his premises had also been sublet without his consent, consequently bringing an action in front of the Rent Regulation Board to evict the defendant. The defendant, however, held that primarily the plaintiff had to prove his title as owner of the property, denying the allegation against him and holding that the state of affairs had not changed for the last twenty years. A director for MCL Ltd. admitted that he sublet the property but maintained that this had been consented to, and that an agreement had been reached with the owner regarding the issue. In this case, the defendant had to prove that the consent required as per Cap. 69 of the Laws of Malta was achieved. However, the owner's books did not illustrate the presence of a sub-lease, and no proof of his consent was present. The RRB authorised the plaintiff to evict the defendant, who appealed, holding that the plaintiff's inaction was equivalent to tacit consent.

The Court delved into the concept of tacit consent, making reference to the case of ***Debono v. Ciantar*** (Court of Appeal, 1967). It concluded that for there to be tacit consent, the consenting individual must be aware of the full meaning and outcome of his consent, and that his actions could reasonably suggest that he is consenting to the sub-lease. The Court stated:

> *"Illi biex ikun hemm il-kunsens tacitu hemm bzonn essenzjalment ta' zewg rekwiziti, cioe` li dak li jikkonsenti jkun pjenament konsapevoli tal-vera portata u l-effetti tal-att li jinghad li huwa qieghed tacitament jakkonsenti jew jaccetta, u di piu` illi l-komportament tieghu jkun tali li jkun inkonsiljabbli mal-volonta` tieghu, b'mod li l-kondotta tieghu ma tkunx tista' tigi sjegata b'mod iehor hlief li huwa accetta l-operat li ghalih ikun qed jigi allegat li akkonsenta. Din l-accettazzjoni hija ta' stretta interpretazzjoni …"*

The Court noted that Article 9 of Cap. 69 of the Laws of Malta required express consent, whilst jurisprudence suggests that this must be clear and unequivocal. The Court concluded that such consent was not present. Since the original owner was deceased, there was no way of verifying the director's testimony. Furthermore, the Court made reference to ***Azzopardi v. Mifsud***, in which it was held that in the absence of consent the lease can be terminated. In conclusion, the Court upheld the ruling by the Rent Regulation Board in favour of the plaintiff.

In some instances, the law requires an express manifestation of consent, wherein it cannot be given tacitly. Therefore, we find the presumption that all consent can be given tacitly unless the law states otherwise.

In the case of ***Napoleon Grech v. Pio Jose Farrugia*** (First Hall Civil Court, 03/05/1993) plaintiff used to rent an apartment to the defendant and incurred various expenses, including unpaid rent payments, amounting to Lm3,446.97: *"tul il-kirja l-konvenut inkorra diversi spejjes fil-konfront tal-attur u huwa wkoll moruz fil-hlas tal-kera".*

The defendant admitted in writing that he was a debtor of the amount of Lm134.80 and, although he agreed to pay the amount within three months, the sum remained unpaid. Later, the defendant recalled that after he had signed the document, he came to the realisation that he was not accountable for the listed expenses. Consequently, the plaintiff brought an action against the defendant to the total amount of Lm4,795.72. In contrast, the defendant held that the plaintiff's allegations were unjustified since he had bought the property and therefore, he was not the debtor of the amount of Lm134.80.

The Court appointed Dr Tonio Mallia as a legal expert in this case. After examining the evidence, he held that the plaintiff's claims should be limited to the sum of Lm304.62. The Court agreed completely with the report brought forward by the legal expert and ordered the defendant to pay the quoted sum. Expenses were to be divided, two-thirds to be paid by the defendant, and one-third to be paid by the plaintiff.

In the case of ***Anthony Sammut u L-Avukat Anthony Farrugia v. L-Avukat Tonio Azzopardi*** (Court of Appeal, 29/11/1993) the defendant leased a property from the plaintiff for a period of five years. moreover, as per the private writing between the parties, the lease could also be extended for another five years, providing that an increase in rent took place in accordance with the increase in value of the Maltese Lira. After the lapse of five years, plaintiff accepted a cheque from the defendant covering the rent for the next six months. The defendant held that this constituted tacit consent and that rent should not change for the next five years as a result. The Board held that the plaintiff could increase the rent notwithstanding the lapse of five years. However, uncertainty arose as to whether the acceptance of the cheque was tantamount to the plaintiff renouncing his right to increase the rent. The Board held that renunciation has to be clear and unequivocal, and not a mistake on plaintiff's behalf. The Board decided for the plaintiff and the defendant appealed on this basis of renunciation.

The Court of Appeal held that tacit renunciation must show clearly that the rights concerned were abandoned whilst there must be the absolute intention to do so. In this case one could not reasonably hold that such intention was present. The Court held that after the expiration of the five years, the law endowed the defendant with the right to the lease, and simultaneously gave the plaintiff the right to increase the rent as per Article 5(3)(c) of Cap. 158 of the Laws of Malta. The Court made reference to ***Vella v. Jones***, in which it was held that the increase in rent depends on the will of the lessor and that he also has the right to decide when the rent is increased. Nonetheless, it must not be increased for the second time in a fifteen-year period. The Court ruled in favour of the plaintiff, upholding the Board's decision, whilst stating that the increase in rent applied from the expiration of the six months and not retrospectively from the lapse of five years.

Simulation of Consent

There must be conformity between the intention and the manifestation, i.e., between the mind and the expression. This may lead to circumstances which may annul the contract. This deformity can be voluntary or involuntary. One can create this problem voluntarily, but also involuntarily. Involuntary confusion occurs when there are the vices of consent, error, violence, and fraud. Voluntary deformity can arise where a person intends something but on purpose manifests a different intention, known as the simulation of consent. This is a ground for the annulment of a contract, and it occurs when a person gives his consent to something differently from what he really intends.

This disformity can be voluntary or involuntary.

a. **Involuntary disformity** between the intention and its manifestation is the result of error, violence, or fraud. In such cases, the disformity is brought about by forces not coming from within the person and therefore the disformity is said to be involuntary.
b. **Voluntary disformity**: A person can voluntarily intend one thing but manifest another. That is called simulation of a contract. In brief, simulation is the voluntary disformity between the intention and the manifestation of consent. It

occurs when a party wants one thing, but for reasons of his own manifests what he wants in a different form. In family law, this is grounds for an annulment.

Simulation can be absolute or relative, the former referring to instances where the contracting parties do not want to enter into a contract but give the appearance of doing so, the latter when parties do want to enter into a contract but give the appearance of entering into a different kind of contract.

1. Absolute: When I do not want to contract at all, but I give them appearance of a contract. There is no intention of contracting whatsoever. We find absolute simulation very common especially when dealing with separation cases. One of the spouses would pretend that s/he is alienating some property to a third party, so as to prevent the other spouse from claiming a share in such property. In this case, this person does not want to enter into any contract vis-à-vis that property but gives the appearance that he is selling/donating his property. In practice very often these transfers would be declared by the Court as fictitious.

2. Relative: I do want to contract but I give the appearance of a different type of contract. The person did want to change the situation and to undertake obligations, but changed the nature of the obligation and gave it a different appearance. Typical examples include to avoid the rules of succession or to avoid fiscal legislation.

In both cases, the principle is that truth prevails over appearance. If the issue comes before the Court, it will change the contract to create what is really the intention of the parties.

- If there is an absolute simulation the Court will say there is no contract.
- If there is a relative simulation, the Court will hold that there is a different type of contract.

Simulation generally, but not necessarily, has fraudulent intentions. The principle in simulation always is that truth prevails over appearance. In the case of absolute simulation, the court will rule that there is no contract because if the parties did not want to enter into a contract but only gave the appearance of doing so then they did not enter into a contract. In the case of relative simulation, the court will discard the contract whose appearance they gave and enforce the contract they actually intended to sign. Simulation is often found in family law matters where the husband creates a contract in order to deprive his wife of her rights on the assets of the community. There are a number of instances, for example, where the husband enters into a contract with his brother transferring his assets thereto such that his wife would have any remaining assets to claim.

Jurisprudence

In the case of ***Grech v. Grech*** (FH CC, 26/06/1998) the husband created a company with his brother giving 499 shares to the brother and retaining one for himself. All his assets where then transferred to this company and when the wife came to seek her share of the assets, she found nothing, so she sought to annul the contract on the grounds of simulation which the court, upon an examination of the facts, found that

there was no real intention of the parties and declared the contract simulated. Simulation is often done to avoid creditors, especially taxes. A third party can attack a contract on the basis of simulation in spite of not being a party thereto. Furthermore, the person whose consent was simulated may himself bring an action forth to have the contract declared simulated.

Innocent simulation is ***Raciti v. Azzopardi*** (FH CC, 03/11/2005) wherein an unmarried couple wanted to buy a house but at the time the banks refused to give loans to women. The couple agreed that the contract of purchase would be entered into by the man only. They married but the couple eventually separated, and the husband claimed that the house was legally his. However, the wife explained to the court the circumstances which led to the contract being in his name. The court found this to be a case of relative, innocent simulation of contract. Although the house was in the name to the husband it found that it belonged in equal shares to both spouses. This action was brought forward by a party involved in the simulation.

The prescriptive period for simulation is thirty years as, when a contract is annulled on the grounds of simulation, it does not affect third parties in good faith. Here we must distinguish between an action based on simulation and an action based on rescission, where the contract is rescinded on the grounds of vices of consent (in which case the prescriptive period is two years). In cases of rescission, only the party who claims his consent has been vitiated can bring an action for rescission which *will* affect third parties.

The courts have held that it is possible to have a contract which has been partially simulated, such that most of it is valid whilst parts of it are simulated. *Vide* the case of ***Abela v. Abela*** (COA, 24//01/1986). If the intended contract cannot be carried out, then the end result would be nothing.

In the case of ***John Abela et v. Giovanna Abela et*** (Court of Appeal, 09/02/1971) the parties were both heirs of a one Paul Abela who had passed away in 1969. Paul Abela had transferred to the defendants, who were his children from his second marriage, his shares in John Abela (1882) and Sons Ltd. Plaintiffs, who were his children from his first marriage, argued that this was in reality a donation disguised as a sale and therefore amounted to situation. Additionally, since the deceased was older than seventy years old, he was incapable of making a donation and, therefore, the transfer was null. It was also noted that the defendants had derived further advantage from their father's inheritance. In contrast, the defendants refused the allegations, holding that the contract of sale was not simulated, being a real and genuine contract.

The Court held that it must first analyse whether it is truly a sale, or else if it was a donation, and in such case whether it is total or partial. Should the transfer have resulted from a donation, the Court would seek to annul the contract since the deceased was indeed over seventy years of age at the time, which is prohibited by law since donations exceeding Lm50 in value made above that age are null unless authorised by the Second Hall of the Civil Court (now the Court of Voluntary Jurisdiction), as per the Civil Code. This is done with the objective of protecting

individuals at such a vulnerable age. In this case, Paul Abela did not have the required authorisation from the Court to make such donations.

Nonetheless, both the First Hall of the Civil Court and the Court of Appeal dismissed the claims made by the plaintiffs that this was a case of absolute simulation. Both Courts felt that the transfer was one of sale which was partly onerous and partly gratuitous, due to the fact that the shares were sold at a lesser price. This did not necessarily or automatically mean that the sale was simulated. As a result, the Court held that there was insufficient evidence to consider the transaction as a whole to be a donation, and therefore dismissed the possibility of absolute simulation. To that end, the contract was not annulled, and the Court held in favour of the defendants.

In the case of ***Joseph Vassallo et v. Carmelo Vassallo et*** (Court of Appeal, 13/07/2001) Paul Vassallo, father of both plaintiff and defendant, died in the year 1988, having left two wills naming his eight children as universal heirs to all of his belongings. However, two properties were sold by the father to two of his children. The plaintiffs, as a result, brought an action claiming that in reality these were donations and not contracts of sale, therefore amounting to simulation. This was presupposed from the fact that the prices were below market value, and no evidence of the transfer of money was present. Consequently, the plaintiff brought an action to declare them null as a contract of sale, and valid only as donations. In contrast, the defendant denied such allegations.

The plaintiffs ultimately instituted an action to protect their interest, ensuring that all of their father's assets were included in the inheritance before they accepted the legacy. The Court agreed with the legal expert who held that the donations were in fact simulated. Additionally, it held that the prices at which the properties were sold were well below their fair market values, even in consideration of the fact that the contract took place between a father and his children. Thus, making it a case of *res ipsa loquitur*, denoting that even if an action occurred by accident, this could still imply negligence. When the fabrications are to such an extent, it is clearly a case of simulation. As a result, the Court ruled in favour of the plaintiff, upholding the decision of the Court of first instance. Additionally, the donations were held to be prejudicial to the defendants and, thus, commenced to the divide the legacy equally.

In the case of ***Angela Galea pro et noe v. Grazio Borg et*** (Court of Magistrates (Superior Jurisdiction, Gozo), 11/07/2008) plaintiff sold a plot of land in 1998 to the defendants through a public deed. the price was declared at Lm20,000, which had to be paid within five years. a private writing was also signed, in which a declaration of the money owed was set-off, due to *servigi* carried out to the plaintiff, constituting service and assistance up until the time of death of the plaintiff. Additionally, the defendants, through a private writing, guaranteed the continuation of such *servigi* unless otherwise advised by a doctor that the plaintiff should be sent to a home or hospital for care. Also, should the defendants stop rendering service to the plaintiff, they would be liable to pay the full price of the plot of land, although it was primarily referred to as being a set-off. After a few months from the date on which the contract was signed, defendants abandoned the plaintiff. Consequently, plaintiffs requested the

Court of Magistrates (Superior Jurisdiction) to declare the contract null on the basis of violence, fraud, and simulation of consent.

The Court made reference to Article 978(1) of the Civil Code, with regard to violence, and held that physical and moral violence was not present, and neither was undue pressure. The plaintiff had also claimed error of fact, since she was under the impression that she was signing a contract similar to a will and, therefore, it could be revoked unilaterally. However, the Court established that the plaintiff herself initiated the idea of *servigi*, and therefore she knew she was entering into a contract of sale. Thus, this claim was also dismissed. The Court then delved into the allegations of fraud and held that for fraud to be present it must be grave and determining to induce the plaintiff's consent. this was also dismissed since the plaintiff was given all the information necessary throughout the contractual proceedings.

Lastly, the Court analysed the notion of simulation. It held that simulation may be absolute or relative, and that *"l-att huwa simulat meta bil-volonta' tal-partijiet ikollu sinifikat apparenti divers minn dak li realment ghandu"* (*Sammut v. Ellul* (1945)). Additionally, for there to be simulation both parties must have simulated. Contracts are presumed to be sincere and, therefore, the burden of proof lies on the individual who alleges invalidity. The Court further made a distinction between rescission and simulation. In *Sammut v. Ellul* (Court of Appeal, 1931) it was held that *"si deve sempre guardare agli effetti giuridici che le parti intesero ottenere mediante la stipulazione"*. In conclusion, the Court held that priority is given to the true intention of the parties, in this case being an onerous donation. This was evident from the fact that the property was worth much more in value than the service. As a result, the plaintiff's claims were denied. It was held that in simulation a contract is not annulled, but rather the true intention behind the contract is given effect.

In the case of ***Julia and James Borg v. Carmel Brignone*** (Court of Appeal, 06/10/1999) plaintiffs, heirs of Alfred Borg, instituted an action against the defendant for the sum of Lm2420 in consideration of a contract of loan with the *de cuius*. In contrast, defendant held that the plaintiff's claims were unfounded since the amount in question was given for illicit purposes and that the money was not lent, but rather a contract was drafted to recognise a debt owed by Borg for illegal gambling losses.

The First Hall of the Civil Court made reference to Articles 1713 and 1715 of the Civil Code, relating to gaming and betting, and also Article 987, relating to "Want or Illegality of Consideration". Consequently, it ruled in favour of the defendant on the basis that *"il-kuntratt li minnu tohrog l-obligazzjoni huwa null"*. The Court of Appeal further compared this illegal conduct to that of a concubine, in which jurisprudence presumes the debt is null since it results from an obligation which is null in and of itself, unless the lender provides otherwise. Therefore, if there is a direct link to an illegal activity that obligation is also null. In this regard, the Court agreed that the illegal activities were linked directly to the loan in question. Furthermore, the Court of Appeal agreed with the First Hall of the Civil Court, in that the action was primarily instituted to recover a gambling debt, something prohibited under Article 1713. Since the contract was drafted in such a way as to avoid this provision, Article 1715 applied instead. The Court noted that in exceptional cases a contract may be annulled through provisions of the

law when the law provides for such nullity. In conclusion, the Court confirmed the decision of the Court of first instance as being just and valid, denying the appeal, and holding in favour of the defendant.

In the case of ***Prof. Carlo Oreste Strocco v. Pietru Baldassarre Contini Contini et.*** (First Hall Civil Court, 08/11/1952) plaintiff had deposited various items of furniture and *objets d'art*, amongst others, with the defendant at the beginning of the War, and had also given the defendant's wife a receipt stating that those same objects had been sold to her. The defendant had returned some of the items and the held that the others were damaged during the War. Since it was ultimately a fictional sale, plaintiff brought an action requesting the Court to order the defendant to return his belongings and, if not, for the defendant to be held liable for damages and for the value of the items.

The Court held that an action for rescission or nullity presupposes a judicially existing obligation, which is missing one of the essential elements in this case. Additionally, it held that rescission is one of the modes in which a contract may be annulled and can only be brought against something which is in existence. In contrast, the Court held that the action of simulation presupposes that an act is non-existent in an absolute or relative manner. Therefore, the object of the two actions is essentially different. An action for rescission may be brought if one of the essential elements of a contract is missing. Meanwhile, an action for simulation seeks to find the real act for which the parties intended to contract. The action for nullity, consequently, is broader, also affecting the rights of any third parties even in good faith. In conclusion, the Court held that the plaintiff was bringing an action of simulation, holding that simulation should fall under the general extinctive prescription of thirty. Therefore, the case was not prescribed.

Actions of Rescission of Simulation

1. **The actions:** In the distinction between voluntary and involuntary disformity, the actions must be different.
    a. Voluntary: gives rise to an action of simulation, i.e., made the mistake on purpose.
    b. Involuntary: gives rise to an action of rescission.

2. **Who can bring the action.**
    a. An action for rescission on the ground of error, violence and fraud, can only be brought by the contracting party whose consent has been vitiated. In the Raciti case, the wife claimed her own simulation.
    b. In an action based on simulation, any interested third party may bring an action. It is possible for the parties themselves to bring an action of simulation.

3. **The effects of the action.**
    a. An action of rescission, as a result effects third parties, even if such third parties had acted in good faith. Let's take a scenario where X sells a house to Y, and Y sells it to Z. If the contract between X and Y is annulled because of a defect of consent, then the contract between Y and Z is also annulled, even though both Y and Z made the contract in good faith.

b. An action of simulation doesn't third parties in good faith. Third parties in good faith are protected from an action of simulation. If for instance a husband sells the house to his brother, and the brother sells that house to a third party in good faith, that sale between the brother and the third party remains valid and cannot be attacked. The prejudiced party can always sue the party who has acted in simulation for damages (but not to annul the contract).

4. **A period of prescription.**
    a. Rescission: 2 years from the discovery of a mistake.
    b. Simulation: 30 years from the date of contract.

The reason is that rescission affects third parties in good faith, while simulation does not, hence more time is afforded.

Stage III – Identity Between the Two Consents

The two contracting parties must consent to and be speaking of the same thing. If there is *error in negotio* there is no identity between the acts of volition. The parties must be discussing the same terms and conditions and the same agreement. Disagreement as regard the object, quantity, juridical modifications of the obligations, etc., disrupt the formation of the contract. Unless there is unity of the consent none can exist.

Otherwise, this would lead to an:

a. ***error in corporae*** or an
b. ***error in negotio.***

If there is *error in negotio* or *in corporae* between the consent of the two parties, not only would we be speaking of unilateral error of the consent of the two parties, but also of lack of identity as there would be no consent.

In the case of ***Camilleri v. AF Alice Home Décor Ltd*** (First Hall Civil Court) plaintiff claimed there was a contract between the parties, but upon realizing there was in fact no contract he tried to change his case into one of pre- contractual liability. The Court held even if he was to consider it under pre- contractual liability, there were no grounds because she had not reached the advanced stage where one would expect them to sign. In any case, the plaintiff was claiming loss of future income and in ***Pullen v. Matysik*** saying that loss of future income cannot be collected as damages in pre-contractual liability.

In the case of ***Grixti v. Grima*** (First Hall Civil Court, 12/12/2014) plaintiff instituted an action based on vice of consent based on violence and fraud at the same time. The Court said it was not possible to have both at the same time. On one side, violence, the party does not want to enter, and in fraud, he was deceived. Thus, they are not compatible. This resembles a fishing expedition where the claimant would not know what he wants and just throws something at the Court to see what happens in an attempt to see what the Court thinks. The Courts will not accept these.

Stage IV – The Union of the Two Consents

This is the moment of conclusion of the contract. There are various theories at play here. The first of which is the theory of declaration which all jurists agree is the best in principle but unacceptable in practice. It means that as soon as the other person accepts it the contract is consummated. However, if no one knows of the acceptance, then the accepting party can freely withdraw such acceptance without consequences as it lacks a concrete basis.

Under the **theory of** declaration, normally, the conclusion occurs upon the occurrence of offer and acceptance. Some support this theory of declaration, i.e., the contract is concluded as soon as there is a manifestation of consent even though the person who made the offer is not aware that his offer has been accepted. However, although jurists agree that in theory this would be the ideal solution, they do not propose it as a practical solution to the problem because in this case, the person who makes the offer has no control and everything is left in the hands of the acceptor who may accept yet deny his acceptance. Hence one would not be in a position to know whether the contract has been concluded. There is no European country following this theory.

The **theory of transmission** is followed by the United Kingdom, and states that the person who accepts must transmit the acceptance, taking it out of his influence once the acceptance is made. Whether the acceptance or not is immaterial. As soon as B accepts the offer of A and transmits it the contract exists.

The **theory of reception** requires that the acceptance is received by the person who makes the offer, as seen in Germany and, to a lesser extent, Italy. As long as A receives knowledge of B's acceptance there is the consummation of the contract.

The **theory of information** is the moment when the person who made the proposal becomes aware of the acceptance. This is the position in Italy subject to exceptions. If A receives it but through negligence, he is not aware of the acceptance, although he should be, the contract is still consummated, although conditionally. *Vide* article 114 of the Commercial Code, wherein the contract is concluded when the person who made the offer is aware of the acceptance. This is the position under Maltese law both commercially and civilly.

The moment of consummation determines whether or not the contract is concluded or whether the parties are still in the negotiation stage. In the case of ***Accountant General v. Alex Vella noe*** (Commercial Court, 27/07/1989) the government issued a call for tenders (i.e., not an offer but a request for offers) saying that he who makes the offer must make the offer open for twenty days. As a rule, an offer can be withdrawn unless it has already been accepted, so long as its withdrawal was manifested in the same way as the offer itself. The government accepted the offer of Alex Vella on behalf of a company and transmitted the acceptance by telephone during normal office hours. As it happened, the individual who received the telephone call did not tell his superiors and after some time the government insisted on the delivery of the goods, but the company refused to do so on the basis that their offer was never accepted. The government insisted that it had accepted and that its acceptance was transmitted.

The issue arose as to whether this was a normal transmission of acceptance, although the message was never passed on. The court ruled that the fact that the individual did not inform his superiors is the company's fault as they had received notice of the acceptance. The transmission was made during normal officer hours and through a perfectly reasonable means, thus forcing the company to provide the goods at the price listed in the tender offer, in spite of the fact that in the meantime the price of the goods had increased from suppliers abroad. The court quoted at length from Vivante who gave the example of an acceptance received when one left one's shop closed, and therefore one was not aware that the offer was accepted. Vivante argued that the shop should have remained open and as such it is the merchant's responsibility for being unaware of the acceptance. The person who made the offer must be aware of the acceptance, but if he does not receive the required information through his own negligence still the contract shall be concluded.

Although this is a question of private international law, the contract is concluded at the time and the place when and where the person who made the offer receives knowledge of the acceptance, or when the individual could or should have been aware of such acceptance.

The Electronic Commerce Act of 2001 is important if one concludes contracts electronically, under which there is another stage for the moment of conclusion, i.e., when the person who made the offer receives knowledge of the acceptance and subsequently acknowledges the receipt of the acceptance to that individual who has accepted the offer. Naturally there are exceptions, such as wills, which cannot be concluded electronically.

Topic IV. Object

The third essential element of a contract, every obligation must have an object. Not necessarily physical, objects can also be an incorporeal right, so long as something is under discussion and has been agreed upon. Article 982 of the Civil Code states:

> **982.** (1) *Every contract has for its subject-matter a thing which one of the contracting parties binds himself to give, or to do, or not to do.*
>
> (2) *Only the things that are not* extra commercium *can be the subject of an agreement.*
>
> (3) *The mere use or the mere possession of a thing can like the thing itself, be the subject of a contract.*

Note that even a future object not presently in existence can form the subject matter of a contract (*pactum de re sperata*), and unless that thing comes into being there is no contract, unless the agreement is a *pactum de spei* in which case the contract is valid whether or not the future thing comes into existence or not. We find large amounts of these contracts in the agricultural markets where purchasers offer to buy all that a particular field produces. The *pactum de re sperata* contemplates that a thing will come into existence, at which point the contract will become valid, whilst a *pactum de spei* remains legally binding irrespective of whether or not the future thing comes into being. An exception to this is the law of succession, wherein a future succession cannot form the object of a contract. If one's parents are still alive and one expects to inherit them when they die, he cannot sell this expectation or this right whilst they remain alive. An exception this general rule is found under article 1240 which regulates pre-nuptial agreements.

The object of a contract can be anything, but it must be:

1. **Possible:** By possible it is meant that the object is simply something which can actually be done.

2. **Lawful:** i.e., something which is not against the law. Giorgi defined something unlawful as any violation of the juridical or moral order. The law itself gives two examples of what is meant by unlawfulness: first, stipulations *quota litis* in article 986(1); and second, usuary. These, however, are purely examples and illegalities are by no means limited to these two. *Vide* the case of ***Vella v. Fenech*** (Commercial Court, 29/08/1990)[2] in relation to building permits and the

[2]The plaintiff bought a house from the defendant, and it later transpired that the sale was not covered by a building permit. This was in due time discovered by the purchaser. As a result, the plaintiff brought an action to annul the contract on the basis that the object was unlawful.

lack thereof. The Courts have also come down against the selling of houses without the necessary building permits, citing breach of contract and unlawful objects.

3. ***In commercio*****:** The opposite of *extra commercio*, as mentioned in article 982(2). The obvious examples of objects *extra commercio* are humans and human organs. One cannot enter into an agreement to purchase either. On one's death one's heirs may donate one organ but never in return for money. Even so, agreements to donate one's organs made during one's lifetime are never legally binding. In cases of adoption no money can change hands for the child per se, not including expenses. The most controversial object is the foreshore which, since Roman times, has always been *extra commercio.* Although the law does not specify this, the courts have repeatedly declared the foreshore to be *dominu publicu* (*vide* the case of ***Direttur tal-Artijiet v. Vincent Farrugia et*** (Court of Appeal, 27/03/2009)).[3] The Public Domain Act states that

---

The Court delved into what is *"prohibited by law"*, extending it also to objects which are not entirely tarnished with unlawfulness. Therefore, it was not seen as a requisite for the object to be directly in conflict with the law. it would be adequate if it is simply tainted for the object to be considered unlawful and, consequently, the contract would be void. Finally, the Court concluded that a property which is not built in conformity with the necessary permits cannot be considered to be the object of a contract since it would constitute an unlawful object. The Court cited Giorgi, who had given an extensive definition of "unlawfulness", holding that whatever goes against the law has an unlawful object. Moreover, the Court held that if an individual is informed after the purchase of the property, the contract can be voided. Additionally, this was held to be a violation of peaceful possession. Lastly, the Court held that the house was built without a permit and, therefore, had an unlawful object, ruling in favour of the plaintiff.

[3]The case concerned the Spinola shore in St. Julian's falling under public ownership. After the War, the government had advertised part of the shoreline and extended it to form a public passage. The defendants built a structure extending to the aforementioned shore, creating an obstacle. The defendants' structure should not have extended itself more than *"ghaxar qasbiet"* yet it was extended by approximately eight and a half metres. The defendants were occupying the plaintiff's property without authorisation, causing damages. Plaintiff asked the Court to declare that such property was their own, that it was being occupied illegally, for the defendants to pay such damages, and to order them to restore the site to its original condition before works were carried out. In contrast, defendants held that the plaintiff should primarily prove their own title of ownership. It further held that plaintiff's claims were unfounded, and that the construction was bult by E.G. Property Holdings Ltd., and so the property was entirely theirs. Moreover, they held that the building was built in *buona fede* and without any opposition from the plaintiff and, therefore, should only be entitled to compensation in terms of Article 571 of the Civil Code.

The Court noted that plaintiff was notified by the St. Julian's Local Council, thereupon the Court held that the issue in question relates to whether they own such property and, therefore, whether they had the right to develop it. The Court did not fully agree with the defendants, and since this was an *actio rei vindicatoria* evidence should be proven beyond reasonable doubt. Furthermore, it quoted *Borg v. Buhagiar* in which it was declared that *"kwalsiasi dubbju jmur favur il-konvenut possessor".* The Court noted that various judgements from the Court of Appeal modified this principle, whereby, should the defendant's title be in doubt, the plaintiff could have a successful action should he prove that his own title is more clear and real in regard to the property in question.

Furthermore, the Court made reference to *Gustavo Lapira v. Canonico Capitolare Monsignor Giuseppe Caruana Dingli et* (June 1917) in which property *extra-commercium* and shorelines were discussed. It was held that in Roman Law it is established that shores belong to the public, therefore property *extra-commercium*, therefore property not subject to private ownership. Reference was also made to *Cutajar*

Parliament can define certain areas as being in the public domain and therefore incapable of forming part of the object of a contract, defining the foreshore as *extra commercio* and 15m from the sea. The foreshore, although in the public domain, is administered by the government and can therefore lease berths to yacht owners, etc. Also, *extra commercium* is public property, not to be confused with that property owned by the government. This property includes property of national importance and heritage which cannot be bought or sold, such as St. John's Co-Cathedral, the Manoel Theatre, San Anton Palace, etc. Whether the government can remove the public domain status of the foreshore remains to be seen.

4. **Specified:** The object must be specified and clearly stated in a way that the object can be properly identified. It need not be specified in the contract itself so long as the contract states how the object can be specified. In such cases the parties agree that the object is identified by third parties (e.g., one agrees to buy a particular car as identified by Mr. X). So long as the contract provides for the possibility of identification the contract is valid.

v. Cutajar (FH CC, February 1960) through which it was maintained that *"… fost il-beni tad-dominju jidhlu xatt il-bahar, l-insenaturi, u l-ispjaggi. Illi fid-dottrina jidher li dawn il-beni damanjali huma inalienabbli".* As a result, the Court ruled in favour of the plaintiff, declaring it the owner of the land. moreover, the defendants were held to be illegally occupying the land, ordering them to restore the site in question to its original condition before occupation. This judgement was confirmed on appeal.

Topic V. *Causa* or Consideration

Since 1944 the Italians have omitted the requirement of *causa*, but the term alone remained in Maltese jurisprudence. *Vide* Articles 987-991 of the Civil Code. The *causa* of a contract is its purpose. One of the creations of the *Code Napoleon* is the freedom of contract but the fact remains that each contract must have a particular purpose. Article 990 states:

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

Identifying the purpose of a contract is complex. One must distinguish between purpose and motive, the latter being irrelevant. It is the former which is taken into consideration. The issue is that at times behind what appears to be a lawful purpose is another less so. Take, for example, someone buying a business. One must go into the nature of the business itself and whether it is lawful. When we discuss the purpose, we must go far deeper than what appears *prima facie* to determine what the actual purpose of the contract is. Initially, some jurists limited the examination of the purpose, stating that if one were to buy a house then the purpose is purely the purchasing of the house, and no more. However, this gives a very tautological, limited approach to *causa.* To that end, Ricci states that there is no real distinction between the object and the *causa*, stating that the *causa* of the obligation of one is the object of the obligation of the other. Rather than treating the object of one and the object of the other separately, Ricci links them, and ultimately finds that as long as the object is lawful, by default so must be the *causa.*

This is an objective point of view. Other jurists went further, that it to say deeper, in the sense that it must be looked into why one is entering into the obligation to begin with. That is to say, what one wishes to do with what it is one purchased. Take, for example, an individual who purchases a house not to live in, but to produce drugs in or from which to operate a brothel. The courts have distinguished between the primary purpose and the secondary purpose, and here they have not always been consistent. Take, for example, someone who purchases a house to live in, but on the contract they have underdeclared the price. Some courts have stated that the evasion of taxes and the intention to defraud the government are unlawful purposes, in spite of the fact that they purchased a house to live in, a seemingly lawful *causa.*

Thus the notion is if in a bilateral contract, I pay you, then I must get something in return (whatever that may be). If I don't get something in return, then it means that there is no causa and hence no valid contract. There is no need that I get something which has financial value in return – the important thing is that were was a reason why I entered into a contract. The law presumes that nobody will enter into a contract without a 'causa'. Thus, if I want to give something as a donation, then that in itself is a valid "causa", namely that I am giving a donation.

This is still the objective reason. Why are you giving me money for the thing? What about the subjective why? Why is he paying money for the house? He wants to buy the house for a brothel. Is that a moral why? He is paying money to buy a gun. Why does he want the gun? He wants the gun to kill someone else. This is the realm of the subjective criteria. Our courts have adopted a dualist approach to causa. If against the law or contrary to public policy or morality, the Courts won't accept the contract as valid.

The Courts have therefore gone into a subjective interpretation of the *causa* of the obligation, depending on the particular circumstances of the contract. If they find that one entered into a contract for what appears to be a valid purpose but there is something else behind it, then they will declare the contract null. The parties, for whatever reason, may not wish to declare their true purpose, and if this is unlawful then the contract may be found unlawful. The court itself can raise this point *ex officio* even if neither party enters into the merits of this issue. Therefore, the courts will go into the matter both objectively, and subjectively. Even so, the court enters into accessory matters when making its considerations, such as fiscal matters.

There must always be a *causa* in any obligation, although it need not be express, as per article 987:

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

As specified in Article 988, the causa need not be specifically stated in the contract as long as the agreement was in fact based on a sufficient cause. If there is no (valid) causa, then there is no valid contract. Nevertheless, the presumption at law is that there is a valid 'causa' – if you are alleging that there is no causa, they you have to prove the absence of 'causa' in order to annul the contract. So here we are not speaking of null contracts but potentially annullable contracts (relative nullity and not absolute nullity).

> **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 *causa*, more often than not, remains unexpressed, but as long as there is a *causa* the contract shall be valid.

In the case of ***Sommers v. Fountain*** (Court of Magistrates, 4/6/1980), defendant booked a room in a privately-run hospital (the Blue Sisters) so when his wife gives birth she would be accommodated. Eventually, defendant did not make use of the room. Plaintiff, on behalf of the hospital sued for the renting of the room, with defendant arguing that he should not pay as he did not make use of the hospital's services. The Court observed how the room was left free for the time agreed, thus *causa* did exist as the room had been made available to the defendant. It was the defendant's choice to not make use of the said room, however she was still obliged to pay for it because

the obligation on the part of the plaintiff bad been fulfilled. The court ruled that there was *causa*, as the room was reserved for his purposes.

In the case of ***Joe Camilleri v. Godfrey Grima*** (First Hall Civil Court, 13/06/2003) a magazine was published locally, a page of which Grima reserved to advertise his company. Grima, however, never sent the necessary material and the publication of the magazine went ahead with a blank page. Camilleri, the owner of the magazine, sued for the advertisement that had to be made, with Grima raising the plea that nothing is due as the page was blank. Although it was blank, the page was reserved for Grima's use and the fact that he did not make use of it does not mean that he has to pay for it as if it appeared.

In the cases of ***Ellis v. Vassallo*** (Court of Appeal, 29/09/1993) and ***Ellis v. Testa*** (Court of Appeal, 15/12/2003) Ellis represented St. Edward's College, a privately run school. In both cases parents booked their sons but eventually sent them elsewhere. The school, through Ellis, sued for one term of education. Here, the Court went into the issue of whether there is a consideration or not, ruling that there is a valid consideration as the school reserved a place for the children irrespective of whether or not they made use of it.

In the case of ***Ellis v. Vassallo*** (Court of Appeal, 29/09/1993), St. Edward's College, represented by plaintiff David Ellis, claimed that defendant Vassallo owed Lm112 for his son's tuition. The student had not attended for most of the school year because he was sick initially and had to sit for his GCSE exams later on. The parents had failed to give a "full term's notice" of termination as required by the school's regulations and therefore, in the school's records, the student in question was still deemed to be attending. Vassallo claimed that he did not know about this rule, yet the College claimed that every person who enrols their children has the ability to access such rules; thus, the fact that Vassallo did not know of such rules was no defence. Vassallo eventually expressed the wish to pay *pro rata,* but this too was against college rules.

The Court of first instance used the example of paying for a license as an analogy. Similar to how one would not be able to pay for a license just for the days on which the car is driven, the college had a right to ask for the fee charged even when the pupil was not in attendance. This was clearly stipulated in the college prospectus and, furthermore, the college had every right to regard the boy as still being a student, seeing how no resignation was submitted.

The defendant appealed the decision on the grounds that the first Court based its decision on what was in the college prospectus and no weight was given to the principle that a person should be able to enjoy the service paid for, as otherwise it would be a case of unjust enrichment. Moreover, Vassallo claimed that he should not have been ordered by the first Court to pay Lm4 for the stationary which was never bought for his son, nor for the food not consumed by the pupil over the period of the term in question. The Court of Appeal agreed and held that Vassallo should not be made to pay for the meals from the date on which the college was warned that the defendant's son would not be attending any longer. Seeing how the stationary was indeed not bought either, the Court ruled that the sum is not owed. With regard to the

prospectus, despite not being given one, Vassallo had a duty to ask for it. Thus, the Court of Appeal upheld the decision of the First Hall of the Civil Court concerning the tuition fees owed to the College.

In the case of ***Ellis v. Testa*** (Court of Appeal, 15/12/2003) the defendants withdrew their son from St. Edward's College when he failed to make the desired progress. He was absent for the entire last term of the year and the parents did not pay the educational expenses. The school, in quoting regulations stipulating that notice of withdrawals must be given at least two months in advance, sued for the expenses in question. The defendants claimed that this request had no *causa* as their son was not attending school during that period and, therefore, had not received anything. They only removed their son due to academic problems and could not give notice until they received confirmation of acceptance elsewhere.

The Court of first instance held that it was not a valid excuse to say that the boy was no longer attending school because of academic problems. Regulations must be abided by, and the defendants could not disregard their obligations. Once they accepted to enrol their son in the aforementioned school, a contractual relationship was formed, and the defendants were informed of this. The Court pointed out that if the parents wished, they could have instituted an *ad hoc* case to settle the dispute concerning the grant of proper education; however, this could not be raised as an objection in this case. The fees and expenses together with interest had to be paid.

The defendants appealed and claimed that the first Court ignored the fact that the College did not respect their part of the contract by providing proper education, thus not keeping up their obligations. They further emphasised that they could not advise the school about the termination before they were certain that their son would be accepted in another school. The Court of Appeal did agree that the parents had the right to look for the best education for their son, however, this did not give them a right to disregard their obligations, especially when they had agreed to them. The parents had received a copy of the regulations and, therefore, they were aware of the conditions. A contract was formed and the Court had to respect the binding document, therefore confirmed the decision of the first Court.

In the case of ***Malta International Airport plc v. Scicluna et.*** (First Hall Civil Court, 09/10/2003) the facts of the case were similar to Camilleri vs. Grima. A booking had been made for advertisement of an external billboard outside the airport. The defendants had cancelled the booking, but the plaintiff company alleged that this letter of cancellation had not been received. Subsequently, the billboard remained empty for nothing. Court said that irrespective of the issue of whether the cancellation letter had been sent or not, once a booking had been made, one could not cancel the booking unilaterally (a contract can only be terminated by the consent of both parties). The Court quoted the above three judgements and said:

> *"Anke jekk is-socjeta' konvenut naqset milli tisufruwixxi mill- opportunitajiet konnessi liha bil-ftehim, dan ma jintitolahiex ma thallasx l-ammont miftiehem. L-ispazju ta' reklam tqieghed ad disposizzjoni taghha skond il-ftehim, u*

l-hlas relattiv irid isir (ara, per ezempju, l-kawza "Sommers noe vs. Fountain", deciza mill-Qorti tal-Magistrati (Malta) fl-4 ta' Gunju, 1980, fejn koppja li kellha a disposizzjoni taghha labour room fi sptar, kellha xorta wahda thallas ghall-kamra li ordnat, avvolja ma ghamlitx uzu mill- istess kamra; il-kawza "Ellis noe vs Testa", deciza mill-istess Qorti fl-14 ta' Novembru, 2002, fil-kuntest ta' genituri li ma baghtux lil binhom fl-iskola fejn irregistrawh u fejn, allura, kien hemm post disponibbli ghalih, u li kellhom, ghalhekk, ihallsu xorta wahda l- mizata dovuta lill-iskola; u l-kawza "Camilleri et noe vs Grima et noe", deciza minn din il-Qorti fit-13 ta' Gunju, 2003, fejn fil- kuntest ukoll ta' reklam, gie osservat li "La darba l-ispazju kien gie prenotat, dan ma setax jigi kancellat u, ghalhekk, l-ammont imhallas ma kienx rifondibbli.")

"Il-principju pacta sunt servanda huwa wiehed applikat rigorosament mill-Qrati taghna, u jekk ma tirrizultax xi cirkustanza li, skond il-ligi, tista' twassal ghat-thassir tal-kuntratt, l-istess kuntratt irid jigi esegwit miz-zewg nahat. Ma jirrizultax li s-socjeta' attrici naqset mill-obbligi taghha, u s-socjeta' konvenuta ghandha, ghalhekk, tonora taghha u thallas l-ammont miftiehem."

Topic V.II: The Validity of a *Causa*

Prohibited by Law

Just like the object of an obligation, Article 990 provides that the causa cannot be unlawful, contrary to morality or to public policy. In fact, most of the cases that end up before the Maltese Courts deal with the issue of whether the causa is illicit or not. On several occasions the Court has struck down contracts on the basis that the causa was unlawful. In these cases when there is an unlawful causa, the Court will not enforce that contract.

Anything which is against the law can invalidate the *causa*, but there remains a test. In the case of ***Vassallo v. Cuschieri*** (14/11/1996) the parties had underdeclared the price of in a contract. An issue arose between the parties and the matter was taken to court. Before the courts it was discovered that the price was underdeclared and the issue arose as to whether that was the *causa* of the contract. The purpose, that is to say the purchase of a house for residential use, was unequivocally valid. However, the court stated that the parties entered into a contract to defraud the government, rendering the *causa* unlawful. Here, the court examined both the principal and secondary purposes of the agreement, finding the contract null.

In this case, plaintiff entered into a preliminary agreement with the defendant to buy the land adjacent to his property. Prior to the expiration of the preliminary agreement, the defendant sold the property to a third party who was also the defendant to the case. The third party was aware of the promise of sale but entered into the contract anyway in bad faith. The plaintiff requested the Court to enforce the preliminary agreement, declare the sale between the defendants null, and oblige Cuschieri to enter into a contract of sale with the plaintiff which transfers the property to the latter. The third-party defendant pleaded, *inter alia*, that the parties had agreed on a false price so as to evade taxes and thus there was an unlawful *causa* which renders the promise of sale null.

The Court of first instance decided not to enforce the promise of sale and stated that once the *causa* of a contract is to defraud the government by under-declaring the price and avoid paying the correct amount in tax, then the Court cannot accept the plaintiff's request to allow an action to take place, seeing how it is based on an illicit *causa.* If it does, it would be condoning the false declaration made by the parties.

The plaintiff appealed the decision, stating that the illicitness of under-declaring the amount which was to be paid for the property in the preliminary agreement is subsidiary to the *causa* of the said agreement, not the substance thereof, thus there was nothing wrong with it. However, the Court of Appeal confirmed the decision of the first Court, as the false declaration of the real value of the property tainted the whole agreement. The Court noted that tax legislation was automatically deemed to have been enacted in the public interest and that the question of illicit *causa* could be raised by the Court *ex-officio.*

In the case of ***Melita Insurance Brokers v. Fenech*** (First Hall Civil Court, 14/10/1997), the parties entered into a promise of sale agreement in which they had

under-declared the value of the property to avoid paying more taxes. The remaining balance was declared as works which were still to be carried out in the premises. Dispute arose when one of the parties failed to appear on the final deed of sale and a case was opened. The Court discovered that part of the price was left hidden in order to evade tax, thus creating an unlawful *causa.* It was decided that since both parties willingly drew up an agreement of an illicit nature, both of them should be made to suffer the risks of that action. Thus, the submissions of both parties were refused on the grounds that if one enters into an illegal agreement, they should not expect the law they intended to break to protect their interests. Both parties were forced to pay the necessary damages. The Court stated:

> *"Meta (l-partijet) daħlu fi ftehim simulat biex jevadu l-ħlas tat-taxxa, il-partjiet kienu qegħdin ifittxu li jqarrqu bil-liġi, u ma jistgħux issa, ladarba l-ħsieb tagħhom ma seħħx, jitolbu lill-istess liġi, li qabel kienu fittxew li jqarrqu biha, tgħinhom jiksbu lura dak li tilfu minħabba fil-ħsieb qarrieqi tagħhom. Huwa minnu li, jekk it-talba ta" l-attriċi ma tintlaqax, sejrin jistagħnew il-konvenuti, li kienu sħab ma" l-attriċi fit-tfassil ta" konvenju qarrieqi. Iżda l-liġi tgħid illi „in pari turpitudine melior est condicio possidentis, u hekk għandu jkun, għax min jidħol f'avventura bil-ħsieb li jqarraq bil-liġi ma għandux ikollu s-serħan tal- moħħ li jekk l-avventura tmurlu ħażin ikun jista" jinqeda bil-liġi biex jieħu lura dak li tilef. Il-biża" li jibqa" mingħajr il-ħarsien tal-liġi huwa disinċentiv għal min jiġih il-ħsieb li jagħmel bħal ma għamlu l-partijiet fil-kawża tallum u ma għandhiex tkun il-liġi stess li tneħħi dan id-disinċentiv għal min ikun irid iqarraq biha."*

In the case of ***Cutajar v. Mamo*** (First Hall Civil Court, 01/11/2012) the court stated that it was clear that the parties underdeclared the price to avoid paying tax. Here, it questioned whether it was the purpose of the contract, and whether this purpose was a valid ground on which to annul the contract. The court gave the opportunity to the parties to pay any taxes and tax penalties due, and, if this were done, it would declare the contract valid. This is a remarkable departure from previous judgements.

In the case of ***Bonett v. Borg*** (Court of Appeal, 06/10/1999) the case revolved around a loan. Under the law, the exercise the business of issuing loans a licensed is required from the Central Bank. In this case, plaintiff was an individual moneylender without the necessary license. When he sued to recover his loan, the defendant raised to plea of the loan being an unlawful *causa.* The court did not say that the illegality rendered the contract invalid. It held that an unlawful act did occur, but declared it to be a separate matter, holding the loan itself valid. One can see that the view of the courts has again changed since *Vassallo v. Cuschieri*. The court distinguished this breach of law from the contract at issue, finding the loan itself valid, concentrating on the primary purpose of the contract.

In the case of ***Azzopardi v. Bonello*** (Gozo, 3/3/2009) a similar situation of an unlicensed loan occurred. The Court, however, came to a different conclusion, stating that the rule of requiring a license from the Central Bank to give out a loan means this is a serious breach of a financial law which the Court is duty bound not to ignore. It went on to state that no one can use the law to find a remedy after breaking the law.

The Courts are not consistent in their decision of what is the *causa* of the contract, as is illustrated by the conflicting judgements in *Bonett v. Borg* and *Azzopardi v. Bonello.*

In the case of ***Portelli v. Bagley*** (Court of Appeal, 21/03/1988) Bagley was an English citizen with property on lease and, at that time, if you give property on lease to a foreigner you require a permit from the tourism authorities. Portelli leased the property to Bagley for a number of years; however, defendant did not pay the lease for the second year, prompting Portelli to sue. Bagley raised a plea of unlawful *causa*, similar to *Bonett.* The Court arrived at a different conclusion, stating that this is an illegal activity and therefore it declined to hear the case. The Court stated that Portelli defrauded the government and as such cannot seek a remedy under the law.

In ***Bonello v. Borg*** (First Hall Civil Court, 14/7/1997) the case followed the same line as *Portelli*. Defendant entered into a lease agreement on behalf of someone else to avoid acquiring the requisite permit, before terminating the lease without giving prior notice, as required by him as per the contract. Plaintiff sued for the payment of rent for the prior two months during which the property was being occupied, for damages made to the furniture, and for a pending water and electricity bull which the defendants failed to pay. Seeing how the rent arose from an agreement which was null due to not having the relevant permit issued by the respective authority, the rent could not be recovered. However, with regard to the issue of damages, it was proven that it was caused during the lease in question. The Court treated this as something independent from the illicit *causa* and deemed the defendant responsible for payment.

In ***Luchesi v. Sultana*** (Court of Appeal, 3/12/2004),[4] plaintiff was an Italian citizen who wanted to buy his second property in Malta. Foreigners then required a permit from the Central Bank to acquire property in Malta and it was wary about giving permits for a second property. Luchesi was advised that it was not probable that he would get the necessary license to buy the second property. He engaged a Maltese friend to buy the property in his own name, with Luchesi funding the purchase. Eventually, this friend declined to transfer the property, suing Sultana as the intention was for him to

[4]Dr. Mallia holds that this case is morally questionable, as the defendant was allowed to keep hold of the house without paying for it. The causa of the obligation was nothing more than buying a house, and subjectively, there was no unlawful causa, but behind the scenes there was the intention to bypass laws. On the one hand the Courts are reluctant to sanction illegal activities because this gives the wrong impression but on the other hand, these are civil matters, and should the Court involve itself in administrative issues which aren't of its concern? There may be fines and punishment for breaching administrative rules and attempting to defraud the government. The government can sue independently for that, but it doesn't mean that the plaintiff should lose out when the main purpose of the agreement is lawful.

own it. The Court rejected this, as they acted in breach of the law by circumventing a required permit. In the end, the house remained in the name of Sultana in spite of the fact that Luchesi funded its purchase. Therefore, the primary purpose of the contract was decent and lawful, but they bypassed the law. This is a rule of fiscal law, a matter of public policy, and therefore the case could not proceed.

In the case of ***Sammut v. Castille Hotel Ltd.*** (First Hall Civil Court, 06/07/2005) a person worked in the Castille Hotel had a minimum wage and the remainder of his salary was given as extra, illegally. For a number of years this carried on peacefully until the employer dismissed Sammut, who sued for compensation. A problem arose as to what exactly the wage was, with the Court stating that this was as duly registered, discarding the extra amount. The Court ruled that the *causa* of the employment contract was valid, and it did not discard the entire case as the result of the illegal activity. Instead, it did not allow plaintiff to profit off of the illegal activity, instead dividing the case between the legal and illegal. This is met often for income tax purpose and compensation under tort for individuals who are self-employed when their wage is ascertained to calculate damages, in which case the amount declared for income tax purposes is used. Note that all fiscal laws are considered to be laws of public order.

In the case of ***Abdilla v. Gauci*** (First Hall Civil Court, 16/01/2008) a loan was granted in foreign currency, specifically the Deutschmark, in the absence of a permit from the Central Bank. Abdilla sued to recover the money with defendant raising the plea that this was an illegal activity. The Court held that the loan is valid, and that once defendant took the money then he must return it.

What the Courts consider to be the *causa* of the contract varies. Generally, the Courts do not examine the principal *causa* only, looking into any ulterior purposes behind the principal purpose.

Contrary to Morality

What is moral and what is immoral is for the courts to decide. Morality is not religion but is instead what society as such considers to be its social values at any particular time. Here, the law does not mean contrary to the principles of the Catholic religion, but contrary to the social values of society. Furthermore, what is legal is not necessarily morally correct. There may be situations where a law could be contrary to morality. This depends on the way in which society accepts or not a particular institute, and this is for the courts to decide. In the past, cohabitation was considered to be immoral, and there are many cases to this effect; today, the Cohabitation Act expressly states that the agreement between a man and a woman cannot be treated as immoral.

In the case of ***Woodall v. Rapa*** (Court of Appeal, 19/11/2001)[5] cohabitation was dealt with, quoting earlier judgements. When the court was dealing with cohabitation it

[5]Plaintiff, a widow, loaned a sum of money to the defendant who was a separated man in a relationship with the said plaintiff. The money was loaned for the purpose of purchasing a car. The defendant claimed that the money was donated to him but also that there was illicit *causa* for the repayment since there were in a seemingly immoral relationship.

distinguished between whether it was the cause of the obligation or the occasion for it. If a woman wants to open a shop and she approaches a man for a loan who would only accept if she lived with him, the cohabitation is the cause of the obligation; this is immoral. But if a man and a woman are living together and she asks her partner for a loan and he gives her one, then there the cohabitation is the occasion for the obligation which is valid. The Court has always made this distinction when dealing with matters of morality. If cohabitation was the cause of the obligation, then it is null, whereas if it was the occasion of the obligation, it shall be valid. Immorality of cohabitation may still arise vis-à-vis third parties. Take, for example, an unmarried couple who wish to lease a house within which to live together. The Court stated:

> *"Dik il-kawza hi ghal kollox lecita fiha nfisha u ma setghat bl-ebda mod titqies li kienet alterata bil-fatt tar-relazzjoni adultera bejn min jislef u min jissellef. Certament din ir-relazzjoni ma tirrizultax li kienet element determinanti biex gie ifformat il-kunsens tal- kontraenti. Il-flus ma nghataw bl-ebda mod b"xi kundizzjoni li l-appellant jibqa" jirrendi xi servizz illecitu lill-appellata jew bhala xi kumpens ghal tali servizzi. Il-kuntatt ta" self allura seta" jkollu kif kellu ezistenza indipendenti u awtonoma mir-relazzjoni "illecita" tal-kontraenti.*
>
> *"Dana aktar u aktar fiz-zmien meta s-socjeta" jidher li qed toqrob lejn ir- rikonoxximent tal-jeddijiet tal-"common law wife" proprju biex jigu mrazzna l- abbuzi f'dan ir-rigward u tinghata protezzjoni xierqa lil min isib ruhu f'posizzjoni vulnerabbli minhabba li jkun liberalment u volontarjament dahal f'relazzjoni ta" din ix-xorta. Dan l-aggravju qed jigi ghalhekk respint bhala insostenibbli fil-ligi".*

In the case of ***Saliba v. Caruana*** (First Hall Civil Court, 06/04/2006) the parties had been cohabiting for some time but eventually broke up. The plaintiff requested the Court to award him compensation for works carried out in her apartment and some other services rendered. The defendant claimed that in the first place, the defendant's demands could not be accepted as they were based on a false and illicit *causa* due to cohabitation. Secondly, she claimed that the money which the plaintiff had spent on the car was a donation, and that the work carried out in the apartment was done out of his own free will. The defendant asked for compensation for clothes which she had bought for the plaintiff.

The question of immorality arose in Court. In quoting *Woodall v. Rapa,* the Court distinguished between obligations entered into for the purposes of concubinage and those which were ancillary to a relationship of concubinage. The Court said that in

---

The Court concluded that in no way was the sum of money donated to the defendant. It also stated that regardless of the relationship between the parties, the adultery being committed was in no way a determining factor in the creation of the loan agreement. The money was not loaned for an illicit cause nor was it dependent on the continuation of the rendering of an illicit service. Thus, it was found that the illicit relationship was the occasion that brought up the obligation but not the cause of the contract itself.

modern times, when these relationships were on the increase and no longer considered as scandalous as in the past, it would be hypocritical and unjust for a person who was in a relationship with another person to later on use this fact to take an unjust advantage over the other party. The Court subsequently granted compensation to both plaintiff and defendant. It did not, however, grant compensation for works carried out by the plaintiff, as there was insufficient proof that the work was carried out properly. The Court stated:

> *"Illi mbagħad wieħed irid jara jekk kemm-il darba (u lil hinn mill-aspett purament morali) illum il-ġurnata, bil-mod kif is-soċjeta" tħares lejn ċerti valuri, wieħed għadux jista" jgħid li relazzjonijiet, ukoll jekk intimi, bejn żewġ persuni barra r-rabta taż-żwieġ humiex relazzjonijiet kontra l-ordni pubbliku jew kontra l-interess ġenerali. Dan jingħad mhux daqstant għall-frekwenza u l-għadd li bih bosta persuni fis-soċjeta" Maltija llum jidħlu f'relazzjonijiet bħal dawn fi żmien jew ieħor ta" ħajjithom, daqs kemm għall-fatt li l-qagħda u n-negozji ta" nies bħal dawn huma aċċettati bħala rejalta" li minnha ma tistax taħrab jew tagħmel tabirruħek li mhix hemm. Imbagħad tkun ipokrezija mill-aqwa li, wara li tkun għext għal ċertu żmien f'relazzjoni bħal dik u ħadt minnha li stajt, tipprova tiżżerżaq minnha u mill-obbligi li jitnisslu billi, meta jinqala' l- għawġ, tallega li dik ir-relazzjoni kienet waħda illeċita".*

An interesting case is that of ***Fenech v. Jubber*** (First Hall Civil Court, 31/01/1983) in which plaintiff was living with Jubber, a foreigner, whilst married. Here, Jubber owned a piece of land and Fenech, a contractor, developed it, building a house for them to live in together. Eventually, the pair split up and the house, as the result of being built on her land, belonged to the defendant. Plaintiff sued for compensation, but the court rejected this as the activity was immoral. Again, a defendant kept the property virtually for free as the purpose of the contract was immoral. Being contrary to morality may raise serious issues. In most cases the courts avoid it by giving rise to this distinction, and there are a number of cases dealing with, generally stating that the cohabitation was the occasion for the obligation and hence finding it valid. However, like always, the court has been inconsistent on this issue.

In this case, Fenech alleged that Jubber had contracted his services to develop a piece of land that belonged to the latter. The amount due to him for the contract of works was agreed at Lm800 but this was never paid. Jubber claimed that the intention behind such development was for the plaintiff and defendant to move into the home together with the defendant's children and other children which the two parties had in common. Jubber therefore pleaded that the plaintiff's claim cannot be accepted by the Court since it was based on an illicit *causa*, as per the then Articles 987 and 990 of the Civil Code. She further pleaded that Lm800 was excessive in consideration of the works done. It transpired that both while the house was being built and also once construction was completed that the plaintiff and the defendant were having a relationship outside

marriage which had subsisted for quite some time and the parties had two children from this illegitimate relationship.

The Court quoted the abovementioned Articles and stated that a contract with a *causa* that is illegal, or against public policy or morality is considered to be null. However, if it results that the obligation was contracted at the time of cohabitation, but as a transaction which is independent of the relationship, then the obligation is valid. The parties had been in a relationship which bore children and were maintaining each other, thus, Fenech was not allowed to recover any of the expenses incurred once he broke up with the defendant and no longer lived with her, as the contract was null due to the prohibited *causa.*

In the case of ***Fenech v. Calleja*** (Court of Appeal, 28/06/1907) a premises was leased for the purposes of prostitution. One cannot seek a remedy under the law when one is themselves breaking the law. The plaintiff had rented an apartment to the defendant in Valletta. The lease was made for the express purpose of operating a brothel and several rent payments were due. The plaintiff sought payment, however, the defendant stated that the obligation to pay rent was null since it is based on an object which is contrary to morality. At the time this was not illegal.

The Court emphasised how an activity may be legal but still immoral. The plaintiff was aware of the purposes for which the premises were being rented and had consequently charged a high rent, taking into consideration the earning that such premises would generate. The contract was drawn up for immoral purposes and this rendered the contract null. It was held that no obligation is generated. In coming to its decision, the Court applied the subjective test. Objectively, the *causa* was there. However, subjectively, after examining the purposes for which the contract had been drafted, the Court declared the *causa* was null. The Court of Appeal upheld this decision.

In the case of ***Bajada v. Lumb*** (Court of Appeal, 29/03/1955) plaintiff loaned a sum of money to the defendant, who held that the obligation to repay was nullified by the fact that the two parties were cohabiting outside marriage. This was the first time that the Court distinguished between an illicit *causa* being the very purpose of the loan and it being merely occasional. The Court held that in such cases the period of time when the money was loaned is not important but rather what is to be ascertained is whether or not the loan was directly related to the illicit cause. If the loan was the cause of the obligation, then the agreement is null, however, if the money was loaned independently of the illicit relationship or behaviour then repayment must occur. In this case, the Court held that there was no link between the illicit nature of the parties' relationship and the loan, and thus the obligation was still valid, meaning that the loan had to be repaid.

Public Policy

There are few cases under this ground, except for breaches of financial law. apart from fiscal rules, there are few judgements. One such judgement is ***Aveta v. Pecorella*** (Court of Appeal, 30/06/1936) in which a cartel of self-drive car owners with the various companies providing a lease of cars agreed to keep the price at a high level. The court

found this contrary to public order and policy, finding this type of agreement null and void. Here, a society of car-hire owners entered into an agreement between them with one of the aims being to fix tariffs and thus lead to collusive behaviour. The plaintiff alleged that the defendant had gone against the association and worked behind its back, so he petitioned the Court to condemn him to liquidate such amount of money and pay it back.

The Court of first instance noted how any negotiations that are directly or indirectly prejudicial to public interest are illicit and therefore null. It is impossible for the Court to order the execution of a contract with a *causa* which goes contrary to public policy. In upholding the decision delivered by the first Court, the Court of Appeal observed how the agreement is contrary to public policy as the local system was based on free competition and people should not make arrangements to avoid competition. At the time there was no competition law.

Article 990 can give rise to various problems, therefore. With the main issues being under the banner of *"prohibited by law"* where the courts have failed to offer consistent reasoning. The courts must enter into the *causa* and go beyond the principal reason behind the contract's creation.

Topic VI. Standard-Form Contracts *and* Exemption Clauses

The idea behind the Civil Code was that every contract is negotiated one-on-one, thus the *Code Napoleon* was based on the complete freedom of contracts. Through time, traders began to introduce standard forms of contracts prep-prepared by the trader with the customer simply told to sign. Today, these are exceptionally popular, being used everywhere from bank loans to car and appliances purchases. These include standard terms and conditions which the customer can either accept or reject. For a time, there was some dispute as to their validity since they were not negotiated, but eventually they have come to be accepted. David Yates writes*: "the exigencies of mass market made the use of standard form contracts indispensable; it is not possible for business to be carried out on an individual bargaining basis. Apart from being time-consuming it creates obstacles in the conduct of one's business. Mass-marketing is not possible without mass contracting".*

Pre-prepared contracts allow for quicker transactions and a faster turnover of business and once the Court accepted these contracts there is no doubt that the practice spread dramatically. These pre-prepared contracts have even found popularity abroad, with the Supreme Court of the United States also speaking in their favour in the case of ***Carnival Cruise Lines Inc. v. Shute*** (499 U.S. 585 (1991)), stating that *"the creation of standardised contracts is essentially to the modern evolution of mass offered services"*. Standardised contracts also make it simpler to determine whose laws and courts have jurisdiction with the inclusion of forum selection clauses. In Malta, standardised contracts were immediately accepted in ***Rizzo v. Dawson*** (Court of Appeal, 15/05/1953), therefore stating that there was no need to negotiate each contract individually and fully binding those that sign them.

It is accepted that trade cannot be concluded on an individual basis. Mass contracting is not possible without standard form contracts. Traders cannot discuss a contract which each individual person who approaches them. They must thus have pre-prepared contracts. This is an internationally accepted rule. Indeed, today it would be preposterous to imagine an airline company having to negotiate the terms and conditions with any prospective passenger intending to buy a ticket. The same goes for various other services with respect to which modern society has become accustomed to standard form contracts. Ergo, there is no doubt today as to the validity of standard form clauses.

Exemption Clauses

If the standard-form contract is pre-prepared one usually finds term and conditions imposed on the weaker party by the stronger one. One finds clauses completely in the favour of the stronger party and to the detriment of the customer. This led to the proliferation of exemption clauses which were unfair to the consumer. The courts were faced with these situations and had to decide whether or not these particular clauses were valid. Initially, if the contract per se is valid, then it stands that all clauses therein are valid, as per the *pacta sunt servanda* rule. The courts eventually came to do something about these clauses, with one of the first ideas behind controlling these

types of contracts was that the court would insist that if a particular clause exempted liability, then it must be brought to the attention of the other party. It is not often to give the other party a copy of the contract and asking him to read and sign it, but the consumer must be directed to these clauses which exempt liability.

Typically, these standard form contracts would include various conditions in barely legible small print or at the back of the paper. The buyer would essentially be signing up to these conditions, but all this was considered to be an exercise of bad faith on the other part of powerful traders who were abusing of their strength to herd consumers into unfair contracts. Indeed, the exemption clauses started becoming so far-reaching that the trader would at times even say that in the event that he failed to perform his obligation, the other party could not sue him to oblige him to perform his obligation.

This is why various systems of law across Europe, most notably the German and Italian systems chose to radically amend their civil codes to include the affidamento concept. The Courts started to assess the fairness of these terms and conditions and were declaring that certain unfair terms were not enforceable. The French and Maltese civil codes are still based heavily on the Code Napoleon (which is based on the *voluntà* theory) and our Civil Code does not expressly cater for these exemption clauses. Nevertheless, the Courts have still started applying affidamento principles in their decisions and there have been several judgements in which the Courts declared that certain exemption clauses were not enforceable. This would not render the whole contract null but simply the parts that were extremely and unreasonably fair.

Specifically Pointing Out Exemption Clauses

One of the earlier cases on this point is ***Borg v. Calascione*** (Commercial Court, 25/05/1961)[6] which involved the delivery of a bulk order of fruit. When the delivery was affected, the wholesaler was presented with a contract exempting the seller from responsibility for the quality of fruit, which was duly signed each time by the official of the wholesaler. After a particularly poor delivery the wholesaler sought to recover the price of the fruit with the seller relying on the said clause. The court did not accept this clause as it was not brought to the attention of the buyer. Note that this is not a case of a trader dealing with a consumer, but of two traders dealing with one another, however, the same rules apply. The court held that clauses exempting liability must

[6]Plaintiff was a wholesaler who had supplied fruit deliveries to a retailer. Once the deliveries were made, the retailer would be asked to sign a delivery note to affirm that the delivery took place. The retailer, once signing the note, realised that the fruit was in bad condition and refused to pay. The wholesaler sued for payment and stated that in the note there was a contractual obligation enlisted that exempted him from responsibility if the fruit arrived in bad condition.

The Court stated that although the delivery note contained a contractual obligation and that it was signed, this was not enough to exempt the wholesaler from situations where the goods arrived in bad condition. It was explained that the clause should have been pointed out to the other party prior to the situation occurring. This is based on the principle of good faith and meant that the claim by the plaintiff could not be upheld. The Court also stated that an exemption clause should not serve to exonerate a person from *dolo*, *culpa lata* (gross negligence), or *culpa laevis.*

be brought to the attention of the other party, refusing to allow defendant to rely on this contract.

In the case of ***Giordano v. Grech*** (Commercial Court, 1933) a person entered into a hotel and booked a room therein. He signed the registration form which included a number of clauses exempting the hotel- keeper from liability for things stolen or damage. Upon arriving at the hotel, he found some things missing. The Court annulled the exemption clauses because the terms and conditions had not been brought to the attention of the guest when he entered into the contract.

In the case of ***Sammut v. Sullivan et*** (First Hall Civil Court, 16/10/1995) an exemption clause was included in a brochure. The plaintiff went on a tour. The brochure included the places that the tour was going to visit. As usual, the brochure contained various terms and conditions and one of these terms was that the tour agent had the right to cancel or change any part of the tour without incurring any responsibility. When the plaintiff went on this tour, she found that it had been changed completely; most of the excursions had been cancelled, the hotel was different and there were other things which were different from the way in which they had been advertised.

She sued to recover damages, but the defendant company said that there was the exemption clause on the brochure and hence they had the right to change these things. The exemption clause read:

> *"The company reserves the right without paying compensation: to change or cancel any tour itineraries (programmes), and/or to substitute any hotels, means of transport or any other arrangements as may be deemed necessary."*

The court dismissed this defence because it said that the clause had not been brought directly to the attention of the customer and thus held the defendant company to be responsible for the damages.

Exemption Clauses and *Dolo*, *Culpa Lata*, and *Culpa Laevis*

Another interesting observation made by the Court in *Borg v. Calascione* is that the Court said that an exemption clause should not serve to exonerate a person from dolo, culpa lata (gross negligence) or culpa laevis. This is another principle (the second manner to tackle exemption clauses) established by our Courts which basically provides that no matter how wide the exemption clause is, it can never excuse dolo (intentional non-performance of a contract), culpa lata or culpa laevis. This prevents an exemption clause being used to justify fraud. The Court stated:

> *"Klawzola ta' ezoneru ma kienx ikollha l-valur li tezonera lid-debitur mid-dolo, mill-kolpa gravi, ekwiparata ghad-dolo, u mill-kolpa ljevi, li tigi riskontrata meta jkun hemm ommissjoni ta' dak il-grad normali ta' diligenza li l-ligi tirrikjedi fl- ezekuzzjoni ta' kull obligazzjoni in genere. Fi kliem iehor, il-klawsola ta' irresponsabbilita' bhal dik in*

> *ezami ma tezimix mir-responsabilita' meta jkun hemm vjolazzjoni ta' kuntratt jew ta' dover; u jekk jigu stipulati espressament biex jezoneraw mid-dolo u miz-zewg gradi ta' kolpa fuq riferiti, jkunu nulli, billi kuntrarji ghall-principju generali tal-morali, bazi tal- ordni pubbliku."*

In the case of ***Sammut v. Sullivan & Sullivan Co. Ltd.*** (First Hall Civil Court, 16/10/1995)[7], plaintiff booked a tour with defendant *qua* travel agent. In the tour brochure there was a clause stating that the company reserved the right to completely change the tour's itinerary. Plaintiff *qua* customer was given this brochure but was not told about this particular right, although it was written down. The tour was completely changed by the excursions such that the excursions did not reflect those listed in the brochure. Sammut duly sued for compensation with the defendant relying on this clause, a plea rejected by the court for their failure to bring it to Sammut's attention.

In the case of ***Micallef v. Baldacchino*** (Court of Appeal, 20/01/1992),[8] a warranty of latent defects was opted out of when plaintiff purchased a RHIB, with the contract including such a clause. It resulted that the RHIB was defective, and the buyer sued for compensation to revoke the sale. The Court rejected the defendant's plea relying on this clause as it failed to bring it to the attention of the buyer. The law allows one to opt out of their responsibility for latent defects, but such a move must be discussed with the client first and cannot be simply added to a standard form contract. It is included in various contracts, especially in contracts for the sale of immovables, but it must be expressly discussed with the buyer who accepts it. To that end, the buyer usually initials near these types of clauses to indicate that he has been informed of them and accepts them.

---

[7]Defendant was a tour agent who organised tours for groups. In the tour agreement there was a clause contained that stated that in the event of cancellations or changes the tour guide was not to be held responsible. The plaintiff had booked a tour and realised that what was advertised was very different to the experience on the day. Plaintiff sued to recover damages, but defendant insisted that the terms and conditions stipulated on the brochure stated: *"The company reserves the right without paying compensation: to change or cancel any tour itineraries, and/or to substitute any hotels, means of transport, or any other arrangements as may be deemed necessary".*

The Court upheld the principle that exemption clauses must be clearly pointed out to the other party signing a contract or making an agreement in accordance with the principle of good faith. It therefore dismissed the defendants' plea and ordered the payment of damages to be paid to the plaintiff.

[8]In this case the plaintiff bought a dinghy from the defendant which was found to be defective. The defendant had placed a clause in the contract of sale that exempted responsibility in the case of latent defects. Plaintiff sued for damages.

The Court did not accept the defence that the exemption clause exonerated the defendant from responsibility. It was pointed out that not only had the clause not been pointed out to the plaintiff, but the contract had been placed in a bag in the dinghy and the buyer had not been informed of the conditions of the contract. It was held that the defendant was responsible for the restitution of the situation despite the contractual exclusion of the warranty.

Another way in which the courts have sought to control these standardised contracts is that they can never exempt the seller for liability resulting from *dolus* and/or fraud. This is a general rule widely accepted by all authors.

Another issue tackled by the courts is what the English call a fundamental breach, which indicates that in spite of the clause the seller is obliged to perform his obligation as per the clause, and in failure to do so, it cannot rely on it. Whilst the name has not been adopted in Malta, the principle has. In the case of ***Camilleri v. Swan Laundry and Dry-cleaning Co. Ltd.*** (FH CC, 13/11/1995) plaintiff had just gotten married and wanted to keep her wedding gown, taking it to be dry-cleaned before putting it in storage. There, she signed a document exempting the company from liability for damage to the gown. However, the entire gown was ruined, with plaintiff suing for compensation. The company relied on this clause, but the court stated that it failed to perform its obligation to clean the gown, with the fact that it was completely burned indicated that they must pay compensation in spite of the exemption clause.

Shifting the Burden of Proof

The third way in which the Courts have dealt with exemption clauses is that of instead of accepting the exemption clause as a full exoneration from responsibility, the Court will consider it as having the effect of shifting the burden of proof on the other party. This was adopted largely in maritime cases, particularly those dealing with bills of lading.

In the case of ***Rizzo v. Ellul Sullivan*** (Court of Appeal, 14/10/1987) at the back of a bill of lading there are a lot of clauses, including exemption clauses. These are common in these types of business and are generally the same in all bills of lading. Thus, there is no need for the carrier of the goods to bring these terms and conditions to the attention of the other party (who is usually also a trader) every time a shipment is made, as the trader should be aware of these clauses. Under the law, once you deliver goods to the carrier, he becomes a depository and is therefore responsible to preserve the goods in good state. By law, if the goods are delivered with some damage, the onus of proof is on the carrier to show that he has taken all the reasonable care to preserve the goods and that despite this care, the goods were still damaged. Now let's assume that there is an exemption clause which says that the depository shall not be responsible for any damage caused to the goods.

The Courts have not been willing to give full effect to these exemption clauses. Neither have they dismissed them as inapplicable. The Courts have instead interpreted these types of clauses as having the effect of shifting the burden of proof on the other party. If the goods suffer damages, then it is no longer up to the carrier to show that the damage was caused through no fault of his, but rather, it is up to the other party to show that the carrier had failed to exercise due diligence, and this had eventually caused damage to the goods. Thus, the Court would be relatively accepting the exemption clause – in a way, this creates a sort of balance, as the Court would be mitigating the absolute effect of the exemption clause (rather than accepting it fully or dismissing it completely). In this particular case, the plaintiff (the sender) claimed that the iron rods (vireg) had been twisted as a result of the defendant (the carrier)'s handling. The Court of Appeal confirmed the judgement of the Commercial Court and

rejected this claim saying that no sufficient proof had been brought to show that the rods were not already in that state when they were given to the carrier. The Court stated:

> *"Ma tezisti ebda prova illi t-tghawwig gie kkawzat waqt l-iskarikar ta` l-istess mill-istiva tal-barkun, jew li kien hemm traskuragni da parti tal-agent fil-process kollu ta` l-iskarikar. Anzi mhux eskluz li l-hsara setghet grat fuq il-moll."*

Doctrine of Fundamental Breach

The fourth way how the courts have tried to limit the effect of these exemption clauses is what the English call the 'doctrine of fundamental breach'. In Malta we do not have a specific name for it but the Courts' reasoning in some judgements is very similar to this doctrine. This doctrine says that if there is an exemption clause in a contract, you cannot use such exemption clause as a means to avoid performing the contract. You can use it if there is some minor variance/breach, but you cannot use it if you cannot fundamentally perform the contract. That is why it is called the doctrine of fundamental breach. If you go against the contract, you cannot exonerate yourself on the strength of an exemption clause. One cannot fail to perform the contract on the strength that he shall not be responsible for damages due to an exemption clause. The Court will never accept such an exemption clause no matter how wide it is.

In the case of ***Farrugia v. Camilleri*** (Court of Appeal, 01/06/1993)[9] a married couple built a house and ordered tile therefor. In the purchase there was a clause that the company who sold these tiles was not responsible for any defects in the tiles supplied, but it resulted that they were in fact not as ordered. The couple sued for compensation and the company sought to rely on this clause exempting them for liability for the quality of the material supplied. The court refused to allow them to rely on this clause in such a case, owing to the fact that the entire order was defective, meaning the company completely failed in its obligation to supply the tiles as ordered. Therefore, the clause could be relied upon if the company performed its duty, supplying tiles with only a few minor defects. The company must perform its obligations diligently, and, failing to do so, cannot rely on an exemption clause, irrespective of how wide it is. This follows from the principle that the obligations of the contract must at all times be performed as agreed to. The Court stated:

---

[9]Farrugia entered into a contract of service where Camilleri had to provide and put in place marble slabs in return for Lm790. Once the work was carried out, most of the tiles turned out to be a different colour to what was promised. In the contract the plaintiffs had signed with the defendant an exemption clause was included which stated that tiles may vary in colour from the one exhibited in the showroom.

The Court acknowledged that the contract contained a clause stating that natural defects in the material of the tiles could not be avoided. However, it also held that natural defects apply in the case of minor defects and would not be present in all the material used. The Court noted that the variation in colour of almost all tiles resulted in the non-performance of the contract. Therefore, the defendant could not rely on an exemption clause to escape the consequences of non-performance of the action.

> *"Fil-fehma ta din il-Qorti din il-klawsola kien ikolla xi valur kieku kien il-kaz li d- difetti naturali kienu jikkonsistu l-eccezzjoni imma tista tghid li l-irham kollu kien difettuz u dan ifisser illi l-kuntratt ma giex ezegwit".*

In the case of ***Camilleri v. Pisani noe*** (on behalf of Small Laundry & Dry-cleaning (First Hall Civil Court, 13/11/1995), the plaintiff (Silvana Camilleri) sent her wedding going-away dress for dry- cleaning. A few days later, the dry-cleaning company manager called her to inform her that since the dress had pearls and embroidery, there would be the risk that the dress would suffer some damage or that some buttons might go missing. She said that she would take the risk provided that the material would remain intact. The company manager denied that he had gone into the specifics but told her that dry-cleaning of the dress was risky in general. Eventually, she learnt that her dress had been completely burnt and only pieces of the dress remained available. Mrs Camilleri had never signed any papers or contractual agreements.

The First Hall considered that dress material was of a good quality and resistant to the usual conditions used in the dry-cleaning process for delicate clothes. The damage caused was due to a high temperature that could have been the result of negligence. The Court referred to a number of UK judgements and the Italian Civil Code and held that an exemption clause (even if implied and not written) is never acceptable when the harm is the result of dolo or grave culpa.

The Court held that evidence showed that when there was such element of risk, the procedure was to ask the client to accept the conditions of risk. This had not taken place in this case. The telephone call was not as specific as it should have been. The Court further stated that one could rely on the exemption clause exonerating from liability if the damage was a minor one but since there was no performance of the obligations, one could not rely on the clause. The fact that the dress had been burnt meant that the defendant had failed to perform its obligation in the contract. The Court ordered that the defendant company pay Lm700 in damages to the plaintiff.

The case of ***Demajo v. Santucci*** (Court of Appeal) (12/11/1994) concerned a sale by auction. In such a sale one is given a catalogue in which there is a brief description of the items to be sold. At the end of the catalogue there was a clause stating that the auctioneer is not responsible for the truth of the description. There was a painting and plaintiff Demajo bought the painting for Lm3,000 on the belief that it was the work of a certain painter. It was later discovered that this painting was not really made by such artist and therefore, it was not worth the money that the plaintiff had paid for it.

The matter went to court and the auctioneer (the defendant) relied on the clause, but the Court held that despite this exemption clause, there was a complete difference between what had been offered (in the catalogue) and what had actually been given. Had it been a painting of a different artist of the same level, then it would have possibly been an acceptable sale (unless it could be voided on the basis of error in substantia). In this case, there was the non-performance of the obligation and thus the auctioneer could not rely on the clause.

Specialist Legislation

The Consumer Affairs Act provides special protection to consumers; and was introduced further to suggestions by the European Union which has itself introduced various laws to protect the consumer. Part VII of this Act deals with unfair practices and lists clauses deemed to be unfair *ab initio.* Here, the court cannot decide whether a clause is null or otherwise or whether or not it can be relied upon by a company. These clauses are ignored by the courts and deemed invalid. Also, apart from the list the law provides that the court may ignore any unfair term and declare it to be invalid. The court may cancel the term and, if it declares it to be vital to the contract, cancel the entire contract. Thus, it has the authority to examine each and every clause as per its wide discretion. This is a marked departure from the *voluntà* theory of contracts, by allowing the court to cancel any term which it deems incompatible with the concept of good faith. It is on this basis of good faith against which each clause is measured. The court is also to take into account the bargaining power of the parties, another marked departure from the Code Napoleon which assumed that both parties in a transaction are equally powerful. The court, taking into account all circumstances regarding the conclusion of a contract, will decide whether a particular clause abides by this requirement of good faith.

Another way in which the legislator has impinged upon the pacta sunt servanda is to allow a party to opt out of a contract at its unilateral discretion as included in the Consumer Rights Regulations (L.N. 439.2013). These are intended to apply only to abnormal contract types as per the Regulations, allowing the consumer to opt out of the contract within fourteen days for no reason at all, in spite of the fact that the contract would have been signed and agreed to, so long as an unequivocal statement declaring their intention to withdraw is made. In the past, the Door-to-Door Salesman Act (1987, since repealed) was in force to regulate the practice of door-to-door salesmen who would intentionally visit houses when the husbands were at work, with housewives agreeing to purchase these expensive and voluminous purchases. Husbands would often seek to annul these sales but would not have been able to at the time. Therefore, the legislator introduced this Act and gave the right of withdrawal within fifteen days. The contract must clearly state the existence of this right. To that end, the rule of *pacta sunt servanda* still exists in general, but it is being slowly sacrificed at the altar of consumer protection. The most marked departure (and most important insofar as the consumer is concerned) is the ability of the court to annul entire provisions and contracts on the basis of good faith.

Part VI of this Act (Articles 44 – 47C) deals with unfair contract terms. Article 44 protects consumers from contracts which contain unfair practices. In fact, one finds an extremely long list of prohibited terms in sub-article (2) ... if such terms are included in a consumer contract, then such terms shall be deemed never to have been inserted. Moreover, the list is not to be taken as an exhaustive one and the Courts or Tribunals may nullify other clauses or terms included in contract if these are deemed to be unfair- Art. 44 (4).

Thus, the law does not limit itself to explaining when a term shall be deemed to be unfair, but it also gives power to the Court to invalidate a term that it considers to be unfair. It will not strike down the whole contract, but it will consider that clause as if it

had never existed. This is innovative because other than this, there is no power given to the court under the general law enabling the courts to strike down a particular clause on the basis of its unfairness.

According to Article 45, an unfair term means any term in a consumer contract, which on its own or in conjunction with one or more other terms, has the object or effect which –

1. creates a significant imbalance between the rights and obligations of the contracting parties to the detriment of the consumer; or
2. causes the performance of the contract to be unduly detrimental to the consumer; or
3. causes the performance of the contract to be significantly different from what the consumer could reasonably expect; or
4. is incompatible with the requirements of good faith.

The unfairness of a term shall be assessed, taking into account the following:

1. the nature of the goods or services for which the contract was concluded;
2. the time of conclusion of the contract; and
3. all the circumstances attending the conclusion of the contract and all the other terms of the contract. Such circumstances may also include:
   a. the bargaining power21 of the parties;
   b. whether a consumer was subjected to undue pressure; and
   c. whether the lack of knowledge or skill of a consumer was improperly taken advantage of.

All these clearly represent an effort to protect the weaker party (the consumer). In this sense, this goes completely contrary to the *voluntà* theory as expressed in the Civil Code, as the law is giving the Courts the power to declare that an agreement is not binding despite the fact that the consent of both parties was validly tendered. This can thus be seen as an embodiment of the affidamento spirit.

In Article 46, we find that a consumer contract that includes a prohibited or unfair term shall not be binding on the consumer unless the contract is capable of continuing in existence without the unfair term.

In the case of ***F Advertising Ltd. v. Anthony Tabone*** (Court of Appeal, Inferior Jurisdiction, 9/1/2009) the court said that the question of unfairness of a particular clause in a contract is independent of the will of the parties. We are not examining the consent of either parties, but the test is an objective test to determine whether a particular clause if unfair or not, taking into account the circumstances mentioned in that section. The court declared:

> *"L-anqas mhi marbuta mal-volonta" tal-partijiet li kkontrattaw izda mal-konsegwenza tad-diffett tal-istipulazzjoni kontrattwali".*

Thus, the court will look at the contract, examine the circumstances irrespectively of the will of the parties, and it may proceed to annul the contract (or certain parts of it) if it considers it to be unfair, even though these clauses had been entered into by the parties of their own free will.

Another interesting point raised during this judgement is whether the question of the unfairness of a particular clause can also be raised in a defence. When it comes to the rescission of a contract under vices of consent, the general view of the Courts is that a vice of consent can't be raised as a defence, but if the party wants to attack a contract on the ground of rescission he must bring an action himself, i.e., If X brings an action against Y seeking to have Y perform his obligations under a contract, Y cannot defend himself by claiming that the contract is null on the basis of a vice of consent. Y has to make a specific action to that effect.

Nevertheless, when it comes to the question of an unfair contract, the Court has said that the unfairness of a contract can be raised as a defence. Thus, if a consumer feels that there was an unfair contract term, he may leave it as it is and not perform his obligation, and then, if he is sued for the performance of the contract, he may raise the unfairness of the term to his defence. The court accepted this and stated that the matter here is different from rescission.

Topic VII. Effects of Contracts

Articles 992 - 1001

The effects that contracts have:

1. vis-à-vis the contracting parties
2. with respect to third parties.

(I) Effects between the contracting parties (Articles 992 & 993)

Article 992 gives a very important principle on which the basis of our contractual law arguably lies. In 992 (1), it provides that "contracts legally entered into shall have the force of law between the parties".

If a party fails to honour its contractual obligations without just cause, then it must face the consequences and the other party has various remedies to force such party to honour the contract. This article embodies wholeheartedly the volontà theory – once a valid consent is given, then one is bound.

Article 992 (2) goes on to say that contracts may only be revoked by the valid consent of the parties or on grounds allowed by law. The general rule therefore is that one may not terminate a contract unilaterally. However, there are certain instances where the law allows the unilateral cancellation of contracts, namely the following.

(1) The contract of Letting of Works ('appalt') (locatio operis) (Articles 1633 – 1643 of the Civil Code)

This is basically a contract where one engages someone to carry out some work for him in return for some reward. Article 1623 of the Civil Code describes a contract of work as: "A contract of letting of work and industry is a contract whereby one of the contracting parties binds himself to do something for the other, for a reward which the latter binds himself to pay to the former". Typical examples would include when one engages the services of a builder, a plumber, or a mechanic.

According to Article 1640, the employer may unilaterally dissolve the contract but would be liable for compensation if the termination is without just cause. So even though the law grants this right, there is still responsibility as one may still have to fork out money to compensate the contractor for all his expenses and work and to pay him a sum to be fixed by the court, according to circumstances, but not exceeding the profits which the contractor could have made by the contract. One should note that this right is not equally given to the contractor.

(2) The Contract of Mandate (Articles 1856 – 1890 of the Civil Code)

This is basically the contract when one (the mandator) gives someone else (the mandatory) the power to do something for him (on his behalf).

According to Article 1866 (a), mandate may be terminated by the mandator's revocation. The mandator need not provide any reasons for this termination and is not

liable for compensation. To safeguard the mandatory, the law does however provide that if the revocation does not reach the mandatory in good time and such mandatory performs an act in the mandator's name (as authorized), then such act will still be binding on the mandatory. But other than in this exceptional case, mandate may be terminated unilaterally.

(3) The Contract of Civil Partnership - (Articles 1644–1688 of the Civil Code)

Partnership is a contract whereby two or more persons agree to place a thing in common, with a view to sharing the benefit which may derive therefrom. An example of a civil partnership would be that between two or more lawyers who agree to share an office and common resources without forming a fully-fledged commercial partnership in terms of the Companies Act.

According to Article 1679 (e), a partnership terminates by the declaration of one of the parties that he does not wish to continue in such partnership. Such partnerships are typically based on mutual trust and therefore if the partners no longer enjoy such trusts, then the law grants a remedy for a swift termination.

These three contracts are generally considered to be weak contracts due to the fact that they can easily be terminated by any of the parties thereof.

Can contracting parties include stipulations which go against the provisions of the law? It depends on what part of the law one is speaking about. In certain cases, the law expressly provides that parties are free to agree on something which is different from what the law provides. In other instances, the law does not grant this possibility.

For instance, in the contracts of lease and emphyteusis, the law grants various possibilities to the parties to contract on certain aspects differently from the default provisions of the law. One often comes across the term "unless otherwise agreed..." or "unless otherwise stipulated". This gives the contracting parties the authority to go against the dispositions of the law. For instance, Article 1513C of the Civil Code provides that the rent of a pre-1995 residence shall be set at a minimum of €185, "unless otherwise agreed upon in writing". Thus, the parties are free to agree on a different rent, even a lesser rent.

On certain points, however, this is not possible. When it comes to perpetual emphyteusis, it is not possible for the parties to exclude the emphyteuta's right to redeem the ground-rent – Article 1501 (5)2.

Article 993 provides that "contracts must be carried out in good faith and shall be binding not only in regard to the matter therein expressed, but also in regard to any consequence which, by equity, custom, or law, is incidental to the obligation, according to its nature."

This article has recently been referred to in various judgements related to pre-contractual liability in which our Courts have extended this attribute of good faith not just to the carrying out of the contract but also during the negotiation stage. Refer to:

- ***Debattista v. JK Properties Ltd*** (07/12/2005)
- ***Baldacchino v. Chairman tal-Korporazzjoni Enemalta*** (11/10/2006)
- ***De Tigne Ltd. v. Lorna Micallef*** (10/1/2007)

The law is here saying that contracts should not be interpreted literally. If something is not specifically mentioned in a contract but is ancillary to the subject-matter and is something which one of the parties expected the other party to perform in good faith despite the fact that it was not specifically mentioned, then it should also be carried out. That is why the law expressly mentions "any consequence which by equity, custom, or law, is incidental to the obligation".

To what extent are contracts binding on one's heirs?
As a rule, when one enters into a contract, he would be promising for himself and for his heirs. This is based on the principle that the heirs continue the personality of the deceased. If for example, the deceased had entered into a promise of sale and dies during its pendency, his heirs have to appear on the final deed of sale.

It is possible for a person to expressly stipulate that a contract which he is entering into is not binding on his heirs. This had to be specific and if one simply says that he is binding himself only, that would not be enough to exclude the heirs. Obviously, the heirs may refuse the inheritance and in so doing, they would be refusing to step into the shoes of the deceased- thus, the obligation entered into by the deceased will not be binding on them. Thus one has to first see whether it there are more assets than liabilities prior to accepting an inheritance.

Even here, there are three exceptions to this general rule that contracts are transmitted to the heirs, two of which have already been mentioned above in relation to the fact that they can be terminated unilaterally.

1. **Mandate:** The mandate terminates with the death of either the mandator or the mandatory. – Art. 1886 (b)
2. **Civil Partnership:** If I enter into a civil partnership with X, it does not mean that upon his death, I will want to continue the partnership with his heir. Article 1679 (c) provides that such partnership terminates by the death of any partner.
3. **Obligation for Maintenance:** One of the essential duties of marriage is that the spouses are obliged to maintain each other but this is limited to the spouses and is not transmitted to the spouse's heirs.

The effects of contracts with regard to the transfer of ownership
There is one drastic change between the Code Napoleon and the Roman law:

- Under Roman law, ownership was deemed to be transferred with the delivery of the object (traditio). With respect to immovable property, the delivery of the keys was considered as the moment of the symbolic delivery of the property.
- The Code Napoleon brought about a drastic change in this aspect, for it provided that it is not the delivery which transferred ownership but the consent

> to perform the transfer. As soon as there is consent, i.e., as the parties agree on the thing being transferred and, on the price, then there is the transfer of ownership, even though delivery has not yet taken place. This means that the risk (*periculum rei*) is transferred as soon as the agreement is made. If the object perishes after the agreement and this is not the fault of the seller, then the buyer would still have to perform his obligation (of paying the seller) despite the fact that he never actually got his hands on the object sold. Article 134723 makes this point amply clear. One should also consider the special provisions of the law dealing with the sale of things by weight, number, or measure (Art. 1348), the sale of things by bulk (Art. 1349 – 1350) and the sale of things that have to be tried and tested (Art. 1351).

Thus, possession and ownership are two separate concepts. For instance, let's give the example of a sale of a house whose public deed has been published today. The buyer becomes the owner immediately. If the parties have agreed that the keys are to be handed over to the buyer in a week's time, this does not affect the transfer of ownership. If the house is struck by lightning and suffers damage, the buyer cannot say that he hadn't yet bought the house simply because he hadn't yet been given the keys! Similarly, there are situations where the keys to a property are given to the prospective buyer upon the signing of the promise of sale. This does not mean that the latter has become the owner of the said property, until the final deed of sale is finally signed.

A collateral principle arising from this distinction between ownership and possession is that the fact that you are the owner of an object, does not entitle you to take possession of the object. As owner, you may sue to get the said possession, but you may not act unilaterally and if you do, you can be guilty of spoliation. Thus, although, delivery is not important to become owner of an object, it is important to start enjoying the object. *Vide* the case of ***Vassallo Gatt v. Camilleri*** (Court of Appeal, 26/01/1996).

A judgement which explains this principle is that of ***Adrian Vella et. v. Marang Holdings Ltd***. (First Hall, Civil Court, 23/06/2004) in which a person bought property through a judicial auction and subsequently found that a person was residing in that building. The Court said that ownership was transferred as soon as there was the judicial adjudication. Nevertheless, such person could not forcefully or unilaterally force the occupier to leave the house. This could only be made by means of a Court case. The Court stated:

> *"Minkejja li l-kunsinna tal-beni immobbli li f' kull kaz issir ipso jure favur il-kumpratur ma timportax ukoll awtomatikament it-trasferiment tal-pussess materjali f' idejn l-akkwirent. Infatti bil-liberazzjoni finali jghaddi l-pussess formali mill-venditur sebbene sfurzat f' idejn il-kumpratur. Hemm ukoll it- traditio tal-immobbli in kwistjoni izda dan ma jimpurtax necessarjament u awtomatikament il-pussess fiziku f' idejn il-kumpratur. Bil-liberazzjoni finali jsir it-trasferiment tal-propjeta` immobbli izda dan ma jwassalx ghat-trasferiment tal-pussess materjali. Infatti d-*

> *detenzjoni materjali tal-immobbli tibqa' f' idejn min kien jiddetjenieh.*
>
> *"Waqt li bil-pubblikazzjoni tal-kuntratt u bil-liberazzjoni finali, il-pussess formali tal-immobbli jghaddi mill-venditur f'idejn il-kompratur, u hemm it-"traditio" tal-oggett tal-vendita` favur tieghu, dan ma jfissirx li necessarjament jghaddi wkoll f'idejn il-kompratur il-pussess fiziku. Il-pussess tal-fond jista' ghal diversi ragunijiet ikun ghadu f'idejn il-venditur stess u spiss ukoll f'idejn terz mhux parti fin-negozju, bhal meta per ezempju l-fond trasferit ikun mikri lil haddiehor.*
>
> *"Wiehed jista' jakkwista l-proprjeta` shiha b'titolu ta' komprovendita` kemm b'att pubbliku kif ukoll b'liberazzjoni finali fil-procedura tas-subbasta imma ma jakkwistax minnufih il-pussess materjali tal-fond".*

The court distinguishes between formal and physical possession. If you do not get a voluntary delivery, then you have to sue the person in court.

Consent transfers ownership. But what if I sell a thing to two different persons? Who is the proper owner of the thing? Here delivery would also have legal importance. It does not only come into play when it comes to the enjoyment of the thing, but it may also have legal importance in such a scenario. Here we have to distinguish what kind of object we are speaking about, whether immovable or movable.

In the case of a transfer of an immovable property (made by a public deed) if the same property is sold to two or more different persons, the person deemed to be the owner is he who registers the title first and not he who bought the property first. After the publication of a public deed, the notary has 15 days within which to register the deed at the Public Registry.25 There can thus be a situation where a person sells a property to two persons within the same couple of days, and both notaries involved register the transfer within these 15 days.

E.g.: X sells to Y on the 1st of February. X also sells to Z on the 3rd of February. Y's contract is registered on the 10th of February whereas Z's contract is registered on the 8th of February. Z shall be deemed to be the owner as his registration came before Y's, even though his contract took place after Y's.

In the case of movables, reference has to be made to Article 997 which gives importance to delivery. It provides that when an object is transferred to more than one person by successive agreements, then the person to whom delivery is made, and who obtains it in good faith, shall have a prior right over the others and shall be entitled to retain it, even though his title is subsequent in date. There is a maxim that possession is nine tenths of the law. The mention of good faith implies that one should not have been aware of the fact that another sale of the same object had been concluded.

Along the same lines, what if I successively lease the same property to more than one tenant? This issue of lease is not specifically found in the law but there have been cases dealing with this matter. In England vs. Gauci Borda (24/05/1968) (Court of Appeal), the court entered into this issue directly and said that lease is a personal right and if it is transferred to more then one person, then it is that tenant who takes the possession of the house first who is the true tenant, as long as he is good faith. Thus, one should not consider the dates when the contracts of lease were concluded.

What about incorporeal rights? Article 997 also provides that in the case of multiple transfers of a credit (i.e., when I assign a credit belonging to me, to more than one person), the cause of preference shall lie with the buyer who first notifies the debtor of that credit. As soon as this person notifies the debtor that he is the assignee of the creditor, then he is deemed to be the new creditor.

Another interesting judgement dealt with the successive transfers is that of ***Baldacchino v. Pace*** (Court of Appeal, 25/2/2000), which dealt with transfer of shares. If I transfer my shares in a company to X and then I transfer the same shares to Y, who is the new shareholder? Again, here the courts have concluded that one should not look at when the contract was concluded but at who has first registered the title with the company. When a person acquires shares in a company, he has to inform the company that he is the new shareholder. He who does so first will be deemed to be the first shareholder.

In the above circumstances, the law and the courts have provided different criteria to determine the true owner in the case of successive transfer of ownership of the same thing. It is true that ownership is transferred with consent, but the notion of possession remains important despite the Code Napoleon's influence. One can conclude that consent makes the transfer but possession kicks in as soon as there is a conflict as to who is the true owner.

(II) The Effects of Contracts on Third Parties

The general rule is that a contract is only binding between the contracting parties and does not bind third parties. If for instance X is the owner of a property which is leased to Y for a 10-year period and during such period X sells the property to Z, this sale will not have the effect of terminating Y's lease. Heirs are not considered as third parties because they continue the personality of the deceased. Article 999 (1) of the Civil Code in fact starts off by asserting the general principle just outlined, namely that a person cannot by a contract entered into in his own name bind or stipulate for anyone but himself.

Nevertheless, despite this general rule, our law provides two types of contracts which can affect third parties, and these are discussed in Articles 999 (2) and 1000 of the Civil Code.

The *promessa da rato* - Article 999 (2)

Article 999 (2) provides that a person can bind himself in favour of another person, to the performance of an obligation by a third party; but in any such case if the third-party

refuses to perform the obligation, the person who bound himself or promised the ratification shall only be liable to the payment of an indemnity.

This means that I can enter into a contract with X promising the performance of an obligation by Y (a third party). If Y (who is not a party to the contract) refuses to perform this obligation, then X may not sue for Y for such performance. Instead, X may sue me for the payment of an indemnity. This is known as a *promessa de rato*. Ex: I promise you that my brother will sell a house to you. If my brother does not do so, then you may not sue him for specific performance. Instead, I am responsible for damages causes and you may sue me for such damages.

This type of contract is used normally used when there are various co- owners in the same property. Let us say that someone is interested in buying this property. Most of the co-owners want to sell the property but one or two cannot be contacted (as for instance they are living abroad). So, the present co- owners make a promessa de rato in which they promise that the other co- owners will also sell their share. On the part of the buyer, he would have the security that if it later turns out that such co-owners are not interested in selling, then he would have the right to seek damages from the other co-owners who had promised him. He would also have his mind at rest that the co-owners with whom he has agreed, are going to do everything within their power to contact the missing co-owners and persuade them to perform the obligation.

This type of agreement used to be common in the past, especially when people used to emigrate and lose contact with their relatives in Malta. This also used to happen often in Gozo in the 1960s and 70s when a lot of people began to immigrate. A lot of property used to be divided amongst the siblings. If 1/8 siblings immigrated, then the other 7 used to transfer the property to each other with a promesso de rato. They thought that by doing so, through possession, they would become full owners of the property.

Also, there used to exist a misconception about the promessa de rato which was finally put to rest in the landmark judgement below.

Before the case of ***George Xuereb v. Carmelo Pace*** (Court of Appeal, 08/06/1964) it was believed that if a co-owner sold his share of a property and promised the buyer that the other co-owner would also sell his share, then the buyer could take possession of the whole property. On this basis, it was further believed that prescription would start to run in favour of such buyer and that if the promise was not fulfilled in 30 years' time, the buyer would become the owner of the whole property. Thus, it was believed that when you bought a share in a property and were given a *promessa de rato* for the remaining share, you would have your mind at rest that you could either sue the promisor for compensation if the promise was not fulfilled (by the other co-owner/s), or else you would acquire the property by prescription if the other co-owner/s was never found/contacted. That is what it made so popular.

However, this judgement ruled against this practice, saying that prescription could not start running in these cases, as the buyer knew from the very beginning that he was not possessing animo domini (as if one is the owner). The very fact that one was in

possession by the strength of a *promessa de rato* meant that he was not in possession animo domini. Thus, one can never acquire ownership through possession under the promessa de rato, even if this possession goes on for 30 years. This judgement stated that in such cases, one would remain with the promessa de rato and never acquires full ownership of the property. The Court stated:

> *"Skond il ligi hu permess li wiehed jobbliga ruhu ghal-haga u ghandha tigi ezegwita minn haddiehor: izda dik l-obbligazzjoni hi vinkolanti "inter contraentes", u ikollha kwindi effett legali biss, jekk tigi ratifikata minn dik il persuna l-ohra li tista tezegwiha: jekk dik il persuna ma tirrikonoxix dik l- obligazzjoni l-istess tibqa minghajr effett. Ir-ratifika ma tistax issir tacitament, ghax dejjem jehtieg l-att pubbliku f'kaz simili. Hu ormaj pacifiku fil-gurisprudenza li meta wiehed ghandu motiv gust biex jirriselixxi minn dik il- promessa, ma tistax il-parti l-ohra, bir-rimozzjoni ta' dak il-motiv, wara li jkun skada z-zmien tal-promessa, tobbligah jezegwiha".*

After this judgement, the promessa de rato was not so popular anymore when it came to these situations of co-ownership.

Another instance when the *promessa de rato* is used is when parents enter into contracts to sell property of their children who are underage. For instance, a father dies leaving property to his child and therefore the property is co-owned between the mother and the child (the mother would have her share of the community of acquests and the child as the deceased's heir). If the mother wants to sell the property, she will have to make an application before the Court of Voluntary Jurisdiction (CVJ) asking for the Court's approval to sell property on behalf of the minor child. The CVJ will only grant the approval if it satisfied that the value for which the property is to be sold reflects the market value of the property (after having appointed an architect to evaluate the property) and if it feels that the sale is in the best of the child.

Due to the fact that this process takes a bit of time, is relatively costly and leaves a certain amount of uncertainty (until the Court's decree is issued), some parents would seek to avoid this whole process and instead utilize the notion of the promessa de rato. How? The mother would sell her share of the property at the present time and then proceed to promise the buyer that the child will sell his/her share of the property to him once s/he reaches the age of majority. This way, there would be no need to obtain the Court's authorization. Of course, the child may refuse to do so when he reaches adulthood, but if this happens, then the buyer may turn against the mother for compensation. In this way, the buyer will still be covered. Obviously, the mother would be putting herself in a risky situation if this scenario arises- however, it all depends on the close familial bond existing between mother and child, and generally speaking, the child will co-operate when the time comes. Even for practical purposes, it would not make much sense for the child to retain a share in a property which is co-owned by a stranger.

What if the mother dies in the interim period? It is likely that the child will be the mother's heir and as such, would continue her personality. This would be mean that he would be bound by the obligations which she had entered into … thus failure to fulfil the promise made by his mother would mean that he would be responsible for the payment of damages (instead of his mother). This situation would not arise if the mother leaves someone else as her heir/s.

Stipulations made for the benefit of a third party – Article 1000

Article 1000 gives us the alternative other scenario to the previous article just examined because Art. 1000 speaks of obligations entered into for the benefit of a third party (rather than an obligation to be performed by a third party).

Article 1000 in fact provides that *"it shall also be lawful for a person to stipulate for the benefit of a third party, when such stipulation constitutes the mode or condition of a stipulation made by him for his own benefit, or of a donation or grant made by him to others; and the person who has made any such stipulation may not revoke it, if the third party has signified his intention to avail himself thereof."*

The first issue that needs to be clarified is the distinction between a "mode" (In Maltese "mod") and a "condition" (In Maltese "*kondizzjoni*"). This is the only article in the Civil Code which makes reference to a mode, and unfortunately fails to give a definition thereof.

1. **A mode is an accessory to a principal obligation:** So, there is a principal obligation and then there is mode related to it. Such mode does not affect the principal obligation – i.e., if not fulfilled, one may sue, but non- fulfilment would not lead to the termination of the principal obligation.
2. **A condition on the other hand would affect the principal obligation:** non-fulfilment of the condition would lead to the termination of the principal obligation as such principal obligation is dependent on this condition.

What Article 1000 is saying is that if I make a stipulation to the benefit of a third party it must be either:

1. a mode or a condition of a stipulation to my benefit or
2. a mode or a condition of a donation or grant made by me to others.

Ex 1: I sell a restaurant to X. In the contract, I include a stipulation to the benefit of third parties, namely that the buyer retains all existing employees in his employment. This is a mode – an obligation in favour of third parties which is an accessory to a principal obligation (the sale) which principal obligation is to my own benefit (i.e. I am selling the restaurant for my own benefit).

Ex 2: I sell an old house to X with the condition that he opens up part of it as a museum. In this case, the condition would affect the principal obligation and non-observance of the condition would render the contract null. Moreover, the principal obligation is to my benefit (the sale) but the condition is to the benefit of third parties (the general public at large who will enjoy the museum).

Ex 3: I give €50,000 donation to X with the condition that he gives half of this sum to a charitable institution of his choice. I am making a condition to the benefit of third parties in a donation made to someone else (X).

When it is a mode and when it is a condition? It is not always easy to distinguish between the two. A condition is tied to the contract so that if the condition is not performed the contract could be annulled. A mode can be enforced but non-performance of the mode does not lead to the annulment of the contract. A mode is a condition which diminishes the enjoyment of the acquired right but the non-enjoyment of which does not prejudice the continued enjoyment of that right.27

In the case of ***Falzon v. Suor Aquilina noe*** (First Hall Civil Court, 05/10/1992) there was an old, widowed woman who in her old age became in need of constant attention, which her children could not give. The children donated the house in which this woman was living to the nuns, and they bound the nuns to look after the woman until she died. This was thus an obligation to the benefit of a third party. The nuns took the woman to their convent and started caring for her there but sometime later, they put her in an old people's home run by the Church (Casa Leone).

Her children contested this and said that this constituted a breach of the nuns' obligation to look after her. They thus claimed the dissolution of the contract of donation. There were two issues which the Court needed to resolve:

1. Had the nuns breached the obligation by putting her in such home, or was she still being looked after appropriately over there?
2. Was this obligation a condition or a mode? If it was a condition, then in the case of a breach, the contract of donation would really be null, but if it was a mode, then the children could only sue for compensation.

In this case the court examined the contract and said that the way it was formulated was more in the form of a mode than in a condition basically because there was a donation of the house and towards the end there was an added clause saying that the sisters were bound to look after their mother. Thus, it seemed that the children were giving a donation of the house under the terms and conditions indicated therein together with the clause that the sisters were bound to look after the mother during her lifetime. It seemed that the donation existed on its own and then there was this other obligation, which was related to it, but not part of it. On this basis, the court decided that this was not a condition which was tied to the original contract but more of a separate obligation thus being equivalent to a mode.

The court said that it was true that the obligation had to be performed but this does not diminish the enjoyment of the contract. A mode is not tied directly to the original contract. So, even if the sisters broke the mode, they would be liable for damages but not to give the house back. Had it been a condition the children could get the house back because there would be a breach of a condition. Non-performance of the mode does not have the effect of cancelling the agreement.

This judgement highlights that it is not easy to distinguish between a condition and a mode unless clear terminology is used in the contract. In any case, the Courts would have the right to determine otherwise despite the term used in a contract. A Court will not necessarily give effect to what is stated and may decide that although the term "condition" is used, the obligation is really a "mode". So, the Courts will attempt to examine the nature of the obligation to determine its true essence. When contracts are involved, Courts will always try to find out what was the party's real intention and will not simply look at how it was actually described.

The last part of Article 1000 is also extremely important and should be well-understood. It provides that the party who makes the obligation in favour of a third party may not revoke it if such third party had been informed of this obligation. This point has been the subject of two important cases.

In the case of ***Maria Giulia Millard v. George Said et noe*** (Court of Appeal, 14/09/1988), the plaintiff (an old lady) was residing in a house under title of lease from Church authorities (one of the defendants). In 1962, the property was transferred from the Church to the defendant Said by title of emphyteusis under the condition that Said would not be able to enter into the property until the plaintiff's death. Moreover, there was also the condition that the amount of rent could not be changed. In 1977, the Church and Said entered into another contract in which they amended the original contract between them, removing the clauses concerning the plaintiff. This was made behind the plaintiff's back.

The plaintiff sought to have this second deed rescinded. Could she do so despite the fact that she was not a party to such contract? In other words, does the third party have a direct action to enforce a condition made in her favour in a contract?

The Court said that under Roman Law the beneficiary did not have a direct action to enforce the condition in a contract as an outsider to a contract cannot enforce a contract to which he is not a party. The Court of Appeal however went on to say that after Roman law, there was a shift in the thinking of this idea and a third party was given a direct action to enforce performance of that obligation, not only damages. As soon as the third party is made aware of the obligation, the third party becomes a party to that contract like the others and therefore acquires a right to insist on the performance of that obligation.

In this case, once the old lady was made aware of the condition in her favour in the first contract, then that first contract could not be changed without her consent because now she had become a party to the contract, and you can't change the contract without the consent of the contracting parties. Since the plaintiff had been made aware of the condition to her benefit, then her consent was required to remove the condition. For this reason, the Court ordered the rescission of the second contract. It also confirmed that the new owner Said could not increase the rent as this had been fixed by the first contract.

The case of ***Portelli v. Portelli*** (Gozo Court, 03/08/2009) confirmed the previous judgment. Two persons entered into a contract in favour of a third party. Said third

party was made aware of it and manifests acceptance. He becomes a party to the contract, and it can't be changed without his consent.

In the case of ***Grace Difesa pro et. noe v. HSBC Life Assurance (Malta) Ltd*** (09/10/2003), the defendant company (a life assurance company) entered into an agreement of life assurance with the association representing prison wardens. One of the wardens died and his wife and children sued to get compensation. The defendant company refused to pay arguing that the dead prison warden had not, at the time when the policy was entered into, been 'actively at work' and secondly that the warden's heirs had no right to sue the company as the said warden was not a party to the contract since the contract had been entered into by the insurance company and the wardens' association, and not the individual warden).

The Court held that even though the contract was between the wardens' association (having a separate juridical entity from the individual wardens) and the insurance company, the contract had been concluded for the benefit of third parties (i.e., the wardens). Once the wardens had been informed of this policy, then they automatically became a party to the contract. As parties to that assurance policy, they had a direct personal interest to seek the enforcement of that contract and therefore the heirs could sue directly in order to get compensation. The Court stated:

> *"Fuq il-kuntratt in kwistjoni, l-Ghaqda obbligat ruhha li thallas il-premiums relattivi, bil-kondizzjoni li, wara l-mewt ta' xi membru, l-parti l-ohra fuq il- kuntratt thallas kumpens lill-eredi ta" dak il-membru.*
>
> *"Kuntratti simili kienu jezistu wkoll fid-dritt Ruman, u fil-perjodi tal-bidu, kien l- istipulanti li kellu jipprocedi kontra l-parti l-ohra biex din taghti lill-beneficcjarju d- drittijiet kontemplati fil-kuntratt; il-benficcjarju ma kellu ebda azzjoni diretta kontra l-konvenut li kien obbligat jibbenefikah. Aktar tard, pero", il-beneficcjarju nghata dan id- dritt ta" azzjoni diretta. Dan id-dritt ta" azzjoni diretta gie eventwalment inkorporat fid- dritt civili ta" dawk il-pajjizi li l-bazi tal-Kodici Civili taghhom hu d-dritt Ruman, u illum hu accettat li l- beneficcjarju taht kuntratt bejn zewg partijiet ohra, ghandu azzjoni diretta ghall-protezzjoni tal-beneficcju koncess lilu b"dak il-kuntratt.*
>
> *"Dan gie kkonfermat mill-Onorabbli Qorti tal-Appell fil-kawza "Millard vs Said et", f'sentenza studjata u elaborata li tat fl- 14 ta" Settembru, 1988. Fuq dan il-punt, dik l-Onorabbli Qorti osservat li l-attrici ghandha azzjoni personali u tista" tagixxi hi a bazi tal-artikolu 1000, peress li bil-kuntratt bejn il-prokuratur u Said saret kondizzjoni favur terz (f'dak il-kaz, li l-attrici tithalla tgawdi l-fond in vendita sa ma tmut): ir-riserva kienet bhala kondizzjoni tal-istess koncessjoni, u din il-kondizzjoni saret favur terzi, u*

> *t-terz giet infurmata bir-riserva favur taghha b'ittra li ntbaghtitilha.*
>
> *"M'hemmx dubju li anke f'dan il-kaz, il-membri tal- Ghaqda hadu u accettaw il- beneficcji li johorgu mill-polza tal-assikurazjoni in kwistjoni, u kwindi kull membru jew l-eredi tieghu ghandhom mhux biss l-interess izda azzjoni diretta biex jitolbu l-hlas tal- beneficcju li hmua intitolati ghalih taht il-polza."*

Unfortunately for the warder's heirs, they did not succeed in winning the case on the basis of the other plea, namely that the dead warden was not covered by the terms of the insurance policy.

Topic VII. Proof of Obligations

This is dealt with in Art.1232-1235 of the Civil Code.

A. Introduction

How do you prove an obligation in your favour? As already discussed in previous topics, a contract may be entered into orally. Such obligations are as binding as any other obligation emanating from a written contract, nevertheless, proving such an obligation would be harder as one would be relying simply on the words uttered by the parties at the time of the conclusion of the contract. Then again, a significant difference would exist if the oral contract was made in front of witnesses who can confirm the existence of such contract and any terms or conditions thereof.

To avoid this uncertainty, the law has in some instances intervened and explicitly states that certain contracts must be given the written form (at least a private writing). There are then certain contracts which require the solemn form, namely through a public deed with all the formalities required by law.

B. Public Deeds & Private Writings

Article 1232 (1) says that "where the law does not require that an obligation or its extinguishment should result from a public deed or a private writing, such obligation or its extinguishment may be evidenced by means of witnesses or any other means allowed by the COCP".

It also gives us a definition of a public deed in Art. 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".* This notion of 'attributing public faith' is of particular importance. A public deed is proof of its own content, and it is very difficult to challenge the validity of a public deed except in those instances specifically catered for by the law.

Article 1233 then gives a full list of contracts whereby the law requires at least a private writing. This is an exhaustive list which contains the following agreements:

(a) a promise of sale
(b) promise of loan for consumption or mutuum
(c) suretyship
(d) compromise
(e) lease for a period exceeding two years in the case of urban tenements and four years in the case of tenements1
(f) civil partnership
(g) promise, contract or agreement in terms of the Promise of Marriage Law

In the case of ***Frendo v. Agius*** (Court of Appeal, 2008) it was held that one cannot promise to sell an immovable if one does not manifest one's consent in writing. A party sued for the execution of a *konvenju* because he did not appear on the PD. However, the *konvenju* was missing. Evidence was produced by the lawyers, notary, etc. The Court had to decide whether it should enforce the konvenju produced before it.

Ultimately, the Court was convinced that the konvenju did exist and could enforce the obligation. The private writing did exist. If the document is not a valid as a public deed, if can be valid as a private writing, and not the other way round.

B1. What are the fundamental differences between a private writing and a public deed?

They are the following:

1. **A private writing need not be drawn up by a notary**, whereas a public deed may only be drawn up by a notary.

2. **Formalities**: A public deed requires certain formalities – for instance, the date must be hand-written (and not typed). Also, in a public deed, full details of the parties are given, whereas in a private writing one may simply include a person's name and ID card number. The notary must explain the contents of the deed to the parties and must specifically write down a declaration that he has so explained the contents to the parties.

3. **Signatures**: In a public deed, all parties must be present at the same time and must sign the deed at the same time. In a public deed, when one of the parties is unable to sign, then deed must be made in front of two witnesses and a declaration that the party is unable to sign should be inserted.

   In a private writing, it is possible for the parties to sign at different times – if this is not followed, the deed is NULL. In a private writing, if one of the parties is unable to sign, then a cross is made – this must be made in front of two witnesses and attested by a notary or a lawyer who must declare that he has ascertained the identity of the person3. If this procedure is not followed, then there would be no writing – see 'Zarb vs. Pullicino (28/03/1988) (First Hall, Civil Court). In this case, the Court held that a promise of sale was valid because even though one of the parties didn't know how to sign, there was still a mark made by such person according to the procedure established by law.

4. **Language**: A public deed may only be drawn up in Maltese or English, whereas a private writing may be made in other languages.

5. **Originals**: The original public deed will be kept by the notary who will then have it deposited at the Notarial Archives for posterity. A private writing may be kept by the parties themselves. Also, private writings may be signed in duplicates.

B2. What if the formalities of a public deed are not observed?

There are some formalities which render the deed null. Some examples include if the deed is undated or if the notary fails to explain the contents of the deed to the parties. One may refer to Article 40 of the Notarial Profession and Notarial Archives Act of the Laws of Malta (cap.55). Other formalities do not render the act null, but the notary can be liable to certain penalties for his short-comings – Article 41 of Chapter 55. Some

examples include if the date of the deed is not hand-written or if the notary fails to include a declaration that he has explained the contents of the deed of the parties.
Finally, reference should be made to Article 633 of the COCP, which gives an indirect clue as to what is a private writing by saying,

> *"any act which by reason of the incompetence or irregularity of the officer by whom it was drawn up, compiled or published, or which owing to the absence of some formality prescribed by law, has not got the force of a public act, shall be admissible as evidence as a private writing between the parties, if the parties have signed or marked the same or if it is proved that such act had been drawn up or signed by some other person acting on their instructions."*

Obviously, the fact that such a public deed (i.e., not having the formalities required by law) may be treated as a private writing will often not have much practical value. For instance, if the deed concerned the sale of an immovable and a formality has been omitted therefrom, it has absolutely no value as a private writing, because the law requires specifically a public deed for the transfer of an immovable!

In the case of ***Zarb v. Pullicino*** (FH CC, 28/03/1988) the court emphasised the rules when a person does not know how to sign. In such a case there must be two witnesses and the notary or a lawyer. The Court said that the notary or lawyer must make a declaration that they have identified the person who does not know how to sign. In the absence of any of these formalities the public deed shall be null. In this case there was only one witness as opposed to two, and therefore the deed was held to be null. The obligation emanating *ex contractu* was therefore null also.

B3. What if a private writing is not signed by all parties?
The first thing that needs to be asked is whether the private writing concerns an agreement which falls under Article 1232 (i.e., when the law explicitly requires a private writing). If this is the case, then the natural interpretation of the law would be that without two signatures, there is no written instrument as required by law and therefore there would be no obligation.

Article 1233 (2) in fact, clearly says that when a private writing is not signed by each of the parties thereto, it must be attested in the manner prescribed in Article 634 of the COCP (i.e., in front of two witnesses and a notary or lawyer who must ascertain the identity of the party, as explained above).

If on the other hand, it is an agreement with respect to which the law does not require any form, then the missing signature will not necessarily render the agreement is null. If the consent had been validly tendered orally, then the obligation would exist from that very moment. The fact that the parties wanted to enter into a private writing to increase the probatory value of their agreement does not reduce in any manner the validity of their oral agreement. So academically, there would still be a contract – the problem however lies with proving that an agreement had been verbally made! Unless,

the agreement was witnessed by third parties, then the Courts will unlikely take one man's word for it against another's.

This point has been discussed in various judgements, particularly with regards to loans. One should bear in mind that in the case of a loan, the law requires no particular form, not even a private writing. Now let's say that the debtor signs a piece of paper in which he declares that he owes someone else (the creditor) a sum of money. If the creditor does not sign this paper, would that writing still constitute proof of the obligation?

The courts have held that if a person fails to sign the obligation in writing, then in general, the writing is to be considered as null.

This point was made in the case of ***Spiteri v. Buhagiar*** (Court of Appeal, 20/01/1961) as the Court held that *ad validitatem*, a private writing requires the signatures of both debtor and creditor, even though the writing was in possession of the creditor. Possession was not sufficient to substitute the creditor's signature. The Court said:

> *"la darba, skond il-ligi, l-iskrittura privata, biex tkun valida, jehtieg tigi ffirmata mill- partijiet, huwa car illi fil-pussess tal-iskrittura f'idejn il-parti li ma tkunx iffirmatha mhux bizzejjed biex jaghmel tajjeb ghan-nuqqas tal-firma.....la darba l-iskrittura "de qua" hija nieqsa minn wiehed mill-elementi rikjesti mill-ligi hija nulla u maghhha hija nulla ukoll il-lokazzjoni stipulate b'dik l-iskrittura."*

This point was made again in ***Schembri v. Falzon*** (18/11/1983) and in ***Spiteri v. Sammut***' (07/07/2003), where the Court stated:

> *"Jekk tigi maghzula l-forma tal-iskrittura privata, din trid tkun iffirmata minn idejn kull wiehed mil-kontraenti u jekk ma tkunx hekk iffirmata, ghandha tkun awtentikata kif trid il-ligi. Diversament, il-kuntratt ikun null. U ghan-nuqqas ta' din il-firma ma jissupplixxix il-fatt illi l-iskrittura, firmata minn wahda mill- partijiet, tkun giet konsenjata u baqghet ghand il-parti l-ohra li ma ffirmathiex."*

However, in the case of ***Brincat v. Falzon*** (Court of Appeal, 17/06/1991), the Court decided otherwise. This was the case of a bank guarantee where the bank had given a loan to a person which was guaranteed by a third party. The third party signed the guarantee form but it was not countersigned by the bank. Eventually, the loan was not re- paid to the bank and the bank sued the principal debtor and the guarantor. The guarantor sought to defend himself by saying that since the contract was only signed by himself and since this was a contract which required a private writing ex lege (a suretyship), then there was no contract as required by law and hence, no obligation.

The court however said that the possession of the document could be substituted for the signature of the document in this case. Thus, possession was taken as a substitute

for signature on the document and the document was regarded as valid which meant that the guarantor was forced to pay. It has to be said however that in this judgement, the Court emphasised the fact that it was limiting its judgement to the case before it and not establishing a general principle.

B4. Can a private writing be made in two separate documents? Or by a change of correspondence?

Another issue discussed by the court was whether a private writing can consist of two documents, one signed by one party and the other signed by the other party. Would that amount to a private writing? The same goes for an exchange of letters - would that amount to a private writing?

For instance, let's take the example of a promise of sale (which requires a private writing). If the prospective vendor sends a letter to a prospective buyer telling him that he is ready to sell a property under terms and conditions established therein, and the prospective buyer replies accepting these terms and conditions, would this exchange of correspondence amount to a valid private writing constituting a promise of sale?

In the case of ***Vella v. Cassar*** (Court of Appeal, 24/04/1967), the court discussed the issues of exchange of letters or two identical documents (one signed by one party and the other signed by the other party). The court said that previous jurisprudence was not uniform but in this case, the Court of Appeal was adamant that these do not amount to private writings as the concept of private writing necessarily requires one document which has to be signed by all parties. The parties need not sign at the same time but the two signatures must appear on the same document. The court said that an exchange of letter or two separate documents signed by the parties do not amount to a private writing but that there has to be one document signed by both parties. At best, such correspondence could only be used for interpretation purposes of the conditions established by the parties.

What happens if the writing is lost? It is very difficult for a public deed to be lost (because this is kept in the notarial archives) but a private writing can be lost as this is often kept by the parties themselves. Would it mean that there is no agreement? No, Article 1233 requires that a written instrument is used. The fact that this writing is lost or destroyed does not mean it never existed. Obviously, one must provide proof of the existence of this writing, for instance by providing a photocopy or else by calling upon witnesses to testify that a writing had been made. In the absence of any such proof, it will be hard for the Court to accept the obligation, especially if one of the parties denies the existence of the writing. However, if the Court is satisfied by the evidence submitted before it, it will accept it and hold the agreement as valid.

C. A detailed look at the list in Article 1233

(a) Promise to acquire or transfer immovable property or other right over such property:

The first contract is a promise of sale agreement dealing with an immovable property. The sale of immovable property, exchange of immovable property, creation of

emphyteusis, servitudes and usufructs are real rights and therefore can only be made by means of a public deed (and not a private writing). But a promise to enter into such agreements requires at least a private writing.

What about partition/division of immovable property? Whilst the actual division requires a public deed, does a promise to affect a division require a private writing? We are not selling but dividing between co-owners.

The court has said that a division only has a declaratory effect, and it does not transfer property. When you divide a property, you are not acquiring property but you are only declaring which part is solely yours. Instead of being co-owner you are now the full owner of a particular property.

Thus, the courts have said a promise to divide immovable property does not require any writing. This was confirmed in ***Caruana v. Caruana'*** (First Hall Civil Court, 30/05/1985). In this case, the court said that a promise of division can even be made verbally, and such promise would be valid, which would mean that the parties would be bound to give effect to the division as agreed. This same point was made in an earlier judgement of ***Giordmaina v. Dimech*** (16/03/1959) and ***Borg v. Borg*** (CC Gozo, 13/10/2006).

(b) Promise of Loan:

Interestingly, a promise of loan requires a private writing, whereas the loan itself does not require this, and can thus be made verbally. A loan given verbally is valid and can be enforced.

(c) Suretyship:

Suretyship requires at least a private writing. A suretyship is when a person guarantees the obligation of someone else (the principal debtor). Thus, the creditor will first seek to obtain payment from the principal debtor and if he fails to pay, the creditor can turn against the surety.

The Courts have made a subtle distinction between two concepts. The first is the situation outlined above where a person guarantees that if the principal debtor fails to pay, then he would be responsible. This is the proper legal understanding of suretyship. In fact, Article 1925 of the Civil Code defines suretyship as *"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".* There are thus two obligations: the principal obligation of the principal debtor and a subsidiary obligation of the surety.

There are then situations where one assumes responsibility for another person's obligation. In this way, he would effectively becoming a co-principal (a co- debtor). This would enable the creditor to sue both debtors at the same time. There is no need for the creditor to first go after the principal debtor and then if he fails to pay, go after the surety because in this case, both would be co- debtors. Here, there is one obligation (unlike in the case of suretyship).

The problem lies that sometimes it is not easy to determine when a person has agreed to act as surety and when a person has assumed liability for the credit. In the first case, a private writing would be required, but in the second scenario, no private writing is required because a loan does not require a private writing. Thus, if one assumes responsibility for another person's debtor (and in this manner, becomes a co-debtor), there is no need for a private writing.

In ***Xuereb v. Cremona*** (1957), the third party had stated *"aħna nagħmlu tajjeb għalih".* No writing was made. The court had to interpret this phrase – was it a suretyship or an assumption of liability? The decision was vital because if it was a suretyship then it was null as it was not made in writing but if it was an assumption of responsibility, then it would be valid because there is no need for a private writing when one assumes the obligation of someone else. The court said that in the circumstances of the case and in the manner in which it was used, this phrase had the idea of creating a suretyship. The parties wanted to act as guarantees for their son if he failed to pay up his debt. Since it was not made in writing, then it was not valid.

This can obviously lead to different interpretations/meanings where certain words/phrases are used. For instance, courts can come to different conclusions. When it comes to the assumption of responsibility, do certain actions amount to this? For instance, if a third party pays someone else's debt, the creditor has to accept. But does this mean that the third party is assuming responsibility? All this depends on the circumstances of the case to see whether it is equivalent to the assumption of liability. However, the fact itself that a third party has affected payment on behalf of someone else will not be enough for the Courts to conclude that this amounts to an assumption of liability.

In ***Attard & Co. Ltd. v. MA Supermarkets Ltd*** (First Hall Civil Court, 23/03/2003). The court had to examine circumstances whether there was an assumption of liability or a suretyship. Again, everything was done by word of mouth. So, if it was a suretyship, then it was null and if it was an assumption of liability, then it would have been valid. The Court made the following observations:

> *"Skond il-ligi - ara artikolu 1233(1)(c) tal-Kodici Civili - il-garanzija, biex tkun valida, trid tirrizulta bil-miktub u dan taht piena ta' nullita'. Pero', l-assunzjoni tad-dejn da parti ta` terz hija figura guridika differenti minn dik tal- garanzija, ghaliex min jassumi dejn jaghmel hekk in via principali, b'differenza tal-garanti. L-assunzjoni tad-dejn hija anki diversa minn novazzjoni ghax matimplikax necessarjament il-helsien tad-debitur.*
>
> *"Dan il-kuncett ta' assunzjoni ta' dejn ta' haddiehor mhux mehtieg li jirrizulta minn kitba, u jista' jigi pruvat bil-mezzi kollha li tippermetti l- ligi, pero', tali prova trid tkun cara, certa u konkludenti. Il-fatt li persuna, per ezempju, tofri biex thallas dejn ta' haddiehor, ma jfissirx li dik il-persuna assumiet dak id-dejn hi. Biex ikun hemm il- figura guridika*

> *ta' assunzjoni ta' dejn hemm bzonn li l-obbligazzjoni ta' hadd iehor jaghmilha tieghu min jassumiha. Il-fatt li wiehed ihallas xi flus akkont ta' dejn, la mhux tieghu, ma jfissirx li huwa assuma dak id-dejn.*
>
> *"Jehtieg li jkun hemm provi aktar cari qabel ma l-Qorti tikkonkludi li persuna individwali assumiet fuq isimha dejn ta' haddiehor. Mhux biss garanzija trid tirrizulta bil-miktub, izda l-firma tal-konvenut mhux bizzejjed biex hi tikkonkludi li assuma xi obbligazzjoni personalment".*

This echoed the reasoning and quoted from an older judgement of ***Zammit v. Frendo Azzopardi*** (Commercial Court, 14/05/1943).

In both judgements, the Court made it clear that the two notions are separate and distinct and that in order to have assumption of liability, there must be clear evidence pointing towards that direction. Simply paying off another party's debt (or part of it), does not mean that you have assumed that person's liability.

(d) Compromise (In Maltese '*transazzjoni*')

Article 1718 of the Civil Code defines a compromise as a "contract whereby the parties, by means of a thing given, promised or retained, put an end to a lawsuit which has commenced or prevent a lawsuit which is about to commence".

Thus, a compromise means the reaching of an amicable settlement. For a compromise to take place, there must be a private writing. This is only required when a lawsuit has commenced or where it is imminent. In other situations, a compromise need not be in writing. This point was clearly made in ***Saverio Spiteri v. Giuseppe Azzopardi*** (Court of Appeal, 21/01/1928), ***Chircop v. Drago*** (Court of Appeal, 28/06/62), and more recently ***Buhagiar v. Montaldo Insurance Agency Ltd*** (First Hall, Civil Court, 30/04/2003).

This latter judgement quoted from an authoritative Court of Appeal judgement ***Maria Attard v. Francesco Camilleri*** (30/06/2000), namely:

> *"Fil-qofol tal-kawza allura jirrizolvi ruhu dwar l-interpretazzjoni tal-kliem "jew jevitaw kawza li tkun sejra ssir". Kliem li kellu jigi sewwa meqjuz. Il-ligi ma titkellimx sempliciment dwar ftehim bejn il-partijiet biex jevitaw kawza jew biex jevitaw kawza li setghet issir. Titkellem dwar kawza li tkun sejra ssir. Kliem li jimplika d-determinazzjoni tal-parti li kellha d-dritt li tagixxa biex tirrivendika l- jeddijiet taghha u li tkun fil-punt li hekk taghmel. Biex jokkorru allura l-elementi tal-kuntratt ta' transazzjoni kellu jirrizulta li bhala effett ta' dak il-ftehim, il-proceduri gudizzjarji li jkunu kjarament ser jigu inizjati jigu mwaqqfa li allura ma tinbediex. Hu ghalhekk, kif sewwa ssottometta l-appellat, li l- gurisprudenza titkellem dwar l-*

> *imminenza ta'kawza. Skop ta' kuntratt ta' transazzjoni hu dak li tigi terminata kawza gja mibdija jew li tigi evitata kawza imminenti. Ftehim bejn il-partijiet jikkonvjenu dwar oggett li fuqu ma hemm pendenti ebda kawza, jew li fuqu ma kien hemm ebda hsieb ta' kawza imminenti ma jikkostitwix transazzjoni kif kontemplata fil-ligi."*

(e) Any lease for a period exceeding 2 years in the case of urban tenements and for 4 years in the case of rural tenements.

As already mentioned above, this paragraph needs to be revised and amended in the light of the 2008 amendments to the rent law. It has been superseded.

A question that has arisen is: 'If I give you a lease of an urban tenement for 3 years by word of mouth, would that agreement be valid for 2 years or would it be wholly null? Technically it does not exist because there is no private writing. The Courts have said that in such case, the whole lease would be considered null. This point was confirmed in ***Vella v. Cassar*** (24/04/1987) and more recently in ***Buttigieg vs. Qala St. Joseph Club*** (Superior Court Gozo, 14/12/2007). The court said that: *"il-kirja hija wahda u m'ghandhiex tigi maqsuma".* It is either valid or not.

(f) Civil partnerships

This also requires a private writing. This is not to be confused with commercial partnerships which require much more extensive documentation and formalities than just a civil partnership.

(g) Promise of marriage law.

For the purposes of marriage law, the betrothal has to be in writing. If it is not made in writing, there would still be an obligation for damages but one would not be entitled to moral damages. Moral damages can only be claimed if the betrothal was made in writing.

Final Issues

The above is by no means an exclusive list.

- For instance Art.1690 also requires a private writing for annuity.
- One may note that the transfer of a ship has to be made in writing – this does not result from Article 1233 but from a special law that introduces this requirement (the Merchant Shipping Act).

With regards to a suretyship, a compromise and a lease, the law mentions the actual contract but what about the promise to enter into such a contract? What formality does the law require? The court stated that since the promise is not regulated by the law, then a verbal promise to enter into any of these contracts would be valid.

In the case of ***Fenech v. Mifsud*** (08/03/1943), the Court said that *"meta jsir ftehim de innuendo contractu (a promise to enter into an agreement) kull parti ghandha dritt tobbliga l-parti l- ohra li tmur ghall-kuntratt".*

In the case of ***Galea Ciantar v. Galdes'***(15/01/1898), the Court said that *"la promessa de contraendo e cosa diversa dal contratto è puo essere provata anche per mezzi di testimoni"* [the promise to contract is different from the contract and can be proved even by means of witnesses], despite the fact that the contract of such promise requires "a writing".

This was stated even in recent cases; ***Spiteri v. Mazzitelli*** (02/06/2003) wherein it was stated that *"weghdiet biex wiehed jaffetwa certu kuntratti huma validi anke jekk maghmulin verbalment."*

In the case of ***Awtorita tad-Djar v. Schembri*** (Court of Appeal, Inferior, 17/03/2003). The court stated that the promise to enter into such a lease agreement does not require a writing. It may be carried out verbally and it would still be enforceable:

> *"Ghalkemm promessa ta' lokazzjoni ma tammontax ghal kirja nnifisiha, eppure skond l- insenjament dottrinali u l-prattika kostanti weghdiet ta' lokazzjoni huma validi, u gew ritenuti kapaci ta' ezekuzzjoni specifika....billi [din it-tip ta' promessa u ohrajn] ma tinsab annoverata fil-lista elenkata fl-Art. 1233 tal-Kodici Civili li tirrikjedi espressament il-kitba ghal dawk l-atti hemm specifikati, ghalhekk ghalihom japplika l-principju generali sancit fl-Artikolu 1232 (1) tal-istess Kap 16 li jipprovdi li fejn il-ligi ma tiddisponix diversament il-prova tal- obbligazzjoni tista' ssir bil-mezzi kollha maghrufa fil-Kodici ta' Organizazzjoni u Procedura Civili."*

In the case of ***Borg v. Fenech*** (26/06/2009) the question arose as to whether there was a contract or not. The Court held that although the Court requires a writing, and there was no writing in this case, the oral agreement could amount to a promise to enter into an agreement.

In the case of ***Lewis v. Debattista*** (Court of Appeal, 17/10/2008) the parties had entered into an agreement to demolish their tenements and develop a block instead. They had never formalised their agreement in writing, however. Eventually one of them (the defendant) went back on the agreement. The plaintiff sought compensation for the expenses incurred to apply for MEPA permits, etc.

The Small Claims Tribunal had decided that since their relationship had not been crystallized in writing, then the parties had no right of action against one another, stating that:

> *"Il-qofol tal-problema jibqa' illi ma kienx hemm ftehim bil-miktub u l- konvenut fl- eccezzjoni Tieghu qieghed jattribwixxi l-isfrattu tal-ftehim ghal- izvilupp anke minhaba dan in-nuqqas".*

The Tribunal thus concluded that: *"iz-zewg partijiet ghandhom jibqghu bl- ispejjez li hargu".*

However, the Court of Appeal stated that the agreement between the parties did not need to be a written one as this type of agreement was not listed in Article 1233(1) of the Civil Code. The Court said that *"ghal dan ix-xorta ta' negozju l-forma skritta mhix essenzjali".* This agreement should have the force of the law in line with Article 992 of the Civil Code.

As per article 1233 the obligations which require at least a private writing, or a public deed, are the following:

1. **Any agreement implying a promise to transfer or acquire, under whatsoever title, the ownership of immovable property, or any other right over such property:** This is a promise to transfer, i.e., a preliminary agreement. As such, a verbal promise has no effect whatsoever. The creation of real rights is also included in this list. It is currently being decided by the courts whether a promise to make a promise through a private deed is valid or not. This rule applies to the promise to purchase immovable property which requires a private writing, whereas the actual transfer requires a public deed. One need not sign a preliminary agreement in front of a notary, but it must be handed over to one to be registered with the proper authorities for the relevant duties to be paid. Apart from the fact that a promise of sale must be made in writing, it must also be registered with the Inland Revenue. The issue arose in a number of cases with regard to promises to make effective a division of immovable property, specifically, whether this requires a private writing. The courts have said no, as a division simply has declaratory effect and is not a title to property. One identifies whose part is whose, but no property or real rights over it are acquired during such contracts of division. This was confirmed in ***George v. Dimech*** (FH CC, 16/03/1969) and in ***Caruana v. Caruana*** (FH CC, 30/05/1985) where in both cases the court confirmed that the law requires a private writing when there is a promise to transfer or acquire immovable property or other rights, but not a division. The actual division of immovable property, however, requires a public deed, whilst the promise to divide requires no writing at all and damages can be sought in the absence of execution.

2. **Any promise of a loan for consumption or *mutuum*:** This refers to a promise for a loan, not the actual loan. The promise of a loan requires a writing, whilst the loan itself does not. Take, for example, bank overdraft facilities. These must be made in writing as these constitute a promise to make a certain amount of funds available to the client. As a rule, banks insist on a private deed.

3. **Any suretyship:** This requires at least a private writing when one promises to act as a surety. A verbal surety does not exist. Here we must distinguish between a suretyship and an assumption of liability. A surety is a guarantee,

but one can assume the liability of someone else which does not require a writing. If the wording is interpreted as a suretyship, then it has no effect, but if they are interpreted as an assumption of liability then they are valid. Here, one takes on the responsibility of another, creating two principal debtors, the principal debtor and the debtor who would have assumed responsibility, both of which can be turned on by the creditor. Under suretyship, one can only sue the secondary debtor if the principal debtor did not satisfy the agreement. If one issues a cheque to pay an obligation of another in part, would he have assumed liability? This depends on the facts of the case, and the circumstances as to why he issues the cheque at all. In one particular case, that of ***Xuereb v. Cremona*** (1957), from the evidence it resulted that the defendants promised *"ahna naghmlu tajjeb ghalih"*, with the court examining the circumstances and determining that this phrase was not an assumption of liability, but a guarantee. Therefore, since it was not made in writing, it did not exist. It is for the courts to decipher the words and determine whether it is an assumption of liability, in which case a verbal promise is sufficient, or a suretyship, in which case it would not.

4. **Any compromise:** Here, parties have a dispute and come to an amicable dispute. This requires a writing, but although the law says any compromise, the courts have made a distinction such that not any compromise requires a writing, but any compromise of a court case or any dispute where the parties are about to enter litigation such that the imminence or presence of litigation is required. Take, for example, an instance in which two parties are driving and crash where the damage is minimal such that both agree to bear their own costs and part ways. This compromise, although verbal, is valid as there is no imminent litigation. In the cases of *Spiteri v. Azzopardi* (COA, 21/01/1928) and *Attard v. Camilleri* (Gozo (Superior), 07/05/1996) it was held that writing is required when litigation is imminent or ongoing. This therefore refers to settlement agreements.

5. **Any lease for a period exceeding two years, in the case of urban tenements, or four years, in the case of rural tenements:** This refers to the old law, today, any lease requires a private writing, under a separate law.

6. **Any civil partnership:** Take, for example, the creation of a law firm.

7. **For the purposes of the Promises of Marriage Law, any promise, contract, or agreement therein referred to:** This refers to a couple's betrothal, also known as their engagement. There is no form for a betrothal, but the fact that a couple have decided to have a future together is an engagement in terms of law. However, if that engagement is broken, under the promise of marriage law there is compensation for actual damages if it is broken for no valid reason. If the engagement is made in writing however, then the victim, so to speak, can sue for moral damages. One can only recover moral damage for breach of a betrothal if there is a private writing at least. If there is no private writing one can sue only for actual damages.

Bear in mind that this is not an exhaustive list and that other laws can provide for the requirement of writing.

The courts were faced with certain situations, especially in lease. What is the case if someone is given property on lease or made a compromise without a writing. Sometimes the courts, in order to do justice, have interpreted certain agreements as meaning a promise to enter into a lease, compromise, suretyship, etc. which do not require any writing. Take, for example, someone who paid the rent when it was due, was given a key, etc. but never entered into a private writing. Technically, the landlord can evict on the basis of the non-existence of a lease, but the courts sought to modify this by stating that promises, unless the law states otherwise, do not require the written form. Therefore, it was sufficient for these to have been made orally making them subject to execution. The tenant can therefore sue to the landlord to force the entering into of a formal agreement. There are a number of cases where this has been held, albeit old ones, namely ***Ciantar v. Galdes*** (15/01/1898) and ***Fiteni Saviour et v. Mazzitelli Louis et*** (COA, 02/06/2003), also ***Housing Authority v. Schembri*** (COA, 17/03/2003). A power of attorney can be made orally under the rules of mandate. If one were to authorise one to sell property, authors state that that mandate must be made in writing as one is authorising another to alienate immovable property on one's behalf. The courts, however, have disagreed and stated that the mandate to alienate immovable property need not be made in writing as the institute of mandate itself need not require the written form.

Topic VIII. Actions

Both the actio surrogatoria and the actio pauliana are actions which a creditor may use to obtain a debt which is due to him. They are found in Articles 1143 and 1144 respectively. Their scope and usability differ, and the two actions have different repercussions.

Actio Debitor Debitoris Mei (*Actio Surrogatoria*)

Article 1143 states as follows:

> **1143.** *It shall be competent to any creditor in order to obtain what is due to him to exercise any right or action pertaining to his debtor, with the exception of such rights or actions as are exclusively personal.*

Here, the law is considering the creditor-debtor relationship. The fact that one is a creditor does not mean that one has control over the life of one's debtor who may incur further debts should he choose to do so. All the assets of the debtor, however, are there to make good for the rights of the creditor who, in other words, has the right to seek performance from all of the assets of the debtor. Amongst the assets of the debtor may be certain rights, such that the debtor himself may be a creditor also. Here, we are involving three parties, with A being a creditor of B who is both a debtor of A and a creditor of C. B, who is a debtor of A, may not exercise his rights of credit against C should he chose. A, however, may know that if B exercises his rights against C, he shall increase his assets such that B's obligation to A can be satisfied. In this case, through this action, A may exercise the right of credit of B against C directly. The action is not made by A on behalf of B, but by A versus both B and C, such that A is securing his credit and ensuring that B is exercising his rights against C by doing it for him. This falls short of full subrogation of rights, but it has a similar effect. The action is not made by A on behalf of B versus C, but against both B and C, on pain of nullity.

The result of this action, should A be successful, is that C pays B with A recovering his credit from B. Therefore, A is not paid by C directly, which is why this action is not particularly successful because if B has other creditors, they may involve themselves and recover their own debts themselves from B. the fact that A has exercised the right does not give him a privilege over the funds recovered from C which enters the patrimony of B. Other creditors whose rights may be privileged would be able to recover their own debts first, possibly even leaving A with nothing at all. This action can be used to increase pressure on B to force payment, without the whole process being carried out. This is therefore a derivative action where A exercises his rights *in nomine debitoris* (i.e., in the name of his debtor).

Of course, there are limits, specifically for those actions exclusively personal, such as a debtor is a wife that fails to sue her husband for unpaid maintenance. Otherwise, if one excludes these exclusively personal rights or actions then it is open for A to exercise the rights of B assuming that B is insolvent. If B is solvent, then A has no method through which to interfere with B's life, so to speak. A may exercise this right only if there is no other way for B to pay his dues without forcing him to be put in funds

by forcing him in turn to exercise his rights against his own debtors. *Vide* the case of ***Mifsud Bonnici v. Howell*** (First Hall Civil Court, 14/10/1980) where the case was dismissed for improper defendants.

Note that a conditional creditor is not a creditor for the purposes of this *actio* until the condition/s is fulfilled. Recently however there was an advance in this meaning of a creditor. There are few cases of the *actio surrogatoria* as it is not particularly advantageous. Recently it has been moved to be applicable also in the case of a promise of sale agreement. A would have a promise of sale agreement with B who is not the owner but has a promise of sale agreement with C. A has no relationship with C and so he cannot him for the transfer of the property. Therefore, he must sue B, but B is not the owner of the property yet, but simply has rights under the konvenju. A would take the *actio* against B and C, forcing C to sell to B, and forcing B to sell to A. this has recently been accepted where a creditor is not a money creditor, but he has a right under konvenju to the property. In order to make B the owner, he must exercise the actio Surrogatoria to force C to sell to B and to force B to sell to A. *Vide* the case of ***Portelli v. Borg*** (Gozo Superior).

When dealing with the *actio* the leading case is ***Stevenson v. Sciberras Camilleri*** (First Hall Civil Court, 30/05/2002), where plaintiff was offered professional consultancy services to a company (Sapphire Networks Ltd.) which was owed money from two other companies. The first company never initiated proceedings to recover the money it was owed by the two other companies. Therefore, the plaintiff sued under the *actio surrogatoria* and asked the Court to declare the two other companies as debtors of Sapphire Networks Ltd.

The court for the first time laid down what has to be proven in an *actio surrogatoria,* stating that:

> *Illi l-elementi mehtiega biex isehh l-azzjoni surrogatorja huma:*
>
> (a) *li l-attur ikun tassew kreditur tad-debitur,*
> [The plaintiff is really a creditor of the debtor]
>
> (b) *li l-kreditu tieghu huwa wiehed fattwali u mhux kondizzjonat jew potenzjali,*
> [The credit is actual and is not conditional, i.e., a certain debt]
>
> (c) *li d-debitur ikollu jedd, ta' natura patrimonjali u miftuh ghalih, kontra debitur tieghu,*
> [The debtor has a right of credit against a debtor of his]
>
> (d) *li l-attur irid juri li d-debitur tieghu naqas, kemm bi traskuragni jew ghaliex ma jimpurtahx, li bl-ghaqal mehtieg imexxi biex jiehu li haqqu minghand id-debitur tieghu,*

> [The plaintiff must show that his debtor has failed to institute proceedings against his debtor through his own fault]
>
> (e) *li l-attur irid juri li, bin-nuqqas ta' agir f'waqtu tad-debitur tieghu, huwa qieghed igarrab pregudizzju fil-jedd tieghu li xi darba jigbor il-hlas minggand l-istess debitur u,*
> [The plaintiff must show that by reason of his debtor's inaction, he has suffered prejudice to his right to recover the amount due by his debtor]
>
> (f) *f'kas li d-debitur tad-debitur iressaq kontestazzjoni, l-attur irid jipprova wkoll il-kreditu d-debitur tieghu ghandu kontra t-terz debitur.*
> [If the debtor's debtor consents to the action, plaintiff must bring sufficient proof to show the credit that is due to his debtor by this third-party debtor]

This case laid down these six stages, so to speak, which must be proven by the plaintiff in this action. The wording is different from that of the Italians, which gives this right even to conditional creditors, making it wider than our law. Under Maltese law the creditor must show that the money is due to him or that he has a credit under *konvenju*. This definition is a closed one and because of the limited number of cases the courts have not been a position to widen it, unlike under the *actio Pauliana* which has been given a much wider meaning by the courts which had ample opportunity to widen it. The Court held for the plaintiff.

In the case of ***Aquilina v. Demicoli*** (First Hall Civil Court, 12/12/2013) a block of flats owned by the Housing Authority had been leased to various tenants and in the lease agreement there was a clause stating that the tenants were not allowed to keep animals. One tenant, the defendant, had one and Aquilina said this was not right, but could not sue directly as the contract was with the Housing Authority, meaning he could not enforce a clause in a contract to which he was not a party. Therefore, he made an action against both the Housing Authority and Demicoli to force the former to take action against latter to remove the apartment. The Court stated that this was not an *actio surrogatoria* as there was not second passage of from B to A. Therefore, the court limited this *actio* to creditors claiming what is due to him.

Actio Pauliana

Article 1144 states as follows:

> **1144.** (1) *It shall also be competent to any creditor in his own name to impeach any act made by the debtor in fraud of his claims, subject to the right of the defendant to plead the benefit of discussion under the provisions of articles*

> *795 to 801 of the Code of Organization and Civil Procedure.*
>
> (2) *Where such acts are under an onerous title, the creditor must prove that there was fraud on the part of both contracting parties.*
>
> (3) *Where such acts are under a gratuitous title, it shall be sufficient for the creditor to prove fraud on the part of the debtor*
>
> (4) *The action competent to the creditors under this article cannot be exercised against minors, except to the extent of any benefit which they may have derived, saving any other right of action competent to the creditors against any tutor who may have taken part in the fraud.*

This action occurs where one's debtor does something in fraudulent of one's claims where one's debtor is free to act normally. The debtor cannot act in such a way as to threaten the rights of the creditor, such as transferring one's assets away. There are three persons involved again here, the creditor, the debtor, and the third party to whom one's debtor transferred some of his assets. This is done quite often to deprive the creditor of his rights, such as to avoid paying tax or succession duty. By virtue of this *actio* the creditor can cancel the transfer between the debtor and the third party such that the creditor will be able to recover the funds lent. The difference from the *actio surrogatoria* is that the latter is an action against the inaction of one's debtor, whilst the *actio pauliana* is an action against the action of one's debtor. The debtor here through an overt act deprived himself of his assets to deprive the creditor of being paid. the other major difference is that whilst the *actio surrogatoria* is *in nomine debitoris*, the *actio pauliana* is in the creditor's own name and there is a direct action such that C will pay A directly. Therefore, the scope of the action is to declare the transfer ineffective vis-à-vis B. This action is not for the benefit of other creditors, unlike the *actio surrogatoria*, but for the benefit of the plaintiff creditor only.

Datio insoluto is whereby C is a debtor of B and B gives something to solve that debt, such that we have a debtor who owes a certain amount and, instead of money, the creditor accepts something else. Therefore, some claim that they own their own father a certain amount, they enter into a contract of *datio insoluto*, giving the father his house in settlement of the debt. This is still a fraudulent action, but it remains very popular. The law says in fact that *"It shall also be competent to any creditor in his own name to impeach any act made by the debtor in fraud of his claims".* Fraud does not mean *dolus.*

The main elements of this action are as follows:

(a) **The creditor:** The one to whom money is owed. In old cases (e.g., ***Tonna v. Psaila***, 1930) this was defined as someone with a debt which is certain, liquidated, and due. This action became very popular, and the courts eventually

widened this definition. In ***Ciancio v. Buontempo*** (First Hall Civil Court, 27/07/1950)[10] the case involved a separation issue, but the case was still pending. In the meantime, the husband transferred his property to a third party. Still whilst the case was pending the wife instituted the *actio pauliana* as she may have to exercise her rights against the husband, but the community of acquests had not been liquidated yet. Therefore, she was not a creditor at that stage, though she may have become one later one. however, she had an interest, and the court gave her the remedy by cancelling the transfer between the husband and the third party, ordering that all the assets be transferred to the husband in case she becomes a creditor in the future. When she instituted the action, she was definitely not a creditor, but it was given to her because of the expectation of becoming one. This opened up the notion of who is the creditor and in fact today we find various wide claims.

An interesting case is that of ***Bellia v. Grech*** (Court of Appeal, 16/10/1999) where the definition of a creditor was considered anyone who would be prejudiced by an act of a debtor or future debtor. In this case, the question arose in view of a sale of a house which formed part of the community of acquests of the plaintiff and her husband, John Bellia. Whilst undergoing separation proceedings the husband sold the house to his sister's husband, Victor Grech. Plaintiff based her action on the *actio pauliana* and asked the Court to declare that the sale of the house was made to defraud her rights. Thus, declaring the sale as null and without effect. The Court of first instance held in favour of the plaintiff, declaring the contract as null and without effet and ordered its recission.

The Court of Appeal went on to analyse the legal principles governing the *actio pauliana.* Making reference to *Ciancio v. Buontempo et* (see the above), the Court held that for one to be able to base his action on the *actio pauliana* two elements must subsist: the fraud and the damage. Prior to giving its decision, the Court observed that:

---

[10]Plaintiff stated that during their marriage, her late husband established Ciancio Photo Studios Ltd., together with the defendant Buontempo. She held that the establishment was part of the community of acquests. In 1946 plaintiff filed for separation from her husband who transferred his shares to Buontempo. Plaintiff claimed that the transfer was made to defraud her from her rights and asked for the nullity of the contract. The defendant on the other hand stated that the plaintiff did not ask for the liquidation of the community of acquests and she did not have a certain and liquid credit. He claimed that the transfer was genuine and in good faith.

The Court held that the word "creditor" should not be interpreted restrictively but shall include anyone who has an action to reclaim the carrying out of an obligation when finding oneself prejudiced by the acts of the debtor. Plaintiff *qua* wife had the right to the *actio pauliana* without asking for the liquidation of the community of acquests, as the *eventus damni* (i.e., the acts of the husband prejudiced his own financial status), *consilium fraudis* (i.e., the husband was aware that he was prejudicing his wife by his acts), and *participatio fraudis* (i.e., the defendant knew of the separation proceedings and was even a witness despite his claims that he did not participate in the fraud. The Court held that the fact that he knew that the husband would be insolvent after the transfer and that he owes money to someone else falls within the ambit of the *actio pauliana*) were present in this case. The Court therefore held for the plaintiff.

1. A promise of sale was not made, and the necessary research was not carried out,
2. Victor Grech could not afford the property with the salary he had,
3. He was also aware of the marital problems between the couple.

To this effect, the Court held that the sale made between the defendants was orchestrated to prejudice the rights of Ms. Bellia. The Court of Appeal rejected the defendant's appeal and confirmed the judgement of the first Court.

The restrictive definition of ***Sciberras v. Camilleri*** was made outdated and it has been widened to anyone who can show that he has a claim. Interestingly, with respect to the *actio pauliana* in the course of a *konvenju*, a *konvenju* creates a personal right such that A has promised to sell to B. A in the meantime sells to C. There are various cases dealing with this situation and whether B is a creditor. In the past the old remedy would have been to sue for damages for breach of promise.

In the leading case of ***Bongailas v. Magri*** (Court of Appeal, 15/01/2002) the court discussed this question in some detail, that is whether B could exercise this action. The court said yes. B would make an action against A and C to cancel the sale between them. The sale between them is cancelled so the property remains of A, and he can transfer to B. The court held that the only way in a *konvenju* to render it in effective was to cancel it altogether. Although B is not a creditor in the traditional sense, he does have a claim to the property which entitles him to make a claim in his own name directly against both parties.

In this case the plaintiff was the prospective purchaser, and the defendant was the prospective vendor of an immovable property, both having entered into a promise of sale together. Subsequently, the defendant sold the property to a third party. The person who had promised to sell was the debtor of an obligation and since he had done something which was to the prejudice of the creditor, the latter was entitled to bring an *actio pauliana.* Magri, instead of fulfilling the sale to Bongailas, sold the property to Micallef, his daughter. This was in breach of the preliminary agreement and done in order to defraud Bongailas.

The Court of first instance made the following considerations. In previous jurisprudence, such as *Bugeja v. Vella* (1946) the Court has held that this action was not possible in cases of a promise of sale as the *actio pauliana* requires the debtor to become insolvent or more insolvent. In case of a promise of sale the action is done to force the debtor to fulfil the obligation undertaken. However, this was an issue widely debated. In this case, the Court considered Article 1144 of the Civil Code, interpreting the terms "debtor" and "creditor" widely to mean anyone who has entered into an obligation or where an obligation has been entered in their favour. The Court confirmed that the defendant was not insolvent because of the deal he had entered into with a third party. From the plaintiff's perspective, it was only the property at hand which counted, so the defendant was insolvent to the extent that the possibility of making good on his promise to sell his property to the plaintiff. However, the

Court said that this action could only affect third parties if they had entered into the contract fraudulently.

The Court of Appeal upheld the decision of the Court of first instance, cjoe that for the contract between the original party and the third party to be attacked there needed to be bad faith coming from both sides; thus, the said contract cannot be attacked if the third party was acting in good faith.

In the case of ***Mario Galea et. v. Carmel Bezzina et***. (First Hall Civil Court, 27/11/2008), the Court accepted a successful institution of the action pauliana and ordered the rescission of a promise of sale which was made to the prejudice of a right of first refusal in case of sale of a plot of land which the plaintiff enjoyed by means of a private writing entered into between the plaintiff and the defendants. In this case, the defendants had entered into a promise of sale with someone else despite the right of first refusal enjoyed by the plaintiffs. This was deemed to be prejudicial to them as it had rendered the defendants unable to perform their obligation. Once again, one can note the Court applying the notion of "creditor" in an extensive manner. The Court stated:

> *"Illi fil-kuntest ta' dan kollu din il-Qorti jirrizultalha li tali att ta' konvenju li jinjora d- dritt ta' preferenza tal-atturi jippregudika serjament id-dritt li l-atturi jezercitaw id-dritt ta' preferenza fuq l-art de quo u gie ppruvat ukoll li dan sar mill-partijiet kontraenti fl- istess konvenju bl-iskop li jiffrodaw lill-istess atturi, fis-sens li tali dritt ta' preferenza li kellu ghall-akkwist tal-istess art u li huma ddikjaraw li jridu jesegwixxu ma jigix ezercitat minnhom u fl-opinjoni ta' din il- Qorti, gie ppruvat anke l-ingann jew qerq da parte tal-istess socjeta' konvenuta ("Marco Bongailas vs John Magri et" – A. C. – 15 ta Jannar 2002) u in omagg ta-lprincipju "fraus omnia corrumpit" hemm lok sabiex tintlaqa' t- talba attrici ghall-annulament tal-istess konvenju fil-konfront taz-zewg konvenuti u fil- konfront taghhom tirnexxi allura l-azzjoni pawliana."*

(b) ***Eventus damni*****:** The prejudice suffered from the act of the debtor. This is divided further into four conditions: first, it must be shown that the act of one's debtor has diminished his own estate thus rendering it insufficient or more insufficient than it was to satisfy the debt (i.e., insolvent, this is not a problem for the creditor as it is for the debtor to prove that he is solvent, known as the plea of discussion (pursuant to article 795 of the COCP[11]) where he files a note indicating what other assets he holds informing the court that the creditors should not interfere as he has other assets); second, the prejudice (i.e., the insolvency) must be the direct effect of the act which the creditor wants to

[11] **795.** *The defendant who pleads the benefit of discussion shall present during the hearing of the cause, or previously, a list showing distinctly the property situate in Malta, possessed by the party of whom discussion is pleaded, and sufficient to satisfy the claim of the plaintiff.*

impugn, and not of supervening causes (i.e., the principle of cause and effect); third, it is necessary that the debtor is still insolvent for the duration of the action; fourth, as a general rule the credit must have existed before the act which the creditor wants to impugn wants to perform. However, in a number of cases since ***Calleja v. Grima*** (Court of Appeal, 10/01/1955), the Courts have said that there could be exceptions where the act to impugn was carried out before one became a creditor where the act was done with the intention of defrauding future creditors.

The *eventus damni* has the following elements:
(i) Prejudice: The act must have diminished the estate of the debtor thus rendering it insufficient or more insufficient than it was to satisfy the debt.

As explained above, in Bongailas vs. Magri, the Court clarified that this does not mean that through this action, the debtor has been rendered insolvent. It is enough to show that the estate of the debtor has been diminished to such an extent that he shall not be capable of fulfilling his obligation.

This is to be contrasted with the situation in the actio surrogatoria where in order for this action to succeed, it must be shown that the debtor has become insolvent. In other words, in the actio surrogatoria, the debtor can defend himself by raising the plea of the benefit of discussion and show that he has enough assets to satisfy his creditor's claim. If this takes place, then the action will not succeed.

On the other hand, in the actio pauliana, the creditor need not exhaust all other remedies before instituting the actio pauliana. If an action has been done to the prejudice to the creditor, the action can be instituted immediately, and the Court will not request proof that the debtor has been rendered insolvent by this action.

(ii) Direct link: The prejudice or the insolvency of the debtor must be a direct effect of the act which the creditor wants to impugn and not the effect of supervening causes.

It must be shown that there is a relationship of cause and effect. One must show that the prejudice suffered was the direct result of the action which he is trying to impugn. If for instance, the debtor's insolvency is the result of something which took place afterwards (ex: an economic crisis), then the action will not succeed.

(iii) Continuous: It is necessary that the debtor be still insolvent at the time when the action is exercised.

This means that if the act does give rise to insolvency but in the meantime the debtor became solvent once again, then the creditor cannot institute the actio pauliana successfully. Although the general principle of prejudice is to be established at the time when the action was instituted, if the during the pendency of the action, the debtor becomes solvent, then the action will fall.

Thus, it must be proved that the debtor remained insolvent (i.e. as explained by Bongailas vs. Magri, incapable of fulfilling his obligation towards the debtor until the end of the lawsuit).

(iv) Before: As a general rule, the credit must have existed before the act which the creditor wants to impugn was performed.

As a general rule, therefore, it is necessary that the debt existed before the debtor performed the act which the creditor is trying to impugn by means of the actio pauliana. There may be exceptions to this rule as explained in ***Calleja v. Grima*** (1955) and ***Bellia v. Grech*** (1999), wherein it was held that an act may be committed to defraud future creditors. In the Calleja vs Grima judgement, the Court first referred to the general principle, namely *"il- kreditu ghandu jkun anterjuri ghall-att impunjat"*, but then added *"hlief meta l- att frawdulent ikun gie maghmul ghall-att preciz li jigu defrawdati kredituri futuri".*

(c) ***Consilium fraudis*****:** The intention to defraud. This is not *dolus*, there is no requirement to prove that he actually wanted to cause to harm. All is needed is that he knew that his action would cause prejudice to the creditor. The debtor knew that through his action he will cause prejudice to the creditor. This is an easy standard to prove as a person knows that he probably will not have enough assets to pay. In the case of ***Portanier*** (Court of Appeal, 29/3/1957) the court said everyone knows one's own assets and one knows what is left if one disposes certain assets. All one has to prove is that one suffered prejudice and that one's debtor now no longer has enough assets to pay his credit. Proving the *eventus damni* and the *consilium fraudis* is therefore not that difficult. All one has to prove that one is depriving oneself of one's own assets to avoiding paying one's debts.

(d) ***Participatio fraudis*** **of the third party:** It must be shown that the third party participated in the fraud of the debtor. This is difficult to prove and generally where actions fail. It must be shown that they knowingly participated in an act which is causing prejudice to the creditor. This is a difficulty in this type of action. The third party must be aware that he is participating in the prejudice and that he is helping the debtor to cause prejudice to his creditor. The third party may claim that he did not know, and proving otherwise is difficulty. This is a burden imposed on the creditor. If the property moves from one person to another, i.e., to a fourth or fifth party, etc., the *actio pauliana* can still be exercised against all these parties but *participation fraudis* must be proven for each and every one. The more the property moves, the harder this action becomes. Each party must be aware that they are abetting in prejudice to the creditor and in this way, one will succeed in the *actio pauliana.* Returning to the example of the *konvenju* between A and B after which B sold the same property to C, if C transferred to D, then it must be proven that D knew of the original promise of sale, which could be extremely difficult. There is no duty on the third party to check that there is a previous *konvenju* registered thereon, such that proving the *participatio fraudis* in this respect is often difficult.

That said, it can be done and there are many instances of successful actions. In the case of ***HSBC Bank v. Fenech Estates Ltd*** (First Hall Civil Court, 19/01/2000) the defendant owed money to the plaintiff bank and transferred its assets to another company, Car Care Products Ltd. HSBC instituted the *actio pauliana* to remove the transfer to bring in enough assets to pay the credit. Companies have separate juridical personality and Car Care Products Ltd had a separate personality from Fenech Estates Ltd, so it had to be proven that the former was aware of the latter's debt. However, the directors were the same, so although the companies had separate personality, the knowledge could be inferred as the directors of both companies were the same. This case involved the court lifting the corporate veil in order to arrive at the knowledge of the company based on the directors. Given that the directors of both were the same, the court said that what Fenech Estates Ltd knew, Car Care Products Ltd knew as well, and the *actio pauliana* succeeded in this case.

In the case of ***Carmelo u Carmen konjuġi Magri v. Mixer Ltd et.*** (First Hall Civil Court, 17/06/2005), the plaintiffs were owed a sum of money by the company Mixer Ltd and had already filed a court action against the company. During the pendency of the action, Mixer Ltd entered into a contract with Mixer Concrete Works Ltd and transferred all its assets to the latter company. At the same time, this property was burdened by debts in favour of a bank. Overall, the Court considered this to be a restructuring exercise which definitely put the defendant company in a worse position than it previously was before. For this reason, the Court considered that the eventus damni was present.

Regarding the consilium fraudis, the Court considered that this was an onerous contract as it was effectively a contract of sale. Therefore, the participation of the third party in the fraud had to be proven as well. Even though this was a company having a separate juridical personality from Mixer Ltd, the court looked beyond the corporate veil to see who had the effective control of the two companies. After considering the fact that the two companies were effectively controlled by the same persons and also the nature of the contracts (sale and hypothecations taking place at the same time), the Court concluded that there was the requisite participation in the consilium fraudis on the part of the third party. The Court stated:

> *"Illi f'każijiet bħal dawn, u meta wieħed iqis sewwa n-nisġa bejn l-interessi attwali fi ħdan iż-żewġ kumpanniji, il-fehma li tasal għaliha l-Qorti hija li ntwera sewwa li t- terza persuna nvoluta kienet taf ukoll bl-effetti ta' dak li kien qed isir fil-konfront tal- atturi wkoll".*

In the case of ***Bellia v. Grech***, the Court came to prove fraud in an interesting manner because the impugned sale concerned a sale to a person who was not a relative. The sale was made without a prior promise of sale. Since there was a sale without a promise of sale and no searches were carried out, then this was considered by the Court to be indicative proof that the transaction was a fraudulent one. The court also held that the notary is usually chosen and paid

> by the buyer whilst in this case the notary was chosen and paid by the vendor. Moreover, the buyer had not even visited the property he was going to buy. Although all these things are possible and legal, the Court held that everything summed up, it was probable that the buyer was aware of the fraudulent act in which he was participating. Moreover, the third party was aware that the party with whom he was contracting was having problems with his wife.

A warrant of seizure is one of the normal court warrants issued in instances such as these. That said, these are difficult in instances such as of a single debtor living with his parents who would claim that everything, he lives with belongs to his parents. These debts are virtually impossible to recover and would have to be written off by the company.

Having gone through these fundamental elements, an advocate can succeed in his action to recover the property which has been alienated to put the debtor in funds to allow the creditor to recover the debt. The remaining assets shall remain with the third party as the transfer is not cancelled, but rendered ineffective up to the extent that the creditor is owed. The law does not say, as it does with the *actio surrogatoria*, whether it can cancel rights or actions which are exclusively personal, although it remains the case here. For example, the payment of a man to his ex-wife for maintenance is considered exclusively personal and courts forbid the intrusion thereof.

In cases where the debtor has multiple creditors and pays one only, in spite of the fact that he would have been able to apportion the debt equally amongst the creditors, the rule generally holds that the other creditors cannot interfere there either. If all creditors are on equal footing, this is not generally considered fraudulent. But if one of the creditors has a cause of preference or some other hypothecary right and another creditor is paid before, this shall amount to a fraudulent payment. If the heirs of the deceased, for example, use assets to pay someone else before the undertaker, he may exercise the *actio pauliana*, as he is considered in a privileged and preferential position. This stems from the understanding that debtors should be given at the very least a decent burial. The government in many cases also has a cause of preference, such that if another creditor is paid before the government, it is considered fraudulent. *Vide* the case of ***Protect Services Ltd. v. Johnson*** (Court of Appeal, 26/10/2022) where the court held that the payment by the debtor to an ordinary creditor before the privileged creditor would amount to fraud.

Extinctive Prescription

The prescriptive period of this action is thirty years from the date of the act to be impugned. This long period is something which favours the creditor, with a number of cases confirming this. *Vide* the cases of ***Sciortino v. Micallef*** (Court of Appeal, 5/06/1959) and ***MidMed Bank Ltd. v. Vella*** (First Hall Civil Court, 28/04/2006). The general view is that this is not a rescissory action, which typically have prescriptive periods of five years at most. This is why it is possible to have multiple parties, as over thirty years the property can move often.

If I have two creditors and I pay off one of them, can the other institute the actio pauliana to impugn that payment?

This is an issue which is discussed but which has rarely arisen in courts. Normally when a debtor has two creditors and not enough assets to satisfy both, once the debtor is declared to be insolvent, the assets will be divided between them (unless one of them is a privileged / hypothecary creditor).

Nevertheless, a debtor may decide to fully pay off one of the creditors in preference over the other. The law does not prevent this. Can such action be impugned by the other creditor? As explained by Ricci, one may not answer such a question a priori as it all would depend on the circumstances of the case. If the debtor paid off one of the creditors for personal reasons, then one cannot say that this was done with the requisite fraudulent intent. If on the other hand, this was done to spite the other creditor, then once again fraus omnia corrumpit would apply and the actio pauliana can possibly succeed.

The differences between the *actio pauliana* and the *actio simulatoria*

The actio pauliana is very similar to the actio simulatoria. Both actions are intended to cancel an act done by someone else. In the actio simulatoria, there would be a third party who claims that an action between A and B is simulated (relative/absolute) and makes an action (the actio simulatoria) to annul that contract. The Court will then seek to establish the truth so that truth will prevail over the appearance.

The distinguishing factor between the actio simulatoria and the actio pauliana is that in cases of simulation, the parties did not want to make the contract, whilst in the actio pauliana, the parties did want to make the contract but they did it with the intention of defrauding the creditors. In simulation, fraud is not an element even if in many cases the simulation is done for fraudulent reasons (i.e. the parties give the appearance of a contract in order to deprive the creditor of his rights/assets).

Although they are very similar, the difference is in the intention. Did he really want to enter into that contract (albeit with fraudulent intent) or did he simulate the appearance of a contract to deprive me of my rights? Since the basis of this distinction lies only in the intention, the Courts have allowed that a person makes both actions simultaneously. In other actions, one must decide what action to make (rather than throw around alternative actions), but in this case, the Courts allows both actions. Then, depending on the facts and how the case develops, the Court will decide whether to annul a contract under simulation or whether to declare it ineffective under the actio pauliana. Although both actions may be made contemporaneously, the court cannot accept them both (as they are contrary to one another – as explained below).

In brief, the differences are the following:

1. A simulated act is inexistent since the parties did not want the act whilst in an actio pauliana the act exists and there was a valid transfer of property but in fraud of someone else's rights.

2. A creditor who exercises the actio simulatoria acts in the name of all other creditors (as in the case of the actio surrogatoria). In the case of the actio pauliana only the credit due to the creditor will be given whilst in the actio simulatoria all the credit simulated will be returned to the debtor. In the case of the creditor therefore it would be better to succeed in the actio pauliana because he gets a direct benefit.

3. In the actio simulatoria, it is immaterial if one is the creditor before or after the act is carried out. In the actio pauliana, the general rule is that when the act is done, one must already be a creditor.

4. The fulcrum of the difference lies in the intention. If there was no intention to enter into the contract, then the actio simulatoria applies. If there was the fraudulent intention, then the actio pauliana would apply. This is the reason, as mentioned above, both actions cannot succeed contemporaneously.

Onerous Obligations

The *participatio fraudis* has to be proven in the case of onerous contracts. If the debtor transfers the property through gratuitous title or donates it, *participatio fraudis* is not required to be proven. If one's debtor donates something to a third party who is completely in good faith, still one can succeed in the *actio pauliana* in spite of this good faith.

In the case of ***Bettina Vossberg v. Equinox International Ltd.*** (Court of Appeal, 09/11/2012) this issue arose in a trust, where a person created their own and transferred the property thereto, with the court holding that the putting of property in the trust was gratuitous and could be reversed through the *actio pauliana*, but not the creation of the trust *per se*, which is onerous. The court entered into the elements of trusts and stated that the setting up thereof was not issue. However, the passing of property from A to B on trust was considered gratuitous and the wife had the right to the action without proving the *participatio fraudis* on the part of the trustee.

Jurisprudence

In the case of ***Rosemary Borg v. Dennis Borg*** (First Hall Civil Court, 13/01/1996)[12] the *actio pauliana* was brought together with the action based on simulation of

[12]Plaintiff and defendant were married and had a son. The couple separate and Mrs. Borg sued her husband for maintenance. However, the defendant went to England and never returned, meaning plaintiff never received the due maintenance. The couple owned an immovable property which formed part of their community of acquests. Pending proceedings for maintenance, the defendant gave his share of the property to his father as payment of a debt which he claimed he owed him. Plaintiff petitioned the Court to order the recission of the contract on the basis of: first, absolute simulation; second, that the property that formed part of the community was given by the defendant to his father in order to defraud his wife. The husband's mother held that the writ of summons filed by the plaintiff was null as it consisted of alternative and contradictory pleas. Additionally, the defence claimed that those claims made by the plaintiff were unfounded as the contract was valid at law.

The Court questioned the credibility of the defendants and held in response to the contradictory and alternate claims that the plaintiff could have acted on the basis of the *actio pauliana.* The Court held that the husband was aware that by alienating his share of the property he would be reducing the assets

contracts, where a person simulates a contract where in fact there was nothing (absolute simulation) or gives the appearance that its contents are different (partial simulation). The court held that these matters are in fact quite similar. If someone were to transfer their house, would they really have intended to do so? The court held that if one intended to transfer there is the *actio pauliana* but if one wanted to appear to transfer without actually doing so there is the *actio simulatoria.* The matter, however, is that it is difficult for the creditor to know what their debtor's intentions truly are.

In this case the husband transferred his property to his father in settlement of a supposed debt (*in datio solotum*). The wife made both actions together which generally could not be done. Lawyers are required to choose the action they wish to take based on an examination of the facts. Here, however, the court acknowledged the similarity of the actions and that it is not possible for the creditor to know what the intentions of his debtor are. It is true that the main differentiation is the intention of the person and that the effects of the *actio simulatoria* are the cancel everything, as opposed to the limited effects of the *actio pauliana* which does not cancel the transfer but merely renders it ineffective up until the amount which the creditor is owed. Both the effects and the proof required are different. In the *actio pauliana* the debtor may raise a plea of discussion, where he files a note with the court describing his other assets. This cannot be raised in actions of simulation which is not predicated on the insolvency of the respondent. These similarities were raised in this case but ultimately the court said that the two actions can be brought together if the required proof is found, with the court decided itself on which action it is to apply depending on the evidence brought before us.

In a similar case involving separation proceedings the husband created a company with his brother giving him 999 shares and keeping one for himself, before transferring his assets thereto. The wife found nothing in the community of acquests, so she made the action to render this company ineffective. The court found a different solution in this case, finding that there was indeed fraud with respect to the creation of the company, and so what the court did was arrive to its solution by simply transferring 998 shares to the husband, whilst leaving the brother with one share. Thus, the company was kept on the books whilst the shareholding was changed such that the husband had full control of the company and its assets which would allow the wife to turn on the company to be given what was due to her.

In the case of ***Pace v. Portanier*** (First Hall Civil Court, 23/03/1957) Mr. Portanier granted a lease of a bar to a certain Victor Pirotta. The plaintiffs claimed that the lease was made with the intention of defrauding their rights to a claim for the ground rent and rent of the building. Hence, plaintiffs claimed that the amount of rent granted to Mr. Pirotta was too little, especially during the carnival holidays when the bar

of the community, thus prejudicing his wife. The father's knowledge of their marital problems at the time of the conclusion of the sale was enough to demonstrate his participation in the fraud. The Court disregarded the first and second pleas of the plaintiff as it was satisfied that there was sufficient proof that the contract was drawn up with the intention of defrauding the plaintiff of her rights. The Court accepted the third plea and declared the contract null and without effect, ordering its recission and annulment.

generated a substantial amount of money. Basing their action on the *actio pauliana*, plaintiffs asked the Court to order the rescission of the contract.

The Commercial Court upheld the requests of the plaintiffs, holding that in order for the *actio pauliana* to be admissible there must be an act which is of prejudice to and made with the intention of defrauding the creditor. The Court held that for the act to be of prejudice, the debtor has to be rendered insolvent. The insolvency is, at least in part, of the fraudulent act, and the credit must be antecedent to the fraudulent act. In the eyes of the Court, all the requisites of the *actio pauliana* were satisfied.

The Court of Appeal held that not all of the requisite elements were satisfied and overturned the decision of the Commercial Court. The Court noticed that the carnival holidays were not included in the lease agreement and thus the prejudice claimed was not apparent. The plaintiffs did not provide any other reason to show that despite the fact that the carnival holidays were not included in the lease agreement, such agreement was still of prejudice to their rights. To this effect, the Court held that the plaintiffs could not succeed in an action based on the *actio pauliana* and revoked the judgement of the Commercial Court.

In the case of ***HSBC Bank Malta Plc. v. Fenech Estates Co. Ltd. & Car Care Products Ltd.*** (First Hall Civil Court, 14/11/2002) plaintiff had summoned Fenech Estates Co. Ltd. to repay two large sums of money. However, before opening a lawsuit for the recovery, plaintiff sent two judicial letters to the defendant company. Exactly after their receipt, the defendant company transferred various immovable property to the second defendant company, Car Care Products Ltd. The directors of both companies, however, were the same individual. Plaintiff asked the Court to declare that the transfers between the companies were made with the intention of defrauding the plaintiff of its rights and hence declare the contract as being null and without effect.

The Court held that both the *eventus damni* and the *consilium fraudis* were present in this case, and decided to lift the corporate veil and examine who directs and owns the defendant companies. The Court held that the fraud was manifested in the acts of the transfer itself which no other scope than to defraud the plaintiff, also because both defendant companies are controlled by the same person. The plaintiff's claims were accepted, and the Court declared that the act of transfer between the companies was made to defraud the plaintiff of its rights and thus the said transfer was declared null and without effect.

In the case of ***Calleja v. Grima*** (Court of Appeal, 10/01/1995) plaintiff entered into a promise of sale agreement with the defendant on the condition that upon transfer the property would be vacant. Moreover, plaintiff also reserved the right to retract over the property in question. Upon the conclusion of the contract of sale, plaintiff informed the defendant that he was going to exercise the right to retract on that same day and did so. The defendant gave the plaintiff the property back but did so after renting it to his son. The plaintiff based his action on the *actio pauliana*, claiming that he, as a creditor of the defendant, could use such action to attack the lease agreement. The Court of first instance held that the elements necessary for the *actio pauliana* were missing.

The Court of Appeal overturned the decision of the first Court and held that, due to the right to retract, the plaintiff had a claim against the defendant. It also held that the plaintiff's claim was antecedent to the fraudulent act as the reserved right was made before the lease agreement was drafted. The *eventus damni* was present as the lease deprived the plaintiff from his freedom to use the property or to sell it as vacant. Additionally, the *consilium fraudis* was met as the defendant knew that by renting the property to his son, he would be prejudicing the plaintiff of his rights. The Court added that the *animus nocendi* was not a requisite, thus, the knowledge that the plaintiff was to be prejudiced was enough. The *participatio fraudis* of the third party was also satisfied as the son was present when the contract was made. For this reason, the son was deemed to be a *fraudem participans.* Hence, the Court declared the lease agreement as null and ordered the eviction of the son from the property within forty days.

In the case of ***Camilleri v. Agius*** (Court of Appeal, 23/11/1934), the Court dealt with the question of whether one needs to prove an intention to cause harm on the part of the debtor in instituting the *actio pauliana.* The Court said that the law does not require *dolus* or the intention to cause harm. What is required is that the debtor knows that he would be prejudicing the rights of the creditor. It is not necessary to do dishonest acts, nor the intention to harm creditors. It is enough if a debtor was aware of the damage which could be caused to his creditors. The Court went on to quote from the case of *Calleja v. Grima*: *"l-*animus nocendi *mhux mehtieg biex tigi ezercitata l-azzjoni revokatorja imma huwa bizzejjed li jkun hemm ix-xjenza u l-previzjoni li l-att ser ikun leziv ghall-kreditur".*

In the case of ***Magri v. Mixer Ltd.*** (First Hall Civil Court, 17/06/2005) Carmelo and Carmen Magri had instituted a case against Mixer Ltd. in order to recover the debt owed to them. during the pendency of such proceedings, the defendant company entered into a contract with Mixer Concrete Works Ltd. selling all its assets to the latter. Plaintiffs claimed that this contract was made to defraud them of their rights to recover the debt which Mixer Ltd. owed them. They claimed that both defendant companies are controlled by the same person Sebastian Dalli and requested the Court to rescind the contract. The defendants argued that there was no juridical link between itself, and the plaintiffs and that the latter was still not formally declared creditors of Mixer Ltd. as the first case was pending.

With regard to the first plea of the defendant, the Court held that the object of an action based on the *actio pauliana* is based on the fundamental element that the action is made between a debtor and a third party, where the possibility of satisfying the creditor's claim is seriously prejudiced. In this case, the act would be the contract made between Mixer Ltd. and Mixer Concrete Works Ltd. and hence the juridical interest was that the contract remains effective. The Court rejected the first plea. The Court also rejected the second plea since the initial case that the plaintiffs had instituted against Mixer Ltd. was already finalised during the pendency of proceedings.

The Court moved to analyse the elements of the *actio pauliana.* It was clear that Mixer Ltd. intended to alter its financial position in order to effectively reduce the possibility of satisfying its creditors' claims through its act. Since the fraudulent act consisted in

a contract of sale, being an onerous contract, the plaintiffs were obliged to prove the bad faith of the third party. The Court observed how both Mixer Ltd. and Mixer Concrete Works Ltd. were controlled by the same person and therefore it was impossible for the latter not to know that such an act would prejudice the rights of Mixer Ltd.'s creditors. The Court ruled in favour of the plaintiffs and ordered the rescission of the contract.

There is a remedy against minors in sub-article (4) to the extent that the minor benefitted from the fraud.

Topic IX. Fiduciary Obligations

Dr Max Ganado

Although we do have legal relationships which have nothing to do with money, the law of obligations touches mostly the law of property, making it a dominant feature in the civil law. We can deal with property directly, but the fact remains that we depend on intermediaries to deal with our property to make the system work (lawyers, accountants, investment advisors). These are service providers, not owners. Blockchain created a digital platform which eliminates intermediaries through the use of peer to peer (P2P) dealings. Whenever a legal organisation is created, it is a legal necessity that it be administered by these intermediaries.

The legal basis for obligations is generally from agreements, either contracts or quasi-contracts. Many, however, also arise from negligence and fraud, known as the law of tort. The Civil Code mostly deals with these two points. Sometimes, laws even create direct obligations on people themselves. Some obligations, however, arise from the factual context of a person in relation to property belonging to someone else, the information he or she has about it, etc. This is where fiduciary obligations arise. These do not need contracts or torts. They can use contracts or arise in the context of torts, and they can supplement those sources of obligations, and often do, but they can also be self-standing and arise without specific agreements or torts. The challenge is when we do not know that these obligations are in force and then they are therefore ignored unwittingly. Another challenge is to then identify which law applies to whom and how. Another challenge is to understand how the law protects parties to such relationships, especially the beneficiary (the creditor). Finally, another challenge is then to determine which remedies arise to enforce such obligations. As Malta has a mixed legal system, our Civil Law influences provided us with a strong Roman Law basis, particularly in the *ius commune*, and an English law influence. Both are a source of law but our rules on fiduciary obligations are based on an ancient Roman law concept, *fiducia*, and this concept permeates all of the Civil Law systems of the world although it was superseded by developments by the time of Justinian. The concept was later adopted by English law and produced the institutes of trust.

Many fiduciary relationships are verbal in form, which is a large part of the problem. In terms of the object, they can refer to anything: property, movables, information, etc. Publicity is very low and often shrouded in secrecy, whilst in effect they make the nominee appear to be the owner. Whilst formal versions of this do exist, such as foundations, they are hyper specific. Nomineeships of shares are also regulated by the MFSA which imposes strict discloser requirements for the beneficial owner. Trusts are also highly regulated.

Topic X. Quasi-Contracts

There three types mentioned in the law, although before 2007 there were only two: the negotiorum gestor, and the indebiti solutio. After 2007 there was added the *actio de in rem verso*, which was always part of Maltese law even before its inclusion in Code. As part of Roman Law, it was never excluded from Maltese law by the legislator. quasi-contracts are nearly but not exactly contracts, as there are no dual consents or the unity thereof, but only the consent of one party. This is a situation where the court said that the law felt that although there is the consent of one party still, he merits some sort of compensation. Article 1012 states:

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

Therefore, it is a voluntary act, done out of the good in one's heart, that creates an obligation for the beneficiary irrespective of their legal capacity or consent.

Negotiorum gestor is like a mandate (i.e., where one gives authority to another to act on one's behalf), but where one acts on another's behalf without being authorised to do so, meaning he would have taken it upon himself to act. The idea is that he tried to help another and should therefore have a right to compensation, especially if it results in a benefit to the other. The classical example is when a house is burning down, and a third party does his best to try and extinguish it.

Indebiti solutio is where one gives something to someone else without either being the creditor or the debtor. The thing lent must be given back. If one gives something to someone and for some reason or other it is not due, either because he is not the creditor or the person who gave the money is not the debtor, the money must be given back.

Actio de in rem verso is unjustified enrichment, where someone gives a benefit to someone else. Even though one did not act on one's instructions, he is entitled to compensation. This was not created in the original Code because it was felt that *negotiorum gestor* was wide enough to cover all situations. It was felt by the legislator and the courts that this is wider and covers more situations, making it applicable as a separate quasi-contract.

Compensation for services rendered was created by the courts and is not in the Code and is compensation for services rendered. This was created to cater for those situations where someone looks after a member of the family or a close friend and should be given some sort of compensation. Only the consent of he who gives the benefit is required, and the beneficiary need not give his consent. If one is looking after one's old relative who has dementia, she cannot give her consent to the arrangement. One would still be entitled to compensation, such that the beneficiary need not be capable at law for the quasi-contract to subsist.

There were some authors who tried to put QCs with the *voluntà* theory, Ricci amongst them. To do so, he argued that what he has is the consent of one of the parties who gives the benefit, and the presumed consent on the part of the beneficiary, arguing that the law presumes this consent on their part. This theory is no longer accepted and is considered to be very artificial. In indebiti solutio, for example, there is no consent as the action hinges on the beneficiary not wishing to give the money back. Therefore, consent could not possibly be presumed. The basis of modern QCs is equity and justice, meaning it is fair and just to give a remedy in these situations. Given the circumstances, it is fair that compensation is given, and it is fair and just to do so. Therefore, it is always possible to create further QCs so long as there is a benefit somewhere the courts can create another if they feel that it would be just and equitable to do so. Whilst this remains possible, the *actio de in rem verso* remains wide enough to cover most situations. QCs allow the courts to play with remedies too, and to modify the effects of the action to provide justice and equity in the particular circumstances of the case. In fact, in Italy, no longer do they have the fourfold classification of contracts that we have, but they have contracts, tort, and any other obligation imposed by the law, an open third category.

Present in all these four quasi-contracts is the element of equity and fairness. The obligation has not arisen out of a contract and yet, it is just that one recovers something from someone else with whom there is a clear connecting factor. In the English legal system, there used to be the Courts of Equity which gave justice to situations not catered for under Common Law.

The prevailing idea is that although there are presently four quasi-contracts, it does not mean that they are limited to four. A new action or idea or situation may arise where justice requires that compensation be given as a last resort – in these cases, a remedy should be given.

Traditionally, this was not the concept of quasi-contracts. Rather, jurists sought to fit in these quasi-contracts under the ambit of the theory of *voluntà* which was the basis of the Civil Code. Ricci, one of the major exponents of the *voluntà* theory, fitted quasi-contracts within the *voluntà* theory. Ricci stated that while in contracts you have two consents, in quasi-contracts, there is one ordinary consent and one presumed consent. This presumed consent would arise out of the fact that:

1. in the case of negotiorum gestio, it is presumed that since you derived a benefit, then you ought to provide compensation;

2. in the case of indebiti solutio, it is presumed that since you are an honest person, then if you received something by mistake, you ought to pay it back;

3. in the case of the actio de in rem verso, it is presumed that since the enrichment is unjustified and since you are an honest person, you ought to return it back;

4. in the case of *serviġi*, since you are receiving the services, you ought to compensate the person rendering these services.

As one can see, this reasoning is the result of a stretched effort to fit everything within the *voluntà* theory. In fact, Ricci's theory is not considered anymore. Instead, quasi-contracts are justified on the basis of justice and equity. Today, the basis of the quasi-contract is not subjective but objective. In other words, why should compensation be given? Because it is objectively just that you should be compensated and therefore, I will give you compensation. This is now the accepted theory of quasi-contracts, i.e., justice in the objective sense.

This leads us to the fact that one would be entitled to compensation even if the beneficiary is not capable at law to give his consent because consent on the part of the beneficiary is not an element required for a quasi-contract. Therefore, if I do something for your benefit, I am still entitled to compensation even though there was no consent and no capacity on your part.

Here we have thus eliminated two of the elements essential for contracts, namely, capacity and consent. These are not needed for quasi-contracts because the basis of quasi-contracts is not the *voluntà* theory but objective justice. Objective justice means that I am entitled to compensation once I got you a benefit no matter if you are insane, incapacitated, a minor etc.

That is why in the fourth case of compensation for services rendered our courts have classified that action as a quasi-contract because in many cases you have got members of the family looking after old people. The courts have classified that action under quasi- contract and not contract. Thus, the issue of capacity would not impede a successful claim for *serviġi*.

Negotiorum gestor

Article 1013 states:

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

Here we are not considering necessarily business affairs. It could be as simple as managing one's neighbour's field whilst they are overseas. The law begins with the duties of the person who created the act, stating that: *"he shall be bound to continue the management which he has begun and to carry it out until the person on whose behalf he has acted is in a position to take charge of such management himself, and to do everything which is incidental to or dependent upon those affairs, and he shall be liable to all the obligations which would arise from a mandate".* Note that the duties are like those of a mandatary. The first duty is that he shall continue the management irrespective of his lack of authorisation. Once he has begun, he must continue until the mandator is in a position to take over the management himself. If one decides of his own volition to undertake an act he must see it to completion. Furthermore, he must *"do everything which is incidental to or dependent upon those affairs"*, such that if one decides to harvest one's field he must replant it, collect the crop, and sell it in the market as acts incidental to or dependent on those affairs.

Article 1014 states that:

> **1014.** *Where the person on whose behalf the voluntary agent has acted dies before the business is completed, such agent shall be bound to continue the management of the business until such time as the heir is in a position to provide for it himself.*

Meaning one would even be bound to one's neighbour's heirs until they are able to take over the management of the field themselves. Mandate is one of those contracts that can be terminated unilaterally, but one must continue until the mandator is in a position to carry on the running of their business themselves.

Article 1015 states:

> **1015.** *The voluntary agent shall be bound to use in the management of the business all the diligence of a bonus paterfamilias.*

In mandate we find that if one has engaged someone the mandatary's standard of diligence is that with which one acts with his own affairs or property. In mandate the person chooses his mandator, meaning if one chooses a negligent person, he can only expect them to act negligently. Here, however, if one interferes in another's affairs he must act as a *bonus paterfamilias*, even if this is above the standard with which he acts in the management of his own property or affairs. Therefore, should one undertake this work they must act as a reasonable man would.

Duties of the Voluntary Agent

The law, articles 1016 and 1017 both increases and decreases the duty of care, stating:

> **1016.** *The provisions of the last preceding article shall be applied with greater strictness in the following cases:*
>
> (a) *where the agent has intermeddled with the business, notwithstanding the prohibition of the party interested;*
>
> (b) *where, by reason of his intermeddling, the business was not undertaken by a more competent person;*
>
> (c) *where the agent himself did not possess the requisite skill.*
>
> **1017.** *It shall, in all cases, be lawful for the court to mitigate the damages arising from the imprudence or negligence of the agent, having regard to the circumstances which may have induced him to undertake the business.*

In these three situations the courts impose an even higher standard, whilst in article 1017 the law authorises the courts to reduce the damages imposed depending on the circumstances of the case. Take, for example, a case where one sees one drowning. Legally, one is not bound to interfere, but chooses to do so. Unfortunately, one is not a strong swimmer so does not have the required skill, with the result that with one's interference one drowned. One might have to pay damages, but the court will consider the circumstances which induced one to attempt to render assistance in the first place, thus allowing them to mitigate the amount owed. This is a clear demonstration of the way in which the principles of justice and equity are balanced against the reality of the individuality and uniqueness of a situation by the courts.

Compensation for the Voluntary Agent

Article 1018 begins with the rights of the *negotiorum gestor*. The basis for which is compensation for enrichment, but Article 1018 goes further, stating:

> **1018.** *If the business was well managed, the party interested shall, even though the management may have accidentally failed to benefit him, be bound to perform the obligations contracted on his behalf by the agent, to indemnify the said agent in regard to any obligation he may have contracted in his own name, and to reimburse to him*

> *any necessary or useful expenses, with interest from the day on which they shall have been incurred.*

Meaning even if there is no benefit, if the business was well-managed, the *negotiorum gestor* is still entitled to receive a benefit. This too is a demonstration of equity. Take, for example, a case where a house is burning and one tries to help, but still the house burned down. No benefit was created but one still tried to help and acted properly, meaning one would be entitled to compensation. The law here balances the attempt of the person who tried to help and acted properly with due diligence whilst doing so alongside the principles of justice and equity against the negative results of one's actions.

Article 1019, however, is a different situation, stating:

> **1019.** *Nevertheless, where the agent was under the impression that he was managing his own affairs, he shall not be entitled to any indemnity beyond the benefit which the party interested may have actually derived.*

Here, the agent was not altruistic, but was acting on his own behalf. In that case, if he does not give a benefit to the other party, he will not be given compensation. If one ploughs a field thinking it is one's own, one will only be given compensation if its proper owner derived a benefit from one's action. This is common in agriculture where it is often unclear where the dividing line between fields lies. If the beneficiary derives a benefit, he is bound to compensate one, but if he does not then one is not given compensation. This is due to the lack of altruism on the part of one's actions, as opposed to those actions described in Article 1018. This is not found in the French Code but was introduced by Sir Adrian Dingli.

This shows that the principle of negotiorum gestor is that one acts for another in an attempt to help them. Here, we have adopted an objective approach to this QC in the sense that if some benefit results, whatever one's intention may have been one is entitled to compensation. This is why the *actio de in rem verso* was not originally introduced. The French follow the subjective approach, such that one is only entitled to compensation if one intends to give a benefit to someone else. Here, in article 1019, there is no intention to give a benefit to another as the agent was under the impression that he was managing his own affairs. If the agent acts and the third party has benefited thereby, whatever the intention of the agent may be, he is still entitled to compensation. If there is no benefit, however, he is only entitled to compensation if his intention was to help the third party.

Article 1020 is also an originally Roman Law rule, stating that:

> **1020.** *Where a person has intermeddled with the affairs of another person against the express prohibition of such other person, he shall not be entitled to any indemnity.*

If the third party insists that there should be no interference, but one interferes just the same, one is not entitled to any compensation. It is true that the third party would have derived a benefit from one's action, but it remains that he would be compensated. Justinian argued that if one interferes when one is told not to, then one is not entitled to any form of compensation, irrespective of the benefit derived therefrom.

Jurisprudence

In the case of ***O'Flaherty v. Vassallo*** (First Hall Civil Court, 26/07/1982), there was a block of flats, each owned by different persons, with there being common parts also. Here, one of the owners went overseas for a long time and could not be reached. The other co-owners sought to redecorate the block of flats and attempted to contact the owner who went overseas but to no avail. They went ahead with the maintenance work. When the owner returned, he was asked to pay his share, however he did not consent and claimed that he was not asked to do so, whilst the others had agreed. He therefore refused to pay his share. The court forced him to do so as his flat, forming part of a renovated block, increased in value such that he received a tangible benefit from the work done without his consent. As he received a benefit, he was bound to pay his share, even in the absence of a mandate.

Plaintiff claimed that, with the consent of the defendant, he had engaged a few people to coat and paint the façade of a block of apartments. The bill was to be divided by eight as there were eight apartments in the block. However, Dr. Vassallo, as the owner of the apartments, claimed that he had never given his consent for the work to be carried out. He admitted that he had received a paper from the plaintiff which contained the estimate of the works which were to be carried out, but he never spoke to the plaintiff regarding this paper. Furthermore, he held that the work that was carried out on the façade caused him more harm than good as he claimed that it removed the protection of the stone. The plaintiff held that he had informed all the owners in the block, including Dr. Vassallo, about the work that was going to be carried out and also held that the defendant never raised an objection to the work that was being proposed.

The Court held in favour of the plaintiff. It observed that whilst the defendant was not satisfied with the work carried out, the facts of the case indicated that the work was carried out well, so much so that the other co-owners were satisfied with the work. They all derived a benefit from the refurbishment as the value of the apartment increased, including Dr. Vassallo's. moreover, if the defendant had realised that the work was being carried out wrongly, he should have taken the necessary steps to stop the execution of the said work. The Court concluded that a quasi-contract had been created between the parties and, as a result, the defendant as an interested party had to indemnify the plaintiff and pay his share of the bill.

In the case of ***Poulton v. Agius*** (Commercial Court, 9/11/1988) the defendant owned a yacht and was going abroad, which led him to engage the plaintiff to carry out specific repairs on the vessel. He then left the island without informing the plaintiff of where he went. It was not the first time that the defendant left his yacht with the plaintiff. Whilst he was carrying out the works as instructed, he realised that the engine too needed work. He was not instructed to carry out work on the engine but repaired it anyway. When Agius returned, Poulton wanted compensation for the engine work, but Agius

argued that he did not tell him to do so. The court held that since they were friends the mandate could be implied, giving compensation, however, on the basis of *negotiorum gestor.* The Court considered that, notwithstanding the fact that no contract was in place vis-à-vis the extra repairs and no authorisation had effectively been given by the defendant, the plaintiff had actually intervened for the defendant's benefit. More so, the engine had been sufficiently repaired and the work was carried out in an appropriate manner.

In the case of ***Mizzi v. Boffa*** (Court of Appeal, 21/11/1994), *negotiorum gestor* was applied and compensation was given. here, a handyman in a block of flats was engaged to do all that was necessary in the common parts of the block, including cleaning, painting, maintenance, etc. This contract expired after the elapse of 10 years and no new agreement was reached. However, he continued with his work, even though he had no contract and was not engaged to carry out the work. He requested payment which the owners refused to give, arguing that they did not engage him. The Court of Appeal granted him compensation because the work was beneficial to the owners, even though they did not request his services and there was no contract between the parties. *Negotiorum gestor* is the principle of receiving compensation for work done for the benefit of another.

Indebiti Solutio

Occurs when someone receives something either which is not due to him or was delivered to him by someone who is not a debtor. Article 1021 states:

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

Types of indebiti solution

This refers to those situations where a person receives something which is not due to him neither under the civil law nor under a natural obligation. Article 1021 in fact provides that "a person who receives, whether knowingly or by mistake, a thing which is not due to him under any civil or natural obligation, shall be bound to restore it to the person from whom he has unduly received it."

It is often said that there can be three types of payments which can be made by mistake.

1. ***Indebitum ex re:*** this arises when there is no obligation. One passes on something to you when there is no obligation (whether civil or natural obligation). In this case one has a right to recover the money.

   In the case of ***Camilleri v. Mifsud*** (Court of Appeal, 08/05/2001) It was held that the *indebitum ex re* applies not only when the obligation does not exist, but also when I pay more than what I am obliged to pay under the existing obligation. With respect to the extra amount, no obligation exists and there would thus be an indebitum ex re, which means that I would be entitled to recover the extra amount paid.

2. ***Indebitum ex persona solventis:*** In this case, the obligation exists and the person receiving is truly a creditor. However, I am not the debtor. When I paid, I thought that I was the debtor when in fact I was not. In such cases, I have a right to claim the amount back. (See ***Gambina noe. v. Farrugia*** below for example).

3. ***Indebitum ex persona accipiendis:*** Once again, the obligation exists and I am truly the debtor, but you are not the creditor. Here again I am entitled to claim the amount back. This is quite common in the lease of land or in emphyteutical grants. The owner would for instance transfer the property and the lessee continues paying the rent to that person. Whilst being truly a debtor, the lessee is paying the rent to the wrong person (the person who is no longer the creditor). Thus, this amount has to be paid back because if the true owner demands payment of the rent, it is no defence for the lessee to say that he has paid that rent to the previous owner. In these situations, there is thus the right of recovery.

Exception to the Right of Recovery

Supposedly, if the thing was not due to one, one should not have accepted it; or if one is the creditor but receives payment from someone who is not a debtor, pursuant to article 1022:

> **1022.** (1) *Where any person pays a debt under a mistaken belief that such debt is due by him, he may recover from the creditor the debt so paid.*
>
> (2) *Such right of recovery, however, ceases if, in consequence of the payment, the creditor has, in good faith, deprived himself of the proof of, or the security attached to the debt, saving the right of the payer against the true debtor.*

Here, someone pays under the mistaken belief that one is a debtor. This often happens in cases of inheritance where one believes oneself to be an heir and pays off the debts of the *de cuius* but turns out to not be a beneficiary of the testament at all. Here, there must be the mistake. These two sections must be read together with Article 1147 of the Civil Code which refers to a payment without an obligation, something which is also recoverable, and states that:

> **1147.** (1) *Every payment implies a debt, and what is paid without being due may be recovered.*
>
> (2) *Nevertheless no action for recovery shall lie if the payment was made in discharge of a natural obligation.*

The difference between the two is that the latter is referred to as objective indebtedness as there is no obligation, and, regardless, one pays something where nothing is due. Here, in article 1021, there is subjective indebtedness as it presumes the existence of an obligation. Article 1147 is known as *indebitu ex re*, as there is no obligation, and is not a quasi-contract. Articles 1021 and 1022 have an obligation, but payment is made to either the wrong creditor or by the wrong debtor. Under Article 1147 there is no question of mistake. If there is no obligation, then one can recover, independently of mistake or not. Article 1021 is also one of the few express mentions of natural obligations in the Civil Code, in which one cannot recover natural obligations one is not bound to pay. When one claims to recover, a possible defence is that one paid under a natural obligation, making it non-recoverable. The salient point to note is that there must be the mistake, and there are cases where the money was not returned because the court found that there was no mistake.

Movables

This also refers to movable objects, including warrants, as was the case in ***Accountant General v. Agius*** (First Hall Civil Court, 26/10/2001) where the applicant did not qualify to be given the warrant of a teacher and the department mistakenly issued one. When the mistake was realised, it sought to recover it and succeeded. In this case, the warrant was not due to him, and therefore recovery was possible.

The Excusability of the Mistake

When it comes to the mistake, the Courts have made it clear that the mistake has to be a real mistake and not a negligent mistake. If the error was made through one's negligence, then such person would not be entitled to compensation. In other words, the mistake must be excusable. If the payment was not excusable, then it is assumed that you made the payment intentionally.

In the case of ***Director General of Education v. Briffa*** (Court of Appeal, 31/05/2002) a watchman was supposed to be assigned to a school to look after the premises. However, it turned out that the school he was assigned to did not exist. The department paid him anyway and Briffa repeatedly collected payment. Eventually, the government sought to recover the money paid to Briffa, arguing that he had not worked for it. The Court refused, saying it was quite clear that there was no mistake as the department knew that the school did not exist and that they were paying him for not working, for the simple reason that they appointed him to a school that did not exist. Therefore, the Court refused the request that Briffa pay back the salary he received during that period.

In the case of ***Enemalta Corporation v. Sacco*** (Court of Appeal, 16/12/2002) the employees had a collective agreement which said that to be entitled to sick leave they must produce a medical certificate. Sacco applied for leave but did not produce such a certificate, but he was given the compensation anyway in the amount of Lm938, later reduced to Lm784.77. Eventually, the corporation sued to recover the money paid as it was not due to him. Defendant held that the plaintiff corporation's allegations were illogical and that the applicable two-year prescriptive period had lapsed in accordance with Article 1027 of the Civil Code. The Court of first instance held that the prescriptive period had effectively been interrupted by the plaintiff corporation, which had sent the defendant a judicial letter. It ruled in favour of the plaintiff and ordered the defendant to pay back the money due.

The Court held that this was a case of *indebiti solutio*, where a quasi-contract subsisted as the *indebitum,* or payment, had been erroneously made. The mistake in question was one of fact and excusable, and the debt was paid both unknowingly and involuntarily. The fact that the payment did not arise from a natural obligation allowed the plaintiff corporation the right to resort to payment. The Court felt that the negligence on the part of the plaintiff in not maintaining precise records should not be of detriment to the employee. The Court also held that there was no mistake as the company knew that there was no medical certificate and paid anyway. Note the importance of the element of mistake in this quasi-contract. Taking into consideration all the facts, the Court held that the plaintiff corporation could not institute an action for restoration of payment. The Court thus held in favour of the defendant and ordered that the expenses be divided between the two parties.

Extinctive Prescription

Recovery is also not possible not only when there is no mistake, but when the extinctive prescriptive period of two years has elapsed from the discovery of the mistake. However, when it is a case of Article 1022, that is, a payment made to a true creditor by a person who is not a debtor, the law says that recovery is not possible if the creditor in good faith disposes of the proof of title or security of title. In that case,

recovery is not possible, because under payment, a creditor cannot refuse payment by a third party. If one wants to pay the debt or one's friend, one cannot be stopped from doing so. When the creditor receives payment from a person who is not his debtor, he can keep the money on this basis. However, if he *"deprived himself of the proof of, or the security attached to the debt"* then the sum cannot be recovered from him. Nevertheless, it can be recovered from the true debtor.

In the case of ***Housing Authority v. Attard*** (First Hall Civil Court, 22/05/2008) the Housing Authority had accepted a request from the defendant for assistance to help her in purchasing a house and granted her a subsidy to this effect. However, the Authority later requested the defendant to pay back the said subsidy on the basis that the defendant had breached one of the essential conditions for the granting of the said subsidy, i.e., that she had never benefitted from any other subsidies from the Housing Authority. In light of this development, the plaintiff accused the defendant of making a false statement to the Housing Authority and requested the defendant to reimburse it.

Making reference to the relevant Articles of the Civil Code, the Court stated that the case refers to a situation where the payment was made to a person who did not deserve it (i.e., *condictio indebiti sine causa*). Seeing that there was no *causa*, the act of the defendant was effectively null or vitiated and, consequently, the obligation on behalf of the Housing Authority was non-existent. The Court held that an action for *condictio indebiti sine causa* was a personal one and can only be directed against the interested party. In order for the repayment to be affected, the Court held that three cumulative points must occur:

1. The payment must have been affected,
2. The *causa* must be lacking, and
3. There must be a mistake on the part of the individual/entity who affected the payment.

The Court held that the above such points were satisfied and that, consequently, the contract was entered into by the defendant with *male fede.* Thus, the Court ruled in favour of the plaintiff.

In the case of ***Bugeja v. Cottonera Waterfront Group Plc*** (Court of Appeal, 03/10/2008) plaintiff entered into a preliminary agreement with the defendant company in October of 2003, wherein the latter obliged itself to transfer an apartment and garage to the plaintiff in a complete state. The plaintiff claimed that in October of 2004, just before the signing of the final contract of sale, he was forced to pay the amount of Lm2,080 to the defendant as a fee for some works. Furthermore, he claimed that the place was not yet complete. Thus, he asked to be refunded as that sum of money was unjustly paid. In turn, the defendant pleaded that during the execution of the works, the plaintiff had ordered that some works be done in the apartment subject to the preliminary agreement abovementioned. Therefore, the defendant could not proceed with the necessary works.

The Court of first instance delved into the meaning of the term *"complete state"*, which, in the context of the agreement, effectively meant that the apartments, including the

common areas of the garage complex, were to be completed by means of the proper and necessary permits issued by the Planning Authority. The preliminary agreement provided that the property was to be delivered by the vendor to the purchaser in a complete state upon the conclusion of the contract of sale. In view of the incomplete nature of the product, the Court dismissed the defendant's pleas and ordered it to reimburse the plaintiff with due interest, together with judicial expenses. The Court of Appeal confirmed this decision.

The law, from Articles 1023 to 1028, deals with the restoration of a thing which has deteriorated or improved in value. What must be returned? The thing itself? Or the thing enhanced? This depends on whether the parties are in good faith or bad faith. For example, Article 1023 states:

> **1023.** (1) *Any person who has unduly received the payment of a sum of money, shall, if he was in bad faith, be bound to restore both the capital and the interest thereon as from the day of the payment.*
>
> (2) *Where, however, he was in good faith, he shall only be bound to restore the capital.*

Article 1024, on the restoration of a thing unduly received. goes on to state:

> **1024.** *Any person who has unduly received any thing, other than money, which is still in his possession, shall be bound to restore it in kind to the party from whom he received it.*

Article 1025, on where thing unduly received is no longer in the possession of the party receiving it, states that:

> **1025.** (1) *If the thing is not in his possession, or has deteriorated, he shall, if he received it in bad faith, be liable to the same obligations as, under articles 556 and 557 are imposed on a possessor in bad faith.*
>
> (2) *If he received the thing in good faith, he shall be bound to restore the value thereof or, as the case may be, to make good the deterioration, but only up to the amount of any benefit which, as a result of the alienation or deterioration of the thing, he may have derived; and where he has not yet received the subject of the benefit derived from such alienation or deterioration, he shall only be bound to assign his right of action for the recovery thereof.*
>
> (3) *He is not bound to restore the value of the thing if he has lost, given or destroyed it.*

Article 1026, on the applicability of Articles 540-545 and 547, states that:

> **1026.** (1) *The provisions of articles 540 to 545 and 547 shall apply to any person who has unduly received a thing, according as to whether he has received it in good or in bad faith.*
>
> (2) *The provisions of articles 548, 549 and 550 shall apply to any such person in all cases.*

Article 1027, on the limitation of action for recovery of what has been unduly given, states that:

> **1027.** *The action for the recovery of that which may have been unduly given, unless prescribed under any of the provisions contained in the title relating to prescription, shall be prescribed by the lapse of two years from the day on which the person to whom the action is competent shall have discovered the mistake.*

Article 1028, on the rule that a payer by mistake cannot recover from third party, states that:

> **1028.** *Any person who has given a thing by mistake cannot recover it from a third party to whom it was, under any title whatsoever, transferred by the party who had received it.*

If one transfers a thing to another when one is not a debtor and the other passes it on to any other by any title, then recovery is not possible against the third party. This quasi-contract only regulates the personal relationship between the person who pays and the person who receives.

Actio de in Rem Verso

Historical Background

This was introduced in the Civil Code in Act XIII of 2007 but it was always there, as the Courts have accepted this as a part of Roman Law even before its introduction. If the law today regulates an institute in a particular way, then the modern legislation takes precedence; but where there are *lacunae* the Courts refer to Roman Law. The Courts therefore did not exclude it and adopted it for a long time before its introduction. This *actio* was not expressly rejected by the law, unlike the institute of *fedecommesso*, and so the Courts acknowledged it. however, under Roman Law it was not as wide as it is today but applied to minors under the *patria potestas* of his father. Any money passed on to the minor could be recovered from the father up to the extent that the family benefitted from it.

The action is basically geared towards situations when one person is unjustly enriched to the detriment of another person. The *actio de in rem verso* enables the latter party to recover the thing or amount which the other party has acquired.

The *actio de in rem verso* existed in Roman Law but it only applied in one particular situation, namely with respect to debts incurred by the filius familias (children of the family) who incurred debts without the consent of the paterfamilias. In time, this *actio de in rem verso* started to be considered as a general action and today it applies to all cases of unjustified profit, so much so that even the marginal note to the Article 1028A in the Civil Code today reads 'enrichment to the detriment of others'.

The *actio de in rem verso* can be described as an action of last resort, or rather, a safety valve for a person who has been wronged in some way or another and who doesn't have a clear-cut remedy to address his grievances. In this sense, the *actio de in rem verso* can be described as a very flexible action and can cater for different situations.

The *actio de in rem verso* is found in most Continental jurisdictions, including the French system. However, there was a particular time when the French courts were reluctant to apply it since it was not specifically mentioned in the *Code Napoloen*.

It is even found under English law and Common law jurisdictions. It has been especially used in situations of co-habitation between couples who are living together outside marriage. Although in England, there are special laws regulating co-habitation, certain areas are still not covered by legislation. For instance, there would be situations where the man works outside the home and the woman stays at home looking after the house (and possibly the children). When they eventually split up, the woman will end up with no savings and no employment; she would thus be able to rely on the actio de in rem verso to get some compensation from the man who would otherwise unjustly enrich himself, in the sense that throughout the years, he would have saved up a lot of money that he would have otherwise spent on housekeepers, childcare, etc. English courts have been willing to accept this principle in such actions. The action has not been tried here in Malta, but the flexibility of such action is in the fact that once it is based on equity and justice, then if one derives a profit by the activity of someone else, then such person should be compensated.

The Principle

The principle of this action is that if someone derives a benefit to which he is not entitled under the law or under a contract, then he must pay compensation. If the benefit is justified under either the law or a contractual relationship, then there is no question of an *actio de in rem verso*, as the benefit must be unjustified. Sir Adrian Dingli did not exclude this on purpose but felt that it was included under the rules of *negotiorum gestor*, where a person wrongly provides a benefit under the impression that he is managing his own affairs. The Courts felt that the *actio de in rem verso*, or action for unjust enrichment or unearned profit, was wider and easier to prove. It is always stated that the *actio de in rem verso* is a subsidiary remedy in the sense that one is entitled to it if there is no other possible remedy under the law or the contract, and if the law or contract denies one a right to claim compensation, then one cannot seek it under the *actio de in rem verso* rule.

Take, for example, a lease, in which the contract often stipulates that any improvements made by the tenant shall remain attached to the property without any right of compensation for him upon the expiration of the lease. In this case one cannot claim compensation under the *actio de in rem verso*, as it is not a case of unjustified enrichment, as the contract itself stipulates that the landlord is entitled to this enrichment. The nature of this *actio* is wide but it is limited at the same time to matters not regulated by law or contract. If it is, however, established under either law or contract, even negatively, then one is not entitled to compensation.

The *Actio in Rem Verso* as a Subsidiary Action

Article 1028A states:

> **1028A.** (1) *Whosoever, without a just cause, enriches himself to the detriment of others shall, to the limits of such enrichment, reimburse and compensate any patrimonial loss which such other person may have suffered.*
>
> (2) *If the enrichment constituted a determinate object, the recipient is bound to return the object in kind, if such object is still in existence at the time of the claim.*

Since the *actio de in rem verso* is a quasi-contract, consent is not an element of this section. In other words, the consent or otherwise of the beneficiary is irrelevant. The crux of this action is whether the beneficiary has enriched himself to the detriment of others or not. Similarly, the fact whether the beneficiary is capable of contracting or not, is of no relevance and the person who caused the benefit would still be entitled to be compensated from the estate of the beneficiary. The action is a subsidiary action in the sense that it can only be brought when no other remedy is available. There is no need to exhaust all ordinary remedies so long as the court is satisfied that there are no other remedies available. If under tort or contract you have a remedy, then you are entitled to that remedy, and you cannot fall on the actio de in rem verso. If, on the other hand, there is a contract which clearly excludes your right to recover something, then you may not rely on the *actio de in rem verso*. Thus, when one says that the action of the actio de in rem verso is a subsidiary action, one means that the issue is

not regulated by any contract, law or by some other obligation. If it is, then one cannot claim that the enrichment is without a just cause.

In the case of ***Bartolo v. Micallef*** (First Hall Civil Court, 28/10/2004), the Court stated:

> *"L*-actio de in rem verso *hija azzjoni moghtija lil persuna f'dawk il-kazijiet fejn ma tistax titressaq azzjoni ex contractu. Din l-azzjoni hija msejha sussidjarja ghaliex ma tistax tinbeda jekk mhux wara li l-attur ikun fittex ghalxejn mod iehor lil min staghna bi hsara tieghu jew jekk ma jintweriex li ma kien hemm l- ebda azzjoni li setghet issir. Tista' titressaq ukoll fejn jintwera li jkun ghalxejn li l-attur l-ewwel jipprova jmexxi kontra d- debitur tieghu f'kaz, per ezempju, li dan ikun falla jew telaq ghal kollox mill-gurisdizzjoni.*
>
> *"L-azzjoni hija wkoll, u minhabba dak li ghadu kemm inghad, wahda ekwitativa. Kemm hu hekk, il-principju li jmexxi din l-ghamla ta' azzjoni huwa da kli m'huwiex xieraq li persuna tistghana bi hsara ta' haddiehor (nemo licet locupletari cum aliena iactura). Ghalhekk, il-limiti tal-azzjoni huma l-qies tal- vantagg li t-terza persuna tkun kisbet minhabba l-ispejjez minfuqa mit-terz, u ghandha l-mira li terga' trodd l-ekwilibriju bejn il-patrimonjuta' min ikun staghna u dak tal-parti li tkun ghamlet jew nefqet spejjez biex dan ikun sehh. Billi din l- azzjoni ghandha l-gherq taghha fl-istitut tal-kwazi-kuntratt, irid jintwera li l-fatt huwa wiehed lecitu u volontarju u li minnu titnissel obbligazzjoni, u li l- fatt ma jkunx sehh kontra l-projbizzjoni espressa tal-parti interessata".*

In ***Scicluna v. Watson*** (Court of Appeal, 15/07/1901) the Court clearly referred to this as a subsidiary remedy which applies only when the issue is not regulated by law or contract.

The Elements of the *Actio de in Rem Verso*

The Courts often cite the authors Baudry-Lacantinerie who gave a detailed exposition of the *actio de in rem verso.* One particular case where the courts established the three basic elements is that of ***Said v. Testaferrata Bonnici*** (First Hall Civil Court, 16/06/1936), where the Court referred to Baudry-Lacantinerie and listed the following elements:

1. **The enrichment:** Originally, the Courts used to say that there must be an addition to one's patrimony, i.e., that they increased in value. However, in the case of ***Grech v, Gauci*** (COA, 05/04/1954), the Court gave a different interpretation, saying that even though there was no addition to one's assets, the fact that one prevented one's assets from diminishing is an enrichment. This was a case of siblings, one of whom decided to look after his parents and

supported them himself. It is not that his parents were poor, but the brother nonetheless decided to help and support them with his own money. On their death, he sought to recover the money he spent. The other siblings argued that there was no enrichment, as the estate of the parents was not added to. However, the Court held that the fact that he prevented the estate from being diminished and maintained the *status quo* constitutes an enrichment.

This principle was adopted recently by the Court of Appeal in a matter where a criminal defendant found guilty of the sale of drugs brought an action for the recovery of that part of his estate not connected to the criminal enterprise. In this case, the criminal defendant worked and had his own money, and argued that the proceeds from drug sales was kept separately in a bank account, and that this should be confiscated, not his personal funds. However, the Court held that when he used his personal funds to finance his daily expenses, the proceeds from drug sales were maintained as a result. Therefore, his personal employment money was also confiscated as it constituted an enrichment to his estate. Similarly, in *Grech v. Gauci* the Court held that the son was maintaining the parents with his own money and therefore preserving their estate, constituted an enrichment for which he should be constituted.

However, if one is enriched through a donation, it is not unjustified, and so the Court had to go into the question as to whether this was a donation by the son to his parents. It decided that this was not the case but was simply a matter of a son looking after his parents.

2. **Cause and effect:** This relationship was the main issue of ***Said v. Testaferrata Bonnici*** (1936). Plaintiff Pace, a tenant, bought wood and other materials to repair and improve his tenement from Said on credit, but did not have the necessary funds to pay the debt. As Pace was insolvent, it was impossible for him to be sued under the normal remedy for breach of contract. Only as the result of this is the *actio de in rem verso* possible. Said sued Testaferrata Bonnici, not Pace, because he would not have been able to recover the debt had he done so. Said sued Testaferrata Bonnici on the basis of the improvements made to the tenement through the use of those materials sold by Pace. Testaferrata Bonnici and Said, however, had no contractual relationship, to which Said replied that he was no suing under contract, but under quasi-contract, i.e., the *actio de in rem verso.*

   The question was of the link of causality. Was it Said that caused the benefit to Testaferrata Bonnici? In reality it was Pace. The case hinged on this link of causality, made complicated by the involvement of three separate parties with varying relationships to each other. The answer found by the Court is that if the person who caused the benefit had entered into a previous contract with the sole purpose of causing that benefit, then there is a link of causality also and amongst that first person. Pace entered into the contract with Said with the sole purpose of benefitting Testaferrata Bonnici. Such that if the person who created the benefit entered into a contract with a third party with the sole aim of giving a benefit to the beneficiary, in that case the contracting party would have a right

to claim compensation as the causal link remains intact. The Court said that had Pace not bought the goods with that aim, then the link of causality would have been broken. Therefore, Said had the right to claim compensation under the *actio de in rem verso.* Once the third party did something as the result of which the agent directly benefitted the beneficiary the link of causality subsists as the action was intended from the very beginning for the agent to cause the said benefit. When there is a third-party involvement, it must be seen whether he did something to directly benefit the beneficiary. What is important is that this link is direct, with his act immediately causing the benefit.

The amount of compensation is not necessarily equivalent to the cost or expense incurred in order to fund the improvements, it being a case based on equity. Instead, the amount of compensation is equivalent to the increase in value created by the works, in this case the increase in value created in Testaferrata's tenement created by the improvements.

3. **The unjust character of the enrichment:** The question, therefore, has to be determined whether the beneficiary is entitled to that benefit. There must be an enrichment for the *actio* to subsist. Furthermore, the beneficiary must not be entitled to this benefit. Had there been a clause in their lease agreement which entitled the landlord to keep benefits without paying compensation then the enrichment is not unjust as it arises from the deed, meaning he cannot be sued under this *actio.*

   In ***Buttigieg v. Bartolo*** (1933) the father was not working and did not have the money to maintain his children, so he took a loan to be able to do so this loan was not repaid. On his death, the children renounced to the inheritance of their father. The creditor sued the children personally under the *actio de in rem verso.* He argued that from his loan these children benefitted as the money was used for their maintenance. Making this a case of enrichment for the children. The Court dismissed the action, as the enrichment on the part of the children was not unjust as they had a right to be maintained by their father. When he took that loan, the father was exercising his duty to maintain his children, meaning their enrichment was not unjustified. The case was therefore dismissed.

   Another issue which has been debated by the courts, is whether the wife takes a loan to maintain her husband. Under the law, spouses have a duty to maintain each other. In the past it was husband who had to maintain his wife whilst she had a subsidiary duty to maintain him if he could not work. Today, both spouses must maintain one another. If the wife takes a loan to maintain the husband and does not pay it back, can the creditor sue the husband? Is that an unjustified enrichment on his part? It is her duty to maintain him after all and he has a right to be maintained, just as he has a duty to maintain himself. When a wife is maintaining her husband, is she fulfilling her duty or is he obtaining an unfair enrichment when he too should be working? The courts have decided inconsistently on this matter. Some have allowed for the *actio de in rem verso,* arguing that the husband should maintain himself. Others argue that it is not

> unjustified. Therefore, justification can lead to the creation of some problems and it can be argued both ways. Recently, with the advent of the welfare State, these cases are far rarer.

These are the three basic elements of the actio de in rem verso. All three elements must be present in order for the action to succeed.

Since then, the Courts have kept faithful with these constitutive elements and have sought to explain them better by further classifying the action in five elements as reproduced below. In so doing, the Courts have sought to be more succinct and explain better the requisites and *the raison d'etre* of the action. One such case (amongst various others) is that of ***Bartolo v. Micallef***, in which the Court stated:

> *L-elementi li jsejsu l-azzjoni huma:*
>
> 1. *li persuna kisbet jew qeghda tikseb vantagg jew utilita' minhabba li xi gid ta' haddiehor ghadda ghandha jew minhabba li xoghlijiet jew servizzi twettqu fi hwejjigha bla ma sar il-hlas ghalihom jew b'mod li gew iffrankati spejjez lill- parti li b'hekk tkun staghniet;*
> 2. *it-tnaqqis mill-gid tal-parti l-ohra b'titolu lukrattiv;*
> 3. *ir-rabta bejn it-tnaqqis tal-gid tal-parti l-wahda u z-zieda jew beneficcju tal-parti l- ohra;*
> 4. *in-nuqqas ta' raguni li tiggustifika l-arrikkiment ta' parti u l-"ftaqir" tal-parti l-ohra u;*
> 5. *li min laqa' ghandu l-haga jew is-servizz staghna b'dik il-haga jew b'dak is-servizz."*

Compensation Based on Equity

The amount in compensation is based on equity and the principle is that the defendant is bound to return the loss sustained by the plaintiff if the profit derived exceeds the loss. If the profit exceeds the expense, then he is only bound to return the expense. Inversely, he is bound to return the profit if it amounts to less than the loss incurred. Essentially, the defendant must only return the lesser of the two, depending on what the case may be. The expense is given if it is less than the profit, if the profit is less than the expense then that is what is given.

One has to consider both the value of the enrichment as well as the value of the loss of the other party (since the person giving the benefit suffered an impoverishment whether financial, of time, etc.). The person is not entitled necessarily to the same amount or value of the enrichment. The Courts' approach has been to grant as compensation the lesser of the two amounts. If for instance, I gave you €2500 in enhancing your property, but in reality, only a €1000 increase in value was recorded, then you would only have to give me €1000. Conversely but similarly, if I gave you €1000 in enhancing your property, but in reality, a €2,500 increase in value was recorded, you would still be ordered to give me back €1,000. This is because the action is based on equity and there has to be an intimate relationship between the loss and the profit.

The case of ***Mallia v. Camilleri*** (Court of Appeal, 2014) revolved around a house which the prospective buyer improved and the value for the house increased as a result of this improvement. The final contract was never concluded, and the prospective vendor had to pay for the improvement.

In ***Spiteri v. Mifsud*** (Court of Appeal, 28/04/1998) a contract of works was entered into where a builder was engaged to build a house, which he did. Once this was done the architect was asked to provide a bill of costs, which he duly did. The owner paid according to this bill of costs as issued by the architect and under the contract everything was settled. It subsequently resulted that the architect had made an error, having forgotten to provide the cost for a side wall of the house. He could not sue under the contract, where the matter was settled. Instead, the contractor sued under the *actio de in rem verso*, arguing that they would enjoy an unjustified benefit as part of their house was not paid for. The Court argued that he was entitled to compensation and that it was not fair that he remained without compensation for his work as the result of a mistake of the architect. Compensation was duly given.

The Court of Appeal agreed with the First Court which had said that:

> *"...li jekk kellha tintlaqa` l-eccezzjoni tal-konvenut, jigi li l-istess konvenut ikun qieghed jarrikkixxi ruhu indebitament a skapitu tal-attur li ntortament iffirma l-ircevuta ghas-saldu".*

In the case of ***Cassar v. Farrugia*** (Court of Appeal/03/09/1993) a preliminary agreement for the transfer of immovable property was drafted where the prospective buyer was given possession of the property subject to the sale. The contract was never signed, however, and the prospective buyer, on the land, built a series of garages. As the contract was never signed, the property remained of the prospective vendor, who made an action for recovery, as the land was never transferred officially. The prospective buyer sued for compensation for the garages through the *actio de in rem verso.* The Court agreed, referring to the principle that no one is allowed to profit from the damage of another (*nemu licet*), stating that he should not benefit as the result of prejudice to the other. The land was recovered but the prospective was made to pay compensation equivalent to the enhanced value of the land. In this case the Court established a principle that the value should be determined as close as possible to the day of the judgement, i.e., the day on which possession is returned.

The Court stated:

> *"Meta konvenju ma jkunx gie segwit bil-kuntratt ta' bejgh u xiri z-zewg partijiet ghandhom jitqieghdu fil-posizzjoni kif kienu meta sar il-konvenju. Ghalhekk, jekk ix- xerrej fuq konvenju jkun ghamel benefikati bil-kunsens tal-bejjiegh fuq konvenju, ghandu jinghata lura l-ispejjez kollha li jkun ghamel".*

Can an unlawful contract form the basis of this action?
The notion of unlawful contract has already been discussed in the context of natural obligations and under the element of causa. In such situations when the law does not afford a remedy due to the unlawfulness of the contract, can one rely on the *actio de in rem verso*?

In France, they do. They will not give compensation but will give less, but they will give some compensation.

For instance, if a contractor engages an illegal immigrant to carry out certain works without a valid working permit, this is clearly illegal. This means that if the contractor refuses to pay the illegal immigrant the agreed wages, the latter cannot sue him for breach of contract as the contract is an unlawful one. Would he be able to sue under the *actio de in rem verso* on the basis that the contractor would have derived an unjustified enrichment out of the labour carried out by the immigrant?

In the past, the Courts were reluctant to give compensation both under contracts (because of the unlawful causa) and also under unjustified enrichment because the court did not want to give the idea that illegality is still compensated in some way or another. The position today is not so strict but at the same time, the Courts have never given judgements which sanction such illegal contracts. The cases below give a good idea of how the Courts have dealt with this thorny issue.

In the case of ***Consiglio Galea v. Salvatore Darmanin*** (First Hall Civil Court, (18/03/1946), we had a situation of a builder (electrician) who carried work in a house by installing all the electricity in the house. He was not paid and when he sued, his action was dismissed as he did not have the necessary license to carry out that work and therefore the contract was not valid. The Court refused to accept his claims under the *actio de in rem verso.* The Court stated:

> *"Ma jistghux jiffurmaw oggett ta' kuntratt hwejjeg impossibili, jew projbiti mil- ligi, jew kuntrarji ghall-kostumi tajba jew ghall-ordni publiku. Min jindahal ghal xoghol meta ma ghandux licenza biex jahdem dak ix-xoghol u dik il-licenza hija rikjesta skond il-ligi, ma jistax jezigi l-hlas tax-xoghol li jkun ghamel. Fil-kaz prezenti dan il-principju gie applikat kontra bennej li ha f'idejh u ghamel xoghol ta' bennej meta huwa ma kellux il-licenza preskritta mill-Ligijiet tal-Pulizija biex wiehed jista' jahdem ta' bennej."*

This strict interpretation was also followed in ***Portelli v. Bagley***, which was a case where a person occupied a house which was not leased with the necessary permits and the court dismissed the action due to the illicit causa.

The recent trend of judgements, however, is not so stringent in their interpretation. Instead, they seem to follow the French line of reasoning, i.e., adopting a middle-way position by not give full compensation but at least giving some compensation.

This reasoning is based on the fact that on the one hand, by reason of the illegality, one would not be entitled to the full compensation and therefore should not expect to be paid according to the normal rate, whilst at the same time, not letting the other party (who was also party to the illegal contract) receive a full benefit. This reasoning was adopted below.

In the case of ***Mercieca v. Laferla*** (Court of Appeal, (31/1/1994) a person carried out work (not licensed, no workbook, no NI) for another person and the former sued for compensation. The court here decided to follow the middle-way. The court held that whatever was agreed was illegal and so the defendant is not bound to follow that agreement.

However, the court held that *omni labor opta premium* (every work deserves a payment) in that the plaintiff should be given compensation; - however, he was given a lesser amount than that stipulated in the agreement. Thus, on the one hand, the Court punished the worker for committing something illegal but on the other hand, on the basis of justice (equity), it awarded sum of the owed wages to the worker so as not to give an unfair advantage to the employer. Ultimately, it is in the hands of the court to utilize the *actio de in rem verso* in order to provide justice in the particular case.

Prescriptive Period

In the case of ***Maltacom v. Vestimoda Co. Ltd*** (First Hall Civil Court, 31/05/2007) the court quoted previous jurisprudence and confirmed that the prescriptive period of the *actio de in rem verso* is of 5 years in terms of Article 2156(f) of the Civil Code which prescribes the period of five years for "actions for the payment of any other debt arising from commercial transactions or other causes."

The prescriptive period of the *actio de in rem verso* is limited to five years. *Vide* the case of ***Borg v. Marrissey*** (First Hall Civil Court, 24/11/1983), where the Court quoted various other judgements establishing this period.

Jurisprudence

This was confirmed in ***Ellul v. Camilleri*** (FH CC, 03/10/2003), where the court said that the value must be calculated as closely as possible to the date of the conversion.

In the case of ***Bartolo v. Micallef*** (First Hall Civil Court, 28/10/2004) Micallef co-owned a house in London with the plaintiff's wife, whilst he also solely owned the adjacent house in London. The Council of Westminster ordered the defendant to carry out works on that property which was solely owned by him, but he engaged a contractor to paint the façade of both houses regardless. Defendant asked plaintiff's wife for half the expenses for which he paid. She paid these, but subsequently learnt that the works on the house jointly owned were minimal, and carried out at a lesser cost, and she therefore filed an application to recover the amount paid in excess.

The Court held that the *actio de in rem verso* is a subsidiary action, meaning that it can be resorted to only if all other remedies have been exhausted, or if the Court is satisfied that there are no ordinary remedies. In this sense, it can be considered to be a remedy of last resort. The Court confirmed that the defendant acted in bad faith

towards the plaintiff when he demanded payment of a sum of money which was not due, and consequently declared that the defendant must pay back that which was unjustly paid to him, along with payment of the relevant judicial expenses.

In the case of ***Mercieca v. Laferla*** (Court of Appeal, 21/01/1994) plaintiff was commissioned by the defendant to perform some works. However, when the plaintiff asked the defendant for the services rendered, the latter refused to pay on the basis that the works were not only of poor quality but also carried out by the plaintiff without the requisite license. The Court noted that the agreement between the parties was illegal and therefore defendant was not bound to follow it. However, the Court held, on the basis of the maxim *omni labor opta premio* (i.e., every work deserves payment), that the plaintiff was still entitled to some form of compensation for his work. The Court, therefore, once again, adopted the notions of equity and justice, whilst at the same time punishing the plaintiff for not following the law, by awarding a lesser sum than had been agreed, to the detriment thereof.

Serviġi

The *actio de in rem verso* gave rise to the fourth quasi-contract, *serviġi*, or compensation for services rendered. This is not found in the Code but refers to instances where services are rendered to members of the family or close friends, and the situation arose where we had, generally, daughters looking after their parents or other family members as they grew old, before suing for compensation. the Court has established that this is a quasi-contract and stated this quite clearly in ***Delicata v. Saliba*** (Court of Appeal, 22/05/1989),[13] which has been repeated in various judgements.

Serviġi was considered to be a quasi-contract for 2 reasons:

1. Firstly, consent and capacity of the parties to the contract are immaterial. There is no need of reciprocal consent and therefore even if one is the looking after a person who is mentally incapable of understanding such service, still the quasi-contract is valid
1. Secondly, had it been a contract, then if I render services worth say €1,000, then you would have to give me that same amount. Instead, the Courts in this quasi-contract will give compensation on the basis of equity and this will generally be less than the value of the service rendered. The Courts will also take into consideration the degree of proximity of the relationship between the persons involved. See below on the quantification of the damages.

Notably, quasi-contracts do not require the consent of the beneficiary. Moreover, capacity is also not required for the plaintiff to be entitled to compensation. Furthermore, the courts feel that they should have full discretion in the liquidation of compensation. They never offer compensation equivalent to what one would have obtained on the open market, i.e., the cost of a nurse. This is because they argued that although they are entitled to compensation, the matter involves an element of gratuity as one is taking care of one's family or close friend.

In one case, that of ***Saliba v. Camilleri*** (Court of Appeal, 26/06/2015), the Court of Appeal confirmed this. These matters involve a family relationship. Therefore, the

[13]The Delicata spouses had cared for the parents of the defendant Saliba before their death. Upon this event, plaintiffs requested a share of the inheritance. However, defendant claimed that the plaintiffs did not render any such services. The issue arose as to whether in such a case the plaintiffs were entitled to compensation, even though this had not been agreed to with the defendant's parents during their lifetime.

The First Hall of the Civil Court noted that the plaintiffs' claims were unfounded and denied any claim for compensation. Plaintiffs appealed this decision, with the Court of Appeal holding that, although the plaintiffs were neighbours and good friends of the deceased, this did not mean that the plaintiffs gave up their right to be compensated. The Court noted that the services were rendered gratuitously. It also referred to the fact that compensation for services rendered is a quasi-contract and is based on the presumption that whosoever renders services does so with the intent of being compensated. This presumption subsists until it results that the person rendering services is doing so without hoping to be compensated and unless such services have been rendered with the clear intention of being rendered as *familiaritatis causa*, i.e., gratuitously. However, every separate case must be determined on its own merits and according to the facts of that particular case.

Court would give compensation, but not to a large extent. In the past, up until 1938, compensation for services rendered were very few as the court based itself on a presumption that when one looked after members of their family they did so gratuitously, meaning no compensation was due, in which case they had to prove that they acted with the intent of being paid.

Today, the presumption that when one looks after members of their family, they do so with the intention of being paid unless it is shown that they had no such intention. The fact that this situation involves family makes it rather delicate. In the case of ***Farrugia v. Camilleri*** (First Hall Civil Court, 29/02/1996) the daughter was asked expressly why she looked after her mother, to which she replied that she did so because she was her mother. The Court held that this does not defeat the presumption that she still intended to be paid, such that in order to renounce the payment it must be very clear that she did the service without the intention of being paid.

Quantification of Compensation

The main criteria for the court to determine the amount in compensation are the following:

1. **The nature and length of the services rendered:** Claimants must bring the court evidence to this effect. For example, was she bedridden? What did she assist her to do?

2. **The benefits or advantages that the person rendering the services might have enjoyed:** Sometimes the person rendering the services might have taken themselves some benefit, such as living off of the person being cared for.

3. **The degree of relationship between the parties or the nature of the bond:** The farther the degree, the more one receives, and vice versa, as the element of gratuity would be higher.

4. **The financial means of the parties, particularly of the beneficiary:** The Court always takes this into account. This may be somewhat unfair as it neglects the poor relation for the same work. The idea is that this is a quasi-contract which is not based on a contractual relationship, and it depends on various circumstances.

These are the main our criteria on which the court would determine the criteria as it feels fit, although these are hardly fixed. The court will then fix the *arbitrio del bonu viri*, i.e., the amount in compensation.

As one can see, therefore, the amount of compensation is not solely dependent on the nature and length of the services rendered. Given that this is not a contractual relationship and given that it is based on a special relationship, the Courts do not look at such normal criteria such as the nature of the trade. The courts try to make a balance; on the one hand they do not want to give full compensation as this is not a contractual rendering of services (i.e. you cannot calculate the amount by seeing what the hourly rate for an employed carer would have been), whilst on the other hand they

do not want to leave the person rendering the services without adequate compensation.

In the case of ***Catania v. Agius*** (First Hall, Civil Court, 11/12/2003), the Court stated:

> *"Ghall-finijiet tal-quantum tas-servigi wiehed ghandu jzomm f'mohhu (i) il- frekwenza u x-xorta tas-servigi; (ii) il-mezzi tal-konvenuta li benefikat mill- prestazzjonijiet u (iii) il- parentela ta' l-atturmal-konvenut. Konsiderazzjonijiet ohra li gieli gew konsidrati mill- Qorti taghna huma jekk il-qaddej ikiddx l-istess sahtu biex jaqdi lill-haddiehor, jekk humiex affarijiet li mhux kulhadd kapaci jidhol ghalihom, bhal meta il-qaddej idur bil- persuna tal-moqdi (ez. hasil), u jekk il-qaddej jinkorrix spejjez li taghhom ma jkunx gie rimborsat fil-mument tal-hrug taghhom.*
>
> *"Bhala regola generali, l-kumpens moghti jkun, ftit jew wisq, imdaqqas meta l- beneficcjarja tkun marida jew mhux mobbli, b'mod li jkollha bzonn assistenza personali u kontinwa."*
>
> *"Minn studju tal-gurisprudenza lokali,wiehed jista' jsib li l-kumpens akkordat ma jkun qatt f'ammonti kbar u dan peress li s-servizzi jinghataw kwazi dejjem minhabba ragunijiet ta' parentela bejn il-partijiet, u anke ghaliex it-talba ghal-hlas ta' servigi hi bazata fuq kwazi - kuntratt, u mhux fuq kuntratt li nholoq bejn minn jirrendi s-servigi u l-beneficcjarju, u kwindi l-kumpens ma jkunx relatat biss mas-servigi, izda ghandhom jittiehdu in konsiderazzjoni diversi fatturi ohra li, ftit jew wisq, inaqqsu r- relazzjoni ekonomika bejn is-servigi resi u l-hlas relattiv.*
>
> *"Dan iwassal biex il-kumpens ma jkun qatt l-ekwivalenti tax-xoghol li sar, izda adegwat mehud kont tac-cirkostanzi kollha partikolari tal-kaz"*

The case of ***Agius v. Galea*** (First Hall Civil Court, 12/04/1996) concerned a daughter who looked after her father who was suffering from a serious illness which required constant care. Upon his death, she wanted an additional share of the inheritance as compensation for having cared for him. Instead, plaintiff was compensated with the amount of Lm1,500. The Court held that the lowness of this amount was due to the close father-daughter relationship. In this case, the Court also emphasized the importance of the defendants being sued not personally, but as heirs who continue the personality of the deceased. Therefore, the maximum amount which can be compensated would be equivalent to the inherited value of the deceased's estate. The Court also held that the acceptance of the inheritance is not a renunciation of the right to compensation for services rendered.

The case of ***Felice v. Mangion*** (First Hall Civil Court, 14/07/1997) demonstrated the flexibility of this action. Here, parents looked after a particular child nearly from part but never adopted it, meaning it was not legally theirs, however he lived with them and was treated as one of their own. This son ended up as a successful businessman and died intestate. His family wanted his money and the parents who looked after him where in a dilemma, as they were not entitled under the law of intestate succession as they were not family. Instead, they sued for compensation for services rendered. The Court agreed but when it came to liquidation it did not follow the strict rules of criteria, and all that the child had was given to the parents, with the court arguing that it was only fair as they looked after the child since birth. This decision was clearly based on the principles of equity, meaning the criteria can change depending on the circumstances.

In the case of ***Schembri v. Busuttil*** (First Hall Civil Court, 28/05/2003), the defendant hired the plaintiff to supervise the construction of a villa. Busuttil lived with the plaintiffs for seven months, during which time they looked after him and even helped him financially by lending him money to open a greengrocer. Schembri's wife also assisted in the grocery store for many months. Upon the completion of the villa, Busuttil refused to pay Schembri, who served him with an official letter. In Court, Busuttil claimed that he himself had looked after the construction works and that he had never hired the plaintiff, and he also claimed that it was not true that Schembri had helped him financially to open the grocery shop.

The First Hall of the Civil Court said that there was sufficient proof that Schembri was hired by the defendant to develop land on his behalf. all services rendered are considered to be subject to compensation, unless renounced by way of an express declaration of renunciation. The Court agreed with the compensation but said that Schembri's wife, who helped run the shop, was not to be compensated for doing so.

The prescriptive period for this action is also for five years, meaning when the family member dies their estate can only be sued for the previous five years of previous work. Like any other period of prescription, it can be interrupted through an acknowledgement of the debt. The same rules apply here, but the courts are more flexible as the action is one of quasi-contract, meaning they more easily accept interruption. One would not send an official letter to one's grandmother, but words to this effect can interrupt prescription. The Courts have very willingly accepted this in such situations where there is a quasi-acknowledgement of the debt. Under a normal civil debt, the Court would require clear proof of acceptance of the debt, but under quasi-contracts they are more inclined to make exceptions such as these. If the daughter under oath confirms that the grandmother so spoke to her and satisfies the court that this is the truth, then prescription would have been interrupted. Even if the beneficiary in her will acknowledges the receipt of the services it shall serve as an interruption of prescription, even if the will is subsequently revoked.

What is mentioned as compensation in the will can be contested. If the beneficiary leaves a certain amount for *serviġi* the court is not bound to that sum, with the agent being able to sue for more or the heirs of the beneficiary being able to sue to reduce it.

If the beneficiary dies, by whom is the compensation due?
If the person who receives the services is dead, the compensation is payable by his heirs, who step into the shoes of the deceased and are therefore only liable to pay compensation up to the amount of the deceased's estate which they have inherited. This means that one cannot bring an action against the heirs in their personal capacity but as heirs who continue the personality of the deceased.

In the aforementioned ***Agius v. Galea*** (First Hall Civil Court, 12/04/1996) judgement, the Court said:

> *"Id-dejn proprjament huwa tal-assi ereditarju w mhux tal-konvenuti fil-kapacita` taghhom personali billi dawn qatt ma kienu w qatt jistghu jkunu debituri 'de proprio' in kwantu s-servigi rezi qatt ma gew rezi lilhom. Ghalhekk l-ammont likwidat huwa dovut mill-eredi kollha fil-proporzjon li dawn jippartecipaw mill-wirt. Billi l-eredi tad- decuius huma tlieta u cioe l-attrici u iz-zewg konvenuti, kull parti trid tbati terz mill- ammont likwidat".*

Prescription for *Serviġi*
Another principle in this action is that the prescriptive period is 5 years. The principle is that the five-year period starts running not from the end of the services but from the day the actual service is given. If I am looking after my mother today, I have 5 years from today to claim compensation. Thus, if I look after my mother for 15 years and claim compensation when she dies, I can only claim for the last 5 years.

This period can nevertheless be interrupted. If there is admission of liability by the creditor, then there is an interruption. Usually, the courts have been strict to declare what is an admission of liability. In the case of *serviġi*, however, the courts have not been strict. The Courts have noted that these services arise in situations when there is a close family or friendly relationship and thus the courts do not expect the daughter, relative or a friend to stay sending an official letter to interrupt the period every time. This is why the courts are very lenient.

The fact that a person says words, even vague words, even *"inkun nafulek", "nahseb fik fit-testment", "niehu hsiebek"* can be seen to be admission of liability thus interrupting prescription. The problem lies with providing evidence of such words. In most cases the court will accept the word under oath of the family member or friend who rendered the services.

Prescription can also be interrupted in a will, even if that will is revoked. If the beneficiary makes a will and in the will s/he claims that s/he will leave the house to the daughter on account of the services which are being rendered, and then after some time the beneficiary revokes the will; although the binding will is the last one, however the declaration in the revoked testament will be enough to interrupt the period of prescription. This point was confirmed in the case of ***Attard v. Magri*** (Court of Appeal, 11/ 01/1989).

Furthermore, if a person leaves a legacy to the person who was rendering services, it does not mean that the Court is bound by that thing or amount left in the will. The Court may for instance decide that the person merits more than the amount left to him in the will. On the other hand, the other children may attack that legacy and argue that it is not true that legatee has actually rendered services and that the legacy is a disguised donation. The Court will thus have to enter into the matter and examine whether the services were actually rendered or not. The Court may come to the conclusion that no services were rendered or that the legacy is excessive and that the extra amount is in effect a donation in violation of the reserved portion established by law. If the legacy is conditional on services having been rendered, and this legacy is challenged, then it is up to the Court to determine whether the services have actually been rendered or not.

The bottom line is that a declaration in a will, definitely interrupts prescription but in itself is not always sufficient for a successful action for *serviġi* and will not bind the Courts. The court may always increase or decrease the amount depending on the circumstances or even not give any amount at all if the Court believes that the child didn't render a service.

Topic XI. Various Types of Obligations

Conditional Obligations

Article 1052 of the Civil Code defines conditional obligations as follows:

> **1052.** *An obligation is conditional when it is made to depend upon an uncertain future event, either by suspending it until the event happens, or by dissolving it if the event happens or does not happen.*

This refers to the suspensive condition and the resolutive condition. These, especially the latter, are very important as they may be implied in certain instances. With respect to conditions in general, Article 1054-1056 are worth noting.

Article 1054, on the condition contrary to morality, etc., states:

> **1054.** *Any condition contrary to morals, or to public policy, or prohibited by law, or which imposes the performance of an impossible thing, is void, and annuls the agreement dependent thereon.*

Note that if there is a condition contrary to morals, public policy, or law, or the performance of the thing is impossible, the condition itself is void but it also annuls the obligation in its entirety.

Article 1055, on the effect of a condition to forbear to do an impossible thing, etc., states:

> **1055.** (1) *The condition to forbear to do an impossible thing does not void the obligation contracted on that condition.*
>
> (2) *The condition, however, to forbear to do a thing contrary to morals or to public policy or prohibited by law may void the obligation.*

In this case the condition is null, but the obligation is valid. The condition to forbear an impossible thing does not void the obligation, but the condition to forbear something contrary to morals, public policy, or the law may be voided, but this is at the discretion of the courts. Here we have a situation where a condition to do something which is impossible or contrary to law or public policy the condition is null as is the obligation. If the condition not to do something impossible the obligation is valid. If the condition is not to do something illegal, then the obligation may be null.

Article 1056, on how the obligation is null if contracted under condition depending solely upon obligor, states:

> **1056.** (1) *Where an obligation is contracted on a condition which makes the obligation depend solely upon the will of the obligor, the obligation is null.*
>
> (2) *Nevertheless, where the obligation depends upon an event the happening of which is within the power of the obligor, he is bound if the event happens.*

If the event depends solely on the will of the obliger the obligation is null, whereas if the event is within the power of the obliger then it shall not be null. This distinction is often contested in court as to whether the event was within the will or power of the obliger, ultimately depending on the facts and discretion of the Court.

Article 1061 states:

> **1061.** (1) *A condition, on being fulfilled, shall have a retroactive effect.*
>
> (2) *If the creditor dies before the fulfilment of the condition, his rights vest in his heirs.*

When a condition verifies itself, its effect shall be retrospective to the date of the obligation.

Article 1062, on how the creditor may secure his rights before condition is fulfilled, states:

> **1062.** *The creditor may, before the fulfilment of the condition, take all the necessary steps for the preservation of his rights.*

A conditional creditor is not yet a creditor, as it all depends on the verification of the condition, but he may take steps to preserve his rights. One may take action to preserve one's rights pending the fulfilment of the condition. This and the preceding Article are important to be kept in mind as even if the condition is suspensive, one may take steps to preserve one's rights pending the fulfilment of the condition.

Suspensive Condition

Article 1063 states:

> **1063.** (1) *A suspensive condition is that which makes the existence of the obligation depend upon a future and uncertain event.*
>
> (2) *An obligation under a suspensive condition does not exist before the event happens.*

Before the event verifies itself there is no obligation. When this does take place, the obligation has retrospective effect. If the object is totally destroyed however, without any fault of the debtor, the agreement shall be void, going against the general principles of contract law. technically, even if the object is destroyed and the condition verifies itself, once the condition verifies itself the person is deemed to have been an owner from day one. if the thing is damaged in good faith, however, then the sale shall go through. When one enters into an agreement and the object was there in perfect condition with the sale requiring a suspensive condition to go through, if the object is damaged in the meantime, then the creditor would still be forced into the sale. Everything that happens after the commencement of the obligation and before the verification of the condition is considered to belong to the new creditor. Until the condition verifies itself one is only a conditional creditor. One may take actions to protect one's rights, but once the condition is verified one is deemed to be the real owner from the date of the obligation. A conditional creditor can even sell the object, in fact both parties can. The sale would be valid depending on whether the condition verifies itself or not. If it does, the sale by the conditional owner would be valid due to the retrospective effect. The sale made by the owner pending the condition would not be valid as he was not the owner when he sold it. Conditional obligations are not registered anywhere, so when one buys from another and the notary makes the necessary searches, one would not know that he has promised or bought under a condition. The retrospective effect of conditions can have serious consequences.

Resolutive Condition

A resolutive condition cancels the obligation when the event happens. Article 1066 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.*

If the condition verifies itself the thing reverts to the old creditor, and it is deemed to always have been his. If it is damaged in good faith by the new creditor, then the thing reverts in that state including any money that might have been received with it. A resolutive condition is implied, especially in two instances: first, trade. Whenever there is a quid pro quo in obligations that is an implied resolutive condition, meaning they are always implied in bilateral contracts and for non-performance one can seek the dissolution of the contract, in these cases one obligation depends on the other. If the condition verifies itself there is the retrospective effect, cancelling everything since the position which existed before the creation of the obligation, i.e., the *status quo ante.* Naturally this creates problem, most evidently in the case of breached lease conditions. In the meantime, the person would have been living in the house, meaning he would have to return the rent *and* pay for his occupation. In Italy, in cases of

periodical obligations for the payment of rent there is no retrospective effect. However, no such law exists in Malta, where, if a resolutive condition verifies itself it leads to the dissolution of the condition and returns things to a state as if the obligation was never contracted.

The law deals with either an express resolutive condition or an implied resolutive condition. In the case of the latter, the law states in Article 1068:

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

If the other party is seeking the dissolution of the contract after a breach, the court can grant time to the defaulter in order for him to perform the obligation. However, if the condition is expressly stated in the agreement that failure would lead to the dissolution of the obligation the court will have no obligation and be forced to dissolve the contract, as per Article 1067:

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

Although the law says *ipso jure*, the court still has the right to establish whether or not there was a breach. For a resolutive condition to be express, the dissolution must be within the contract.

In the case of ***Abela v. Bonello*** (Court of Appeal, 31/05/2002) it was held that a clause in a contract enabling one party to terminate the contract in the event of a fault was not an express resolutive condition, as for that to be the case the dissolution must be expressly stated in the contract. This is different from stating that one reserves the right to sue for termination in the case of non-performance. If it is not express, the court can grant time for the obligation to be fulfilled.

In the granting of time, the court must be attentive towards the rights of both parties. There were cases where the court did not grant time out of fear of causing prejudice to the creditor, such as in the case of ***Mercieca v. Spiteri*** (14/05/1956), where the court held that shall be lawful for the court to grant a reasonable time, within its discretion, so long as the rights of the creditor are not prejudiced. However, if the debtor is continuously in delay for the performance of the obligation, then the Court will take this into account and not allow for a reasonable time within which the

obligation can be performed. This granting of a reasonable period is not a right of the debtor but lies exclusively within the discretion of the court.

This resolutive condition gives rise to a very important plea, that of … if one is sued for the performance of an obligation. This plea means that one cannot be sued for non-performance if one did not fulfil their part. One has to be careful that when one sues for performance, he himself must be on the good side of the contract, so to speak. *Vide* the case of ***Herrera noe v. Debattista*** (Court of Appeal, 25/04/2008), during which Herrera was representing a goalkeeper for the Hamrun Spartans FC.

In the case of ***St. Michael's Foundation for Education v. V. Attard (Works) Ltd.*** (First Hall Civil Court, 07/03/2013) plaintiff wanted to overhaul its IT system, for which the defendant company was contracted. A time clause was imposed on the contract, otherwise they would be liable to a penalty for each day. Plaintiff sued for the penalty, whilst the defendant countered with this plea, in which they agreed that they were in delay, but argued that the plaintiff failed to perform its duty when it resulted that under the contract payment had to be made in the beginning and a subsequent payment at a later date, which was not made. In fact, V. Attard (Works) Ltd. satisfied the court with this plea and the matter was held in its favour.

There are three basic conditions for this plea to be successful:

1. That there was an obligation imposed on the plaintiff,
2. That plaintiff did not perform that obligation imposed upon him,
3. That there is proportionality between the two defaulters.

Here again the court went into the seriousness of this failure to pay the second deposit, compared to the seriousness of failing to complete the project within the stipulated time, and they were found to be proportionate. The Court will not accept this plea if the failure of the plaintiff is of small consequence.

Of Joint and Several Obligations

The law discusses two types of joint and several creditors (active solidarity) and joint and several debtors (passive solidarity).

Active Solidarity

Active solidarity is hardly ever used, and Article 1090, on the obligation *in solidum* in favour of several creditors, stipulates:

> **1090.** *An obligation is joint and several in favour of two or more creditors when it expressly vests each of such creditors with the right of demanding the payment of the whole sum due, and the payment made to any one of them discharges the debtor, even though the benefit accruing from the obligation may be divided between the several creditors.*

Here, joint and several creditors give a quasi-mandate to a fellow creditor to act on their behalf. This need not be in writing, but there must be agreement, i.e., it is never presumed by law. This is weak because it can be terminated unilaterally and is difficult to prove as it is made orally. One creditor can approach a debtor to collect the debt on behalf of his fellow co-creditors but find this agreement difficult to prove to the debtor, as creditors typically appoint a mandatary to collect debts on their behalf. Regardless, if such an agreement were reached, the creditor is empowered to collect and protect the debt but can never reduce it. If this one person interrupts prescription, sends judicial letters, and seeks payment it is on behalf of all creditors.

Passive Solidarity

This refers to situations of multiple debtors bound *in solidum*, with the advantage being that the creditor can sue any one debtor for the full amount, and they cannot raise the plea of co-discussion. If there is joint and several liability, each one is responsible for the full amount and the creditor can choose, with the court being unable to interfere in this choice. If the creditor sues one of the debtors and does not receive full payment, he can turn against another and seek the remaining balance from him. The advantage is that this is presumed by law in two main instances: first, in commercial obligations (it is presumed that if two or more debtors are liable for a commercial obligation, they are bound *in solidum*); and second, in tort. Where more than one person participates in causing damage voluntarily and the court cannot decipher exactly who did what, they are bound *in solidum* through the creation of a community of fault. The law stipulates the term *"voluntarily"*, but the courts have expanded this to encapsulate involuntary damage as well in certain instances.

The plea of discussion is one in which a co-debtor argues that he is only responsible for a portion of the debt and as such action should be brought against his co-debtors. However, as far as the creditor is concerned, he can seek payment from any one of the debtors. Passive solidarity is presumed unless expressly excluded, which is hardly ever the case. Sureties are a classic example of co-debtors who are bound *in solidum* with the original debtor in the event that he fails to pay the debt owed. The creditor

may sue all co-debtors for the full amount if he so wishes, but he is free to pursue payment from any one debtor. Naturally, the creditor cannot sue each co-debtor for the full amount.

Article 1094 stipulates:

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

In cases of passive solidarity, we are not considering necessarily a monetary obligation, but simply the same one.

Article 1095 goes on to state:

> **1095.** *An obligation may be joint and several even though one of the debtors is bound differently from the others for the payment of the same thing, as when the obligation of one is conditional and that of the other is pure and simple, or when one is allowed a time for payment which is not granted to the other, or when the debtors are bound to pay in different places.*

From a reading of these two sections, jurists state that the obligation under solidarity is objectively one, as they are responsible for the same thing, but can be subjectively different for each co-debtor. The law itself provides examples of varying conditions of payment between co-debtors which may be different whilst keeping the obligation as the same thing for the purposes of passive solidarity. When one says the same obligation, one does not necessarily mean the full thing, as a co-debtor may be bound for a part of the full amount, whereby co-debtors are bound *in solidum* up to a certain amount whilst the remaining debt belongs exclusively to the principal debtor. Here, one considers two principal debtors, not a principal obligation and a subsidiary obligation, but of one obligation and two principal debtors. Therefore, this is different in cases of a surety, who acts as a subsidiary debtor.

The advantage of course belongs to the creditor who can sue any one for the whole amount. Moreover, if he were to send a judicial letter to a co-debtor to in interrupt prescription, this would affect all other co-debtors to the obligation bound *in solidum*, in spite of the fact that no judicial letter would have been sent to them *per se.* Naturally, if one of the co-debtors accepts the obligation, this admission would burden one's co-debtors and interrupt prescription for the entire obligation by virtue of this solidarity.

Interest in commercial obligations runs automatically from the date of the obligation, unlike in the case of civil obligations where interest must be demanded. Article 1098 stipulates:

> **1098.** *A demand for the payment of interest, where competent, made against one of the joint and several debtors, shall cause interest to run against all the debtors.*

Therefore, a demand for interest made to one shall cause interest to run for the entire obligation affecting each individual co-debtor.

Responsibility for damage to the thing subject to the obligation is shared amongst all co-debtors, even though the damage would have been caused by one of them. Similarly, if performance is not possible and the obligation is not performed, responsibility is shared amongst all co-debtors.

There is an important limitation with respect to solidarity, in that it is not transmitted to heirs. Generally, one binds oneself for himself and his heirs, with obligations being passed on by law unless there is an express renunciation. Solidarity, however, does not pass on. Take, for example, A and B, two debtors bound *in solidum* for a debt of €300. A dies, and is succeeded by three children, C, D, and E. They succeed in the rights of A but are not bound *in solidum*, neither with B nor amongst themselves. Each Heir is responsible for their share of A's share of the initial debt, i.e., €50 each.

Another issue is that solidarity is used to preserve or collect debt, not to cancel the contract surrounding it. Solidarity cannot be used to extinguish the obligation. This was established in the case of ***Degabriele v. Gullia*** (1968) in which two co-emphyteuta were bound *in solidum* for the payment of ground rent, one living in the house and the other not. The ground rent was not paid, and the landlord took action against the emphyteuta who was not living in the house, who did not bother to pay, in spite of the fact that an official demand was made. The landlord, therefore, sought dissolution of the emphyteutical concession, suing only the emphyteuta not living in the house, and one the case, causing the concession to be cancelled. He then sued for possession of the house and sought to evict the emphyteuta who was living in the house. He had no knowledge of the goings-on as he was not informed by his co-emphyteuta and promptly sued, arguing that the judgement dissolving the concession did not affect him. The Court agreed, arguing that solidarity can be used to pay the obligation, but not to dissolve it. it is one thing to use solidarity to demand and execute payment, and another entirely to terminate the obligation and cancel what had taken place. A Latin maxim stipulates that one can use solidarity to preserve and extend the obligation, but not to terminate it.

If the creditor demands part payment from one of the co-debtors, it is not taken to mean a renunciation of the solidarity. The demand for part payment and the receipt thereof does not amount to a renunciation of solidarity. He may do so, should he choose, so long as it is done both expressly and clearly. The mere fact of having sent a judicial letter for part payment is not tantamount to a renunciation.

Another advantage is illustrated by the following: take, for example, three debtors bound *in solidum* for a debt of €300. Co-debtor A pays his share of €100 and is freed from the solidarity, such that the creditor has renounced solidarity for him. B and C remain bound *in solidum* for the remaining balance. However, B has become insolvent

or died intestate such that he cannot be turned against. Therefore, the remaining debt in full is collected from C, who has been forced to pay more than his share. The law stipulates that when it comes to division of the amount between the co-debtors amongst themselves, there is no such solidarity. Here, A has paid his share and C has paid double his. The remaining balance, i.e., B's share, must be shared by all co-debtors, including A, in spite of the fact that the creditor has renounced his solidarity, in virtue of the fact that B has fallen insolvent. Therefore, the remaining balance of €100 is divided equally amongst the remaining creditors, including the freed A.

Now, take, for example, the same scenario in which A has paid his share and B is not insolvent. The law stipulates that if the law was given for the advantage of one co-debtor, say, B, who made use of the loan, then he is responsible as between the co-debtors for the full balance of the loan, i.e., the full €300. As a rule, each co-debtor is responsible for his share without solidarity. However, if the obligation is created for the benefit of one of the co-debtors specifically, it is he who is responsible for the full amount vis-à-vis the co-debtors. Article 1109 stipulates:

> **1109.** *Where the matter in regard to which the joint and several liability has been contracted, concerns only one of the co-debtors, such co-debtor shall be liable for the whole debt towards the other co-debtors, and the latter, in relation to such co-debtor, shall be considered merely as sureties.*

Vide the case of ***Sciberras v. Rouni*** (Court of Appeal (Inferior), 09/11/2005) where the Court stipulated that where an obligation burdens the community of acquests apply, the spouses are bound *in solidum* for the debts thereof. If the debt burdens the community of acquests, where it was made through an ordinary or extraordinary act of administration, there is solidarity. This was accepted in the case of ***Transport Authority of Malta v. Busuttil*** (Court of Magistrates, 30/05/2016).

Indivisible Obligations

An indivisible obligation is similar to but different from solidarity. This considers the object of the obligation, which may be either naturally or conventionally indivisible. The effects of indivisibility are similar to solidarity. Take, for example, two individuals who sell a dog, something naturally indivisible. The creditor can sue either for the transfer of the dog so that the sale could be complete. Whether there is solidarity or not, there is indivisibility which has the same effect. Conventional disability occurs when there is an agreement. Banks not only insist on solidarity but indivisibility also. The effects are mostly the same with the exception of succession. Whereas solidarity is not transmitted to heirs, indivisibility is. Under indivisibility, the creditor can sue individual co-debtors for the full amount. Therefore, each heir would be responsible for the performance of the full obligation.

Under solidarity, a judicial letter that interrupts prescription affects all other co-debtors, but if there is a suspension of prescription vis-à-vis one debtor it does not affect the co-debtors bound *in solidum.* However, if the obligation were indivisible, if prescription is suspended vis-à-vis one co-debtor it is suspended vis-à-vis all others. These

loopholes, so to speak, left by solidarity, are closed by the indivisibility of the obligation. otherwise, the effects are the same. Indivisibility, unlike solidarity, is not presumed, even in commercial obligations, such that it is either natural (e.g., a dog) or conventional (expressly agreed upon).

Penalty Clauses

Parties can agree that in the case of non-performance the debtor of the obligation will pay a pre-stipulated sum. This is often found as a deterrent, as the law does not impose a limit on the sum. The penalty can also be included for delay, where time is stipulated for the contract, i.e., the obligation is to be carried out by a certain date in breach of which the debtor would be liable to, for example, a sum of €50 per day in breach. *Vide* the *St. Michael's Foundation* case.

Article 1118 stipulates:

> **1118.** *A penalty clause is a clause whereby a person, for the purpose of securing the fulfilment of an agreement, binds himself to something in case of non-fulfilment.*

The penalty need not be in the form of money, so long as the clause stipulates what the penalty shall be.

Article 1119, on the effects of nullity of principal obligation and of penalty clause, stipulates:

> **1119.** (1) *The nullity of the principal obligation produces the nullity of the penalty clause.*
>
> (2) *The nullity of the penalty clause does not produce the nullity of the principal obligation.*

When a penalty is agreed upon for non-performance, one can still insist on performance. However, one cannot insist on both performance and the payment of the penalty. However, the creditor can insist on both performance and payment of the penalty provided that the penalty was introduced in case of delay, not for non-performance. If the penalty is introduced for non-performance the creditor can either sue for performance or for the benefit, but not both. If the penalty is introduced for delay the creditor can insist on both.

Article 1122 stipulates:

> **1122.** (1) *It shall not be lawful for the court to abate or mitigate the penalty except in the following cases:*
>
> (a) *if the debtor has performed the obligation in part, and the creditor has expressly accepted the part so performed;*
>
> (b) *if the debtor has performed the obligation in part, and the part so performed, having regard to the particular circumstances of the creditor, is manifestly useful to the latter. In any such case, however, an abatement cannot be made if the debtor, in undertaking*

> *to pay the penalty, has expressly waived his right to any abatement or if the penalty has been stipulated in consideration of mere delay.*
>
> (2) *Where an abatement is to be made under this article, the penalty shall be reduced in proportion to the unperformed part of the obligation.*

As a general, the Court has no right to reduce the amount of an agreed-upon payment except in those two instances listed in Article 1122(1)(a)-(b). In these cases, the Court shall examine the circumstances and see either whether the creditor has accepted the partial fulfilment of the agreed upon work, or if the partial completion is manifestly useful to him. However, if the penalty is imposed for a delay the law only allows mitigation if the part performed has been expressly accepted. If the penalty is for non-performance and there has been performance of a part manifestly useful to the creditor, then the courts shall be allowed to mitigate the penalty. For long periods of time the Courts have been saying, as they did in ***Vella v. Falzon*** (12/07/1982), that the court has no discretion to reduce the penalty if not in terms of Article 1122.

Article 993, however, remains relevant.

In the case of ***Pace v. Micallef*** (Court of Appeal, 15/12/2004), the court examined the penalty clause in light of Article 993. In spite of what the law stipulates, Article 993 requests that the contract is interpreted in terms of good faith. Even though the situation does not fall within the two provisos of A and B, still the court may mitigate if it sees that this is in accordance with good faith.

More recently, this was reinforced in the case of ***Falzon Sant Manduca v. Grima*** (First Hall Civil Court, 08/03/2005).

Today, where penalty clauses are involved, Article 1122 states when the court can mitigate the penalty, but *Pace v. Micallef*, which remains followed, gave the courts full discretion to reduce the amount in penalty.

Force Majeure and Other Defences

The law insists, under Article 1125 of the Civil Code, insists on the obligation of a performance. One can attempt to enforce an obligation through the various warrants and court orders at one's disposal. As far as possible courts will insist on performance. If not, they can resort to the secondary effect of obligations, i.e., the payment of damages. The defence of *rebus sic stantibus* is no longer a favourable one, whereas a more favourable one is the plea that the creditor has not performed his side of the obligation either. A more favourable defence still is that of *force majeure* whereby one physically cannot perform the obligation through no fault of one's own as the result of a fortuitus event beyond one's control. Economic difficulty, therefore, is not *force majeure*, which refers to an impossibility.

There are three conditions for *force majeure* to be accepted, which must exist cumulatively for the non-performer to justify his breach:

1. **The impossibility must not be relative or subjective, but absolute:** As one Italian judgement said, "the total impossibility can extinguish the obligation if it is objective and absolute". A different Italian case dealt with the supply of oil. As the result of the nationalisation of Libyan oil under Colonel Gaddafi and the Yom Kippur war, the price of oil increased dramatically, and as such an Italian company held that it could no longer supply oil due to the cost. The Milanese Court of Appeal held that this was not an objective and absolute possibility. It was still possible for the company to gain the oil in spite of the cost. A rise in the cost of production therefore does not count.

   In the case of ***Mizzi v. Attard*** (Court of Appeal, 08/02/1969) a company bound itself to supply a large quantity of garments to another company but was unable to do so. As a defence, the company held that it could produce the garments as the result of a strike of its workers. The Court did not accept this, arguing that the company could have purchased suitable garments from elsewhere and used those to fulfil the obligations.

2. **The act must be of a third person who has no relationship with the debtor of the obligation:** A case in point was Farrugia v. Attard (Court of Appeal, 28/04/1998) in which a person gave a car for repair to the defendant company after it was involved in an accident. The defendant company ordered parts for this car from its parent company in the UK which, first sent the incorrect parts, before sending them to Mali instead, thus creating a long delay. In the meantime, plaintiff rented a car for his use and sued the defendant for compensation. The defendant claimed that he did not perform as he did not receive the parts in time. The Courts, however, dismissed the claim on the basis that there was no independence between the defendant company and the third party.

3. **The *force majeure* must be supervening to the obligation:** i.e., it must have arisen after the creation of the obligation.

Once *force majeure* has been dismissed, there is liability for damages. In case of breach of contract, there is no formula for the liquidation of damages, unlike in the case of tort, such that one can receive whichever type of damages one wishes so long as one can prove real damages, i.e., actual loss. If a company claims to have lost money in view of a breach of contract, it must prove the exact amount lost.

Liquidation of Damages

There are three types of the damages which can be liquidated:

1. **Conventional damages:** Pre-liquidated damages which the parties can agree on in re the quantum thereof, e.g., penalty clauses. Here, the creditor need not prove that he actual lost the amount of pre-liquidated damages. Once damages are pre-liquidated and the court has confirmed default, the amount in damages is due. The principle in *Pace v. Micallef* will probably be applied also. As a rule, the amount in damages pre-liquidated is paid for non-performance and the Court cannot disturb this amount.

2. **Legal liquidation:** There are amounts stipulated by the law where the obligation consists in the payment of money, in which case the amount in damages is interest calculated at 8%, as per Article 1139.[14] In such cases, the only amount in damage which could possibly be liquidated is the principal debt and interest. Under tort, however, if one causes another loss in money, the amount in damages is 8%, but if the victim can prove that he suffered further damage he can sue for it. Interest is due in the case of a civil obligation from the date of the sending of a judicial letter, whereas under commercial law it is due from the date of the obligation. This limitation of interest does not apply to banks, however, provided they receive the requisite authorisation from the Central Bank. The law also provides for compound interest, as per Article 1142,[15] which is allowed only under three conditions:

    a. Simple interest must be due,
    b. It must be due for a period of not less than a year,
    c. The creditor must make a judicial demand.

    Alternatively, there can be an agreement between the creditor and the debtor signed after the interest is due, i.e., they cannot agree to impose compound interest beforehand. The only exception for this is the overdraft facility offered by banks. That said, for loan facilities Article 1142 remains applicable.

[14] **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.*

[15] **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.*

3. **The Judicial System:** Where the courts liquidate the damage themselves, provided one can prove actual loss. Here, there are two principles which must be upheld: first, the damage must be directly the result of non-performance; second, the law provides a distinction between negligent and fraudulent non-performance. If it is the latter, all direct damage, whether foreseeable or not, is compensable. If non-performance was the result of negligence only those damages which were foreseeable are compensable. It is for the creditor to prove either fraud or negligence, but if he succeeds with the former, he can claim any damage caused, foreseeable or otherwise.

The Law of Tort

Mr Justice Lawrence Quintano
Dr Mattia Felice
Dr David Zammit
Dr Max Ganado
Dr Jessica Borg

Introduction

Judgements present us with the path to understanding Maltese tort law because they offer cases in which the law was applied in practice. Naturally, Appeals Court judgements are more authoritative whilst first court judgements offer better overviews of the facts of the case.

Comparative Tort Law

In order to cause damage, one must have had broken the law in some way, thus we can explore the two sources of tort law: first, the concept of unlawful conduct; and second, the concept of damage. *Neminem lædere* is a Latin maxim that states that one should not harm others in breach of which damages must be paid. Secondly, one should not break the law. These two sources are normally both present when we have liability to pay damages in tort as otherwise if one cannot use the law as a guide to what is permissible to do or otherwise one will end up in a situation where one is sued for the slightest infraction. Therefore, the concept of illegality must bisect the concept of harm. At the same time, although the harm must derive from conduct which is somehow harmful, the idea that this conduct must necessarily be in breach of a specific provision of positive law, like a Codal provision, would restrict the field of tort law too much. Therefore, the other idea present is that if one does something which is not strictly speaking illegal but forms part of a pattern of conduct which is criminal (take, for example, one's intention to harm another through a scheme that is not strictly illegal), in this case the idea exists that even if one is throughout exercising one's legal rights, nevertheless one's intention to harm (the *animus nocendi*) is going to mean that one should be held liable for harm caused because one is abusing his rights and exercising them outside their legal limits, as per article 1030 of the Civil Code:

> **1030.** *Any person who makes use, within the proper limits, of a right competent to him, shall not be liable for any damage which may result therefrom.*

It is not enough to simply rely on one's strictly legal behaviour if their intention was to cause harm. This is an example of what is known as a general clause, the idea that everyone in the exercise of their rights must restrict themselves by staying within the proper limits of the exercise of that right. The proper limits of this clause ultimately must be filled in by jurisprudence, thus giving a great deal of discretion to the judge who may interpret it with a large degree of latitude, an idea that we find recurring in tort law. The Maltese version of *abus des droit* originates from Austrian Civil provisions. Whilst Roman Law forms an important foundation, the largest portion of Maltese Civil Law originates from French and Italian doctrine and jurisprudence. However, today, English Law is often referred to by judges through the use textbooks

although this may be often problematic, in spite of the presence of an English mentality.

Roman Law

Under the Roman Law of Tort, Roman Law never developed the general idea that one is liable for any harm inflicted to others through one's fault. Instead, Roman Law had a sort of compartmentalised concept of tort with specific cases of liability in tort existing, such as *furtum, injuria*. The latter came to include offences against the honour of an individual, and the Maltese Courts have kept open the possibility that where there is no statute or Codal provision which provides a remedy for a particular situation, but Roman Law used to, the Roman Law remedy can be applied and cited directly. For this reason, if one has a case of identity theft or reputational harm, since a remedy in the form of moral damages is not always available, one could argue that there is a *lacuna* here allowing one to find a remedy in the concept of *injuria.* Dr Claude Micallef Grimaud has dealt with this in his LLD dissertation and written an article in Id-Dritt. The idea of *injuria* can lead to cases where harm is caused to others but is not covered by law protecting one's personal date.

Take, for example, the case of *Boffa v. Mizzi* where Mizzi had made a comment about the late Prime Minister Paul Boffa which was considered as injurious and defamatory to his memories by his heirs which sued Mizzi to obtain compensation. Whilst initially this was a Civil case, the matter was taken to the ECHR on the basis of freedom of expression. In this case the matter related to a comment passed during a radio interview and was therefore not covered by the Press Act. The Court of Appeal had looked at the Criminal Code and said, at the time, that the criminal offence of criminal libel existed, and that since the defendant was breaking the criminal law, even though this is a private Civil law case the fact that he had broken the law and caused damages entitled the victim to damages. Thus, we return to the idea of the two sources of the law of tort: damage and a breach of the law. The civil court in a civil case is giving an opinion that a criminal law has been broken, a highly controversial act owing to the differences in the standard of proof and human rights requirements. In Roman Law the boundaries between criminal and civil law were not as sharp as they are today. In this case damages were given on the basis of the Roman Law concept of *injuria* which could be applies when the criminal law has been broken.

Roman Law is not just a subsidiary source of Maltese Civil Law but can act as a primary source should the need be. The Maltese Civil Code does not constitute a fresh start and so the provisions contained therein may contain *lacunas*. On the other hand, in Italy and France they do not admit that their Civil Codes can have gaps and as a result they cling to the idea that the Civil Code provides a solution to any possible problem. They therefore resolve this issue with analogous reasoning. In the UK they do not have this type of reasoning as they do not make use of a Code-based structure. In Malta the Civil Code is that layer of legislation intermediates between Roman and feudal law and, on the other hand, we find that legislation which came after the Civil Code and was never incorporated therein, in spite of the fact that they essentially deal with Civil Law matters. The Civil Code is a partial instrument and so it is possible to return to Roman Law where there is some kind of gap and apply these provisions as a primary source of the Civil Code. Take, for example, the *ultra duplum* rule which

states that the sum of interest can never exceed the capital of the loan, a rule which originates from a construction by the emperor Justinian. Although this has been superseded by more sophisticated laws, the Courts continue to apply this.

This is the reasoning which the Civil Code adopted in the case of *Boffa v. Mizzi.* Here, the courts were faced with a situation of the kind of tort of *injuria,* a kind of tort which originally covered harm to the person but eventually evolved to cover harm to personality. As a tort, it gave a right to act to obtain compensation if someone suffered harm to their personality. The interesting things about *injuria* are that: first, it is an example of the Roman compartmentalised approach to tort law, that is Roman lawyers never reached the general principle that one is liable to compensate others for the wrongful damage inflicted upon them because they did not think in that way but in more specific ways, instead creating specific torts *sans* the generic concept of liability in tort; second, in the case of *Boffa v. Mizzi* the courts referred to the Roman Law concept of *injuria* for two different purposes (that the Maltese law did not appear to provide a remedy for the kind of harm which appeared to have been caused by Mizzi to Boffa because the law of libel did not cover comments made in a radio interview which defamed or cast a bad light on someone who had been dead for some time). This allowed to the court to not only establish responsibility but also to award damages. Roman Law is not just the law of an empire long gone, but it remains a primary source today.

As has been said, Roman lawyers never reached the concept of a general liability in tort. However, the closest they came to this was in the specific case of liability under the *lex aquilia.* Initially, liability under this law only arose on those who killed someone else's farm animal or damaged property. Note the strong agricultural connection the Romans maintained within their law. The act originally had to be done with the consciousness of doing harm. Over time liability developed in two ways: first, the idea of damage caused through carelessness arose and subsequently, the scope of liability under the *lex aquilia* grew to cover negligence; second, the idea developed that harm can be caused just as easily though omission than through positive action. With regard to this principle of damage through omission, Civil Law countries have created a specific duty to help those in need whilst Common Law countries have the good Samaritan principle wherein those who help those at risk of dying are exempt from liability should they cause any harm to those they are saving in the process. In English Law, *vide* the opinion of Lord Denning in the case of *Donoghue v. Stevenson,* wherein he stated that the Christian duty to love one's neighbour those not exist at law, with it instead becoming the negative duty to harm one's neighbour. The notion that one may be liable for an omission is generally not accepted unless the said omission is a violation of a legal duty. Such a case was dealt with by the Maltese Courts in the case of ***Micallef v. Bondin*** wherein a woman had relied on a friend's advice to book a holiday tour in Rome. The friend recommended a travel agent who subsequently became insolvent. It was proven that the friend knew that the travel was in a bad financial situation but failed to communicate this fact to Micallef who went on this holiday but was told by the hotel that no accommodation had been booked. Micallef fainted on the spot and incurred various kinds of damages which she sought to recoup from Bondin who, so Micallef claims, was duty bound to inform Micallef of the travel agent's financial position. The Court of First Instance found Bondin liable as he had

no right to advise Micallef whilst suppressing the knowledge of the agent's financial situation. The Court of Appeal explored whether there was a legal duty to act which had been violated by Bondin, reversing the judgement of the first court on the basis that there is no legal duty to offer comprehensive advice to someone when the parties are not bound by a contract. The Court stated that one can only be liable for this failure if a legal duty exists which can be pointed to.

In terms of liability under the *lex aquilia* we have the developments of omissions and negligence as has been explored. The idea of a general principle of general liability in tort, not only for deliberate actions but also for negligent omissions, was a direct descendant of the *lex aquilia* which brought with it a more sophisticated development in the concept of intention, what Roman lawyers referred to as *culpa.* They distinguished the *animus nocendi* from *dolus.* Whilst the former is the intention to cause harm, the latter is conduct which is carried out in the knowledge that it will cause harm. One does not necessarily need to intend to cause harm to a particular person in order to be liable under *dolus,* it is sufficient to act in the knowledge that harm will result. *Culpa,* meanwhile, covers the act of unintentionally causing harm. Here the Romans distinguished between *culpa lata* (gross negligence) and *culpa levissima* (very slight negligence) and placed them on either ends of a spectrum. The Romans considered gross negligence equivalent to *dolus. Culpa levis* was the failure to show the diligence, prudence, and attention of a *bonus paterfamilias* (today equated to the reasonable man, although a slight difference exists as the Roman variant is the mentality of a parent who would be expected to conduct himself with the prudence above and beyond that of a reasonable man as parents have a stake in the future of their parents). This general principle continued to develop as the result of philosophical enquire.

French Law

Jean Domat, the 17th Century French jurist, belonged to the Natural Law school of thought and as a result tried to find the underlying principles which created a coherence in the contradictory state of jurisprudence and doctrine in tort law. He developed the idea that a legal order could be inferred through reason alone and so the general principle is that one is liable for conduct undertaken through fault to the one who has been harmed by it. In reality, when one speaks of the development of this general principle one is simultaneously speaking of a process of a philosophical inquiry and one which will have a tremendous practical impact on all the legal systems of Continental Europe. Civil Law, in the Continental sense, tries to create a broad set of systems and rules which can be applied to an equally broad breath of situations. Whilst the Common Law requires a person of great skill to interpret complicated language, Civil Law attempts to reduce the law to a set of basic principles and leave the application thereof to the courts. In order to apply these general principles correctly one must be a lawyer capable of reasoning philosophically and of bringing practical situations within the scope of a general principle.

Robert Joseph Pothier was a classifier who had created a way of distinguishing what he called delictual liability (which reflected *dolus*) from quasi-delictual liability (conduct which reflects negligence but is nevertheless culpable). The distinction between dealings and quasi-dealings is basically that between intentional harm and harm

caused by negligence. The French Code contained a general clause has not been altered for two hundred years as the basic elements are denoted properly and no further modification is required. The French Code contains only five articles on tort, but no more are required as the result of their broad nature. Simply put, any damage must be compensated for.

Articles 1382 and 1383 of the *Code Civil* combined two concepts together: first, liability for omissions; second, liability for negligence or recklessness:

> **1382.** *Every act whatever of man which causes damage to another obliges him by whose fault the damage occurred to repair it.*
>
> **1383.** *Everyone is responsible not only for the damage which he has caused by his own act but also for that which he causes by his negligence or imprudence.*

Therefore, tort under French Law had the following requirements:

1. ***Dommage*:** Interpreted broadly to include pure economic loss and moral damages
2. ***Faute*:** Mazeaud/Tunc distinguish between delictual fault, where the defendant's intention to cause harm is what counts & quasi-delictual fault, which consists of conduct which falls below expected standards of behaviour
3. ***Lien de causalite*:** No *cause etranger.*

Hence, we may discern the following features of such law:

1. No limitation of protected interests,
2. No distinction between acts and omissions as all can give rise to right to compensation,
3. Problem of limits: where do you draw the line: e.g., Abuse of procedural rights in litigation.

German Law

German Law seeks to create a balance by creating a general clause whilst also creating certain situations which are not compensated by the courts. Only if a legally protected interest is harmed will the German courts find that liability for damages is owed. French Law does not contain such protected interests or distinguish between acts or omissions because either may cause damages. However, it has a problem of limits. In reality, it is easy to argue that damage has been caused and damages should be owed. One must understand French legal culture which is such that the courts do not have a civil jury as exists in the United States as a result of which damages have spiralled out of control. In relation to France, it is the judges who shall compensate for the damage, and they might easily decide that one has suffered moral damages but a sum of hundred euros is sufficient to compensate for the damage caused. Therefore, they may offer a small sum whilst nevertheless accepting that damage has been caused. This is because French judges see themselves as the keepers of a social

equilibrium, allowing everyone to feel that they received redress without rocking the societal boat. Therefore, through this system tort law is essentially defined by the courts behind the veneer of codification. In principle nothing is excluded from being caught by tort law liability provided that one can prove the requisite criteria. Because the French trust judges to perform such a social function through their judgements, and because the French legal culture does not accept civil juries and punitive damages, the French are quite happy to have this apparently broad possibility for liability in tort and they have never reached the kind of extremes which occurred in the United States.

Introducing Maltese Tort Law

Adrian Dingli inserted into what is now known as the Civil Code the equivalent of this general clause of liability as found in articles 1031 and 1032:

> **1031.** *Every person, however, shall be liable for the damage which occurs through his fault.*
>
> **1032.** (1) *A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus paterfamilias.*
>
> (2) *No person shall, in the absence of an express provision of the law, be liable for any damage caused by want of prudence, diligence, or attention in a higher degree.*

Whilst the second article speaks only of actions, because it was modelled so closely on the French general clause there is a strong tendency not to investigate too closely whether we are speaking of actions or omissions, but to speak broadly of conduct, i.e., whether or not it was as that which would have been practiced by a *bonus paterfamilias.* Under the Maltese Code we find this same kind of elements as one would find in France. In fact, article 1031 references liability for damage, meaning there is no limitation in that particular article as to the kind of damage that can compensated for. Furthermore, the elements of conduct, fault, a causal link, and damage are all the same. Why is it that the French have only five articles in their law of tort whilst the Maltese law of tort has some thirty? This is where the awareness of the Maltese mixed system must be tapped. Because we are dealing with a mixed system, we have to ask the question as to the provenance of each article of our Civil Code. One cannot rest at simply articles 1031 and 1032. In fact, article 1030 states that:

> **1030.** *Any person who makes use, within the proper limits, of a right competent to him, shall not be liable for any damage which may result therefrom.*

This is quite an interesting provision as it appears to be stating the obvious, but the interpretation of the provision lies in the phrase *"proper limits"*. The provision can be read *a contrari sensu* to signify that anyone who exercises a right beyond the proper limits shall be liable for damages caused to others through the exercise of this right.

This article actually introduces another general clause within the system by stating that it is no excuse to state that one is exercising one's right if they exercise it outside the proper limits. This is actually a concept of French Law called *abus des droits.* The French courts concluded early on that one could be at fault not only through the cause of unlawful harm, but when one exercises a right in a manner which is disproportionate and solely with the harm of harming another person, linking this concept with that of the *animus nocendi.* Eventually, it was expanded to include *dolus.* The classical example is the *clemon bayard* case in which there were two landowners, the former owning a zeppelin with the second owning the adjacent field to the landing sight. The latter wanted to spite his neighbour and built a high wall such that it rendered the landing sight inoperable. The court concluded that this high wall was built on the property of the second landowner and as such he had the right to build it. However, the only reason for the disproportionate exercise of this right was to cause damage or spite to the neighbour. Thus, it was an abusive exercise of the right of ownership.

Article 1030 is perfectly compatible with articles 1031 and 1032 and this also because they all originate from the same French matrix. However, article 1033, when looked through the French interpretative approach, may be surprising because it begins by defining various kinds of intentional mistakes, reading as follows:

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

This provision allows for any type of damage to be compensated for. Here one must note the differences between this article and its two precedents: whilst articles 1031 and 1032 speak of failure to use the prudence and care of a *bonus paterfamilias*, article 1033 goes even further by including the *animus nocendi.* Whilst the former two provisions set a standard that must be reached, article 1033 specifies the different intentional states that a person might have. Article 1033 contains no question as to whether omissions are covered or not as they are expressly catered for. Here we return to the two foundations: the idea of wrongful conduct coupled with the causing of a certain intolerable kind of harm; and the other is conduct in breach of the law where any harm which is caused must be compensated for. One realises that article 1033 gives expression to the notion that unlawful conduct which causes damage will always give rise to a duty to compensate that damage regardless of whether the tortfeasor acted with *dolus* or with *culpa* and even if the tortfeasor acted with very slight negligence whilst under articles 1031 and 1032 slight negligence is specifically exempted from liability. Articles 1031-1032 are stating that anyone who fails to meet a particular standard are considered to be at fault, but the standard is considered to be the prudence, diligence, and care of a good parent. If the law where to render one liable for a higher standard it would have to say so specifically, e.g., the contract of deposit where the depositary, according to contract law, is held to a standard of diligence which is higher than that of a *bonus paterfamilias but* is instead held to the standard such that even slight negligence on his part will be considered a breach of his contractual duties. However, this is found specifically in the Civil Code, so it does

not breach article 1032. Article 1033 derives more from Austrian law than any other and deviates from the French matrix used to create the two articles preceding it. Even in German Law we find that liability does not exist purely by virtue of the general provisions but also from the idea of the legally protected interest. In order to reflect the idea of *injuria,* the German courts could not look to Roman Law in spite of the fact that they could place libel in the set legally protected interests, the Germans created the right to protection of one's personality. This is the starting point for the category and concept of personality rights.

Since the Italian Civil Code which is currently in force is actually the second version of the Italian Civil Code, that is, the 1942 version, and therefore the Italians have a Civil Code drafted under fascism. This has various interesting implications, especially considering that it was kept (as part of the fascist ethos the idea persisted that one should promote social cohesion within Italy). For this reason, even when the Code speaks of the right to property it makes clear that it is a right given for a social purpose. Therefore, it is necessary to balance these rights against the rights of the whole society. It is for this reason that the Code was kept, as it was framed in such a way that it appealed to both sides of the aisle. This must be borne in mind whenever any aspect of Italian private law is compared with Maltese law. For example, the Italian Civil Code incorporates commercial law in it whilst Malta has its own separate Commercial Code. In Italy the Civil Code governs all private transactions irrespective of whether the participants are traders or otherwise. When one speaks of Italian tort law it is important to note that the new version of the Civil Code was also very much inspired by the German Code, the BGB, which itself focuses on the kind of damage caused and, in many cases, in order to find liability in tort one has to show that the harm is of a kind which harms a legally protected interest, whether it is the interest to property, the interest to one's own health, the interest to one's own personality, the interest to run a flourishing business or otherwise. Given this background, in Italy what we find is that the Civil Code is constructed in such a way that liability in tort is not dependant on acting wrongfully so much as causing wrongful harm, in other words, if one inflicts a harm which is unjust then one is liable in tort. For a long time, it was considered that one had an unjust harm whenever a real right was infringed upon, that is to say, property rights. In fact, article 2059 of the Italian Civil Code speaks of moral damages and states that it is only in those cases specifically foreseen by the law for which moral damages can be compensated.

This has had a big impact on the Maltese Code and the interpretations made by the courts, such as in relation to the abuse of rights. For a long time, this was mainly seen as the abuse of property rights by neighbours. Another such example of the influence of Italian law on the courts is that of moral damages. Previously, the courts did not as a general rule admit the acceptance of moral damages except in the cases expressly provided for by law (i.e., violations of human rights, victims of particular crimes, actions for libel, actions for breach of written promises of marriage, cases of *injuria*, etc.).

English law is not particularly visible in the text of the Maltese Civil Code, with only sections existing where an influence can be found, namely article 1351 and article 1045. Sir Adrian Dingli not only studied in Germany and Italy, but also in England so he must have brought all of his experiences to bear when drafting the Code. Articles

1030, 1031, and 1033 all make it clear that the damage caused through wrongful conduct shall be compensated, and so if we were to stop there we would be in the same position as the French. However, article 1045 changes this, stating:

> **1045.** (1) *The damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused:*
>
> *Provided that in the case of damages arising from a criminal offence, other than an involuntary offence, and only in the case of crimes affecting the dignity of persons under Title VII of Part II of Book First of the Criminal Code and of wilful crimes against the person subject to a punishment of imprisonment of at least three years under Title VIII of Part II of Book First of the said Code, up to a maximum limit of ten thousand euro (€10,000) or up to such maximum limit as the Minister may by regulations establish both with regard to the maximum amount and about the method of computation depending on the case, the damage to be made good shall also include any moral harm and, or psychological harm caused to the claimant.*
>
> (2) *The sum to be awarded in respect of such incapacity shall be assessed by the court, having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.*

Here, the English law influence is obvious as it does not speak so much of compensating for the damage, but the court itself awarding damages. When English law is framed damages are categorised into heads of compensable damages so in terms of English law one could not obtain compensation for pure loss of profit under the law of tort because it was not recognised as when one of the heads of damage. If the damage falls within one of the recognised heads of damages, then it will be compensated. This may seem obvious, but under French Law the courts would compensate for any damage, without acting in an exclusive way. In other words, the Continental judge, once he finds liability, has the full power to provide a remedy. Traditionally, Continental Law does not theorise damages because it is obvious to them that it is simply a matter of calculation. Whereas English Law follows a different principle rooted in the Medieval forms of action. Under the Civil Law we find the idea that *ubius iberi mediu*, that is to say if one has a right the court must find a remedy. In Common Law we have the idea of *ubi rimidiu ubi*. Maltese jurisprudence contains both

approaches within it. Article 1045 and the way it was interpreted in the case of *Butler v. Heard,* has the mentality of a Common lawyer.

More recently, judgements have continued to adopt this same approach in order to find a remedy where there was a breach of human rights. In other words, there may be a situation where a tort constitutes a breach of human rights. We still follow the principle developed in *Cassar de Sain v. Forbes* where, with regard to ordinary civil liability, the State is bound by the ordinary law. When we speak of civil liability against the State it might overlap with an action for a breach of fundamental human rights. In *Baldacchino v. PM* a *de facto* expropriation by the government of the plaintiff's villa located close to the planned Marsaxlokk power station would have been considered a breach of the right to property had a Constitutional case been filed. This particular case was argued on private law grounds on the basis of the law of tort. The court is empowered to compensate for moral damages suffered from a breach of fundamental human rights. So, in a situation where one files an action for tort in damages, we find this overlap which is incomplete as the Constitutional Court can compensate for all forms of damage but not for moral damages. In order for the civil court to find a way to compensate for moral damages it has interpreted article 1045 in a way which is more similar to the civil law and took the approach that it only gives examples for the kinds of damage which can be compensated for without being exhaustive. Subsequently the legislature intervened to close off this opportunity and we find that therefore there are some court judgements which take a civil law approach whilst the bulk take a common law approach.
Here we find a change in mentality governed by a declining familiarity with Continental Law coupled with a growing familiarity with Common Law. We find many references to categories of tort law which have absolutely no relevance to Maltese legislation on tort. In the Maltese system, negligence is simply a word to denote a particular intentional state which corresponds to quasi-delictual fault. Alternatively, in the Common Law negligence is a tort as they never reached the idea of a general clause denoting liability in tort, meaning it is closer to Roman Law in this area than the Maltese law.

INSERT

In the Maltese system it is always possible for the employer to be found liable for simply being negligent in terms of article 1031 and 1032. In practice there are various rules by which one can create liability on the part of the employer. Very often, lawyers have a number of different avenues through which to approach the matter. It is even asked whether or not the practitioner should have to choose. In reality the temptation would be to include all avenues in one's arguments and from the perspective of the judge this is unproblematic as he would only wish to know whether or not damage has been caused. Damages obey a strictly compensatory logic in the Maltese system of tort and so it can be argued that they are not intended only to compensate for the harm, but also for the fact that the contract could not be performed, and any benefits of an efficient performance have been lost. One can be confident that the courts, because one mentions various heads of liability, will not compensate the individual twice over. In reality, this issue lies in this practical context of situations where, if one applies this non-cumul rule, the lawyer cannot mention breach of contract and then go

on to mention breach of tort. The court will only agree to examine one avenue, not any others.

Therefore, the practical importance of the rule lies in the fact that there can be situations where liability would arise in contract and even potentially in tort, and where the courts, if they uphold this rule, as the French Courts do, in its strict form, would argue that if there is a breach of contract, they shall only examine it from that side. In practice this kind of rule would have a strong impact on basically limiting the possibility of a victim of tort to obtain redress. This presupposes that the rules of contractual liability are different from those of tortious liability. When one speaks of liability for breach of contract the key idea is that a contract is in place, i.e., an agreement productive of rights and also of duties. The law states that a contract is the law which the contracting parties create for themselves, and it is treated that the parties have the power by way of this agreement to regulate their relationship. Contracts *per se* look towards the future brought about by the contract itself, by creating multiple future duties and obligations. On the other hand, the field of tort always looks to some sort of wrongful conduct which has caused damage in the past. The aim of tort law is to restore the victim to the position he or she was in before this wrongful conduct took place. Something has happened which has caused harm and he who has caused it shall put the victim back where the person was before. This is in line with the maxim of *resitutio in integrum* which the Maltese courts follow. The aim of contract law is, contrastingly, to protect the agreements reached between the parties insofar as they are lawfully permissible, and therefore aims to promote the fulfilment of those contracts. When one speaks of an action for breach of contract invoking contractual liability, in this situation it is said that the aim of the law is first of all to have the contract performed (specific performance) if at all possible. If those obligations had to be performed within a certain time and of their nature cannot be performed subsequently, the law gives the option to ask for damages (a sum of money) in lieu of the performance of the obligation. When therefore one sues for breach of contract the damages are not based on the idea of *restitutio in integrum* as they are in the law of tort, but instead to put the individual in the position he would have been in had the contract been performed by the other party. The aim of damages in contract is to improve one's position as it was supposed to have been improved had the other party honoured its agreement. Therefore, we often say that damages for breach of contract reflect the plaintiff's positive interest in having the contract performed.

The aim of contractual damages is therefore often said to be positive by looking to the future. In the case of tort damages, the aim is in a sense negative, that is it is to try and negate the impact of the wrongful conduct of the tortfeasor on the individual. This is one important distinction between contract and tort damages. In practice, if one is speaking of a workplace injury and the employee as a result of the injury is unable to work, in that case, under tort, we would compensate the employee for the impact of the permanent disability on his or her ability to work in the future. Even though we are speaking of tort damages we still look towards the future. Whilst, if this were to be configured as a breach of contract, we will be looking at very much the same thing. However, consider that the contract had certain fringe benefits which the employee was entitled to by virtue of his employment, then, since the predominant understanding of the employer's liability for such harm done to the employee is that such harm

resulted in the course of the employee's duties and as a result of the employer's failure to uphold safety standards, then it would be said that even those fringe benefits are to be compensated for as they are expressly upheld in the employer's contractual obligations. Contractual damages are therefore always regulated by the contract whilst tort damages are not usually measured in relation to a particular contract but measured from a consideration of the impact upon the employee.

Beyond this difference of negative and positive interest, other difference between tort and contract falls in the field of extinctive prescription. When we consider prescription, this period differs. If one can make an action for breach of contract one would generally prefer to that because such actions enjoy a longer prescriptive period of five years as opposed to a prescriptive period of two years for damage arising from tort.

Another important difference between contract and tort liability has to do with the onus of proof. In tort, the victim must prove everything, one of the ways in which the law inherently frowns upon tort litigation. The victim must prove that the tortfeasor was unlawful in his conduct and acted with negligence or *dolus*, as well as proving that the fault actually caused harm to the victim and that there was a causal connection between the conduct of the alleged tortfeasor and the harm suffered. This means that the alleged tortfeasor can simply rely on the presumption of his innocence and the onus of proof. In an action for breach of contract, however, returning to the example of a workplace injury, the employee need not prove that the employer failed to maintain a safe workplace, but only that he suffered damage and that this damage was suffered in the course of those duties related to his employment. In reality, it is the employer who must prove that he was not at fault. For the employee if the liability was contractual, it is enough to prove that the harm was caused in the course of one's employment as a result of the work environment per se.

In the case of ***Gauci v. Government Chief Medical Officer*** (CA, 2019) this case concerned …

An *obbligazzione di resultato* is an obligation to produce a particular result which can be either positive or negative. Meanwhile, an *obbligazzione di mezzi* is an obligation to act with diligence and prudence in pursuing a particular result. As regard surgeons it was held that they are not subject to an *obbligazzione di resultato*, that is, a doctor has no obligation to cure a patient but to do his best according to professional standards of diligence and prudence. Even though doctors are bound by duties to perform their work well and professionally, they can never be subject to an obligation to achieve a particular result. In the case of surgeons and doctors it does not make sense to oblige them to achieve a particular result in terms of healing the patient, keeping them alive, or making sure that they are healed. But it does make sense to oblige them to use the professional standards and prudence to pursue a particular result. Even in a contractual context we find these two kinds of obligations and when we speak of a surgeon who hits a nerve during surgery as the result of his inattentiveness, this is not normally considered an *obbligazzione di resultato.* However, what the court in this case held is that in this particular case the surgeon was bound by a negative *obbligazzione di resultato,* i.e., a negative obligation not to worsen the patient's condition. The presumption is that it is the surgeon who violated

a contractual duty should the patient end up worse off than he was to begin with. The court places the onus of proof under contract on the doctor to prove that he did not breach his negative *obbligazzione di resultato.*

The Co-existence of Tort and Other Forms of Liability

Whilst previously we considered the relationship between tort and contractual liability, we shall now consider the relationship between tort and other forms of liability.

In Common Law equity is understood to mean something far bigger and refers to a branch of remedies offered by the Chancery Courts. After the courts have looked to Common Law, and equity, they will then consider legislation to see if it provides any solutions and even in this tripartite approach it is the case-law which is given the highest priority. Legislation is mainly seen as filling in the gaps by providing for situations which the first two approaches did not consider. In the Continental system we first consider legislation, before moving on the doctrine if it exists, and then finally case-law.

INSERT

We were discussing the *obbligazione di risultato* and *obbligazione di mezzi* in the context of delictual and contractual liability. We spoke about whether it makes a difference in practice to distinguish between liability ex contractu and liability for breach of tort. When it comes to the difference in practice between contractual liability and liability in tort, we have pointed to the prescriptive periods being different. This of course is an important and very relevant distinction. In the contractual sphere – 5 years to take action for breach of contract. Delictual/quasi-delictual – 2 years, unless there is some special reason, like for example if what gave rise to the delictual/quasi-delictual action is also a criminal offence, then the prescriptive period for the civil liability is the same as for the criminal offence.

However, when we are talking about the difference between contract and tort in practice, it is also said that there is a difference when it comes to the onus of proof – the key idea is that in contractual liability, the onus of proof will shift quite quickly from the plaintiff to the defendant, whereas when we are talking about liability in tort, the onus of proof rests always with the plaintiff/victim. The plaintiff must also prove that the defendant was at fault/acted with dolus, not just that he was affected by his conduct. In contract, the key idea is that the plaintiff can prove that a contract exists, can prove that a particular result was owed to him from the contract, and then does not have to prove himself that the defendant is at fault. That is the starting point.

When talking about *obbligazione di mezzi* as against *obbligazione di risultato*, in French, Italian and Maltese law, this blurs the distinction between liability in contract and liability in tort, because rather than asking whether the obligation was delictual or contractual, we are now asking what kind of obligation it was – an obligation to be prudent/diligent, or an obligation to achieve a particular result? E.g., a doctor is under an obligation to exercise diligence, not to cure me. Therefore, under contract, the

obligation of the doctor has a duty to abide by normal standards of professional diligence – *obbligazione di mezzi* – an obligation to act prudently.

The next twist in the argument – if the doctor is there only to help me/care for me but not to cure me, how am I going to prove that the doctor has broken his contractual duties towards me? – I have to prove that he did not act with prudence, diligence or attention of a bonus pater familias. At that point, we cannot say that the onus of proof shifts from plaintiff to defendant. It is still a contractual situation, but the fact is that I as the victim have to prove that the doctor through his conduct damaged me, and I have to prove that he was at fault. It is practically the same as the proof/the way of proving tortious liability when we are talking about *obbligazione di mezzi*.

For more than 10 years, it was thought in Malta that it does not matter whether medical liability is based on contract or tort, because the only difference it could make was with regards to prescription, however the situation changed since ***Gauci vs. CGMO***. Our Court of Appeal in this case held that in a situation where the doctor not only does not cure you but actually harms you and you end up being worse off than you would have been had you not gone at all. In that situation, the court held that there is not only a failure to show prudence, diligence and attention which would need to be proved by the patient, but there was a failure to achieve the negative result of not harming the patient. The court is basically concluding that in this contract, there are 2 obligations on the part of the hospital medical staff –

Positive obligation - to use professional care and attention equivalent to this bonus pater familias standard – *obbligazione di mezzi.*

Negative obligation - not to achieve a specific result – you shall not make the patient's position worse - negative *obbligazione di risultato.*

Obbligazzione di risultato – all one needs to prove is:

- That the patient went to the hospital
- That his condition was made worse than before he went to the hospital

If you prove that, you proved that the negative *obbligazione di risultato* was violated, and it then becomes an obligation on the surgeon concerned to prove that he was not at fault. If he does not do so, he will be held to be at fault.

Brincat v. CGMO (refer to article on VLE): When we say that they gave this money to the plaintiff to compensate them for the loss of the foetus, it has to be pointed out that this is actually very difficult to justify in terms of the rationale by which damages are normally compensated in such circumstances. Normally, the approach taken by our courts is that damages are strictly patrimonial in character, so even if the courts compensate you for harm to your body, it is actually compensation for you not being able to incur an income as a result of such injury, or due to medical expenses.

If they are going to give you EUR 18,000 for the loss of a fetus, it is going to look like moral damages.

The logical basis for damages should be consistent. We can see that there is a problem – how come it is just 20,000 euros for the loss a fetus?

What courts normally do when they award these kinds of damages is that they use the judgement of a good man, and the Judge will order you these damages in accordance with this. In reality, the CoA must have felt challenged by this kind of decision to find a rationale for awarding damages to the mother. Our system at the end of the day is not based on an appreciation of the dignity of human life or based on a concept of human rights. As our system has traditionally presented, it is based on a strictly patrimonial logic. What you have lost is only relevant as far as it can be translated into money. Only then does the system really take notice.

According to the strict logic of our system, you should only get compensation for the hospital expenses. There are in fact 2 dangers –

1. Going overboard and compensating everything - you have to keep in mind that you cannot create a general obligation to compensate for any kind of harm. If there is some kind of guidance/limit, then the system would become unworkable. There has to be a way by which the courts can select certain kinds of harm and say that they are compensable, and others that aren't.
2. The other big mistake which is made is that of saying that in reality, we have to stick to the most conservative and narrow aspects of our system possible, we do not compensate for moral damages. Our courts have generally held that they do compensate for moral damage, even though they do not provide moral damages.

How did the Court of Appeal reason the matter out? (refer to VLE)
The court is saying that it will not enter the issue of responsibility, however, it held that it classifies this as contractual rather than delictual/quasi-delictual – the courts are now paying attention to the distinction between delict/quasi-delict. Furthermore, the second court agreed that the second plaintiff deserved compensation for the actual income she lost, not only during her visit to London, but also and as a result of the psychological harm inflicted upon her, during the period which elapsed between her second pregnancy and the birth of her third child.
Second plaintiff - first she had a pregnancy, and she gave birth to a child which is when she was diagnosed. Then, she had a second pregnancy and lost the child because she did not realise as a result of the misdiagnosis that certain measures had to be taken and therefore were not taken in mind. Then, she had a third pregnancy, and she gave birth to a child. That is the background.

The court is saying that she was actually so badly impacted psychologically that she actually changed her whole career and did not want anything to do with pharmacy or medicine. It awarded EUR 23,293 to compensate for her actual loss of income. So, the court is saying that in the period which elapsed between her second pregnancy and the birth of her third child, she lost income because she did not work as a pharmacist because she was trying to solve this problem and she was trying to conceive another child.

As regards to harm and the degree suffered by plaintiff, that is also quite interesting. If we look at the period which lapsed, we are talking about 14th May 1987 (original misconduct/misdiagnosis), and the final judgement was delivered on 27 October 2021. The court was also faced with this complaint that she suffered harm as a result of delays in litigation.

Second court (Court of Appeal) is basically saying; they requested specifically that the CoA compensate them for the moral damage that they suffered. Ultimately, the court held that there was no need for further proof of the impact on plaintiffs due to the loss of their child, as it appeared on the face of the record that this had a devastating impact on both their lives, and the court awarded an additional EUR 20,000 as compensation for the moral damage that they suffered. The CoA raised the award to EUR 60,000 euros, by awarding EUR 23,000 for actual loss of income for the time when she was in London and the time in between her second pregnancy and her third child, and the additional EUR 20,000 for the moral damage.

The court is basically saying – when there is a breach of contract, we are not bound by the jurisprudence which says that moral damages are not granted, because that jurisprudence refers to delict/quasi-delict. When we are talking about the violation of a contract, the damages can extend beyond those for tort. There is no reason why contractual damages should be awarded on the same logical basis that damages in tort are. Ultimately, damages in tort reflect the negative interest to be put back in the situation you were in before the conduct of defendant inflicted harm on you. On the other hand, damages in contract reflect your positive interest to have your situation improve following the contract. In this particular case therefore, the First Court does not seem to have classified the action as contractual; the second court did this. The second court did not enter the issue of responsibility; it held that the responsibility was already sufficiently proved by the first court.

The responsibility to conduct a blood test in order to discover whether the mother is rhesus negative or rhesus positive, is that an *obbligazione di mezzi* or an *obbligazione di risultato*? – the blood test produces a specific result; either positive or negative, and if it is conducted well, the result should be the appropriate one – it is very unlikely that it is conducted well and the result is misleading – since you have a specific *obbligazione di risultato* to achieve the right result from the blood test, applying the same approach as that developed in Gauci v. CGMO, you are going to reach the same conclusion; that the mother did not need to prove the fault of the hospital. It was enough for her to prove that the blood test produced the wrong result. Once she proved that, then contractual liability was assured. Once she had proved this therefore, the court could award moral damages as compensation. You can see how the new conceptual architecture by which our courts now classify actions for breach of contract as distinct from actions for delictual/quasi-delictual damages has produced a scenario where a contractual classification is much more favourable to the victim. So, ultimately, we are saying – not only does the victim have 5 years rather than 2, but he can obtain moral damages, he does not need to prove, in the case of an *obbligazione di risultato* that the victim suffered harm, or that the result was not achieved. In this case, it is a positive *obbligazione di risultato* – the obligation to conduct the blood test to achieve a specific result relating to the mother's blood type is a positive obligation – positive

result, whereas the obligation to conduct an operation in such a way that the patient does not come out of the operation crippled/damages in a way that he was not before the operation, that is a negative *obbligazione di risultato.*

We have explained the difference in practice between liability for breach of contract and liability for delict/quasi-delict, and how classifying an action under one or the other can really make a difference. This case was only a year ago. In reality, this case is going to filter through, hopefully, our own law of obligations. Whenever we are talking about a positive contractual action, we have to keep in mind this distinction between positive and negative *obbligazione di risultato* and the practical difference as regards damages.

Fault and Causation

We will be focusing on certain elements of the action in tort which are crucial to proving that responsibility exists. The two elements are basically the elements of –

- fault
- causation

Fault

The general approach which is adopted by our court is that we are always going to ask whether the defendant conducted herself with the prudence, diligence and attention of the bonus pater familias. What the bonus pater familias is will change depending on the particular trade or profession of the defendant for instance in order to show that a lawyer has been negligent, you have to show that he has failed to show the prudence, diligence and attention of the bonus pater familias – you are going to compare the lawyer to other members of his profession to determine how he should have acted.

That is the model you are supposed to compare the defendant's conduct to decide whether defendant was at fault.

Keep in mind that this model/stereotype is not as such exactly the same thing as the reasonable person. Normally in the common law world, we are used to talking about the reasonable person. In French law 3 or 4 years ago, the law was changed and now they talk about the '*homme avise'*. Both the expression 'pater familias' and 'reasonable man' are both highly gendered terminology. However, there is the difference that the 'pater familias' is a parent, which is a different feature from the person in the street. Parents can normally be relied upon to think in more long-term ways. In practice, our courts generally refer to the concept of responsibility for negligence or for failure to meet this standard as being liable for culpa. The word 'culpa' which denotes quasi-delictual liability also denotes failure to abide by the standard of the bonus pater familias.

Culpa itself is normally defined by our courts in terms of Carrara's definition. Carrara in the criminal law field talks about culpa in terms of a failure to foresee that a certain damage would result from one's conduct, in situations where such foresight would be expected from a bonus pater familias. The way in which the standard of prudence, diligence, and attention of the bonus pater familias is operationalised is by first constructing the stereotype of the bonus pater familias, which will be different

depending on the person concerned. Then, in order to see whether the standard was breached or not, they will ask; would this stereotypical figure of this prudent, diligent programmer for instance inflict this harm on others? – if he could not have foreseen that such harm would result, then he is not at fault, because the criterion/test of prudence, diligence and attention would have been met. If a bonus pater familias could foresee that the damage could result and would have therefore abstained from this conduct from which the damage resulted, in those situations only could the defendant be held liable for fault.

This bonus pater familias standard is often called 'culpa levis in abstracto'. The reason it is called that is because it is an abstract standard. It is different from what the majority of people do. In situations of for instance, medical liability, you could argue that even if for example, most doctors in Malta issue medical certificates without actually even seeing the patient when it is a matter of taking a day or two off from work, that does not mean that this conduct is going to be therefore equivalent to that which a bonus pater familias would engage in - a diligent, prudent and attentive doctor. Although the court will look at the practice, the court is also invited to define what is the standard of prudence, diligence, and attention. Proper reflection on this standard should lead one to the conclusion that this is an invitation for the court itself to produce standards of proper conduct via the device of the bonus pater familias. Plaintiff must prove that the act or omission of defendant is what caused the incident and the damage. It is a legal principle that anyone who suffered harm due to the fault of another person has the duty to prove an act or omission which is proof of the culpa – culpa must assume a specific and actual form. In practice, this means that the plaintiff in an action for delict/quasi-delict must prove both that defendant was at fault through his act or omission where he acted intentionally or negligently through dolus or culpa and that the harm caused to him was the direct and immediate result of such act or omission.

Going back to the 3 elements that must be proved normally by the plaintiff in an action for damages in tort – we said that one of these elements is fault on the part of the defendant: *culpa* or *dolus*. Another element: causation – a causal link between the act or omission and the harm suffered by the plaintiff.

Fault and Causation

We will not focus on these 2 elements. We pointed out that proof of fault normally requires proof of failure to achieve the standard of diligence expected from the bonus pater familias. Our courts interpret this through the test developed by Carrara in the criminal law field which translates into a focus on foreseeability.

So, the question is in order to decide whether the defendant was at fault or not; would this harm be foreseeable to the bonus pater familias? That is the test for fault. At the same time, one may raise the question; how do you prove causation? Is causation an independent test for liability for fault, or once you prove fault, you must also prove causation?

If we were to look at court decisions, what we would find is that our court decisions tend to assume that we are speaking of 2 separate tests, and therefore, foreseeability is required to prove culpa. Incidentally, why are we focusing on culpa, and not dolus?

In our law of tort, the idea is that damages are given purely to compensate the victim for the harm suffered by the victim. Damages are purely compensatory in nature. When discussing dolus, since the principle is that damages are there to compensate you and not to punish the defendant, it does not make any difference in most cases whether you prove that the defendant acted with dolus or culpa, because in both cases, the defendant is obliged to compensate the victim for the damage that he suffered.

By and large, it does not make a difference in most cases whether you prove that defendant acted with culpa or dolus. In practice, it is sufficient to show that there is culpa. In practice, in most cases, it is liability for culpa; for fault, failure to achieve the standard of the bonus pater familias. In reality, since our law defines fault negatively in terms of failure to achieve the standard expected from the bonus pater familias, that not only covers culpa, but it also covers dolus. If someone who is negligent, imprudent, and inattentive failed to live up to this standard, how much more will someone who inherently sets out to engage in conduct knowing it will cause harm to others?

When we look at our legislation, we will see that Articles 1031 and 1033 of the Civil Code require defendant to compensate the damage which occurs through his fault. Article 1033; 'and damage resulting from any act constituting a breach of the duty imposed by law' – you have to prove that the damage occurs through the fault or results from the conduct which is in breach of the duty imposed by law.

We must also look at Article 1037 –
1037. Where a person for any work or service whatsoever employs another person who is incompetent, or whom he has not reasonable grounds to consider competent, he shall be liable for any damage which such other person may, through incompetence in the performance of such work or service, cause to others.

This speaks of the effects of obligations, which therefore does not distinguish between obligations in contract and obligations in tort.
The debtor in this case – the person obliged to pay the sum of money. It could be the debtor of the contract, or it could be the debtor in the case of tort/quasi-tort. They both owe an obligation to the other.
We can see here why it is important to show that the damages are the immediate and direct consequence of the wrong performed. This is why you have to prove the causal link, and why the causal link must prove directness and that it was immediate (without a cause in between).

Tarcisio Borg et vs. Commissioner of Police – First Hall, Civil Court – 2012
"Where damage results from multiple causes the courts often resort to the test of 'but for cause' – would the loss have been incurred but for the defendant's negligence. This notion is based on the view that a defendant should be liable only to the extent that it can be shown that his conduct was a condition of the claimant's hurt". – in that case, the court held that there was not sufficient proof that the staff had mishandled plaintiff who was the victim of a traffic accident which caused paralysis. The court applied the 'but-for' test, holding that it had not been proved that the conduct was a necessary condition for the harm caused to plaintiff.

Here we have a test followed by our courts for causation; in order to prove that the harm caused was a direct an immediate consequence of the conduct of the defendant, he had to ask the question – had defendant's conduct not intervened, would this harm have been caused OR could this harm have been caused anyway by some other cause?

Here, we have 2 tests –

1. When we are talking about fault, in order to check whether there is culpa, we must ask – was the test foreseeable by the bonus pater familias in the defendant's position. If it was foreseeable, therefore the defendant is liable for culpa.
2. To prove causation, the plaintiff must prove that defendant's conduct was such that had it not been for this conduct, this harm would not have been caused to the plaintiff.

So, -

- Fault – foreseeability test
- Causation – 'but-for' test

Both of these need to be proved by the victim. When we are talking about liability in tort, we are shown that there are 2 different tests.

AB vs. CB and EF – Court of Appeal – 25 October 2013

In this case, the plaintiff claimed to have suffered severe psychological damage as a result of being the victim of repeated sexual abuse by the first defendant (CB) from the age of 9 till 15. He threatened that he would inflict severe harm of her grandfather. In order to justify the claims, CB relied on at least some occasions on a medical certificate issued by second defendant; Dr. EF, a physician, which he obtained from the same physician and which he presented to school authorities. The plaintiff sued both CB and Dr. EF in court to obtain compensation for the damage, consisting primarily in permanent psychological scars inflicted upon her as a result of the abuse and which caused a permanent disability assessed at 50%.

First Court – both defendants were jointly and severally liable to compensate for the damages suffered by the plaintiff. It held that the initial liability of defendant CB was clear – this is a case where dolus was manifest – not just dolus, but there was animus nocendi. As regards Dr. EF, the court held that he acted negligently and unprofessionally in terms of Articles 1032 and 1033 of the Civil Code insofar as he had –

- Issued at least 2 medical certificates justifying absence from school on medical grounds, despite never conducting a medical examination of the plaintiff, nor did he ever meet her.
- That is notwithstanding that at least one of these certificates attempted to justify plaintiff's absence on 4 previous days.
- That these certificates were given directly to CB, although Dr. EF knew that CB was not plaintiff's father.

Does the fact that 90% of doctors in Malta for instance issue certificates without seeing the patients mean that the court should conclude that such behaviour is the conduct of the bonus pater familias? – this is an example where the court held that if one issues a certificate without seeing a patient, you can be considered to have acted in error of the bonus pater familias standard. The heirs of Dr. EF who died in the course of the case, appealed. The CoA overturned the findings of the first court on the doctor's responsibility, on the grounds –

- Not proved to be in culpa; the court pointed out that in Maltese tort law, culpa is identified as the failure to observe the diligence of the prudent man.
- The court further observed that this foreseeability test is only satisfied if the powerful consequences which one should have foreseen are reasonably probable.
- The court held that the situation could not have been reasonably foreseen by Dr. EF. It was quite a common practice for certificates to be issued with retrospective effect, therefore this should not be seen as suspicious, and Dr. EF should have no fault on his part.

The First Court said that it is not foreseeable that the person who issued the certificate would have caused such harm. Therefore, the court held that he was not at fault. Moreover, the court observed that in any case, even if Dr. EF had been at fault, the causal link between the damage suffered by the plaintiff and his conduct had not been adequately proven by the plaintiff. It established that causal link and fault are separate.

The court held that the proximate cause of the harm suffered by plaintiff was not the conduct of Dr. EF, but the conduct of CB, who created an independent scheme to corrupt the daughter of a family friend. Moreover, it also emphasised on the importance of the 'but-for' test – that the harm would not have incurred had it not been for defendant's negligent conduct. In this case, the court concluded that Dr. EF's conduct in issuing the medical certificates in question had not caused the harm suffered by the plaintiff, as plaintiff had been sexually abused by the defendant for at least 5 years before the doctor issued the medical certificates.

This case treats psychological harm resulting from this kind of sexual abuse as if it were something which was 'either or' – you either suffer psychological harm or not. However, psychological harm could be a matter of degree. We can argue that the doctor also contributed to the harm to an extent which is not plausible to law.

This case relates to prolific abuse that took place over a protracted period of time and as the victim grew older the abuser, CD, became even more, so to speak, 'outrageous', in the sense that he rented a flat close to her school so that instead of attending school she would be raped. CD also made use of medical certificates which he obtained from Dr EF, a physician, to explain her absence from school, without the physician having actually seen her, and the physician knew that the girl in question was not CD's daughter. These two facts were proven, and this is interesting from the standpoint of fault as it is well-known that medical practitioners in Malta occasionally issue certificates where strictly speaking none is necessary. There is a tendency to interpret

the power to issue such certificates rather expansively. Therefore, can we consider the conduct of this particular medical practitioner to be: first, an action or an omission; second, whether there was good faith on the part of the doctor concerned. His conduct, whilst on the extreme, could be seen as part of the range of professional conduct which was accepted. This case on the one hand is a litmus test for the provisions related to fault, that is, when we discuss the diligence of the *bonus paterfamilias,* do we consider the behaviour of the average man or the average physician, as the case may be? Or is it the case that the court should come up with a stereotypical model of how a good doctor should act? And then once we have such a model it could be that even if 1% of doctors abide by this model, all the rest are being negligence in their failure to reach this standard. The Court of First Instance found fault on the doctor's part. In terms of the Maltese law of tort, where there is more than one tortfeasor and the degree to which each has contributed to this harm is not knowable or cannot be established easily in advance, the Maltese law imposes joint and several liability between them. The idea is that a victim has a right to be paid in full for damages and it is no defence to the victim's claim to say that the court must first establish the precise proportion of harm caused by individuals, provided that there is an indication that some of the harm was caused by the doctor's negligence. It is quite possible that in this situation the tortfeasor would not be able to pay the full amount of compensation. The physician, for having failed to check his facts properly, would end up being responsible for paying the full amount of compensation for the repeated sexual abuse which she suffered which naturally also caused psychological harm considered permanent.

On the other hand, we have conduct which one can easily consider par for the course for any physician. The way the Court of Appeal tackled the issue was by saying that Dr EF had not been proved to be in *culpa* as the test is when the tortfeasor conducts himself negligently whilst failing to foresee consequences when such consequences were reasonably foreseeable and not highly remote. In spite of the fact that Dr EF issued medical certificates retrospectively, without examining the patient, and to an individual who reasonably would not be considered *in loco parentis*, he was not held liable in *culpa* as CD's use of the certificates was not ordinarily foreseeable. What the Court is saying is that what CD produced is a Machiavellian scheme of such magnitude and sophistication that it is unlikely that the doctor would have foreseen it or his own role in it. In this particular case the court did not completely exclude the presence of fault, stating that even if Dr EF had been at fault, the causal link between Dr EF and the conduct had not been adequately proven. The proximate cause of the cause suffered by plaintiff was not caused by Dr EF, but by CD. Fault and the causal link must therefore be proven separately and independently from one another and with different tests, i.e., the foreseeability and 'but for' tests, respectively.

This reasoning is questionable because if one were to look at the damage caused it is not something that happened initially, that is each act of sexual abuse aggravated the damage suffered by the victim. Therefore, if the damage is not conceived as a one-off event, then why should damages be considered as such? The judge in this instance was most likely influenced by the old-fashioned notion that one is 'corrupted', so to speak, in a one-time event when the victim lost her virginity. Worse than that is the continuous impact of repeated acts of sexual abuse which repeatedly impacted her psychological health. The court physician ascribed a 50% permanent disability to the

victim. It could be argued that since the damage was repeatedly caused and growing ever greater, to say that the damage only occurred before Dr ED issued his medical certificates and that no damage was inflicted subsequently is a stretch, and in this context the judgement can best be understood as an attempt to avoid a situation where this doctor would have been responsible for paying for all damage caused. Ergo, it is more an exploration of the rule of joint and several liability than the rules of cause and fault.

Interruption of the Causal Link

The following cases involved the sudden annual autumnal rainfall in Malta, as the result of which damage is caused throughout the country.

The case of ***Carmelo Wismayer noe et v. Anthony Falzon noe et*** (1996) the court was faced with a situation where the plaintiff owned a factory located at the base of a hill on which the then power station at Marsa was built. As part of the process of building the power station what were previously fields were covered in tarmac and their surfaces were rendered impermeable, making the risk of flooding plaintiff's factory predictable and foreseeable. So much so that in the summer plaintiff wrote to the government department responsible urging them to take steps to avoid the flooding. Predictably, the request was ignored, and the factory flooded. What happened in this case was that the Court of Appeal held that there was no liability because the government successfully managed to invoke article 1029 which speaks of interruption of the causal link in cases of *force majeure* and/or fortuitous cause. In an ordinary tort action, it is the plaintiff who must prove damage, fault, and the causal link between the two. As a defence to this kind of action it is possible for the defendant to plead that even though his or her conduct might have been capable of causing this harm, nevertheless something happened which interrupted the link of causation between his conduct and the harm suffered by the plaintiff. In these scenarios it is no longer the plaintiff who must prove, but the defendant who must prove that the causal link was interrupted. The wording of article 1029 makes it clear that it foresees the possibility of fortuitous cause (completely unforeseen) without *force majeure* (predictable but overwhelming), although they typically come together. In this particular case, the court upheld the arguments brought by the defendant that there was such an exceptional rainfall that according to the records held in the Met Office that there had never been a rainfall greater than that particular instance. Furthermore, the court pointed out that according to the provisions on legal easements, namely that of *stillicidju*, which states that the inferior tenement has a duty to accept any water which spills onto it from the superior tenement. The Court at one point also seemed to have argued that because the drainage canals under the factory were part of the plaintiff's property, he himself had the duty to maintain them. Finally, the court referred to a principle which says that when there is *culpa* preceding the event which constitutes *force majeure* and/or fortuitous cause, then one cannot successfully invoke the latter pleas. This is why the court referred to this legal servitude because it meant that its existence denied the possibility of *culpa* on the part of the government.

This argument is also questionable, as, if *culpa* relates to fault and *force majeure* refers to causation, the two refer to separate elements of liability in tort. The only way to defend this reasoning is on grounds of public policy. There is the need to invoke *force*

majeure and fortuitous cause when there is *culpa* only, as in the absence of *culpa* one can simply prove that one is not at fault.

A more recent judgement, that in the case of ***Ronald Camilleri et v. Water Services Corporation et*** (Court of Appeal, 31/05/2013) contrasts that of Wismayer. Here, the Court of Appeal was faced with a situation where the plaintiff was alleging that the local council of Naxxar and the WSC had together contributed to cause him harm which consisted of the entry of rainwater mixed with drainage into his basement-level garage. The local council, although not responsible for the maintenance of road drainage, narrowed the canals that channel rainwater in a particular street leading to a flood which itself mixed with overflown drainage. In this particular case the court essentially held that there was liability on the part of both, pointing out that for fourteen years before the local council's intervention the rain culverts had never overflown. The Court also rejected the claim of *force majeure* as the technical expert testified that had the culverts not been narrowed the rainwater would not have entered the plaintiff's garage. The Court upheld the principle that where there is human intervention in the causation of damage *force majeure* cannot be proven. It was proven that the amount of rainwater was not particularly exceptional and the fact that the water was contaminated with sewage was *ipso facto* proof of the WSC's liability, and that this had clearly caused harm to the plaintiff. Here there is no mention whatsoever of the legal easement found in Wismayer v. Falzon and had the reasoning of the prior judgement been utilised it is likely that Camilleri would not have proven successful in his claim. When there is the culpable conduct of the defendant which contributes to the harm, one cannot successfully invoke *force majeure* and/or fortuitous liability.

INSERT POWER POINT

Contributory Negligence

This is important as, in practice, it is raised in practically every case of negligence. The practical dilemma involved in this case is as follows: when we speak of contributory negligence it is often the case that it is invoked in order to destroy completely the argument of the plaintiff (if the defendant was at fault, then the plaintiff was equally at fault, meaning there can be no claim for damages). However, if there is contributory negligence, then the damages are reduced according to the proportion of contributory negligence. Nevertheless, in this area, as in other areas of tort, the fact that the Maltese system is a mixed one is important to keep in mind.

This concept of percentages allocated to fault is very much a French one which imposes an obligation to compensate for any harm which may have been caused. Wherever there is fault, there is liability, both of the defendant to the plaintiff and vice versa. What this translates to in practice is an approach where, say, if 50% of the harm is due to the conduct of the defendant and 50% is due to that of the plaintiff, the damages owed by the defendant are reduced by 50% in turn. However, the traditional, Common Law, understanding until the 1930s is that where one has contributory negligence, the action for damages in tort must fail.

The idea was that if the plaintiff himself has contributed to the harm, and this was understood in terms of the Common Law theory of causation which did not permit the existence of multiple causes leading to the same harm. Therefore, the idea was to search for the single most proximate cause and once this is identified, and if it happens to be the actions of the victim himself, then the idea is that this is what actually caused the harm and once contributory negligence is proven it is held that it is the victim who effectively caused their own harm, exculpating the defendant of liability. In Common Law they resolved this problem via statute which made clear that contributory negligence was to be understood in a Continental fashion, allowing for a reduction in the damages payable to reflect the degree to which the defendant's own conduct caused the harm.

In Malta, nevertheless, we follow more closely the French approach. In spite of this, it is also true that although we do follow this approach, we are different from France in that we have a specific article in our Code which considers contributory negligence, namely article 1051 of the Civil Code:

> **1051.** *If the party injured has by his imprudence, negligence, or want of attention contributed or given occasion to the damage, the court, in assessing the amount of damages payable to him, shall determine, in its discretion, the proportion in which he has so contributed or given occasion to the damage which he has suffered, and the amount of damages payable to him by such other persons as may have maliciously or involuntarily contributed to such damage, shall be reduced accordingly.*

This seems designed to cater for a situation which is superfluous. An examination of the French Code will find no article for contributory negligence, but only on for liability for fault, which is extended to the plaintiff himself. In France, there is no need for this separate article, but they simply rely on their counterpart to our articles 1031 and 1032. In reality, in the French system, the only difference between proving fault and proving contributory negligence is that when one proves fault it is the burden of the plaintiff to prove fault, the causal link, and damage, whereas when it is the fault of the plaintiff being alleged it is the defendant who is burdened with the proving thereof, respecting the basic principles of the law.

However, article 1051 is somewhat deceptive, as it begins by echoing the same words used in articles 1031 and 1032. However, article 1051 then goes on to state that whoever has by his own conduct contributed or given occasion to the harm, words not found in the former two articles. These precise words make no mention of an accident or harm-causing event, but refer directly to the harm *per se.* It appears that if the plaintiff, having suffered some kind of harm, fails to take the necessary precautions to minimise it, such as seeking proper medical attention, then that person is acting with a lack of prudence, diligence, and attention, and even if he is not responsible for the harm-causing event, he is still responsible, by virtue of article 1051, for having caused the harm.

Therefore, in Maltese Law, a failure to act prudently, diligently, and attentively in order to care for oneself after one has suffered harm would translate into contributory negligence, to a degree which the court is completely at liberty to determine as the law no longer contains a limit as to the degree of contributory negligence which can be found. Prior to 1938, article 1051 contained a presumption that unless more specific evidence is brought the degree of contributory negligence is 50%. In practice, the courts still tend to follow this approach if contributory negligence is proven but it remains unclear as to what degree it contributed to the harm, so long as it is significant.

The other way in which article 1051 diverges from articles 1031 and 1032 is that it uses the words *"contributed or given occasion to"*. The latter suggests that the conduct of the victim has actually caused the damage, whilst the latter suggests that the damage was caused by the tortfeasor but made worse by a failure of the victim to take steps to minimise that harm which he has suffered. It would also be the case, for example, if the victim has suffered some minor bodily harm which could be treated perfectly capably in Malta, but he insists on seeking expensive private treatment overseas.

The third aspect of article 1051, is that the law seems to contemplate that the alleged tortfeasor might have acted not just without the care, attention, and prudence of a bonus paterfamilias, but with either the *animus nocendi* or *dolus.* Even if the tortfeasor acted maliciously, nevertheless if the victim was contributorily negligent there will be a reduction in the compensation given.

This is a moot point which arose in an English case where plaintiff was a shipping company called Allseas Co. Ltd. which wanted to raise funds to construct a ship meant to be the world's largest, aimed at decommissioning oil rigs. The directors of Allseas

wanted to raise a special amount of capital for this project and were approached by a former employee of theirs who informed them that he knew of an individual with contacts with particular traders who could trade stocks in a parallel stock market in which only government entitles have access. This person, an Anglo-Maltese businessman called Paul Sultana had a history of acting as a car salesman and claimed to have contacts in Malta who could introduce the owners of this firm to these traders who had access to special bonds and stocks not typically available to the public. Incredibly, the managing director of Allseas believed that this was possible and there were two visits to Malta where introductions were made, with the result that Allseas transferred one hundred million euros into a bank account to which the introduced traders had access for a period of 24 hours.

Instead of making this investment, they began withdrawing money from this account for their "salaries". This one hundred million was reduced by 17 million in the course of a few hours whereupon the Metropolitan Police were alerted to the situation, closing the account. The only person involved who was found was this Mr Sultana who was imprisoned but claimed that his role was merely that of an intermediary, without benefiting from the fraud. The case came to be decided in England according to Maltese Law. The issue which arose, in terms of Maltese law, is whether someone who is merely an intermediary and seems to have carried out the duties thereof without the prudence, diligence, and attention of a bonus paterfamilias, could be held liable for tort. The Court held that there was no need to enter into whether there was a lack of prudence, diligence, and attention as enough evidence resulted to prove *dolus.* However, there remained the fact that this multinational with huge expertise in the field of shipbuilding believed Mr Sultana's fraud to the extent that they transferred this massive sum of money, effectively rendering themselves vulnerable.

To that end, what impact did contributory negligence have on the case? The argument brought forward by the defendant was that the company's directors were negligent in their failure to carry out effective due diligence, stating that since there is fault on both sides there can be no liability for either. However, the fact that there is no contributory negligence does not mean that there is no liability, but that the extent of which is reduced. Furthermore, they stated that in cases of fraud there can be contributory negligence in English law. Many of the judgements of the Maltese courts simply ignore article 1051 completely because they take the same approach as the French courts, and since according to French law where we have contributory negligence, it is regulated according to the same principle for liability for fault, why look at article 1051 at all? Although article 1051 seems to foresee the possibility of contributory negligence in situations of *dolus* and the *animus nocendi*, the courts in practice ignore this and do not investigate cases of contributory negligence in cases of fraud. The Court upheld this assessment based on an examination of Maltese jurisprudence.

In the case of ***Falzon v. Felice***, however, plaintiff approached defendant with the intention of striking him, with the latter goading him. The question was whether there was some sort of contributory negligence and whether there was *dolus.* This is one of the few cases where the court held that there was *dolus*, an investigation modern courts rarely enter into owing to the fact that there is no difference between *culpa* and *dolus* insofar as damages are concerned. In the early twentieth century, however,

damages for *lucrum cessans* where only given for *dolus*, so they had an interest in actually entering into this assessment. In this particular case the court concluded that given the size of the piece of wood used to strike Felice and that Falzon clearly approached him with the intent to cause harm there was *dolus.* However, the fact that Falzon stood his ground and provoked the attacker constituted a contributory fault on his part, if not contributory *dolus*, because he did not protect himself, deciding that one-thirtieth of the damages would be reduced on the basis of the fault shown by Falzon. This is the only case in the history of Maltese jurisprudence where contributory negligence was found to subsist in cases of *dolus.* It can therefore be concluded that this is the exception that proves the rule, demonstrating the reluctance of the court to find contributory negligence in cases of *dolus.* Given the minimal reduction in the amount offered in damages awarded and the fact that there was provocation, in this case there was not *dolus* on the part of both parties involved.

In the case of ***Carolyne Debono v. Mayor of Nadur***, plaintiff passed through the public garden of Nadur in which works were being carried out and the normal pathways of access were closed except for one intended for the use of the workers. It was clear that works were going on, but plaintiff ignored this fact, walking through the site, falling into a covered pit, and injuring her leg. The Local Council which had commissioned the works tried to avoid responsibility for the works carried out on the basis of it having sub-contracted the works with the contractor bearing responsibility. This argument was rejected by both the court of first instance and the Court of Appeal, stating that the Local Council has a duty to the public to take all the necessary measures to ensure that the works are carried out in a manner that ensures the safety of the public, holding them responsible on the basis that entry to the site was not properly controlled and signposted.

With regard to the contributory negligence of the plaintiff, the first court decided that plaintiff had not contributed to the incident and that the fact that she entered into the garden did not demonstrate that she failed to take care of herself. The Court of Appeal, on the other hand, considered article 1051 and highlighted the phrase *"contributed or gave occasion to the harm"*. It quoted an English judgement which stated that contributory negligence does not depend on accountability, but the foreseeability of harm to oneself, such that if the harm to oneself could have been foreseeable, contributory negligence subsists. The Court questioned whether plaintiff should have entered the garden when it was clear that works were ongoing. In the Court's opinion she should have waited to make use of the space until the project was concluded, citing the tendency of the population to lack patience and discipline. The Court stated that, had she been attentive, plaintiff could not, not have realised that the hole she fell into was there, therefore ascribing one-third of the fault to her.

Luca Camilleri

Defences in Liability to Tort

In French law, contributory negligence, as has been said, is based upon the concept of liability for fault. Therefore, the basic approach is that if the plaintiff was himself or herself at fault, then it follows that since everyone is liable for the harm that they caused through fault, then the harm which the plaintiff causes to themselves through fault must also be compensated by the plaintiff. In the same way therefore that one has a duty on the part of the defendant to compensate the plaintiff for any harm that he has caused, so the plaintiff has the duty to compensate himself that he causes to himself through his own fault.

In the UK, contributory negligence was introduced by a special act of parliament in 1945. The traditional common law position was that contributory negligence impacts upon causation, not upon fault. In other words, if there was contributory negligence of the plaintiff, contributing therefore to the harm suffered, then the plaintiff's contributory negligence means that the harm is either caused by the plaintiff or by the defendant.

Traditionally, in common law, they did not accept the idea that there were multiple tortfeasors causing the same harm, but that instead there was a single proximate cause of the harm. Therefore, the approach was to say that if there was contributory negligence it interrupts the causal link between the conduct of the defendant and the harm suffered and therefore it completely exempts the defendant from any liability whatsoever. This approach is very black and white. It can be seen how the idea of a single proximate cause and the idea that contributory negligence interrupts the causal links functions traditionally in common law to ensure that if it was proven, then there could be no liability on the part of the defendant. In England, section 1 of the Law Reform (Contributory Negligence) Act of 1945 imported into English Law this Continental understanding of contributory negligence. The fact that we have contributory negligence does not mean that the defendant will be let go as far as his culpability is concerned. Even today, when we concern CN it is called comparative fault in the common law worked as the exercises includes comparing fault of the parties. Under Maltese law we still find a legacy of the CL understanding of CN when we find that in an application or reply to the court, in the context of tort or quasi-tort, sometimes lawyers say in defence of the defendant that if there was fault on the side of the defendant then there was also fault on the plaintiff. The idea being invoked is that if there is fault on both sides then the defendant cannot be held responsible. This does not stand as an accurate defence to make in the context of Maltese tort law which still has its foundations very clearly in the French approach where one is liable for the harm caused through one's fault, whether they are the plaintiff or the defendant. If there is fault on both sides the court must determine what is the degree of fault and what the percentage to which each party's fault has contributed to causing the damage. Article 1051 makes it quite clear that that is the situation in Malta, stating that:

> **1051.** *If the party injured has by his imprudence, negligence or want of attention contributed or given occasion to the damage, the court, in assessing the amount of damages payable to him, shall determine, in its discretion, the proportion in which he has so contributed or given occasion to the damage which he has suffered, and the amount of damages payable to him by such other persons as may have maliciously or involuntarily contributed to such damage, shall be reduced accordingly.*

It is made clear that one cannot under Maltese law state that there is fault on the part of the plaintiff and therefore that the action cannot proceed further, and it must reduce the damages payable by the defendant in proportion to the degree by which plaintiffs have contributed to the harm.

The defence of self-help

Whereas the defences of self-defence and necessity are concerned with the defendant's actual preservation of his interests, the defence of self-help is directed towards the restoration of the defendant's legitimate interests in those situations where interference with such has already occurred. Therefore, rather than actually preventing a harmful event from occurring to him, the defendant is performing an action in order

to restore himself to the status quo ante. Since it is never justified for a person to act in a manner which amounts to *ragion fattasi*, the defence of self-help is virtually limited to those situations where help from the authorities is not available and where it is specifically allowed by law.

Article 438, for instance, states that:

> **438.** (1) *A person over whose tenement the branches of the neighbour's trees extend, may compel him to cut such branches, and may gather the fruits hanging from them.*
>
> (2) *Moreover, if the roots extend into his tenement, he may cut them off himself.*

In recent years there has been an amendment to the Civil Code which introduced another defence to liability under article 1033A stating that:

> **1033A.** *Notwithstanding the provisions of articles 1031, 1032 and 1033, any person who causes damages in the performance of a rescue or in the course of assisting another person whose life or personal safety is in clear danger, shall not be liable for any damage caused in the course of the rescue or of giving assistance to the person who he rescued or assisted or tried to rescue or assist, to that person's property or to third parties or third party property:*
>
> *Provided that, the person performing the rescue or granting the assistance above mentioned shall be liable for acts performed with malice or gross negligence.*

This defence is aimed at facilitating the Common Law good Samaritan principle based on the idea of Lord Denning that in law we do not have a legal duty to love our neighbour (*vide* the case of *Donoghue v. Stevenson*) but instead we have a duty not to harm our neighbour. In view of this particular formulation, in English law they never developed what in some Continental traditions is regarded as a legal duty to rescue people. In other words, in Continental law if someone is drowning and one is in a position to help them, the fact that they failed to do so is considered to be a breach of a legal duty to rescue people. In Common Law there is no such legal duty. There might be some jurisdiction where this has been introduced by way of statute, but in the sense of common law it has not. There was no such duty to rescue but instead they introduced the good Samaritan principle which, rather than created a duty to rescue others, instead creates an exemption from liability if you injure others or harm their property in the attempt to rescue people or save their lives. The idea is that the law does not create a duty, but if you do choose to do so, then in that situation the law will not hold you liable for any damage caused to the person or their property, or the property of others, in the attempt to save their lives.

Another case is mentioned in article 355W of the Criminal Code.

Ex Turpi Causo Non Oritur Actio

A special case of voluntary assumption of risk dealing with the situation where the defendant causes damage to the plaintiff whilst both are engaged in the performance of a criminal activity. The illegality has to be connected to the tort in question. Normally this principle is invoked to justify the fact that if a party has acted with an unlawful or immoral *causa* then he or she cannot sue the other party for breach of contract. In other words, the law does not exist to support and assist people who are responsible for fraud, for example, in relation to contracts. In the Civil Code, in relation to *causa*, article 991 states:

> **991.** (1) *Where the consideration for which a thing has been promised is unlawful only in regard to the obligee, any thing which may have been given for the performance of the contract, may be recovered.*
>
> (2) *If the consideration is unlawful in regard to both contracting parties neither of them, unless he is a minor, may recover the thing which he may have given to the other party, saving the provision of article 1716.*

If both parties are acting with the intention to break the law or have entered into a contract that goes against public policy, the law will not give them any right to recover by virtue of the whole contract being declared null. Say both parties were involved in some sort of corrupt deal, in that case, neither the defendant nor the plaintiff can sue the other for damages which they suffered in tort.

Contractual Exclusion or Reduction of Liability

That situation where the plaintiff would have already waived or restricted his rights for compensation prior to the actual occurrence of the act in question. By means of a contract, plaintiff would have waived or restricted his rights to compensation. If there is a sign that states that one parks at their own risk one cannot hold its owners liable for third parties entering into the car park and damaging one's vehicle as it is assumed that the sign was read and that the condition was agreed to. The plaintiff would be assumed that have entered into agreement with the owner by virtue of having parked and to have voluntarily waived ones right to compensation.

The main distinction between the defence of *volenti non fit injuria* and the present is that in the former, the victim of the damage would be either agreeing to a concrete event (consent) or agreeing to undertake a risk which is foreseen (voluntary assumption of risk) whilst in the latter, the exclusion of liability for damage which is deliberately occasioned would include acts which go beyond that agreed between the parties (Example: Parking at your own risk). There is no need for a specific agreement or a specific kind of harm in mind. When one knows that parking is at one's own risk, anything which happens to the car is covered.

Authority Conferred by Law

This defence is most commonly applicable in the sphere of public law, such as where a police officer deprives a person of his liberty by placing him under arrest. One cannot sue a policeman for taking away one's freedom if he is doing so by virtue of a legally granted power or authority.

Protection of Public Interest

This article specifically provides for a defence in the situation where legally relevant damage is caused by information which is disseminated in the media in cases where such damage was caused 'in the necessary protection of values fundamental to a democratic society'. This relates to the law of libel that in a situation where we have harmed caused to a person by the disclosure of facts that injured one's good name but that it is in the public interest for these facts to be known, then one cannot sue for damages in tort.

Limitation of Action – Prescription

Extinctive prescription can be raised as a defence.

Conclusion

Maltese legislative intervention in this field is very limited and often reference has to be made to several different sources which include criminal law and jurisprudence. Where the defences raised are those of self-defence, necessity and self-help, the Courts usually refer to Civilian doctrine. Where the defence concerns consent or conduct of the person suffering the damage, such as volenti non fit injuria and contributory negligence, it is the Common law which is generally referred to. Maltese civil law, even though originally based on Civilian law, has allowed the introduction of Common law into the domain of tort law.

Damages

We have already referred to articles 1030-1033 and if we consider articles 1031 and 1033 each creates a clear responsibility on the tortfeasor to compensate the victim for the damage caused, with the former being drafted exactly like its French counterpart. Clearly, they authorise the courts to compensate for any kind of damage. In principle, under French law, all damage must be compensated for, so French courts do not distinguish between pure loss of profit, and loss of profit coming from harm to the person. The French courts also do not distinguish between moral damage and patrimonial damage, such that everything must be compensated for. They do compensate for all damage, but at the same time the amounts in damages are far less than those of the American courts. In the United States one can still expect to find a civil jury and one of the things which they would decide is this question of damages. Secondly, in France, judges generally see their task as that of reaching a kind of solution by which all the parties walk away from the tort case with the feeling that justice has been done and that no one party has been advantaged at the expense of another. The French judges discourage litigation which is purely aimed at making the other party suffer, introducing the concept of *abus de droits*, whilst they seek to restore the social fabric which would have been disturbed by the tortious event. Thus, they calibrate damages in such a way that victims are not paid a hug amount unless it can be justified. In reality, in France, the principle prevails that tort damages are purely

compensatory, not deterrent, or punitive in nature. This holds true in Malta, too, where the aim is simply to compensate for damage caused. In the US the idea holds that litigation is a zero-sum game where one party wins and the other loses. These differences in legal culture must be kept in mind to interpret our provisions on tort law.

If the Maltese system of tort had been purely Continental, following the French system, there would be no need for provisions on damages other than articles 1030-1033, but in Malta the Civil Code was drafted in the context of English rule. There are different cases of tort liability, without there being any general clause for liability for fault. Secondly, according to the Common Law approach, certain kinds of damages were traditionally not compensated for in a tort action. Traditionally, the common law courts would not compensate for pure economic loss (i.e., simple loss of profit with no damage to person or property). They did not compensate for harm to one's feelings either. In France moral damages are considered to be those damages which compensate for harm to one's emotional pain and suffering, thus there is no accompanying harm to one's person or property.

It is questionable whether article 1045 is actually needed and what would happen to our system for damages under tort law if it were to not exist. We would be left with article 1031 which states that damage caused through tort should be compensated, as found under French law, and also article 1033 which deals with the special situation where damage is caused in breach of a duty imposed by law. the impact of that would be that we would be looking at the latter article which states that in that specific instance not only does it not matter whether the person acted with or without the animus nocendi, however even if any damage whatsoever is caused, then that damage must be compensated for. Thus removing all possible doubts that our courts are authorised under these articles to compensate for any damage in case the conduct constitutes a breach of a duty imposed by law.

In reality we do have article 1045 and must consider whether our courts' ability to compensate for any damage has been impacted negatively by it. Article 1045 is formulated in a manner which refers back to articles 1031 and 1033, as it begins by saying *"the damage which is to be made good by the person responsible in accordance with the foregoing provisions"*. It goes on to categorise compensable damage. The main question which arises is how we are to treat these categories of compensable damage listed in article 1045 in relation to the power of the court to compensate for any damage under article 1033. When it is said that the court may compensate for any damage, must any damage by understood as corresponding to the damage specifically listed in those categories and no other? Or should be consider the categories of compensable damage listed in article 1045 as simply ways of classifying the compensable damage but not exhaustive heads of compensable damage which are limiting the court's ability to compensate other kinds of damage not specified therein. This issue goes to the heart of how our system of tort law functions. In common law there is a completely different philosophy then there is in civil law systems. In the former, the main principle governing this area is the principle that one does not have a right unless there is a remedy which gives one that right. common law is very practical and focuses on enforceability, with the idea being that remedies are not to be thought up by the court but must be found in the law or established

through leading judgements which constitute a precedent. In common law systems, therefore, the basic principle is that *ubi rimedium ibi ius* (only where there is a remedy is there a right).

If we consider article 1045 as being focused on the enforcement of one's right to compensation as given by article 1031-1033, then the conclusion would be that in as much as article 1045 gives one the remedy by specifying the heads of damage, if the harm does not fall within the recognised heads of damage one cannot obtain compensation: one has no remedy, therefore one has no right.

The Civil Law approach is more philosophical and emphasises human dignity more. In Civil Law, if one has a right it is up to the court to provide a remedy. There is no objection to the fact that one does not have a specific named remedy available rendering the right unenforceable. In Civil Law systems it becomes the duty of the court to find and create an appropriate remedy. In Malta, with respect to breaches of human rights, we follow this approach, although the provisions of human rights law have been drafted in a common law manner. With respect to a remedy under private law, on the other hand, the court are expected to reason as if they were common law courts, that is the approach has been that articles 1031 and 1033 are to be forgotten for the purposes of damages, and that the heads of damages under article 1045 should be considered only. Therefore, if it does not fall under one then the damage is not compensable. This is how the court have tackled moral damages and how they are non-compensable. The COA decision in ***Butler v. Heard*** referred to an English textbook for the purposes of calculating damages and did not refer to an Italian or French work of doctrine.

As we have a mixed system, it will always be questioned as to which approach, we shall adopt. When it comes to the legislator we must distinguish between the original draft of the Civil Code and the Civil Code as it was amended after it was translated into English and Maltese in the 1940s. If we llok at the Code as it was in Sir Adrian Dingli's time, with respect to damages it seems quite clear that Dingli was more or less accepting that the interpretation of article 1045, as it existed in his formulation, would be in such a manner as to exclude the possibility of compensating for moral damages, but that nevertheless, by keeping this kind of dual system Dingli intended to leave open the possibility that a court would look at the provisions of article 1031 and 1033 and in a particular situation state that is empowered to compensate for any damage, allowing it to bypass article 1045 and compensate for foreign damage. Dr Claude Micallef Grimaud dealt with this in his thesis. When there is a human rights violation, the court is empowered to create any remedy. Very often, this includes moral damages. However, even here, Judge Giovanni Bonello states it took the courts decades to begin doing so. It took time, even for the legal culture to change, for this to be possible. A civil lawyer would not use the expression moral damages as they suggest that there are some damages which are compensable and some which are not whereas a Civil lawyer would state that it is compensation for moral damage, but the damage itself makes no difference. It is not the damages which are themselves moral, but it is the harm caused which is moral. Therefore, under Civil Law we consider compensating for moral damage, not moral damages.

Article 1045 reads as follows:

> **1045.** (1) *The damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused:*
>
> *Provided that in the case of damages arising from a criminal offence, other than an involuntary offence, and only in the case of crimes affecting the dignity of persons under Title VII of Part II of Book First of the Criminal Code and of wilful crimes against the person subject to a punishment of imprisonment of at least three years under Title VIII of Part II of Book First of the said Code, up to a maximum limit of ten thousand euro (€10,000) or up to such maximum limit as the Minister may by regulations establish both with regard to the maximum amount and about the method of computation depending on the case, the damage to be made good shall also include any moral harm and, or psychological harm caused to the claimant.*
>
> (2) *The sum to be awarded in respect of such incapacity shall be assessed by the court, having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.*

The categories of compensable damage have always been divided by the courts into the following: first, *damnum emergens* (the actual harm emerging from the incident); second, *lucrum cessans* (loss of profit). The latter concerns loss of future earnings. By contrast, the first three headings of compensable damages listed under article 1045 are considered *damnum emergens.*

With respect to actual damages, in ***Busuttil v. Muscat*** the first court produced a decision which was subsequently overruled. Here, a woman went to a clinic for treatment because she had some kind of varicose veins which were disfiguring her face. This clinic had a new laser treatment which had the potential of actually restoring her appearance. The doctor who was trained to apply this equipment was away, so it was administered by a nurse who did not know when to stop pressing the machine and kept going beyond the point where she removed the veins, also removing the pigmentation of her face in the areas subjected to this treatment. The result in practice was that she remained with white blotches where the veins once were. The issue before the court was whether the woman had suffered any actual loss. The lawyer for

the defendant stated that she had a problem with her face before and continues to have one now, therefore claiming that she had not suffered any actual loss at all. He argued that this was not an action for loss in tort and was able to argue quite persuasively that she had not suffered any actual harm to her appearance as she could conceal the damage easily. The judge had to decide whether an actual loss had occurred or not and to conclude on this point relied upon the European Charter of Fundamental Rights. This Charter is one which Malta has signed and ratified but, as a dualist State, the fact that the treaty was signed does not make it immediately operative in Maltese national law. The judge held that this Treaty provided protection of the individual's psychophysical integrity, and stated that the woman has suffered an attack on her psychophysical integrity and as a result the judge reasoned that the words "actual loss" need to be understood also in an expansive and holistic manner such that such harm constitutes a loss which is actual because it takes place at a particular moment in time, therefore forming part of the *damnum emergens*, i.e., the actual harm which must therefore be compensated for.

The way in which the judge managed to apply this Charter in the context of a private law action was based on Maltese law with the text of the Charter forming part of the local Constitutional *corpus*, thus allowing the judge to offer dual protection. The values underlying human rights as understood in Europe have to be part of the Constitution which should be read and interpreted in the same way that a normal Statute would be interpreted. The interpretive position from which the Constitution is best understood is one that considers the ECHR part of it, and therefore considers the values which lie at the basis for the European Convention. As to how these provisions can be brought to bear on private law, the judge argued then that as a judge in a private law case, he is subject to a duty to interpret also private law, and in doing so, he must also interpret the Civil Code from a standpoint which is compatible with the Constitution. In other words, if the judge has a choice between an interpretation of the Civil Code which leads to a violation of human rights and another interpretation which is compatible, the judge should adopt the latter. The judge ultimately concluded that in this particular case that all things were equal in the sense that he had two possible ways of interpreting the words "actual loss" and one such way would be as harm to property or any harm which results immediately from the incident which constitutes a tort which impacts not only on the property of the victim, but also which impacts upon the person and also any harm which leads to a reduction in the psychophysical integrity of the victim. The idea being that where we find a reduction in psychophysical integrity, we are not considering moral damages.

Moral damages are therefore harm to one's emotions, whilst a reduction in psychophysical integrity we mean that the wholeness of her person was damages as a result of the incident which left her with permanent facial scars. Whereas before she had hope of removing them this was no longer possible and she has irrevocably lost part of what made her a whole person, i.e., the union of psyche and body. It was the union of these two therefore which was harmed. This is the reasoning by which the judge quantified 5,000LM as compensation for the harm suffered.

If one follows this argument there are basically two stages thereto: first, to say when we are talking about the Constitution we are considering both the text and values of

both it and the ECHR; second, when it comes to applying this civil law, the second jump is to say that the private law judge has a duty, all things being equal, to interpret private law compatibly with the Constitution such that if a constitutionally compatible manner is available it should be preferred. This second jump follows the lead of German and Italian courts with the principle of drittwirkung, an approach to interpreting private law where it is insisted that private law must be understood compatibly with the constitution. This is indirect drittwirkung which is all about interpreting private law in line with the constitution. Direct drittwirkung, meanwhile means that even in the absence of private law provisions, decisions must be taken in line with the constitution. In the common law world this is unaccepted. In Malta the constitutional compatibility of private law is still debated.

In a sense, one can see how the decision in ***Busuttil v. Muscat*** also relied on the translation of the Civil Code into English to create a new interpretation of actual loss to create a constitutionally compatible interpretation of the article by protecting loss of psychophysical integrity.

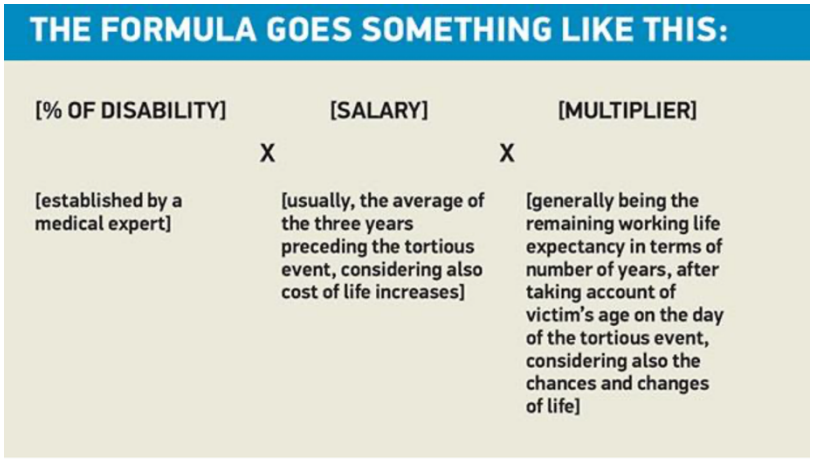
With respect to expenses, we have a very broad understanding thereof. These would include medical expenses but could also include any costs which the victim would have been compelled to incur. The loss of wages or other earnings is in fact actual loss, not *lucrum cessans.* The question becomes whether we are concerning an actual loss, not of future losses. An actual loss of wages or other earnings does not require permanent incapacity for one to be given damages.

In the case of ***Shaw v. Aquilina***, a fire broke out in a tenement which was above a pharmacy, and it spread thereto, having been sparked off by the person in the flat overloading the circuit. There were a lot of questions as to how this actually happened, in the sense that whether there was responsibility or not for the tenement owner. However, there was no doubt that the pharmacy had to be closed to repair structural damage which was suffered. When there was an action against the person responsible for causing the fire, the damages requested included the damages for keeping the pharmacy closed for five months, which were basically therefore the loss of profit that would have been made. Apart from the loss of profit, there was also the fact that the pharmacy owners continued to pay employees their salaries for these five months. In this case, what the court did was to compensate the loss of actual wages and also the loss of other earnings, the actual loss of profit. Here, it was not so much the wages which needed to be received by the victim, as in this case it the victim was the pharmacy owners. Instead, what they needed to receive was the loss of wages paid. Nevertheless, the court considered this as a loss of wages. The court calculated the actual loss of profit by looking at the average earnings over a period and calculating how much profit normally would be made in this period. Here we find a category of actual loss with respect to loss of income and actual wages. This case created a dividing line, that is, until the date of the judgement there were actual loss of profits and actual loss of wages. These did not result from a permanent disability of any kind (as is required for *lucrum cessans* damages). All that happened was that the pharmacy was damaged because of the fire and had to be closed, although no one was injured. The issue in this case was therefore resolved by considering the damages which occurred in this period which had a beginning and an end, which ended before the

judgement was delivered, and the damages for this period were considered as *damnum emergens.*

In ***Vella v. Cesareo***, as the result of the tortious conduct the victim ended up reliant on the use a wheelchair for the rest of his life. Until the case was decided, his parents, who lived on the top floor of a block of flats, had to purchase a ground floor flat. There was a difference in price of around 11,000LM which was reimbursed by the court because it was considered to be expenses which the latter may have been compelled to incur as a consequence of the damage. These expenses were incurred before the judgement was delivered and therefore fell under the heading of *damnum emergens.*

When it comes to *lucrum cessans* we are considering *"the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused"*. The Court typically asks medical doctors to produce a percentage to indicate the reduction in ability of the victim. This reduction in ability to make an income is then multiplied by the multiplier being the number of years for which the victim would have been expected to continue to work until his or her retirement. Whilst this is the basic approach, a lot of factors are taken into consideration. When we consider the loss of future earnings the court has to consider a date from which the future earnings loss is calculated. There must be a starting point for this number of years during which one is to lose his income.



Normally, the date of judgement is considered the watershed. *Lucrum cessans* is actually a different criterion from *damnum emergens.* There have been cases where people have kept their jobs but have nevertheless suffered damage to their income earning ability. *Vide* the case of ***Gatt v. Enemalta.*** When it comes to permanent incapacity and therefore to *lucrum cessans* damages the court always keep in mind the wording of article 1045(2). The idea here is that the court is being given a discretionary power which is quite strong when it comes to assessing the sum to be awarded in respect of such incapacity. This opens a whole range of questions which relate to what an incapacity is.

Incapacity

We know an incapacity must be permanent, but what is an incapacity per se? Is it an incapacity when someone is clinically depressed following a physical injury which led to the loss of a hand, for example, and the person is unlikely to ever work again? At that point normally our courts would consider the loss of the hand together with the clinical depression to constitute a permanent incapacity of a certain degree of gravity and therefore, in that situation, the courts would likely create a percentage of permanent incapacity which would be greater than if we were considering a 20 year old who would have retrained himself in spite of the loss of a hand.

Permanence

Another important question emerges naturally from the previous one, that being what is *permanent* disability? Permanent disability is often understood as the disability to earn an income. It is not identical with a medical concept and the courts have insisted that even though they will gather medical evidence they are free to disagree with the doctor as to the degree of disability which has been suffered. What this also means therefore is that not only is this not a purely medical criterion and therefore doctors cannot have the last word, it also means that the court might conclude that one person's permanent disability is greater or lesser than another's who has suffered the exact same physical injury. The courts therefore consider the specific work that the person used to perform, their educational background, the kind of wages that the work brought as opposed to the sort of wages of the work which he can now perform, etc. Having said that, our courts nevertheless have also compensated people for the loss of their ability to perform certain kinds of work in the abstract, even if there is no evidence to show that they ever performed or shown an interest in performing that kind of work. This concept of permanent incapacity is understood in ways which are difficult to nail down. At the end of the day, if one has suffered certain kinds of psychological harm, one's ability to work has been diminished too.

When we consider *lucrum cessans* damages and damages for actual loss of wages or loss of income are similar. However, when we consider the former, we must always ask that for which these damages are being given. The law speaks of a permanent disability, and it seems very clear that in the original drafting of the law it was believed that a permanent disability meant a physical injury to the tort victim or victims, such as would arise if the tort victim lost a limb. The meaning of what is a permanent disability has changed since Sir Dingli introduced the concept into his Ordinance, and now the courts understand by it something which must have some kind of basis in some kind of physical injury, but which nevertheless translates into a reduction of income earning capacity of the victim. In order to have *lucrum cessans* damages there is no longer the need to show a loss of earnings, but what counts is a loss of income earning potential. When it comes to the physical disability the understanding go what is a physical disability has broadened over time. The courts began to ask what if the victim, for example, lost the use of a hand and was working in a manual labourer's work, but following the injury he was promoted to a clerical job for which he does not need his left hand. Does this mean he should not be considered as having suffered a loss worthy of compensation? the courts began to say that yes, he has suffered a loss to his ability to work, not necessarily to his particular work but to his ability to work in the abstract by diminishing his options. Even in cases where victims after the accident begin to earn a greater income, if it can be shown that his ability to make an income

in the abstract has been reduced then one could still claim damages for *lucrum cessans*, depending on the extent to which his ability to earn an income has been reduced.

How can this be concluded? And what are the causes that can diminish one's income earning ability? This is where the issue of various kinds of harm previously considered as moral damage came into the picture. Consider the ***Antonella Tonna*** case, where she suffered an aesthetic harm to her face following a traffic accident (suggesting harm caused through negligence, but that may also include the intentional cause of harm). Here, she argued successfully that she was a law student and was training to be a lawyer, and that to be a lawyer confidence in one's appearance was part of one's ability to work. The court held that her ability to make an income as a lawyer had been reduced as a result of the injury, she had sustained which had resulted in a minor disfigurement of her face. This was one of the first cases where the court began to expand the concept of what constitutes permanent disability.

In the case of *Gatt v. Enemalta*, plaintiff had been promoted and earned more income after he sustained the injury but nevertheless his ability to work in the abstract had been reduced, leading the court to move on from this idea that a permanent physical disability resulting in a reduced ability to perform the particular work should be considered in the abstract.

In the case of ***Sultana***, he was proved to have suffered greater psychological harm than physical harm as a result of the injury he sustained. In this case the Court concluded that the psychological harm consisted of litigation neurosis. Following the injury, he actively sought to portray himself as a victim in order to receive greater compensation by way of damages. Evidence was brought that he had really altered his pattern of life in order to make the injury he had sustained appear greater than it had been. As a result, he had basically reduced his ability to work himself because after years of taking a limited view to what he could do and not do, he actually established a record where he fit into the permanently disabled category. The result was that the court concluded that he would not have suffered from this compensation neurosis had he not been involved in this traffic incident. Therefore, the cause of him developing this condition which led him to exaggerate the symptoms of the physical harm he had suffered and led to a reduction in his ability to work owed to the conduct of the tortfeasor and the court therefore quantified damage on this basis. This is not moral damages, but the result of a permanent physical harm which was actually far less than the psychological harm built upon it. In the case of *Sultana* therefore there was some kind of basis physical harm.

However, there have been other cases where our courts have held that there was some kind of psychological damage, even in the absence of physical harm, but these are very few. In reality, the whole issue of psychological damage is one which deserves to be focused on partly because in practice it is slightly different from what one might expect. For a start, it is important to point out that the first cases in Malta which started to compensate damages for psychological damage were all based on the assumption that psychological and moral damage are completely distinct from one another. The dividing line was drawn in relation to medical criteria, that is, the

distinction between the field of psychiatry and psychology. On one level, psychiatrists are more easily captured by a medical discourse than psychologists are. In a sense, it can be said that psychologists are concerned with one's psyche whilst psychiatrists are ultimately concerned with one's body, which can be altered through medication. Since psychological harm developed in the context where courts have insisted since Butler v. Heard that moral harm is not compensable, psychological harm developed as a form of permanent disability, having to be construed as such in order to qualify for compensation under *lucrum cessans.*

In *Busuttil v. Muscat*, where the plaintiff went for laser treatment at Muscat's clinic which was wrongly administered by a nurse and not a doctor who had limited experience with the machine and caused permanent disfigurement to the plaintiff's skin. The first court ultimately awarded a sum of Lm5,000 to represent the loss of psycho-physical integrity which the victim had suffered. The argument was that it was true that her ability to earn an income had not been reduced as a result of the injury because, unlike the case of Antonella Tonna, before the injury her face was disfigured, and it remained as such afterwards. Her ability to earn an income could therefore not be shown to have been reduced. The court therefore had no option but to award moral damages, on the basis that they reflected compensation for the psycho-physical integrity which she enjoyed before the injury. In other words, it was no longer possible for her to undertake another operation to conceal this new injury, which was the case before. In this case, she once had the possibility of undergoing treatment to restore her face, whilst after the injury this was no longer the case. Therefore, the court awarded damages to reflect this and in order to interpret our Code in such a way as to allow for compensation of this loss of integrity, what it was to consider the phrase actual loss under Article 1045 and awarded under *damnum emergens* damages for the actual loss of psycho-physical integrity. When we consider this loss of psycho-physical integrity, the expression was drawn from the Nice Charter. The Judge conceded that this document did not apply to Malta internally, as a dualist State, however it had to be considered as part of our fundamental human rights *acquis*. This *acquis*, including the ECHR, has to be understood as part of our Constitution broadly speaking, meaning even if one does not apply the Nice Charter in Malta, the values underlying it have to be understood as helping to explain the values held in terms of our Constitution. The Judge held that all three documents and the values contained therein shall be used to interpret one another. When the Civil Code mentions actual loss, that actual loss included the loss psycho-physical integrity.

This was overturned on Appeal with the Court stating that we do not compensate for moral damage and the matter ended there, also holding that the Charter cannot be applied in relation to the Civil Code. However, later, similar arguments were raised in Jane Agius v. Attorney General and were accepted by the Constitutional Court. The Court of Appeal held that there was no need to award moral damages as she could be compensated for psychological harm. What it did was it applied the multiplier method assuming that the victim has suffered a loss to her ability to earn an income in the abstract as the result of the mainly psychological harm suffered, which will lead us to the exact same conclusion as the first course without shifting the basis on which damages are awarded in Malta. The Court awarded the same amount but not for

damnum emergens, but for *lucrum cessans.* Therefore, the Court ultimately concluded that psychological damages were due.

When we consider our jurisprudence, we find that these psychological damages where generally understood in psychiatry terms, in spite of the use of the phrase "psychological damages". In order to fit these psychological damages within the wording of Article 1045, our courts have generally insisted that the psychological damage must have some physical basis. For example, one must be able to point towards medication being taken, that a psychiatrist has in fact prescribed this medication, and it must be described in some kind of medical terms. Essentially, psychological damages are not really psychological but psychiatry. Nevertheless, there is the possibility that psychological damages could be understood as being another spin on moral damages. Although traditionally they were described as totally distinct from moral damage, nevertheless, the possibility that they could be described or used instead of moral damage to cover the same kind of harm exists, because this is what the court did in *Busuttil v. Muscat*, arguing that the psychological damage could be identified in the same kind of situation where the injury was more to do with the emotional suffering caused than to physical harm.

In 2018 the Civil Code was amended, and this amendment was presented in terms of introducing the possibility of compensating moral damage in our legal system for tort cases. In fact, a proviso to Article 1045 was introduced:

> *Provided that in the case of damages arising from a criminal offence, other than an involuntary offence, and only in the case of crimes affecting the dignity of persons under Title VII of Part II of Book First of the Criminal Code and of wilful crimes against the person subject to a punishment of imprisonment of at least three years under Title VIII of Part II of Book First of the said Code, up to a maximum limit of ten thousand euro (€10,000) or up to such maximum limit as the Minister may by regulations establish both with regard to the maximum amount and about the method of computation depending on the case, the damage to be made good shall also include any moral harm and, or psychological harm caused to the claimant.*

Note the requirement of *dolus.* The use of the word *"only"* has caused incredible trouble for our courts. Only in these specific cases, up to a maximum limit of €10,000, the damage to be made good shall only include any moral harm or any psychological harm suffered. It is clear that moral and psychological harm are being conflated, treated as part of the same phenomenon. This proviso seems to have been written by someone who was unaware of these developments in jurisprudence because whilst psycological damage was considered as primarily patrimonial harm, i.e., harm to the ability to earn an income, i.e., *lucrum cessans*, moral harm was considered as an unofficial third category of harm. Psychological harm has now been declassified from *lucrum cessans* to being considered equivalent to moral damage. Furthermore, psychological harm has been considered as moral damages, and has been limited to

these specific kinds of criminal offences. What this means is that the loophole which the courts have developed through which they can compensate for the psychological ramifications of permanent bodily harm through *lucrum cessans* was being closed-off. However, jurisprudence no longer accepts this formulation as colonising the field of psychological damage, returning to considering psychological damage as part of *lucrum cessans*, which is compatible with previous jurisprudence.

Moral and psychological damages can appear to be interchangeable but are in fact different concepts in their own right. In spite of this, there remains a disharmony between statute and jurisprudence with the latter separating them on the grounds that moral damage is harm is one's feelings whereas psychological damage is harm to one's psycho-physical integrity which reduces one's ability to make an income in the future. Looked at from this perspective, psychological damage can be inserted in the prevailing patrimonial framework of our law, as it becomes harm which translates into an inability to make an income, and it is for this reason that psychological harm is traditionally compensable. Moral damage, as such, does not necessarily translate into a reduction in one's income earning capacity, whether in the abstract or to earn one's specific income. The category of psychological damage was developed by the courts in order precisely to find a way to compensate for harm which appeared to effect one's morale, but only in as much as it reduces one's ability to earn an income. Therefore, psychological was initially developed as a patrimonial form of damage distinct from one moral damage, a non-patrimonial form of damage.

The effort to insert psychological damage within this patrimonial framework meant that the courts had to try and fit it within the wording of Article 1045. This provision considers compensation for *lucrum cessans* damages in case where the harm caused has created a permanent disability. It is true that this is a permanent disability to earn an income in the future and that the word disability is understood as a reduction in one's capacity to earn an income in the future, but it still must be permanent. The courts therefore have been trying to theorise psychological damage in such a way that a link would be created to the permanent inability to earn an income. The courts have tended to find that psychological damage exists only when some kind of medically treatable harm has been caused to the victim, in other words the courts have tended to treat purely psychological harm as not being sufficiently serious to warrant the compensation of moral damages on that basis. Therefore, as a result, they have tended only to compensate psychological damage when there is some kind of physical injury or prescribed medication and have paid attention to reports mainly by psychiatrists. There are instances where psychologists refuse to affix a percentage of permanent disability. From the standpoint of the court this was not necessarily such a problem because the court would have in any case only taken the medical report as the starting point for ascertaining the degree of permanent disability. The courts have repeatedly said that the physicians cannot have a final say over the degree of permanent disability. The point being that a physician can only testify as to how a permanent disability has impacted on the victim's quality of life but cannot say how it has impacted his ability to earn an income in the future. This is why psychologists tend to feel too uncomfortable to provide a percentage, whilst psychiatrists are capable of doing so with respect to quality of life but not the ability to work.

The second twist is the amendment to Article 1045 of the Civil Code which was introduced as a proviso in 2018. This amendment linked the compensability of moral damage to the existence of a criminal offence of a certain kind, i.e., *"crimes affecting the dignity of persons under Title VII of Part II of Book First of the Criminal Code and of wilful crimes against the person subject to a punishment of imprisonment of at least three years under Title VIII of Part II of Book First of the said Code".* With respect to psychological damage, the proviso indicates that in the case of these kinds of damages, up to a maximum limit of €10,000, the damages to be made good shall also include moral harm and psychological harm. Therefore, the two are equated. Whilst jurisprudence had been heading in the direction of configuring psychological harm as a patrimonial damage classified in the *lucrum cessans* category, legislation equates the two and held that even if they were different both could only be compensable *"only"* in these specific situations. However, recent jurisprudence has gone beyond this hurdle and has reinstated the idea that psychological damage can be compensable, i.e., as a species of *lucrum cessans.* Now, psychological damage can either be understood as a counterpart to moral damage, following the approach taken by jurisprudence both before and after the 2018 amendments, and that psychological damage can be considered as being compensable as a kind of moral damage only in those specific situations addressed in the proviso to Article 1045 introduced in 2014.
The third twist to this field is represented most clearly by ***Busuttil v. Muscat*** where the logic of the defendant's response, i.e., that she was disfigured before and remains disfigured after, is watertight, as callous as it may be. Thus, the judge was forced to innovate, in this case creating psycho-physical integrity and the constitutionality of the European Charter for the purposes of making her whole for her "actual loss". In the beginning, Roman Law catered for damnum emergens, comprising within it damnum reale (harm to property), actual loss of wages or other income, and actual expenses. This was combined with *lucrum cessans.* Owing to the reinterpretation of this case, the Court sought to make an interpretation compatible with the constitution.

If ordinary law can sometimes provide an ordinary remedy and sometimes cannot, when it cannot one must resort to an extraordinary remedy, i.e., the constitutional framework. When ordinary law provides one with a remedy, the interpretation and application of ordinary law is serving to protect fundamental human rights. There are cases where this does happen and cases where this does not. If we grant that there are occasions when ordinary law can be interpreted in such a way as to provide a remedy for a breach of fundamental human rights and there are occasions when it cannot, we only need to accept one other thing: in *Busuttil v. Muscat* the court assumed that different interpretations are possible of ordinary law. in other words, much of the work of the judge consists in deciding how he will interpret ordinary law. The idea that the law was subject to different kinds of interpretation was considered suspect in post-revolutionary France as it would run counter to legal certainty and the principle of democracy. However, this too runs counter to centuries of legal development. That judges interpret the law is an empirical fact which should not be the subject of controversy.

Once one accepts this fact, one comes to the possibility that there are situations where the law can be subjected to varying interpretations. This is usually where Courts of Appeal differed from the courts of first instance. If the possibility that courts can derive

differing interpretations of the same provision of law, it could be the case that one interpretation protects the values of fundamental human rights whilst another does not. All things being equal, Continental courts say that they should interpret the law in the manner that corresponds with constitutional values, i.e., indirect drittwerkung. The first court in Busuttil essentially took this approach by interpreting actual loss to include harm to the psycho-physical integrity of the victim. The judge imported the term psycho-physical integrity in the way in which the victim is understood, i.e., not just as a human being but as a union of psyche and body. The first court therefore produced this interpretation based on an interpretation of private law compatible with human rights, whilst the Court of Appeal reversed the decision in as much as its logic was concerned, replacing the concept of harm to psycho-physical integrity with the concept of psychological damage. The court held that this woman suffered a physical injury that does not translate immediately to an actual loss of income, but also held that the loss of confidence did impact her ability to make an income negatively, does being in conformity with the dominant patrimonial system of quantifying damages.

The Asbestosis cases of 2011 were a series of cases featuring the Court of Appeals filed by dockyard employees, many of whom developed a form of lung cancer and generally died of it within a few months of it becoming manifest. Therefore, many of these cases were filed by their heirs. These diseases were the result of inhaling asbestos fibres in the course of their employment. The Court of Appeal gave them expanded *lucrum cessans* damages but refused on principle to grant any moral damages, taking the approach that at the end of the day there was no need to file a human rights case, as an ordinary remedy was available, i.e., patrimonial damage through an expanded interpretation of *lucrum cessans.* the ECtHR disagreed with the logic of the Maltese courts that they do not compensate for moral damages but compensate for all forms of damage but interpreting *lucrum cessans* widely. The ECtHR held that since they do not compensate for moral damages there is no ordinary remedy for instances of breaches of human rights.

Having considered the compensation of moral damage from the standpoint of the system for compensating *lucrum cessans* damages and also psychological damage as being in certain situations an alternative to compensating moral damage, ultimately it can be concluded that the system for compensating psychological damage and the concept of psychological damage itself is somewhat dualistic, with an approach which considers psychological damage as being a form of patrimonial damage on the one hand, and an approach which considers it as being a substitute for moral damage on the other. if one considers jurisprudence the dominant trend is to consider it as being a form of patrimonial damage, being normally associated with *lucrum cessans*, requiring the proof of some sort of permanent psychological disability for the damage to be compensated. The other trend, to regard psychological damage as a counterpart to moral damage, i.e., a legally acceptable way to consider compensating for moral damage, is found in legislation, specifically in the amendment to Article 1045 which places together moral and psychological damage, and stipulates that both can only be compensated in the presence of a voluntary criminal offence in relation to the particular category of crimes, mainly those which affect the dignity of the person, which are mentioned therein.

Thus far, the two understandings of psychological damage co-exist simultaneously, one enshrined in legislation and the other the result of the way in which the courts have interpreted *lucrum cessans.* in reality, neither of these concepts actually deal with psychological damage, as the concept thereof contained in jurisprudence reflects what is better termed as psychiatric damage, requiring the involving of a medical doctor. Whereas the concept of psychological damage contained in statute is simply harm to one's emotions without the need for harm to one's psyche. Arguably, the Maltese system of damages in tort, does not in reality compensate for psychological damage.

In the case of damages from which death ensues, *vide* Article 1046 of the civil Code, which considers a situation where the victim of the delictual or quasi-delictual conduct dies. The way in which this Article is phrased stipulates that the court may in such situations assess the damages due to the heirs of the victim, using the same criteria as contained in Article 1045, and assuming that the permanent disability in such cases is equivalent to 100%. Article 1046 gives the court a wide discretion to award damages to the heirs of the victim, and therefore how this discretion has been traditionally exercised is that the court considers the expenses and damages suffered by the heirs (e.g., funereal and medical expenses) as *damnum emergens*, and, with respect to *lucrum cessans* the courts would apply the same multiplicate system transplanted into Maltese law as the result of the appeal decision in Butler v. Heard and they would use this system to assess the amount of wages which would have been earned by the victim had he or she remained alive, and had the injury not occurred, until retirement age. The approach of the courts was that they would therefore compensate this *lucrum cessans* damages to the heirs of the victim on the assumption that they do not multiply this amount by the percentage of permanent disability. This lump sum is not typically awarded to the victim in cases where he survives because it is said that he is receiving all at once a sum of money that he would otherwise have had to earn piecemeal over a number of years, if not decades, and therefore when one earns one's income piecemeal one cannot invest the total amount and earn interest thereon, therefore an advantage is gained when the victim survives by virtue of having been awarded the potential to invest one's sum. Therefore, there is typically a reduction of this lump sum to represent this fact. The amount by which the lump sum is reduced according to the amount of time taken by the case to reach its conclusion.

In cases where the victim dies, we once again have a situation where the heirs inherit the lump sum, and as such the lump sum is reduced to compensate for this fact. Secondly, another deduction is made, in the case where the victim dies, which is meant to reflect the personal consumption of the victim, with the idea being that the heir would not have inherited all of the victim's earnings, but those earnings after the sum of money which the *de cuius* would have used for his own purposes has been spent.

On what basis are damages awarded when the victim dies?
Since the law speaks of the heir, on what basis are they being given these damages? Is this because he steps into the personality of the victim? Is this simply an application of the law of succession? If that were the case, is this acceptable from the standpoint of tort law (it is a basic principle of tort law that the damages are personal)?

Say the victim were to die at a relatively young age and he was betrothed, with his own parents having died, by operation of the rules of intestate succession the heir is a distant uncle who had never met the victim and is given the right to receive this compensation whilst he personally would not have suffered any damage financially speaking. If one simply applies the law of succession and says the damage is due because the heir is simply the heir, we begin compensating people who have not suffered any damage. Another issue which appeared in the past is that according to the law of succession as it was then, the spouse could not be an heir in cases of intestate succession. Therefore, in cases where the wage-earner died, the wife could not inherit. Hence, on what basis could the court award damages to the surviving spouse? In this situation, the courts developed an approach through jurisprudence by which they effectively introduced the concept of dependency in the way Article 1046 is read.

The reasoning of the courts was that the surviving spouse who was very often in this scenario the spouse who remained at home, was financially dependent on the income brought by the working spouse, and as a result he or she had suffered a personal harm through the death of the income-earning spouse. Therefore, since the surviving spouse had suffered harm, he or she was entitled to compensation for that harm, in spite of the fact that Article 1046 speaks only of the heirs. The courts expanded this definition to include heirs and dependents of the victim.

This, however created another problem, namely that succession and dependency are competing criteria, with one having to prevail over the other where either the dependent receives the damages by virtue of this personal loss, or the heir by virtue of having succeeded to them by operation of the law of inheritance combined with the law of tort. The courts substituted the word *dependent* with the word *heir*, and in so doing this raised the issue of the heirs who had not suffered a loss, in other words the heirs for whom it was simply a windfall. The courts introduced another deduction applicable to the heirs, in order to reflect the degree of lack of dependency. If the heir was not financially dependent on the victim and could not normally expect to be maintained by him, the courts made a further deduction of 50% to reflect this fact. This deduction therefore suggests or strongly indicates that the courts consider financial dependency to be the real basis on which relatives of the victim are compensated in cases where the victim of the tort dies. Although the law speaks of the word *heirs*, nevertheless jurisprudence has developed in such a way that those who are not heirs but are financially dependent can receive full compensation, but those who are heirs but not financially dependent will have the sum reduced.

In the case of ***Turner v. Agius,*** the first court decided that defendant, who died as the result of the accident, was succeeded by her parents. She was still quite young when she passed in a traffic collision, with the court stating that the parents succeeded to her by virtue of the law of succession, therefore they inherit the same right of action which she would have had had she survived with permanent total disability. Therefore, the first court refused to make a deduction for personal consumption of the victim and refused to make a further deduction for lack of dependency, holding that ultimately the parents are the heirs and as such have the right to obtain compensation for the full

damages as if the disability were total. The Court of Appeal intervened and overruled the first court, holding that the basis of the system for compensation for damages when the victim dies is financial dependency, not succession. After the Appeal decision it became clear that the real basis for the system of compensation for tort damages in cases where the victim dies is dependency, meaning the court may compensate someone who is financially or expects to depend financially on the victim, using the *lucrum cessans* category with a permanent disability of 100% on grounds of loss of financial support which the victim would have been expected to provide.

Nevertheless, there remains a question relating to cases where the heir is not financially dependent and would not expect to be as such, half the damages are deducted on the basis of not having suffered any loss. On what basis is the remaining 50% awarded? Here, one returns to the question of moral damage, that is, in order to explain why that remaining 50% is awarded one must resort to such a concept as moral damage, or perhaps punitive damage, and one must return to the reasoning of the first court in Turner which held that it needed to award damages which were higher in cases where the victim dies than in cases where the victim remains alive because otherwise the law would favour the defendant who negligently, or even intentionally, kills the victim of the tort, than the one who leaves him alive. At the end of the day this returns to a punitive understanding that tort law is not simply there to compensate for damages which the victim suffered. It seems that the only way to explain why the heir of the victim would receive 50% of the *lucrum cessans* damages after deducting a share for personal consumption, in cases where the heir of the victim has not suffered any loss by virtue of not being financially dependent, is that either because the victim ultimately was emotionally close to the heir and as a result the victim has suffered moral harm, or else because the law wants to ensure that those who negligently or intentionally kill others are subject to a strong sanction, and therefore this damage award must be understand as, in part, for punishing the wrongdoer

The main issue that was at stake in *Turner* was whether to adopt this interpretation founded on the words used by the legislation itself, or whether to adopt the interpretation which jurisprudence has developed over the years which has largely, but not completely, replaced the concept of inheritance with that of financial dependency. Financial dependency was introduced for two different reasons: first, to extend the range of people entitled to compensation beyond those who are heirs and who encompass those who are not heirs but are nevertheless financially dependent on the victim (the approach by which the surviving spouse was compensated for damages in cases where the husband or wife who was the sole income-earner could be compensated in cases where they were not also an earner); second, to make possible the deduction of up to 50% from the lump sum payment arrived at by applying the multiplier system to the future income which the court predicted was lost as the result of the debt of the victim, to reflect cases where the heir was not also financially dependent on the victim. In these cases, the courts were shifting the basis of the law of damages in cases where the victim of the tort dies, so that the real criterion was financial dependency. This was the opinion of the Appeal court in contrast to that of the court of first instance.

The Civil Code (Amendment) Act 2011, which was passed but never enforced, aimed to substitute Article 1046 of the Civil Code with another provision, to followed also by an Article 1046A. This was an attempt to substitute the concept of paying to the heirs of the deceased the *lucrum cessans* damages which the deceased would have been entitled to, with a form of compensation which would be more or less equivalent to the financial maintenance which they would normally had been expected to receive had the victim remained alive and been able to work. This Bill is clarifying the basis on which damages can be compensated to the *de cuius*, that is, it suggests that there should be no place for the concept that the *de cuius* inherits the right of action which the victim would have had had he remained alive with permanent total disability. This Bill stipulates that there are two bases on which damages can be awarded: one, financial dependency; two, when there is some kind of moral damage linked to close relatives of the deceased (however this does not include couples who had lived together for a long time without having formalised their relationship).

Therefore, when one interprets Article 1046 as it is, it is clear that even a 50% deduction for lack of dependency would not be justified in terms of the logic behind this Bill because if the lack of dependency is unaccompanied by any moral damage, then there is no basis on which one can justify the award of the 50% of the damages to the heir who was not financially dependent nor emotionally harmed by the debt of the victim. The only logical basis, therefore, would be that of punitive damage, with the idea being that the law frowns upon a situation where one can kill another and not be subject to any obligation to also pay damages as a result. The law does not appreciate the idea that depending on whether the person killed had others dependent on him or not the amount in damages will be higher or lower. Article 1046 makes clear that one cannot argue that the system of compensating tort damages in Malta completely excludes the possibility of compensating for moral damage. The Courts always insist that the basis for the payment of damages in the system is strictly compensatory and not punitive, therefore, since a punitive rationale is excluded in cases according to this pronouncement, and since the idea of compensating for financial damage where there is no dependency, then the only way we can justify this whilst keeping within the compensatory logic is by saying that the court compensates for moral damage in cases where the victim of the tort dies and the heirs of the victim were not, and could not expect to be, financially dependent thereon. This, in spite of the fact that the Court of Appeal decision in *Butler v. Heard* rejected the idea of compensating for moral damages.

In *Brincat v. Malta* the ECtHR gave access to moral damages on the ground that the Maltese State had failed to prevent the violation of a fundamental human right, in this case the right to life of the dockworkers, as the State had effective control over health and safety precautions at the dockyard. The State's failure to be proactive to protect human life was at the core of this case combined with the right to family life. The idea was that the inertia of the State which could have been prevented simply by applying certain procedures to limit the exposure of these workers to asbestos and constituted a breach of their fundamental human rights. This was opposed to the reasoning of the Maltese Court of Appeal which held that violation of health and safety standards is tackled by ordinary law which provides a remedy under Articles 1045 and 1046, and as such in cases of workplace injuries the courts generally find a breach of a specific

duty under the contract of employment on the part of the employer to provide a secure working environment, as opposed to the general duty not to harm others. The approach of the Court of Appeal held that a breach of this contractual duty will result in damage suffered by the employees. In order to assess this damage, the Court will refer to Articles 1045 and 1046 in spite of the fact that these provisions refer to damages arising from delictual or quasi-delictual actions. The Court stuck to its understanding that moral damages are not compensated for, but that the damages given are sufficient to cover any harm suffered by the victim. Ultimately, the system for compensating *lucrum cessans* damages is highly discretionary, with Article 1045(2) itself giving the court the power to calibrate the damage suffered to the victim. Since this system is so discretionary, the reasoning of the Court of Appeal is to apply them as broadly as possible in cases where the victim has suffered moral damages, meaning they would receive a larger sum than that which they would have received had no moral damages been suffered.

The Strasbourg Court rejected this reasoning, holding that a remedy for a human rights violation which does not compensate for the moral damages suffered could not be considered adequate. As a result, no ordinary remedy exists which can be relied upon by the State to prevent such a case from coming before the Constitutional Court. The State was obliged to give access to the extraordinary human rights remedy in any case of a tortious or contractual breach which could also be understood as a breach of fundamental human rights. In any case, as a result of this ruling, the court were deprived of this route of resting on the existence of the ordinary remedy.

Those cases of tort of breaches of contract which could also be understood as breaches of fundamental human rights are any cases where the State has caused damage to the individual. In Malta, courts have not accepted that private individuals can be found to have breached the fundamental human rights of other private persons. Essentially, the result of Brincat was the creation of an imbalance in the system for the compensation for a breach of contract which also constitutes a breach of fundamental human rights in that where the person being held culpable is the State one has access to a human rights remedy, whilst if the tortfeasor is a private person there is access to a constitutional remedy.

In the aftermath of *Brincat v. Malta* the Courts faced a situation where it seemed as though their efforts to ensure that human rights violations, where possible, should be dealt with by ordinary law, were actually having the opposite effect. It seems that their starting point was to try to ensure that cases like these were dealt with via the ordinary remedy mechanism, but insistence that the law does not compensate for moral damage brought about an intervention by the ECtHR that held that they must allow for access to a human rights remedy in any case where damages are sought, the defendant is the State, and the damage can be construed as a result of a human rights violation by the government or the State of Malta. As a result of *Brincat* the Court was faced with direct constitutionalisation of tort law and an imbalance in the system between tort cases against private persons, which could not result in compensation for moral damage or be the basis on which access to a human rights remedy could be allowed, and tort injuries inflecting by the State, which could give rise to both, provided

that damage itself could be considered as reflecting a violation of fundamental human rights.

Drittwerkung, as has been considered, refers to the application of human rights as the basis for understanding tort law. This notion is divided into direct and indirect spheres, with the latter being exemplified by the Court's decision in *Busuttil v. Muscat* in which the Court interpreted civil law in a manner which is constitutionally compatible. Indirect *drittwerkung* means the impact of fundamental human rights on private law is indirect and manifests itself in the form of a particular interpretation of that law in a manner compatible with the Constitution. In reality what one finds in the first court decision in this case is indirect *drittwerkung.* By contrast, direct *drittwerkung* is directly applying the constitution and human rights to private law relations. What this does is that it means that the moment one has an action in tort which can be understood as a human rights violation, one can sue to obtain a declaration that fundamental human rights have been broken and a remedy, including one for moral damage, in the private law sphere directly invoking the Constitution. In a sense, the Courts seem to have gone up a blind alley, so to speak, with the fact that they rejected indirect *drittwerkung* and have ended up with a situation in which any tortious or contractual action involving the government could be spun into a human rights action, where moral damage would be possible. Thus, any private law action against the government will turn into a public law action where damages are granted.

In the case of ***Jane Agius v. Attorney General***, the Court returned to the approach of the first court in *Busuttil v. Muscat* and again tried to resurrect the idea of indirect *drittwerkung*, clearly in order to avoid the direct *drittwerkung*, and thus an explosion in constitutional litigation where the Constitutional Court, at both levels, could no longer reject these cases on the grounds that an ordinary remedy exists, based on the declaration from Brussels that no such remedy existed. It seems that *Jane Agius* could be understood as a well-thought-out attempt to recalibrate the system.

In this case, on the 22nd of February 1995, Carlos Chetcuti, a drug addict, died while he was imprisoned in the Corradino Correctional Facility and after a prison employee had incorrectly administered a double dosage of methadone to him, as the result of an improper handover between nurses and improper record-keeping. His father sued the government before the Civil Court to recover the resulting damages as an ordinary Article 1046 action, and following his death the action was continued by Jane Agius, Chetcuti's aunt. The approach of both courts was to grant a significant damage to reflect the patrimonial harm suffered by the father. On the 6th of October 2010, the First Hall of the Civil Court held that the defendant, the Minister for the Interior, was civilly responsible for the negligent actions of the employee which had caused the death of Mr. Chetcuti. It assessed the resulting patrimonial damages at 53,497.50 Euros, which it awarded to Ms. Agius in terms of Article 1046 of the Civil Code. These damages were subsequently reduced to 38,213 Euros by a judgment of the Court of Appeal of the 1st of April 2014.

Nevertheless, plaintiff filed a constitutional action based on the approach taken by the ECtHR and was therefore an action against the government for moral damages based on its failure to look after the fundamental human right to life, and family and private

life of the victim and victim's aunt. The Civil Court quantified €5,000 in non-patrimonial damage for this breach.

The Constitutional Court gave its decision after making some general reflections on non-patrimonial damages under ordinary law in Malta. It observed that since Articles 1045 and 1046 of the Civil Code, which seem to prohibit the award of moral damages are located in the sub-title dealing with Torts and Quasi-Torts, it is clear that any prohibition of the compensation of non-patrimonial damage found in these Articles could only apply to actions made in Tort or quasi-Tort. Thus, the Court proceeded to distinguish the current case from an ordinary tort action; since Carlos Chetcuti was being held in the custody of the Director of Prisons and the relationship between the tortfeasor and the victim was hence more similar to a contractual one, or at least a relationship ex lege. Additionally, the Court observed that the veto on compensating moral damage is not based upon any provision of positive legislation expressly prohibiting such compensation, but has emerged instead from Maltese jurisprudence, which had adopted a rigid and narrow *'favor debitoris'* interpretation of Article 1045. Finally the Court argued that the interpretation of Civil legislation could not take place in a vacuum and where possible such legislation should be interpreted in a manner which conforms to Constitutional principles and human rights, instead of adopting an interpretative stance which leads to anti-Constitutional judgments and which would also lead to the Maltese state being held to be in breach of its international obligations under the European Convention of Human Rights.

Having set out the parameters of its judgment, the Court proceeded to apply these principles to the case before it. It agreed with plaintiff that a declaration that human rights had been violated could not be made by the ordinary civil courts. However it held that in this case there was no need for the Constitutional Court to make such a declaration; since when they awarded plaintiff an ordinary remedy, both the Civil Court and the Court of Appeal had emphatically declared that Carlos Chetcuti's death was attributable to the negligence of the state authorities. This declaration, the court held, should suffice to vindicate plaintiff without the need for the Constitutional Court to pronounce itself on whether Carlos Chetcuti's human rights had been violated.

As regards plaintiff's request for compensation of non-patrimonial harm that she claimed to have suffered, the Court observed that the sum of €38,213 which had already been awarded to plaintiff were given in the absence of any financial dependency of plaintiff upon the de cuius and simply because she acquired the status of heir of Carlos Chetcuti upon his father's death. Moreover plaintiff had not produced any proof that she enjoyed a particularly close relationship with the deceased, sufficient to justify an additional award of non-patrimonial damages to reflect pain and suffering caused by his death. In this context, the Court held that the damages she had already been awarded were sufficient to compensate for all kinds of harm suffered by plaintiff and refused to award an additional sum of specifically non-patrimonial damages.

The Court attempted to maintain both its reasoning in *Brincat* (i.e., that it gives sufficient damages) and that it is necessary to compensate for moral damage in order to provide a sufficient ordinary remedy for a human rights violation as per the ECtHR.

The Court therefore returned to the first Court's reasoning in *Busuttil v. Muscat*, holding that ordinary law must be interpreted in a manner compatible with Constitutional Law if the possibility exists. At the time Article 1045 did not refer to moral damage in any way, but it also did not exclude it outright. Since compensation for moral damage at the time was not prohibited, when we consider the prohibition of compensating for moral damage it is the result of jurisprudence and does not emanate from the law. Therefore, the Court argued that a jurisprudential orientation need be understood narrowly. When the Courts held that they did not compensate for moral damages, the court held, they were arguing that they did not compensate for ordinary actions in tort, but not for breaches of contract. Thus, damages for breach in contract, when assessed through Articles 1045 and 1046, would constitute an example of reasoning by analogy.

The Courts held that in such cases the reference to Articles 1045 and 1046 in connection with a breach of contract are essentially only for the purposes of importing the *Butler v. Heard* formula, i.e., to assess the damage to victim's capacity to earn an income in the future. However, the court should not limit itself to not compensating itself for moral damages in such instances. Therefore, the courts distinguished between contracts and tort, where breaches of the latter could be compensated through the awarding of moral damages, unlike the latter. Why the courts would be more sympathetic to the idea of moral damages in such cases was that when there is an agreement between two individuals, there is an understood guarantee that the obligation would be carried out properly and that no harm would come to the thing in the exercise thereof. Hence, contracts are understood to have an implicit guarantee that normal safety standards would be held. When the victim of the tort is dependent on the tortfeasor in some fashion, then in those situations the court *can* grant compensation for moral damage. Considering the situation of Carlos Chetcuti, in the custody of and dependent on the State, even in the absence of a contractual relationship he was dependent on the prison authorities in a manner analogous to one who was working in an environment whose safety is the responsibility of one's employers. Thus, compensation for moral damage may be granted.

However, the court went on to State that in spite of this, moral damage remains damage and as such must be proven. In this case, nothing was done by the victim's aunt to indicate that she had suffered an emotional harm as the result of his death. The Court returned to the *Brincat* judgement and held that the damages awarded are sufficient to encapsulate any harm suffered. This judgement managed to uphold the previous stance of the courts, opened another avenue through which damages could be awarded, respected the ECtHR ruling, and did not compensate for moral damages as they could not be proven. The legislator intervened, less than a year after the judgement in Jane Agius, with the proviso to Article 1045. It seemed, for a period, that the matter ended there, as the legislator made its position clear. As a result, the direct constitutionalisation of Maltese private law proceeded quite rapidly, although there was some effort on the part of the Constitutional Court to argue that moral damages must be proven, although it took the line that it does not have the discretion *not* to award moral damages.

In the case of *Brincat v. CGMO* the Court returned to the Jane Agius reasoning by compensating for moral damage in a case of breach of contract. It remains an open

question whether one can compensate for a breach of a duty of care on the part of the tortfeasor, in which it could be argued that there is a quasi-contractual relationship.