CVL3034 NOMINATE CONTRACTS

The European Law Students' Association

MALTA

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Introduction

One may remember from one's studies of Roman Law the law of obligations in its extended form the question *what kind of obligation is involved in the following case?* With a scenario being created there and then. The student would then be asked to correctly identify which form of obligation is present. In this unit one will be covering the law of sale as found in *Title VI Sub-Title I* (article 1346 onwards) of the Civil Code. Beyond the Civil Code, one would also be well-served should one be well-versed in the Consumer Affairs Act (Cap. 378 of the Laws of Malta). Furthermore, judgements delivered by the CJEU are legion and hold massive sway over local jurisprudence, and for that reason one ought to keep up to date with them.

With regard to the contract of sale, articles 1346 and 1347 involve a contract where one of the contracting parties binds himself to transfer to the other for a price which the latter binds himself to pay to the former. In order to have the capacity to sell, the object of the sale cannot be a *res aliena,* that is to say property that does not belong to the vendor. The sale of *res aliena* is its own area of nominate contracts with the law catering for a series of actions to allow one to reclaim one's property. On the other hand, we have specific sections dealing with the sales of dangerous goods, or defective goods, etc. The law caters for all scenarios involved in a sale including past the point of completion.

Sales can be made through a number of methods, be it direct purchase or hire purchase. With regard to the latter, that thing bought through hire purchase only truly becomes the purchaser's once he has made his final payment. Article 1347 therefore deals with the moment at which the sale is completed (with regarded to movables), stating that:

> **1347.** *A sale is complete between the parties, and, as regards the seller, the property of the thing is transferred to the buyer, as soon as the thing and the price have been agreed upon, although the thing has not yet been delivered nor the price paid; and from that moment the thing itself remains at the risk and for the benefit of the buyer.*

Even prior to delivery, the object is still the sole property of the purchaser who is held responsible for the property from that very moment. Should something happen to the item sold even prior to delivery, the purchaser is still responsible for the payment thereof.

Luca Camilleri

Topic I: Contracts of Sale

Topic I.1: Of Warranty of the Quiet Possession of the Thing Sold

The origins of any contract of sale lie in those searches ordered from the Public Registry by a notary public with the goal of investigating the root of title of the immovable property. It was the idea of Minister Bonello Depuis to have all inheritances of immovable property registered in the Public Registry for record-keeping purposes. The root of title is frequently the cause of many problems and as such the importance of proper records is paramount. *Vide* articles 1409-1423. Quiet possession of the thing sold does not mean that the thing is vacant, but it only warrants that no other person has a right over the immovable property. Even if no clause exists to this effect, it is assumed that the owner enjoys quiet possession of the immovable being sold. Should a seller wish not to take any risks, he must state outright that he cannot guarantee peaceful possession of the immovable being sold.

[Quintano, didn't bother going, there are good pass-downs]

Luca Camilleri

Topic II: Contracts of Lending and Lease

Topic II.1: The Historical Development of the Law of Lease in Malta

The history stretches from the Civil Code of 1868 to the latest developments in 2021. One cannot understand the law of lease unless one has a clear understanding of its development, its evolution over time, and also the focus and priorities of the law of lease. One will soon realise that the major changes relate to residential leases, and one will understand that this is not only a controversial area but is politically sensitive with no legislator or court enjoying evicted people from their homes into the street, making this at the heart of the evolution of the law of lease. Beyond the detail and structure of the law of lease, one must be aware of the reality of the constitutionalising and impact of human rights on private law. Some new laws are a direct consequence of the pressure created by consistent criticism by the Court in Strasbourg. One must also be aware of the changing values, policies, and politics behind the law, specifically in this area. This phenomenon has been further developed by changing demographics with the law of lease being required to reflect this reality.

We begin in 1868 with Ordinance VII of the Civil Code. It is not the case that there was no law of lease before, with laws of lease existing, *inter alia*, in the *Code de Rohan*, and the *Code de Manoel*, the Lascaris Code. Lease is a personal right, not a real right, i.e., it does not follow the asset beyond the parties involved. The 1868 Code was more or less a liberal one reflecting the society at the time and the keynote to it was that parties were at full liberty to agree whatever conditions or terms as they wished. There was no clear distinction as happened later between urban leases and rural leases. Later on in history we find special laws on urban property and later agricultural leases in 1957. The 1868 Code did not regulate the licensing of intellectual property, but the creativity of Maltese businesses devised a system whereby the goodwill of a business is leased as distinct from the immovable without a legislative framework. This goodwill was rented separately to the premises as the renter gained a going concern beyond the bare premises.

The 1868 Code had as its basis contractual liberty (parties were at liberty to agree), and corporeal things, and one of the key factors was that at the end of the lease there was no right to renewal unless it was expressly agreed upon. Later on in history there were automatic rights or granted rights of renewal, but no such rights existed in the 1868 Code. Other positive factors included the liberalism it offered as well as a useful default position in the sense that the Civil Code, as originally drafted, provided default rules which made sense and respected, in the tradition of the time, the autonomy of the parties leaving them fully at liberty.

This Code worked well until the turn of the century when we started to find the typical situations of the time, such as the fact that there was a difficulty and a scarcity of residential accommodation, and that there was also the situation that rents were unaffordable. Furthermore, young couples could not easily find independent accommodation. Such that in 1931 we had what is today known as Cap. 69 of the Laws of Malta, the Reletting of Urban Property (Regulation) Ordinance, the second landmark law on the issue. This regulation has been amended over the years with the last taking place last year. As the name implies it referred to urban property. The definition of property was perhaps arbitrary through today's lens. It included residential accommodation, certain categories of commercial property, (wholesale, retail, cinemas, warehouses (it was unclear whether offices were considered to be commercial properties, garages were not included although it was debated whether or not they counted as warehouses)). The lessee and tenants were very widely.

The basis of Cap. 69 is that at the termination of the lease there was an automatic, given by law, right of indefinite renewal of the lease under the same terms and conditions such that the idea was that it was to be a temporary measure to ease the housing shortage (although it also

applies to commercial premises). The conditions could be changed if one were a lessor in very particular qualified circumstances, but the law created a specialised court known as the Rent Regulation Board which is still in existence today. Therefore, if the lessor wanted to take back the premises leased, or felt that the rent was unfair, or decided to make improvements, the remedy was going to the Board which then had parameters whether to allow or reject these requests.

The keynote to take from this law is the following key features: urban property as therein defined, the wide definitions of the term *"tenant",* and the indefinite renewal. This law came into operation when the Civil Code period ended. The way in which it was conceived was that when the original term (all leases must have terms) under the Civil Code ended then Cap. 69 came into force. To that end, Cap. 69 itself did not impose controls on the original rent.

In 1944, Cap. 116 of the Laws of Malta, The Rent Restriction (Dwelling Houses) Ordinance, was supposed to be a war measure because houses were continuously destroyed especially around the Grand Harbour, leaving the homeless at the mercy of unscrupulous landlords. For the first time, there was control on rent. This law imposed initial control on rent, creating the concept of fair rent. As a result of this situation parties were not at liberty to agree initially what they wanted but were instead forced to work within strict parameters. Rents, even those agreed upon, were subject to review and reduction.

Next, although this law has since been abrogated, the Housing Act was passed in 1949 and gave the Housing Secretary the right to requisition private, unoccupied property and force the landlord to rent it out on certain conditions. What would happen was that neighbours would often report houses they knew to be vacant to the Housing Secretary. Again, at the time there was a crisis of homeless as the nation rebuilt in the aftermath of the War.

In 1961 the Housing (Decontrol) Ordinance, Cap. 158 of the Laws of Malta, was passed. Although the current Cap. 158 has been significantly amended such that a lot of the original 1961 content has been removed and legislated, the concept of the control remains a reflection of the market reality which showed that in spite of the good intentions of Cap. 116, Cap. 69, and the Housing Act, these laws had the opposite effect as owners were doing their utmost not to lease out property for fear of never seeing their property again. The burdens of structural maintenance and repairs were entirely disproportionate to the frozen rent. On the one hand we find increasing costs and on the other we find low, fixed income.

The term *"decontrol"* means to take-away-from. As such, this Ordinance was intended to create a legal context whereby the effect of certain laws which were considered to be unfair or an economic disincentive to renting. The thinking at the time was that there was the need to act to reactivate the rental market to bridge the gap between demand and supply of rental property. Therefore, incentives were created to encourage landlords to place property on the market for property. The concept of decontrol was to take away from the sphere of operation of these restrictive rent laws, those properties which were decontrolled, making it a legislative incentive for people to build or buy to rent, free of the issues of indefinitely frozen rents or the risk of requisition. Note that this referred only to residential accommodation, as the thinking was that businesses take care of themselves.

In 1979 there were amendments, which have been shot down by the Constitutional Court (but not struck off the books), to protect the sitting tenant of a decontrolled dwelling house. Before these amendments the sitting tenant of a decontrolled dwelling house was out in the street at the end of a lease. Furthermore, they created protection to the temporary emphyteuta of a dwelling house who likewise would have been forced to leave prior to the 1979 amendments.

In 1995 we find three major pieces of legislation. Leases entered into on or after the 1st of June 1995 were completely liberalised so new leases returned to 1868 conditions. However, the old leases continued as they were. To that end, the thinking was that the old laws would be phased out over a period of a century.

In 2019 the Private Residential Leases Act, Cap. 604 of the Laws of Malta, was created in the familiar context of abuses of landlords. This law refers to residential leases which commenced under the 1st of June 2020 had to be registered with the Housing Authority and there were certain minimum safeguards, such as the minimum length of the contract. This was undoubtedly a legislative intervention to control the increases in rent, attempting to regulate what were seen as abuses. The idea of precarious leases was entirely banned.

Finally, in Act XXIV of 2021, the Reform of Controlled Residential Leases Act referred to dwelling houses with the background of mounting criticisms by the European Court in Strasbourg regarding the rights of the landlord. This Court has had occasion to think and reflect on what is a reasonable restriction to the right of enjoyment of property and it has always stressed the reasonable and proportional burden of the owner, such that it has consistently held that there should be a proportion between the interests of the tenants and those of the landlord such that the right of peaceful enjoyment of possessions, Article 1 of the First Protocol, is respected. Therefore, the Court has taken a certain pro-landlord approach in commercial leases (*vide* the ongoing discussion of leases taken by band clubs), as can be noted in the language used, stating that in the case of residential eviction situations the owner must suffer a disproportionate burden. Therefore, the yardstick in commercial situations is that the owner is in a stronger position that those in residential scenarios, in which case the stance is decidedly pro-tenant. Act XXIV of 2021 addressed specifically this situation, creating a means test for the tenant to fulfil based on income and capital in the previous five years. If the tenant is not over the threshold, then the rent is increased by 2% of the open market value of the property, but the difference is subsidised by the Housing Authority. If one is over the threshold, the tenant must vacate the premises in two years.

Topic II.2: Introductory Provisions of the Civil Code

When one reads the Civil Code, one will release that it refers to particular acts and it is best to have a general background of these three specialist laws before approaching the general law of lease. Since 1931, over the years there have been amendments made to Civil Code and so one cannot understand the current Civil Code without a background in these laws.

The Civil Code in 2009 had an important amendment, Act X of 2009, which had interesting reforms, including the fact that pre-1995 commercial leases will finish in 2028, that the summer residence was no longer protected, that garages were no longer protected, etc.

Defining the Contract of Letting and Hiring

Article 1525 refers to contracts of letting and hiring and that they may be verbal or in writing and states as follows:

> **1525.** (1) *A contract of letting and hiring, whether of things or of work and labour, may be made either verbally or in writing, provided that a contract of letting and hiring of urban property and of a residence and of a commercial tenement entered into after the 1st January, 2010 shall be in writing.*

Locatio operis, or a contract of work and labour, differs from a contract of employment. *Locatio operarum* is today all but abrogated by the contract of employment (*vide* Cap. 425 of the Laws of Malta). A contract of letting and hiring may be verbal or in writing, however, there are two important amendments here, Act X of 2009 which introduced as a general stream the distinction between urban, residential, and commercial leases, and as from 1st of January 2010 such contracts had to be in writing. The second important law is that in the case of private residential leases (*Vide* Cap. 604 of the Laws of Malta), as of the 1st of January 2010 these must be in writing and registered.

The Rent Regulation Board

This initial article of the Civil Code also sets out the competence of the Rent Regulation Board. The RRB was a creature of what is today Cap. 69 1931 but the Board has had a long life and has taken over most if not the entire competence relating to leases. As a general statement it is relevant to note and be aware of the fact that practically any issue relating to lease falls in front of the RRB.

> *The Rent Regulation Board (hereinafter referred to as the "Rent Board") established under the Reletting of Urban Property (Regulation) Ordinance shall decide all matters affecting the leases of urban tenements including residential as well as commercial tenements including causes relating to the occupation of urban tenements where such leases have expired, and any damages resulting during such period of occupation. Other leases fall under the competence of the courts of civil jurisdiction while matters relating to agricultural leases shall fall under the competence of the Rural Leases Control Board appointed according to the provisions of the Agricultural Leases (Reletting) Act:*
>
> *Provided that matters relating to the validity of a contract of lease, shall be examined by the courts of civil jurisdiction, so however, that any other matter following the determination of such matters relating to validity shall fall under the competence of the Rent Board.*
>
> *The Rent Board shall also have the competence to decide demands related to maintenance, repairs, defects and faults of the tenement including latent ones, damages or improvements, amounts due for water and electricity and any amount left by way of security deposit by the tenant, where such demands are included in other demands or pleas made before the Board, over which the Adjudicating Panel has no jurisdiction.*
>
> *The Rent Board has the authority to request information and documentation from government entities, departments, and authorities as well as from any other entity to meet its functions as established in this Code.*

Note that this Board shall decide all matters involving leasing of urban tenements including questions relating to occupation of urban tenements where such leases have expired and damages resulting from such occupation. This was a welcome clarification in 2009 because prior to these amendments the discussion existed if one wants to sue for structural damages

which happened during a lease which has been terminated, which court is competent, the ordinary civil court or the RRB? The argument was that if the lease is now terminated why should the Board have competence. Historically, the competence of the rent board was triggered by the existence of a lease. However, this 2009 clarified the point that even though the lease has been terminated if one wants to sue one's former tenants for something related to the lease in which damages are sought.

Tenants are often asked to leave a security deposit, oftentimes the amount of one month's rent, which the landlord is entitled to take if the tenant refuses to pay for something which he ought to have paid for. In the past, the trend was for water and electricity, and utility bills to be in the name of the tenant with the reason being that the landlord did not want to be responsible for the payment thereof. However, the water and electricity service providers would often in the case of unpaid bills turn on the landlord even if he is not the subscriber because it is written in the water regulations that the property owner is joint and severally liable vis-à-vis unpaid bills for these services. The trend today is for the account to be in the name of the landlord so that he may receive the bills, control what is happening, and have this guarantee, and in the case of a default of two months the landlord may seize the deposit. There are three important exceptions to this: first, questions of validity of a contract of lease are not the competence of the RRB but of the ordinary civil court; second, agricultural leases, which were principally for cultivation, and issues relating thereto are the competence of the Agricultural Leases Control Board (*vide* Cap. 199 of the Laws of Malta) and the farmer is absolutely protected unless a building permit is in hand, although the validity of an agricultural lease is still determined by the civil court; third, under the Private Residential Leases Act (Cap. 604 of the Laws of Malta), there is an adjudicating panel if the amount claimed is below €5,000, the RRB has residual competence should the amount be larger.

Article 1525(3) contains a number of important definitions and is interesting because it builds on the definition of Cap. 69 but develops it in a more logical and structural manner. One may recall that the definition of 'commercial premises' in Cap. 69 was in many ways anomalous, such as the fact that it was unclear whether a commercial office is a commercial premises, and there were conflicting judgements to this effect. This provision reads as follows:

> (3) *For the purposes of this Title:*
>
> *"commercial tenement" means an urban tenement which is not a residence and which is leased to house an activity primarily intended to generate profit and includes, but is not limited to, an office, a clinic, a tenement leased out for the sale of merchandise by wholesale or retail, a market stall, a warehouse, a storage used for commercial purposes as well as any tenement licensed to sell things, wines, spirits or foodstuff or drinks, theatre, or tenement mainly used for any art, trade or profession:*

A professional office is today equated with a commercial activity in terms of the Civil Code. A profession today must generally be run along commercial lines as any business would if the professional wishes to be successful financially.

> *Provided that a tenement leased to a society or leased to a musical, philanthropic, social, sporting or political entity, that is used as a club, shall not be considered as a commercial*

> *tenement even if part of it is used for the purpose of generating profit;*

This provision is rife with potential for litigation. The issue of generating profit is because, historically, the band club used to have its *bottegin*, a small bar in which drinks would be sold. Today, it works in a Totally different manner because many band clubs are hired out to commercial caterers. The problem here is the phrase *'part of it'*. If the principal part of the club is run commercially, where does one draw the line between a commercial venture and a place for people with similar interests to meet. The hinging factor whether a club became totally commercial or remained a club with commercial activity was the control exercised by the club on the commercial activity. If it could be shown that the club's committee was capable of binding the club's activity in spite of it being run by a commercial activity it remained a club.

> *"club" means any club which is registered as such with the Commissioner of Police in accordance with the appropriate provisions of the law;*
>
> *"private residential lease" means any long or short private residential lease, including the letting of shared residential space, which is entered into after 1st January, 2020, and any leases for a residential purpose entered into before the 1st January, 2020, which would still be in its original or renewed period on the 1st January, 2021.*

Topic II.3: The Letting of Things

Article 1526 is the result of interesting and positive developments in the sense that an amendment in 2016 extended the applicability within its terms to ships and aircraft, the reason for which was that there was some doubt that the old articles of the Civil Code could somehow be applicable to the regulation of charter parties.

> **1526.** (1) *The letting of things is a contract whereby one of the contracting parties binds himself to grant to the other the enjoyment of a thing for a specified time and for a specified rent which the latter binds himself to pay to the former.*
> (2) *Any kind of corporeal property, whether movable or immovable, may be the subject of a contract of letting and hiring.*

This does not extend to licensing agreements, a variation on the theme of lease of intellectual property. One does not rent a trademark but is given a license to use it.

The phrase *'for a specified time'* may appear to be straightforward and is an essential requirement for a lease. Furthermore, there cannot be such a thing as an indefinite lease. Perpetual leases cannot exist. It is illogical with practice but now set in law that where a lease exceeds sixteen years it is done by public deed. The more difficult question is whether there can be an indefinite renewal of the lease. This is not a question which is altogether clear, but it cannot be the case, i.e., one cannot have a lease which is renewed indefinitely, which follows the logic that there cannot be a lease either without a term or with a perpetual term. It is perfectly lawful to agree on a right of renewal which is not perpetual.

In the case of the charter or lease of aircraft or ships and the charter or lease of spare parts thereof, or a finance agreement by way of a mortgage for any of the above, the old articles of the Civil Code are overridden by the provisions of the agreement between the parties and the

generally accepted rules of international commerce in this, and the special laws relating to merchant shipping and civil aviation. What is also significant here is that the lessor of an aircraft has the unilateral right without the need to go to court to dissolve the lease in the case of a default or breach of agreement, subject to the counterbalance and rights of the lessee to sue for damages where appliable, arguing that the unilateral termination was without justification. This is not only a violation of an agreement with an express resolutive condition but a change in the financial position of the lessee which may result in a significant financial loss. It is also a default if there is a deterioration in the legitimate expectations of the mortgagee who enjoys a privileged position in the case of liquidation by being allowed to sell the asset and repossesses should the need be. Thus, in the case of lease and charter of ships and aircraft the traditional rules do not apply insofar as these are overruled by agreements, specific legislation, practices of the trade, etc.

> (3) *The letting of ships and aircraft, including aircraft engines, shall be regulated by the provisions of any agreement between the lessor and the lessee in accordance with its terms as well as by the international usages of trade applicable in the context.*
>
> *Notwithstanding any of the provisions of this sub-title, any agreement relating to the letting of ships or aircraft or aircraft engines, shall be governed by:*
>
> (a) *the terms and conditions agreed between the parties, and in case of conflict with the provisions of this Code, such terms and conditions shall prevail; and*
>
> (b) *the special laws relating to merchant shipping and civil aviation, as the case may be.*

The Lease of Property which is Co-Owned

Vide articles 1527-1531. Here, two situations are addressed: first, when there is a lease of a co-owned property; second, the validity of a lease where there is 'temporary or dissoluble title'. With regard to the first, this was recast on the old articles of the Code in Act X of 2009. The principle is first established that for a lease of a co-owned property which is not challengeable by any of the co-owners all of the co-owners have to consent and agree to the lease. Here we are speaking of the lease of the entire thing, the lease of an undivided share of a property is legally inconceivable, because one cannot gather the enjoyment of such an undivided share. The articles continue in the sense that lease is nonetheless valid even if it is made to one of the co-owners. There is a linguistic point which is an old problem going back to the old French text which refers to co-possessors not co-owners. This is irking, although writing and jurisprudence have consistently held that the meaning of possessors here means ownership and it is not the technical possession *corpus, animus rem sibi habendi* that we spoke about in possession. The linguistic anomaly is noted but that is what it means. The articles provide for a situation where one of the co-owners without the consent of the other co-owners leases out the entire object. Each of the co-owners have the right to act within two months of knowledge of the lease to have the lease annulled because it was done without their consent, pursuant to article 1527(3). On this, a concluding point: there is a remedy, although impractical, of the willing co-owners to request the Rent Board or the ordinary courts, in the case of movables, to approve and sanction such a lease (the relevance here may be damages because if the court establishes that the lease can go ahead because even though not all the co-owners agree but it is a good opportunity and due to the opposition of the other co-owners the lease is lost one can look at damages). Pursuant to article 1529, the co-owner who has in general terms opposed the rent out to a third party does not lose by opposing the right to preference of the lease.

With regard to the lease of temporary or dissoluble title, article 1530 states as follows:

> **1530.** (1) *The letting made by a person possessing the thing under entail or in usufruct or under any other temporary or dissoluble title, shall be valid even in regard to his successors, if it is made on fair conditions and for a term not exceeding eight years, in the case of rural tenements, or four years, in the case of urban tenements, or an ordinary period according to usage in the case of movable property, or for any period, shorter than the said periods respectively, in the case of property the letting of which for a period exceeding such shorter period is prohibited.*
>
> (2) *The letting made for any longer period by a person possessing the thing as aforesaid shall, on the demand of his successors in the possession of the thing, be reduced to the reasonable period above-mentioned, to be reckoned from the date of the contract.*

The hypotheses mentioned here are threefold: first, entails; second, usufruct; third, temporary emphyteusis. The scenario is where one, as a tenant, takes a lease from a usufructuary, and whether or not this would be valid. In a sense, usufruct is a very transient title and may be conditional and always terminates on the death of the usufructuary. The question is one where the usufructuary rents out to another and dies after two years, the usufruct will terminate but is the lease still valid? The question arises because on the death of the usufructuary there is a consolidation and reversion of the property to the bare owner and therefore, how far does the lease created by the usufructuary bind the owner on consolidation?

With regard to temporary emphyteusis, take for example, the temporary emphyteuta who leases out the property to his own company, the question arises as to how far this lease is valid. The response has changed somewhat over the years, but article 1530 which states where there is a letting out of something under temporary title the lease is valid provided that these conditions are met. Bear in mind that the issue is how far should the owner be made to bear the brunt of a lease created by a person who occupied under temporary or dissoluble title. The courts have generally inclined to protect the interests of the owner. The rule is that a lease by a third-party temporary occupant is valid if it does not exceed in length 8 years in the case of rural property and 4 years in the case of urban property, and it is made on fair conditions. The law says 'for a term not exceeding' so an argument could be made there that even though the length does not exceed 8 or 4 years, that even if the lease does not exceed these it could be reduced on the basis that it is intrinsically unfair on the owners. These could be liable to reduction in the wider context of fair conditions even though there is a maximum established. Today it is difficult to determine what is an urban and what is an agricultural tenement.

Fair conditions are open market conditions, where a willing lessor and a willing lessee negotiate in the open market at arm's length and without any undue pressure. The courts have developed this and the question is not only one of rent, but also of the conditions. Is subletting allowed? Who is responsible for insurance, maintenance, repairs, etc? These are the normal clauses that one would look at in a lease. These represents a movement of change in the courts which began in the 1980s, prior to which the meaning and interpretation of fair conditions was linked and pegged to the old rent laws, i.e., that the law could not be increased, etc. There was a well-known judgement of ***Zahra v. Frendo*** where Chief Justice Sir Anthony Mamo declared in favour of the old rent laws.

Article 1531A speaks of the requirements of an urban, residential, commercial lease:

> **1531A.** (1) *With regard to the letting of an urban property, a residence and a commercial tenement made after the 1st January, 2010, the contract of lease shall be made in writing and shall stipulate:*
>
> (a) *the property to be leased;*
> (b) *the agreed use of the property let;*
> (c) *the period for which that property will be let;*
> (d) *whether such lease may be extended and in what manner;*
> (e) *and also the amount of rent to be paid and the manner in which such payment is to be made.*
>
> (2) *In the absence of one or more of these essential requirements, the contract shall be null.*
>
> (3) *The lease of an urban property, a residence and a commercial tenement made after the 1st January, 2010 shall be regulated exclusively by the contract of lease and by the articles of this Code:*
>
> *Provided that private residential leases shall be regulated by the Private Residential Leases Act.*

With regard to article 1531A (2), take, for example, one who has entered into a contract and is honouring it with one of the requirements missing, does this mean that the contract can be annulled when the parties have given the contract operation? Cap. 604, the Private Residential Leases Act, has all of these requirements. Note that a guest house or dormitory would not constitute a shared residential lease. The act posits two types of leases, the short and the long residential lease. Although it may seem strange, a short residential lease is one which is for six months (the first requirement is this period of six months). This short private residential lease is defined as follows:

> *"short private residential lease" means any lease, negotiated for a duration of six (6) months, which is meant to satisfy the need of the following categories of lessees:*
>
> (a) *non-resident workers who are employed either for a period less than six (6) months or only to complete a specific task within a maximum period of six (6) months;*
> (b) *non-resident students who are enrolled in courses for less than six (6) months;*
> (c) *residents who need to rent an alternative primary residence for a period of less than six (6) months;*
> (d) *non-residents who need to rent a tenement for a period of less than six (6) months, provided that they would not be seeking to establish their long residence in Malta:*
>
> *Provided that a contract of short lease shall identify the specific category within which the lessee falls into and attest it through attached documentation. In the absence of either of these requirements the contract shall be deemed to be a private residential lease in accordance with article 8:*

> *Provided further that any short private residential lease negotiated for a period exceeding six (6) months shall also be deemed to be a private residential lease in accordance with article 8:*
>
> *Provided further that short private residential leases may not be extended.*

Apart from the duration there is some anomaly in the sense that the definition mentions six months, however, the qualifying purpose then suggests a period of less than six months which raises the question as to whether a lease for less than six months can exist.

A long private residential lease is one which is not a short residential lease. It is important to place it in context because Cap. 604 does not apply to government property, tourism letting, those properties which are not rented for a primary residential purpose. To qualify for the law the property must be a primary residence. Also, pre-1995 leases are not within the purview of the law (we know that such leases have a separate regulation under Cap. 158). Cap. 604 likewise does not apply to the letting of urban tenements when an emphyteusis is converted into a lease. It is unclear as to why the drafting had to say, *"urban tenements"*, not *"residential tenements"* in its exclusions. The intention is probably to refer to the residential leases. This Act applies to those leases entered into and renewed after the 1st of January 2021. Therefore, this applies to private residential leases, short or long, entered into after the said date and which fall within the purview of the law, so much so that these contracts

It is necessary to be aware that these contracts require registration, and in the absence thereof they are unenforceable.

Article 6 establishes the requirement as replicated in the Civil Code, stating:

> **6.** (1) *All private residential lease contracts made after the entry into force of the Act shall be made in writing and shall include the following requirements:*
>
> (a) *the tenement to be leased;*
> (b) *the agreed use of the tenement let;*
> (c) *the period for which that tenement shall be let; whether such lease may be extended and in what manner;*
> (d) *the amount of rent that shall be paid and the manner in*
> (e) *which such payment shall be made;*
> (f) *any amount deposited by the lessee by way of security for the performance of his obligations; and*
> (g) *an inventory, in the form of documentary evidence, attesting the condition of the tenement as well as the state of any furniture and domestic appliances supplied by the lessor.*

The Act tries to establish a careful balance between being a consumer law and repeated the mistakes of Cap. 69.

Article 7 lists forbidden clauses, such as the fact that the lessor has no right to an early termination of the lease except in the case of default. Significantly, the lessor may terminate in the event of the default clauses of the Civil Code, so the Private Residential Leases Act in effect makes a statement that apart from the provisions of this act there can be no early

termination except as provided for in the Civil Code. Other prohibitions are that the lessor may not reduce the services available without a corresponding reduction in the rent. Likewise, the lessor may only try and increase rent if there is some improvement in the service. Other clauses refer to the prohibition on the increase in insurance or increased rent in the case of added furnishings.

In the definitions it is said that a long private residential lease is one which is not a short one. however, article 8 states that a long private residential lease cannot have a shorter term than a year:

> **8.** *A long private residential lease cannot have a duration of less than one (1) year. Any agreement stipulating a shorter duration shall be deemed to have been agreed for a period of at least one (1) year:*
>
> *Provided that this article does not apply to short private residential leases or the letting of shared residential space.*

With regard to termination of the lease, in the case of short private leases, the provisions of the Civil Code apply in the sense that on the expiration of the agreed term the lease is terminated without the need for notices or the like. In the case of the long residential lease, it can expire after the agreed term, however, it is necessary for the lessor to give notice to the lessee by registered mail at least three months before the expiration of the term of a long residential lease:

> **9.** (1) *A private residential lease shall cease to have effect upon the expiration of its term, whether such term is conventional, legal or judicial, provided that the lessor gives notice to the lessee at least three (3) months before by registered letter:*
>
> *Provided that for the purpose of proving the fulfilment of his obligation under sub-article (1), it shall be sufficient for the lessor to provide evidence that the registered letter has been sent within the stipulated time, and to the correct address.*
>
> (2) *If the lessor does not serve the lessee with a notice of termination within the specified time, the private residential lease shall be deemed to have been renewed for a further period of one (1) year:*
>
> *Provided that in the absence of a notice of termination by the lessor, the lease shall continue to be renewed.*
>
> (3) *This article shall not be applicable for short private residential leases or letting of shared residential space.*

In the case of a long residential lease, it expires on the agreed term provided there is prior notice.

Article 13 clearly establishes freedom of negotiation for the commercial terms of the rent, such that we are not dealing with the controlled rent of Cap. 116:

> **13.** (1) *The rent shall be freely stipulated between the parties.*

> (2) *Unless otherwise agreed, the payment of the rent shall be deemed to have been calculated for one (1) month. In no case may the lessor require the advance payment of more than one (1) month's rent, unless it is otherwise agreed by the parties:*
>
> *Provided that this shall be without prejudice to the lessor's right to request an amount by way of security, for the performance of the lessee's obligations.*
>
> (3) *The lessor shall be obliged to deliver to the lessee a receipt of the payment, unless it has been agreed that payment is made through procedures that are capable of proving the effective fulfilment of the obligation.*

The provisions on the increase in rent are particular in the sense that for an increase to happen, article 14 stipulates two requirements: first, increases may only happen once a year; second, increases must be agreed upon:

> **14.** (1) *Rent increases may only take place once every year. In the absence of any express agreement, the rent cannot be revised during the term of the lease.*
>
> (2) *Yearly increases may not exceed the annual variations recorded in the Property Price Index published by the National Statistics Office. The annual variation shall be understood as the average of the previous four quarters recorded until the date of the increase.*
>
> (3) *The increase foreseen in sub-article (2) may never exceed the previous rent by more than five per cent (5%).*
>
> (4) *If the average annual variation is negative, this shall not result in the reduction of the rent.*

If there is agreement on the increase in principle but no agreement on the quantum, then there is a national property statistical index which applies. However, this property price index, which the National Statistics Offices publishes, may never increase by more than 5%. There is therefore the capping of the increase in rent of 5%. There are also minimum time limits.

Article 16 is dedicated to shared residential leases, for six months at which point the lease will be up for renegotiation and renewal:

> **16.** (1) *Any contract entered into for the lease of a shared residential space shall have a duration of six (6) months.*
>
> (2) *The lessee may withdraw from the lease, at any time, by giving one (1) week prior notice to the lessor by a registered letter.*
>
> (3) *No penalty may be imposed on the lessee for exercising his rights of withdrawal.*

> (4) *The letting of shared residential space is also subject to the rules of registration under article 4.*
>
> (5) *Any lease of shared residential space may not be renewed and it shall cease to have effect by operation of article 1566 of the Civil Code.*
>
> (6) *The above provisions shall also apply where either the lessor, or the lessee in case of a sub-lease, also reside in that property.*
>
> (7) *The Authority shall have the power to introduce and enforce safety and security standards in relation to tenements which are let to more than one (1) household, including rules limiting the number of persons that could occupy such tenement at once.*

Article 17 deals with the provision of water and electricity services.
Under article 18, where a tenant occupies without a legal basis, then the compensation and damage due is the current rent:

> **18.** (1) *A tenant in default of his obligations, who remains in occupation of the rented tenement beyond the lapse of his title, shall be bound to pay the lessor an amount equivalent to the rent until the date of the effective eviction of the property.*
>
> (2) *A demand for such compensation may be made simultaneously with the demand for termination of the lease and, or for the eviction of the lessee from the rented tenement.*
>
> (3) *Nothing contained in sub-article (1) shall preclude the lessor's right to obtain compensation for any greater damage.*

There is also created an ad hoc panel for leases to decide on disputes under this Act insofar as the claim does not exceed the value of €5,000.

Article 1531B of the Civil Code is relevant because it places the operation of this law into context. This was essentially Act X of 2009 which liberalised the lease market for post-1995 leases. The amendments of 1st June 1995 clearly avoided those leases which came before it. At the time, the policy was that new leases are liberalised, but the old leases continue to be regulated by the old laws. The philosophy of this was to avoid the social shock to residential and commercial premises. However, over the years, it became apparent that the pre-1995 old leases required intervention and therefore we had this Act X of 2009. Garages, summer residence, and old commercial leases, amongst others, all lost their protection as a contemporary context was phased in gently whilst the old leases were gently phased out. This provision states:

> **1531B.** *The contracts of lease made before the 1st June, 1995 shall be subject to the law as in force prior to the 1st June, 1995 sohowever that from 1st January, 2010 articles 1531C, 1531D, 1531E, 1531H, 1531I, 1531J and 1531K of this Code shall apply.*

Generally speaking, these amendments refer to the old residential leases, the definition of a commercial tenement, the increase in commercial rent, the termination of the old commercial rents, the regulation of commercial sub-leases, the ongoing controversial issue of clubs, garages, summer residences, and the casa bottega. This article states that the old law continues to apply except and insofar as modified by the amendments of Act X of 2009 which prevail over the old law.

Articles 1531L and 1531M make it clear that leases in force on or after the 1st of June 1995 will continue to be regulated by the law in force at the time of the contract of lease, and that pre-1995 leases which are not urban, residential, or commercial, and subject to the provisions of Act X of 2009 relating to clubs, garages, and summer residences, will continue under the old law, respectively. One will see the difficulty here when one gives advice to try and identify the applicable law. This does not make one's task easy because of two supervening laws: Cap. 604, and Act XXIV of 2022 relating to the reform of the Controlled Leases Act.

Without prejudice to the reform of the Controlled Leases Act, in 2010 the minimum rent of residential dwelling house was €185 p.a., and to increase on the controlled cost of living every three years.

Topic II.4: Chapter 69

This came into effect on the 19th of June 1931 and created the Rent Regulation Board, still in existence today. The definitions are important and have been amended over the years, reflecting the changing policy of the law. We find amongst other definitions of 'club', to 'let', 'premises' (which defines the scope of this Ordinance). In Act X of 2009 we will note that the Civil Code further distinguishes urban into residential and commercial property. Urban property in this Ordinance refers to residential property, commercial property, garages, market-stalls, etc. Rural property is regulated in Cap. 199 which caters specifically to agricultural leases, i.e., leases for the cultivation of crops, not husbandry. The courts have held that certain types of leases (e.g., quarries) are not held within the purview of Cap. 69. Likewise, petrol stations are neither considered to be urban immovables.

The term 'tenant' has received a recast due to Act XXIV of 2021, the Control (Residential) Leases Reform Act. The history of this is that when Cap. 69 was written in 1931 it created an indefinite renewal of an urban immovable lease under the same terms and conditions and such conditions could only be modified with the permission of the RRB. The thinking behind the law at the time was very much pro-tenant, the reason being that it was drafted as a necessary intervention to address the shortage of housing available and to protect sitting tenants. Ultimately, this had the counter-effect of what was intended because people refused to offer their property for rent. Act XXIV of 2021 came as a response to the repeated judgements and rebukes of the European Court of Human Rights in Strasbourg on the violation of Article 1 of the First Protocol of the European Convention on Human Rights and Fundamental Freedoms as a result of the low rents and frozen conditions. The Court often reflected on the repeat nature of its rebukes in the face of legislative intransigence with such repeated judgements reflecting a significant expense as the result of compensation being awarded. Therefore Act XXIV of 2021 is a direct response to the situation of the old controlled residential leases whose rent and conditions had not been altered or were still a pittance. Therefore, the definition of tenant is, in the case of a dwelling-house:

> (i) *That person who has been recognised as a tenant in accordance with any law validly applicable before the 1st June 2021.*

(ii) *The widow or widower of a tenant:*

Provided that the widow or the widower shall not have the right to be considered a tenant if he did not inhabit the dwelling-house for four (4) out of the last five (5) years prior to the 1st June, 2008 and, in the case of this sub-paragraph did not continue living with the tenant until the date of his death;

(iii) *the siblings of the tenant who have continued the lease in solidum together with him:*

Provided that the siblings shall not have the right to be considered as tenants if they did not inhabit the dwelling-house for four (4) out of the last five (5) years prior to the 1st June, 2008, and, in the case of this sub-paragraph did not continue living with the tenant until the date of his death:

Provided further that following the coming into force of the Controlled Residential Leases Reform Act, 2021, no person who has not yet been recognised as the tenant of a dwelling-house up to that date shall qualify as a tenant of a dwelling-house in terms of this definition, except for those who qualify in accordance with sub-paragraphs (ii) and (iii):

Provided further that persons who do not qualify under sub-paragraphs (i), (ii) and (iii) and have lived in the dwelling-house for four (4) out of the last five (5) years before the 1st June, 2008 and have continued to live with the tenant until the date of the demise of the tenant shall continue occupying the dwelling-house for a period of five (5) years from the date of death of the tenant, at the end of which period they shall vacate said dwelling-house. The compensation for the occupation of the dwelling-house that shall be payable to the lessor during the aforementioned period shall be equal to the highest rent amount that may have been payable by the tenant:

Provided further that following the death of the tenant the lessor may file an application in accordance with the provisions of article 4A and if these persons who do not qualify under sub-paragraphs (i), (ii), and (iii) do not satisfy the income and capital assets criteria of the means-test, the Board shall make a decision in terms of sub-article (4) of article 4A.

Note the status of cohabitation and civil union leases.

This amendment has brought in a major change because it has limited specifically the definition of a tenant, and it also means that the lease terminates with the death of the surviving spouse who has inherited the lease. The lease is also inherited by children who had similarly satisfied the same criteria and here again the lease terminates. Ergo, this means that in 2021 the old rule that leases were inherited indefinitely under Cap. 69 was terminated and these amendments are an effort to bring the definition of tenant in line with the Civil Code. Here one

will note the difficult balance between respecting the right to property and the peaceful enjoyment thereof, and the ability to evict tenants. Surviving spouses and children who had occupied the property have the right to continue subject to the overriding provisions of article 4A. Therefore, beyond these two limited cases the definition of tenant has been qualified.

There is a specific rule to allow some safeguards for those persons who do not qualify as tenants, either as surviving spouses or as a child, but who live with the tenant for a period of four years out of five before the 1st of June 2008 and continue to live till the death of the tenant. This category of exclusive persons has to vacate within five years and pay the highest rent legally possible. This originates from Act X of 2009 amending the Civil Code.

We have also an important definition of a shop and it is noteworthy that the definition of a shop has not been amended in Cap. 69. However, the Civil Code built upon and improved this definition:

> *The expression "shop" means any premises principally leased for the sale of any wares or merchandise, whether by wholesale or retail, any market stall, warehouse and any premises licensed for the sale of wine and spirits or refreshments, any cinema hall or any other premises principally leased for the exercise therein of any art or trade or for use as a club.*

We have also a definition of a tenant in the case of a commercial premises in Cap. 69, as distinct from a commercial tenant in the Civil Code, and we shall assume that the lease of a shop refers to the lease of commercial premises:

> (b) *In the case of a shop, where the tenant leaves no widow or widower, such persons as are related to the tenant by consanguinity or affinity up to the degree of cousin inclusively, provided, in the latter case, such persons are the heirs of the tenant.*

The tenants of a club are defined as:

> (c) *In the case of a club, the person or persons from time to time succeeding in the management or direction thereof.*

Article 3 is the defining article of the Ordinance, and it has hardly been amended, reading as follows:

> **3.** *It shall not be lawful for the lessor of any premises, at the expiration of the period of tenancy (whether such period be conventional, legal, customary, or consequential on the provisions of this Ordinance), to refuse the renewal of the lease or to raise the rent or impose new conditions for the renewal of the lease without the permission of the Board.*

Here it states that leases are renewed indefinitely except with the permission of the Board. Therefore, this is one of the key articles to understanding Cap. 69.

Article 4 is amongst the grounds where the Board shall grant permission to alter rent conditions:

> **4.** *The Board shall grant the said permission:*
> (a) *if the lessor is bound to carry out or has reasonable cause for making any alterations or works other than ordinary repairs;*
> (b) *if the new lease established in accordance with the provisions of this Ordinance is not more than two per cent (2%) per annum of the freehold value of the tenement on the open market.*

Like article 4(a), article 7 contemplates a similar but different situation, being a hypothesis where the lessor wants to invest in the property by carrying out alterations or other works, meaning that the lessor may not do this with a view to increase the rent without the permission of the Board. The major amendment introduced in Act XXIV of 2021 is in article 4(b) and article 4B. In a sense, the summary of this provision is as follows: that, in the case of a pre-1st June 1995 lease of a residential dwelling-house the lessor can ask for the application of this law, the tenant has to undergo a means test establishing a minimum threshold of income and capital, if the lessee is above the means test then the tenant is out within two years and in the interim pay the rent and compensation established by the Board.

If, on the other hand, a party is under the means test then that party is entitled to continue in the lease, but the rent will be increased up to a maximum of 2% of the current value of the property vacant on the open market with the proviso that the tenant is entitled to apply for a subsidy. The Board will first establish the open market value of the property when vacant and establish a rent at maximum of 2% of such value. This is subject to a subsidy by the Housing Authority. The lessor is entitled to ask for a revision of the rent every six years and where a person has other property or where the current tenant is a co-owner of the property rented this fact will be taken into account by the Board.

Another corollary to be made is that where the tenant does not fit precisely within the definition of lessee, the tenant, on condition that he has lived for four out of five years prior to the 1st of June 2008 and continued to so live with the former tenant till their death, the tenant has a five-year term within which to leave and pay the highest rent possible and permissible by law.

Topic II.5: The Rent Regulation Board

Although article 4A has its own specific application for residential dwelling houses, the Ordinance also addresses whether there is entitlement to an increase in rent if the landlord invests money in the property. A landlord might want to invest money in the property as part of an obligation to carry out structural extraordinary repairs. If the landlord wants to increase the value of the immovable by investing money there are two provisions which might not be in complete harmony, namely article 5 which seems to suggest a reference to article 4(1)(a) in that it refers to a duty of the lessor to carry out works and invest in the property. However, reading article 7 one notes a possibility of the lessor acting to increase the value without any legal obligation to do so. In this event, there is a procedure that for the increase to be allowed the lessor has to obtain prior permanent permission from the Board.

What is not entirely straightforward, however, is the following question: does this provision also apply where article 4A applies? In the case of the old leases, Cap. 69 as modified by the Controlled (Residential) Leases Reform Act of 2021 continues to apply. Therefore, the grounds for eviction contemplated in this Ordinance apply.

Generally, the grounds for eviction are found in article 9(a) and some following articles. This article provides that the lessor may request the Board to terminate or not renew in the following instances: first, where the lessee has caused considerable damage to the premises; second, where the lessee has changed the use of the premises; third, where the lessee has not paid two or more instalments of rent and remains in default for fifteen days following a request in writing and remains so in default for 15 days in respect of each default in instalment. There must be a separate request in writing for each defaulted instalment. Finally, where the lessee has, without the consent of the lessor, either assigned or sublet the premises there shall be cause for termination. If the lease between A and B is sublet, the sublease depends on the continuous nature of the lease, if the lease is dissolved the sublease shall dissolve with it. An assignment is simply a transfer of the lease.

Another ground for resumption of possession is where the lessor requires the premises for himself or his family. This does not apply where the lessee is over 65 years old. In this event, the lessor may request the Board to terminate the lease in the event that the lessor can demonstrate that the lessee has other comparable accommodation.

Article 10 of Cap. 69 states that:

> **10.** *Saving the provisions of the last preceding article, any right of preference granted by the Civil Code in the case of renewal of a lease of any premises shall, so far as the tenant is concerned, remain in abeyance during the time in which this Ordinance shall be in force.*

This provision suspends this right of preference as it emerges from the Civil Code.

Article 12 has never been amended and states that:

> **12.** *Where the premises consist in a shop, the lessor shall not be entitled to resume possession thereof during the time in which this Ordinance shall be in force, except in the case mentioned in article 9(a) or where the premises belong to or are administered by the Government or are otherwise required by the Government for any public purpose.*

Therefore, in the case of a shop a resumption of possession can only be granted in the cases contemplated in article 9(a) as seen above. In the case of a shop, therefore, one cannot ask for termination on the ground of personal need.

Articles 16 and 16A create the Rent Board. Article 16(4) replicates the competence of the Rent Board as found in the Civil Code:

> (4) *Without prejudice to any other law the Board shall also decide all matters affecting the leases of urban property including residential as well as commercial property in terms of Title IX of Part II of Book Second of the Civil Code, Of Contracts of Letting and Hiring, including causes relating to the occupation of urban property where such leases have expired after the termination of the rent, and any damages resulting during such period of occupation.*

The validity of a lease contract remains the reserve of the ordinary civil Courts although the Board has a competence to decide on claims of damage during the lease.

Article 16A was taken from articles 167 *et sequitur* from the COCP which provides for what is known as special summary proceedings and the unfairness of this provision is that it purports to allow a judgement without a hearing. The danger of this provision is that it allows the magistrate of a Rent Board to decide in a few minutes whether or not to grant the possibility of a hearing.

Article 46 basically states that the provisions of this Ordinance will not apply in respect of leases entered into after the 1st of June 1995, in which case the Civil Code applies. However, as originally amended the renewal of the old leases did not make the leases new ones for the purposes of this Ordinance.

Means Test

The Continuation of Tenancies (Means Testing Criteria) Regulations (S.L.16.11) *"establish the criteria of the means test to be satisfied in terms of article 4A of the Reletting of Urban Property (Regulation) Ordinance and article 12B of the Housing (Decontrol) Ordinance by a person with a claim to the continuation of the tenancy under the said articles".* We are told that the means test is carried out on a joint criterion of income and capital, and to be eligible to continue in the lease because one is under the threshold one must be under the threshold in both respects. Therefore, if a tenant is under threshold income but has more capital than that tenant would not qualify to continue. This criterion also applies in respect of a spouse. Income refers to the 12 months immediately preceding the date of application whilst capital refers to the five years immediately preceding the date of application. When there is an application before the Board the Board will order the respondent to provide evidence on the means test.

The Housing (Decontrol) Ordinance, Cap. 158

This Ordinance was enacted specifically to try and stimulate homeownership and the rental market as the framework of wartime emergency measures designed to address profiteering from those whose houses had been demolished and ensure adequate housing (*vide* the since-repealed Housing Act) completely demolished the rental market. This law has seen many amendments over the years, and it has undoubtedly departed from its original form and policy. This Ordinance has the dubious merit of being struck down in that its provisions are a violation of the right to peaceful enjoyment of one's possessions because of its stringent provisions whilst remaining on the books.

In this Ordinance, the definition of lease is as follows:

> *"letting" or "lease" includes -*
>
> *(a) any emphyteutical or sub-emphyteutical grant for a period not exceeding sixteen years;*
>
> *(b) notwithstanding any stipulation to the contrary, any agreement in pursuance of which any person has been accommodated in consideration of payment periodically recurrent in any dwelling-house; and*
>
> *(c) any other agreement whereby any real or personal right on any dwelling-house, which right includes that of occupation of that dwelling-house, is granted under an onerous or commutative title for a period of time, whether such time is established by fixing a certain*

> *specified day or whether it can be established by reference to a certain or to an uncertain future event;*

Of note is the restrictive purview of this Ordinance which is limited to dwelling-houses, defined as:

> *"dwelling-house" means a building or part of a building constructed or structurally adapted for occupation as a separate dwelling;*

This Ordinance replicated article 4(b) of Cap. 69. Furthermore, a tenant is defined as follows:

> *"tenant" means also:*
>
> (a) *in the case of a dwelling-house:*
>
> a. *that person who has been recognised as a tenant in accordance with any law validly applicable before the 1st June 2021;*
>
> b. *the widow or widower of a tenant:*
>
> *Provided that the widow or the widower shall not have the right to be considered a tenant if he did not inhabit the dwelling-house for four (4) out of the last five (5) years prior to the 1st June, 2008 and, in the case of this sub-paragraph did not continue living with the tenant until the date of his death;*
>
> c. *the siblings of the tenant who have continued the lease in solidum together with him:*
> *Provided that the siblings shall not have the right to be considered as tenants if they did not inhabit the dwelling-house for four (4) out of the last five (5) years prior to the 1st June, 2008, and, in the case of this sub-paragraph did not continue living with the tenant until the date of his death:*
>
> *Provided that following the coming into force of the Controlled Residential Leases Reform Act, 2021, no person who has not yet been recognised as the tenant of a dwelling-house up to that date shall qualify as a tenant of a dwelling-house in terms of this definition, except for those who qualify in accordance with sub-paragraphs (ii) and (iii):*
>
> *Provided further that persons who do not qualify under sub-paragraphs (i), (ii) and (iii) and have lived in the dwelling-house for four (4) out of the last five (5) years before the 1st June, 2008, and have continued to live with the tenant until the date of the demise of the tenant shall continue occupying the dwelling-house for a period of five (5) years from the date of death of the tenant, and at the end of which period they shall vacate said dwelling-house. The compensation for the occupation of*

the dwelling-house that shall be payable to the lessor during the aforementioned period shall be equal to the highest rent amount that may have been payable by the tenant:

Provided further that following the death of the tenant the lessor may file an application in accordance with the provisions of article 12B and if these persons who do not qualify under sub-paragraphs (i), (ii) and (iii) do not satisfy the income and capital assets criteria of the means-test, the Board shall make a decision in terms of sub-article (4) of article 12B;

(b) *any sub-tenant in relation to the tenant*

Article 3 is the original, historic article to provide for decontrol:

3. *Subject to the provisions of article 6, the Land Valuation Officer, on the application of an owner made in such manner as may be prescribed, shall register as a decontrolled dwelling-house any dwelling-house which -*

(a) *is not completed or ready for use as a dwelling-house on the appointed day; or*

(b) *although completed or ready for use as a dwelling-house on the appointed day, has not been occupied as a dwelling-house on or before that day; or*

(c) *is completed or ready for use after the appointed day by the making of the structural alterations converting one or more dwelling-houses into a larger number of dwelling-houses; or*

(d) *was on the first day of March, 1959, occupied by an owner as his ordinary residence and has continued to be so occupied up to and including the appointed day; or*

(e) *was acquired under a scheme as is referred to in the Home Ownership (Encouragement) Act, and in respect of which the right to register as a decontrolled dwelling-house has been granted as an incentive in accordance with that Act; or*

(f) *is on the date of the application, occupied by the owner as his ordinary residence and has been so occupied by him, under any title, throughout the period of ten years immediately preceding the date of the application. For the purpose of this paragraph the expression "ordinary residence" does not include a summer residence.*

With regard to article 5, in 1979 we had a major amendment which was later struck down by the Constitutional Court and the ECtHR which said that in the event of a lease of a decontrolled residence which was occupied by a citizen of Malta as his or her ordinary residence, there was the right of the tenant to continue in the lease. Prior to 1979 the Civil Code provisions applied that at the end of a lease of a decontrolled residence there was no further right of residence. This, however, gave the right to the tenant to continue in the lease and granted the lessor increases according to a cost-of-living index published annually as an annex to this law. Which cost of living index has two parts, starting in 1946 and the latest published version was

in 2021, where there is a percentage or an indication of the cost of living. The fifteen-year increase is that one takes the first year of the lease, moves fifteen years down the line, takes a percentage of the variation, and multiply it the current lease. Therefore, the lease continues here indefinitely subject to these periodic fifteen-year increases. There were certain possibilities, as this was heavily weighted against the lessor, where if a landlord could show that a rented decontrolled dwelling-house was in good condition, certified by an architect, there was the right to apply to the Rent Board and all extraordinary and ordinary repairs will go to the tenant.

Article 10 states that if a lessor wishes to shift the burden of extraordinary repairs and repairs to the tenant then the landlord is entitled to request the Rent Board to determine that once the property is in a good state of repair and maintenance henceforth repairs, both ordinary and extraordinary, will be shifted on the tenant. In the background here is the inherent unfairness of the small rent receivable coupled with the burden of repairs.

Article 12 refers to the temporary emphyteusis of a dwelling-house. Prior to 1979 amendments if a dwelling-house was granted on temporary emphyteusis at the end of the period there was no protection to the emphyteuta by forcing them to vacate. Under the 1979 amendments, since struck down repeatedly by the courts, in the case of pre-1979 emphyteusis of dwelling-houses which did not exceed 30 years, either if before June 1979 they did not exceed 30 years, or if entered into on or after that date, there was the entitlement to convert the temporary emphyteusis into an indefinitely renewable lease. The initial rent could not exceed the formerly payable ground rent and then was revised every fifteen years according to the cost-of living index.
There existed also the right to convert, in certain circumstances, into a perpetual emphyteusis. There was entitlement to convert the temporary emphyteusis into a perpetual emphyteusis multiplying by six the ground rent. What would happen was that people would redeem the perpetual ground rent and get the freehold of the property for a pittance. The compensation is normally borne by the State, but the question remains whether this invalidates the right to continue in occupation. The courts have held that when there is a judgement declaring that this is against the human rights protocol of article I, the emphyteuta may no longer use this redemption as a basis for occupation.

Article 12B replicates more or less article 4A of Cap. 69. In 2021 we find an important amendment as part of the ongoing reform which allows the owner of a residential premises where the temporary emphyteuta has converted to a lease the same procedure of applying for the means test. There is also the right of the Board to, in the event of a temporary emphyteusis converted into a lease, allow the resumption of possession and the eviction of the lessee if the owner can show that the lessee has comparable acceptable accommodation. As in the case of Cap. 69 this does not apply in the case were the tenant is over 65 years of age.

Article 16 states that the right to convert from a temporary dwelling-house to a lease does not apply to new leases entered into after the first of June 1995, but those temporary emphyteusis converted into leases continued to be valid. The amendments of 2021 were designed to address the pre-1995 leases which were in some way controlled or restricted because it had become obvious that these were a violation of human rights.

The Private Residential Leases Act, Cap. 604

This is a consumer law to attempt to create some rights and balance in favour of the tenants. The key to understand this law is that there are short leases and longer leases, defined as follows:

For a private residential lease to be valid it has to be done in writing and registered online with the Housing Authority. This residential lease does not apply to guest houses or dormitories.

Topic II.6: Commercial Tenements

Article 1531D and 1531(8) addressed the question of the increase of rent of commercial premises. It is still applicable but the substance of it is that, in the case of pre-1995 leases, unless agreed in writing prior to the 1st of January 2010 or unless on the 1st of January 2010 it was still in its original period (remember that a lease has its original period and, by virtue of Cap. 69, its renewals). Saving these two instances, the rent from the 1st of January 2010 till the 1st of January 2013 increased cumulatively by 15% p.a. such that over three years there was a 45% increase cumulatively. From the 1st of January 2014 there was the possibility of an adjustment of increase published by the government which absent such publication is 5% p.a. which is the current rate.

There is a saving clause in article 1531D (3) in the sense that sometimes there is some form of understanding between parties, not necessarily recorded in any valid form, of periodic increases which would have been honoured by parties. This is evidenced by conduct. In this article it is written that this shall continue to be valid and honoured within the terms of the agreement:

> (3) *In the case of a commercial tenement, if there was an agreement between the parties for periodic rent increases, then such agreement shall continue to apply without the increases contemplated in this article:*
>
> *Provided that except in such cases where the increase in rent has been effected following an agreement, where the increase as proposed here before for commercial tenements is applied, the tenant may by means of a judicial letter served on the lessor or on one of the lessors, terminate the lease by giving him advance notice of three months and this shall also apply if the lease is for a definite period.*

There is an exit clause for the lessee in the sense that if the 15% and 5% increases are not what the tenant had envisaged, the tenant is not bound to accept these increases but has the right to exit and terminate the lease. The essence of article 1531I is that the old commercial leases (pre-1995) will terminate on the 1st of June 2028. This is an important cut off date and whilst it was considered that in the case of old residential leases and saving the revolution created by the reform of the controlled tenancies Act, the increases in the case of residential leases continued, in the sense that there was no time limit for the termination of the old leases. However, this article purports to define what a commercial tenement is. In the case of commercial premises leased before 1995 the tenant is the current tenant, spouse (so long as they are not separated and living together), the definition of tenant extends to a cousin provided such cousin is an heir, and in the case of the death of the tenant howsoever defined and understood the leasehold passes to the heirs up to cousin.

> **1531I.** *In the case of commercial premises leased prior to 1st June, 1995, the tenant shall be considered to be the person who occupies the tenement under a valid title of lease on the 1st June, 2008, as well as the spouse of such tenant, provided they are living together and are not legally separated, and also in the*

> *event of the death of the tenant, his heirs who are related by consanguinity or by affinity up to the grade of cousins inclusively:*
>
> *Provided that a lease of commercial premises made before the 1st June, 1995 shall in any case terminate within twenty years which start running from the 1st June, 2008 unless a contract of lease has been made stipulating a specific period. When a contract of lease made prior to the 1st June, 1995 for a specific period and which on the 1st January, 2010 the original period "di fermo" or "di rispetto" is still running and such period of lease has not yet been automatically extended by law, then in that case the period or periods stipulated in the contract shall apply. A contract made prior to the 1st June, 1995 and which is to be renewed automatically or at the sole discretion of the tenant, shall be deemed as if it is not a contract made for a specific period and shall as such terminate within twenty years which start running from the 1st June, 2008.*

The fact that there is reference to affinity tends to suggest that it includes the heirs of the spouse of the tenant. We are told that commercial tenancies end in 2028. Here again we have a replica of the earlier article that in the event that there is either an agreement as to period of tenancy entered into before the 1st of June 2008 or was in its original period on the 1st of June 2008, and even in the *de fermo* or the *rispetto* periods (that period of time where both lessor and lessee are bound, an option not an obligation given to the tenant to continue in the lease which in the event that it is exercised binds the lessor), the time limits agreed therein apply.

Commercial Sub-Leases

Article 1613 governs sub-letting in the Civil Code. The sub-lessor remains responsible to the lessor for any damage caused to the sub-lessee, and the sub-lessor is still responsible to pay the lease to the lessor even if the sub-lessee does not pay rent to the sub-lessor. The two relationships are independent and neither has any claim against the other. In line with article 1531I, the original article 1613 relating to commercial sub-leases, originally was drafted in 2009 in the sense that old commercial sub-leases (pre-1995) were to finish on the 31st of May 2028. Owing to the fact that the old commercial leases were designed to finish on the 1st of June 2028, the old commercial sub-leases were designed to finish on the 31st of May 2028.

In early 2018 a bill was rushed through Parliament which remedied the situation by which sub-lessees faced eviction. One has to understand that originally there was the possibility that the old sub-leases terminate also in 2018. It was legislated that the sub-lessee may before the 31st of May 2018 file an application to continue in the sub-lease. The added provisions are somewhat difficult to understand as there are a lot of criteria which may potentially conflict. This contradicts the principle that there is no relationship between the lessor and the sub-lessee because the Rent Board has the power to vary not the conditions and rent of the sub-lease but also of the lease itself. It is noted that the extension of the sub-lease cannot go beyond the 1st of June 2028, therefore in line with the current law.

We have spoken in depth of the difficulty of the commercial leases expiring on the 31st of May 2008 and the difficulty of the articles to be interpreted by attempting to please all parties whilst pleasing none. There is so much latitude left in the hands of the court without any clear policy direction, except that the rent has to be increased.

Article 1613. A sub-lease is a relationship between the sub-lessor and the sub-lessee, and not between the lessor and the sub-lessee. The lessee remains responsible to the lessor for any damage and the acts or omissions of the sub-lessee. The title of the sub-lessee is contingent on that of the sub-lessor such that if the latter loses title for whatever reason so too does the former. In 2009 there were a number of significant amendments reflecting contractual practice and judgements. Prior to that point sub-lease was allowed unless prohibited. Today, the contrary is true, with sub-lease being prohibited unless expressly allowed. There is a distinction between a sub-lease and an assignment, with the latter involving a transfer of the lease such that the old lessee exits the relationship and is replaced with the novation of a new one along the terms and conditions of the original contract. In the past, due to the creativity of lawyers, certain unclear agreements came into existence, such as what were known as management or operation agreements, to disguise a prohibited sub-lease. This often took place in government property and catering or tourism locations. This could be legitimate in the sense that it could be lease of a goodwill. It used to happen in the past, and still does, where one takes over a going concern not the bare premises, and this was sometimes stated to be legitimately a management or operation agreement where the owner of the premises of the goodwill entered commercially into an agreement whereby the manager carried out the commercial activity at its own risk and profit but gave an agreed return to the owner of the premises and the goodwill. This is quite current in many commercial leases, with a fixed minimum rent agreed upon combined with a percentage of sales. However, over time, these management and operation agreements came to be nothing but a way of avoiding a sub-lease prohibition in the sense that there was no real business to be managed or operated, but it was simply a premises. The responsibilities of the management operator were often unclear. This was prohibited in 2009 such that these management or operation agreements entered into without the consent of the lessor were prohibited. Perhaps the only pity here was that whilst it was a good idea to clarify circumvention of the sub-lease provisions, it also closed a contractual presumption that the lease of goodwill is not a management or operation agreement, whereas there can be many good and legitimate reasons for the lease of a goodwill. A person may either sell a business wholesale or lease, but this must now be contractually agreed to.

Another trick of the past relates to the lease of a limited liability company. Today this is contractually prohibited, at the time the obvious mechanism was to circumvent this was to affect a transfer of shares in the lessee company, with the tenant remaining the same. This has since been closed and any majority change in shareholding or control and management, is considered to be a sub-lease or assignment. A transfer to a spouse in marriage or children is not considered to be a transfer prohibited and the lessor can consent to this possibility.

Topic II.6: The Rights and Obligations of the Lessor/Lessee

Articles 1540 et sequitur are generally straightforward in the sense that their drafting reflects that they have been more or less left unamended since their original drafting and reflect their old French drafting. Particularly, they emphasise that lease is a personal right inter partes. Without any interference, these articles are designed generally to be default provisions, meaning: first, that the Code recognises the ample negotiating and contractual space that exists in lease; second, the difficulty to identify which principles are of public order and interrogable, and which are not. The general principles of lease are interrogable for the reason that they define the nature and contract of lease, otherwise, there is clear implied recognition that parties are at liberty to agree contractually. Of course, one will no doubt understand that it depends essentially on the nature of the lease, whether it is residential or commercial, and also on other determinate factors, such as the duration of the lease, as the longer the period is (a lease would be long to allow a lessor to recover the investment in the property) there would be a shift in greater burdens and responsibilities of the lessor because it is a long-term

relationship and therefore the lessor has added responsibilities. It is necessary to acknowledge that a significant amount of lease articles are the result of practice and customary drafting over generation. Leases from the early to mid-twentieth century were typically simple, with parties assuming good faith with the suppletive articles of the Code as distinct from today's leases which, to a large extent, go into the minutiae of details which are either not necessarily relevant or simply are already subject to detailed regulation.

Article 1540 states that the lessor has three important obligations:

Delivery is essential in the sense that part of the continued obligation of the lessor is to hand over the control of the object lease, be it movable or immovable. There must therefore be a moment when detention passes. An owner possesses through the lessee and therefore this is a rather essential moment of delivery. At that point, the rights and obligations of detention come into place.

The next cluster of articles speak of the maintenance and repair obligations of the parties. Here again customary drafting has played a defining role in the sense that the default position is that the lessor is responsible for extraordinary and structural repairs and the lessee is responsible for maintenance and ordinary repairs. There is hardly any definition in the Code as to the distinction between extraordinary repairs and ordinary repairs, with the only clear reference being under the law of usufruct. What is exceptional remains unless otherwise agreed with the lessor, and what remains in the ordinary course of a lease constitutes ordinary repairs/maintenance. There is some difficulty as to finding this defining line because maintenance is by its definition something which is on an ongoing basis and therefore the area tends to be blurred. Also, there are situations where maintenance is required over the passage of time, and these are normally the default responsibility of the lessee. This is, however, a matter of contractual replacement. Bear in mind the matter of ongoing use, deterioration, and the fact that there is a presumption, unless otherwise excluded by an inventory, that the object leased is received in a good condition, throwing therefore on the lessee the burden to return in original condition. There is the obligation, saving far wear and tear through proper use, the obligation to return in original condition.

However, there is some dissonance between the articles immediately preceding 1540 and those following 1556. In article 1540 we are told that the "during the continuance of the lease, the lessor is bound to make all repairs which may become necessary, excluding, in the case of buildings, the repairs mentioned in article 1556", which implies that the lessor is responsible for everything. On the other hand, article 1556 states that "the lessee of an urban tenement is responsible for all repairs other than structural repairs". Often in contractual and legislative drafting we find the distinction between ordinary and extraordinary maintenance, which is strange as maintenance is by its very nature ordinary.

There are some useful transitory provisions in article 1540, for example the fact that in pre-1995 leases of urban tenements, subject to an opt-out clause by the lessee, if repairs have become necessary, not due to the fault of the lessor, the lessor has the right and the duty to carry out such repairs and increase rent by 6%. There is another opt-out in the sense that the lessee may choose to carry out the structural repairs itself, with no 6% increase being applied, however there would also be no entitlement to compensation from the lessor at the end of the lease. There are two important rules relating to the unwillingness of the lessor to carry out structural repairs. If structural repairs are necessary and the lessor fails to carry them out, the lessee has a remedy to ask the Rent Board to be authorised to carry out itself such structural repairs, whilst holding back and setting off the rent against the cost of such repairs, and during the period during which such repairs are necessary but have not been done the lessee is

entitled to, prior to any authorisation from the Rent Board, hold back the rent, an implied bilateral dissolutive condition. Where the repairs are urgent the lessee may act immediately, without the necessity of approaching the Rent Board, and hold back the rent. The following provisions grant direct contractual remedies to the lessee against the lessor for the failure to carry out and deliver the obligations of the lessee.

The first is a consequence where the lease has become uninhabitable or if the lessor does not maintain and repair in terms of the agreement as agreed. Note, the necessity of clear drafting and the importance of strong default clauses in situations such as these. The lessee, in the fault of default of the lessor has two remedies to dissolve the lease and receive damages. However, damages are difficult to prove but what can be proven are direct damages and that the lessee did not find a comparable property with the same rent. In general terms, the lessor is bound to maintain, and the lessee has an action for dissolution and for damage for the failure thereof.

The third and final obligation of the lessor is similar to the warranty of peaceful possession in sale. There is here a warranty of peaceful possession that the lessee is entitled to the continued enjoyment of the lease, that is that there are no challenges in title and that the lessor is bound to ensure the continued enjoyment. It is not necessary that the lessor is an owner, but that they ensure the continued enjoyment of the lease. Likewise, there exist articles which relate to the undisclosed defects of a lease. This is part of the ongoing warranty whereby a lessor is to not only make sure of continued enjoyment, but that the object is generally fit for the purpose lease, but that there is no defect undisclosed. Here we find an analogy with the law of sale. The defences of the lessor are that it is not a legal molestation, in other words it does not have anything to do with title, but it is a molestation of fact, meaning it is then up to the lessee to defend against such molestations. Another defence by the lessor is that the legal cause of the molestation arose after the lease and the final cause of molestation is that the lessee did not immediately inform the lessor of the molestation. This is similar to the principle that if the lessee did not inform the lessor and the lessor had means to defend the lessee then the lessor escapes liability.

The rights and Obligations of the Lessee

These are generally summarised in the following manner: first, the lessee must make use of the object let according to the agreed and/or presumed use/purpose (this is why the purpose of the lease must be cited in the agreement); second, the obligation to use as a *bonus paterfamilias* (this will become relevant when we address the question of deterioration); third, to pay the rent. Rent is payable as an essential element of the contract of lease and the requirements of such a contract impose the terms and modalities of payment of rent. There is also implied and developed by the courts that non-use is a ground for termination, cioe there is an obligation on the part of the tenant implied to make use of the object leased. Historically, this has developed in the following manner: in the case of **commercial** leases, ongoing use was jurisprudentially considered as an essential component of the goodwill of a commercial premises such that non-use in the case of a commercial lease, because of the link to goodwill, was considered to be a renunciation of the lease, and hence, the courts, if this where indeed proven, consistently considered this to be a ground of dissolution of the lease. The other articles in the case of **residential** premises establish that non-use for a year, subject to exceptions, is considered to be *"bad use"*. Although this may not be the most elegant term, it is a codification of the cases in the sense that non-use in the case of residential premises for a year entitles the lessor to demand dissolution. There are important exceptions, such as when a person has to work abroad or illness, which are not considered to be examples of improper non-use. Subject to this, the articles provide that non-use in the case of residential leases entitle the dissolution of the lease in the case of non-use for a year or more.

The 2009 amendments attempted to put to rest an unsettled question in the case, that is, when a lessee goes into residential care, does this mean an abandonment, that is to say, a renunciation of the lease? This implies that the tenant is unlikely to ever return to the lease on a permanent basis. There were two approaches in jurisprudence: the first held that even though a person may have been in long term residential care the possibility and the thought of having one's home, and returning thereto, was a sufficient ground not to terminate the lease. Therefore, there was a line of judgements which supported this view. There was however, an equally consistent, although contradictory, line of judgements which held that if a lessee were admitted to long-term care, then there is an implied renunciation of the lease. The 2009 amendments attempted to address this and stated: first, although this has since been overtaken by subsequent legislation, in article 1555A (2); second, this article tends to suggest that even where the tenant does not remain in the property leased due to being totally dependent on a care institution, and there is no one who succeeds to the lease in terms of 1531F (since repealed), then the lessor shall have the right to demand the dissolution.

Repairs

The next question is repairs. It would seem that, in spite of contradictions, all ordinary repairs and maintenance are at the charge of the lessee, whilst extraordinary repairs, principally structural ones, are at the charge of the lessor, with the qualification that this can be contractually modified. The more difficult question relates to deterioration, as this raises the question of deterioration *per vetusta* (owing to the passage of time). This has two sides: first, the obligation of the lessee to carry out repairs and maintenance (meaning that if any deterioration is due to this failure, it is clearly the fault of the lessee; second, whether there has been proper use. However, the conclusion is that unless it is shown that the lessee is somehow at fault, there is no liability for natural deterioration and depreciation, saving repairs, due to ordinary proper use. In other words, if the lessee carries out proper maintenance and repairs, and uses the object properly, but nonetheless this deteriorates due to the passage of time, that deterioration must be borne by the lessor. One can glean these conclusions indirectly from two provisions: article 1557, the statement that the lessee is responsible for any damage or loss which is cause through his fault; and article 1561, that the lessee is liable for deterioration or damage unless he shows that it happened not due to his fault. Therefore, absent fault does not give rise to liability of the lessee.

Important articles to bear in mind are articles 1559-1561, read together, which state that there is a presumption created by the law that the thing was delivered in a good condition, and, saving fair wear and tear owing to proper use, the lessee is to return in the condition received. Where there is no description proving the contrary there is a presumption that the lessee received the thing in good condition, as linked to the preceding article which states that where there is a proper description the property must be returned in the condition received saving fair use wear and tear, and force majeure. The lessee is responsible for those occupying the property, even if not permanently, for any deterioration liability unless it is shown that this was occasioned through force majeure, or, in the case of a fire communicated from an adjoining tenement.

The final article, 1564, is rather interesting in the sense of the jurisprudential development attached thereto. This, at first glance, prohibits any structural alteration in the premises by the lessee. Obviously, people who occupy a property by title of lease do tend to carry out for their own convenience structural alterations, and the courts have developed a number of principles on this. Thus, the question is this: *does the fact that there have been structural alterations mean that the lessor is entitled to dissolve and terminate the lease?* The answer is it depends. If there a specific express prohibition, prohibiting structural alterations or under certain

conditions, and this is violated, then yes there is entitlement to dissolve. Second, if the agreement is silent on the matter, the lessee is, within the following parameters, entitled to carry out structural alterations:

1. The lessee must show that the alterations are of improved enjoyment,
2. The lessee must show that there is no risk to the structural solidity of the building,
3. The lessee must show that these alterations can be, at the termination of the lease, unwound, in the sense of being reversed to their original state at the request of the lessor.

Note how the jurisprudence has developed and evolved an otherwise express provision in the law under article 1564. It is clear that structural alterations are regulated in detail in all agreements today. A typical clause would prohibit them without the express consent in writing of the lessor. But if they are, in advance, they must create no structural risks, they must be done under the supervision of a responsible architect, and finally all planning permission would have to be in order in advance; and sometimes the agreement regulates the question of undoing the alterations at the end of the lease, that is to say, whether the lessor retains the right to request that the situation be reversed. Invariably, it is written that there is no right for compensation for any improvements or structural alterations, even if the property leased has increased in value.

The Termination and Dissolution of a Lease

The Private Residential Leases Act has its own rules, but where the Civil Code is applicable there is the specific rule applicable that a lease is terminated on the expiration of its natural term. When the agreed covenanted period expires, then the lease is over. This is, naturally, subject to specific exceptions as we have seen in the Private Residential Leases Act. Apart from the natural termination of the lease, leases terminate through violation of contractual conditions, or through violation of rules imposed by the law. These are normally in the more complicated lease agreements grouped under the term “events of default”, i.e., whether or not there has been a default. These are partly negotiated and during the negotiation period these are conditions which are discussed at length and negotiated between the parties, e.g., is the lessor entitled to terminate the lease in the event that the lessee fails to pay multiple instalments of rent.

Conditions in a Contract of Lease

Where there is agreed an express resolutive condition and the typical language of such a condition will be “in the event that … the lessor shall be entitled to dissolve and terminate the lease”, then the implication is that once a violation of this express resolutive condition is established the court has no discretion and is mandatorily enjoined, an obligation arising from the law, to order the dissolution of the lease. A number of reflections are in order: first, it is often wrongly written that a lease is dissolved *ipso jure*, this cannot happen because a lease can of course expire but in the event of a claim for dissolution based on a violation of a contractual obligation, this cannot be unilaterally determined by the party claiming a breach, but has to be judicially established and ascertained, meaning it is ultimately the court who must decide whether or not there has been a violation; second, there must be the putting of the lessee on notice, that is to say, the lessee is formally, through a judicial act, called upon by the lessor putting notice on the fact of a breach or violation and therefore enabling subsequently a writ demanding dissolution. A claim for dissolution can be with or without a claim for damages, which must be established (e.g., that the lessor did not manage to rent at the same earlier rent). The point of an express resolutive condition is that the court has no discretion in allowing the respondent qua lessee to remedy the violation, and this is therefore a crucial point in negotiations. A proper negotiation would require a judicial intimation to allow

a period for remedy, after which there shall be entitlement to dissolution. Even if one accepts an express resolutive condition, the effect of which is clear and does not allow time to remedy the situation, there should be included also a time within which there will be an opportunity to remedy.

There could be questions arising from the violation of a contractual obligation which, however, is not placed in the terms of an express resolutive condition. Take, for example, a lessee prohibitied from sub-letting. This is not expressed as a resolutive condition in the sense that if it were indeed established that there has been a violation of a condition it does not follow that there will be automatic dissolution, although dissolution can follow but only after an opportunity to remedy the breach is granted. This is the fundamental distinction between the violation of an obligation mandatorily cast in express resolutive terms and a violation of an obligation imposed either by law or by contract without the consequence that the lease is resolved. This is because, in this second event, dissolution is not automatic, rather the court is enjoined to grant a time for cure and may either order specific performance or indeed dissolution. The right to damages may or may not be claimed. What has been said, generally, particularly in all conditions imposed by law or by contract, follows in the sense that the court has the discretion to grant a cure period. The dissolution can only be ordered if it is expressly agreed.

There is a specific provision relating to the payment of rent and the thinking behind this is that whilst the lessor is entitled to the payment of rent as part of an essential obligation of the contract of lease, there has to be the service of a judicial letter and a period of not less than a month wherein the lessee can pay and remedy the default, *viz.*, we are not looking at a situation where the lessor can wait for a due date and claim dissolution. These times can be extended in favour of but not against the lessee.
Loss of object can be a ground of dissolution if the object leased is totally destroyed, saving issues as to whose fault it is. Partial destruction gives the lessee to either dissolve or retain the lease and demand an abatement in the rent. There are then a number of particular provisions, the most important being that the death of a tenant does not dissolve the lease. That is to say, the heirs of the lessee continue in the lease within its original terms, meaning if there was a time limit which bound the original lessee then the heirs succeed to the obligations relating to this term. There are a number of provisions that a lease is dissolved if the immovable rented is sold, with this being valid provided it had been reserved in the lease agreement. There are doubts as to whether this would be valid with respect to the Private Residential Leases Act, but in general terms it shall apply. There are also the general rules of extinction of obligations which also apply in the case of lease, i.e., merger, novation, etc. The general principles of contract and the extinction of obligations also apply here.

The Right of Preference

Pursuant to article 1590, the right of preference has existed in the part but was significantly rewritten in the 1960s and has the effect of either granting, in certain situations, an acknowledge preference on the same conditions for a particular person, or that it goes against the rules of the free market in the sense that having people who are preferred means that the property is not freely on the market. Of course, one can say that the right of preference operates on the same conditions of the open market. There are three categories of persons who are preferred:

1. A co-owner: Where an immovable is going to be rented out, a co-owner is entitled to be preferred on the same terms and conditions, and if there are two or more co-owners who have an interest to be preferred in the lease then a so-called internal auction is held where whoever offers the better terms is preferred.

2. Sitting tenants: These, on the same terms and conditions, are entitled to be given the lease
3. Lessor of above tenement: The tenant above has the right of preference in the case of a lease of the tenement below. Does not include cases of common tenement accommodation or apartments. This was originally cast for the traditional *kerrejja*, when an old house would have families living on each level, without a block being shared.

If one is a lessee and knows that one has a right of preference, there is no way that one qua lessee can get the person entitled to a preference to exercise it. One may wish to inform a person with a stronger right of preference in order to avoid having their possession molested during the lease. In practice, either where a contract is in the offing or when it has been concluded, the initiative is with the party having the right of preference, *viz.*, the party having a right of preference is to be intimated with the conditions by the lessor, not the new lessee, and it is only a trigger by the lessor to the party potentially interested or a challenge by the party claiming to have a right of preference is to inform the lessor and lessee that on the basis of the lease concluded he is exercising his right of preference. *Vide* articles 1595 and 1596. The new lessee is dependent on either the lessor giving notice to a party entitled to a right of preference which is not exercised, or the inactivity of the party entitled to such a right. If a party entitled the said right is fully aware of the situation and choose to remain inactive it can be suggested that such inactivity will be seen as a renunciation.

In fine, there are civil implications for misrepresentation, e.g., a lessor who informs one with the right of preference that the lease is to be at a higher rate than that at which he intends renting it for to specifically put him off it. The contract will then become valid on the misrepresented amount (the lesser rate). Furthermore, there are situations where the right of preference cannot be exercised, e.g., in the case of the co-owner, pursuant to article 1607, there are a number of situations which exclude this right, such as when the potential lessee does not reside in Malta; or the right of the lease in respect to the lower part does not apply if the lessee of the upper part does not make use of the upper part for his or his family's habitation and the right of the co-owner to exercise a right of preference prevails over the right of the lessee of the upper tenement to rent the lower tenement.

Luca Camilleri

Topic III: Minor Contracts

Topic III.1: Nominate vs Innominate Contracts

Nominate is divided into three: the law of sale, contracts of letting and hiring, and the minor contracts. Obligations arise from contracts, quasi-contracts, the law itself, quasi-torts, and torts. The easiest way to give rise to an obligation is through an agreement. However, if an incident occurs in the absence, it does not mean that one is not liable because if one is responsible for an act or omission that causes injury to another, he is liable for any damages which are incurred. Lending and hiring, sale, mandate, loan, and deposit are regulated by their own specific rules in the Civil Code. Article 965 states as follows:

> **965.** *Contracts, whether they have a special denomination or not, shall be governed by the general rules contained in this Title saving such special rules as apply to certain contracts.*

These contracts are specifically regulated as they are held in higher importance due to the frequency of their use. We make this distinction because if there is a specific agreement the court will go to the substance of the said agreement.

"Nominate are those which have a special denomination, and which form the subject matter of a special title of the Code. Innominate are those which have no particular denomination, and which do not form the subject matter of a special title. Both nominate and innominate contracts, however, are subject to the rules of contracts in general. The former is also subject to certain rules of their own, which sometimes even modify the general rules; also, innominate contracts may, by analogy, be subjected to the special rules of any one of the nominate contracts".[1]

"Nominate contracts i.e., those contracts which, due to their greater importance or their greater frequency, have been specifically regulated by the legislator".[2]

"The significance of the distinction is that the standard incidents of nominate contracts are, in the absence of contrary intention, laid down by general rules, whereas the content of an innominate contract derives in principle directly from the intention of the parties.

The first step in interpreting a contract is therefore to 'qualify' or characterise it, i.e., to determine whether it falls within the limits of one or other of the nominate contracts. ... Of course, the parties to what the court concludes to be an innominate contract will often have left some or all of its terms unexpressed. The court may well decide that the contract is akin to one or other of the nominate contracts or that it embodies elements of several of them (a contract for board and lodging in a hotel provides an example) and will interpret it accordingly".[3]

In the case of ***Robert Borg v. Francesco Abela*** (Court of Appeal, 16 December 1949, Vol. XXXIII (1949) I.ii.774):

> *On apparent contract of warehousing, the conditions of which were more akin to a (sub-)lease: specified rent and duration, consumption of utilities, obligation to conduct repairs and prohibition of alterations to property*

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[1] V. Caruana Galizia, Notes on Civil Law, Year III: Obligations, p. 5.
[2] A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 740
[3] B. Nicholas, French Law of Contract, (London: Butterworths, 1982), p. 45

> *Ghalkemm il-partijiet jaghtu lill-ftehim taghhom xbiha ta' figura guridika, hija l-Qorti li ghandha tara fil-fatt x'ghamlu, u fuq is-sustanza li tirrizulta tapplika n-"nomen juris" u l-ligi. Fil-kaz prezenti l-Qorti tara fil-ftehim tal-partijiet vera sullokazzjoni mohbija ta' xbiha ta' speci ta' magazzinagg, u ghalhekk il-Qorti ghandha tapplika r-regoli tas-sullokazzjoni.*

Topic II.2: Distinctions

NOMINATE vs INNOMINATE: Article 960 of the Civil Code describes a contract as *"an agreement or an accord between two or more persons by which an obligation is created, regulated, or dissolved".* The contract is an agreement of wills intended to create obligations ... the clause is to the contract what the article is to the law.[4]

I. BILATERAL VS UNILATERAL: From article 961 we find differentiations to the contractual formula with article 961 stating as follows:

> **961.** (1) *A contract is synallagmatic or bilateral when the contracting parties bind themselves mutually the one towards the other.*
>
> (2) *It is unilateral when one or more persons bind themselves towards one or more other persons without there being any obligation on the part of the latter.*

A contract in its simplest form is essentially a juridical bilateral act with the union of wills between two or more parties. If there are two parties in a contract, are they both binding themselves to act, or could there be an instance where one party agrees to bind themselves whilst the other does not? To that end, the difference between a bilateral or unilateral contract lies in the obligation *per se.* One must ask who is obliging himself towards whom. If each obliges itself towards the latter than the contract is a bilateral one. Therefore, the main difference lies in the reciprocity of obligations. A contract of sale would be an example of a bilateral contract, whilst a contract of loan would be an example of a unilateral contract.

What makes a contract synallagmatic is the reciprocity of the obligations that arise from it; each party is both creditor and debtor of the other e.g., sale & letting and hiring. The interdependence between the commitments assumed on both sides and which mutually serve as a cause is, in fact, what most profoundly characterises the synallagmatic contract. On the other hand, in the unilateral contract there are only obligations to be borne by one party. Unilateral contracts are of several types, such as restoration or "restitution" contracts (e.g., loan, deposit where there is only the commitment by the borrower and the depositary, to return something that has been given to them, at the end of the contract) and promises to contract (e.g., the unilateral promise of sale, a person undertakes to purchase a property from another person within a determined period).[5]

A synallagmatic contract is one which creates reciprocal obligations, each party having both rights and duties. A unilateral contract creates only rights in one party and only duties in the other.[6]

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[4]J. Carbonnier, Droit civil: Vol. II, (Paris: Presses Universitaires de France, 2017), p. 1942
[5]J. Carbonnier, Droit civil: Vol. II, (Paris: Presses Universitaires de France, 2017), p. 1942
[6]B. Nicholas, French Law of Contract, (London: Butterworths, 1982), p. 37

A unilateral contract can, exceptionally, become synallagmatic by the addition of a clause: e.g., a remunerated deposit. This situation should not be confused with the case of imperfect synallagmatic contracts. Deposit and commodatum, in themselves, only imply an obligation for the party who, having been delivered the thing, is bound to return it. These are unilateral contracts, but if, during the contract, the debtor has to incur expenses to maintain the thing, he will, in turn, become a creditor. In this case, the indemnity claim by the depositary or the borrower is accidental; it arises from a fact subsequent to and external to the contract.[7]

An originally unilateral contract may become synallagmatic when the other party becomes liable during the life of the contract. This occurs when a gratuitous depositary expends money to preserve the property for which reimbursement will be due.[8]

II. ONEROUS VS GRATUITOUS: The second distinction is between an onerous and a gratuitous contract, as found in article 962:

> **962.** (1) When each of the parties undertakes an obligation, the contract is termed onerous.
>
> (2) When one of the parties gratuitously procures an advantage to the other, the contract is termed gratuitous.

In an onerous contract each party gains an advantage, whilst in a gratuitous contract only one does.

"An onerous contract is one where each of the parties intends to provide a service only in exchange for a consideration and intends to give it only on condition of receiving something in return e.g., sale, letting & hiring, interest-bearing loan (the interest is the consideration for the service rendered by making the money temporarily available to the borrower).

"A gratuitous contract is one where one of the contracting parties intends to provide the other with an advantage without consideration (there must be the liberal intention, outside of which there may be enrichment without cause or lesion, but not a free contract). The "*contrat de bienfaisance*" (contract of benevolence) is reserved for a particular variety of gratuitous contracts where service rendered without consideration e.g., non-interest-bearing loan, commodatum, unremunerated (gratuitous) mandate and unremunerated (gratuitous) deposit.

"In gratuitous contracts, the liability of one who renders a service without remuneration is considered to be more lenient than under ordinary law (*culpa levis in abstracto* & *culpa levis in concreto*), they generally impose a lesser degree of care".[9]

"In an onerous contract, a party confers an advantage (i.e., a right) on the other party with the intention of obtaining a reciprocal advantage for himself. In a gratuitous contract, a party confers the advantage with the intention of obtaining no such advantage".[10]

"A contract can be both onerous or gratuitous, such as mandate. This approach has been praised as the "wiser choice" to help keep the contract of mandate useful and realistic in the modern day."[11]

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[7]J. Carbonnier, Droit civil: Vol. II, (Paris: Presses Universitaires de France, 2017), p. 1943
[8]D. Tallon, "Contract Law", Introduction to French Law, (Bermann & Picard Eds: 2012), 208
[9]J. Carbonnier, Droit civil: Vol. II, (Paris: Presses Universitaires de France, 2017), p. 1943-1944.
[10]B. Nicholas, French Law of Contract, (London: Butterworths, 1982), p. 42
[11]R.J. Scalise, "Classifying and Clarifying Contracts", Louisiana Law Review, Vol. 76(4), 2016, p. 1072

Distinctions that largely coincide: all synallagmatic contracts are onerous, and most unilateral contracts are gratuitous ...[12]

In truth, all bilateral contracts are onerous. A contract, however, may be onerous without, at the same time, being bilateral.

Bilateral = Onerous
Onerous ≠= Bilateral

A loan at interest serves as a good example of an onerous, unilateral contract. In such a case, both parties have obtained advantages—the borrower, the use of the thing loaned, and the lender, the interest. The obligations of the parties once the loan has been extended, however, are not reciprocal. Rather, the obligations are engendered solely by the borrower and thus the contract is unilateral.

Although all gratuitous contracts are unilateral, not all unilateral contracts are gratuitous.

Gratuitous = Unilateral
Unilateral ≠= Gratuitous[13]

III. COMMUTATIVE VS ALEATORY: The third distinction mentioned in the Civil Code is commutative or aleatory, as found in articles 963 and 964, respectively:

> **963.** *A contract is commutative, when each party binds himself to give or to do a thing which is considered as the equivalent of that which is given to or done for him.*
>
> **964.** *When the advantage or loss, whether to both parties or one of them, depends on an uncertain event, the contract is aleatory.*

It is a sub-division of onerous contracts. Onerous contracts are, in general, commutative; but some are aleatory, because the performance to which one of the parties is bound depends, in its existence or in its extent, on an uncertain event or the occurrence of chance. The eponym is a betting agreement, but it is hardly a contract. The best example is ultimately the life insurance contract.[14] A contract is aleatory when the extent of one party's performance depends on some future uncertain event and the other party's performance does not vary correspondingly, [therefore] a sale of next year's crop at so much per ton is not aleatory. An aleatory contract is when the advantage or loss, whether to one party or both, depends on an uncertain event.

With regard to commutative contracts, the following are Classification of nominate contracts (*contratti tipici*) suggested by Torrente & Schlesinger according to their structural characteristics:

a. Contracts of exchange involving a *do ut des* i.e., commutative contracts whereby something is given so that something may be given in return e.g., sale

[12]B. Nicholas, French Law of Contract, (London: Butterworths, 1982), p. 42
[13]R.J. Scalise, "Classifying and Clarifying Contracts", Louisiana Law Review, Vol. 76(4), 2016, p. 1072
[14]J. Carbonnier, Droit civil: Vol. II, (Paris: Presses Universitaires de France, 2017), p. 1944-1945

b. Contracts of exchange involving a do ut facias i.e., commutative contracts whereby something is given so that something may be done in return e.g., letting and hiring (both *locatio rei* as well as *locatio operis*)[15]

IV. REAL VS CONSENSUAL: The final distinction is not contained in the law but in doctrine and is the difference between consensual and real contracts. In the former the contract comes into being upon the agreement between the two parties because the consent of both is a requirement, with the typical example being sale. What distinguishes real contracts from consensual ones is that no contract exists until the delivery of the thing. Take, for example, a contract of loan in which one's father lends his son five thousand euros with no written agreement. Does a contract between the two exist? The contract came into being as soon as the father delivered the five thousand euros, which would be the material fact he would be required to prove should the son refuse to pay his father back. On the other hand, say the father and son agreed on a contract of loan but he never delivered the amount, can it be said that a loan took place? The answer is no. It can be claimed that there was a promise of loan, but no contract of loan came into being as the father failed in his obligation to deliver, something for which he would be liable.

Under Roman Law, the distinction was made as follows:

> There were four consensual contracts at Roman law - sale (*emptio-venditio*), hire (*locatio-conductio*), partnership (*societas*), and mandate (*mandatum*) - so called because they were enforceable by the mere consent of the parties without any other formality.[16]
>
> There were four distinct real contracts. They were mutuum (loan for consumption), commodatum (loan for use), depositum (deposit), and pignus (pledge). In contrast to consensual contracts, the commonality of these contracts was that no contract existed until delivery of the thing loaned, deposited, or pledged. Once delivery occurred, an enforceable contract arose.[17]

Consensual contracts which are the majority, are concluded with the simple consent or agreement of the parties. Real contracts require, in addition to the consent of the parties, the delivery of the goods (*re perficitur obligatio*). Real contracts are: mutuum, commodatum, deposit and pledge.[18]

In the Roman view real contracts came into existence when the thing (res) was delivered to the borrower, who then came under an obligation to return it (or, in a loan for consumption, its equivalent) at the appointed time. Loan is a unilateral contract, the borrower having a duty (to return the money) and the lender a correlative right, but not vice-versa. Until the delivery of the thing there is no contract ... [Real contracts] come into existence not by the making of the

[15]A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 741
[16]Justinian's Institutes §§ 3.13.22-26
[17]Justinian's Institutes §§ 3.3.14
[18]A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 538

agreement, but by the delivery of the thing. Until then the borrower (to take the example of a loan) is under no obligation.[19]

Definitions

These elements are all present in the definitions of the respective contracts.

Contracts of Sale

Article 1346 states that:

> **1346.** *A sale is a contract whereby one of the contracting parties binds himself to transfer to the other a thing for a price which the latter binds himself to pay to the former.*

This contract is bilateral with an exchange taking place. Furthermore, the contract is an onerous one as both parties gain an advantage. Finally, the contract is a consensual one because the emphasis is placed on the agreement, with the delivery of the thing not being a requisite for a valid contract of sale but is instead one of the fundamental obligations of the vendor.

Contract of Lease

Article 1526(1) states that:

> **1526.** (1) *The letting of things is a contract whereby one of the contracting parties* [the lessor] *binds himself to grant to the other* [the lessee] *the enjoyment of a thing for a specified time and for a specified rent which the latter binds himself to pay to the former.*

This contract is bilateral because of the corresponding obligations. It is an onerous one because both parties gain an advantage. It is a consensual contract because the agreement comes into being when the parties bind themselves to the other. The definition makes no reference to delivery.

Contract of Commodatum

This is a contract for use wherein one lends something to another to allow them to use it. Article 1824 states as follows:

> **1824.** *Commodatum or loan for use, is a contract whereby one of the parties* [lender] *delivers a thing to the other* [the borrower]*, to be used by him, gratuitously, for a specified time or purpose, subject to the obligation of the borrower to restore the thing itself.*

Therefore, this contract is unilateral as the definition refers to the obligation of the borrower to restore the thing. The delivery of the thing is not a corresponding obligation of the lender because by delivering the thing the lender would not be carrying out an obligation but would bring the contract into being creating the obligation to return the thing by the borrower. This contract is gratuitous as the law itself specifies that the loan is gratuitous as soon as it is otherwise it becomes a lease. The contract is furthermore a real one as the obligation is created upon the delivery of the thing.

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[19] B. Nicholas, French Law of Contract, (London: Butterworths, 1982), p. 39

Contract of Mutuum

Known as a loan for consumption, article 1842 states that:

> **1842.** *Mutuum or loan for consumption is a contract whereby one of the parties* [lender] *delivers to the other* [borrower] *a certain quantity of things which are consumed by use subject to the obligation of the borrower to return to the lender as much of the same kind and quality.*

This contract is unilateral because the article mentions only the obligation of the borrower to return to the lender the things of the same kind as quality as that lent. This contract is gratuitous as neither party agrees to interest. Finally, the contract is real because of the requirement for delivery. If interest is agreed upon it becomes onerous but remains real.

Contract of Deposit

Article 1891 defines a contract of deposit as:

> **1891.** *Deposit, in general, is a contract whereby a person* [depositary] *receives a thing belonging to another person* [the depositor] *subject to the obligation of preserving it and of returning it in kind.*

With regard to the nature of the property so-called, article 1892 states that:

> **1892.** (1) *Deposit properly so called is a gratuitous contract, saving any stipulation to the contrary.*
>
> (2) *Only movable things can be the subject of such deposit.*

Finally, with regard to the way in which deposit is perfected, article 1893(1) states that:

> **1893.** (1) *A deposit is only perfected by the delivery of the thing to the depositary.*

This type of contract is unilateral because the depository is the only one bound to preserve the thing deposited and return it in kind, although it will become bilateral should a reward be stipulated for the deposit. The contract is gratuitous unless it is stipulated otherwise. The contract is also a real one as it is created by the delivery itself.

On the other hand, if the depositor is bound to reimburse depositary for certain expenses, article 1918 stipulates that:

> **1918.** *The depositor is bound to reimburse to the depositary the expenses which the latter has incurred for the preservation of the thing deposited and to make good to him all the losses which the deposit may have occasioned him.*

Therefore, this mutates the form of the contract which becomes bilateral, gratuitous, and real. This situation where obligations arise during the course of the obligation is known as an imperfectly bilateral agreement, as opposed to a perfectly bilateral agreement in which the compensation would have been agreed upon from the outset.

Contract of Mandate

Article 1856 states that:

> **1856.** (1) *Mandate or procuration is a contract whereby a person* [the mandator] *gives to another* [mandatary] *the power to do something for him.*
>
> (2) *The contract is not perfected until the mandatary has accepted the mandate.*

However, with regard to gratuity, article 1861 states that:

> **1861.** *Mandate is gratuitous unless there is a stipulation to the contrary.*

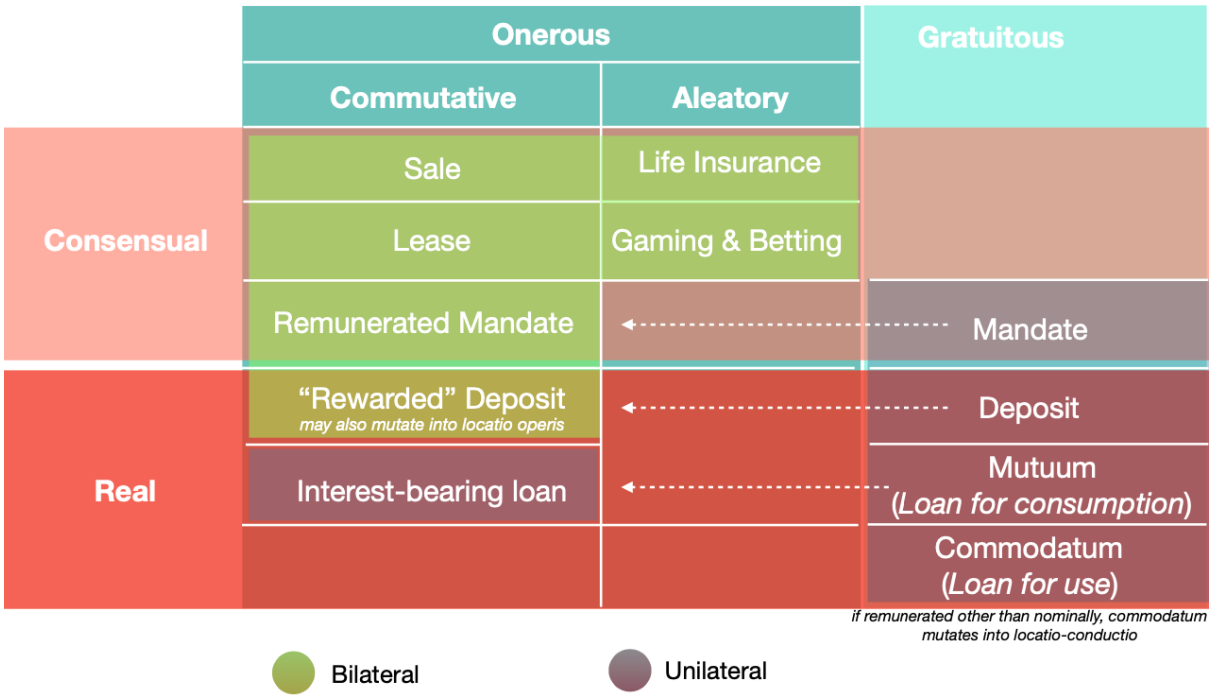
This contract is therefore bilateral because the mandator gives the mandate to the other party. Unless stipulated otherwise it is assumed that the agreement is gratuitous, and the agreement is a consensual one.

In the case of ***Valhmour Borg noe v. Major Alfred Casascione*** (Commercial Court, 25th May 1961, Vol. XLV (1961). iii.814), on a contract of cold storage of pears, the Court states that:

> *"Il-kuntratt li bih il-konvenut nomine assuma li jikkustodixxi u jikkonserva fil-"cold stores" tieghu l-lanġas fuq imsemmi mhux kuntratt ta' mandat, ghaliex tonqos ir-rapprezentanza karatteristika tal-mandat; u lanqas ma hu kuntratt ta' semplici depozitu, ghaliex fil-waqt li in massima d-depozitu ma jistghax ikollu l-karattru kummercjali, il-konvenut nomine ghamel, bil-kuntratt, operazzjoni kummercjali b'kumpens propozjonat bhala korrispettiv; u allura l- kuntratt li ghamel mal-attur nomine hu dak ta' lokazzjoni d'opera. U difatti, dak il-kuntratt li bih kummercjant jew industrijalist jezercita l-professjoni tieghu billi jikkustodixxi oggetti mhux kuntratt ta' depozitu, imma lokazzjoni d'opera".*

Luca Camilleri

Topic III.3: Introduction to the Nature and Form of Mandate



The Origins of Mandate

Mandate has its origins in the phrase *manu dare*, as the gesture of a handshake gave rise to this contract in the past. The symbolic handshake served to highlight the strong element of trust which is characteristic of this contractual relationship. It is a contract characterised by a fiduciary nature and may be considered an *intuitu personae* contract i.e., a transaction in which the personal qualities of the parties are relevant. The mandator is the one giving the instructions whilst the mandatory is that party tasked with the performance of an agreed upon act. In the ancient world, social life was based on friendly relationships, and especially on fides, which embraced concepts such as faithfulness, trustworthiness, and trust. It was a *bona fide negotium* and both parties had to act in good faith. The mandatory, gaining no benefit from the contract, was expected to display *omnis diligentia*. In time, the economic importance of this contract increased dramatically, and it eventually started playing a major part in commercial life.

Article 1856 defines a contract of mandate as:

> **1856.** (1) *Mandate or procuration is a contract whereby a person gives to another the power to do something for him.*
>
> (2) *The contract is not perfected until the mandatary has accepted the mandate.*

Alternatively, article 1703 of the Italian Civil Code defines mandate as *"il contratto col quale una parte (mandatary) si obbliga a compiere uno o più atti giuridici per conto dell'altra (mandator)".* This definition contains the *atto giuridico* which the Maltese provision lacks. In maltese law we also tend to make no distinction between the *mandat* and the *procura.* There is a clear difference between a power of attorney [procura] (a unilateral act by which the dominus confers the power to represent him externally in front of third parties) and a mandate

[mandato] (contract by which the principal and agent regulate their internal relations and the consequent rights and obligations).[20] In italian law *procura* is the act itself which confers the power contained in the *mandat.* Contracts of mandate are always consensual as there is nothing to be delivered.

Mandate was based on friendly relationships and was therefore assumed to be gratuitous, an assumption the Maltese Civil Code still makes. With the economic importance of this agreement increasing mandate started taking on an important role in economic life.

Mandate vs Contracts for Works or Services

One of the fundamental distinctions to be made is that between mandate and *locatio operarum* (a contract for work) and *locatio operis* (a contract for letting of industry). Take, for example, one who appoints a mason to build one's house. This is not a mandate because one had no intention of building one's house oneself.

"The letting of skill and labour is a contract by which person places his own activity at the disposal and to the benefit of another in return for a salary: the exercise of human activity may form the object of a contract in two ways: either principally in itself, or principally in its results.

When the work of man is regarded *"per se"* in the way in which it is executed, and from the point of view of the diligence and the other qualities accompanying its execution, or, in other words, when regard is principally and to the labour in itself and only a secondary importance is attributed to the result of such work, we have a *"locatio operarum"* of Roman Law or a contract of letting of work or industry (of services).

When, on the contrary, regard is principally had to the results which derive from labour, i.e., when the execution of some work is entrusted to someone, e.g. the building of a house; i.e. when the work of man forms the object of a contract not principally in itself but in view of the object which is to be executed, we have the *"locatio operis"* of Roman Law or task-work."[21]

In a mandate we are looking at the performance of a juridical act. On the other hand, if we are speaking of an activity which is not juridical in nature it cannot be the subject of a mandate, but of a contract for works (*vide* article 1623). In practice, we find mandate most frequently used in the lawyer-client relationship in which lawyers serve as the mandatories of their clients. On the other hand, the retention of the services of a client is regulated by a contract for works or services as the work involved is that of a service that only an architect can accomplish on account of the particular nature of the skills involved. However, if one were to retain an architect to supervise works of construction, it has been decided that this would require a contract of mandate.

It is fundamental to be able to distinguish between a contract of mandate and a contract for services or works. With respect to agents, in the Parliamentary Secretariat for Competitiveness and Economic Growth, Malta's Property Code and Regulations, 2016 (White Paper), real estate agency work was defined as *"any work done, or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction",* a definition that leans heavily towards mandate. However, in the Real Estate Agents, Property Brokers and Property Consultants Act (Cap. 615 of the Laws of Malta) article 3(1) states that *"The activity of a property broker or real estate agent means the acting as an intermediary in the process of negotiating and arranging transactions involving the acquiring or disposing or leasing of*

[20] A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 798

[21] V. Caruana Galizia, Notes on Civil Law, Vol. III: The Contract of Letting and Hiring, p. 752.

land, including when the said activity is carried out through the engagement or the employment of a branch manager or a property consultant or both", a definition that leans towards that of a broker. Brokers differ from mandatories by being extraneous to either party involved, acting on behalf and in the interests of neither. A mandatory must act in the exclusive interests of the mandator.

Whilst jurisprudence seems to classify estate agents in the category of brokers, if the situation breaks down between the parties at an advanced stage, on what basis would the broker be compensated? Jurisprudence states that, in spite of the fact that brokers are not paid if the final act falls through, estate brokers would be paid on the basis of the work they would have carried out towards putting together both parties as a mandatory. Therefore, elements of mandate are brought into those agencies.

Mercantile Agency

Mandate is frequently brought up in the field of mercantile agency. With regard to the law governing mercantile agency, Article 49 of the Commercial Code reads as follows:

> **49.** *In the absence of any agreement, law or custom to the contrary, mercantile agency is governed by the provisions contained in Title XVIII of Part II of Book Second of the Civil Code so far as applicable, with the exception of article 1861.*[22]
>
> *Provided that where a mercantile agency involves also the obligation on the part of the agent of performing particular services, then it shall also be governed by the provisions of the Employment and Industrial Relations Act, so far as applicable.*

With regard to the effects of acts done by agent within scope of his authority, article 50 of the Commercial Code states as follows:

> **50.** *All acts done by the agent on behalf of the principal, within the scope of his authority, produce directly their effect whether in favour of or against the principal.*

On this note, Cremona states that *"Agency is a contract whereby one person, the principal, authorises another, the agent, to act in his name and on his behalf in a legal relationship between the principal and a third party. ... because of the continuous development of trade, traders and commercial partnerships require necessarily not only the services of ordinary employees but also and even more the services of persons who may place them in a legal relationship with third parties and in favour of whom they may delegate a part of their power to act and to operate. By such means traders and commercial partnerships increase the profits of their commercial credit and of their industrial direction".*[23]

Agency

"Agency is a contract whereby one person, the principal, authorises another, the agent, to act in his name and on his behalf in a legal relationship between the principal and a third party.

... because of the continuous development of trade, traders and commercial partnerships require necessarily not only the services of ordinary employees but also and even more the

[22] **1861.** *Mandate is gratuitous, unless there is a stipulation to the contrary.*
[23] F. Cremona, Notes on Commercial Law, 1970, p. 97

services of persons who may place them in a legal relationship with third parties and in favour of whom they may delegate a part of their power to act and to operate. By such means traders and commercial partnerships increase the profits of their commercial credit and of their industrial direction".[24]

The scope of agent is more specific than that of the mandatary: "Agency is a contract whereby the agent is authorised to act i.e. to decide and conclude business transactions in the name and of behalf of his principal ... it is immaterial whether the scope of the authority granted to the agent is general or special; in fact it may be very limited and the person appointed would still be considered an agent, provided he is left with a margin of personal initiative in the conclusion of the business; ... a broker and a commission agent who merely promotes the business of his principal and transmits orders for his acceptance are not agents in the sense above mentioned."[25]
With regard to the differences between mandate and agency, Cremona states that: "Jurists generally hold that agency presumes the existence of a mandate. Cremona presents a different view i.e., that contract of mandate is not to be identified with the contract of agency and that at law there can be a mandate without agency and an agency without a mandate".[26]

Contrastingly, Muscat states that: "... [I]t is clear that, at law, agency is a species of mandate ... the existence of an agency, like that of mandate, gives rise to legal consequences both between the agent and his principal and between the principal and the third party ..."[27]

In the case of ***Emmanuele Borg v. Emmanuele Bartoli et*** (Court of Appeal, 02/03/1953) a broker had effectively led parties to sign a promise of sale, however, relationship between prospective buyer and prospective seller broke down and final deed of sale was not signed. Broker claimed compensation for services rendered. The Court stated as follows:

> *"Hu maghruf illi s-sensal ghandu dritt ghas-senserija meta l-operazzjoni tigi effettivament konkjuza; diversament, jekk l-operazzjoni ma ssehhx, ma hemmx dritt ghas-senserija, avvolja s-sensal ikun laqqa' l-partijiet u dawn ikunu ghamlu bejniethom l-att tal-konvenju. ...*
>
> *[Iżda] hu ormaj pacifiku fil-gurisprudenza illi fil-kamp civili ..., jekk sensal ikun ikkoncilja l-partijiet dwar is-sostanzjali u l-accidentali tal-operjazzjoni, b'mod li n-negozju guridiku jigi konkjuz, allura ... hu ghandu dejjem dritt ghall-hlas; izda mhux ghal senserija piena imma ghal kumpens in bazi ghal mandat jew lokazzjoni d'opera, fissabli diskrezzjonalment mill-Qorti".*

In the case of ***Melchiore Demajo v. Giuseppe Micallef*** (Court of Appeal, 10/05/1922, Vol. XXV.i.176) the court stated:

> *"... while due to the failed conclusion of the sale one might not be entitled to brokerage fees, one could be still entitled to claim compensation from whoever would have benefited from his work. The remuneration for the work carried out as a mandatary or as a contractor does not depend on the conclusion of the*

[24]F. Cremona, Notes on Commercial Law, 1970, p. 97.
[25]Ibid., p. 98.
[26]Ibid., p. 100.
[27]A. Muscat, Principles of Maltese Company Law, (Malta University Press: 2019), Vol II, p. 566

> *transaction, but on the nature and importance of the work carried out in the execution of his tasks".*

In the case of ***Nicholas John Dunkley v. Joe Cardona*** (Court of Appeal (Inferior), 9/01/2008, App. Civ. Nr. 92/2006/1):

> *"Fil-fatt, dejjem kif taraha din il-Qorti, is-sales negotiator jew kommissjonarju kif raffigurat fil- fattispeci ta' dan il-kaz, hu speci ta' mandatarju fejn l-operat tieghu hu intiz biex jikkonkludi affari, kemm fl-interess propju u dak ukoll tal-mandati tieghu, rigwardanti kompravenditi ta' stabili b'mod li quddiem it-terzi kontraenti hu jikkonfigura bhala t-titolari tad-dritt (f'dan il-kaz ta' senserija) riversanti fuq il-mandanti permess ta' rapport intern".*

In ***Carmelo Pace v. Josephine Tabone Valletta*** (FH CC, 04/03/1952, Vol. XXXVI.iii.394):

> *"Meta ma jkunx tort tas-sensal li ma jsirx ftehim, jew dan jisfratta, huwa xorta wahda ghandu dritt ghal kumpens in bazi tal-mandat jew lokazzjoni d'opera".*

In ***S.G. South Ltd v. Scicluna*** (FH CC, 2/04/2004, Cit. 2287/2000/1):

> *"Meta ma jkunx tort tas-sensar li ma jsirx ftehim, jew dan jisfratta, huwa xorta wahda ghandu dejjem dritt ghal kumpens in bazi tal-mandat jew lokazzjoni d'opera, fissabbli fid-diskrezzjoni tal-Qorti skond ic-cirkostanzi kollha tal-kaz. ...*
>
> *Kif inghad, il-mandant jista' jnehhi l-mandat kull meta jrid, izda ma jistax jipprova jevita li jikkumpensa l-mandatarju billi jghid li dak li beda l-mandatarju gie komplut minnu wara t-terminazzjoni tal-mandat ...".*

With regard to the exclusion of brokerage if the agent is acting in a representative capacity, in the case of ***Morris v. Grech*** (FH CC, 05/10/1970) a foreign plaintiff had given a power of attorney with specific instructions to an estate agent in order to purchase some properties. However, the estate agent did not follow these instructions and plaintiff suffered damages. Plaintiff brought an action against the estate agent as his mandator under the institute of mandate. The estate agent pleaded that was he was not a mandatary, but merely a broker.

The Court held that defendant did not assume the role of a broker, since he acted in the name and on behalf another person. When defining a brokerage contract, a broker is one who does not conclude any contracts himself and restricts his role to negotiations. Therefore, if an intermediary acts in a direct or indirect representative capacity, he may not be considered a broker, because an intermediary having the capacity of a power of attorney to conclude a contract himself would indicate going beyond his role of acting as a negotiator.

Directors

With regard to company directors, Muscat states as follows: "Traditionally directors have been regarded as mandatories and agents. Prof. Cremona had observed that in their internal dealings with the company, directors should be classified as mandatories of the company, and that in their dealings with third parties they should be considered as agents thereof. More

recently, as a result of the introduction into the Civil Code of a set of "fiduciary obligations", directors can also be regarded as "fiduciaries"".[28]

Furthermore, he stated: "... [T]he distinction that is drawn by Prof. Cremona ... in relation to the juridical character of directors is somewhat puzzling. ... It is suggested that the juridical nature of agency and that of mandate are so closely linked that it is unnecessary to distinguish between the character of a director as a mandatary in his internal dealings with the company and that of an agent in his dealings with third parties.

The correct legal position ... is to regard the director as a type of mandatary whose legal position in such capacity is regulated primarily by the Companies Act and any other specific legislation regulating companies and, where no provision is made in such laws, by the provisions in the Civil Code relating to mandate".[29]

In the case of ***Michael J. Falla v. John H. Sorotos*** (Court of Appeal, 12/03/1976), in his internal relations with the company, a director is its mandatary and in cases of a breach of his duties qua director he would be responsible towards the company.

In the case of ***Dr Ian Refalo noe et v. Albert David Boweck et*** (FH CC, 18/03/1983) the Court stated that *"id-diretturi ghandhom jitqiesu bhala agenti jew mandatarji tal-kumpaniji li tgawdi personalita' guridika u indipendenti mill-membri li jikkomponuha".*

Managers

Cremona states as follows: "The manager is a mercantile agent due to his right to manage and conclude his principal's business affairs ... but besides transacting business in the name and on behalf of his principal, administers the principal's affairs at least in respect of the business or branch of business with which he is charged, and performs particular services in connection therewith for his principal. All this implies that the contract which exists between the manager and the principal is "sui generis"; in fact, it partakes at the same time of the contract of agency, of mandate and of letting or work and industry."[30]

Could managers be assumed to be mandatories, under the rules of agency? Article 59 of the Commercial Code states that:

> **59.** (1) *The authority to act as manager may be express or implied.*
>
> (2) *In the first case, where the principal desires to limit the authority conferred on the manager in such a way as to raise a presumption that the limitations imposed are known to third parties, he must file in the one or the other of the courts mentioned in article 55 a note showing in detail all such limitations, and cause such note to be affixed in the Exchange and published in the Government Gazette and in another newspaper, possibly a commercial newspaper.*
>
> (3) *In the second case, the authority to act as manager shall in regard to third parties be deemed to be general and to comprise all matters pertaining and necessary to the exercise of the*

[28]Ibid., p. 562.
[29]Ibid., p.566.
[30]F. Cremona, Notes on Commercial Law, 1970, p. 107-108

> *business or branch of business in respect of which it has been conferred, unless the principal proves that such third parties knew of the aforesaid limitations at the time the transaction was concluded.*

Whilst article 60 states that:

> **60.** *The principal shall be liable for the acts of the manager and for the obligations contracted by him within the limits of the business or branch of business which has been entrusted to him.*

With regard to contractual representation, Muscat states that "If the representation clause, for example, simply states that the contractual representation is vested "in any director" or "in any two directors", then the manager would not have authority to represent the company in contractual matters (independently of how material - or insignificant - the matter may be). On the other hand, if the representation clause says, for example, that the contractual representation vests in "any Director or in any person authorised by the board for the purpose" then the manager should generally be considered as having been authorised by the board to contractually bind the company within the limits of the business which has been entrusted to him. It is submitted that the authorisation by the board may even be implied (unless the representation clause clearly requires that the authorisation be express or in writing)".[31]

The Legal Ramifications of Mandate

Article 1870(1) states that *"The mandator can, for the execution of a contract, act directly against the person with whom the mandatary in his capacity as such has contracted".* The essential characteristic of this contract lies in the fact that the acts done by the agent in the name and on behalf of his principal are considered at law to be acts of the principal, and consequently, all profits or losses deriving therefrom are to go in favour of or are to be borne by the principal, while the agent and his estate remain extraneous to anything deriving from the said acts. If the mandator is insolvent, the mandatory is not joint and severally liable for the performance of the duty. The acts done by the agent in the name and on behalf of the principal are considered at law to be acts of the mandator. The agent and his estate, so far as he remains within his *vires*, remain extraneous to anything deriving from such acts. The juridical effect of a transaction involving a mandate is that the mandator and the third party are bound directly to one another irrespective of the presence of the mandatory assuming he remained within his *vires* at all times. If the mandatory has not been paid for his role in the transaction, that is a dispute between him and the mandatory only, and in such a case the third party has no involvement.

This was best exemplified in the case of ***Andrea Spiteri v. Architect Edward Vassallo et*** (FH CC, 21/01/1954, Vol. XXXVIII.II.421). The facts are as follows: Architect engaged with the reconstruction of a house. Architect had, in virtue of the task entrusted to him as an architect, engaged plaintiff as a mason. The tasks entrusted to an architect in his professional quality to supervise the reconstruction of a tenement is a mandate, and consequently the relationship between he architect, and his client is to be governed by the rules on mandate.

For the execution of the contract, the mandator may act directly against the person with whom the mandatary, in his capacity as such, has contracted. This is a corollary of the principal that a mandatary does not contract but offers his services in the name of the mandator, who, in

[31] A. Muscat, Principles of Maltese Company Law, (Malta University Press: 2007), p. 858

turn, is to be considered as the contracting party. The only condition is that the mandatary had contracted as a mandatary and not in his name. Consequently, if an architect who has been engaged by an owner of a house to reconstruct his house, has in turn engaged a mason, such mason can act directly against the person engaging the architect for payment for his work. Once the architect had not dealt with plaintiff in his personal capacity but in the name of the owner and as the owner's mandatary, the relationship existed directly between plaintiff and the owner who could not plead that he had no relationship with plaintiff.

In its judgement, the Court stated that:

> *"Illi ladarba l-konvenut Vassallo ma agixxiex ma' l-attur f'ismu imma f'isem il- konvenut Jacono, u bhala mandatarju tieghu, stabilew ruhhom rapporti diretti bejn l-attur u Jacono li ghalhekk ma jistax jippretendi l-liberazzjoni tieghu. ... Illi lanqas jista' l-istess Jacono jippretendi li l-Perit Vassallo ecceda mill-mandat, ghaliex l-attur f'dina l-operazzjoni huwa terza persuna u kwindi mhux milqut bil- konsegwenzi ta' dan l-eccess, sakemm Jacono ma jippruvax li l-attur kien jaf b'dak l-eccess. ... Barra minn dan hemm ukoll il-konsiderazzjoni li l-konvenut Jacono accetta l-vantaggi derivanti mill-pretiz eccess tal-mandat u qieghed igawdihom".*

The Object of Mandate

Article 1857 reads as follows:

> **1857.** (1) *Every mandate must have for its object something lawful which the mandator might have done himself.*

If one cannot do the thing oneself juridically, one cannot appoint someone to it in one's name. If the mandator gives instructions to the mandator to perform something illicit, the mandate does not have a lawful object and there is therefore no relationship.

In the case of ***Rev. Vincenzo Borg v. Giuseppe Caruana et*** (FH CC, 05/10/1950, Vol. XXXIV.II.632), plaintiff, who was travelling back to Malta by sea, was tipped that he was going to be searched by the port authorities upon his arrival. He wanted to do away with the money that he was carrying in order to avoid having to declare it. He, therefore, tasked another person to deliver the money to someone who could, in turn, hold them in deposit for him.

On matters such as these jurists state as follows:

1. **Laurent:** When the act is unlawful, the law does not recognise any effect of the agreement.
2. **Duranton:** The task which has been assigned must be lawful.
3. **Troplong:** The mandator cannot demand account from the mandatary who in turn cannot demand a remuneration or compensation from the mandator.[32]

The court states:

> *"Illi huwa evidenti li l-iskop precipwu ta' l-attur, met huwa kkonsenja l-flus lill-konvenut biex dan jgħaddilhom lil dak ir-*

[32]P. Farrugia Randon, The Word of the Court, Vol XIII: Mandate, (Malta: Mid-Med Bank, 1993), p. 425.

> *ragel, kien dak li jevadi l-ligijiet fiskali. ... [Il-mandatarju] rriferixxa kollox lill-attur, u dan immedjatament avvicina lill-konvenut biex dan jaghmel dak "li huwa nnifsu ma setax jaghmel", jigifieri biex inizzillu l-flus l-art hu, u hekk jevadi l-ligi u jehles flusu mill-konfiska, apparti xi piena ohra. ... L-oggett ta' mandat kien ghalhekk illecitu ... Illi fuq l- iskorta tal-principji fuq zvolti, jidher car ghalhekk li, ladarba l-mandat fuq imsemmi kien illecitu, lill-attur ma tikkompeti ebda azzjoni ghar-restituzzjoni ta' flusu kontra l-konvenut."*

In the case of ***Judith Lucchesi noe v. Rita Sultana et*** (COA, 03/12/2004, App. Civ. Nr. 556/1991/1) a foreign company had engaged a local to purchase property on its behalf. Company had not acquired the necessary permit to be able to purchase property in Malta. The Court stated that:

> *"... l-Artikolu 1857 tal-Kodici Civili espressament jghid li l-mandat ghandu jkollu bhala skop tieghu haga lecita li min jaghti l-mandat seta' jaghmel huwa nnifsu.*
>
> *"... s-socjeta` appellanti ma setghetx takkwista ghaliha nnifisha l-fond meritu tal-kawza minghajr ma qabel xejn tottjeni l-permess skond il-Kap. 246 tal-Ministru responsabbli ghall-Finanzi. Isegwi li l-ftehim li Roland Sultana jagixxi bhala [mandatarju] tas-socjeta` appellanti kien imur kontra l-imsemmi Kap. 246.*
>
> *"... fin-nuqqas ta' dan il-permess hija ma setghetx taghti mandat lil Roland Sultana biex dan jaghmel ghan-nom taghha dak li huma kienu prekluzi li jaghmlu bil-ligi. Jidher ghalhekk li kull obligazzjoni li twieldet minn dak il-ftehim ghandu jitqies bhala bazat fuq kawza illecita u din il-Qorti ma tistax tordna l-ezekuzzjoni ta' dak il-ftehim".*

The Form of Mandate

Article 1857(2) states that:

> **1857.** (2) *Subject to any other special provision of the law, a mandate can be granted by a public deed, by a private writing, by letter, or verbally, or even tacitly.*

With regard to form the Civil Code is extremely liberal, not only does it not have to be in writing, but it can also be tacit. Article 1863 states that:

> **1863.** (1) *A mandate made out in general terms applies only to acts of administration.*
>
> (2) *The power to make alienations of property, except such alienations as fall within the limits of the administration, or to hypothecate property or to perform other acts of ownership, must be expressed.*

With regard to the alienation of property the mandate must always be express, that is to say it cannot be tacit.

The Commercial Code stipulates the form of mandate in article 52 stating that:

> **52.** *Where the law requires that an act be expressed in writing, the authority given to an agent to do such act must be conferred in writing.*

In the case of ***Richard Rizzo Bamber noe v. Giuseppina Rizzo noe et*** (FH CC, 11/01/1950, Vol. XXXIV.II.430) the following question was asked: If act to purchase immovables requires formality, does mandate given to perform that act also require same formality? Here, JR's heirs (defendants who were objecting to the transfer of the property from mandatary to the mandator) challenged form of mandate but the Court disagreed with this reasoning. In fact, the mandate granted to JR for the purchase of property did not require any formality.

The words "must be expressed" do not mean that they should result from a writing. The words of article 1863(2) are only an exception to the rule that a mandate may also be tacit. The expressed mandate could be proven by testimonial evidence.

The court stated that:

> *"An acquisition of an immovable in the interest of another person is valid even though the agreement between the purchaser and such other person was not made in writing.*
>
> *"... formalities required by law for the validity of a sale of an immovable must be distinguished from an agreement between a mandator and the mandatary.*
>
> *"... whilst a sale of an immovable must be made by a public deed, and a promise of sale must be made by a public deed or private writing, the proof of the mandate given by the mandator to his mandatary for the purchase of an immovable need not perforce result from a written instrument but may be proved in any manner allowed by law".*

In the case of ***Saverio Galea et v. Paolo Gauci noe*** **(**COA, 24/04/1931, Vol. XXVIII.I.60) that court stated that *"the mandate to buy immovable property is not subject to the need for a private writing; and, therefore, witness evidence is admissible to prove it".*

In the case of ***Elizabeth Elkhiate et v. Emanuel Attard*** (FH CC, 28/02/2001, Cit. Nr. 911/97) a couple applied for a government plot and agreed with their children that the land would go in favour of one of their daughters. On the basis of the evidence presented, the Court agreed that the plot had been acquired and developed by the parents on behalf of their daughter, stating that:

> *"Il-konvenut qed jissottometti li l-mandat f'kazijiet simili irid ikun wiehed espress u accettat bl- istess mod mill-mandatarju prestanom. ...*

> *"Minn naha l-ohra l-atturi qed jissottomettu li kien hemm ftehim espress bejn il-partijiet li gie accettat mill-konvenut. ...*
>
> *"L-akkwist ta' immobbli fl-interess ta' haddiehor jiswa, avvolja l-ftehim dwar dan l-akkwist bejn l-akkwirent u l-persuna l-ohra ma jkunx bil-miktub. Il-mandat jista' jinghata mhux biss bil-miktub, imma anke bil-fomm u anki tacitament."*

In the case of ***Carmela Farrugia v. Giuseppe Farrugia*** (COA, 20/11/1953, Vol. XXXVII.I.350) it was held that a mandate given for the acquisition of an immovable need not be in writing even though the object thereof is the acquisition of an immovable.

Tacit Mandate

The law of mandate states that a mandate can be given in accordance with article 1863 which only prohibits the formation of a mandate if the instructions are not express. Jurisprudence holds that if one is knowledgeable and aware of the fact that someone is doing something on one's behalf and one does not stop him, then one is indirectly/tacitly giving one's consent to the mandate. It is therefore imperative to stop someone acting on one's behalf in time as if he enters into a relationship on one's behalf one is bound directly with the third party.

In the case of ***Romeo Fleri v. Notary Francis Xavier Dingli*** (COA, 17/05/1963, Vol. XLVII.I.277) it was decided that a mandate may also be tacit, but an essential element of a tacit mandate is the knowledge and awareness in the alleged mandator that the matter in which he had an interest has been undertaken by another person and that the lawyer is to be considered a mandatary of his client for the acts in a proceeding. However, the lawyer cannot agree to or bind himself in a compromise on behalf of his client, unless he has an express and special authorisation from his client.

Here, plaintiff was a party to a suit with regard to which the draft deed of compromise was made. Notary took instructions from lawyers but never contacted the plaintiff. Eventually, deed of compromise was not signed, but the Notary sought payment from the plaintiff. Though plaintiff himself stated that he used to leave matters in his lawyer's hands, this could not be construed as an express and special mandate or authorisation for this compromise. In this case it resulted that the proposal for a compromise was made by the other parties to that suit and defendant had been instructed to draft the deed by the lawyer of those other parties. Thus, plaintiff could have waited silently until all the proposals were crystallised and then study them. In fact, after the draft was completed, the contract was not made owing to disagreement on the terms of the compromise. To that end, a lawyer cannot enter any compromise without having a mandate which is not only express, but also special. Ergo, the relative party would not be bound by such compromise if it was entered into by his counsel, without any special mandate.

In the case of ***Dr Paolo Borg Grech v. Dr Giuseppe Attard Montalto*** (COA, 29/10/1956, Vol. XL.I.287), plaintiff, a lawyer, had drafted a contract of partition to which defendant and his brother were parties. Defendant refused to pay any part of the legal fees. Defendant pleaded that he had never engaged plaintiff as his lawyer, however, Court found that defendant knew that plaintiff was preparing the draft, and that he had also retrieved certain documents from the notary for this reason. Defendant had not protested against plaintiff's drafting of the contract. Court resorted to doctrine:

Borsari: Tacit mandate is inferred from a certain combination of facts which make one presume that whoever performs something for another person, has been requested or authorised to do so.

Olivieri: An essential and fundamental element of tacit mandate is the knowledge of the interested party who, having the possibility and duty or even only a reasonable interest to oppose such performance of his business which has been undertaken by others in his name and on his behalf, tolerates in silence, thus causing such silence to become the basis of a mandate which is juridically binding.

Defendant was deemed to have granted a tacit mandate to plaintiff and was bound to pay for his services.
In the case of ***S.G. South Ltd v. Joseph Scicluna*** (FH CC, 02/04/2004, Cit. Nr. 2287/2000/1) the court states that:

> *"Inoltre, il-konvenut Franco Scicluna jammetti li ftit qabel ma iffirma l-konvenju meritu ta' din il- kawza, kien gie kkuntatjat mis-socjeta' attrici, u ghalkemm ighid li l-kuntatti kienu qed jonqsu, accetta li jittratta fuq il-kaz imressaq lilu mis-socjeta' attrici. Meta gie infurmat li dak in- negozju thassar, wiegeb li ma kien gara xejn u jekk ma kienx se jirnexxi dak il-kaz "tkun darb'ohra". Dan kollu jindika li l-istess konvenut, f'isem shabu, accetta li jkompli jinnegozja mas-socjeta' attrici u dan juri li, zgur tacitament, hu kien qed jikkonferma l-mandat li kien sar qabel (ara artikolu 1857(2) tal-Kodici Civili).*
>
> *"Kwindi l-Qorti tikkonkludi li kien hemm relazzjoni kontrattwali bejn il-partijet li bih is-socjeta' attrici giet imqabbda mill-konvenuti tipprova takkwista l-bejgh tal-proprjeta' li l-istess konvenuti kellhom gewwa Marsaskala".*

Mandatory's Name

The name of the mandatory can be left blank in the case of private writings. A power of attorney which does not contain the name of the mandatary indicates that whoever has signed this document has left the choice of the mandatary completely in the hands of the person to whom such document is delivered. In the case of ***Fortunata Maggi v. Rosina Coleiro*** (COA, 14/12/1949, Vol. XXXIII.I.556), the person bearing the document and purporting to be the mandatary, had filled in the missing fields herself, indicating her own name as the attorney. The Court stated that *"There existed no abuse, since it was to be presumed that the mandator had left the choice of the mandatary to the person to whom he had delivered the power of attorney".*

Proof of Mandate

In the case of ***Alfred Borg v. Raymond Portelli*** (FH CC, 24/11/1981) it was established that he who alleges the existence of a mandate must prove it, such that in ***Air Malta Co. Ltd. v. Richard Muscat et*** (FH CC, 28/02/2001, Cit. Nr. 642/98) the court stated that:

> *"Fis-sentenza moghtija mill-Qorti tal-Kummerc fil-kawza fl-ismijiet "Carmelo sive Charles Azzopardi et noe - vs - George Cauchi" ntqal: "Li hija haga mil-lewn id-dinja li normalment bniedem jikkontratta ghalih innifsu, sakemm ma jindikax li qieghed jikkontratta f'isem haddiehor jew jekk dan ma jindikahx*

> *espressament. Il-kontraent l-iehor ikun ragonevolment jaf li jkun qieghed jikkontratta f'isem haddiehor. Il-piz tal-prova li min jikkontratta ghamel hekk f'isem haddiehor tinkonmbi fuq min jaghmel din l-allegazzjoni. Il-provi f'dan ir-rigward ghandhom jintiznu fid-dawl tar-regola li fin-nuqqas ta' provi, jew anke fid-dubju, il-mandat ma jistax jigi prezunt, anzi ghandu jigi eskluz".*

Acceptance of the Mandatory

Article 1856(2) of the Civil Code states that:

> (2) *The contract is not perfected until the mandatary has accepted the mandate.*

Whilst article 1858 states that:

> **1858.** *The acceptance on the part of the mandatary may also be tacit, and may be inferred from acts.*

In the case of ***Alessandro Mattei noe v. Not. G.D. Page noe*** (Commercial Court, 02/10/1884, Vol. X.557) the mandatary made a purchase on behalf of his mandator, but the power of attorney was dated some days after than the sale. The mandatary was considered to have accepted the mandate since this could be inferred from the fact that he appeared on the deed of sale.

Mandate is Special or General

Article 1862 states that:

> **1862.** *Mandate is either special, if it is for one matter or for certain matters, only; or general, if it is for all the affairs of the mandator.*

Article 1863 states that:

> **1863.** (1) *A mandate made out in general terms applies only to acts of administration.*
>
> (2) *The power to make alienations of property, except such alienations as fall within the limits of the administration, or to hypothecate property or to perform other acts of ownership, must be expressed.*

In the case of ***John La Rosa noe v. Carmelo Galea*** (COA, 30/05/1958, Vol. XLII.I.344) a mandatary negotiated a sale on behalf of his mandator. The broker of the deal wanted to maintain an action for brokerage against the mandatary. The mandatary was extraneous to the sale. Mandator's instructions had been to find a buyer rather than engage a broker. In this case mandatary exceeded the limits of the mandate and the mandator would not be responsible. One cannot assume that a mandate to sell includes a mandate to engage a broker since one can sell without the involvement of a broker. According to Baudry Lacantinerie a mandate to perform certain determinate acts must be interpreted restrictively.

In the case of ***Edward Vassallo noe et v. Edward Lewis Galea et*** (FH CC, 07/10/1950, Vol. XXXIV.II.638) it was stated that the general power of attorney, as expressed, was not

considered to have the special authority to submit a case to arbitration. Mandate was express but not special. To that end, one should not confound the term 'express mandate' with 'special mandate'. A mandate can be express without being special and vice-versa. The special nature of a mandate is the specification of the affairs which the mandatary is empowered to perform. The express element is the manifestation of the will of the mandator that the mandatary performs acts which exceed the limits of ordinary administration. The court stated that:

> *"Issa bl-iskrittura tat-22 ta' Settembru 1941 l-attur gie minn Laura Galea nominat "mandatarju in generali u amministratur tal-beni taghha, bil-fakoltajiet kollha li taghti l-ligi, kompriza l-fakolta' li jaghmel aljenazzjonijiet u trasferimenti anke ta' beni stabili, li jipoteka l-beni taghha u li jaghmel atti ohra ta' dominju ... huwa fatt li anke jekk Laura Galea tat lill-attur il-mandat espress li jittransigi u jikkompromett, dak il-mandat ma kienx specjali, u ghalhekk, fit-termini tad- dottrina fuq imsemmija, l-attur ma kellux il-fakolta' mill-mandanti tieghu li jinnomina abritru ghall-finijiet li jaghmel dik it-trasazzjoni jew kompromess in partikolari."*

General Powers

Article 1868 states that:

> **1868.** *Where a person has been employed to do something in the ordinary course of his profession or calling, without any express limitation of power, such person shall be presumed to have been given power to do all that which he thinks to be necessary for the carrying out of the mandate, and which, according to the nature of the profession or calling aforesaid, may be done by him.*

In the case of ***Spiridione Zammit v. Dr Antonio Caruana*** (COA, 04/12/1957, Vol. XLI.I.572), The task entrusted to a lawyer to act as counsel for his client is of a *sui generis* nature, and is similar to letting of work and mandate. Whatever mandatary had done in the performance of his mandate, even if erroneous, but provided that there existed no fraud, gross negligence, or ignorance in his profession, defendant was not responsible for the damages suffered by the plaintiff.

Summary on form of mandate

Object of Mandate	Form of Mandate
Mandate in general terms	General Mandate, limited to acts of administration can be done in all forms including tacitly, not deemed to cover extraordinary acts
One or specific acts only	Special mandate, can be done in all forms including tacitly, is to be interpreted restrictively
if specific act is act of ownership (e.g. alienation or hypothecation)	Special mandate, has to be expressed (not necessarily in writing but certainly not tacit)

Luca Camilleri

The Mandate Between Spouses

Article 1322 of the Civil Code states that:

> **1322.** (1) *The ordinary administration of the acquests and the right to sue or to be sued in respect of such ordinary administration, shall vest in either spouse.*
>
> (2) *The right to exercise acts of extraordinary administration, and the right to sue or be sued in respect of such acts or to enter into any compromise in respect of any act whatsoever, shall vest in the two spouses jointly.*
>
> (3) *Acts of extraordinary administration are the following:*
>
> (a) *acts whereby real rights over immovable property are acquired, constituted or alienated;*
> (b) *acts constituting or affecting hypothecation of property;*
> (c) *acts whereby immovable property is partitioned;*
> (d) *acts granting rights of use and, or, enjoyment over immovable property;*
> (e) *donations other than those referred to in article 1753(2)(a);*
> (f) *borrowing or lending of money, other than the deposit of money in an account with a bank;*
> (g) *the acquisition of movable property or of any right of use or enjoyment over movable or immovable property the consideration for which is not paid on, or prior to, delivery:*
> *Provided that this shall not apply to any debt incurred for the needs of the family in terms of article 1327(c), or to the hiring of movables or immovables when the consideration therefor is moderate in relation to the condition of the family and the duration of the lease is for a short period;*
> (h) *the contracting of any suretyship;*
> (i) *the giving of a pledge;*
> (j) *the entering with unlimited liability in a commercial partnership, or the subscribing to or acquisition of any shares in a limited liability company which are not fully paid up;*
> (k) *the transfer of a business concern as well as the transfer of any share in a commercial partnership other than a public company;*
> (l) *any act that may give rise to a special privilege in terms of paragraph (b) of article 2010;*
> (m) *any act of rescission of any act referred to in paragraphs (a) and (c), and any act of declaration made inter vivos whereby any real right over immovables is acknowledged or renounced; and*
> (n) *the settlement in trust of property forming part of the community of acquests and the variation or revocation of the terms of any trust in which any such property has been settled.*

…

(6) *Either spouse may, by means of a public deed or a private writing duly attested in terms of article 634 of the Code of Organization and Civil Procedure, appoint the other spouse or any other person, as his or her mandatory with regard to acts of extraordinary administration and compromise.*

(7) *The notary publishing a public deed as is referred to in sub-article (6), and the advocate or notary public attesting a private writing as referred to in the same sub-article, shall in each case warn the spouse so appointing a mandatory of the importance and consequence of such appointment and shall in the public deed or the private writing, as the case may be, declare that he has so warned the spouse.*

Article 12 of the Cohabitation Act states as follows:

12. *Articles 1322, 1323 and 1325 to 1333 (both inclusive) of the Civil Code shall apply mutatis mutandis, limitedly to the community of assets between the cohabitants in terms of article 11.*

Article 1324 states as follows:

1324. *Normal acts of management of a trade, business or profession being exercised by one of the spouses, shall vest only in the spouse actually exercising such trade, business or profession even where those acts, had they not been made in relation to that trade, business or profession, would have constituted extraordinary administration.*

Article 1326 states as follows:

1326. (1) *Acts which require the consent of both spouses but which are performed by one spouse without the consent of the other spouse may be annulled at the request of the latter spouse where such acts relate to the alienation or constitution of a real or personal right over immovable property; and where such acts relate to movable property they may only be annulled where the rights over them have been conferred by gratuitous title.*

(2) *An action for annulment may only be instituted by the spouse whose consent was required and within the peremptory term of three years from -*

(a) *the date when such spouse became aware of the act, or*

(b) *the date of registration, where such act is registerable, or*

(c) *the date of termination of the community of acquests, whichever is the earliest.*

…

(4) *The spouse who has not instituted the action for annulment within the stipulated time and who has not expressly or tacitly ratified the act, shall nevertheless have an action to compel the other spouse to reintegrate the community of acquests or, where this is not possible, to make good the loss suffered.*

(5) *Saving the preceding provisions of this article, where in any act which requires the consent of the other spouse and which relates to movables, a spouse has acted unilaterally, there shall be no right competent to the other spouse to demand the annulment of the act; where however, the other spouse has not ratified such act, whether expressly or tacitly, such spouse shall have an action to compel the spouse who has acted unilaterally to reintegrate the community of acquests, or where this is not possible, to make good the loss suffered.*
(6) The provisions of this article shall be without prejudice to any right competent to a spouse under this Code or any other law.

This provision is concerned specifically with those situations in which a spouse is performing acts of ownership over community property that can be annulled by the non-consenting spouse. Sub-article (4) also deals with an express or tacit ratification of the act.

In the case of ***Angela Demarco v. David Demarco et*** (FH CC, 09/10/2003, Cit. Nr. 1774/2001/1) one spouse constituted himself as a personal surety in favour of a company, of which he was also the financial controller. Wife sought to annul the contract through which her husband had offered himself as a surety, thereby binding property falling within community of acquests. On the wife wanting to annul the suretyship in its entirety the court stated as follows:

"Fejn din il-Qorti ma taqbilx mal-attrici huwa sa fejn hi trid twassal dan l-argument taghha, u cioe', li thassar in toto l-garanzija li ffirma zewgha, anke, jigifieri, in kwantu dik il-garanzija giet assunta minn David Demarco f'ismu propju. Din il-Qorti tasal biex tghid li din il-garanzija ma torbotx il-komunjoni tal-akkwisti ezistenti bejn il-mizzewgin Demarco, izda mhux li dik il-garanzija ma tolqotx il-proprieta' parafernali tal-firmatarju David Demarco.

"... Ir-rekwizit legali, u cioe', il-kunsens tal-mara, hu mehtieg biex dak il-ftehim jorbot lill- komunjoni tal-akkwisti, izda mhux mehtieg ghall-validita' nnfisu tal-ftehim. In-nuqqas tal- kunsens tal-parti l-ohra jista' jwassal ghall-annullament tal-att in kwantu jolqot il-komunjoni tal-akkwisti, izda mhux tal-att innifsu. ...

…

"[L-artikolu 1327(b)] jimplika li d-djun inkorsi minn parti wahda minghajr il-kunsens tal-parti l-ohra huma validi, biss ma jkunux djun li jimpingu fuq il-komunjoni tal-akkwisti. ... Il-konsorti li ma jkunx parti f'att straordinarju ghandu dritt jitlob dikjarazzjoni li dak l-att ma jolqotx il-komunjoni, izda darba ottenuta dik id-

> *dikjarazzjoni dak il-konsorti ma jibqalux aktar interess fil-materja. Sakemm l- obbligazzjoni assunta mill-konsorti wahdu ma tkunx marbuta espressament ma kundizzjoni li din trid torbot lill-komunjoni tal-akkwisti, l-konsorti l-ohra m'ghandha ebda interess thassar dik l- obbligazzjoni, u l-interess taghha hu limitat biss li takkwista dikjarazzjoni li ghal dik l- obbligazzjoni jaghmel tajjeb biss il-konsorti li ffirma. ...*
>
> *"Kreditur li jkun qed jinnegozja ma' konsorti wahdu, m'ghandux ghalfejn jirrikjedi aktar mill- firma tieghu biex b'hekk ikollu obbligazzjoni valida u bir-"rekwiziti kollha legali"; huwa biss biex jorbot lill-komunjoni tal-akkwisti, li jkun jirrikjedi l-firma tal-konsorti l-ohra. Kuntratt li jinvolvi att ta' natura straordinarja ffirmat minn konsorti wahdu, mhux nieqes mir-"rekwiziti kollha legali", izda validu u jorbot lil min jiffirmah. ...*
>
> *"Dan ifisser li qabel ma att jigi deskritt bhala ordinarju jew straordinarju, irid l-ewwel jintwera li hu marbut mal-amministrazzjoni tal-komunjoni tal-akkwisti; jekk le, il-provvedimenti ta' l-artikolu 1326 ma japplikawx ghal dak l-att.*
>
> *"Ghalhekk, it-talba attrici, in kwantu mirata ghall-annullament tal-garanzija iffirmata minn zewgha, ma tistax tigi milqugha ... kwalunkwe obbligazzjoni naxxenti mill-iskrittura ta' Settembru, 1999, hija parafernali ghall-firmatarju David Demarco u mhux ta' piz fuq il-komunjoni tal- akkwisti ezistenti bejn David Demarco u martu l-attrici, salv il-provvediment tal-artikolu 1329 tal- Kodici Civili."*

The wife managed to challenge the suretyship but only as far as it affected the property of the community with the court protecting the interests of the creditor. If the agreement does not affect the community the other spouse cannot demand nullity. When a customer goes to a bank and wants to hypothecate property, if the bank knows the spouse is married, they will assume that the property is part of the community and demand the signature of the other spouse on any form of guarantee.

In the case of ***Charles Muscat et v. Roy Lancelot et***, (First Hall (Civil Court), 22 February 2016, Rik. Gur. Nr. 88/2011) plaintiffs sued spouses Lancelot for the enforcement of a promise of sale. Spouse objected to sale since she had not consented to her husband entering a promise of sale relating to an immovable forming part of the community of acquests. The court stated as follows:

> *"Il-konvenuta Giovanna Sharples tipprevalixxi ruhha mill-proceduri odjerni sabiex tressaq il- kontrotalba li permezz taghha titlob li l-weghda ta' bejgh tigi dikjarata nulla u bla effett ghaliex jonqos il-kunsens taghha fuq il-konvenju liema konvenju hu att ta' natura straordinarja ghax hu trasferiment ta' immobbli formanti parti mill-komunjoni tal-akkwisti.*
>
> [Court cited *Demarco v. Demarco et* judgment extensively]

> *"... il-Qorti hi tal-fehma illi l-konvenju tat-13 ta' Ottubru 2010 mhux null izda hu validu biss ghal sehem Roy Lancelot Sharples cioe nofs billi l-fond jappartjeni lil komunjoni tal-akkwisti.*
>
> *"... l-atturi ghandhom il-jedd jekk iridu li jitolbu li jsir il-kuntratt ta' bejgh izda biss ghal nofs indiviz tal-fond".*

The court took for granted that a promise of sale is an extraordinary act of administration because it is conducive to trade. In this case the court agreed with the wife and annulled the act. Without appreciating the difference in facts of Demarco whilst borrowing heavily from it, the court held that the decision was valid as far as the husband's share was concerned.

In the case of ***David James Sammut et v. Advocate Tonio Azzopardi noe et*** (Court of Appeal, 5 December 2014, Civ. App. Nr. 287/2004/1), the court stated that:

> *"Various agreements are listed as extraordinary acts of administration in article 1322(3), but the signing of a promise of sale agreement is not listed. The law, in article 1322(3)(a) lists as acts of extraordinary administration "acts whereby real rights over immovable property are acquired, constituted or alienated", but a promise of sale agreement does not have this effect."*

Thus, a spouse can sign a promise of sale agreement to buy or sell immovable property having only an oral power of attorney from the other spouse, and such a promise would be valid and binding on the other spouse but in doing so he/she would be implicitly binding himself/herself to obtain a written and witnessed power of attorney to sign the public deed on behalf of the other spouse, unless the two spouses decide to appear jointly on the final deed. This judgement disagrees with the previous one.

Tacit Ratification Between Spouses

In the case of ***Anthony Bugeja v. Publius Micallef et*** (Court of Appeal, 27 June 2003, Rik. 282/1997/1) defendant was in default on a loan given out to him by plaintiff. Defendant pleaded that since his wife had not given her consent to the loan, the plaintiff could not be repaid through the assets that formed part of the community of acquests. On appeal, plaintiff (appellant) claimed that even if the wife had not given her consent initially, she had eventually ratified it tacitly. Here, PM borrowed money from AB without his wife's consent. PM and MM (wife) then approached the bank to be granted credit with which they could repay debt owed to AB.

As an act of extraordinary administration Micallef required his wife's consent. The creditor argued that Micallef's wife had accompanied him with a bank to take out a loan with which to pay the creditor. Plaintiff argued that it is impossible for her to seek to annul an act which she knew of and did not object to. The court stated that:

> *'Qed jigi sottomess mill-attur li "il-konvenuta ma setghetx ma kinitx taf li zewgha kien debitur tal- esponenti, (kif irriteniet l-ewwel qorti) la darba hija stess kienet marret mieghu il-Bank biex tkellem lill-Manager biex tinghata l-facilita` tas-self lil zewgha l-konvenut.*
>
> *'"Ghalhekk, fl-assenza ta' prova li dik il-parti, espressament jew tacitament, irratifikat dak l-att, ir- rimedju tal-parti li ma tkunx*

> *ippartecipat fl-att ta' amministrazzjoni straordinarja, jkun biss li "tiehu azzjoni biex iggieghel lill-parti li tkun agixxit wahedha tirreintegra l-komunjoni tal-akkwisti, jew meta dan ma jkunx jista` jsir, taghmel tajjeb ghad-danni li jkunu ggarbu" (Art. 1326(5)). Minn dan jidher li att ta' amministrazzjoni straordinarja ta' wiehed mill-konjugi wahdu jorbot l-assi tal- komunjoni tal-akkwisti kemm-il darba ma jkunx hemm pronunzjament tal-qorti dwar in- nullita` ta' dak l-att. [Ir-relazzjonijiet interni bejn il-konjugi ghar-reintegrazzjoni jew danni, kif fuq inghad, ma jeffettwawx lit-terz.]*
>
> *'"Izjed u izjed meta rrizulta li l-konvenuta Mary Micallef attendiet l-Bank biex isir self bl-iskop li jithallas lura dan id-dejn, liema partecipazzjoni hija indikattiva li l-istess Mary Micallef "espressament jew tacitament" irratifikat dak l-att. (Art. 1326(5))'.*

Unless wife challenges act of extraordinary administration, third party creditor not affected (internal relations between spouses do not affect third parties)

In the case of ***Lombard Bank Malta v. Eurimpex Ltd et*** (FHCC, 27 February 2004, Cit. 1642/1998), a spouse constituted a general hypothec and a special hypothec over property falling within the community of acquests, in favour of plaintiff (bank), for the benefit of a company (Eurimpex Limited). Wife claimed that she was not aware of the hypothecation and that the hypothecs were not effective over the community of acquests. Despite the act remaining valid the non-consenting wife still held the right to have the spouse reintegrate into the community. The court stated as follows:

> *Huwa veru li l-konvenuta Zaffarese rnexxilha tipprova li l-firma taghha fuq il-'consent form' (a fol. 71) u dik fuq il-prokura generali (a fol. 79) ma kienux taghha u li hija ghalhekk ma tistax titqies li ppartecipat fl-att straordinarju ta' amministrazzjoni maghmul minn zewgha meta huwa ipoteka l- propjeta' appartenenti lill-komunjoni tal-akkwisti favur is-socjeta' attrici permezz ta' ipoteka specjali. ...*
>
> *Il-konvenuta Zaffarese fil-fatt ma ressqet ebda procedura ntiza biex tannulla l-att straordinarju ta' amministrazzjoni maghmul minn zewgha bil-mod u fit-termini stabbiliti mill-Artikolu 1326 tal-Kap. 16 u ghalhekk dan l-att ta' amministrazzjoni jorbot il-komunjoni. ...*
>
> *Minn dan jidher li att ta' amministrazzjoni straordinarja ta' wiehed mill-konjugi wahdu jorbot l- assi tal-komunjoni tal-akkwisti kemm-il darba ma jkunx hemm pronunzjament tal-qorti dwar in-nullita` ta' dak l-att. [Ir-relazzjonijiet interni bejn il-konjugi ghar-reintegrazzjoni jew danni, kif fuq inghad, ma jeffettwawx lit-terz. Fil-kaz in ezami l-konvenuta Louise Zaffarese ma istitwit ebda proceduri biex tannulla l-iskrittura fuq imsemmija, is-semplici talba taghha biex tigi liberata mill-osservanza tal-gudizzju ma tissodisfax il-vot tal-Artikolu 1326 tal Kap 16. Isegwi li dak id-dejn li gie rikonoxxut bl-istess skrittura huwa piz fuq il-komunjoni tal-akkwisti ezistenti bejn il-konjugi Zaffarese.]*

Administration of trade, business, etc. [article 1324]

In the case of ***Nazzareno Cardona v. Massimo Zahra et*** (Court of Appeal, 16 December 2019, Rik. 284/06), a spouse claimed that loan had been taken out without her consent, therefore, the debt did not burden community of acquests but only husband's paraphernal property. The court stated as follows:

> *"Din il-Qorti hi konvinta li self maghmul ghall-iskop tan-negozju ta' airconditioners gestit mill- intimat jaqa' fil-parametri ta' att normali ta' gestjoni ta' kummerc' kif trid il-ligi. Izda ma hemm l-ebda prova li l-istess jista' jinghad ghall-ammont kollu misluf. Din il-prova kienet tinkombi fuq ir-rikorrent gjaladarba ittenta l-kawza anke fil-konfront tal-mara tad-debitur tieghu fejn din ma ffirmatx l-iskrittura de quo jew ma kienitx konsenzjenti ghas-self.*
>
> *"Illi fejn għemil ta' tmexxija straordinarja jsir minn waħda biss mill-miżżewġin u mingħajr l- għarfien – imqar taċitu – tal-parti miżżewġa l-oħra, dak l-għemil xorta waħda jkun jgħodd.*
>
> *"Illi fid-dawl tal-kunsiderazzjonijiet li għadhom kemm saru tqum il-kwestjoni dwar jekk għemil straordinarju li jsir minn jew bl-għarfien ta' waħda biss mill-partijiet miżżewġin u li dwaru ma ssirx kawża għat-tħassir tiegħu jgħabbix xorta waħda lill-komunjoni tal-akkwisti daqs li kieku kien għemil li sar mit-tnejn, jew jekk jgħabbix biss lill-ġid parafernali tal-parti miżżewġa li waħedha tkun għamlitu ...*
>
> *"Illi, fid-dawl tal-kunsiderazzjonijiet li saru, din il-Qorti tasal għall-fehma li l-ewwel Qorti qatgħet sewwa meta qalet li dik il-parti tad-dejn likwidat li ma kienx maħsub biex jiffinanzja t-tagħmir tal-arja kundizzjonata ma kienx jgħabbi lill-komunjoni tal-akkwisti eżistenti bejn l-appellati, imma kellu jitħallas lura mill-appellat Massimo Zahra, bil-mod li jibqgħu bla mittiefsa l-jeddijiet tal-appellant f'każ li l-ġid partikolari tal-appellat debitur ma jiswiex biżżejjed biex jissodisfa l-ħlas imsemmi."*

1. Is it an act of extraordinary administration?

   (a) acts whereby real rights over immovable property are acquired, constituted or alienated;
   (b) acts constituting or affecting hypothecation of property;
   (c) acts whereby immovable property is partitioned;
   (d) acts granting rights of use and, or, enjoyment over immovable property;
   (e) donations other than those referred to in article 1753(2)(a);
   (f) borrowing or lending of money, other than the deposit of money in an account with a bank;

   If no, act of ordinary administration and act cannot be challenged and binding on community

2. If yes, is it a normal acts of management of a trade, business or profession?

   If yes, no consent required and act cannot be challenged and binding on community

3. If no, has it been done without consent of spouse?

   If it has been done with consent of spouse, act valid and binding on community

4. If it has been done without consent of spouse, spouse may seek annulment in so far as it affects community of acquests (spouse may obtain declaration that the obligation must be fulfilled solely by the signatory through his paraphernal property)

   However, unless annulled by spouse, act still binding on community of acquests

   Assuming spouse did not expressly or tacitly ratify the act, if spouse does not annul act in time, may request reintegration of the community of acquests

If the spouse does not seek annulment, although she has no remedy against the third-party creditor, she does have a remedy against her husband.

Topic III.4: *Prestanome* Mandate

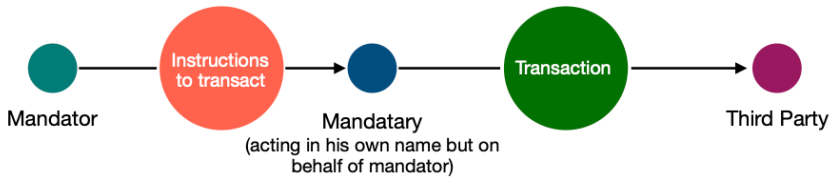
This is when a mandatory is lending his name in favour of the mandator. What makes this different is that the mandatory does not disclose the fact that he is acting on behalf of someone else, with the mandatory acting in his own name. Article 1871 states as follows:

> **1871.** (1) *When the mandatary has acted in his own name, the mandator cannot maintain an action against those with whom the mandatary has contracted, nor the latter against the mandator.*
>
> (2) *In any such case, however, the mandatary is directly bound towards the person with whom he has contracted as if the matter were his own.*

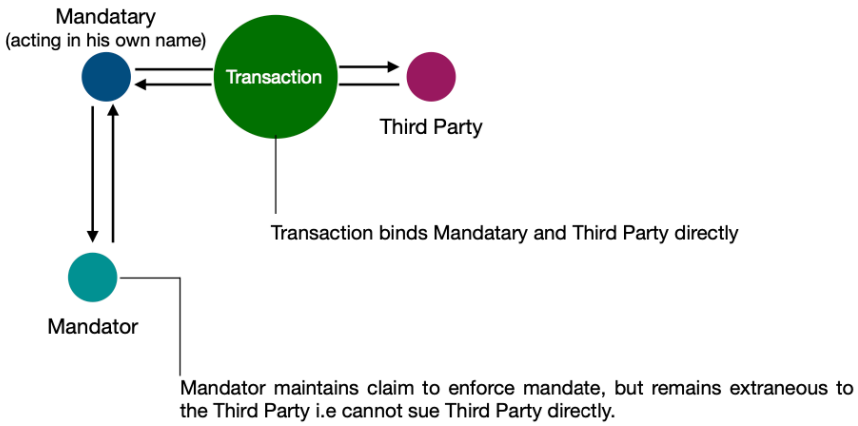
When a mandatory acts on a *prestanome* basis, the transaction binds him and the third party directly whilst the mandator remains extraneous to the third party but maintains a claim to enforce the mandate. In the case of ***Richard Rizzo Bamber v. Giuseppina Rizzo noe et*** (FH CC, 11/01/1950, Vol. XXXIV.II.430), plaintiff authorised JR to purchase one undivided share of a house on his behalf. JR bought it in his name and started inhabiting it but kept paying rent to plaintiff. JR had also often requested plaintiff to sell him his share. JR died, but his widow and heirs refused to transfer property to him. It was held that in the acquisition of an immovable in the interest of another person, the mandator has a direct action against the mandatary, or against his successors, for the transfer of such immovable in his favour.

Defendants argued that the mandator could only demand damages from the mandataries or his heirs, rather than the transfer of the property in his favour. Mandator could exercise the *actio mandati directa* even if the mandatary has passed away. Court argued that when JR had purchased in his name but as mandatary of plaintiff, plaintiff acquired no real right over the property purchased which entitled him to demand back such property. However, plaintiff enjoyed a personal action - *actio mandati directa* - against the successors of the mandatary to demand the return of the share which the mandatary had purchased in his own name. The Court, therefore, acknowledged plaintiff as owner of one-half share of the house and ordered defendants to transfer this share to plaintiff by means of a public deed.

Ordinary transaction in prestanome mandate



Legal effects arising out of prestanome mandate



How to prove a mandate

In the case of ***Emanuel Frendo v. Carmelo Azzopardi et*** (First Hall (Civil Court), 28 January 2004, Cit. nr. 3355/1996/1) during a long period of cohabitation with the defendants' wife and mother, plaintiff had instructed the latter to acquire a property in his name. The cohabitee proceeded to purchase the property in her name. Following her death, her heirs at law attempted to evict the plaintiff from the property on the basis that he had no valid title to occupy that property. The court stated as follows:

> *"Huwa innegabbli mill-provi, li, kif inghad, baqghu wkoll inkontraddetti, illi d-defunta Carmen Azzopardi ma kellhiex fondi proprji taghha u li l-fondi ghall-akkwist u xiri ta' l-istabili ngiebu minn sorsi ohra bl-intervent ta' l-attur, li ghamel tajjeb ghar-rimbors lura taghhom ... Huwa wkoll inkontestat illi meta l-imsemmija Carmen Azzopardi assumiet l-inkarigu li tidher fuq il-kuntratt relattiv tax-xiri tal-fond dan ghamlitu ghan-nom ta' l-attur. Li jfisser allura illi meta hija accettat dan kien dmir taghha li takkwista ghan-nom tal-mandanti taghha l-proprjeta` tal- fond ...*
>
> *"Taqta' u tiddeciedi l-kawza billi prevja r-rigett ta' l- eccezzjoni ewlenija tal-konvenuti li baqghet mhix sostenuta, takkolji d-domandi ta' l-attur billi fl-ewwel lok tiddikjara illi l-fond 11B Triq Nazzarenu, Marsa ghandu jitqies proprjeta` assoluta ta' l-istess attur."*

However, the following question arises: *When does the mandator become the owner of the thing forming the object of the mandate?* In the case *of* ***Nicola Farrugia pro et noe v. Francesco Farrugia et*** (First Hall (Civil Court), 10 December 1954, Vol. XXXVIII.II.606) it was held that when a mandatary acquires a tenement in his name but in the interest of his mandator, the mandator becomes the owner thereof *ex tunc* (from the outset). This, however, applies in the internal relationship between the mandatary who has so acquired, and the mandator. Thus, for the acquisition to be valid in favour of the mandator, in relation to third parties, the juridical act of the acquisition in the mandator's interest is to be perfected by the transfer of the property from the mandatary to the mandator by means of a public deed.

In the ground-breaking case of ***Prof Anthony J. Mamo noe v. Charles Sant Fournier*** (Court of Appeal, 2 May 1957, Vol. XLI.I.298) it was held that the nominee mandatary (*mandatario prestanome*) is that mandatary who exercises the right of an owner but who, in reality, is merely a mandatary. There is a secret agreement wherein the alleged acquirer is merely a mandatary, but with regard to third parties, this secret agreement does not have any effect. However, between the mandator and the nominee mandatary, the real agreement (the secret one) prevails over the apparent one (the public one); the things acquired by the mandatary therefore belong to the mandator.

Here, the Government sued the bank for the payment of ad valorem stamp duty. Defendant bank argued that when the architect (mandatary) had appeared on the deed he had already been granted a verbal mandate by defendant for that purpose. Defendant stated that in this case the property acquired by the mandatary immediately become the property of the mandator even though the mandatary had acquired in his own name and the mandator's interest had not been indicated therein. Defendant argued that the second deed was a mere declaration since defendant had already the ownership of the property in virtue of the first deed. The point of contention concerned the second deed since, while defendant insisted that

no transfer or assignment of immovables was involved in that deed which was therefore not subject to ad valorem stamp duty, plaintiff insisted that such deed implied an assignment or transfer of ownership and hence was subject to ad valorem stamp duty.

The court stated as follows:

> *"'Illi l-mandatarju prestanom huwa dak li apparentement jezercita drittijiet tal-proprjetarju, mentri fir-realta' mhux hlief il-mandatarju. Meta huwa, f'din il-kwalita' ta' mandatarju prestanom, jakkwista l-proprjeta; tal-haga immobili, ikun hemm att publiku li bih tigi lilu transferita l-proprjeta' tal-haga, u konvenzjoni segreta fis-sens li huwa, pretiz akkwirent, mhux hlief mandatarju. Ghar-rigward tat-terzi jibqa' l-principju illi, rispett ghal dawn, il-konvenzjonijiet segreti li jidderogaw ghall-konvenzjoni palesi, ma jipproducu l-ebda effett. Imma bejn il-mandant u l-mandatarju prestanom il-konvenzjoni vera tipprevalixxi ghall-konvenzjoni apparenti, u d-drittijiet u l-obbligi tal-mandatarju prestanom jigu retti mill-ligi tal-mandat, u l-hwejjeg minnu akkwistati jappartjenu kwindi lill-mandant".*
>
> *…*
>
> *'Fil-kaz prezenti, sakemm ma sar it-tieni kuntratt il-proprjeta kienet apparentement tal-mandatarju prestanome Inginier Edwin England Sant Fournier. Bit-tieni kuntratt din l-apparenza giet imnehhija; l-Inginier Edwin England Sant Fournier ma baqghax sid taghha lanqas apparentement u saret proprjetarja taghha, mhux biss realment kif kienet, imma anke apparentement, id-ditta konvenuta. B'dan il-kuntratt, ma kienx hemm dikjarazzjoni ta' fatt materjali, imma vera u proprja mutazzjoni, ta' importanza kbira ghall-istess ditta konvenuta, specjalment fir-rapporti bejnha u t-terzi. Hemm appuntu dik il-mutazzjoni li saret bl-indikazzjoni illi l-Inginier Edwin England Sant Fournier ma kienx sid vera ta' dik il- proprjeta', ghaliex proprjetarja kienet verament id-ditta konvenuta; u kif ga ntqal, l-istess proprjeta giet moghtija lil din id-ditta bhala proprja ...'*

"Il prestanome non si distingue dal mandatario; infatti la dissimulazione della sua qualità non ha luogo che di fronte ai terzi. Gli oggetti acquistati appartengono quindi al mandante."[33]

The government wished to collect stamp duty both on the purchase of the property by the mandatory and on the transfer from the mandatory *prestanome* to the mandator. The court sided with the government by stating that as far as third parties are concerned it is what appears that matters, i.e., two distinct transactions. What is important is the distinction between the secret agreement between the mandator and the *prestanome* mandatory, and the agreement that appears in the eyes of the public.

When does the mandator take ownership of the thing forming the object of the mandate?

[33]Baudry-Lacantinerie and Wahl, Trattato Teorico Pratico di Diritto Civile, vol. XXIV, p. 486.

In the case of ***Nicola Farrugia pro et noe v. Francesco Farrugia et*** (First Hall (Civil Court), 10 December 1954, Vol. XXXVIII.II.606) it was held that when a mandatary acquires a tenement in his name but in the interest of his mandator, the mandator becomes the owner thereof ex tunc (from the outset). This, however, applies in the internal relationship between the mandatary who has so acquired, and the mandator. Thus, for the acquisition to be valid in favour of the mandator, in relation to third parties, the juridical act of the acquisition in the mandator's interest is to be perfected by the transfer of the property from the mandatary to the mandator by means of a public deed.

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The point of contention concerned the second deed since, while defendant insisted that no transfer or assignment of immovables was involved in that deed which was therefore not subject to ad valorem stamp duty, plaintiff insisted that such deed implied an assignment or transfer of ownership and hence was subject to ad valorem stamp duty. The court stated as follows:

> *"Illi l-mandatarju prestanom huwa dak li apparentement jezercita drittijiet tal- proprjetarju, mentri fir-realta' mhux hlief il-mandatarju. Meta huwa, f'din il-kwalita' ta' mandatarju prestanom, jakkwista l-proprjeta; tal-haga immobili, ikun hemm att publiku li bih tigi lilu transferita l-proprjeta' tal-haga, u konvenzjoni sigrieta fis-sens li huwa, pretiz akkwirent, mhux hlief mandatarju. Ghar-rigward tat-terzi jibqa' l-principju illi, rispett ghal dawn, il-konvenzjonijiet segreti li jidderogaw ghall-konvenzjoni palesi, ma jipproducu l-ebda effett. Imma bejn il-mandant u l-mandatarju prestanom il-konvenzjoni vera tipprevalixxi ghall- konvenzjoni apparenti, u d-drittijiet u l-obbligi tal-mandatarju prestanom jigu retti mill-ligi tal-mandat, u l-hwejjeg minnu akkwistati jappartjenu kwindi lill-mandant".*
>
> *Baudry-Lacantinerie and Wahl, Trattato Teorico Pratico di Diritto Civile, vol. XXIV, p. 486: "Il prestanome non si distingue dal mandatario; infatti la dissimulazione della sua qualità non ha luogo che di fronte ai terzi. Gli oggetti acquistati appartengono quindi al mandante".*

> *Fil-kaz prezenti, sakemm ma sar it-tieni kuntratt il-proprjeta kienet apparentement tal- mandatarju prestanome Inginier Edwin England Sant Fournier. Bit-tieni kuntratt din l- apparenza giet imnehhija; l-Inginier Edwin England Sant Fournier ma baqghax sid taghha lanqas apparentement u saret proprjetarja taghha, mhux biss realment kif kienet, imma anke apparentement, id-ditta konvenuta. B'dan il-kuntratt, ma kienx hemm dikjarazzjoni ta' fatt materjali, imma vera u proprja mutazzjoni, ta' importanza kbira ghall-istess ditta konvenuta, specjalment fir-rapporti bejnha u t-terzi. Hemm appuntu dik il-mutazzjoni li saret bl-indikazzjoni illi l-Inginier Edwin England Sant Fournier ma kienx sid vera ta' dik il- proprjeta', ghaliex proprjetarja kienet verament id-ditta konvenuta; u kif ga ntqal, l-istess proprjeta giet moghtija lil din id-ditta bhala proprja ...*

What degree of disclosure is necessary for mandatary to bind his mandator towards third parties?

In the case of ***Emily Davis v. Liberata Martinelli*** (First Hall (Civil Court), 26 June 1882, Vol. IX.759) it was held that a mandatary must indicate the name of the mandator to third parties to establish his position as mandatary. If he fails to do so, he would be bound personally and the mandator would have no right to act directly against the third party. If mandatary acts in his own name, the relationship would be constituted solely between the mandatary and the other party. Here, plaintiff sued defendant for payment of a loan. Although plaintiff provided the money, the creditor who appeared on the agreement was the mandatary, whom plaintiff (mandator) alleged to have tasked with the granting of the the loan in favour of the defendant. Agreement did not in any way mention plaintiff's name. If the name of the mandator would not be revealed, the mandator would have no right of action against third parties, and vice versa. Mere fact that plaintiff (mandator) had supplied the money did not entitle her to sue defendant when the former's name had not even been revealed to defendant. Defendant had not contracted with plaintiff, neither directly nor indirectly. Defendant was released from plaintiff's demands.

Is it sufficient to merely claim that one is acting as a mandatary?

In the case of ***Valerio Caruana v. Antonio Mercieca*** (Court of Appeal, 18 December 1920, Vol. XXIV.I.646), Plaintiff had taken a watch to defendant for repairs. Though plaintiff was in reality a mandatary he had dealt in his personal name with defendant. Plaintiff sued defendant for the return of the watch. Consequently, once plaintiff transacted in his own name, he had the interest to act in his own name for the restitution of the watch; and this even though he was not in fact the owner but the mandatary of the owner. Plaintiff had merely indicated that he was not the owner thereof but had failed to indicate who the real owner was. In failing to identify his mandatory, the mandatary had constituted no relationship between his mandator and the third party, therefore, the mandator could not have acted directly against the defendant. It is not enough that a mandatary declares to the person with whom he is contracting that he is acting as mandatary without, however, giving sufficient information on his mandator, divulging his name and all other particular's part to identify him, in order to exempt himself from further responsibilities towards the other contracting party. Plaintiff's demand was upheld.

In the case of ***Salvatore Coleiro v. John Ellis*** (Court of Appeal, 4 February 1914, Vol. XXII.I.93) it was held that the rule that a mandatary who acts within the limits of his mandate binds his mandator but is not bound personally, applies when he contracts the obligation as a mandatary. Where the mandatary acts on behalf of another person but has not manifested his

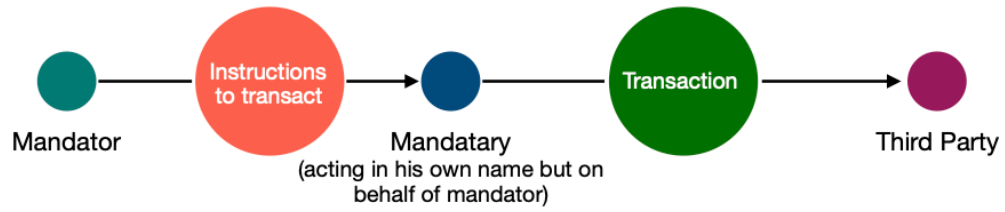
quality of attorney, or has failed to declare that he does not intend binding himself personally, or if his quality of mandatary is not known to the third party in such a manner that such third party would not have granted credit to the mandator personally, the mandatary is to be held responsible for the obligation which he has contracted personally.

In this case plaintiff sued for payment of a piece of furniture. Defendant pleaded that he had purchased the furniture on behalf of a religious association. Defendant had failed to inform plaintiff that he was purchasing on behalf of the association. The mere fact that plaintiff knew that the furniture was to be used in the association's premises was not sufficient to show that defendant was acting as president of the said association, when entering the negotiations with the seller.

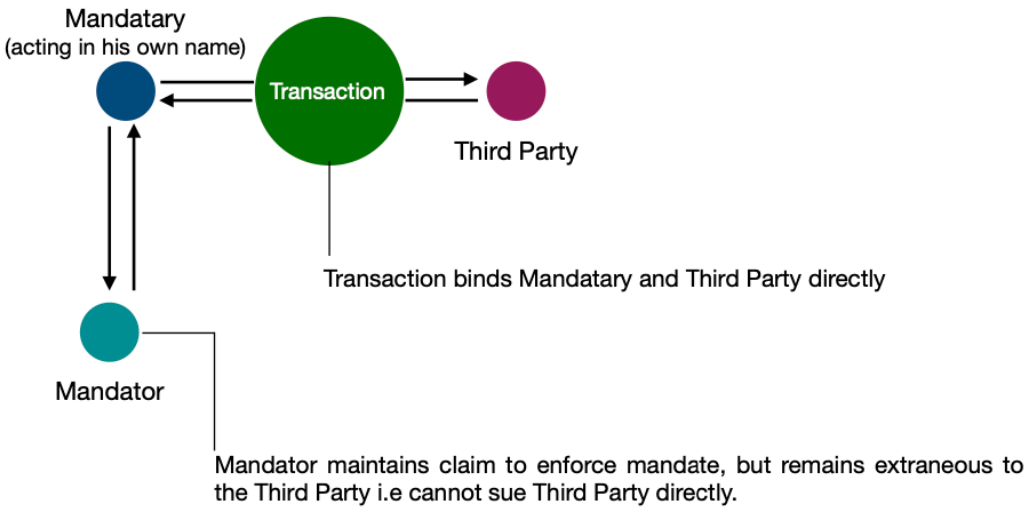
In fine, a relatively recent innovation in Maltese law is that the contents of these judgements have been articulated into law in the form of article 1871A which states that:

> *"Taqta' u tiddeciedi l-kawza billi prevja r-rigett ta' l-eccezzjoni ewlenija tal-konvenuti li baqghet mhix sostenuta, takkolji d-domandi ta' l-attur billi fl-ewwel lok tiddikjara illi l-fond 11B Triq Nazzarenu, Marsa ghandu jitqies proprjeta` assoluta ta' l-istess attur.*

Ordinary transaction in prestanome mandate



Legal effects arising out of prestanome mandate



The *actio mandati directa*

In the case of ***Saverio Galea et v. Paolo Gauci noe*** (Court of Appeal, 24 April 1931, Vol. XXVIII.I.60) a prestanome mandate was used to purchase property. The action arising in

favour of a mandator is that of forcing the mandatary to perform the task which the latter had accepted. Only if such performance is impossible can the mandator sue for damages and interest. The mandator may, if such thing is still in the mandatary's hands, demand the restitution of such thing. The mandator would, however, lose the right of restitution if the thing has been transferred by the mandatary to a third party. Whilst in the latter case the mandatary would be responsible for damages, in the former case he would be subjected to the action of restitution.

In the case of ***Carmela Farrugia v. Giuseppe Farrugia*** (Court of Appeal, 20 November 1953, Vol. XXXVII.I.350) plaintiff (mandator) was the original purchaser even though defendant (mandatory) had appeared in his own name. The said mandatary can only be forced for the specific execution of his obligation to transfer the property to the mandator. One cannot argue that since the mandatary had not performed the mandate, he is therefore only subject to a claim for damages, but not to a forced specific execution. The mandator who judicially demands the specific execution need not impugn the act of acquisition. It suffices if he proves that the acquirer (mandatary) had appeared on the deed and contracted in the interest of the mandator, in spite of the fact that he had acquired in his personal name. Mandatary argued that he had exceeded his powers and appeared on the deed in his own name, his juridical position was not that of a nominee but was only responsible for payment of damages, and hence could not be forced into a specific execution. Though the mandator has no real right over the property acquired by the mandatary in virtue of the mandate, the mandator still enjoys a personal action - *actio mandati directa* i.e., an action for specific performance against the mandatary as long as, and until, the property remains in the hands of the mandatary. The mandator in such cases has a right to demand the assignment of the property to him.
Article 1871A states as follows:

> **1871A.** (1) *Any person holding property for another holds property subject to fiduciary obligations to the person engaging him for such purpose and shall be regulated by the provisions of this title and by the provisions of this Code relating to fiduciary obligations.*
>
> (2) *Where such person acquires property in his own name but on behalf of a mandator, the mandator shall at all times be entitled to demand the immediate and unconditional transfer thereof from the mandatory. The mandatory shall on such demand or, in any case, on the expiration of the time during which the mandate was to continue, immediately render account of his mandate in terms of article 1875 and transfer the property to the mandator by such means as may be appropriate, saving any special terms of the mandate relating to fees and expenses and rights of any third party in good faith. ...*
>
> (3) *Notwithstanding article 1886, a mandate in favour of a person acting in terms of this article shall not lapse -*
>
> (a) *on the death of the mandator and shall continue to bind the mandatory to preserve the property and all rights related thereto until such time as the property held by him is validly transferred to the heirs or legatees of the mandator; and*
>
> (b) *on the bankruptcy of the mandator or the mandatory and shall continue to bind the mandatory to preserve the*

> *property and all rights related thereto until such time as the property held by him is validly transferred as directed by the competent court for the benefit of the mandator or of the creditors of the mandator, as the case may be.*
>
> (4) *A term of the mandate purporting to bind a mandatory as referred to above to transfer the property held by him to a third party after the death of the mandator shall not be valid unless such bequest be made by means of a will in accordance with the formalities required by law.*
>
> (5) *In the event of the death of the mandatory, the heirs at law or the executor, if any, of the will of the mandatory shall be bound by the same obligations to preserve the property held for the mandator and to immediately transfer it to him or as he may instruct, saving such rights to the payment of outstanding dues and expenses according to law.*
>
> …
>
> (6) *Notwithstanding the provisions of article 1871(1), in cases where a mandatory, as referred to above, brings, by any means, to the attention of any third party the fact that he is acting in such capacity, the mandatory shall not be personally liable for the obligations entered into other than with and to the extent of the property held by him.*

Nominee Services

Dr Max Ganado, on this provision, stated as follows: “The variation of the “holding cases” mentioned above is when the holder registers the assets in his own name. This is the typical nominee-ship. A nominee is a fiduciary as he is holding property belonging to a client in his name and is bound under the law of mandate to obey the instructions of the mandator at all times (1871A). When the relationship is a mandate, we call the holder a prestanome because all he does is lend his name to the customer and does not acquire any rights of ownership over the assets ...”

“The relationship between an owner of property and his nominee is regulated in the Civil Code in a manner consistent with the fiduciary obligations’ provisions. Article 1871A - a provision in the law of mandate - was introduced into the Civil Code at the same time as the provisions on fiduciary obligations and at the same time as the Trusts and Trustees Act, was amended to incorporate trusts into Maltese domestic law. This happening simultaneously was to ensure that when trusts - a new institute - were introduced into Maltese law it could be put in context as a fiduciary obligation and would not be confused with a very similar institute already in our law and practice, namely the nominee/prestanome, well known to our legal tradition and regularly the subject of court judgments”.

“Article 1871A states principles already recognised by our courts and should clarify the rules for this kind of legal relationship. The law makes it clear that the mandator shall at all times be entitled to demand the immediate and unconditional transfer of the property. This is basic. The relationship between the mandator and the mandatary is only in the interest of the mandator

and so the professional servicing him cannot ever refuse to hand the property back. That would be a very serious breach of fiduciary obligations".[34]

Ownership by a Fiduciary

Prestanome comes into practice under the concept of ownership by fiduciary, on which Dr Max Ganado states the following:

"A professional service provider may need to acquire the ownership of property. It is at this point that the service provider acting under a contract and the trustee are almost one and the same thing; however, under Maltese law they remain distinct institutes at law. One is a mandate the other is a trust and it all depends on the agreement between the parties, their intent, and the formalities they follow in establishing the relationship and transferring the property.

"Although nominees normally never intend to acquire the ownership of the assets in their own name, at least as mandataries, the concept of fiduciaries in the Civil Code is wider than persons holding under a mandate. In a mandate it is clear that the mandatary prestanome is lending his name to the client in relation to the assets but does not intend to acquire the assets.[35]

"The concept of fiduciary obligation is wider than a mandate obligation and contemplates the possibility of a fiduciary actually intending to acquire ownership of an asset which would be held in his ownership for the benefit of the beneficiary of the fiduciary obligation. In the securities areas we see many operators such as prime brokers, persons involved in securities lending and secured creditors actually being able to "use" the assets of the clients and re-transfer or re-hypothecate them. They are very often fungible assets. In these cases, the assets become the property of the service provider, subject to fiduciary obligations, pursuant to the contract of services they have with their clients".[36]

Naturally, the idea of mandatories not disclosing their mandator's names raises multiple money laundering concerns. To that end, articles 2 and 8 of Prevention of Money Laundering and Funding of Terrorism Regulations (S.L. 373.01) read as follows:

"The concept of fiduciary obligation is wider than a mandate obligation and contemplates the possibility of a fiduciary actually intending to acquire ownership of an asset which would be held in his ownership for the benefit of the beneficiary of the fiduciary obligation. In the securities areas we see many operators such as prime brokers, persons involved in securities lending and secured creditors actually being able to "use" the assets of the clients and re-transfer or re-hypothecate them. They are very often fungible assets. In these cases, the assets become the property of the service provider, subject to fiduciary obligations, pursuant to the contract of services they have with their clients".[37]

Prevention of Money Laundering and Funding of Terrorism Regulations S.L. 373.01

Article 2 states as follows:

[34]Max Ganado (ed.), Introduction to Maltese Financial Services Law, (Valletta: Allied Publications, 2009), pp. 159-160
[35]Max Ganado (ed.), Introduction to Maltese Financial Services Law, (Valletta: Allied Publications, 2009), p. 161
[36]Max Ganado (ed.), Introduction to Maltese Financial Services Law, (Valletta: Allied Publications, 2009), p. 162
[37]Max Ganado (ed.), Introduction to Maltese Financial Services Law, (Valletta: Allied Publications, 2009), p. 162

> **2.** (1) *In these regulations, unless the context otherwise requires:*
>
> *…*
>
> *"beneficial owner" means any natural person or persons who ultimately own or control the customer and, or the natural person or persons on whose behalf a transaction or activity is being conducted*
>
> *…*
>
> *"relevant activity" means the activity of the following legal or natural persons when acting in the exercise of their professional activities:*
>
> *...*
>
> (c) *notaries and other independent legal professionals when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction or by assisting in the planning or carrying out of transactions for their clients concerning the –*
>
> (i) *buying and selling of real property or business entities;*
> (ii) *managing of client money, securities or other assets, unless the activity is undertaken under a licence issued under the provisions of the Investment Services Act;*
> (iii) *opening or management of bank, savings or securities accounts;*
> (iv) *organisation of contributions necessary for the creation, operation or management of companies;*
> (v) *managing of client money, securities or other assets ...*
> (vi) *opening or management of bank, savings or securities accounts; ...*
> (vii) *creation, operation or management of companies, trusts, foundations or similar structures, or when acting as a trust or company service provider;*
>
> *"subject person" means any legal or natural person carrying out either relevant financial business or relevant activity;*

Article 8 states as follows:

> **8.** (1) *Subject persons shall verify the identity of the customer and, where applicable, the identity of the beneficial owner, before the establishment of a business relationship or the carrying out of an occasional transaction.*

Powers of the Mandatory

Whatever the mandatory does beyond the limits of his mandate he becomes answerable to them. Article 1864 states that:

> **1864.** *A mandatary cannot do anything beyond the limits of the mandate.*

The landmark judgement on this matter was delivered in the case of ***Caterina Schembri et v. Gaudenzia Cachia et*** (Court of Appeal, 30 May 1975), in which it was held that if the mandatory exceeds his powers, he does not bind his mandator; the acts performed in excess of mandate are judicially null and without effect:

> *"The above regulates the relationship between mandatary and a third party, not that existing between a third party and the mandator. Thus, the following rules must be borne in mind:*
>
> (1) *A mandatory who acts within his mandate binds his mandator. The relationship arises between the mandator and the third party.*
>
> (2) *A mandatory who acts beyond his mandate does not bind his mandator. The relationship exists between the mandatory and the third party insofar as the excess of mandate is concerned.*
>
> (3) *If a mandatory gives the third party enough information as to his powers, the third party is aware of the mandatory's limits and hence any contract entered into beyond such limits would be contracted at the third party's risk. He enjoys no action against the mandator nor the mandatory, unless the mandator ratifies the mandatory's actions".*

In the case of ***Alfredo Micallef v. Marietta Borg pro et noe*** (First Hall (Civil Court), 5 November 1932, Vol. XXVIII.II.292) it was held that a third party who in good faith contracts with a mandatory or who is not informed of the mandatory's limitation of powers, cannot act against the mandator if the contract is not made within the terms of the mandate – saving of course any remedy against the mandatory. It was held that since contracts are only binding between the parties and cannot benefit nor prejudice other parties, one has to consider agreements entered into by a mandatory in excess of his mandate as having no effect whatsoever against the mandator, who is an extraneous third party in relation to such agreement. Such agreements are inexistent in relation to the mandator. Thus *"ne segue che il mandante non ha bisogno di domandare la nullità di ciò che il suo mandatario ha fatto oltre i limiti dei poteri conferitogli, poiché non si domanda la nullita' di ciò che non esiste".*

When third parties are in the knowledge of excess of mandate

In the case of ***Dr Enrico C. Vassallo noe v. Giuseppe Ebejer et*** (Commercial Court, 17 March 1936, Vol. XXIX.III.245) plaintiff (mandator) agreed to purchase an engine from defendant, provided that the price was fixed by an engineer to be nominated by the mandatary and that the engines were of a certain horsepower. Following the engine's purchase, it immediately transpired that it was defective, and that the horsepower it produced was not as requested. The sale was also made *tale quale*. Plaintiff sued mandatary and seller requesting the Court to declare the sale null and order defendants to pay damages.

A mandator is not bound by the actions performed by the mandatory in excess of his powers. Whatever the mandatory does in excess of his powers is absolutely null. It is inexistent to such

a degree as to enable the mandator to repudiate the actions of the mandatory without the need to exercise the action for nullity. The mandatory's actions are also null in relation to the other contracting party, even if such other party is in good faith.
The court stated as follows:

> *"Peress illi n-nullita' hija assoluta, u l-att huwa totalment inezistenti, il-mandant jista' jiddiskonoxxi dak l-att u l-anqas jagixxi bl-azzjoni tan-nullita' ammennoke bhal dan il-kaz, ma jkollux interess illi l-mandatarju jkun kundannat ghall-effetti ta' nullita, u f'dan il-kaz l-azzjoni tan-nullita hija diretta mhux biex il-qorti tiddikjara illi dak il-bejgh jigi annullat imma biex tiddikjara, ossija tikkonstata, illi dak l-att huwa totalment inezistenti u null di fronti ghall-mandant ab initio u qatt ma ezista. U ghalhekk ma jistax jezisti qatt di fronti ghall-kontraent l-iehor, anke jekk dan kien in buona fede ghaliex quod nullum producit effectum".*

If the mandatory acts in bad faith, he is responsible for damages towards the mandator. If the other contracting party is also in bad faith, both he and the mandatory are bound *in solidum* for damages towards the mandator. The sale was therefore declared absolutely null and inexistent, and the seller was ordered to take back the damages, whilst both the mandatory and the seller were condemned *in solidum* to pay damages and refund the sum paid.

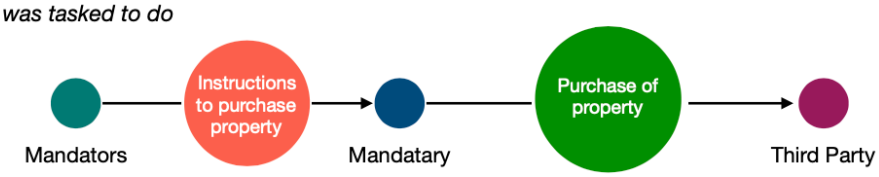
In the case of ***Primitive African Art Limited v. Henri Baudet*** (FH CC, 27/02/2018, Rik. Gur. Nr. 1004/12) the court stated as follows:

> *"Fir-rikors guramentat, kif ukoll fl-att ta' l-akkuza li hareg kontra l-konvenut Baudet fil-Canton ta' Geneva, jirrizulta li sa mis-sena ta' registrazzjoni, il-kumpannija attrici hatret lil Allied Services SA bhala fiducjarja taghha, u din min-naha taghha hatret lil Henri Baudet sabiex jagixxi f'isimha, fl-interess u fuq struzzjonijiet tas-socjeta' attrici beneficjarja.*
>
> *…*
>
> *"Direttur ta' kumpannija ghandu l-obbligu li jagixxi dejjem fl-interess tal-kumpannija, pernezz ta' transazzjonijiet mhux awtorizzati, l-flus hawn fuq surruferiti gew imnezza u mnaqqsa mill-patrimonju ta' PAA u dana wara l-intimat Henri Baudet fuq meddha ta' numru ta' snin, trasferixxa dawn il-flus lil terzi minghajr ma' kien awtorizat sabiex jaghmel dan.*
>
> *...*
>
> *"Il-kuntratt ta' mandat b'rappresentanza johloq relazzjoni ta' fiducja li ggib maghha drittijiet u obbligazzjonijiet bejn il-mandant u l-mandatarju. Bhal kull obbligazzjoni ohra, l-obbligazzjoni li kellu l-konvenut Baudet bhala mandatarju kien li jwettaq l-inkariku tieghu in bona fide u fl-interess ta' hadd hlief tal-mandant tieghu, ossija s-socjeta' attrici. Abbazi tal-provi, irrizulta li kien hemm diversi transazzjonijiet mhux awtorizzati, fejn ammonti kbar ta' flus kienu trasferiti minn kont bankarju tas-socjeta' attrici fl-Isvizzera ghal kontijiet li kien hemm Malta fil-*

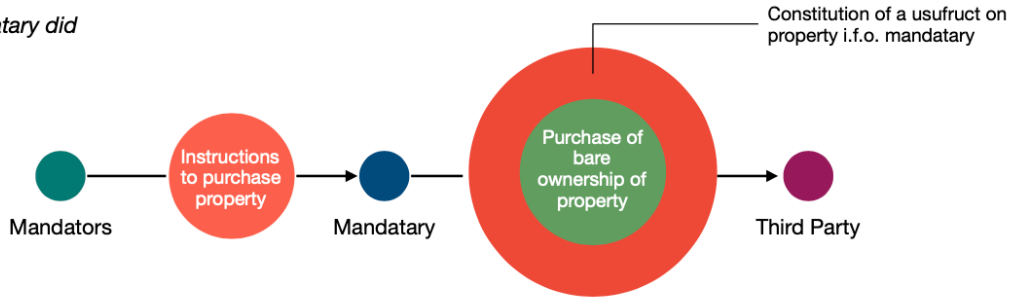
> *Bank of Valletta u li taghhom kienu titolari uhud mill-konvenuti. Abbazi tax-xiehda ta' Pierre Amrouche, beneficial owner tas-socjeta' attrici, huwa qatt ma awtorizza t-trasferiment ta' flus lejn Malta. Fil-fatt huwa qatt ma kellu negozju mal-konvenuti titolari ta' dawk il-kontijiet; u lanqas awtorizza lil Baudet sabiex ghan-nom tieghu jew ghan-nom tas-socjeta' attrici jaghmel negozju ma' dawk il-persuni. Dawn il-fatti jirrizultaw ukoll mill-atti relatat mal-proceduri kriminali li kienu istitwiti kontra Henri Baudet fil-Canton ta' Geneva fl-Isvizzera. F'dak il-procediment, Baudet ammetta li huwa trasferixxa fondi tas-socjeta' attrici bla ma kien awtorizzat.*
>
> *"Fil-kaz odjern, jirrizulta car li Henri Baudet agixxa barra mil-limiti tas-setghat moghtija lilu, u minn imkien ma jirrizulta, lanqas remotament, li s-socjeta' attrici, espressament jew tacitament, irratifikat l-agir tieghu. Baudet agixxa certament ben oltre l-limiti tal-poteri tieghu, u kwindi ghandu jirrispondi ghall-agir tieghu fil-konfront tas-socjeta' attrici. Kien ippruvat illi Henri Baudet kiser il-fiducja riposta fih u ghandu jwiegeb ghal-ghemil tieghu, kif tghid il-ligi stess: din is-somma ta' EUR 520,000 ghandha tithallas minn Henri Baudet lis-socjeta' attrici. Dwar danni, il-qorti hija tal-fehma li ghandha tikkalkola l-imghax li ntilef mis-socjeta' rikorrenti fuq l-ammont ta' EUR 520,000".*

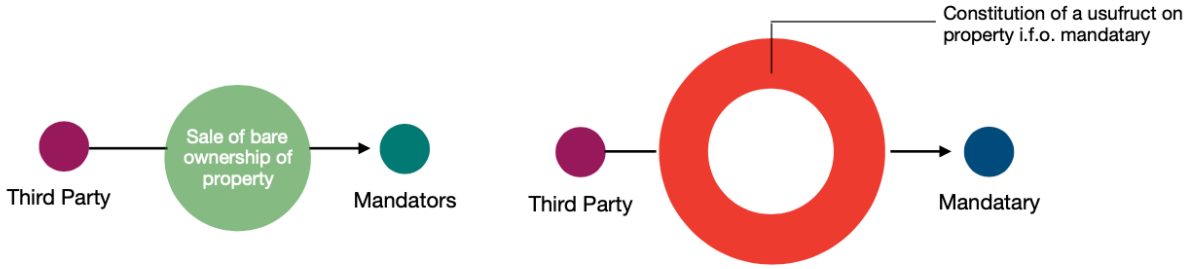
In the case of ***Caterina Schembri et v. Gaudenzia Cachia et*** (Court of Appeal, 30 May 1975 [unpublished]) plaintiff (mandator) appointed her mother as a mandatory for the purchase of a house. Prior to purchasing the property in the name of her children, the mandatory proceeded to constitute a lifetime usufruct in her favour. Mandator challenged the usufruct claiming that its constitution was null and void due to excess of mandate.

What mandatary was tasked to do



What mandatary did





Third party was in good faith. Mandators did not want to seek nullity of usufruct since rights would have reverted back to the seller.

Could mandators revoke a contract of usufruct?
If the third party is in good faith the usufruct cannot be rescinded since the consequences would have been that the usufruct would have had reverted back to the seller who would be bound to return the price thereof. The seller in good faith could not be bound to disburse money and retain the usufruct of a place which he never intended to retain (contradicting *Vassallo v. Ebejer* on nullity resulting from excess of mandate by mandatory).

Was the mother liable as a mandatory?
In this case, the court stated as follows:

> *"Il-kuntratti ghandhom jigu ezegwiti bil-buona fede u skond in-natura taghhom ... u ghalkemm it-termini tal-prokura jaghtu certa latitudini lill-mandatarju, dik il-latitudni ghandha tinftiehem illi giet moghtija fl-ambitu u fil-limiti ta' xiri tal-proprjeta 'qua proprieta' shiha, u mhux ghall-proprjeta menomata ossia dritt parzjali ta' proprjeta''*
>
> *"Meta mandatarju jagixxi bhala tali, cioe f'isem il-mandant, u fl-esekuzzjoni tal-mandat jeccedi l-poteri lilu konferiti, huwa ma jobbligax lill-mandant hlief jekk dan espressament jew tacitament jirratifika l-operat tal-mandatarju".*

Plantiff could enjoy the action for damages against the mandatary for not carrying out the mandate, and this in virtue of section 1873 Civil Code.

Is dealing with a different supplier deemed to be an excess of mandata?

In the case of ***Alessandro Gauci v. Costantino Fenech*** (Court of Appeal (28 April 1920, Vol. XXIV.I.495), in the course of reconstructing a villa, B (mandatory) promises A (mandator) that he would procure these materials from supplier C. after some time supplier D informed A that he was owed £300 for various materials sold. It transpired that C had never been part of the transaction and that B was in actual fact purchasing the goods from D.

A (mandator) pleaded that he had never authorised anyone to purchase from supplier D and that therefore supplier D had to direct his claim against B (mandatary).

In regard to those powers conferred on B by A, the relationship between A and B was based on a special mandate. A argued that he had only authorised B to purchase from C and had not authorised purchases from any other seller. The court held that this argument was not valid: a mandate for the acquisition of goods from a determinate seller also includes the power to purchase the same goods from another seller if the first seller does not have such goods at his disposal. It is to be presumed that the mandator's interest is solely to acquire the indicated thing for the requested price, provided such goods are of the requested quality. Though in principle a special mandate is restrictive in its nature and is therefore to be interpreted restrictively, yet such principle does not prevent the judge from examining the intentions of the mandator on the same grounds that he can examine the intention of both parties in a contract.

Personal Liability of the Mandatary

In the case of ***Giovanni Anastasi noe v. Kaptan Serafino Xuereb et*** (Commercial Court (14 June 1951, Vol. XXXV.iii.624) the directors went ahead and liquidated a company. In turn, one of the directors also appointed a delegate to act in his name. the court stated as follows"

> *"Ma hemmx dubju li din kienet id-decizjoni mhux ta' l-azzjonisti imma tal-Board of Directors … Ma hemmx dubju ugwalment illi d-Directors humma semplice amminstraturi tas-socjeta' ("agents"). Issa, skond il-kodici civili jekk ma jkunx hemm ftehim xort'ohra, il-jeddijiet setghat u obbligi ta' dawn l-amministraturi huma regolati bhal fil-kaz ta' mandatarju, u skond il-kodici civili fil-mandat jidhlu biss l-attijiet ta' amministrazzjoni. ... Decizjoni li tigi xolta l-kumpanija toltrepassa ghal kolloz il-limiti ta' semplici amministrazzjoni. Decizjoni simili ma kienitx tmiss lid-"directors", imma evidentement kienet tmiss lix-"shareholders" f'"general meeting"."*

With regard to who is liable for damages, the court stated that:

> *"Fit-tieni domanda l-attur qieghed jitlob delaratorja generika tar-responsabilita' ghad-danni ... la l-fatt tal-konvenuti kien illegali, ghanda ssir din id-dirjoratorja generika fis-sens premess. Kwantu ghall-konvenut, il-mandatarju tieghu Degiorgio hareg mill-poteri tieghu meta rrapprezentah bhala direttur f'dik is-seduta, kif fuq inghad; ghalhekk dak il-konvenut ma ghandux jirrispondi ghal dak li sar b'eccess tal-mandatarju; ... tiddikjara lill-konvenuti Kaptan Xuereb u Commander Bell responsabbli ghad-danni li seta' sofra l-attur in konsegwenza ta' dak li gie illegalment ezegwit."*

The Obligations of the Mandatory and the Mandator

These can be summarised into four main duties:

1. To carry out the mandate,
2. To do so neither fraudulently nor negligently,
3. To render an account,
4. *Delegatus non potest delegare.*

On the duties of the mandatory, article 1873:

> **1873.** (1) *A mandatary is bound to carry out the mandate so long as he is vested therewith, and in case of non-performance he is answerable for damages and interest.*
>
> (2) *He is also bound to conclude any matter, which he may have commenced before the death of the mandator, if delay might be prejudicial.*

On the liability for damages in case of non-performance, article 1133:

> **1133.** *The debtor, even though there has been no bad faith on his part, shall be liable for damages, where competent, both for the non-performance of the obligation as well as for the delay in the performance thereof, unless he proves that the non-performance or delay was due to an extraneous cause not imputable to him.*

On the liability of the mandatory, articles 1874:

> **1874.** (1) *A mandatary is answerable not only for fraud, but also for negligence in carrying out the mandate.*
>
> (2) *Nevertheless, such liability in respect of negligence is enforced less rigorously against a person whose mandate is gratuitous than against one receiving a remuneration.*

On the duty of the mandatory to render account, article 1875:

> **1875.** *The mandatary, unless expressly exempted by the mandator, is bound to render to the latter an account of his management and of everything he has received by virtue of the mandate, even if what he has received was not due to the mandator.*

On the prohibition of the mandatary delegating his authority:

> **1876.** (1) *The mandatary cannot substitute another person for himself, if he has not been empowered to do so by the mandator.*
>
> (2) *If such power has been conferred upon him but without naming the person to be substituted, the mandatary is answerable for the person he has substituted if he has selected*

> *a person notoriously incompetent or insolvent or whom he otherwise knew to be such.*
>
> (3) *In all cases, the mandator may act directly against the person whom the mandatary has substituted.*

Actions

The actions involved are:

1. ***Actio mandati directa*:** Action by the mandator, for the exact execution of the assignment and the fulfilment of the obligations related to the performance of the assignment.
2. ***Actio mandati contraria*:** Action by the mandatory, for his remuneration, the expenses incurred by him, indemnities due to him for losses sustained, and for the reimbursement of advances made by him.

Duties of the Mandatory

Article 1873(1) states as follows:

> **1873.** (1) *A mandatary is bound to carry out the mandate so long as he is vested therewith, and in case of non-performance he is answerable for damages and interest.*

Is a mandatory responsible for losses occasioned by failure to perform the mandate?
In the judgement of ***Ernesto Gulia noe v. Paolo Ellul*** (FH CC, 18 January 1911, Vol. XXI.II.229) it was held that the obligations of an administrator are those of a mandatary and hence the administrator is responsible for all damages and interest occasioned by non-performance of his obligations, just as in any other negligence committed in the execution of the mandate. A mandatary who is entrusted with the administration of property is responsible for any loss occasioned by prescription of rents or other incomes which he failed to receive or demand.

Mandatary (defendant) was appointed to administer the property of the mandator (plaintiff). Mandatary failed to collect rent from certain tenants, as a result of which, the claim had become prescribed. Mandator sued mandatary for the rental arrears that had been lost as a result of his failure to collect them.

> *"By failing to collect the aforementioned rents in time, the mandatary, did not fulfil his mandate, and the damage arising from the loss of such rents are attributable to this negligent omission".*

Liability of the Mandatory

Article 1874(1) states that:

> **1874.** (1) *A mandatary is answerable not only for fraud, but also for negligence in carrying out the mandate.*
>
> (2) *Nevertheless, such liability in respect of negligence is enforced less rigorously against a person whose mandate is gratuitous than against one receiving a remuneration.*

In the case of ***Dr Carlo Moore noe v. Architect Carmelo Falzon et*** (First Hall (Civil Court), 4 November 1957, Vol. XLI.II.1134) an architect engaged in the supervision of construction works did not check the material being used by the workers. As a mandatary architect was bound to perform the mandate not only in good faith but also with the diligence and ability demanded by the execution of the task undertaken by him. If the architect fails to examine properly the materials used in the construction which is carried out under his supervision, he is responsible for the damage which is caused by the defective material.

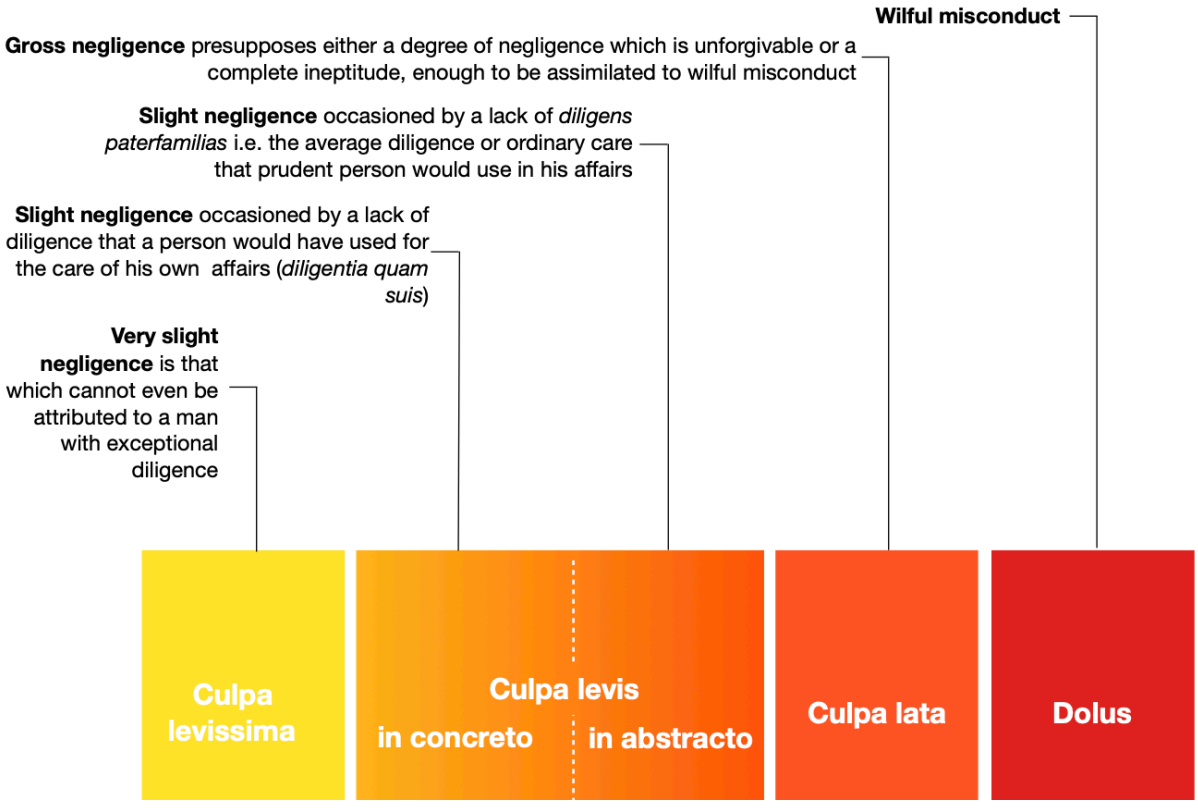
> *"Del resto, l-artikett, bhala mandatarju, huwa obligat jezegwixxi l-mandat lilu moghti."*

In the case of ***Zejt Marine Services Limited v. BNF Bank p.l.c.*** (Court of Appeal (Inferior), 18 November 2020, App. Inf. Nr. 251/2017/1) the Court stated as follows:

> *"... l-bank konvenut ... kien avżat li kellu jwaqqaf pagament, ammontanti għal USD15,154.19, li kien ittieħed b'qerq minghand is-soċjetà attriċi fit-18 t'April 2017, u għalkemm l-istess bank konvenut kien saħansitra kkonferma li kien hemm żmien biżżejjed sabiex iwaqqaf l-istess pagament, xorta waħda l-bank konvenut naqas li jeserċita d-diliġenza rikjesta sabiex iwaqqaf l-istess pagament, bil-konsegwenza li s-soċjetà attriċi sofriet danni ammontanti għal USD15,154.19 għal liema danni l-bank konvenut huwa responsabbli.*
>
> *"*[Defendant's argument]
> *... Is-soċjetà appellata kienet tat lill-Bank appellant żewġ mandati, wieħed minnhom fit-18 ta' April, 2017, sabiex jittrasferixxi l-ammont ta' USD15,154.19 lil Kraiem Walid, liema mandat ġie eżegwit, u l-ieħor konsistenti f'recall request li ġie eżegwit iktar minn erba' u għoxrin siegħa wara, fejn intalab sabiex dik is-somma tiġi ritornata lura stante suspett ta' frodi da parti tal-benefiċjarju. Il-Bank appellant aġixxa fuq l-istruzzjonijiet tat-tieni mandat, iżda qatt ma ta garanzija li tali recall kellha tirnexxi peress li din kienet tiddependi minn fatturi lil hinn mill-kontroll tiegħu u s-soċjetà appellata kienet taf sew b'dan il-fatt.*
>
> *"... Iżda kemm is-soċjetà appellata u anki l-ewwel Qorti jisħqu li l-Bank appellant apparti li kellu jibgħat messaġġi tramite s-sistema tas-SWIFT, li hija sistema sigura li tintuża mill-banek sabiex jikkomunikaw bejniethom, kellu jċempel jew jibgħat email dirett lil Wells Fargo Bank. ... Minn hawnhekk is-soċjetà appellata tgħaddi sabiex telenka d-diversi allegati nuqqasijiet tal-Bank appellant meta dan ġie mitlub li "jagħmel recall. Tgħid li dan ma kien għamel xejn għajr bagħat telex lil bank barrani, imma dan kien tliet sigħat wara li hija kienet talbet ir-recall fil-ħin tal-17:27 "after close of business hours", daqslikieku l-istruzzjonijiet intbagħtu l-għada. Dawn l- istruzzjonijiet ma kinux idoneji, tant hu hekk il-Bank appellant ma kienx irnexxielu jagħmel ir- recall.*
>
> *"... l-ewwel Qorti għaddiet sabiex stabbiliet il-kronoloġija tal-fatti kif ġraw. Sabet li meta fid-19 t'April, 2017, il-Bank appellant*

bagħat l-ewwel messaġġ tiegħu lil Banco Santander għal recall permezz ta' SWIFT, dan kien sigħat wara li s-soċjetà appellata kienet talbet li jsir dan, u saħansitra f'ħin meta l-banek kienu diġà għalqu n-negozju tagħhom tal-ġurnata. ... L- ewwel Qorti osservat ukoll li fil-frattemp Diane Attard kienet bagħtet żewġ emails lill-impjegati tal-Bank appellant, fil-14:02, fejn infurmathom li kellu jsir recall u oħra fl-14:41.7 Fid-dawl ta' dawn il-fatti, il- Qorti tgħid li hawnhekk mill- ewwel jirriżulta li l-Bank appellant mexa b'mod negliġenti u naqas mill-obbligi tiegħu meta l-każ ma ġiex trattat bl-urġenza li kien jistħoqq, u dan indipendentement mill-fatt li recall mhux dejjem jirnexxi. Wara kollox dwar din il-kwistjoni AG, impjegata fil-Payments Section mal-Bank appellant, tgħid fix-xhieda tagħha li madwar 80% tar-recalls jirnexxu. ... L-istess argument dwar tardività min-naħa tas-soċjetà appellata, il-Bank appellant kien diġà ressqu quddiem l-ewwel Qorti. Is-soċjetà appellata mill-ewwel iddikjarat li l- argument ma kienx wieħed fondat għaliex kif osservat l-ewwel Qorti, "il-mument li s-soċjetà attriċi ndunat, hija ħadet il-miżuri kollha neċessarji biex tinforma lill-bank konvenut biex jieħu azzjoni għal irkupru tal- flejjes"."

1874. (2) Nevertheless, such liability in respect of negligence is enforced less rigorously against a person whose mandate is gratuitous than against one receiving a remuneration.



Degree of Responsibility when Mandate is Remunerated

In the case of ***Valhmor Borg noe v. Major Alfred Calascione noe*** (Commercial Court, 25 May 1961, Vol. XLV.III.814) it was held that:

> *"[Il-kolpa li missier tajjeb tal-familja ("culpa levis in abstracto")] hija wkoll il kolpa li ghaliha jirrispondi l-mandatarju meta l-mandat ikun bi hlas; ghaliex ir-responsabbilta' tieghu, kwantu ghan- negligenza, titqies b'mod anqas sever biss fil-kaz meta l-mandat ikun bla hlas.*
>
> *"Il-mandatarju mela, ghall-mandat bil-hlas ... [huwa tenut] għall-"culpa levis in abstracto", dik, jigifieri, derivanti minn nuqqas tal-uzu tal-prudenza, diligenza u hsieb ta missier tajjeb tal-familja ..."*

Degree of Responsibility when Mandate is Gratuitous

In the case of ***Prof. Valentino Tonna Barthet noe v. Carmel F. Izzo*** (Court of Appeal, 14 December 1925, Vol. XXVI.I.i.365) the mandator appointed mandatary to sell a photographic camera for him. Mandatary sold it on credit, and eventually buyer paid the mandatary with a cheque that was returned dishonoured. Mandator sued mandatary for payment of the agreed price of the camera. The mandatary argued that he used the same degree of diligence that he would have used had the camera been his.

Is a mandatary acting gratuitously bound by culpa levis *in abstracto* or *in concreto*?

When a mandate is accepted without remuneration, the mandatary is still bound to use the diligence of a bonus paterfamilias and remains responsible even for slight negligence. Mandatary could not release himself from any liability by claiming that he exercised the same diligence which he uses in the conduct of his own affairs. The defence that the mandatary had, on other occasions, sold items on credit, did not exonerate the mandatary from liability. Mandatary should have sold the camera in a way as to assure payment of the price. Mandatary should have insisted on payment on delivery and should have requested special authorisation from the mandator to grant credit before selling on such terms.

Duty of Mandatory to Render Account

Article 1875 states that:

> **1875.** *The mandatary, unless expressly exempted by the mandator, is bound to render to the latter an account of his management and of everything he has received by virtue of the mandate, even if what he has received was not due to the mandator.*

In the case of ***Marie Louise Micallef et v. Joseph Said*** (First Hall (Civil Court), 25 March 2015, Cit. Nr. 1095/2011) plaintiffs claimed that the mandatary had abused of his position and misappropriated funds belonging to their mother's estate.

> *"Hu evidenti li l-atturi qeghdin jippretendu li l-qorti tillikwida somma flus li ghandha tinghata lura mill-konvenuti lill-wirt ta' Filomena Vella minhabba li hemm flus li baqghu unaccounted for. Fil-fehma tal-qorti l-ewwel pass ghandu jkun li l-konvenut jaghti rendikont skond il-ligi. ...*
>
> *"Rendikont li ghandu jkun fih taghrif dettaljat dwar id-dhul u l-infieq fil-perjodu li l-konvenut kien mandatarju tal-attrici (Artikolu 390 tal-Kap. 12) u jkun akkumpanjat minn dokumenti. Hu*

> *evidenti li s'issa l-konvenut ghadu m'ghamilx dan u anzi jippretendi li r-rendikont kien inghata lil Filomena Vella. Allegazzjoni li baqghet ma gietx ippruvata. Pero' din il-kawza ma saritx sabiex fi zmien li tiffissa l-qorti, il-konvenut jigi kkundannat jaghti rendikont tal-operat tieghu bhala mandatarju. M'huwiex bizzejjed li l-konvenut jipprezenta dokumenti. Fejn imbaghad jibqa' ma jinghatax ir-rendikont il-ligi tipprovdi ghal rimedju (Artikolu 394 tal-Kap. 12). Jekk ir-rendikont jinghata u lil min ghandu jinghata ma jaqbilx mieghu, jista' jimpunjah (Artikolu 392 tal-Kap. 12)".*

Mandatory Cannot Delegate his Authority

Known as the rule of *delegatus non potest delegare,* article 1876(1) states that:

> **1876.** (1) *The mandatary cannot substitute another person for himself, if he has not been empowered to do so by the mandator.*

In the case of ***Edward Borg Olivier pro et noe v. Hon. Dr. Giorgio Borg Olivier*** (First Hall (Civil Court), 12 September 1957, Vol.XLI.1089) it was held that a mandatary cannot substitute another person in his stead unless he has been empowered to do so by the mandator. However, this authorisation need not be express; it may also be tacit in the same manner as mandate may be tacit:

> *"L-artikolu fuq citat [section 1876 Civil Code] ma jeżigix li din is-segtha ta' delegazzjoni ghandha tkun tabilfors espressa; l-ghaliex l-istess tista' tkun tacita; multo magis meta l-mandat jista' jigi mogħti tacitament.*
>
> *"Din il-prezunzjoni, bazata fuq il-mandat tacitu, giet konfermata fil-kors tal-kawza l-ghaliex il-mandanti tieghu kkonfermaw id-delega li huwa kien per necessita ghamel fil-persuna ta' Edward Borg Olivier, kif jidher mid-dokument ezibit".*

Mandatary's liability for the acts of the person that he has substituted in his stead without having express authorisation to do so by the mandator

In the case of ***Vincenzo Bartolo v. Roberto De Cesare*** (First Hall (Civil Court), 13 June 1877, Vol. VIII.262) the defendant had requested plaintiff to purchase some items for him. Instead of purchasing them himself, plaintiff sub-delegated a third party to find such items, whilst adding that such third party should purchase irrespective of the price. After plaintiff handed the items to defendant, the latter found the price exorbitant and refused to pay the requested price. The Court held that the power to substitute had not been granted by defendant. Plaintiff had acted beyond his mandate when he had authorised the third party to purchase irrespective of the price. Such behaviour encouraged a degree of overcharging and was considered negligent. The mandator's acceptance of the plaintiff's claim would have been equivalented to protecting the negligent acts of a mandatary. The Court therefore allowed plaintiff's request limitedly to the real value of the items purchased.[38]

Damages in case of breach of *"delegatus non potest delegare"*

[38]P. Farrugia Randon, The Word of the Court, Vol XIII: Mandate, (Malta: Mid-Med Bank, 1993), p. 171

In the case of ***Giovanni Cavallo v. Pubblio Said*** (Court of Appeal, 25 February 1927, Vol. XXVI.II.i.159) it was held that the fact that a mandatary sub-delegates his powers to another without the authority to do so, does not by itself render the mandatary liable to damages. He would be liable to pay damages if it is proved that the mandatary would have reaped a greater profit had he performed the mandate himself. If a mandatary sub-delegates his powers to another person without the authorisation of the mandator, the mandatary cannot act against the mandator if the substitute mandatary has incurred some liability. Here, a mandator had authorised mandatary to sell a quantity of goods on his behalf. Without mandator's authority, mandatary sub-delegated another person to sell those goods. Mandator claimed that had mandatary carried out the task himself, he would have obtained a better price.

Court was not satisfied that mandatary could have obtained a better result if he had sold the goods himself instead of the substitute mandatary. The penalty incurred by a mandatary who substitutes himself without the mandator's authorisation, consists in the fact that the mandatary cannot act against the mandator if the substitute mandatary had incurred a liability.

Principle of *"delegatus non potest delegare"* applied to company directors

According to Muscat "There can be no doubt that as long as they are duly authorised by the memorandum and articles of association, the directors of a company may appoint a mandatary to act on such company's behalf. The need for authorisation by the memorandum or articles of association stems from two principles that, in the case of a company, operate side by side: (i) that the directors are themselves regarded as mandatories of the company and (ii) that a mandatary is not entitled to appoint another person for himself unless he has been empowered to do so by the mandator - delegatus non potest delegare. ... The articles of association of the vast majority of companies do in fact contain this power. Thus, the articles generally provide that the directors have the power: "to appoint any person to be the attorney of the company for such purposes and with such powers, authorities, and discretion (not exceeding those vested in or exercisable by the directors under [the articles]) and for such period and subject to such conditions as they may think fit. ... The appointment of mandatories by the company need not be made in writing. Indeed, the appointment may be made orally or even tacitly. The acceptance on the part of the mandatary may also be tacit and may be inferred from the circumstances. ... As a general rule, of course, it would always be prudent for a third party dealing with a company to require written evidence of the board's authorisation".[39]

Directors cannot delegate authority without the authorisation of the shareholders

According to ***Giovanni Anastasi noe v. Capt. A. Xuereb et*** (Commercial Court, 14 June 1951, Vol. XXXV.III.624) directors of a company are mandataries of the shareholders and hence, according to the rule applicable to mandate, cannot sub delegate unless specifically authorised to do so:

> *"Difett iehor kien li l-konvenut Degiorgio, non ostanti l-prokura generali, ezibita, u malgrado l-ampjezza tal-poteri lilu deferiti mill-konvenut, ma kellu ebda dritt (ghad li huwa mexa in bwona fede) li jippartecipa f'dik is-seduta bhala rapprezentant ta' l-istess Kurunell Strickland, nominat direttur fl-att fuq imsemmi. Bhala "shareholder" il-Kurunell Strickland seta' jigi rapprezentat minn Degiorgio, imma mhux bhala direttur. Infatti f'din il-materja*

[39] A. Muscat, Principles of Maltese Company Law, (Malta University Press: 2007), p. 852 et seq.

> *tvigi l-massima "delegatus non potest delegare". ... Hu car li d-"directors" huma l-mandatarji ta' l-azzjonisti jew socji, u bla permess tal-mandant il-mandatarju ma jistax jiddelega l-awtorita' tieghu. Dan hu konformi ghall-ligi generali taghna. Kif inghad, id-direttur tas-socjeta huwa ekwiparat ghall-mandatarju, u l-mandatarju, b'ligi, ma jistax bla setgha tal-mandant, jissostitwixxi lil hadd iehor minfloku.*

Mandatary is not personally liable towards party contracting with him as such

Article 1879 states as follows:

> **1879.** *A mandatary who has given to the party with whom he has contracted in such capacity sufficient information as to his powers, is not liable for any warranty in respect of what he has done beyond such powers, unless he has personally bound himself thereto.*

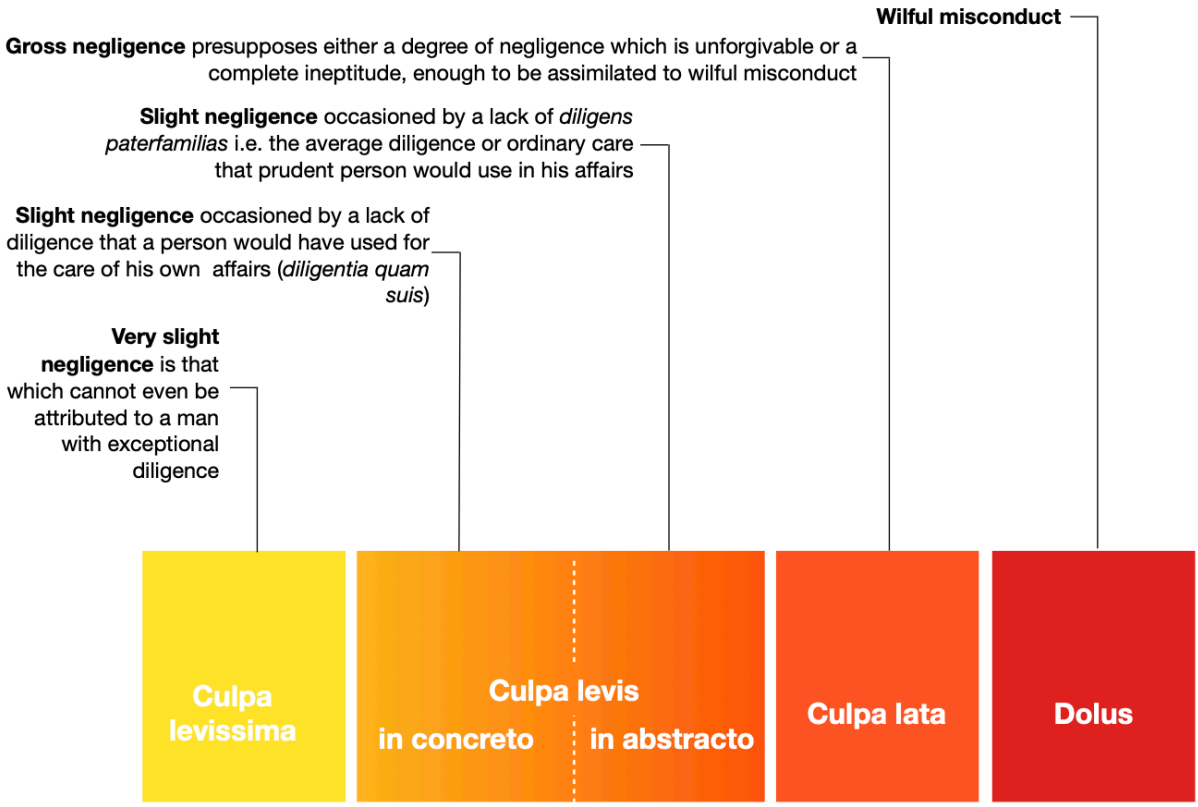
In the case of ***Geraldo Rosso Frendo v. Rev. Amabile Fenech*** (Court of Appeal, 10 June 1927, Vol. XXVI.I.i.847), Ricci:

> *"... when the third party knows the limit of the powers granted to the agent and, nevertheless, gives his consent to an operation that is beyond these limits, he himself is at fault, and, therefore, cannot impose the consequences of this on the agent. ; ...*
>
> *"For the agent to be covered from any liability towards the third party, where he has acted in excess of his power, it is not enough that he has given knowledge of the mandate received, but it is necessary to have made him know the content, because the law speaks of sufficient information of the faculty received, and this sufficient information is not obtained for the certainty of a mandate in general, but is then acquired when the limits of this are known."*

Degree of diligence required in the performance of an obligation

Article 1132:

> **1132.** (1) *Saving any other provision of this Code relating to deposits, the degree of diligence to be exercised in the performance of an obligation, whether the object thereof is the benefit of only one of the parties, or of both, is, in all cases, that of a bonus paterfamilias as provided in article 1032.*
>
> (2) *This rule, however, is applied with a lesser or a higher degree of strictness in certain cases specified in this Code.*



Good faith in mandate

In the case of ***Yolanda Carabott v. Pauline Calamatta et*** **(**Court of Appeal, 25 February 2011, App. Civ. Nr. 1770/1998/1) the following took place:

1. **24 August 1993:** General Power of Attorney by mandator (plaintiff) in favour of mandatary (defendant) authorising latter "to administer [her] property movable and immovable in the most ample and unlimited manner".
2. **26 March 1998:** Mandator found that locks to her former residence had been changed.
3. **2 April 1998:** Deed of transfer where mandatary appeared on behalf of mandator to transfer in the mandatary's own favour the former residence of the mandator. It was declared that this was done in full and final settlement of the mandatary's claim against the mandator for the services rendered by the former to the latter during the previous thirteen years.
4. **6 April 1998:** Mandator formally requested that the keys to her former residence be returned to her by her mandatary.
5. **16 April 1998:** Mandator sent judicial letter to mandatary in order to formally inform her that she wished to terminate and revoke any engagement with which she had been entrusted by virtue of the general power of attorney.

The court stated as follows:

> *"L-assenza tal-bona fidi da parti tal-konvenuta li tirriżulta ampjament:*
>
> (i) *kemm mill-fatt li hija ttrasferiet il-proprjeta` ta' Yolanda lilha nnifisha ad insaputa tal-attriċi,*
>
> (ii) *kif ukoll mill-fatt li l-kuntratt fih dikjarazzjonijiet foloz peress li jistipula li l-partijiet "ftehmu" li kellha tiġi*

> *trasferita l-proprjeta` in kwistjoni għas-saldu ta' debitu ta' Lm16,900 meta fil-fatt mill-provi mressqa jirriżulta li assolutament ma kien hemm l-ebda ftehim bejn il-partijiet f'dan is-sens. Certament li l-ftehim ma jistax jorbot lill-attriċi fil-konfront ta' Pauline u żewġha Carmelo Calamatta meta l-bona fede da parti tagħhom tidher li hija mankanti ...*
>
> *Jista' jingħad wkoll li l-konvenuta abbużat mill-prokura ġenerali li kellha f'idejha u għaldaqstant dan l-operat jammonta għal għemil doluż da parti tagħha bħala mandatarja. F'dan ir-rigward issir riferenza għall-Artikolu 1874(1) tal-Kodiċi Civili li jistipula li l-mandatarju jwieġeb għall-għemil doluż fl-esekuzzjoni tal-mandat. [Il-Qorti] ... tordna għalhekk li l-kuntratt jiġi rexiss għall-finijiet u effetti kollha tal-liġi"*

Fiduciary Obligations

The introduction of fiduciary obligations was mainly intended to cover financial services operations; however, the effect is more diffused. "Fiduciary obligations impose a higher test or degree of good faith and assume honesty and loyalty so that conflicts of interest are totally eliminated".[40] "[The notion of fiduciary obligations] is very wide in scope and seeks to address the trust placed in one person by another and the reliance one generates through trust. This in turn creates dependence and a vulnerability which is what cannot be allowed to be abused for any reason, let alone for personal gain".[41] "Fiduciary obligations are the type of obligations which impose on a person: duties of care, honesty, accountability, and loyalty in the handling of the property of another person. These obligations bind persons who are in control, directly or indirectly, through ownership or possession, of property belonging to another person or dedicated for the benefit of persons other than the fiduciary. "... one set of rules which applies at the basis of (and runs through) all fiduciary civil law contracts (like mandate or deposit) …".[42]

"A source of fiduciary obligations is when a person holds, exercises control or powers of disposition over property for the benefit of other persons ... It is however wide enough to catch persons acting as attorneys under powers of attorney or agents dealing in property belonging to a principal."[43] "Fiduciary obligations can give rise to simple obligations between two or more persons. This would be the case where, as a result of a contract of mandate, a person engages another to do something with his property, e.g., appear on a deed of sale to sell the property to someone else. Another example would be the deposit of a thing for safekeeping or the engagement of a lawyer to advise a client. These contracts create fiduciary obligations".[44]

Applicability of the Provisions of this Title

Article 1124J states as follows:

> **1124J.** *In the application of the provisions of this Title the following principles shall apply:*

[40]Max Ganado (ed.), Introduction to Maltese Financial Services Law, (Valletta: Allied Publications, 2009), p. 61
[41]Max Ganado, "Fiduciary Obligations under Maltese Law", Trusts e attivita' fiduciarie, (Wolters Kluwer Italia: 2013), p. 356
[42]Max Ganado, "Fiduciary Obligations under Maltese Law", Trusts e attivita' fiduciarie, (Wolters Kluwer Italia: 2013), p. 354
[43]Max Ganado (ed.), Introduction to Maltese Financial Services Law, (Valletta: Allied Publications, 2009), p. 158
[44]Max Ganado (ed.), Introduction to Maltese Financial Services Law, (Valletta: Allied Publications, 2009), p. 154

(a) *when a fiduciary relationship is governed by particular rules, whether because of the source and type of the obligations or because of any special law, such particular rules shall apply to the context and these provisions shall apply as necessary to support the interpretation of the said rules;*

(b) *it shall be presumed that these provisions operate consistently with particular rules applicable to any particular fiduciary relationship or obligation but, in case of inconsistency, the particular rules shall prevail over the provisions of this Title;*

(c) *the provisions of this Title shall apply to all fiduciary obligations, which exist at the time of the coming into force of these provisions, or any amendments thereof, even if arising before such date, as well as any fiduciary obligations arising thereafter:*

Provided that such provisions shall not apply retrospectively where their effect is to deny or restrict any vested right or create any liability where such did not occur under law prior to such provisions coming into force;

(d) *where a fiduciary obligation is vitiated by a breach or attempted breach of law by the parties or any one of them and is thereby rendered unenforceable due to the falsity or illegality of the cause, the compliance by the beneficiary or the fiduciary, or both, with such law or a change in law resulting in the cause no longer being false or unlawful, shall render the fiduciary obligation enforceable with effect therefrom. In such cases, the Court may give such interim orders it considers appropriate to ensure compliance with the law or to prevent the further abuse by the parties or any one of them.*

Article 1124A states as follows:

1124A. (1) *Fiduciary obligations arise in virtue of law, contract, quasi-contract, unilateral declarations including wills, trusts, assumption of office or behaviour whenever a person (the "fiduciary") -*

(a) *owes a duty to protect the interests of another person and it shall be presumed that such an obligation where a fiduciary acts in or occupies a position of trust is in favour of another person; or*

(b) *has registered in his name, holds, exercises control or powers of disposition over property for the benefit of other persons, including when he is vested with ownership of such property for such purpose; or*

(c) *receives information from another person subject to a duty of confidentiality and such person is aware or ought, in the circumstances, reasonably to have been aware,*

that the use of such information is intended to be restricted.

(2) *A person who is delegated any function by a fiduciary and is aware, or should, from the circumstances, be aware, of the fiduciary obligations shall also be treated to be subject to fiduciary obligations.*

…

(4) *Without prejudice to the duty of a fiduciary to carry out his obligations with utmost good faith and to act honestly in all cases, a fiduciary is bound, subject to express provision of law or express terms of any instrument in writing excluding or modifying such duty, as the case may be -*

(a) *to exercise the diligence of a bonus pater familias in the performance of his fiduciary obligations;*

(b) *to avoid any conflict of interest or any conflict of trust or fiduciary obligations;*

(c) *not to receive undisclosed or unauthorised profit from his position or functions nor permit any other person to do so, nor enter into any transaction related to the property, directly or indirectly, unless authorised to do so by the instrument creating the fiduciary obligation or permitted by a person or authority empowered to approve such dealings under the instrument or applicable law or as otherwise authorised by the Court:*
Provided that any references to "the Court" shall be construed as references to the Civil Court (Voluntary Jurisdiction Section) unless otherwise indicated or unless the context refers to any court seized of any matter in which case it is the court where the matter arises;

(d) *to act impartially when the fiduciary duties are owed to more than one person;*

(e) *to keep any property as may be acquired or held as a fiduciary segregated from his personal property and that of other persons towards whom he may have similar obligations and to affect a change in the registration of any relevant property, as may be required for such purpose;*

(f) *to maintain suitable records in writing of the interest of the person to whom such fiduciary obligations are owed;*

(g) *to render account in relation to the property subject to such fiduciary obligations;*

(h) *to return on demand any property held under fiduciary obligations to the person lawfully entitled thereto or as instructed by him as otherwise required by the written instrument regulating the fiduciary obligation or by applicable law, and for such purpose, execute such agreements, including any public deed, or other*

instruments and, or effect a change in the registration of any relevant property, as may be required;

(i) *to return any property held under the fiduciary obligations upon the termination of the fiduciary obligations to the person lawfully entitled thereto, as required by the written instrument regulating the fiduciary obligation or by applicable law, and for such purpose, execute such agreements, including any public deed, or other instruments and, or effect a change in the registration of any relevant property, as may be required;*

(j) *to keep confidential the affairs of the person to whom fiduciary duties are owed, subject to the fiduciary's duty to provide information to the beneficiary of the specific fiduciary obligation or to other persons in accordance with and subject to any restrictions contained in the written instrument, if any, giving rise to the fiduciary obligation with reference to this sub- article, unless the fiduciary is given consent from the person to whom fiduciary obligations are owed to disclose such information:*

Provided that a fiduciary has the right to declare on any written instrument or when carrying out any act, that he is acting as a fiduciary in such context and such declaration shall not be considered to be a breach of this sub-article; and

(k) *to carry out the designated purpose, where property has been entrusted to him.*

Liability of third parties when aware of breach of fiduciary obligations

Article 1124A (3) states as follows:

1124A. (3) *Fiduciary obligations arise from behaviour when a person -*

(a) *without being entitled, appropriates or makes use of property or information belonging to another, whether for his benefit or otherwise; or*

(b) *being a third party, acts, being aware, or where he reasonably ought to be aware from the circumstances, of the breach of fiduciary obligations by a fiduciary, and receives or otherwise acquires property or makes other gains from or through the acts of the fiduciary.*

Proprietary remedy in case of breach of fiduciary obligations

Article 1124A (5) states as follows:

(5) *In addition to any other remedy available under law, a person subject to a fiduciary obligation who acts in breach of such obligation shall be bound to return any property together with all other benefits derived by him, whether directly or indirectly, to the person to whom the duty is owed.*

Liability of third parties when aware of a breach of fiduciary obligations

Article 1124B holds as follows:

> **1124B.** (1) *Where a third party is aware that a fiduciary is vested with ownership, has registered in his name, holds, exercises control or powers of disposition over property subject to fiduciary obligations, third parties may, in good faith, act in relation to the fiduciary as though he were the absolute owner thereof.*
>
> …
>
> (2A) *Where a third party acquires property under gratuitous title as provided for in sub-article (1) from a fiduciary who acts in breach of the fiduciary obligation or where the third party has acquired property under gratuitous title to the detriment of a beneficiary, the third party shall be subject to the same fiduciary obligations which the fiduciary was subject to, which shall take effect when the third party becomes aware or where he reasonable ought to have become aware from the circumstances of the breach of the fiduciary obligations:*
>
> *Provided that the fiduciary obligations which the third party is subject to shall be limited to the extent of the breach or unauthorised gain, unless the Court provides otherwise pursuant to any of the remedies in article 1124A:*
>
> *Provided further that the performance of the fiduciary obligations in accordance with the terms and conditions that the fiduciary is subject to shall not be considered to be gratuitous for the purpose of this article.*
>
> …
>
> (3A) *Any third party dealing with a fiduciary in a transaction shall be entitled to enquire about the purposes of the fiduciary obligation, including the obligation of not exceeding the value raised by the transaction, or otherwise relating to the propriety subject to the transaction or the applicability of the funds in question.*
>
> …
>
> (6) *Where a fiduciary is vested with ownership, has registered in his name, holds, exercises control or powers of disposition over property informs a third party with whom he is dealing that he is acting as a fiduciary, the third party is otherwise aware or should reasonably be aware, the fiduciary shall not be personally liable for the obligations entered into with such third party, other than those entered into in the exercise of his obligations. Where the third party is unaware of the fiduciary obligations, the fiduciary shall, subject to any terms which may have been stipulated or which otherwise apply under the*

> *applicable law, be personally liable to such third party in respect of any obligation entered into.*
>
> (7) *The fiduciary shall have a right of recourse against the beneficiary where contemplated in the provisions of this Code or in any special law, by way of indemnity against such liability unless he has acted in breach of his duties, in which case he shall not be entitled to be indemnified.*

Property subject to fiduciary obligations and ownership

Article 1124C (1) holds as follows:

> **1124C.** (1) *Where a person is vested with ownership, has registered in his name, holds, exercises control or powers of disposition over property subject to fiduciary obligations, such property shall constitute a distinct and separate patrimony, consisting of all relative rights and obligations with respect thereto, and such property shall not be subject to the claims or rights of action of the fiduciary's personal creditors, nor of his spouse or heirs at law, except as stated in the provisions of this Code or of special laws.*

In the case of ***Dhalia Real Estate Services Limited v. Gordon Attard*** (FH CC, 15/12/2020, Rik. Gur. Nr. 449/2015) the court is quoted as having stated the following:

> *"Fost l-agir skorrett u qarrieqi tal-intimat, huwa bieghed lill-klijenti tas-socjetà rikorrenti biex iressaqhom lejn is-socjeta' imsiehba mar-Remax u dan bil-ghan illi jiffinalizza l-istess negozju tieghu mal-istess socju/principal tieghu, kollox kif ser jigi pprivat waqt il-kors tal-odjerna kawża.*
>
> *Il-manager allura avolja m'ghandux responsabbilita' ta' policy making, huwa fiducjarju tal-principal tieghu u jrid jagixxi dejjem in bona fede u b'lealta' …*
>
> > *Fis-sentenza taghha fl-ismijiet* Vascas Enterprises Limited v. Adrian Ellul*, tat-13 ta' Novembru 2014, din il-Qorti diversament presjeduta ttrattat mertu simili …*
> >
> > *"Qua agent u mandatarju l-manager ghandu doveri li-jagixxi bid-diligenza ta' bonus paterfamilias bir-responsabilita' implicita li din iggib maghha. Illum bl-introduzzjoni tal-artikolu 1124(A) tal- Kap. 16 dwar obbligi fiducjarji, giet kristallizzata dak li l-Qrati taghna kienu jsostnu cioe illi certi kuntratti minn natura taghhom jimponu obbligi addizjonali ghal dawk kuntrattwali fosthom il-kuntratt ta' impjieg …*
> >
> > *Hi l-fehma ta' din il-Qorti li dan l-artikolu ma hu xejn ghajr l-applikazzjoni generali tal-ligi illi fil-qadi tad-doveri tieghu, impjegat irid iqis l-interess tal-principal tieghu u jagixxi bid-diligenza kollha fil-qadi ta' dmiru u aktar ma hi*

> *gholja l-pozizzjoni jew il-kariga, aktar jassumi piz l-obbligu ta' fedelta, lealta, onesta u buona fede fil-konfront tal-principal u aktar hu ta' importanza li dak li ghandu kariga jagixxi bid-diligenza ta' bonus paterfamilias. Tradott f'termini semplice l-impjegat specjalment fil-karigi esekuttivi ma jridx jaghmel hsara, jew jagixxi b'detriment jew pregudizzju jew b'dannu ghall-interess tal-principal tieghu. Dawn id-doveri ghandhom jitqiesu b'zieda ma' kull kondizzjoni ohra kontrattwali fir-rapport ta' impjieg bejn il-principal u l-impjegat …*
>
> *Fil-fehma tal- Qorti, bhala manager mas-socjeta' attrici, il-konvenut kellu dmir li jhares l-obbligi fiducjarji li johorgu mir-relazzjoni li kellu mal-istess attrici, skont ma jipprovdi l-artikolu 1124A* et seq *tal-Kapitolu 16".*

In the case of ***Joann Cordina v. Charles Cordina*** (Court of Magistrates (Gozo) Superior Jurisdiction, 26/09/2007, Cit. Nru. 95/2000/1) spouses had inherited two equivalent sums of money, respectively, from a third party. Both sums were deposited in an account held in the husband's sole name. The husband then refused to transfer the amount inherited by his wife back to her. The court stated as follows:

> *"Bla dubju is-sehem tal-attrici mill-flus li wirtu minghand Andreas Weiss kienu fil-pussess tal-konvenut bhala mandatarju ta' martu … l-attrici stess ammettiet li hi tat il-kunsens taghha sabiex dawn il-flus jigu depozitati f'kont fiss f'isem zewgha ghall-perjodu ta' sena.*
>
> *Bl-Att Numru XIII ta' l-2004 gew introdott emendi komprensivi fil-Kodici Civili (Kap. 16) dwar id-dmirijiet ta' fiducjarju (Artikolu 1124A tal-Kodici Civili) u dwar il-mandat prestanome (principju li kien ilu jigi applikat fis-sistema guridika taghna). Il-Qorti tqies li bid-dhul fis-sehh ta' dan l-Att, is-sitwazzjoni giet hafna iktar iccarata u l-legislatur introduca provvedimenti dettaljati fejn mandatarju jzomm ghandu proprjeta' f'isem hadd iehor u anke rimedji godda. Insibu wkoll rimedji bhal per ezempju li persuna li tikser l-obbligazzjonijiet fiducjarji trid trod lura l-proprjeta' u kull beneficcju li tkun hadet bi ksur tal-obbligazzjonijiet. Dan jinkludi l-proprjeta' li fiha tista' tkun giet konvertita l-proprjeta' originali (Art. 1124A(6)) tal-Kodici Civili).*
>
> *Certament li meta l-konvenut gibed minghajr il-kunsens ta' martu l-flus li gew fdati ghandu u mbaghad irrifjuta li jirritorna l-flus parafernali taghha u anzi ghamilhom tieghu, gie li approprja ruhu indebitament minn flusha. .... In-non-restituzzjoni tal-flus li l-konvenut kien qieghed izomm ghandu ghan-nom ta' martu, certament tikkwalifika bhala approprijazzjoni indebita.*
>
> *... tikkundanna lill-konvenut sabiex ihallas lill-attrici s-somma ta' Lm6,461.05."*

In the case of ***Saviour Cremona et v. Anthony Cassar et*** (Court of Magistrates (Gozo) Superior Jurisdiction, 30/03/2007, Cit. Nru. 91/1999/1) the court stated as follows:

> *"VB u SC taw għalhekk mandat lill-konvenut sabiex, minkejja li fuq dak il-konvenju kien ser jidher waħdu u f'ismu proprju, jikkuntratta bil-moħbi f'isimhom ukoll. Dan m'hu xejn għajr l-hekk imsejjaħ mandat prestanome. Terġa' fl-okkażżjoni tat-tieni fteħim, u ċioe' qabel ma kellu jigi iffirmat il-kuntratt proprju tax-xiri ta' l-isħma, il-konvenut ġie mogħti l-mandat biex din id-darba jidher għall-kumpanija li kienet tapparṭjeni lill-atturi VB u SC biss, mingħajr ma jkunu jafu l- vendituri, u ta' dan irċieva s-somma ta' LM1,000,000 li kellha tkopri l-ispejjeż kollha nvoluti ....*
>
> *Meta mbagħad sar il-kuntratt finali ta' l-akkwist ta' l-isħma fir-Realfinanz, l-atturi baqghu ma jafux illi kien sar il-kuntratt tal-villa mill-konvenut, u wisq inqas illi kienu akkwistaw art inqas minn dak li kien intenzjonat .... Imma b'dan l-aġir tiegħu, l-konvenut ma onorax l-obbligi mposti fuqu bil-mandat fdat lilu mis-soċji tiegħu, u minflok ma infurmahom b'dak kollu li kien qed jagħmel, minn wara daharhom, qabad u dderoga għalih inniffsu dak li suppost kien għall- benfiċċju ... ta' l-atturi VB u SC biss... . Dan kollu ma jistax ifisser ħlief illi f'dan ir-rigward tassew ittradixxa l-fiduċja li kellhom fih l-atturi VB u SC, liema komportament jesponih għad-danni kkaġunati lill-istess atturi."*

As to damages

> *"... il-fiduċja fdata fil-konvenut minn VB u SC ġiet ittradita f'parti minima biss ta' dan in-negozju. Fil-fatt mill-bqija huwa wettaq dak kollu li kien ġie inkarigat biex jagħmel f'isem il-mandanti tiegħu . ...*
>
> *"Kif ġia rajna iżjed 'l fuq f'din is-sentenza l-konvenut approprja għalih innifsu mat-tmient elef metru kwadru (8000 m.k.) li proprjament kellhom jibqgħu nklużi mat-territorju kollu li kienet tipposjedi s-soċjeta' Realfinanz ... għas-sebat itmiem (8000 m.k.) żejda li ħa madwar il-villa tiegħu l-konvenut, u meħud ukoll in konsiderazzjoni, l-awment fil-prezzijiet ta' l-art u l-potenzjal pjuttost żgħir ta' xi żvilupp edilizju fuq l-istess art, somma ta' ħamsin elf lira maltija (Lm50,000) għandha tkun waħda adegwata għal dan il-fini."*

Article 1124A (5) states as follows:

> (5) *In addition to any other remedy available under law, a person subject to a fiduciary obligation who acts in breach of such obligation shall be bound to return any property together with all other benefits derived by him, whether directly or indirectly, to the person to whom the duty is owed.*

"There were cases where the courts … missed a valuable opportunity and awarded the wrong remedy … in the Ta' Cenc Case, Court of Magistrates (Gozo), 30th March 2007, the judge

awarded damages for breach of fiduciary duty rather than a proprietary remedy which the law carers for in breaches of fiduciary duties".[45]

Liability of Mandator

Article 1880 states:

> **1880.** (1) *A mandator is bound to carry out the obligations contracted by the mandatary in accordance with the powers which he has given him.*
>
> (2) *He is not liable for what the mandatary has done beyond such powers, unless he has expressly or tacitly ratified it.*

Liability of Mandator towards Mandatory

Article 1881 states:

> **1881.** (1) *The mandator must repay to the mandatary the advances and expenses made or incurred by him in carrying out the mandate; and he must pay him the remuneration if promised to him, or if it is presumed to have been tacitly agreed upon, regard being had to the profession of the mandatary and to other circumstances.*
>
> (2) *If no negligence be imputable to the mandatary, the mandator cannot refuse to make such reimbursement and payment, even though the matter has not been successful; nor can he have the amount of such expenses and advances bona fide incurred or made, reduced, on the ground that they might have been less.*

In the case of ***Giovanni Antonio Vassallo v. Giovanni Griscti*** (Court of Appeal (Commercial), 11/03/1910, Vol. XXI.I.7) the court stated:

> *"… the commission agent has the right to reimbursement of expenses incurred in execution of the mandate and when no fault is attributable to the commission agent, the principal has no right to object on the basis that the expense was avoidable".*

Liability of Mandator for Losses

Article 1882 states as follows:

> **1882.** *The mandator must also indemnify the mandatary for the losses he has sustained by reason of the mandate, where no negligence is imputable to him.*

Liability of Mandator for Interest on Advances and Expenses

Article 1883 states:

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[45]M. Ganado, "Maltese Law on Trusts and Fiduciary Obligations: Recent Experiences", Ganado Advocates: Insights, 19 November 2014, https://ganado.com/insights/publications/maltese-law-on-trusts-and-fiduciary-obligations-recent-experiences/#_ftn2

> **1883.** *Interest is due by the mandator to the mandatary on the advances and expenses mentioned in article 1881 from the day of the payment of such sums.*

Right of Retention Competent to Mandatory

Article 1885 states as follows:

> **1885.** *The mandatary shall have the right of retention, so long as he is not paid what is due to him in consequence of the mandate.*

In the case of ***Amerigo Marsal Capua pro et noe v. Giovanni Scicluna noe*** (Commercial Court, 19/10/1933, Vol. XXVIII.III.1209) it was held that the right of retention is not as strong as to rank higher than a hypothec:

> *"[The] right of retention to cater for any professional fees which may be due might potentially clash with the duties of the fiduciary not to act in his own interests against that of his customers".*[46]

Obligations of the Mandator

On the tacit ratification of mandate, article 1880(2) states:

> (2) *He is not liable for what the mandatary has done beyond such powers, unless he has expressly or tacitly ratified it.*

In the case of ***John La Rosa noe v. Carmelo Galea*** (Court of Appeal, 30 May 1958, Vol. XLII.I.344) a mandator had entrusted a mandatory to find someone to carry out some marble works in his shop. The mandatory contacted a worker (plaintiff) who agreed to do the job. The worker sent a quotation to the mandator (defendant) who told the mandatary to confirm to the worker that the work could start. However, the mandator had no funds in his availability and he claimed that he had told his mandatory to find a person who could perform the work at the rates paid by the War Damage Commission and who agreed to be paid after the said Commission had paid the defendant. The mandator further argued that if the mandatary had failed to inform the plaintiff of these conditions, the mandatary had exceeded the limits of his mandate and it was therefore the mandatary who was bound to pay the plaintiff.

The mandator's silence and inaction were to be deemed a tacit ratification of the mandatary's behaviour. It is accepted doctrine that in certain circumstances even the mere silence of the mandate may infer a ratification of the mandatary's actions – and this on the strength of the principle that whoever remains silent when he could have and should have spoken, is to be deemed as having consented.

According to Zachariae, tacit ratification is generally accepted as arising from the mere silence of one who, whilst knowing that a matter has been commenced in excess of the limit of the mandate given by him, suffers his mandatary to complete it. Once the mandator had received the worker's quotation, he was bound to inform the worker that he wanted to insert certain conditions. Thus, the mandator's inaction inferred an acceptance of that agreement especially

[46]Max Ganado (ed.), Introduction to Maltese Financial Services Law, (Valletta: Allied Publications, 2009), pp. 159-160

when the defendant accepted plaintiff's work and admitted the debt but merely insisted on the term of payment.

Third party in good faith: responsibility of mandator, if mandatary had not exceeded limits

In the case of ***Alessandro Gauci v. Costantino Fenech*** (Court of Appeal, 28/04/1920, Vol. XXIVI.I.495) the following facts were at issue: In the course of reconstructing a villa, A, the administrator of the construction, B, required various materials. B suggested that he could procure these materials from C. For a certain period, B delivered various materials to A against an invoice and a receipt which were allegedly signed by C. After some time, D informed A that he was owed over £300 for various materials sold. A answered that he had purchased the said goods from C. It transpired that C had never been part of the transaction and that B was in actual fact purchasing the goods from D. B, however, had held all the money and when the truth was found out he absconded.

D sued A for payment of the price of the goods sold. A pleaded that he had never authorised anyone to purchase from D and that therefore D had to direct his claim against B.

Who was to bear the consequence for B's behaviour?

Supplier D was neither negligent nor in bad faith. In this case the error was not committed by the third party but by the mandator who, having been deceived by his mandatary, believed that the materials were being supplied by another person. Thus, it was the mandator who had badly placed his confidence and of his own error. Had the mandator discovered the fraud earlier he could have returned the unused material to the seller. The fraud was, however, discovered after the materials were used and hence it was felt highly unjust to allow defendant to enjoy the purchased materials but at the same time exempting him from paying the seller.

Responsibility of mandator towards third parties for negligence of mandatary

In the case of ***Carmelo Ellul v. Giuseppe Imbroll et*** (FH CC, 21/05/1921, Vol. XXIV.II.589) it was held that a mandator is bound to carry out the obligations contracted by the mandatory in accordance with the powers which he has given him. The mandator is also responsible towards third parties for negligence and fraud of the mandatory. A mandator who owes money to a third party, appoints a mandatary to transfer the payment to said third party. Mandatary proceeds to retain such sum and fails to forward it to the third party. The mandator still remains responsible towards the third party for the payment of the sum.

In the case of ***Vincenzo Vella v. Marianna Curmi*** (FH CC, 15/01/1902, Vol. XVIII.II.94) it was held that when a mandator authorised the mandatory to take a sum of money on loan for a determinate purpose, the lender is not prejudiced if the mandatory misuses the money borrowed and utilises it for a purpose which is not that indicated in the procuration.

Indeed, in such a case the mandatory is not to be considered as having exceeded the limits of the mandate as would, on the contrary, have been the case if he borrowed twice the sum indicated in the procuration, or borrowed a larger sum than that authorised or performed an action which differed from that included in the procuration. The case mentioned in the previous paragraph involves only the obligation of the mandatary to use the money borrowed solely for the purposes authorised by his mandator. The consequences of misuse are to be borne by the mandator without any prejudice to the lender.

Third party must not be in bad faith

In the case of ***Vincent Attard noe v. Raffaele Farrugia*** (FH CC, 9/02/1956, Vol. XL.II.739) it was held that if the person alleging a mandate is not in good faith when contracting with the alleged mandatary, such person cannot maintain an action against the alleged mandatary. In this case a cement supplier (plaintiff) alleged that the alleged mandator (defendant) had purchased from him some cement through his son (the alleged mandatary). The cement had indeed been purchased by his son. The third party admitted that he had imagined that the alleged mandator could not have been aware of his son's actions, yet he failed to verify. The court found that the third party had not negotiated the agreement with the mandatary in good faith and, therefore, he could not claim the protection of the law.

On the obligations of the beneficiary towards the fiduciary, article 1124H states:

> **1124H.** (1) *The beneficiary shall be bound towards the fiduciary:*
> (a) *to perform all such obligations as are agreed by him in writing or as may be established in the relative instrument under which the fiduciary obligations arise or as may arise under the applicable law;*
> (b) *to pay the remuneration to, and all expenses incurred by, the fiduciary as may be established in the relative instrument under which the fiduciary obligations arise or are governed;*

Termination of Mandate

Article 1886(1) states as follows:

> **1886.** (1) *Mandate is terminated -*
> (a) *by the revocation of the procuration;*
> (b) *by the death, the interdiction or the incapacitation, whether general or special, from entering into contracts, the declaration of bankruptcy, or the cessio bonorum either of the mandator or of the mandatary;*
> (c) *by the termination of the powers of the mandator;*
> (d) *by the expiration of the time during which the mandate was to continue;*
> (e) *by the renunciation on the part of the mandatary:*

The law wants equality and balance between the respective positions of the mandator and the mandatary: the former may terminate the mandate through revocation, the latter through renunciation.

Article 1887 states:

> **1887.** (1) *The mandator may revoke the mandate whenever he chooses, unless the mandate is expressly stated to be granted by way of security in favour of the mandatary or of any other person, and that it is irrevocable, in which case it may only be revoked with the consent of the person whose interest is secured thereby. The mandatary under such an irrevocable mandate granted by way of security, shall be bound to act in a fair and reasonable manner when exercising the powers granted thereunder, provided that a mandate by way of security which is irrevocable may only be granted when the object to*

> *which it relates is property which is movable, by nature or by operation of law, and it shall not be permissible for such a mandate to be issued with reference to immovable property or rights therein.*
>
> (2) *Where powers are exercised under an irrevocable mandate granted as stated above and form part of or are granted pursuant to or in the context of a written agreement governing a broader relationship, the mandatary shall furthermore be bound to exercise such powers in accordance with the terms and subject to the conditions of such agreement.*
>
> (3) *Except as provided in the preceding sub-article, the appointment of a new mandatary for the same business is equivalent to a revocation of the mandate given to the previous one, even though the new mandatary does not accept the mandate.*
>
> (4) *A general mandate does not produce the revocation of a special mandate previously given, unless the business contemplated in the special mandate is expressly included in the general mandate.*

With regard to the renunciation of mandate, article 1889 states as follows:

> **1889.** (1) *A mandatary may renounce the mandate by giving notice of his renunciation to the mandator.*
>
> (2) *Nevertheless, if the renunciation is prejudicial to the mandator, he must be compensated by the mandatary, unless it is impossible for the latter to continue to carry out the mandate without suffering himself considerable prejudice.*

Revocation of mandate: must a mandator pay compensation to the mandatary if the former terminates the mandate without a just cause?

In the case of ***Giuseppe Vella Zarb v. Antonio Caruana et noe*** (Court of Appeal, 7/03/1932) a commercial agent (mandatary) of foreign principal (mandator) claimed compensation for services rendered since he had introduced various goods supplied by the foreign film in Malta. The mandate had been revoked without notice.

Can the mandator revoke the mandate at will?
The court endorses the absolute right of the mandator to revoke the mandate, whether this be gratuitous or against remuneration:

> *"Mandate is based on the trust which the mandator places in the mandatory and hence the mandator must be allowed to withdraw the authorisation when the necessary trust exists no more, unless, being bound by a term, he fails to respect such reciprocal obligations."*

Was there a right to compensation?

Revocation creates no difficulty when the mandate is gratuitous, not so when it is remunerated. Laurent states that "the Code presumes that the mandate is a very secondary thing for the mandatory; it is merely incidental in his life. This presumption is not always exact. There are mandatories who base their living on mandates or tasks entrusted to them. Certainly, a revocation of a mandate granted to a salesman would cause him damage. Would it therefore not be just to grant him compensation? Since the law does not grant such a right, he could only enjoy such right in virtue of an express or tacit agreement".

The Maltese Civil Code only burdens the mandatory with the obligation of compensation in case of renunciation, but it does not contain a corresponding obligation for the mandator in case of revocation. The Court inferred from circumstances that the mandatory would not have made the utmost to introduce principal's goods in Malta had he not expected to work longer-term with the principal. Court, therefore, assumed that the parties' intended mandatory to do his utmost but to remain in charge of his task for a period of time sufficient to compensate him for his efforts. The court stated:

> *"Good faith must exist in the formation of a contract but must also exist in its execution and interpretation. In contracts similar to the one under review, it is not just nor equitable for a revocation of a mandate without just cause to be made at a time which does not allow the mandatary the opportunity to be compensation for his efforts."*

Mandatary's claim to compensation following termination

In the case of ***Victor Salomone v. Dr Giuseppe Mifsud Speranza noe*** (Commercial Court, 12/11/1934, Vol. XXIX.III.19) the facts were as follows: a foreign film had appointed a local agent. The local agent had been assured a permanent agency and, as a result, the agent started carrying out work for the mandator. The mandator subsequently decided to terminate the agency and set up a branch in Malta. The mandatary sued the mandator for compensation for services rendered.

The court decided that:

> *"A mandate could, in terms of law, be revoked at any time. However, if the procuration is granted for an established time, the mandator is responsible for damages since, by revoking the mandate prior to its expiry, the mandator would be in breach of a contract and would have caused damages unjustifiably to the mandatary. Such damages would be ex contractu … furthermore, there existed cases where even though the parties had not specifically established a time limit, the circumstances of the case indicate an inferred term and that the representation should subsist for a certain time to enable the representative to reap the fruit of his work. This principle is strongly applied when an agent is appointed to introduce a new produce in a market".*

In this case, revocation had taken place after five years. However, the mandatory proved that he had attracted other firms which were operated in the mandator's name, and he would not have done so had he been aware that the agency would have been terminated after a few years.

Termination of mandate does not affect third parties unaware of such termination

Article 1888 states:

> **1888.** (1) *The existence of any of the causes for which a mandate is terminated cannot be set up against third parties who, having no knowledge of such cause, have contracted with the mandatary; saving the right of the mandator to seek relief against the mandatary, where competent.*
>
> (2) *Nor may the existence of any such cause be set up against the mandatary, if at the time of acting he also had no knowledge thereof.*

The relevance of third parties' knowledge of the revocation of the mandate

In the case of ***Luigi Caruana et v. Ella Farrugia et*** (Court of Appeal, 12/07/1976) a sale was made by a mandatary despite the revocation of the mandate whilst the mandator wanted to annul the sale. The mandator's action could only succeed if the mandator could prove that the third party contracting with the mandatary was aware of the revocation. The contract was annulled since facts indicated that the third party (purchaser) had been aware of such revocation.

Termination of mandate of transfer of immovable property

Article 1886 states:

> *Provided that:*
>
> (i) *in the case of the termination of a mandate whereby the mandatory, being a physical person, has been empowered to transfer immovable property on behalf of the mandator or where the mandate is one of a general nature given between physical persons, such termination may be notified by the mandator or by any other person having an interest in the mandate to the Chief Notary to Government who will enter the particulars of such termination in a register held by him for the purpose and which shall be accessible to the public during office hours;*

Owen Bonnici stated the following in the House of Representatives: *"Se ndahhlu procedura gdida fejn tidhol ... l-irtirar ta' prokuri ... perexempju jekk ghamilt prokura lil hija u kelli xi nghid mieghu jew inkella hija ma jridx jibqa' prokuratur tieghi, jekk irrid nimxi mas-sewwa, irri naghmel ittra ufficjali u ninnotifika lin-nutara kollha biex nirtira dik il-prokura. Meta cempilt [lir-Registratur tal-Qorti] u staqsejtu kemm tigi din il-procedura qalli li biex tirtira prokura tigik xi €2,150. Affarijiet tal-meravilja! … Hafna nies jirtiraw il-prokura u ma jibaghtux l-ittra ufficjali at their own risk. Suppost tibghat ittra ufficjali."*[47]

Dr Keith German (Nutar Principali tal-Gvern) said the following: *"L-ewwel prijorita' taghna kienet li nirrevokaw il-prokuri, pero' mbaghad tkellimna man-nutara. At an initial stage ridna li nirregistraw il-prokuri kollha. Tlaqna minn dak il-punt ukoll fuq suggeriment taghhom. Pero'*

[47]Hon. Owen Bonnici, DIBATTITI TAL-KAMRA TAD-DEPUTATI (Rapport Uffiċjali u Rivedut), IT-TNAX-IL PARLAMENT Seduta Nru 321, It-Tlieta, 3 ta' Novembru, 2015, p. 15.

mbaghad, meta ghamilna iktar studji, bdew johorgu certi issues problematici, fosthom jekk prokura ghandhiex tkun available lil kulhadd. Jekk se nirregistrawhom kollha mar-Registru Pubbliku jidhlu data protection issues, perezempju.

"... L-idea hija li ghalissa se nirrevokaw prokuri rigward physical property, jigifieri dwar immovable property, jigifieri rigward persuni wkoll. Ejja ninsew il-kumpaniji u l-affarijiet kollha, inkunu tlaqna mill-ewwel pass. Jekk se jkollna sistema ta' certezza – ghax fl-ahhar mill-ahhar anke n-nutara qed inbatu meta lanqas inkunu nafu jekk prokuri thassrux jew le – jekk se jkollna sistema online li se nibdewha jekk Alla jrid ... ahna ghamilna studji. Kemm jista' jkun hemm revoki f'sena? Bhalissa, skont l-istatistika, forsi jkun hemm 200 prokura f'sena.
"... Ghalissa nitilqu mir-registru li se niehdu f'idejja jien bhala Nutar tal-Gvern.

"... Kemm idahhal nota mad-Dipartiment, fejn ikun irid jehmez il-prokura li se jirrevoka."[48]

Duty of mandator to inform mandatary about revocation of mandate

In the case of ***S.G. South Limited v. Joseph Scicluna et*** (FH CC, 02/04/2004, Cit. Nr. 2287/2000/1) estate agents claimed compensation for the role in the sale of a property. Mandator claimed that if any mandate had been given to the property agent, it had been revoked. It resulted that the revocation had never been communicated to the agents. The court stated as follows:

> *"Issa ghalkemm il-mandat huwa wiehed minn dawk il-kuntratti li ecezzjonalment jista' jigi terminat unilateralment bit-tnehhija tal-prokura (artikolu 1886(1) tal-Kodici Civili), il-mandat jibqa' kuntratt bilaterali, u biex jinhall hemm bzonn li d-decizjoni ghat-tnehhija tal-mandat tigi kkomunikata lill-mandatarju. Il-mandatarju li, in buona fede, jibqa' jesegwixxi il-mandat li kellu ghax ma jkunx gie mgharraf mill-mandant li l-prokura giet irtirata, jibqa' xorta wahda bid-dritt li jithallas dak li hu dovut lilu skond il-ftehim ta' agenzija.*
>
> *"Kwindi l-Qorti tikkonkludi li kien hemm relazzjoni kontrattwali bejn il-partijiet li bih is-socjeta' attrici giet imqabbda mill-konvenuti tipprova takkwista l-bejgh tal-proprjeta' li l-istess konvenuti kellhom gewwa Marsaskala."*

Death of mandator includes the dissolution of a legal person

In the case of ***Joseph Aquilina et v. Jean Paul Mifsud et*** (Court of Appeal, 05/10/2001, Cit. Nr. 667/99) the court stated:

> *"Hu mbaghad principju bazilari ta' dritt li ma jehtieg l-ebda elaborazzjoni illi l-mandat jispicca bil-mewt tal-mandant jew tal-mandatarju. Fil-kaz taht ezami l-mewt legali tal-mandant okkorriet bl-att tax-xoljiment tas-socjeta' WSSA ...*
>
> *"Il-konsegwenza ta' dan kollu hu illi una volta l-mandatarju jkun gie ezawtorat mill-mandat tieghu ghaliex il-mandant ikun "miet", l-appellant la qabel kienu mandatarji ma jistghux jibqghu*

[48]KUMITAT PERMANENTI GĦALL-KUNSIDERAZZJONI TA' ABBOZZI TA' LIĠI AĠĠUNT (Rapport Uffiċjali u Rivedut) IT-TNAX-IL PARLAMENT LAQGĦA NRU 1 L-Erbgħa, 16 ta' Diċembru, 2015, p. 16 et seq

> *jippretendu li ghandhom xi jedd li jibqghu jamministraw dak li ma jkunx ghadu jappartjeni lill-mandant taghhom. Hi allura skorretta s-sottomissjoni illi l-fatt innifsu illi s-socjeta' WSSA setghet giet xolta ma jhassarx atomatikament kull att jew decizjoni jew obbligu assunt mill-istess socjeta."*

Duty of heirs of deceased mandatary

Article 1890 states:

> **1890.** *In case of the death of the mandatary, his heirs must, if they know that he was a mandatary, give notice thereof to the mandator, and attend, in the meantime, to what is required in the interest of the latter, as circumstances may demand.*

In the case of ***Charles Michael Gauci v. Alfred Vella pro et noe*** (CA, 14/01/2002, Cit. Nr. 248/99) it was held that the heirs of the mandator are not bound by the mandate:

> *"Ir-relazzjoni guridika bejn il-mandant u l-mandatarju kient wahda personali bazata fuq il-fiducja reciproka li ma setghet qatt testendi fuq l-eredi sew tal-mandant kif ukoll tal-mandatarju. Il-fatt allura illi l-mandant Paul David Gauci ntrabat illi l-hatra ta' amministratur generali minnu maghmula tkun wahda irrevokabbli, kienet u setghet biss torbot lilu vita durante. Ma setghetx tobot lis-successuri tieghu bit-titolu. Dana jekk xejn ghar-raguni ovvja illi l-proprjeta' tan-negozju baqghet tal-mandant, kienet tghaddi, mal-mewt tieghu, fuq is-successuri tieghu, u dawn ta' l-ahhar kellhom kull dritt li jassiguraw l-amministrazzjoni ta' hwejjighom bil-mod kif jidhrilhom huma. M'hemmx ghalfejn jigi sottolinejat li, f'dan ir-rigward allura, il-posizzjoni ta' amministratur generali, anke jekk nominat b'mod irrevokabbli, kienet aktar vulnerabbli minn dak ta' semplici impjegat li kien protett fl-impjieg bl-ligijiet ad doc. Din il-qorti hi allura tal-konvinzjoni li l-appellat ma kien bl-ebda mod obbligat li "jirrispetta d-drittijiet li Paul David Gauci" (missieru) kien ta lill-apellant". Fil-fatt Paul David Gauci ma kien ta l-ebda drittijiet lill-appellant. Kien tah biss inkarigu li jintemm mal-mewt ta' min inkarigah."*

However, with regard to prestanome mandates article 1124D states:

> **1124D.** *Where a fiduciary is vested with ownership of a property, has it registered in his name, holds, exercises control or powers of disposition over such property and for any reason, ceases to act as fiduciary and is thereafter replaced by another fiduciary, the latter shall continue to perform the same fiduciary obligations, as may be applicable at the relevant time:*
>
> *Provided that:*
>
> *...*

(n) *where a fiduciary dies in the course of performing his fiduciary obligation:*

i. *his universal heir who has reached majority and is capable at law, or if more than one, each one of such heirs severally, shall be deemed to be executors ex lege of the property and shall immediately transfer or deliver the property to a successor fiduciary or the beneficiary;*

Property held subject to fiduciary obligations

Article 1871A (3) states:

1871A. (3) *Notwithstanding article 1886, a mandate in favour of a person acting in terms of this article shall not lapse -*

(a) *on the death of the mandator and shall continue to bind the mandatory to preserve the property and all rights related thereto until such time as the property held by him is validly transferred to the heirs or legatees of the mandator; and*

(b) *on the bankruptcy of the mandator or the mandatory and shall continue to bind the mandatory to preserve the property and all rights related thereto until such time as the property held by him is validly transferred as directed by the competent court for the benefit of the mandator or of the creditors of the mandator, as the case may be.*

"The law clarifies that this kind of mandate continues to operate beyond the normal mandate, which usually terminates on the death or bankruptcy of one of the parties. The context is the mandate given by a client to a financial services professional who is holding shares in a company, for example, on the death of the client. Our law states that on death the mandate terminates automatically. This is a situation where an automatic termination is not in the interest of the client. So the law now states that the mandate will continue to bind the service provider to preserve the property and all rights related thereto until the property is validly transferred to the heirs or legatees of the mandator. So until the persons entitled come into possession of the property, the property is protected and a financial services provider cannot stop carrying on his duties towards a client because they are automatically continued for the benefit of his heirs.

"It is often the case that the heirs ask the professional to continue handling the property and then one has a new mandate, but if they want the property back to engage someone else then the professional must comply. A very important point to note is that the kind of agreement cannot designate what the professional should do with the property after the mandator, his client, dies. That kind of agreement would be invalid as it should be done in a will before a notary. Mandates cannot be used as a will substitute".[49]

Mandate in Anticipation of Incapacity

"The need for protection in this regard is greatly amplified by Malta's ageing population and the increasing potential of a cognitive impairment with old age. Advance planning tools for incapacity … mental incapacity must occur for the mandate to have validity … this provides the protection, as it is ineffectual until the cause of incapacity is proven and accepted by the

[49]Max Ganado (ed.), Introduction to Maltese Financial Services Law, (Valletta: Allied Publications, 2009), pp. 159-160.

Court, which may also establish other conditions in the mandate. The wording of the law indicates that this type of new mandate under our law is not a continuing mandate as it cannot be used before incapacity, and it is thus a conditional mandate".[50]

"… an instrument of self-determined substituted decision-making which better safeguards the latter's autonomy and self-determination. This implies that the mandator should be able to execute the affair personally when conferring the power on the mandatary".[51]

Convention on the Rights of Persons with Disabilities (CRPD)

Article 12 on the equal recognition before the law states as follows:

1. *States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*
2. *States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*
3. *States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*
4. *States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.*
5. *Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.*

In the case of ***X & Y v. Croatia*** (ECtHR, 3/11/2011, no. 6193/09) it was held that divesting someone of legal capacity entails serious consequences. The person concerned is not able to take any legal action and is thus deprived of his or her independence in all legal spheres. Such persons are put in a situation where they depend on others to take decisions concerning various aspects of their private life, such as, for example, where to live or how to dispose of their assets and all income.

[50]M. Pace, The Administration of Property of Others Under Maltese Law: What is the Extent of Protection Afforded to Vulnerable Persons? A Study with Special Emphasis on the Elderly and Persons with Disabilities, Faculty of Laws, University of Malta, 2017 pp. 17, 90.

[51]J. Attard, The Introduction of the Enduring Power of Attorney Under Maltese Law - A Critical and Comparative Analysis, Faculty of Laws, University of Malta, 2019, Faculty of Laws, University of Malta, 2017.

Article 520 of the COCP states:

> **520.** (1) *A demand for the interdiction or incapacitation of persons who have a mental disorder or other condition, which renders them incapable of managing their own affairs, or who are insane or prodigal, is made by an application to the Court of voluntary jurisdiction.*
>
> (2) *The application shall contain a statement of the facts on which the demand is founded and an indication of the witnesses, if any, to such facts.*
>
> (3) *Any documents in support of the demand, shall be filed together with the application.*
>
> (4) *For the purposes of this Title, and for the purposes of the provisions of articles 187, 747, 781 and 929:*
>
> (a) *"other condition", where used in the context of a condition that renders a person incapable of managing his own affairs, means a long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder one's full and effective participation in society on an equal basis with others; and*
>
> (b) *"mental disorder" shall have the meaning assigned to it in the Mental Health Act:*
>
> *Provided that any reference in such definitions to "disability of mind" or "arrested or incomplete development of mind" shall not be construed to mean a mental disorder for the purposes of this Title and of such provisions.*

Article 521 of the COCP states as follows:

> **521.** *Interdiction or incapacitation may be demanded -*
>
> (a) *by any one of the spouses against the other spouse;*
>
> (b) *by any person against another related to him by consanguinity;*
>
> (c) *by any person who is related by affinity to the person whose interdiction or incapacitation is demanded and who may be called upon to supply maintenance to such person;*
>
> (d) *in case of a mental disorder or other condition, which renders a person incapable of managing his own affairs, by the State Advocate; unless the demand shall have been made by any other person.*

A major who is a person with a mental disorder or other condition, which renders him incapable of managing his own affairs, or who is insane or prodigal, may be interdicted or incapacitated from doing certain acts. Interdiction is the preclusion of all civil acts, including those of ordinary administration; the will of the subject is substituted by that of the curator. Incapacitation is the preclusion of performing extraordinary acts of administration (borrowing any money, receiving

any capital, transferring or hypothecating his property); the will of the subject is not substituted by the curator whose duty is to assist him.

The Hon. J. Caruana stated the following in the House of Representatives:

> *"Dan ghaliex qed ikollna hafna persuni li gew abbandunati jew li spiccaw f'pozizzjoni li ma jistghux jiddeciedu ghalihom infushom u qed ikollhom jitwikkew b'persuni li kieku kienu f'sensihom u ghad ghadhom il-kapacitajiet u l-fakultajiet taghhom, kieku ma kinux jaghzluhom ... Hafna drabi meta l-persuni jaslu fic-cirkostanza li ma jistghux jiehdu d-decizjonijiet huma, isir rikors il-qorti biex jinhatar kuratur ghalihom, izda huma ma jkollhomx say. Ghalhekk, il-koncett ewlieni huwa li d-decizjonijiet tehodhom il-persuna meta tkun ghadha f'pozizzjoni li tehodhom hi.*[52]
>
> …
>
> *"Hafna drabi l-abbuz jigi assocjat ma' abbuz fiziku, imma jezisti wkoll l-abbuz finanzjarju u l-abbuz ekonomiku.*
>
> …
>
> *Qed nirreferu ghall-persuni li jew gew issuggeriti li jaghmlu xi trattament jew gew dijagnostikati fi stadju bikri ta' xi kundizzjoni li b'konsegwenza taghha jistghu jitilfu l-fakultajiet taghhom, kemm b'mod permanenti kif ukoll b'mod provizorju. Persuna li tkun giet dijanjostikata li ghandha bidu ta' dementia u ovvjament ikun hemm certifikat tat-tabib kif tkun ghadha fil-bidu nett tkun kapaci tiehu certu decizjonijiet u allura tkun tista' tiddeciedi ghal meta ma' tkunx f'punt u pozizzjoni li taghmel dan. ... L-iskop originali ta' din il-Ligi huwa li naghtu poter lill-persuna li taf li se tigi bzonn lil-haddiehor biex jiehu decizjonijiet ghaliha ghax ma' jkunx possibbli li hi stess tkun tista' taghmel dan ... qed nintroducu l-koncett li barra minn Malta jissejjah jew "advanced directives" jew inkella "supervision directives".*[53]

In the House of Representatives, the Hon. G. Farrugia stated as follows:

> *"Permezz ta' dan l-Abbozz ta' Ligi l-aktar nies li se nkunu qed nilqghu ghalihom huma dawk li jbatu bil-presenile dementia li llum pjuttost komuni, fejn l-aktar wahda maghrufa hija l-Alzheimer. Se nkunu qed nilqghu ukoll ghal persuni li jkunu se jaghmlu xi operazzjoni jew xi intervent li jkun pjuttost riskjuz, tant li wiehed ma jkunx jaf jekk hux se johrog minnu kif jixtieq jew le."*[54]

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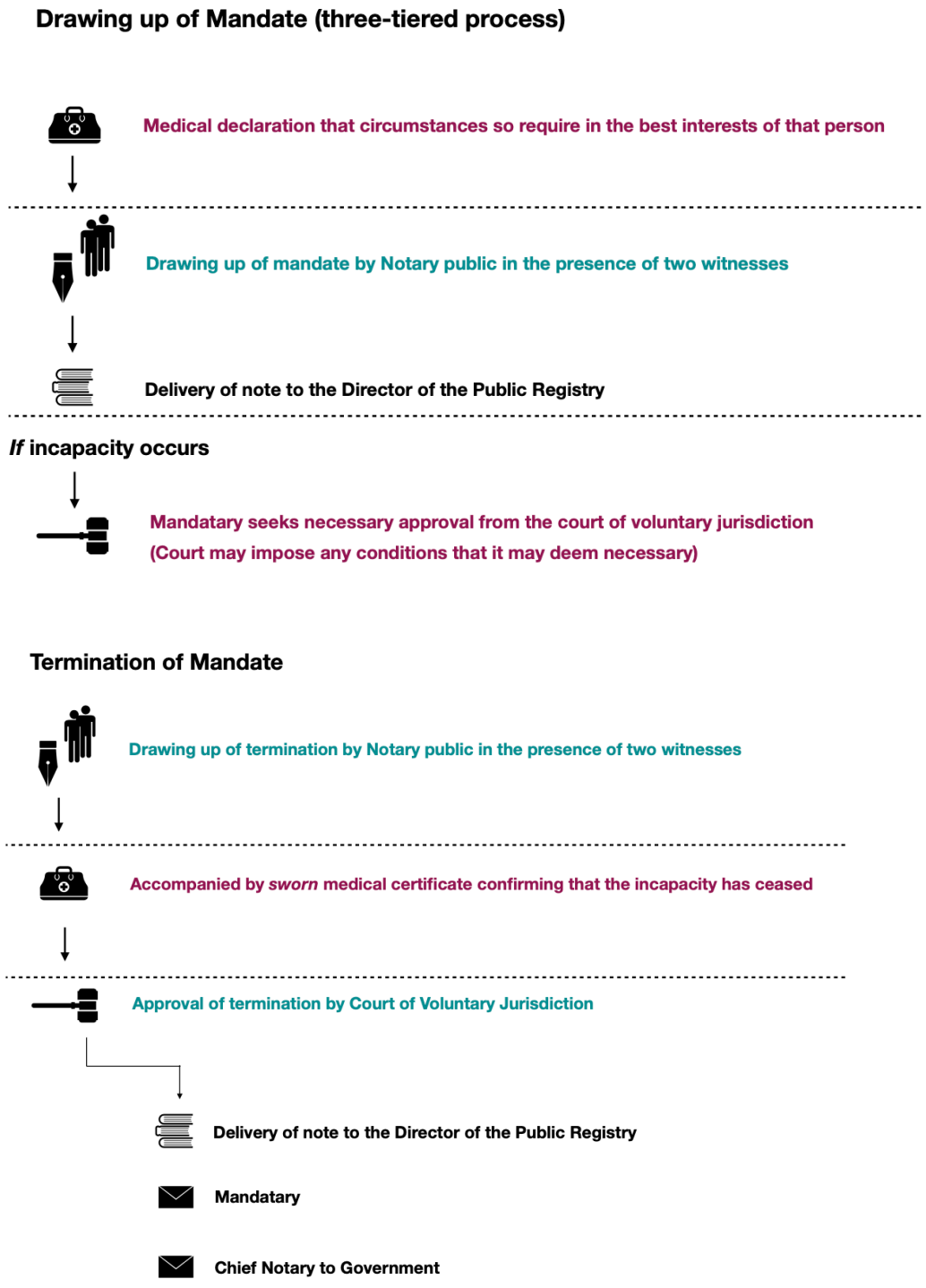
[52]Hon. J. Caruana, DIBATTITI TAL-KAMRA TAD-DEPUTATI (Rapport Uffiċjali u Rivedut) IT-TNAX-IL PARLAMENT Seduta Nru 320 It-Tnejn, 2 ta' Novembru 2015, p. 973.
[53]Hon. J. Caruana, DIBATTITI TAL-KAMRA TAD-DEPUTATI (Rapport Uffiċjali u Rivedut) IT-TNAX-IL PARLAMENT Seduta Nru 320 It-Tnejn, 2 ta' Novembru 2015, p. 958
[54]Hon. G. Farrugia, DIBATTITI TAL-KAMRA TAD-DEPUTATI (Rapport Uffiċjali u Rivedut) IT-TNAX-IL PARLAMENT Seduta Nru 320 It-Tnejn, 2 ta' Novembru 2015, p. 971

Luca Camilleri

Mandate given by a person in anticipation of incapacity

Article 1864A states as follows:

> **1864A.** (1) *A mandate given by a person of full age in anticipation of his incapacity to a mandatary, for the latter to take care of the mandator or to administer his property shall be drawn, under pain of nullity by a notary public in the presence of two witnesses in accordance with the requirements of article 655(1) of this Code, after having obtained a medical declaration that circumstances so require in the best interests of that person. This mandate shall be registered in the same manner as any one of the acts mentioned in article 50 of the Notarial Profession and Notarial Archives Act.*
>
> (2) *In the case of a person of full age, performance of the mandate shall be conditional upon the occurrence of the incapacity and after obtaining the necessary approval from the court of voluntary jurisdiction upon application by the mandatary designated in the act. The court of voluntary jurisdiction may impose those conditions that it may deem necessary.*
>
> (3) -
>
> (a) *For the purpose of termination of the mandate, that termination has to be drawn by a notary public in the same manner as the mandate was constituted and the termination shall be accompanied by a sworn medical certificate which confirms that the incapacity has ceased and that termination has to be approved by the court of voluntary jurisdiction. That termination shall be registered in the same manner as any one act mentioned in article 50 of the Notarial Profession and Notarial Archives Act.*
>
> (b) *Such termination shall be communicated or notified, as the case may be, to the mandatary who shall be bound to cease from representing the mandator with immediate effect. The registrar of the court of voluntary jurisdiction shall send a copy of the termination approved by the court of voluntary jurisdiction to the Chief Notary to Government who shall enter the particulars of such termination in a register held by him for the purpose and which shall be accessible to the public during office hours.*
>
> (c) *If the mandatary continues to represent the mandator after the termination has been communicated or notified to him, the mandatary shall be held personally responsible for damages and shall be considered as acting in contravention of this article.*
>
> (4) *The provisions of sub-title II of Title XVIII of Part II of Book Second of the Code shall, mutatis mutandis, apply to a mandatary appointed in terms of this article.*



Comparison with English Law

Distinction between an Enduring Power of Attorney (EPA) and a Lasting Power of Attorney (LPA)

"A distinction must be made between the terms of an LPA and an EPA, found in common law countries. In the United Kingdom, LPAs were introduced by the Mental Capacity Act in 2005 after extensive consultation, and supersede EPAs which had been introduced in 1986. An EPA was only valid for the administration of financial affairs of another and did not encompass health and welfare issues. In contrast, the LPA now introduced in UK legislation includes the

administration of financial matters, property matters, and personal welfare issues. Under Maltese law, the new provision empowers the mandatory to 'take care of the mandator or to administer his property', thus it appears that the Maltese provision is more akin to the broader LPA than the narrower EPA."[55]

"EPAs dealt solely with property and financial affairs; indeed, according to the court's interpretation in the landmark judgement of *F. V. West Berkshire HA* was restricted to merely relate to business matters, legal transactions, and other dealings of a similar kind. Health and welfare issues remained beyond the scope of EPA ... In order to address the issues related to EPAs, LPAs were introduced that cater for both financial as well as personal welfare issues. LPAs now provide wider powers and for the first time in England and Wales since 1959 the personal welfare LPA now includes the right of the attorney to consent to care and treatment decisions on behalf of the incapable adult."[56]

Does *"to take care"* include the power to take a final decision about life support treatment?

The Hon. J. Caruana stated the following in the House of Representatives:

> *"Madanakollu inkwetajt li assocja dan it-tentattiv li nipprotegu lill-persuni vulnerabbli ma' xi tentattiv li b'xi mod nimpingu fuq id-drittijiet tal-persuna jew sahansitra fuq il-hajja taghha. Il-focus principali ta' dan l-Abbozz ta' Ligi huwa 'to take care of the mandator' u bil-Malti li 'jiehu hsieb'. Jigifieri hawnhekk qed nitkellmu fuq il-bzonn tal-persuna meta ma tkunx f'pozizzjoni li tiehu hsieb taghha nnifisha.*
>
> *...*
>
> *Jigifieri mhux se nkunu qed naghmlu u nirregolaw l-Advanced Directives permezz ta' din il-ligi ghaliex ovvjament dan huwa suggett kumpless hafna li jirrikjedi l-input tas-settur mediku wkoll."*[57]

The Hon. C. Mifsud Bonnici, in the same parliametary sitting, stated the following:

> *"Il-principju tal-mandat huwa kuntrattwali. Mandat huwa kuntratt li persuna taghmel ma' xi haddiehor. Qabel kien hemm diffikulta' dwar x'jigri fil-kaz li l-mandant imut u l-mandatarju jibqa' ghaddej bil-mandat tieghu.*
>
> *...*
>
> *Fil-kamp mediku naqbel li hemm bzonnha din, pero' rridu naghmluha ring-fenced ghal hemmhekk. Barra minn Malta hemm diskussjoni kbira ghar-rigward ta' kif inti tista' taghmel*

[55]M. Pace, The Administration of Property of Others Under Maltese Law: What is the Extent of Protection Afforded to Vulnerable Persons? A Study with Special Emphasis on the Elderly and Persons with Disabilities, Faculty of Laws, University of Malta, 2017, p. 19.
[56]J. Attard, The Introduction of the Enduring Power of Attorney Under Maltese Law - A Critical and Comparative Analysis, Faculty of Laws, University of Malta, 2017, p. 66.
[57]Hon. J. Caruana, DIBATTITI TAL-KAMRA TAD-DEPUTATI (Rapport Uffiċjali u Rivedut) IT-TNAX-IL PARLAMENT Seduta Nru 320 It-Tnejn, 2 ta' Novembru 2015, p. 973

> *care plan ghal xi hadd biex meta ma jkunx qieghed f'pozizzjoni li jiehu d-decizjonijiet medici tieghu, tal-familja u nies li huma vicin tieghu jkunu jafu x'tip ta' trattament mediku se jinghata. Jigifieri hawnhekk m'ghandhiex x'taqsam il-proprjeta' ta' dak li jkun.*
> *...*
>
> *Mela jekk jien ghandi l-hsieb li naghti prokura lil xi hadd biex dak ix-xi hadd jiehu hsieb persuna li qieghda f'kondizzjonijiet medici difficli, per ezempju dahlet f'coma jew kellha incident u ma tistax tiehu decizjoni, fis-sistemi guridici ta' barra jien nista' mmur ghal advanced directive li permezz taghha nagheml dak li barra minn Malta jghidulu 'a controlled carefully planned power of attorney'. Pero' dak huwa fis-settur mediku, imma ahna hawn qed indahhluh fis-settur tal-Kodici Civili u allura nahseb li qeghdin niznaturaw l-affarijiet."*[58]

Irrevocable Mandate

Irrevocable Mandate intended as security

This is a form of power of attorney entitling the creditor to a self-help remedy in the event of a default under the financing arrangement. Only the person whose interest is secured (the creditor mandatory) can revoke the mandate. The mandator may only revoke it with the consent of the person whose interest is secured thereby. A declaration of bankruptcy does not terminate an irrevocable mandate as would be the case with a revocable mandate. Such a mandate may only be granted when the object to which it relates is property which is movable, by nature or by operation of law. In fact, the law does not allow irrevocable mandates given by way of security in respect of immovable property or rights therein.

Exception to the rule in article 1886(1)(a)

Article 1886(1)(a) states:

> **1886.** (1) *Mandate is terminated -*
> (a) *by the revocation of the procuration.*

"This element of irrevocability may be considered unusual because mandate is essentially built on trust, a factor susceptible to change. Does absolute irrevocability preserve the true nature of mandate, or would it render it more akin to an atypical contract? … Revocability due to loss of trust constitutes an essential and typifying element of the mandate".[59]

"Another innovative concept was the introduction of irrevocable mandate. Mandate under Maltese law is by its very nature revocable. Mandate can be terminated by virtue of a declaration of bankruptcy of either the mandator or the mandatary. In view of this the Civil Code was amended in order to introduce the concept of irrevocable mandate granted by way of security. Thus, in security documents a clause may be inserted granting the creditor an irrevocable mandate by way of security.

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[58]Hon. C. Mifsud Bonnici, DIBATTITI TAL-KAMRA TAD-DEPUTATI (Rapport Uffiċjali u Rivedut) IT-TNAX-IL PARLAMENT Seduta Nru 320 It-Tnejn, 2 ta' Novembru 2015, p. 968

[59]J. G. Castillo, "Irrevocable Mandates: Questioning Their General Acceptance," Revista Chilena de Derecho 44, no. 1 (2017): 43.

"One such mandate takes the form of an irrevocable de-registration and export request authorisation (the "IDERA"). Therefore, the creditor will be able to de-register and export the aircraft upon default without the consent of the debtor. The IDERA is registered in the National Aircraft Register and provides an element of certainty and a level of comfort to the IDERA holder (typically the lessor or financier) that should there be an event of default, the IDERA holder could re-possess the aircraft accordingly".[60]

"A power of attorney or IDERA may be registered in the National Register or in the International Registry. Where a mandate or power of attorney (irrevocable or otherwise) granting powers relating to the exercise of rights relating to the aircraft, or to the closure of the register on behalf of the registrant, is granted for a stated period of time after which it shall lapse, such date must be recorded in the register and the registration of the mandate will cease to have effect after such date. Where the request in writing is made by an authorised person, pursuant to an IDERA or power of attorney which has been registered in the National Register or in the International Registry, such request shall be acted upon in all cases, provided that the authorised person certifies that all registered interests ranking in priority to that of the authorised person have been discharged or that the holders of such interests have consented to the de-registration and export. Revocation of an IDERA, where recorded by the Central Aviation Directorate, requires the written consent of the authorised person. An irrevocable mandate by way of security survives the insolvency of the debtor or the creditor and continues to be binding on, or continue for the benefit of, the heirs or liquidator (or similar officer) of the debtor, or the creditor, in accordance with its terms".[61]

Object of Mandate

Article 1857(3) states:

> **1857.** (1) *Every mandate must have for its object something lawful which the mandator might have done himself.*
>
> (2) *Subject to any other special provision of the law, a mandate can be granted by a public deed, by a private writing, by letter, or verbally, or even tacitly.*
>
> (3) *An irrevocable mandate granted by way of security as specified in article 1887(1) shall be granted in writing on pain of nullity.*

Power of the mandator

Article 1870 states:

> **1870.** (1) *The mandator can, for the execution of a contract, act directly against the person with whom the mandatary in his capacity as such has contracted.*
>
> (2) *The powers of the mandator in relation to the subject matter of the irrevocable mandate by way of security may be suspended by express agreement for the duration of the mandate.*

[60]M. Xerri, "The Aircraft Registration Act, 2010: A success story?", Ganado Advocates: Insights, 28 January 2016. Available on: https://ganado.com/insights/publications/the-aircraft-registration-act-2010-a-success-story/

[61]M. Falzon et, "Malta", Aviation Finance & Leasing in 25 jurisdictions worldwide, (Getting the Deal Through: 2014), p. 97.

(3) *Such mandates may be registered in a public register. In this article "public register" means:*

(a) *where the subject matter of the mandate is a ship or rights related or connected therewith, the Register of Maltese Ships and by means of an annotation;*

(b) *where the subject matter of the mandate is an aircraft or an aircraft engine or rights related or connected therewith, the National Aircraft Register and by means of an annotation; and*

(c) *in all other cases, the Public Registry by means of a note, and in such case it shall have effect in relation to third parties and any exercise of any such powers by the mandatary as are suspended shall not have any effect except when done with the written consent of the mandatary.*

Termination of Mandate

Article 1886 states:

1886. (2) *An irrevocable mandate by way of security shall not terminate upon the events stated in sub-article (1) and shall continue to be binding on, or continue for the benefit of, the heirs or liquidator (or similar officer) of the mandator, or of the mandatary, or the creditor if a different person, in accordance with its terms. Neither shall such an irrevocable mandate terminate on such events when they occur in relation to a mandatary who is a different person than the creditor in whose favour the mandate has been granted.*

(3) *The creditor whose interests are secured through the mandate, or his heirs, or liquidator (or similar officer), may appoint a substitute to act as mandatary, including himself, or may apply to the Court of voluntary jurisdiction to make such appointment.*

When Mandatory may not sue or be sued

Article 1866 states:

1866. *A mandatary, however, may not sue or be sued, on behalf of the mandator, although the latter shall have given him authority to do so, when the mandator himself is not absent from the Island in which the action is to be tried, saving the provisions of article 786 of the Code of Organization and Civil Procedure: provided that a mandatary under an irrevocable mandate granted by way of security may sue on behalf of the mandator irrespective of this provision in order to protect or enforce the interests secured by the mandate.*

Revocation of mandate

Article 1887 states:

> **1887.** (1) *The mandator may revoke the mandate whenever he chooses, unless the mandate is expressly stated to be granted by way of security in favour of the mandatary or of any other person, and that it is irrevocable, in which case it may only be revoked with the consent of the person whose interest is secured thereby. The mandatary under such an irrevocable mandate granted by way of security, shall be bound to act in a fair and reasonable manner when exercising the powers granted thereunder, provided that a mandate by way of security which is irrevocable may only be granted when the object to which it relates is property which is movable, by nature or by operation of law, and it shall not be permissible for such a mandate to be issued with reference to immovable property or rights therein.*
>
> (2) *Where powers are exercised under an irrevocable mandate granted as stated above and form part of or are granted pursuant to or in the context of a written agreement governing a broader relationship, the mandatary shall furthermore be bound to exercise such powers in accordance with the terms and subject to the conditions of such agreement.*
>
> (3) *Except as provided in the preceding sub-article, the appointment of a new mandatary for the same business is equivalent to a revocation of the mandate given to the previous one, even though the new mandatary does not accept the mandate.*
> (4) *A general mandate does not produce the revocation of a special mandate previously given, unless the business contemplated in the special mandate is expressly included in the general mandate.*

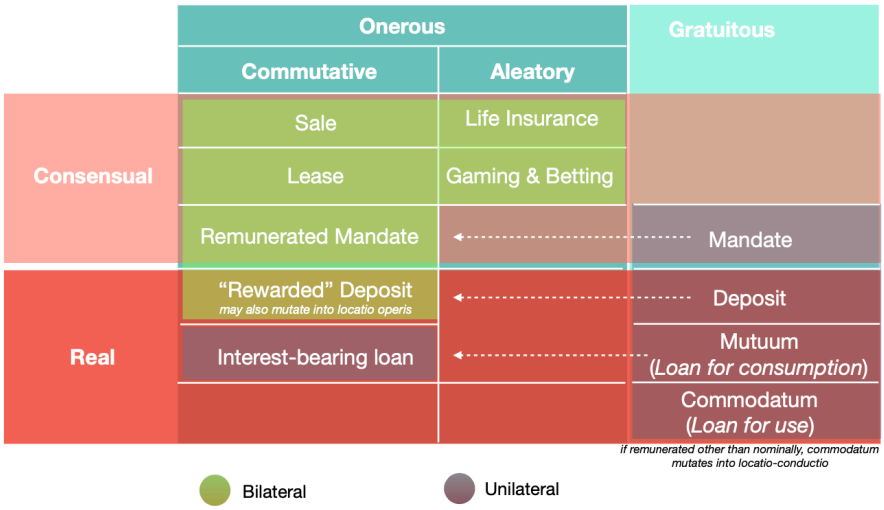
Difference between irrevocable mandate under Maltese and Italian law

Article 1723 of the Italian Civil Code states:

> **Art. 1723. (*Revocabilita' del mandato*).**
> *Il mandante puo' revocare il mandato; ma, se era stata pattuita l'irrevocabilita', risponde dei danni, salvo che ricorra una giusta causa.*
>
> *Il mandato conferito anche nell'interesse del mandatario o di terzi non si estingue per revoca da parte del mandante, salvo che sia diversamente stabilito o ricorra una giusta causa di revoca; non si estingue per la morte o per la sopravvenuta incapacita' del mandante.*
>
> (The principal can revoke the mandate; but, if irrevocability had been agreed, he is liable for damages, unless there is a just cause.
>
> The mandate conferred also in the interest of the agent or of third parties is not extinguished by revocation by the principal,

unless otherwise established or there is a just cause for revocation; it does not lapse due to the death or supervening incapacity of the principal.)

Topic III: *Mutuum*



Definition of *commodatum*

Article 1824 states:

> **1824.** Commodatum *or loan for use, is a contract whereby one of the parties delivers a thing to the other, to be used by him, gratuitously, for a specified time or purpose, subject to the obligation of the borrower to restore the thing itself.*

Definition of *precarium*

Article 1839 states:

> **1839.** *Precarious loan or* precarium *is the same contract of loan for use defined in article 1824 with the only difference that the lender has the power to take back the thing when he pleases.*

Definition of *mutuum*

Article 1842 states:

> **1842.** Mutuum *or loan for consumption is a contract whereby one of the parties delivers to the other a certain quantity of things which are consumed by use subject to the obligation of the borrower to return to the lender as much of the same kind and quality.*

"Contracts of loan are those by which one of the parties receives a thing from the other party with the obligation of returning it in kind or any equivalent to it, after having made use of it for a certain time".

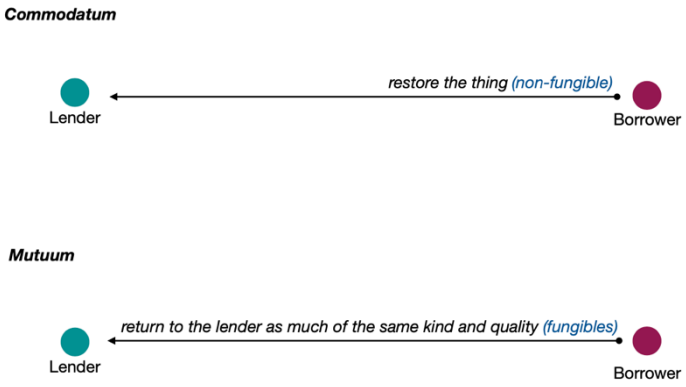
Common characteristics of Contracts of Loan

1. **Gratuitous nature:** The three contracts [mutuum, commodatum & precarium] belong to the class of gratuitous contracts.

   This character is essential to "commodatum" and to "precarium" and it distinguishes them from lease, however, it is only natural to "mutuum" in which case the lender may stipulate interest in his favour.

2. **Real:** They are also real contracts because they become perfect only when the thing which forms part of the object is delivered. This is no bar for the validity of a promise of loan which is binding on the promisor.[62]

[62] V. Caruana Galizia, Notes on Civil Law, Year III: Obligations, p. 192.



The fungible goods are the interchangeable goods, those which can replace each other indifferently, in payments and restitution. Non-fungible goods are those which are considered in their individuality, and which therefore cannot be replaced by one another. Monetary instruments, metal coins, banknotes are the most prominent fungible goods.[63]

[There exists a] difference as regards the object of one or the other. Only inconsumable things can form the object of the loan for use, not consumable things: the use of these consists, in fact, in destroying their substance (e.g.: edible) or in disposing of them in favour of third parties (e.g.: money).[64]

Loan for use (*prestito d'uso*) v. Loan for consumption (*prestito di consumo*)

One lends another a book: one can read it, but one has an obligation to return it, and to return the same book, not another. The simple possession of the thing passes on to one: if one were to sell it, one would be guilty of misappropriation.

In *mutuum*, the situation is different: a quantity of fungible things is given to one, such as a sum of money, and one can spend it and consume what it was spent on (and therefore the denomination consumer loan); in fact, one becomes the owner of the sum and one would be obliged to return not the same things, but the same quantity.

Elements of *mutuum*

The contract is perfected at the moment and as an effect of the transfer in ownership (datio) of the property given on loan, from the lender who is despoiled of the thing, to the borrower who receives it. The 'datio' effects the transfer in ownership of the property to the borrower.

The lender must be capable of alienating the things which form the object of the loan, these must be *res fungibilis*, therefore corporeal and movable since only these things can be consumed by their use. The borrower suffers any deterioration or even the loss of the thing lent since the loan transfers the *periculum rei* from the lender to the borrower.

Effect of loan on borrower.

Article 1843 states:

> **1843.** *In virtue of such a loan, the borrower becomes the owner of the thing lent, and the loss of such thing falls upon him, in whatever manner it may have occurred.*

[63] J. Carbonnier, Droit civil: Vol. II, (Paris: Presses Universitaires de France, 2017), p. 1608.
[64] A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 816

Constitutive elements of *mutuum*

In the case of ***John Muscat et v. Pacifico Bonnic et*** (First Hall (Civil Court), 19 January 2005, Cit. Nr. 745/1994/1) lenders claimed to have lent the sum of Lm14,000 at 8% interest and that borrowers were in default. In examining the nature of the contract in question the Court stated that:

> *"... Mill-premessa tifsira li l-ligi taghti lill-kuntratt bhal dan hu ovvju illi l-attur li jitlob ir-restituzzjoni tal-hwejjeg minnu mislufa jrid jipprova l-elementi kostituttivi tal-kuntratt, u cjoe t-traditio rei ossija f' dan il-kaz, il konsenja tal-flus, u, inoltre, li din il-konsenja giet effettwata b' titolu li jimporta l- obbligu fl-accipiens li jirrestitwixxi l-ekwivalenti tas-somma mislufa. Huwa biss meta jirrizultaw accertati dawn iz-zewg elementi tal-fatt kostituttiv tal-pretiza illi jista' jinghad illi l-attur ikun adempixxa l-oneru probatorju nkombenti fuqu."*

Mutuum is a real contract

In the case of ***Antonio Xuereb v. Maria Leone*** (Civil Court (First Hall), 19 January 1864, Vol. XXX.15.) an amount loaned as indicated in a public deed was that of £10 with interest. The sum lent in reality was that of £8 (the other £2 consisted of hidden interest). Lender's demand was only allowed up to the sum which was actually loaned i.e., £8 along with interest.

Term for repayment

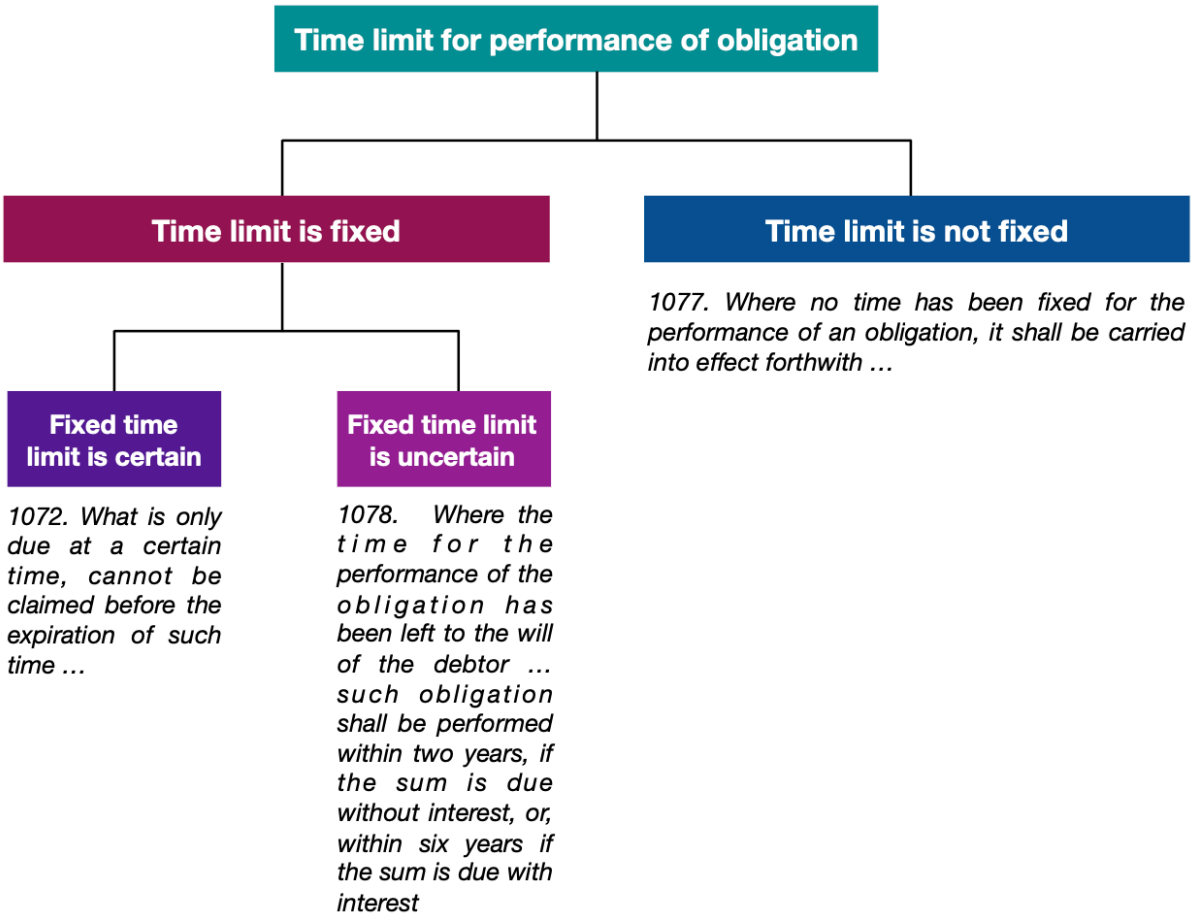
Thing may not be claimed before expiration of time: Article 1072 states:

> **1072.** *What is only due at a certain time, cannot be claimed before the expiration of such time, but what has been paid in advance, cannot be recovered even though the debtor at the time of payment may not have been aware of the stipulation as to time.*

When debtor cannot claim benefit of time: Article 1079 states:

> **1079.** *A debtor can no longer claim the benefit of time if he has become insolvent, or if his condition has so changed as to endanger the payment of the debt, or if by his own act he has diminished the security which under the agreement he had given to the creditor, or if he has failed to give the security agreed upon.*

In the case of ***Giuseppe Barbieri v. Antonio Xuereb*** (Civil Court (First Hall), 1 December 1880, Vol. IX.287) a lender sued borrower for the repayment of a loan. Borrower claimed that demand was premature as two years had not passed since the deed of loan. The court noted that the law makes a distinction between obligations to which a time limit had been established and obligations to which it had not. Since parties had not agreed to a time-limit, the obligation had to be performed forthwith i.e., on the demand of the creditor. The lender's demand was deemed admissible.



Where no time is fixed for performance of obligation

Article 1077 states:

> **1077.** *Where no time has been fixed for the performance of an obligation, it shall be carried into effect forthwith, unless the nature of the obligation, or the manner in which it is to be carried into effect, or the place agreed upon for its execution, implies the necessity of a time to be, if necessary, fixed by the court.*

In the case of ***Spiridione Portelli et v. Dr Vincenzo Tabone M.D. et noe.*** (Civil Court (First Hall), 18 August 1965, Vol. XLIX.ii.1034.) a lender sued borrower for the balance of a loan. No interest was agreed upon, nor any term fixed for payment. Borrower claimed that the demand was premature (on the basis of article 1078).

The Court held that the three instances foreseen under article 1078 were to be interpreted restrictively:

(a) when the time for the performance of the obligation is left to the will of the debtor;
(b) when it has been agreed that the debtor shall discharge the obligation when it will be possible for him;
(a) when it has been agreed that the debtor shall discharge the obligations when he will have the means for so doing.

All three cases imply the manifestation of an intention through an agreement, whether verbal or written.

The court proceeded to examine whether, in the light of the circumstances, the parties probably had intended a term which, however, for some reason or other, they had omitted to agree upon. It found that lender had assisted the borrower during times of financial difficulty, and he had awaited a number of months prior to instituting the suit, during which, lender had also accepted some part payments. The Court considered that all these facts indicated that the parties wanted to establish a term for payment, therefore, payment was not to be made forthwith and that the relative term was to be fixed by Court. Lender's claim was dismissed since he had requested the Court to order the borrower to repay the amount immediately, rather than to fix a time for payment. When the parties intended a time limit, the creditor cannot determine a time limit himself rather than request the Court to fix a time itself. Lender could sue the borrower anew, on the basis of a proper demand.[65]

In the case of ***Carmelo Bonavia et v. Giuseppe Fenech*** (Court of Appeal, 27 May 1946, Vol. XXXII.I.398) it was held that in the case of a loan repayable on demand, the lender is not bound by any term and hence, provided he grants a reasonable time to the debtor, he may at any time demand the repayment of the loan.

The following is a comment by Dr. Farrugia Randon on the fact that bank facilities are made *"repayable on demand"*: "... both before and after payment, banks invariably pass through a discussion and negotiating period with the customer, in the sense that banks invariably discuss the manner how the defaulting customer could meet his commitments even by re-arranging the payment schedule or terms of repayments. Sometime also elapses between the demand and the actual judicial procedures.

It is strongly felt however, that if a defaulting customer is immediately sued by a bank, the Court should not dismiss the bank's claim but should, at most, grant some time to the customer to pay the bank, unless of course it results that the situation is such that it could not be remedied by granting a reasonable time or unless the customer shows that he would not have paid even if her were granted a reasonable time."

Dr. K. Scerri states: "It, however, appears that banks are not so steadfast in the execution of warrants of eviction, and they seemingly allow plenty of breathing space to the debtor. A defaulting customer would first of all be contacted by the debt collection unit that would inquire into the particular situation of the client. Whether there exists a valid reason for default (e.g., illness, unemployment etc.) or not, defaulting customers would in any case be directed to the rehabilitation unit which is a body set up with the specific task of advising debtors who would be in a period of distress. This may be considered as a half-way house since if the rehabilitation is successful the customer would revert to the previous, or rescheduled, repayment terms, if not he or she would be directed to the ultimate stages of remediation or litigation. The former has the primary scope of dealing with problematic customers and attempting, for the last time, to rectify them back into financial health. It is ultimately at the failure of this stage that the bank would resort to litigation. The bank would therefore proceed to call in the loan and demand the customer to pay the remaining balance within a short period of time (usually not longer than a week) and eventually send him an official letter.

"... Even when in possession of affirmative judgment, the bank would still give the defaulting customer a further chance to sell the property on the open market. Litigation is also avoided since it increases costs and the eventual sale by judicial auction would be unlikely to retrieve much more than 60% of the estimated price of the property. Moreover, if the creditor would

[65]P. Farrugia Randon, The Word of the Court, Vol VII: Loan; Overdraft, (Malta: Mid-Med Bank, 1992), p. 185.

have guaranteed the repayment of the loan through another means of security his residence would be the last to be resorted to".[66]

Where time for performance of obligation is left to the will of the debtor

Article 1078 states:

> **1078.** *Where the time for the performance of the obligation has been left to the will of the debtor, or where it has been agreed that the debtor shall discharge the obligation when it will be possible for him to do so, or when he will have the means for so doing, the following rules shall be observed:*
>
> (a) *if the subject-matter of the obligation is the payment of a sum of money, such obligation shall be performed within two years, if the sum is due without interest, or, within six years if the sum is due with interest;*
>
> (b) *if the subject-matter of the obligation is other than the payment of a sum of money, the time within which the obligation is to be performed shall be fixed by the court according to circumstances.*

In the case of ***Ganni Attard v. Josephine Cachia*** (Court of Magistrates (Gozo) Superior Jurisdiction, 8 January 2019, Rik. nr. 15/2018) the court said as follows:

> *"Ghandu jinghad izda li fil-kaz odjern fl-iskrittura datata 22 ta' Settembru, 2010 id-debituri ma nghatawx terminu stabbilit li fih id-dejn kellu jithallas lura lill-attur. Anzi l- iskrittura taqra kif isegwi:*
>
> > *'Id-debituri ghandhom jaghmlu l-almu taghhom sabiex ihallsu dan id-debitu, kemm jista nkun malajr'. ...*
>
> *In oltre, fl-istess skrittura jinghad li fuq is-somma dovuta kellu jiddekorri mghax bir-rata ta' sitta fil-mija (6%) mid-data tal-1 ta' Jannar, 2010.*
>
> *In vista ta' dan jirrizulta ghalhekk li jidhol fis-sehh l-artikolu 1078 tal-Kap. 16 tal-Ligijiet ta' Malta li kif ikkwotat aktar 'il fuq jipprovdi li f'dawn ic-cirkustanzi d-debituri kellhom l-obbligu li jezegwixxu l-obbligu taghhom fi zmien sitt snin. Meta wiehed japplika dan l-artikolu ghall-iskrittura tat-22 ta' Settembru, 2010 jirrizulta ghalhekk li d-debituri kellhom l-obbligu li jeffettwaw il-hlas dovut minnhom sa massimu sitt snin wara d-data tat-22 ta' Settembru, 2010 u cioe' sal-21 ta' Settembru, 2016".*

When debtor cannot claim benefit of time

Article 1079 states:

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[66]K. Xerri, "National Eviction Profiles: Malta", in P. Kenna et, Pilot project - Promoting protection of the right to housing - Homelessness prevention in the context of evictions, (Human European Consultancy, FEANTSA & NUI Galway, 2015, p. 11.

> **1079.** *A debtor can no longer claim the benefit of time if he has become insolvent, or if his condition has so changed as to endanger the payment of the debt, or if by his own act he has diminished the security which under the agreement he had given to the creditor, or if he has failed to give the security agreed upon.*

In the case of ***Tommaso Azzopardi v. Paolo Micallef*** (Civil Court (First Hall), 13 February 1936, Vol. XXIX.ii.984) the borrower was late in the payment of a loan. Lender claimed the loss of the benefit of time on the basis that the borrower had become insolvent and that he had the diminished the security.

Fadda: "The non-performance owing to a temporary lack of money does not suffice to create the loss of the benefit of time. Change has to be such as to endanger the payment of the debt. A positive and conclusive proof of insolvency was required. As to the diminution of the security, the loss of the benefit of time would only occur if the lender would not have contracted in the manner in which he in fact did without being reassured by that particular security. The reasoning behind this principle is that the creditor would have granted the benefit of time on the condition that the debtor retained that particular security.

Does partial default by the borrower entitle lender to recall the loan (if contract is silent on borrower's default)?

In the case of ***the Rev. Camilleri et v. Dr. Fenech et*** (Civil Court (First Hall), 28 October 1895, Vol. XV.258) plaintiff claimed that defendants (borrowers) had failed to pay interest on a loan within the agreed time (interest had been agreed on an annual 5% in arrears). A request was made to Court to declare that defendants had lost the benefit of time and that the whole balance of the loan was immediately due and repayable. Defendants claimed that demand could not be allowed since the parties had not expressly stipulated that the benefit of time would be lost with regard to the capital, in case of non-payment of interest.

Does the partial non-payment of a loan instalment provide the basis for the dissolution of the contract under a. 1068?

Article 1068 states:

> **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.*

"In case of a tacit resolutive condition, the occurrence of non-performance by one of the parties entitles the counter-party to request Court to declare the dissolution of the contract".[67]

"The "*pactum commissorium*", even though it be tacit, applies to lease, which is a bilateral contract, and it may bring about the dissolution of the lease in case of delay in the payment of the rent or of non-performance of any obligation of either party. ... Under our law any delay is

[67] V. Caruana Galizia, Notes on Civil Law, Year III: Obligations, p. 167.

sufficient, even though it refers to a part of an instalment of the rent, for the dissolution of the lease in virtue of the *"pactum commissorium tacitum*".

"In Civil Law the "*pactum commissorium tacitum*" is not automatic and the Court has the discretion to grant relief according to the circumstances of the case".[68]

Is the non-payment of interest (even when the instalment on capital would have been paid) lead to the dissolution of the contract?
The Court held that the implied resolutive condition did not apply to unilateral contracts; and a loan is undoubtedly unilateral. If the obligation is to be performed by instalments, the delay in payment of the instalments does not cause the loss of the benefit of time unless such loss is agreed upon. Since the implied resolutive condition does not apply to unilateral contracts (such as loans), one could not demand the loss of the benefit of time for the debtor, except in the cases established by section 1079 of the Civil Code. Lender could not prove that the borrower satisfied any of the conditions of article 1079 and his demand was rejected.

In the case of ***Michele Vella v. Pietro Grech*** (Civil Court (First Hall), 28 February 1871, Vol. V.490) plaintiff lent a sum to defendant repayable in a number of instalments, at the debtor's option, provided each payment was not not less than a specified sum. Defendant failed to pay interest and the lender requested the Court to declare that defendant had lost the benefit of time, and that he was bound to pay the remaining capital and interest. The contract of loan contains one principal obligation, namely that of the borrower to return the thing lent to him. Other obligations are not principal but accessory .... The Court declared that the defendant had not lost the benefit of time and limited its order to the payment of the interest that was due.

In the case of ***Giuseppe Vassallo v. Carmelo Calleja et*** (Civil Court (First Hall), 4 April 1913, Vol. XXII.ii.51) lender had lent a sum of money which was repayable within four years with interest. The parties had not expressly agreed that the defendant would lose the benefit of time in case of non-payment of the interest. The Court stated that a debtor's non-payment of the interest does not, by itself, cause the loss of the benefit of time, unless the facts referred to in article 1079 materialise themselves. The Court authorised lender to enforce his rights vis-à-vis the interest which was due and unpaid but rejected the lender's demand for the immediate repayment of the remaining capital and interest due.

Interest in Mutuum

A. Stipulations on Interest

Interest not due unless agreed upon.

Article 1849 states:

> **1849.** *No interest is due in respect of mutuum unless agreed upon, saving the provisions of articles 1139 and 1140 where the borrower does not return the things borrowed at the time agreed upon, or at the time which, in the absence of an agreement, is fixed by the court.*

Stipulation for interest

Article 1850(1) states:

[68] V. Caruana Galizia, Notes on Civil Law, Vol. III: The Contract of Letting and Hiring, p. 733.

> **1850.** (1) *It shall be lawful to stipulate for interest on a loan, whether of money or of goods or other movable things.*
>
> (2) *It shall also be lawful to convert into a new capital at interest, the amount of interest due, provided such interest be not due for a time less than one year.*
>
> (3) *Any other agreement for payment of interest on interest, is null.*

Payment of interest not agreed upon

Article 1851 states:

> **1851.** (1) *The borrower who has paid interest which was not agreed upon, can neither claim it back nor deduct it from the capital, except in so far as such interest exceeds the rate fixed in the next following article.*
>
> (2) *Nevertheless, the interest paid on any amount of interest due for a time less than one year, may be claimed back or deducted from the capital, even though the interest so paid does not exceed the said rate.*

Rate of interest

> **1852.** (1) *The rate of interest cannot exceed eight per cent per annum.*
>
> (2) *Any higher interest agreed upon shall be reduced to the said rate.*
>
> (3) *If a higher interest than that fixed by law has been paid, the excess shall be deducted from the capital.*

Excess of rate of interest [Subject-matter of contracts]

Article 986 states:

> **986.** (1) Stipulations quotae litis *are void.*
> (2) *Saving the provisions of article 1852 and of any other provision of this Code or of any other law, any obligation to pay a rate of interest exceeding eight per cent per annum is also void in regard to the excess.*

Contracts made in evasion of last preceding article

Article 1853 states:

> **1853.** *Any contract, whatever its designation, made in evasion of the provisions of the last preceding article, is subject to rescission; and in any such case, if the things given cannot be returned, the creditor can only demand the payment of their value at the time when he delivered them to the debtor.*

Where rate of interest is not agreed upon

Article 1854 states:

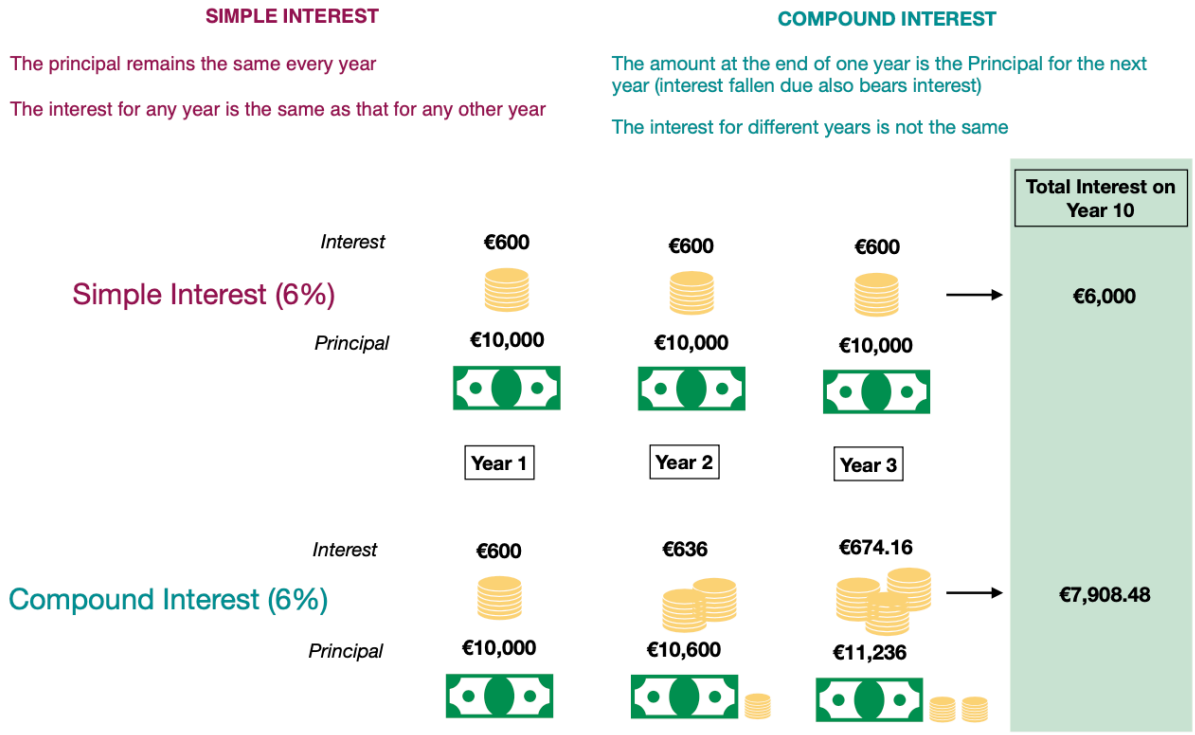
> **1854.** *If the borrower has bound himself to pay interest without fixing the rate, interest shall be at the rate of five per cent per annum.*

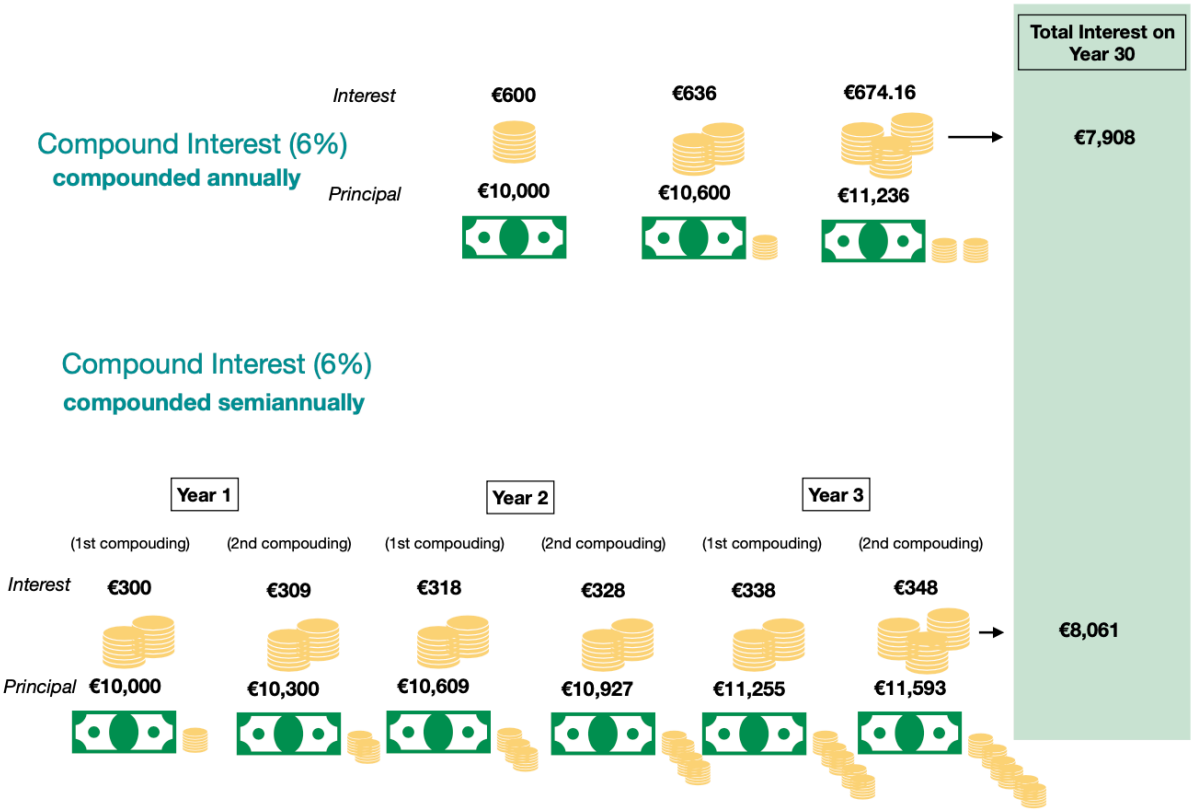
B. Restrictions on the charging of Compound Interest (the addition of interest to the principal)

Compound interest

Article 1142 states:

> **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.*





Article 1855A states:

> **1855A.** *The Minister in conjunction with the Minister responsible for finance may make regulations prescribing the conditions under which debts and obligations as designated by the same regulations may be exempted from any of the provisions of Title IV and Title XVII of Part II of Book Second subject to such conditions as he may in such regulations establish, and further regulating the charging of interests, the compounding of interests in all respects and the maximum amount of interest that may become payable.*

Article 3(1) of Subsidiary Legislation 16.06, Interest Rate (Exemption) Regulations, states:

> **3.** (1) *The provisions of Title IV and Title XVII of Part II of Book Second of the Civil Code or of any other part of the Civil Code or of any other law in so far as they limit or restrict the charging of interest and the compounding of interest shall not apply to any:*
>
> (a) *debts and other obligations which may arise from financial transactions where one of the parties is a designated entity:*
>
> *Provided that no party to the financial transaction maybe a natural person; …*

Why is the charging of compound interest restricted by law?

In the case of ***L-Avukat Dottor Dominic A. Cassar noe v. Lawrence Farrugia noe et*** (Court of Appeal, 6 December 2002, App. Civ. Nr. 529/1988/1) the court stated:

> *"Il-periklu socjali ta` l-anatocizmu huwa fil-verita` marbut mal-kuncett ta` l-uzura. ... L-imghaxijiet komposti, ghalhekk, huma principalment, jekk mhux unikament, oggezzjonabbli ghax indirettament (jew direttament) iwasslu ghall-uzura ... Il-hazin, u hija verament prattika infami, huwa meta jsir abbuz bil-pozizzjoni tal-persuna debboli u ddisprata tad-debitur u jigu lilu addebitati imghaxijiet anke ferm oghla mic-cifra msemmija mill-ewwel Qorti".*

In the case of ***Bank of Valletta Limited v. "Anna`s Trading Company Limited" et*** (Court of Appeal, 6 December 2002, App. Civ. Nr. 160/1997/1):

> *"(First Hall) Fil-fehma tal-qorti, l-anatocizmu, kemm fil-kuntest specjali tal-mutwu kif ukoll fil-kuntest generali, jista' jservi bhala mezz ta' evazjoni tar-regola kontra l-uzura, li certament hija regola ta' ordni pubbliku. Meta jservi ghalhekk, l-anatocizmu wkoll huwa vjetat minn regola ta' ordni pubbliku. Il-ligi ma tippermettix rata ta' mghax oghla minn dik ta' tmienja fil-mija fis-sena ghal obbligazzjonijiet civili u kummercjali, waqt li, dwar operazzjonijiet bankarji, il-Ministru tal-Finanzi jista' jippermetti mghaxijiet oghla".*

Are rules limiting compound interests under the Civil Code applicable to Overdrafts Accounts?

1. What is an overdraft?

An overdraft is a loan—it enables the borrower to borrow on a designated account up to a specified amount. An arranged or authorised overdraft is a pre-agreed limit with your bank, and you can spend up to that limit. Interest is payable on the overdrawn amount — interest is calculated at the close of each business day and is based on the closing balance of the designated account.

2. Are the rules of mutuum applicable to overdrafts?

In the case of ***William Warrington noe v. Consiglio Sciberras*** (Commercial Court, 8 July 1985, [NOT PUBLISHED]), the court cited the distinction made by Ferri in *Manuela di Diritto Commerciale* which distinguished *"apertura di credito"* from *"mutuum"*. The former has as its object the "enjoyment of an availability of a credit", whilst the latter has as its object a sum of money:

> *"Placing a sum at the disposal of another does not mean a transfer of ownership of the sum. This sum remains the bank's property and is merged with the other money of the bank. In default of a specific indication, the contract which has as its object a generic thing does not imply a transfer of ownership. Juridically the 'placing of a sum at the disposal' of the other party implies solely that the accredited party may expect the payment of the sum demanded by him from the bank. Thus, only a right of credit is implied. ... The Bank cannot transfer the sum lent to the accredited unless requested by the borrower"*.

In the case of ***Edwin Vassallo noe v. Salvatare Ballucci*** (Civil Court (First Hall), 30 April 1947, Vol. XXXIII.II.64.) a lender sued for the payment of balance of an overdraft facility. Borrower pleaded that lender was claiming compound interest and that interests exceeded the principle. Was an overdraft equivalent to a loan? An overdraft is not a contract of *"mutuum"* or a loan for consumption, even if it involved the amounts lent out to a borrower.

According to Buttigieg: "An overdraft is an agreement which allows a customer a determinate ceiling up to which he can withdraw moneys from the bank. The amount allocated by the bank in an overdraft would result in a debit balance in the customer's account. The customer can utilise the overdraft to withdraw money up to the agreed limit, rather than from a previous amount he would have deposited with the bank It is a contract by which the bank obliges itself to leave at the disposal of the other party a sum of money for an indeterminate period of time saving any agreement to the contrary ... it definitely cannot imply transfer of ownership, unlike in the case of mutuum where there necessarily must be the transfer of ownership from the lender to the borrower. Jurisprudence seems to be constant by holding that an overdraft is a separate and distinct contract from mutuum. The main argument being that in the case of overdraft the bank remains in possession of the funds until these are used and in this case one may not speak of a transfer of ownership like in mutuum".[69]

3. Are general rules on compound interest applicable to overdrafts?

In the case of ***Edwin Vassallo noe v. Salvatare Ballucci*** (Civil Court (First Hall), 30 April 1947, Vol. XXXIII.II.64.) it was considered whether article 1142 find its application in the case of overdraft. As a matter of fact, it had been agreed that the interests would accrue *ipso jure* without the need for a judicial demand or any subsequent agreement, therefore, in contravention of article 1142. Argument was made that the overdraft fell under commercial uses and was to be regulated by the Commercial Code. In fact, the *ipso jure* accumulation of interests with the capital, was a commercial usage in overdrafts. Article 1142 of the Civil Code found an exception where there exists a commercial usage, which usage has the force of law. Compounding of interest at periods of less than one year was, therefore allowed.

Micallef stated: "Banking practice has been accepted as derogating the general principles of Civil Law in connection with the matter of capitalisation of interests. It has been acknowledged that a Bank may capitalise interests in a current account quarterly or half yearly. The leading recent authority on the subject is the case ***Edwin Vassallo noe v. Salvatore Balucci***. Could the Anglo-Maltese Bank charge in other words compound interest half yearly? And could the total amount of those interests exceed the capital amount *"ultra alterum tantum"*? An affirmative answer to these questions would run contrary to the general principles of Maltese Civil Law and of Roman Law on which our law on the subject of loans and interest is based. The Civil Code expressly lays down in Section 1185 that interest may bear other interest provided that interest shall be due for a period not less than one year. The Court then considered whether it could accept the Bank's overdraft account which computed compound interests half-yearly.

Maltese case-law had accepted the view that account currents can be debited with interests periodically and to cover periods of less than one year, since 1901 in a judgment delivered in the case ***Alfonso Ellul noe v. Giovanni Mifsud*** (Commercial Court, 12 November 1901, Vol. XVIII.iii.53).

[69]V. Buttigieg, Mutuum: A Comparative Analysis with Particular Reference to the Prohibition of Usury in Maltese Law, Faculty of Laws (UoM), 2021.

The Court held that Maltese legal doctrine had adopted the French legal system and quoted a number of French authors that recognised this usage in account current. The French Court de Cassation as far back as 1812 and acknowledged that interests were capitalised in account current "de plein droit". On the score of these principles our Maltese Court decided that once interests were capitalised half-yearly the other rule that interests could not exceed the capital based on Roman Legal principles did not apply in the case of Account Current. One could no longer describe the item as interests after they have fallen due but were automatically converted into capital".[70]

Elaboration of *Vassallo v. Ballucci* in more recent jurisprudence

In the case of ***L-Avukat Dottor Dominic A. Cassar noe v. Lawrence Farrugia noe et*** (Court of Appeal, 6 December 2002, App. Civ. Nr. 529/1988/1) the Court stated:

> *"Fin-nuqqas ta` provvediment tal-ligi tal-kummerc japplikaw l-uzu tal-kummerc li jiehdu precedenza fuq il-provvedimenti tal-Kodici Civili. ... Huwa ovvju li ebda uzu tal-kummerc, huwa kemm huwa prevalenti, ma jista' jippermetti li din ir-rovina tigi mhux biss tacitament ammessa izda sancita b'ligi (l-istess uzu).*
>
> *"Il-kaz tal-banek u istituzzjonijiet finanzjarji, pero`, huma ferm differenti. Fl-ewwel lok l-'uzura' taghhom hija sancita b`ligi – din il-Qorti tghid kontrollata b`ligi – l-Att dwar il-Bank Centrali ta` Malta, Kap. 204 tal-Ligijiet ta` Malta. Ukoll, pero`, u dan huwa rikonoxxut mill-istess appellati, il-kuntratt ta` 'overdraft' jaghti beneficcji enormi lill-istess debitur. Permezz tieghu jista' iserrah rasu li l-likwidita` mehtiega hija ghad-dispozizzjoni tieghu minghajr l-obbligu li jigbed is-somma mislufa f`daqqa u qabel ma huwa jkollu bzonnha. Mill-banda l-ohra jista' f`kull hin (daily debit balances) jiddepozita flejjes fil-kont kurrenti u, b`hekk, inaqqas id-debitu tieghu.*
>
> *…*
>
> *"Stabbiliti dawn il-principji, pero`, huwa daqstant essenzjali li d-deroga ghall-provvedimenti tal-Kodici Civli jigu mizmuma f`linji ristretti. Terminat il-kont kurrent anke unilateralment da parti tal-kreditur simultanjament jidhlu in vigore il-provvedimenti normali tal-mutwu u minn dak il-hin huwa illecitu ghall-kreditur li jkompli jikkredita l-imghaxijiet komposti. Id-data preciza ta` din it-terminazzjoni hija kwistjoni ta`prova u tista` tvarja minn kaz ghal kaz. Filkaz prezenti jirrizulta illi il-Bank appellant ghamel 'call in' tal-facilitajiet fl-4 ta` Settembru 1987. Wara dik id-data, ghalhekk, ma huwiex permessibbli ghall-Bank attur li jiddebita imghax hlief b`rata semplici fuq bazi annwali".*

... exception permitted only until Bank "calls in" overdraft

In the case of ***Avukat Reno Borg noe v. Joseph Borg et noe*** (First Hall (Civil Court), 3 October 2002, Cit. Nr. 121/1990/1), the court stated:

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[70] J.A. Micallef, Banking Practice and Case-Law in Malta, A Public Lecture delivered by Professor Doctor Joseph A. Micallef, LL.D., Dr. Jr. (E.U.R.) to members of the banking profession, p. 8.

> *"Din il-koncessjoni tibqa' topera però, f'kaz li jibqa jopera l-*overdraft facility*, ghax meta il-kont kurrent jigi terminat, l-imghax irid jigi kalkolat bis-sistema normali stabbilit fil-Kodici Civili. Dan isehh ghax darba li l-facilita' tigi terminata, is-somma dovuta tigi determinata, u bhal obbligazzjoni li ghandha bhala oggett taghha il-hlas ta' somma determinata, ma jistax jintalghab imghax fuq imghax jekk mhux kif kontemplat fl-artikolu 1142 tal-Kodici Civili".*

In the case of ***Bank of Valletta Limited v. "Anna`s Trading Company Limited" et*** (Court of Appeal, 6 December 2002, App. Civ. Nr. 160/1997/1) the Court stated:

> *"Minn dawn il-provi pero` jirrizulta illi sa mill-15 ta` Novembru ta` l-1993 il-Bank, bl-ittra ufficjali li baghat, ittermina unilaterament il-kors tal-kont kurrenti bis-sejha ghar-refuzjoni ta` l-ammonti lilu dovuti w allura sa minn dak iz-zmien ir-relazzjoni bejn il-partijiet ma baqghetx dik ta` kont kurrenti izda tbiddlet f`wiehed ta` self jew mutwu w allura minn dak iz-zmien l-imghaxijiet li jistghu jintalbu huma biss imghaxijiet semplici u mhux komposti.*
>
> *...*
>
> *"Wara id-data tat-terminazzjoni tal-kont kurrenti ma kienx aktar lecitu ghal-Bank appellant li jkompli jiddebita limghax kompost izda seta` biss jiddebita imghax semplici. Fir-rigward ta` dan l-imghax pero` lanqas ma kienet tapplika r-rata massima pprovduta fl-Artiklu 986 (2) tal- Kodici Civili izda r-rata massima kif deciza f`dak iz-zmien mill-Ministru tal-Finanzi jew mill-Bank Centrali ta` Malta skond il-kaz".*

Exceptions to rules on compound interest must be proven by designated entities

In the case of ***H.S.B.C. Bank Malta p.l.c. v. Tal-Barrani Company Limited*** (Court of Appeal, 28 January 2021, App. Civ. 530/2002) the Court stated:

> *"... huwa meqjus li f'każijiet [ta' overdraft] ma jgħoddux ir-regoli li jinstabu fl-Artikoli 986(2), 1142 u 1850 tal-Kodiċi Ċivili għal dak li jirrigwardaw it-tħaddim tal-ogħla rati applikabbli ta' mgħax fuq self u wkoll dawk relattivi għal meta u kif jista' jintalab imgħax fuq imgħax. ... Huwa minnu wkoll li llum il-Kodici Civili nnifsu, f'dak li jirrigwarda l-Obbligazzjonijiet in Generali (Titolu IV tat-Tieni Ktieb) u l-kuntratt ta' Mutwu (Titolu XVII tat-Tieni Ktieb) jidher li qieghed jerhi mill-qawwa tar-rabta tar-regoli civili wkoll dwar it-thaddim tal-imghaxijiet".*

In the case of ***Bank of Valletta Limited v. "Anna`s Trading Company Limited" et*** (Court of Appeal, 6 December 2002, App. Civ. Nr. 160/1997/1) the Court stated:

> *"Din il-Qorti trid taghmilha cara li stante illi d-derogi ghar-regoli normali ta` dritt ta` pajjizna huma regoli maghmula favur il-Banek u istituzzjonijiet finanzjarji allura huwa huma li jridu jippruvaw li verament dawn ir-regoli qeghdin jigu skruplozament*

> *interpretati fil-limiti ta` l- eccezzjonijiet fuq maghmula u dan proprju ghax, kif gie ritenut f`uhud mis-sentenzi msemmija f`dan l-Appell, dawn id-derogi favur dawn l-istituzzjonijet huma derogi minn provvedimenti li huma minimament ta` ordni pubbliku, izda li, f`certi kazijiet, il-Legislatur dehrlu li kellu jidderoga minnhom".*

C. The *Ultra Duplum* Rule - *usurae ultra duplum* (interest exceeding the principal)

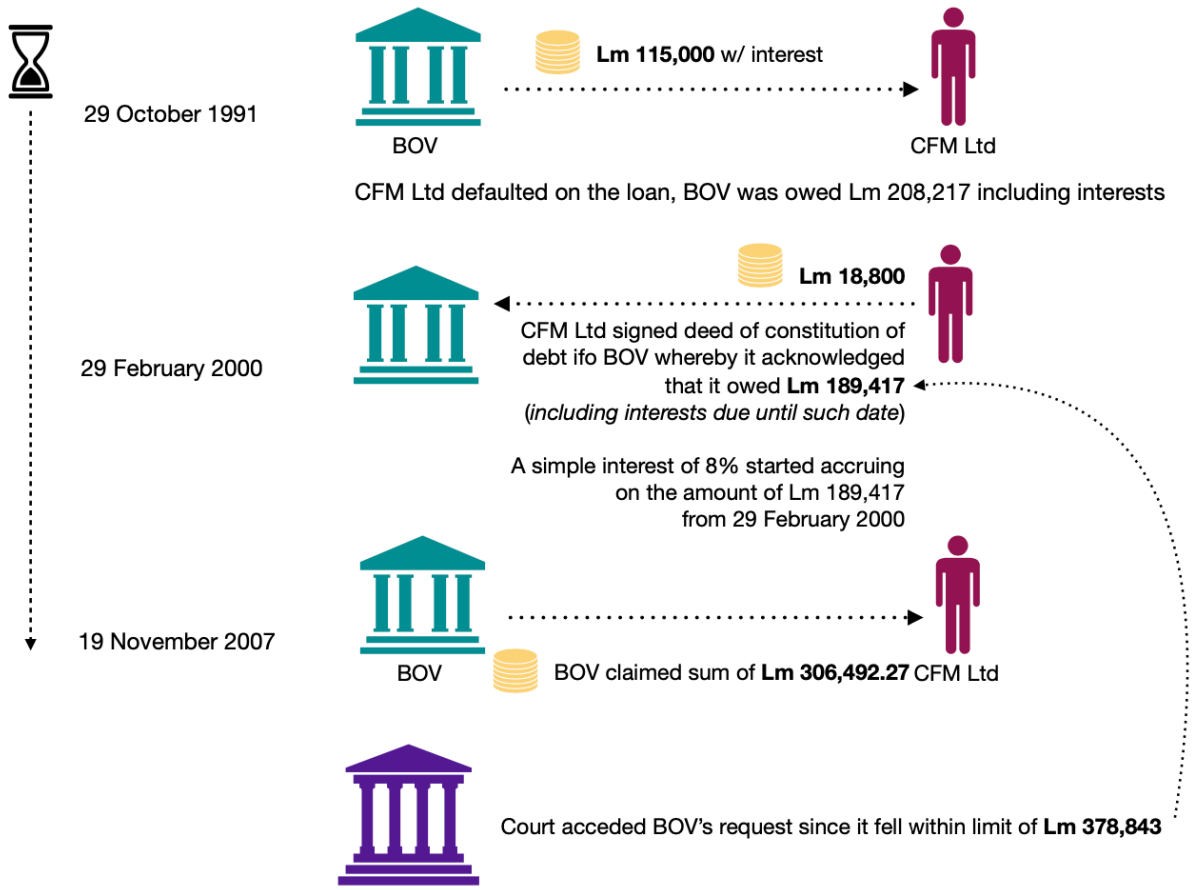
The general rule is that *"no interest can be demanded by the creditor once the interest paid equals the sum due".*[71] To that effect, in the case of ***Cecil Pace et v. Emanuel A. Bonello noe*** (First Hall (Civil Court), 18 February 2010, Cit. Nr. 249/1986/1) the Court stated:

> *"Illi dan iġibna għat-tieni eċċezzjoni tal-imħarrek nomine li trid li l-liġi ma tħallix li ssir talba għal imgħax f'ammont li jaqbeż il-kapital. Din ir-regola li ilha mħarsa fis-sistema legali Malti sa minn żminijiet 'il bogħod, hija miruta mid-Dritt Ruman u dejjem tqieset bħala waħda ta' applikazzjoni rigoruża għalkemm mhix waħda assoluta. Kemm hu hekk, hija regola li wkoll tippermetti eċċezzjonijiet, bħal ma jkun il-każ ta' użu kummerċjali jew fejn il-liġi nnifisha tippermetti l-imgħaxijiet bħala d-danni li jitnisslu mid-dewmien ta' twettiq ta' obbligazzjoni li jkollha biss bħala oġġett il-ħlas ta' somma determinata".*

In the case of ***Bank of Valletta p.l.c. v. Carmelo Farrugia Melfar Ltd*** (Court of Appeal, 30 October 2015, Rik. nr. 471/2007) the Court stated:

> *"Fil-każ odjern il-bank appellat kien ta self ta' Lm115,000 lis-soċjetà appellanti b'kuntratt tad-29 ta' Ottubru 1991. Is-soċjetà appellanti ġiet moruża fil-ħlasijiet u fuq talba tal-bank appellat hija, flimkien mal-appellanti l-oħra bħala garanti solidali, wara ħlas ta' Lm18,800 akkont tal-kapital, ikkostitwiet ruħha vera, ċerta u likwida debitriċi fis-somma ta' Lm189,417, liema somma tinkludi l-imgħaxijiet dovuti sa dik id-data. L-istess kuntratt ikompli jgħid* "interest shall continue to accrue at such rate at the bank's sole discretion not exceeding the maximum rate allowed by law".
>
> *Ir-regola ultra duplum għalhekk tolqot il-kapital "ġdid" ta' mija u disgħa u tmenin elf, erba' mija u sbatax-il lira ta' Malta (Lm189,417) u tfisser illi, sakemm ma ssirx kapitalizzazzjoni oħra kif igħid l-art. 1142 tal-Kodiċi Ċivili, l-imgħaxijiet minn dakinhar tal-kuntratt ma jistgħux jaqbżu l-kapital. Għalhekk id-dejn b'kollox jista' jitla' biss sa' tliet mija u tmienja u sebgħin elf, tmien mija u tlieta u erbgħin lira ta' Malta (Lm378,843) jew tmien mija u tnejn u tmenin elf, erba' mija u ħamsa u erbgħin euro u erbgħa u tmenin ċenteżmu (€882,445.84), li ma jeċċedix issomma ta' seba' mija u disgħa u tletin elf, disa' mija u tmienja u erbgħin euro u sebgħa u disgħin ċenteżmu (€739,948.97) msemmija mill-ewwel Qorti".*

[71] A. Berger, Encyclopedic Dictionary of Roman Law, (Philadelphia: APS, 1980), p. 754.



First exception to ultra duplum rule: overdrafts

In the case of ***Edwin Vassallo noe v. Salvatare Ballucci*** (Civil Court (First Hall), 30 April 1947, Vol. XXXIII.II.64.) the court held that if following the capitalisation of interest, it resulted that the interests payable by the borrower exceeded the principal, could the borrower reduce that amount? The rule could not apply in this case since, once commercial usages allowed the capitalisation and compounding of interest, without a judicial demand or an express agreement, once the interest due is capitalised, the nature of the interest ceases and becomes capital, and is to be considered capital for the purposes of law until the obligation is extinguished.

Second exception to ultra duplum rule: accruing judicial interests

In the case of ***Bank of Valletta p.l.c. v. Francis Bezzina Wettinger*** (First Hall (Civil Court), 10 December 2007, Rik. Nr. 36/2005) the Court stated:

> *"Illi permezz ta' sentenza moghtija mill-Qorti tal-Kummerc fid-9 ta' Marzu 1993 fl-ismijiet "Prokuratur Legali Joseph Zammit ghan-nom u in rapprezentanza tal-Bank of Valletta Limited vs Francis Bezzina Wettinger" (Citazz. Numru 1102/90) (Dok "A"), is-socjeta` rikorrenti giet kanonizzata kreditrici tal-intimat fis-somma ta' hamsa u tletin elf, erba' mija u tmienja u tmenin liri Maltin u sitta u disghin centezmu u tmien millezmi (Lm34,333.96,8) ...*

> *"Illi, llum id-debitu ta' l-intimat ilahhaq is-somma ta' tlieta u tmenin elf, tmien mija u wiehed u sittin Liri Maltin u erbatax-il centezmu (Lm83,864.14) flimkien ma' l-imghaxijiet ulterjuri mill-1 ta' Ottubru, 2004 sal-jum tal-pagament effettiv. ...*
>
> *"Izda hawn wiehed jinnota li dak li qieghed jintalab huwa dwar sentenza finali u mhux dwar kuntratt ta' self. Jistghu l-imghax fuq is-sorte jaqbzu l-istess sorte? Hawn ma ghandniex il-kuntratt ta' self izda istitut iehor [ara Leonard vs Sammut fuq imsemmija]. Dawn huma d-danni sofferti mill-kreditur. Ir-regola tal-ultra duplum ma hix applikabbli fil-kaz ta' kanonizazzjoni ta' flus b'sentenza. Wara s-sentenza msemmija l-ammont sar somma kanonizzat b'sentenza u certament wiehed ma jistax iwaqqaf l-imghax ghax altrimenti jkun jikkonveni lid-debitur li ma jhallasx u ma jigrilu xejn".*

Usury

Excess of rate of interest [Subject-matter of contracts]

Article 986(2) states:

> **986.** (2) *Saving the provisions of article 1852 and of any other provision of this Code or of any other law, any obligation to pay a rate of interest exceeding eight per cent per annum is also void in regard to the excess.*

Rate of Interest

Article 1852 states:

> **1852.** (1) *The rate of interest cannot exceed eight per cent per annum.*
>
> (2) *Any higher interest agreed upon shall be reduced to the said rate.*
>
> (3) *If a higher interest than that fixed by law has been paid, the excess shall be deducted from the capital.*

Contracts made in evasion of last preceding article

Article 1853 states:

> **1853.** *Any contract, whatever its designation, made in evasion of the provisions of the last preceding article, is subject to rescission; and in any such case, if the things given cannot be returned, the creditor can only demand the payment of their value at the time when he delivered them to the debtor.*

Consequences of usury: *Interest as an accessory obligation; does usury also lead to rescission of principal obligation?*

In the case of ***Guzeppi Axisa et v. Mark Belli et*** (First Hall (Civil Court), 24 April 2007, Cit. Nr. 986/2005) the Court stated:

"[L-atturi jitolbu lill-Qorti] tikkundanna lill-imħarrkin iroddulhom lura s-somma ta' Lm 8,000 li kienu silfuhom brevi manu fid-9 ta' Diċembru, 2004. ... Dwar il-flus li ssellef, [il-konvenut] jgħid li ssellef mingħand l-attur wisq anqas – jammetti li ssellef elfejn u sitt mitt lira Maltin (Lm 2,600) – minn kemm qiegħed jintalab f'din il-kawża. [il-konvenut] jgħid li l-ammont li qiegħed jintalab fiċ-Ċitazzjoni huwa minfuh minħabba l-użura;

...

"Illi l-fatti li joħorġu mill-atti tal-kawża jiddependu mix-xhieda mogħtija mill-partijiet. Għalkemm din hija kwestjoni ta' self ta' flus, ma saret l-ebda kitba u l-flus għaddew mill-ewwel fuq l-idejn.

...

*"[Il-konvenut] jfisser li, f'dak iż-żmien, kellu bżonn il-flus u kien jgħix bir-*relief*. Jgħid li, meta ftiehem l-ewwel darba mal-attur, dan kien qallu li jislef b'imgħax bir-rata ta' nofs Lira fil-Lira. Jiddikjara li aċċetta u dak il-ħin stess issellef mingħand l-attur mitejn lira (Lm 200) li kellhom jitħallsu lura f'sitt (6) xhur bir-rata ta' ħamsin lira (Lm 50) kull xahar. Xahar wara, mar biex iħallsu l-ewwel rata u talbu jisilfu ħames mitt Lira (Lm 500) oħrajn. L-attur kien aċċetta, u f'dik iċ-ċirkostanza wkoll żamm għandu l-karta tal-identita' tal-imħarrek. Ir-rata tal-ħlas baqgħet ta' ħamsin Lira (Lm 50) kull xahar, għaliex iż-żewġ somom mislufa ngħaddu f'ammont wieħed.*

...

"Illi huwa siewi li wieħed iżomm quddiem għajnejh li l-ħlas ta' mgħax f'kuntratt huwa obbligazzjoni fih innifsu. Fil-mutwu, jieħu s-sura ta' obbligazzjoni aċċessorja għas- self innifsu tal-ħaġa fungibbli li sejra tintuża mid-debitur (Torrente).

...

"[Fuq art. 1852]: Illi dwar imgħaxijiet f'każijiet ta' mutwu, l-liġi trid li l-imgħax ma jaqbiżx ir-rata tat-tmienja fil-mija (8%), u kull rata miftehma ogħla minn hekk tiġi mnaqqsa sa dak l-ogħla limitu. Il-liġi ma tgħidx li l-ebda mgħax ma jkun dovut jew li l-obbligazzjoni kollha ma tkunx tiswa;

...

"Illi għal żmien twil, u minħabba kwestjonijiet ta' ordni pubbliku, tqies li jekk kemm-il darba jintwera li xi somma misselfa kienet mgħobbija bi ħlas ta' rata ta' mgħax li taqbeż l-ogħla rata ffissata mil-liġi, dik l-obbligazzjoni tkun assolutament ma tiswiex. Dan jgħodd għall- obbligazzjoni marbuta mal-ħlas tal-imgħax, imma mhux ukoll għall-obbligazzjoni ewlenija tas-self innifsu, li tista'

> *titħassar, bla ma jintilef l-obbligu li jintradd lura l-valur tal-ħaġa misselfa meqjus fiż-żmien ta' meta s-self ikun sar. Dan minħabba n-natura aċċessorja tal- obbligazzjoni tal-ħlas tal-imgħax, li ssemmiet aktar qabel. Għalhekk, meta titqanqal il-kwestjoni tal-użura, wieħed irid jgħarbel sewwa jekk dak li jiġi allegat ikunx qiegħed jipprova jwaqqa' l-eżistenza tal-obbligazzjoni ewlenija għal kollox, jew jekk ikunx qiegħed jattakka biss dik aċċessorja".*

Would usury lead to the return of the entire sum paid in interest, or just the excess?

In the case of ***Maria Dolores Montebello et v. Saviour Chetcuti*** (Court of Appeal, 27 January 2017, Rik. nr. 638/07) the Court stated:

> *"Jirriżulta li fl-1991 u fl-1992, l-attriċi issellfet is-somma komplessiva ta' Lm7,000 mingħand il-konvenut biex tixtri diversi fondi fil-Mosta; l-imgħax miftiehem kien ta' 10%. L-attriċi obbligat ruħha li, meta takkwista dawn il-fondi, tiggarantixxi l-ħlas lura tas-self b'ipoteka ġenerali fuq il-beni kollha tagħha u b'ipoteka speċjali fuq l-istess fondi. Il-kuntratt ta' akkwist da parti tal-attriċi tal-fondi fil-Mosta qatt ma sar, iżda l-attriċi bdiet tħallas lura s-self b'rati kull tant żmien. Il-konvenut, meta ra l-ħlasijiet lura ma kienux qed ikopru dak li kellu jieħu lura, kellem Nutar li ħejja kuntratt pubbliku iffirmat mill-konvenut biss, iskriva ipoteka favur tiegħu, u sussegwentement talab il-bejgħ bis-subasta ta' fond ieħor tal-attriċi. Meta saret taf bis-subasta, l-attriċi fl-2007, tat Lm7,500 oħra lill-konvenut biex dan iwaqqaf il-proċedura tas-subasta, u dan mingħajr ebda preġudizzju għall-pożizzjoni tagħha f'din il-kawża.*
>
> *...*
>
> *"L-ewwel Qorti, wara li qieset li l-attriċi kienet ħallset lura lill-konvenut is-somma ta' Lm11,000 u qieset l-iskritturi ta' self nulli minħabba imgħax bl-użura, ordnat ir-refużjoni ta' Lm4000 lill-attriċi, u ħassret ukoll il-proċeduri tas-subasta imnedija mill-konvenut.*
>
> *...*
>
> *"Din il-Qorti, pero`, ma taqbilx li l-konvenut għandu jrodd lura d-differenza bejn il- Lm11,000 li ħa u s-Lm7,000 li silef. L-ewwel Qorti qalet dan għax qieset l-iskritturi ta' self bħala nulli għax milquta b'użura.*
>
> *"L-użura pero`, ma twassalx għan-nullita` tal-iskritturi. L-artikolu 986 tal-Kodiċi Ċivili jgħid li "kull obbligazzjoni għall-ħlas ta' imgħaxijiet f'izjed minn tmienja fil-mija fis-sena hija wkoll nulla għal dak li hu zejjed". Kwindi, l-użura ma tirrendix l-obbligazzjoni nulla, iżda jkun null l-obbligazzjoni ta' ħlas ta' imgħax b'rata għola mit-8%. Dan joħroġ ċar ukoll mill-Artikolu 1852 tal-Kodiċi Ċivili, li wara li jgħid li l-imgħax fuq self ma jistax jaqbeż it-8%,*

> *jiddisponi li "l-imgħax miftiehem f'iżjed minn daqshekk jiġi mnaqqas sal-limiti" ta' 8%.*
>
> *...*
>
> *"Obbligazzjoni li tipprospetta ħlas ta' imgħax b'użura ma hijiex obbligazzjoni msejjsa fuq kawża illeċita, għax l-obbligazzjoni ta' self, bħala causa, hija indipendenti mill-obbligazzjoni tal-ħlas tal-imgħax. F'dan il-każ, l-obbligazzjoni infisha għandha causa ġusta – self biex tinxtara proprjeta` – u l-obbligazzjoni marbuta mal-imgħax hija nulla biss għal dak li hu żejjed 'l fuq mir-rata ta' 8% fis-sena. L-iskritturi in kwistjoni ma jistgħux, għalhekk, jitqiesu bla ebda effett fil-liġi. Dan ifisser li fuq is-self ta' Lm7,000 li għamel il- konvenut lill-attriċi, l-istess konvenut hu intitolat ghal imgħax bir-rata ta' 8% fis- sena.*
>
> *...*
>
> *"Issa mill-1992, meta sar l-aħħar self lill-attriċi, sal-2002, għaddew 10 snin – għas-snin mill-2002 sal-2007, il-konvenut stess jammetti li kien ħafer l-imgħax ulterjuri dovut mill-attriċi. Għal dawk l-10 snin, il-konvenut hu intitolat għal Lm5,600 imgħax, li jfisser li jekk il-konvenut ħa lura s-somma ta' Lm11,000 (Lm7,000 kapital u Lm4000 imgħax), ma ħa xejn żejjed mingħand l-attriċi u ma għandu jirrifondilha xejn lura".*

In the case of ***Paul Pisani et v. Emmanuel Pisani v. Emmanuel Custo*** (Court of Magistrates (Gozo) Superior Jurisdiction, 8 November 2002, Cit. Nr. 157/1998/1), the Court stated:

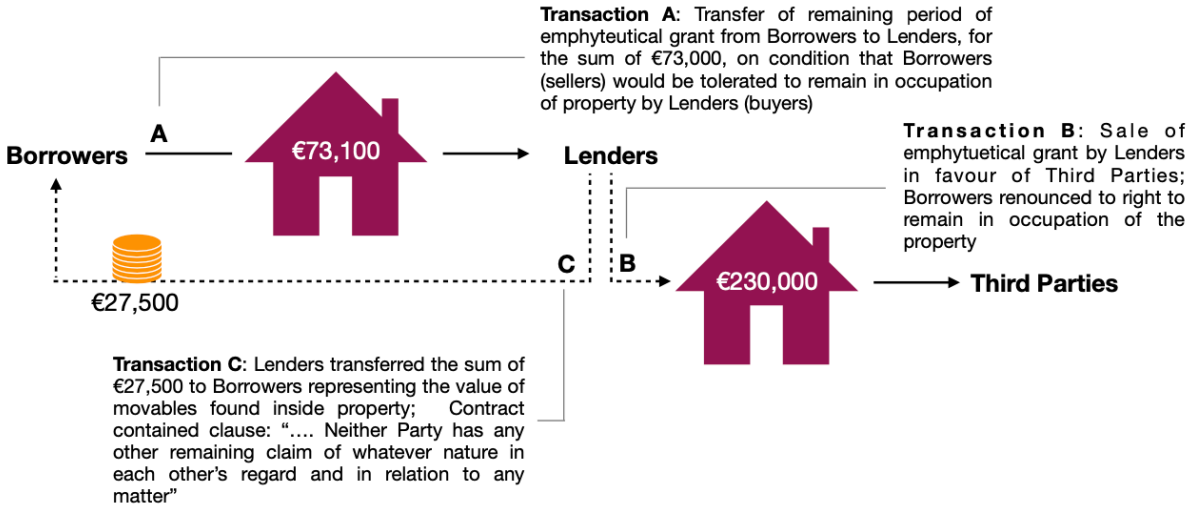
> *"Illi l-konvenuti b'rikors fl-atti tas-subbasta numru 23/98 fl-ismijiet inversi fil-waqt li ppremettew li huma krediturі ta' l-attur fis-somma ta' Lm16,667.88 ammont dovut skond att ta' kostituzzjoni ta' debitu, u talbu l-bejgh tas-subbasta tal-fond fuq imsemmi sabiex jigi sodisfatt il-kreditu tal-konvenuti. ...*
>
> *"Illi dan il-kreditu pretiz mill-konvenuti ma huwiex verament dovut u hemm fih ammont sostanzjali ta' imghax superjuri ghal dawk permessi mil-ligi billi l-ammonti dikjarati mill-attur bhala dovuti lill-konvenut fil-kuntratt fuq imsemmi kienu simulati. ... Issa l-unici ammonti li jirrizulta li gew mislufa kienu ta' Lm7000 bl-imghax tat-8% dekorribbli in kwantu ghas-somma ta' Lm2000 mit-12 ta' Mejju 1986 u in kwantu l-ammont ta' Lm5000 mit-22 ta' Frar 1988. ... Inghad dan u fuq l-iskorta tal-prospett hawn anness u li ghandu jifforma parti integrali ta' dan il-gudikat lil din il-Qorti jirrizultalha li l-ammont dovut sad-data allura ta' l-ahhar pagament kien ta' Lm3,124.*
>
> *"[Il-Qorti]:*
>
> 1. *tilqa' l-ewwel talba ta' l-atturi;*
> 2. *tilqa' ukoll it-tieni talba u ghall-finijiet ta' din it-talba tillikwida l-ammont realment dovut minnu versu l-konvenut fl-ammont ta' Lm3,124 salv l-imghaxijiet*

ulterjuri mill-14 ta' Mejju 1990 sad-data ta' l-effettiv pagament.

3. *Tilqa' t-tielet talba limitatament l-irritwalita tas-subbasta u sakemm l-ammont pretiz ma hux kollu dovut, kif fuq deciz".*

Contracts made in evasion of [Article 1852]

In the case of ***Cyril Worley et v. Emanuel Ellul et*** (Court of Appeal, 27 March 2020, Rik. Nr. 952/2012), in total, borrowers received the sum of €100,600. Borrowers claimed that lenders made a total profit €113,000 through this series of transactions.



The Court stated the following:

> *"L-atturi ressqu din il-kawza peress li qeghdin jikkontendu li sar hlas zejjed lill-konvenuti, konsistenti f'imghax li jaqbez it-8% u dan kontra l-provvediment tal-ligi, kif ukoll li l-konvenuti arrikew ruhhom indebitament a skapitu tal-atturi. Kwindi qeghdin jitolbu likwidazzjoni u kundanna ta' hlas tas-somma hekk likwidata, rapprezentanti l-imghax imhallas zejjed, b'rata oghla minn dak permess bil-ligi.*
>
> *"Hu evidenti li l-konvenut sab lill-atturi f'sitwazzjoni xejn felici u hataf l-opportunita' biex jaghmel negozju li hallielu qliegh konsiderevoli.*
>
> *...*
>
> *"Pero' gialadarba l-kuntratt tas-16 ta' Frar 2012 ma giex impunjat, ma jistax jigi ikkunsidrat mod iehor ghajr kuntratt ta' bejgh. Dan irrispettivament ta x'setghet kienet il-verita'.*
>
> *"Ladarba l-qorti ghandha quddiemha kuntratt ta' bejgh li ma giex impunjat ma jista' qatt jinghad li nnegozju guridiku kien mutwu. Bil-kuntratt tas-6 ta' Gunju 2012 il-konvenuti saru s- sidien tal-fond.*

[Id-debituri] 'Dak il-hin hekk kien jaqblilna nghidu.... Dak iz-zmien nerga' ntenni hekk kien jaqblilna naghmlu. Kellna bzonnhom'.

"Izda jtennu li c-cirkostanzi li kienu jinsabu fihom, fejn kellhom bzonn b'self is-somma ulterjuri ta' €73,000, huma cedew ghall-kondizzjoni li ghamel il-konvenut cioe` li jsir dan it-trasferiment ta' proprjeta`, pero` jikkontendu li l-ftehim wara l-kuntratt ta' bejgh kien li d-dar tigi mibjugha lil terzi, u mir-rikavat jithallas il-konvenut is-€73,000 u xi spejjez u imghax skont il-ligi u l-kumplament johduhom l-atturi. Izda wara li sar il-bejgh lil terzi, il-konvenut zamm kollox ghalih bil-konsegwenza li ghamel qliegh ta' €113,000 li jikkonsisti f'imghax oltre` r-rata ta' 8%.

"Dan hu l-pern tal-kwistjoni kollha, l-atturi appellanti jikkontendu li l-kuntratt ta' bejgh effettivament kellu jinftiehem bhala kuntratt ta' self, izda ma ghamlu ebda tentattiv li jimpunjaw dak il-kuntratt minhabba simulazzjoni, kif lanqas ma jippruvaw mod iehor iwaqqghu dak il-kuntratt. Huwa kontro-sens li l-atturi appellanti jitolbu rifuzjoni minghajr ma attakkaw il-kuntratt ta' kompro-vendita`.

"Ladarba l-atturi, ghalkemm kontra qalbhom, accettaw din il-kundizzjoni, issa ma jistghux jergghu lura mill-kunsens moghti minnhom fuq l-istess kuntratt.

"Isegwi li t-tesi tal-atturi appellanti taht l-ewwel aggravju taghhom li dan kien kuntratt ta' self garantit bid-dar, bil-kundizzjoni li jsiru l-konteggi wara l-bejgh taghha, ma jregix, in kwantu mill-provi ma jirrizultax.

"Kwindi l-argument tal-atturi appellanti huwa li n-negozju bejn il-kontendenti kien ibbazat fuq kawza llecita (l-uzura), izda minkejja dan mhumiex qeghdin jattakkaw il-kuntratt bejn l-istess kontendenti, jghidu biss li ghandhom dritt ghal rifuzjoni tal-imghaxijiet imhallsa zejda.

"Kif ritenut mill-Qrati taghna li "Kwalunke' ftehim li l-partijiet jistghu jivvantaw biex il-kreditur jista' jasal ghal fini tieghu li jiehu imghax aktar minn dak li tippermetti l-ligi huwa null" (Ara sentenza fl-ismijiet Neg. Lewis Formosa v. Antonio Gatt deciza mill-Qorti tal-Kummerc fl-20 ta' Novembru, 1934). Kif ukoll: "Il-konvenzjoni affetta b'uzura hija, ghal dik li jirrigwarda l-uzura, nulla b'mod assolut, jigifieri inezistenti, billi illecita ghax projbita mil-Ligi u hija illecita fir-rigward tal-mutwant … Ghalhekk is-somma mhallsa bhala uzura ghandha tigi restitwita lil min hallasha u ma tista' qatt tifforma oggett ta' obbligazzjoni naturali." (Ara Carmelo Lia v. Emmanuele Genovese, (Kollez. Vol: XXX.i.103) deciza minn din il-Qorti fl-4 ta' Marzu 1938).

> *"Din il-Qorti filwaqt li thaddan dan l-insenjament appena citat, izzid tghid li l-uzura, jekk hi ppruvata, isservi biex tizvinkola lid-debitur mill-eccess.*
>
> *"Jista' jkun li l-konvenut approfitta ruhu mis-sitwazzjoni li sabu ruhhom fiha l-atturi, fis-sens li xtara dik il-proprjetà bi prezz hafna irhas minn dak li effettivament kien il-valur taghha fis-suq miftuh u li f'cirkostanzi differenti qatt ma kienet ser tinbiegh b'dak il-prezz, pero`, kif diga` inghad qabel, dwar il-principju* contra scriptum testimonium non scriptum non fertur*, il-miktub ghandu piz determinanti, sakemm dak bil-miktub ma jigix fix-xejn jew kontradett bi provi univoci u konklussivi, provi li f'dan il-kaz tal-lum kienu jispettaw lill-atturi appellanti u li ma sarux.*
>
> *"Izda ladarba l-atturi appellanti accettaw u ghazlu li jiffirmaw l-iskrittura ta' kwittanza tat-28 ta' Frar, 2012, ma jistghux jitolbu rifuzjoni ta' flus fuq pretensjoni ta' arrikiment indebitu, semplicement peress li wara li hadu l-flus li kellhom bzonn, kellhom ripensament! L-affarijiet ma jsirux hekk, altrimenti lkuntratti jsiru inutilment u ma jkunu jiswew ghal xejn".*

In the case of ***Arthur Briffa et v. Carmelo Farrugia et*** (Court of Appeal, 8 January 2010, App. Civ. Nr. 632/2004/1) the Court stated:

> *"Din il-kawza hija dwar weghda ta' bejgh-u-xiri, u nstemghet flimkien ma' kawza ohra bejn l- istess partijiet li nqatghet illum ukoll u fejn gie deciz illi l-konvenju li dwaru saret il-kawza tal-lum huwa milqut b'kawza illecita.*
>
> *...*
>
> *"Il-konvenuti gew bzonn il-flus u ghalhekk riedu jbighu xi mmobbli. Sensara laqqghethom ma' l-atturi, izda ma waslux ghal ftehim dwar prezz, u, minflok xtraw il-proprjetà, l-atturi silfu flus lill- konvenuti. Il-ftehim dwar is-self sar b'att li gie pubblikat min-Nutar Mark Anthony Sammut fit-30 ta' Jannar 2003; bis-sahha tal-att l-atturi nghataw ipoteka u gew ukoll stipulati xi pattijiet dwar ir- radd tas-self. Fuq l-att jinghad illi s-self kien ta' Lm33,000 minghajr imghax, ghalkemm il-konvenuti jghidu illi s-somma tassew mislufa kienet ta' Lm30,000, u d-differenza kienet imghaxijiet mohbija. Fuq l-att jinghad ukoll illi s-self kellu jintradd bi hlasijiet ta' Lm5,000 kull xahar, l-ewwel hlas fl-1 t'April 2003, hlief illi l-ahhar hlas kellu jkun ta' Lm3,000; il-konvenuti min- naha l-ohra jghidu illi nghataw zmien ta' sena biex ihallsu.*
>
> *...*
>
> *"'[Il-Krediturl] allura jistghu jaghzlu li minflok jithallsu s-somma kollha jew il-bilanc li jkun ghadu dovut, il-krediturl jaghtu lura lid-debituri l-parti mis-somma li d-debituri jkunu lahqu hallsu, u d-debituri jaghtu lill-krediturl b'titolu ta'* datio in solutum *il-beni ipotekat b'dana l-att'.*

> *...*
>
> *"Ghal din ir-raguni, billi temmen illi s-somma mislufa kienet inqas minn Lm33,000, u illi s-somma msemmija fil-kuntratt tigbor fiha imghaxijiet b'uzura, il-Qorti tilqa' l-eccezzjonijiet ta' kawza illecita.*
>
> *...*
>
> *"Ladarba l-konvenju sar biex jithallas b'*datio in solutum *dejn gej minn kawza illecita, il-konvenju wkoll huwa milqut b'dik il-kawza illecita, u t-talbiet maghmula fic-citazzjoni, mahsuba biex jitwettaq il-konvenju, ghalhekk ma jistghux jintlaqghu.*
>
> *"Il-Qorti ghalhekk, wara li tilqa' l-eccezzjoni ta' kawza illecita, tichad it-talbiet tal-atturi, bla hsara ghal kull jedd li jista' jkollhom ghar-radd tas-somma tassew mislufa minnhom lill- konvenuti.*
>
> *...*
>
> *"a. L-Artikolu 1852(1) talistess Kodici Civili jiddisponi li l-imghax ma jistax jaqbez it-tmienja fil- mija fis-sena. [L-artikolu 1853] jiddisponi li kull kuntratt maghmul b'qerq tad-disposizzjonijiet tal-ahhar artikolu qabel dan jista' jithassar. Fil-kaz in ezami fit-tieni eccezzjoni taghhom il-konvenuti qed jeccepixxu l-uzura ossia impozizzjoni ta' imghax aktar minn dak permessibbli mil-ligi. Kien dan il-fattur li kellha tiddetermina l-ewwel Qorti, u mic-cirkostanzi kollha li rrizultawlha waslet biex tat affidament lix-xhieda talkonvenuti u kkonkludiet li effettivament il-kuntratt ta' self ta' Jannar 2003 kien jikkomprendi l-uzura".*

Where rate of interest is not agreed upon

Article 1854 states:

> **1854.** *If the borrower has bound himself to pay interest without fixing the rate, interest shall be at the rate of five per cent per annum.*

In the case of ***Guzeppi Axisa et v. Mark Belli et*** (First Hall (Civil Court), 24 April 2007, Cit. Nr. 986/2005) the court stated:

> *"Illi għall-finijiet tal-kwestjoni tal-imgħax fuq is-somma mislufa lill-imħarrek, ladarba ma jirriżultax li kien sar xi ftehim partikolari dwar rata ta' mgħax bejn l-attur u l-imħarrek, il-Qorti qegħda tordna li l-imgħaxijiet legali mitluba fiċ-Ċitazzjoni jibdew jgħoddu minn dak inhar tan-notifika tal-Att taċ-Ċitazzjoni, u għandhom jitqiesu bir-rata tal-ħamsa fil-mija (5%) fis-sena".*

In the case of ***Francesco Mifsud v. Leone Agius*** (First Hall (Civil Court), 7 March 1958, Vol. XLII.ii.952) the Court stated:

> *"Illi, ladarba l-flus gew mill-attur "mislufa", ir-rapporti li nholqu bejn il-kontendenti huma soggetti ghar-regoli li jiggovernaw is-self, ghad li d-denominazzjoni moghtija lill-kuntratt kienet diversa; u ghalhekk, f'kaz ta' self bl-imghax minghajr ftehim fuq ir-rata, l-imghax jitqies bil- hamsa fil-mija fis-sena ... Illi minn dan tinzel il-konsegwenza li l-ftehim fuq il-profitti ghandu jiftiehem bhala ftehim dwar l-imghax; u billi r-rata tal-imghax ma tirrizultax specifikatament mifthema, l-attur huwa ntitolat ghall-imghaxx tal-hamsa fil-mija (5%) fis-sena".*

Bank Deposits (Irregular Deposits)

Regulating when depositary may make use of thing deposited, article 1894 states:

> **1894.** *A deposit of money or of other things which are consumed by use, is regulated by the laws relating to loan for consumption or mutuum, whenever power has been granted to the depositary to make use of the thing deposited on the sole condition of returning as much of the same kind and quality.*

"It is more difficult to distinguish between loan and irregular deposit, given that, also as a result of this contract, the property is transferred to the depositary. The distinctive element can be identified in the function, which in the irregular deposit is similar to that of the deposit in general, i.e., custody: if I deposit a sum into a bank account, the main purpose I would be after is the custody of the money, which I couldn't safely keep at home. It would not matter whether the bank returned the same bank notes, with the same serial numbers, that I would have had deposited: I just require the equivalent value. A loan, on the other hand, satisfies the borrower's need to temporarily dispose of a sum. This does not change the fact that, given the undeniable similarity between the two institutions, the rules laid down for the loan are generally applied to the irregular deposit". [72]

"The Maltese Civil Code in Section 1996 [now 1894] states that a deposit of money is to be regulated by the laws relating to loan. But does it remain a contract of deposit? The answer is probably in the affirmative. Although the law compares it to the rules of the contract of loan, yet loan is considered juridically as being contracted in the interest of the debtor while in the contract of deposit this is done in the interest of the party depositing the money. Betti in his work "Teoria Generale delle obbligazioni" expresses the view that this is a mixed contract. The Italian Civil Code 1942 realising this juridical situation has provided a separate chapter in the code entitled "Of Banking Deposits" and while it has continued to classify it as a contract of deposit it has recognised that the ownership of the money passes into the Bank. Under a normal contract of deposit, the person receiving the money only receives the custody of the object without a right to make use of the money. Scordino in his work "I contratti Bancari" takes the view that this is not a contract of loan because in the Italian law it is expressly stated under section 1782 of the Civil Code that the rules of loan are to be followed only as far as they are applicable. It corresponds to section 1996 [now 1894] of the Maltese Civil Code. A model section does not appear in the *Code Napoléon* and was introduced in the Civil Code by the Maltese legislator".[73]

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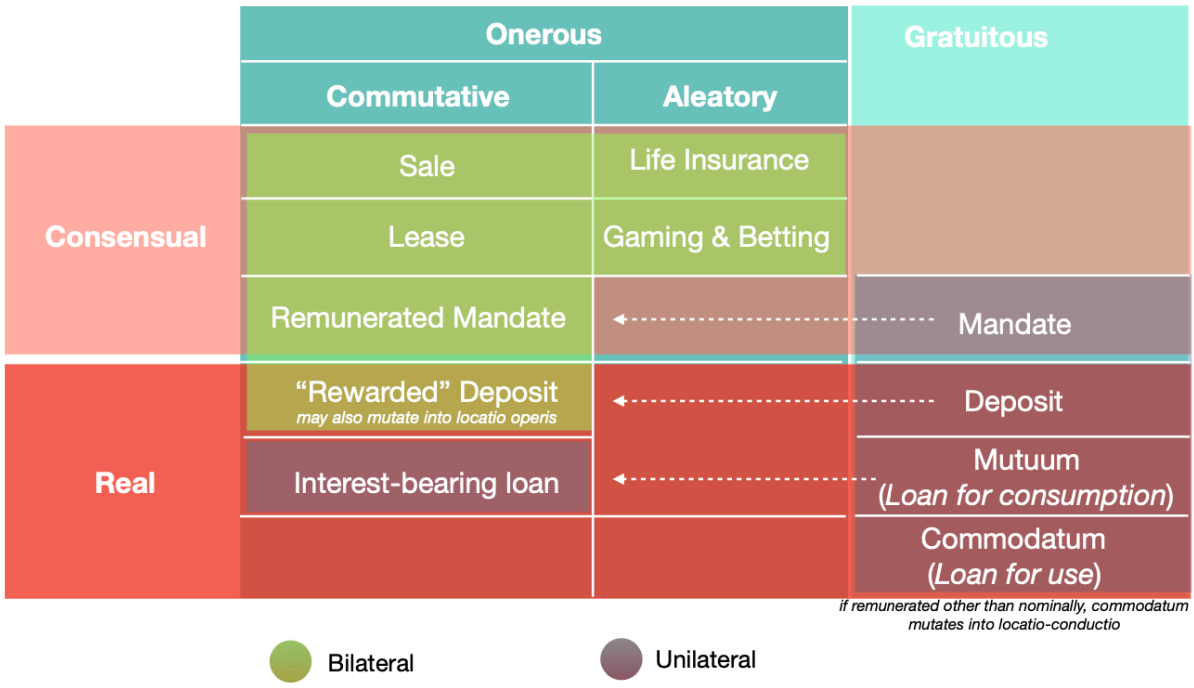
[72] A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 821.

[73] J.A. Micallef, Banking Practice and Case-Law in Malta, A Public Lecture delivered by Professor Doctor Joseph A. Micallef, LL.D., Dr. Jr. (E.U.R.) to members of the banking profession, p. 10.

Luca Camilleri

Topic IV: *Commodatum*



Definition of commodatum

Article 1824 states:

> **1824.** *Commodatum or loan for use, is a contract whereby one of the parties (lender) delivers a thing to the other (the borrower), to be used by him, gratuitously, for a specified time or purpose, subject to the obligation of the borrower to restore the thing itself.*

Definition of *precarium*

Article 1839 states:

> **1839.** *Precarious loan or precarium is the same contract of loan for use defined in article 1824 with the only difference that the lender has the power to take back the thing when he pleases.*

Definition of mutuum

Article 1842 states:

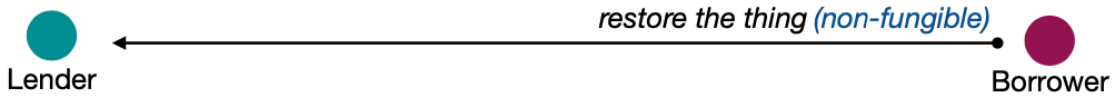
> **1842.** *Mutuum or loan for consumption is a contract whereby one of the parties (lender) delivers to the other (borrower) a certain quantity of things which are consumed by use subject to the obligation of the borrower to return to the lender as much of the same kind and quality.*

"Contracts of Loan are those by which one of the parties receives a thing from the other party with the obligation of returning it in kind or any equivalent to it, after having made use of it for a certain time."

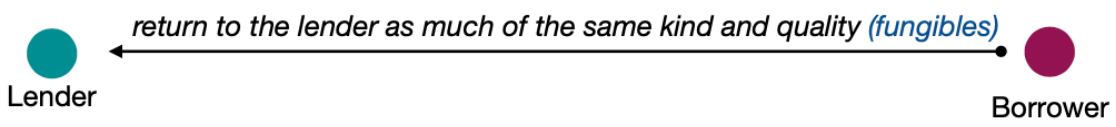
Common characteristics of Contracts of Loan:

1. Gratuitous nature. The three contracts [mutuum, commodatum & precarium] belong to the class of gratuitous contracts. This character is essential to "commodatum" and to "precarium" and it distinguishes them from lease; however, it is only natural to "mutuum" in which case the lender may stipulate interest in his favour.
2. They are also real contracts, because they become perfect only when the thing which forms part of the object is delivered. This is no bar for the validity of a promise of loan which is binding on the promisor".[74]

Commodatum



Mutuum



"Commodatum (from the Latin *"commodo datum"*) is the contract by which a party (lender) delivers to the other (borrower) a movable or immovable thing, so that he can use it for a specific time or use, with the obligation of return the same thing received, but without being required to pay any consideration".[75]

"The requisites proper to this contract are that the thing must be granted for a determinate use and that the contract is perfect only when the thing is delivered. The form of the contract is free".[76]

Loan for use (*prestito d'uso*) v. Loan for consumption (*prestito di consumo*)

"They lend me a book: I can read it, but I have an obligation to return it, and to return the same book, not another. The simple possession of the thing passes on to me: if I sold it, I would be guilty of misappropriation. There is no transfer of ownership like mutuum. In fact, it is not necessary that the object be the property of the lender, because the function of "commodatum" is not that of transferring the ownership of the thing".[77]

Unlike mutuum, which can be either gratuitous or onerous, commodatum can only be gratuitous. If any consideration is established in return for the use of the thing, the contract would transmit into a lease e.g., is a library lending books for free or is it lending them against

[74]V. Caruana Galizia, Notes on Civil Law, Year III: Obligations, p. 192.
[75]A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 818.
[76]V. Caruana Galizia, Notes on Civil Law, Year III: Obligations, p. 193.
[77]V. Caruana Galizia, Notes on Civil Law, Year III: Obligations, p. 193.

a subscription fee? Another difference with respect to mutuum is that only inconsumable things can be the object of the commodatum.
On those things which may be lent for use, article 1825 states:

> **1825.** *All things which are not extra commercium and which are not consumed by use may form the subject of this contract.*

Loan for use v. Deposit

"There is also a difference between commodatum and depositum. In a contract of deposit, the depositary cannot use the thing. If I leave a car in a friend's garage there is a deposit and, as a depositary, my friend cannot make any use of it. If, on the other hand, I give it to him on commodatum then, as a borrower, he would be able to use it for the time that we would have agreed upon".[78]

On nature of commodatum

In the case of ***Annunziata Galea et v. Carmen Borg et*** (First Hall (Civil Court), 4 June 2019, Rik. Gur. Nr. 870/18), the Court stated:

> *"Illi l-kommodat (mil-Latin commodo dato) huwa kuntratt li permezz tiegħu parti (il-kommodant) tikkunsinna lill-oħra (il-kommodatarju) oġġett mobbli jew immobbli, sabiex din tisserva biha għal żmien jew użu determinat, bl-obbligu li troddu lura, mingħajr korrispettiv; Illi l-kommodat jiddistingwi ruħu mill-użufrutt jew abitazzjoni billi mhux traslattiv tal-proprjeta` u ma jikkostitwixxix dritt reali. Dan għaliex l-oġġett tal-kommodat huwa biss it-tgawdija transitorja mill-kommodatarju, bħala rapport personali [u huwa wkoll differenti] mill-mutwu billi huwa "self għall-użu" u mhux self għall-konsum. ... Dan apparti li l-kommodat huwa dejjem gratuwitu filwaqt li s-self jista' jkun kemm gratuwitu kif ukoll oneruż. Il-kommodat jiddistingwi ruħu mid-depożitu billi f'dan tal-aħħar, id-depożitarju ma jistax juża' l-oġġett a benefiċċju tiegħu. Il-kommodat jiddistingwi ruħu wkoll mill-prekarju, li huwa self ta' ħaġa mingħajr determinazzjoni ta' żmien, f'liema każ il-ħaġa trid tiġi mrodda lura meta sidha jgħoġbu jitlobha lura".*

In the case of ***Lorenzo Zahra pro et noe v. Mary Zahra*** (Court of Appeal (Inferior), 6 October 2004, App. Civ. Nr. 427/2002/1), the Court stated:

> *"Issa l-orjentament dominanti fid-dottrina legali u fil-gurisprudenza hi dik li l-kommodat hu essenzjalment kuntratt reali gratuwitu, perfezzjonat bil-konsenja tal-haga, liema konsenja timmanifesta l-intenzjoni tal-kommodant li jinstawra l-vinkolu guridiku mal- kommodatarju".*

Question as to whether contract is *commodatum* or *locatio et conductio*

Article 1838 states:

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[78] A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 819.

> **1838.** (1) *If any question shall arise as to whether the loan of a thing is by way of a loan for use, or by way of letting and hiring, the person claiming a reward must prove his right thereto by express or tacit agreement.*
>
> (2) *A tacit agreement may be inferred from the condition of the parties, the quality of the thing, the prolonged use thereof and other circumstances.*

"Commodatum is very similar to lease with the difference that one is gratuitous and the other is onerous. In case of doubt whether the contract is commodatum or lease, the presumption is that it is commodatum and therefore the grantee who alleges that it is a lease must show that the rent was expressly or tacitly agreed upon".[79]

Gratuitous element essential to commodatum [1]

In the case of ***Robert Borg v. Francesco Abela*** (Court of Appeal (Commercial), 16 December 1949, Vol. XXXIII.i.774) plaintiff allowed defendant to store various goods in his warehouse that he was renting. It later resulted that a sum of £12 was fixed every three months as compensation. This period was automatically renewed unless plaintiff gave a seven-day notice for the termination of the agreement. The agreement also regulated the water and electricity consumption as well as whitewashing of the premises, and further prohibited structural alterations. The gratuitous nature is the principal element of 'commodatum'. Thus, if one grants the use of a thing or a tenement to a person against a compensation for such use, the contract would not be 'commodatum' but a 'lease' if the compensation was given in money. If the compensation consists of some other thing, the agreement between the parties would be an innominate contract.

Baudry Lacantinerie: "If the lender requests from the borrower some payment as compensation for the benefit granted to the latter by the agreement such agreement shall not be null but shall no longer be a 'commodatum'. It shall be a lease if the remuneration agreed upon consists in a sum of money."

Ricci: "In commodatum one makes a favour out of friendship or out of respect towards the person in whose favour the loan is made. There exists no idea or intention of profit".

The Court of Appeal further noted that the remuneration demanded by the plaintiff had by far exceeded the rent which the plaintiff himself paid to his landlord.

Gratuitous element essential to commodatum [2]

In the case of ***Joseph Calascione noe v. Carmelo Schembri*** (Court of Appeal (Civil), 5 April 1954, Vol. XXXVIII.i.121) plaintiff claimed that he gave a tenement in Valletta to defendant on commodatum, against a nominal compensation of £12 per annum. Defendant refused to vacate property, claimed protection of special rent laws. The Court conceded that a nominal compensation does not terminate the contract of 'commodatum' but added that the compensation must be slight and insignificant. The Court commented how in previous judgments (see Borg v. Abela) the law was excluding any type of compensation from 'commodatum'. Court held that once defendant was paying £12 per annum, the gratuitous element did not subsist. Not being gratuitous, the contract was one of lease, hence, subject to the special rent laws.

[79] V. Caruana Galizia, Notes on Civil Law, Year III: Obligations, p. 196.

Gratuitous element essential to commodatum [3]

In the case of ***Bartolomeo Gauci v. Ronald Abela*** (First Hall (Civil Court), 5 June 2020, Rik. Gur. 929/2017) plaintiffs alleged that defendants were occupying premises without a valid title. Defendants claimed that they were using the property in virtue of a commodatum. It resulted that the defendants were paying the amount of €16 daily. The Court stated:

> *"Illi l-kommodat huwa kuntratt fejn parti tikkunsinja haga lill-parti ohra sabiex tinqeda biha bla hlas. Ghalhekk jinsorgi li fil-kaz prezenti l-element kostituttiv tal-kommodat u cioe' n-nuqqas ta' hlas m'huwiex prezenti. Lanqas jista jinghad li l-ammont imhallas u cioe' dak ta' €16 kuljum jikklassifika bhala kumpens nominali u cioe' 'kumpens zghir u insinjifikanti'.*
>
> *...*
>
> *"Ghaldaqstant il-Qorti tqis li l-eccezzjoni tal-ezistenza tal-kommodat ma tistax legalment tirnexxi fil-kaz odjern.*
>
> *"[T]iddikjara li l-konvenut qieghed jokkupa l-garaxx minghajr l-ebda titolu validu fil-ligi u qed jaghmel uzu illecitu minnu u tordna li fi zmien xahrejn mid-data ta' din id-decizjoni l-konvenut jizgombra mill-istess fond ... tirriserva izda favur l-intimat kwalunkwe drittijiet spettanti lilu fil-ligi fir-rigward ta' benefikati li setghu saru minnu fil-fond in kwistjoni".*

Gratuitous element essential to commodatum [4]

In the case of ***Maria Sammut v. Lawrence Sammut*** (First Hall (Civil Court), 28 January 2004, Cit. Nr. 2268/1996) the court stated:

> *"Il-fatt li l-konvenut ihallas l-ispejjez tad-dawl u ta' l-ilma ma jgibx nieqes il-figura tal-kommodat, billi dan il-fatt ma jistax jintegra ruhu bhala xi kontro-prestazzjoni ghall- vantagg tal-kommodant".*

"Specified" does not mean "definite"

In the case of ***Annunziata Galea et v. Carmen Borg et*** (First Hall (Civil Court), 4 June 2019, Rik. Gur. Nr. 870/18) the Court stated:

> *"Il-liġi titkellem dwar żmien jew użu determinat. Ma tgħidx "żmien definit". Għalhekk, din il- Qorti tifhem li ikun hemm kommodat jekk id-dgawdija tingħata għal tul ħajjet il-kommodatarju; f'dan il-każ, iż-żmien, għalkemm ma jkunx definit (ngħidu aħna għal sena, sentejn, għaxar snin) b'danakollu jkun determinat".*

In the case of ***Lorenzo Zahra pro et noe v. Mary Zahra*** (Court of Appeal (Inferior), 6 October 2004, App. Civ. Nr. 427/2002/1) the Court stated:

> *"Mis-suesposti disposizzjonijiet huwa deducibbli li l-kuntratt jista' jkun ghal zmien determinat jew ghall-uzu determinat. Fir-rigward jinsab spjegat illi "iz-zewg modalitajiet possibbli tal-kuntratt tal-kommodat, kemm dik relatata maz-zmien u dik relatata ma' l-*

> *uzu, jistghu jezistu indipendentement minn xulxin u wahda ma kienetx marbuta mal-ohra. Il-partijiet jistghu allura jiftehmu zmien li fih il-kommodat kellu jipperdura, bla ma jiftehmu x'uzu determinat kellu jsir mill-haga kunsinnata b'self u vice- versa" – "Fortunato Mercieca et -vs- Joseph Mercieca", Appell, Sede Inferjuri, 1 ta' Novembru 2000".*

Either a specified time or purpose [1]

In the case of ***Bartolomeo Gauci v. Ronald Abela*** (First Hall (Civil Court), 5 June 2020, Rik. Gur. 929/2017) plaintiff was the owner of a warehouse that had been transferred on lease to company which had subsequently been liquidated. It turned out that one of the shareholders had kept occupying the property without, allegedly, any valid title at law. Defendants claimed that he had kept occupying a property in virtue of a commodatum. The Court stated:

> *"Fis-sena 2004 il-kumpanija waqfet topera u ghalhekk ma ghamlet l-ebda pagament. Mis-sena 2005 sal-mewt tal-missier Simon jew Simon Mallia ma tressqitx prova konvincenti sal-grad rikjest mil-ligi li [l-intimat] kien qed ihallas xi kera f'ismu personali ... filwaqt li min-naha l-ohra huwa inkontestat u sufficjentement pruvat li l-intimat baqa jokkupa l-fond mis-sena 2004 sad-data tal-mewt tal-missier fis-sena 2016 minghajr ebda kontestazzjoni da parti [ta' missier l-atturi] u baqa' jokkupa l-fond sad-data li nfethet il-kawza odjerna. ... In vista ta' dak suespost il-Qorti tqis li l-element ta' gratuwita' tal-prestazzjoni tal-haga kif eccepita mill-intimat giet sufficjentement pruvata.*
>
> *"[Rigward konsenja] It-trapass ta' perjodu tant twil ta' inkontestazzjoni da parti ta' Simon Mallia anki wara s-sena 2004 fil-konfront tal-intimat huwa evidenza qawwija lil din il-Qorti li verament bejn l-istess Simon Mallia u l-intimat kien hemm il-ftehim tal-kommodat fis-sens li sakemm Alfred Mallia jibqa' juza l-fond ghall-iskop intiz originarjament mill-missier u cioe' dak ta' 'pet-shop' u hanut tal-ghodda tal-agrikoltura allura huwa seta jibqa jopera mill-istess u dan minghajr ebda hlas ta' korrispettiv.*
>
> *"[I]l-Qorti tqis li l-intimat ghandu titolu ta' kommodat fuq il-fond de quo tghaddi sabiex tichad it-talbiet kollha attrici bl-ispejjez li ghadhom mhux decizi kontra l-istess attrici".*

Either a specified time or purpose [2]

In the case of ***Farstone Limited v. Anthony Farrugia et*** (First Hall (Civil Court), 6 December 2019, Rik. Gur. Nr. 63/13) the defendants had started occupying the property with the intention of eventually acquiring it. For some reason, the promise of sale agreement never took place. Plaintiffs filed for the defendant's eviction from the property. Defendants pleaded that they were occupying the property in virtue of a commodatum. It also resulted that the defendants had spent up to €90,000 on improvements to the property. The Court stated:

> *"Ma jista' qatt ikun dubitat illi l-komodat għandu inerenti fih karattru fiduċjarju. Dan għaliex huwa essenzjalment gratuwitu. Effettivament il-kawża tal-ftehim tikkwalifika l-kommodat bħala kuntratt ta' tgawdija bażat fuq il-gratuwita tal-użu tal-ħaġa. Naturalment din il-kawża tiddistingwi ruħha mill-motivi li jistgħu*

> *jkunu r-riżultat ta' rabtiet affettivi u familjari jew ta' rikonoxxenza. Tali motivi pero', ma għandhom ebda rilevanza ġuridika*
>
> *...*
>
> *"Illi eżaminati l-provi, il-Qorti waslet għall-konklużjoni li l-ftehim kien li l-konvenuti jokkupaw il-fond sakemm isir il-kuntratt mingħajr ħlas.*
>
> *...*
>
> *"Tilqa' [l-kontro-talba tal-konvenut u] tiddikjara u tiddeċiedi li l-partijiet għandhom ftehim li l-esponenti jakkwistaw mingħand is-soċjeta' attriċi l-fond [in kwistjoni] u li jibqgħu jabitaw fih b'mod esklussiv sakemm jiġi ppublikat l-att tal-bejgħ".*

Either a specified time or purpose [3]

In the case of ***Paraggi Holdings Limited v. RD et*** (Court of Appeal, 20 July 2020, Rik. nr. 821/04) plaintiff company requested Court to declare that the defendant and her son were occupying the property without a title. Defendants claimed that they were occupying the property by virtue of commodatum. It resulted that the defendant had started occupying the property after engaging into an extra-marital relationship with the plaintiff. The plaintiff eventually bought the property in the name of his company and started cohabiting with the defendant. After some years, the relationship broke down, and the plaintiff requested the defendant and her children to vacate the property. The Court stated:

> *[Il-konvenuta] tibqa' ssostni illi [l-attur] dejjem weghedha li dak l-appartament kien ser jibqa' darha. ... "Kien halifli li hadd m'hu ser ikeccini mid-dar." ... Ezaminati l-fattispecie tal-kaz in ezami fid-dawl tal-fuq espost, din il-Qorti ssib illi l-prova tal-"uzu determinat" tezisti. Il-fond mertu ta' dawn il-proceduri nkera u sussegwentement inxtara mis-socjetà attrici sabiex tghix fih [l-intimata] wara li din telqet mid-dar konjugali li kienet tghix fiha waqt iz-zwieg taghha. [L-attur] fil-bidu tar-relazzjoni tieghu mal-konvenuta, ma kienx mar jghix f'dan l-appartament mal-ewwel. Kien biss xi xhur wara li ghazel li jmur jghix fil-fond de quo ukoll.*
>
> *...*
>
> *"Il-Qorti ezaminat bir-reqqa kollha l-hafna provi tar-relazzjoni ezistenti bejn [il-partijiet] u mix-xejra li kellha l-istess relazzjoni ma ssibx verosimili l-kundizzjoni li issa [l-attur] jghid li kienet hemm u cioè, "sakemm konna ser nibqghu flimkien".*
>
> *…*
>
> *"Il-Qorti hija konvinta li Parraggi Holdings silfet l-appartament lill-konvenuta biex tghix fih u minghajr ebda kundizzjoni ohra.*
>
> *Illi din il-Qorti tasal għall-istess fehma bħall-ewwel Qorti. Tqis li bejn l-partijiet kien hemm relazzjoni li damet numru ta' snin bis-sieħeb jieħu ħsieb kemm lill-appellata kif ukoll lil uliedha, u li sa*

ċertu punt l-appellata spiċċat dipendenti fuqu. Tqis ukoll ix-xhieda ta' Yana Cassar, li kellha ħbiberija kbira maż-żewġ partijiet, minn fejn joħroġ ukoll li kien is-sieħeb li ħajjar lill-appellata biex toħroġ mid-dar taż-żwieġ tagħha w tmur toqgħod ġo l-appartament tas-Sliema u, wara xi żmien, bdew jgħixu fih flimkien. Tgħid li wegħedha li jieħu ħsiebha u saħansitra sar appuntament meta kellhom jersqu quddiem Nutar biex jikteb l-appartament fuq isimha, iżda minħabba ċirkostanzi familjari, l-appellata ma marretx għall-appuntament;

Illi jingħad li l-fatt li ma jidhirx li kien hemm ftehim dwar żmien preċiż li kellu jtul tali self m'huwiex ta' xkiel biex jgħoddu r-regoli ta' dik l-għamla ta' kuntratt, għaliex għal-liġi jkun biżżejjed li jsir self għal żmien determinat jew għal użu determinat. Il-liġi ma tgħidx "żmien definit", għaldaqstant ikun hemm kommodat ukoll jekk it-tgawdija tingħata għal tul ħajjet il-kommodatarju u l-liġi tagħraf ukoll li l-jedd maħluq b'dak il-kuntratt jgħaddi fil-werrieta tal-partijiet, sakemm is-self ma jkunx sar għall-ġid tal-kommodatarju nnifsu biss. Min-naħa l-oħra, lanqas jista' jingħad li n-nuqqas ta' żmien prestabilit jissarraf fil-jedd li l-kommodant seta' jitlob ir-radd lura x'ħin ifettillu, kif irid il-kuntratt tal-prekarju, għaliex il-fatt li l-oġġett jingħata għal użu speċifikat ma jneħħihx mill-ambitu tal-kuntratt tal-kommodat sakemm dak l-użu fil-fatt ikun qiegħed u baqa' jsir;

Ir-rabta kuntrattwali titnissel hekk kif isseħħ il-kunsinna. Fil-każ tal-lum, il-kunsinna seħħet hekk kif sieħeb l-appellata ħajjarha u hija aċċettat li tidħol fl-appartament u tibda tgħix fih bħala d-dar residenzjali tagħha. B'mod partikolari għall-aggravju tal-appellanti, ma jidhirx li hu meħtieġ li ssir xi kitba biex tissostanzja l-milja ta' kuntratt bħal dak, għaliex il-kunsinna tal-ħaġa tixhed ir-rieda tal-kommodant li joħloq ir-rapport ġuridiku mal-persuna li lilha jsir is-self tal-ħaġa (jiġifieri l- kommodatarju).

Il-Qorti hija tal-fehma li r-rabta komodatarja nħalqet hekk kif is-sieħeb ħajjar u ikkonvinċa lill- appellata titlaq minn darha u tmur fil-post. Kif sewwa qal l-għaref difensur tal-appellata waqt it-trattazzjoni, il-kuntratt ta' kommodat seħħ mal-konsenja lilha tal-post. Iċ-ċirkostanza tar-relazzjoni li kellha mas-sieħeb tagħha kienet il-qafas li fih inħalqet dik ir-rabta kuntrattwali u mhux il-kundizzjoni (riżoluttiva) li lill-appellata rabtitilha dik il-konsenja;

...

[l-użu miftiehem] kien li l-appellata tgħix fil-fond bħala r-residenza tagħha. Ittenni li l-artikolu 1824 tal-Kodiċi Ċivili ma jitlobx li s-self irid ikun kemm għal żmien determinat kif ukoll għal użu determinat, għaliex għan wieħed minnhom huwa biżżejjed għall-finijiet tal-liġi u s-siwi tal-kuntratt tal-kommodat.

Either a specified time or purpose [4]

In the case of ***AM v. AZ*** (First Hall (Civil Court), 26 April 2019, Rik. Nr. 809/2016) plaintiff was in a relationship with defendant. Throughout their relationship the defendant had always cohabited, gratuitously, with the plaintiff, in the properties owned by the latter. Eventually, the defendant discovered that plaintiff was seeing another woman, which caused the couple to part ways. Defendant remained in occupation of the plaintiff's property. Plaintiff filed a case to evict her, but the defendant pleaded an agreement of commodatum in her favour. The Court stated as follows:

> *Illi ghandu jkun pacifiku li ghall-finijiet tal-vertenza in dizamina l-aktar kliem rilevanti huma s- segwenti:*
>
> > *"This is to confirm my intention that for as long as you live with the children ... I ... will continue to pay .... utility cost of E5/1501, Fort Cambridge"*
>
> *...*
>
> *Illi minn dan id-dokument fuq riprodott jirrizulta li l-intenzjoni tar-rikorrenti awtur tal-istess, kienet li jassumi l-obbligazzjonijiet tieghu versu l-intimata billi fl-istess qieghed jassigurha li kien ser jibqa' jhallas il-kontijiet tad-dawl u l-ilma – il-"utility costs", – sakemm l-istess intimata tibqa' tghix mat-tfal taghhom fil-fond mertu ta' din il-procedura; ... ir-rikorrenti qieghed iserrah ras l-intimata li anke wara li hu telaq mill-imsemmi fond peress li kien beda relazzjoni ohra, hu xorta wahda kien ser jibqa' jhallas dawn l-istess kontijiet minnu stess hemm indikati; ... – l-intenzjoni tar-rikorrenti kienet li jhalli lill-intimata tghix fl-imsemmi appartament sakemm din tibqa' tiehu hsieb lill-ulied li twieldu mill-imsemmija relazzjoni;*
>
> *...*
>
> *Illi minn ezami tar-rizultanzi in atti ma jirrizultax li sallum inbidlu c-cirkostanzi li permezz taghhom inholoq il-kommodat in dizamina billi l-ulied maggorenni in kwistjoni effettivament ghadhom jirrisjedu fil-fond mertu tal-procedura odjerna;*
>
> *Illi finalment, fid-dawl tas-suespost, jigi sottolineat li r-rikorrenti ma jistax, wara li assuma l-obbligu fuq deklinat vis-à-vis l-intimata, jaqbad u kapriccozament jibdel fehemtu – molto piu` wara li hu stess ikun ikkonferma kemm-il darba mal-intimata li hi ghandha d-dritt li tibqa' tirrisjedi fl-appartament de quo.*

Either a specified time or purpose [5]

In the case of ***Lorenzo Zahra pro et noe v. Mary Zahra*** (Court of Appeal (Inferior), 6 October 2004, App. Civ. Nr. 427/2002/1) plaintiff was defendant's father-in-law. Defendant had been occupying the plaintiff's property for 41 years, including the time that she spent in marriage with plaintiff's son (who had passed away). The Court stated as follows:

> *"Applikati dawn l-enuncjazzjonijiet ghal kaz taht konsiderazzjoni jibda biex jigi osservat illi kieku wiehed kellu jirricerka mill-fatti l-fattur zmien, dan ma jidherx li gie konkretament u espressament*

> *determinat. Mill-provi prodotti, kif fuq elenkati, jidher li l-fond de quo gie misluf lill-appellanti qabel iz-zwieg taghha ma' iben l-appellat. Dan minhabba d-dizgwid familjari ma' missierha.*
>
> *"Dan stabbilit, ma jistghax minn naha l-ohra ma jigix rilevat, kif hekk hu ragonevoli li jigi dezunt mill-istess provi, illi l-konsenja kienet ghall-uzu determinat u specifiku. Uzu li baqa' jipperdura ghall-ghexieren ta' snin fejn l-appellanti u zewgha rabbew familja fl-istess fond misluf. Dan l-uzu ma jidhirx li gie estint tant li l-appellanti baqghet tghix fil-fond skond l-iskop li ghalih originarjament sar is-self.*
>
> *Mill-kumpless tac-cirkostanzi f'dan il-kaz hi l-fehma ta' din il-Qorti li l-ftehim kien jirrivesti l-karattru guridiku tal-kommodat, fl-liema kaz il-gudikant ma jkunx jista' jikkoncedi t-talba tal-kommodant ghar-restituzzjoni dment li l-utilita` tal-haga mislufa ma tinsabx ezawrita.*
>
> *"[Il-bzonn tal-appellanti li jbieghu] mhux bzonn urgenti u mprevidibbli li jillegittima lill- kommodant jitlob il-haga lura qabel l-iskadenza taz-zmien jew it-temm ta' l-utilita` tal- fond. Ma jidherx li l-ligi tikkuntenta ruhha bi kwalsiasi pretest, hi x'inhi. Certament, u zgur, mhux wahda kapriccjuza jew appozitament krejata".*

Duties of borrower

Article 1827 states:

> **1827.** (1) *The borrower is bound to take care of and preserve the thing borrowed as a bonus paterfamilias.*
>
> (2) *He cannot, under pain of paying damages, apply the thing to any other use than that for which it is intended by its nature or by agreement.*

"The borrower's sanction for this obligation is his responsibility even for fortuitous events, in case the use he makes of it is in violation of the agreement. He is bound to look after the safety and preservation of the thing *"uti bonus paterfamilias"*; he is liable, therefore, for *culpa lata* and *levis* but not for *culpa levissima*".[80]

Borrower not liable for indemnity if thing perishes

Article 1828 states:

> **1828.** *If the thing perishes by a fortuitous event, without the fault of the borrower, the borrower is not liable for any indemnity.*

Damages which take place through a fortuitous event, without any fault of the borrower's part, are borne by the lender according to the rule *"casus sentit dominus".*

However, there are three exceptions:

[80] V. Caruana Galizia, Notes on Civil Law, Year III: Obligations, p. 194.

a. Wrong use or delayed return: Liability of borrower for wrong use or delay.

> **1829.** *If the borrower uses the thing for another purpose or for a longer time than he ought, he shall be answerable for the loss which may occur even by a fortuitous event, unless he proves that the thing would have equally perished if he had not used it for another purpose, or had restored it at the time fixed in the contract.*

The presumption is that the thing would not have perished had he not employed it for another use or had he restored it in due time. However, the law entitles the borrower to rebut this presumption.

b. If borrower would have been able to safeguard it: Where borrower could save the thing borrowed from perishing.

> **1830.** *If the thing lent perishes by a fortuitous event from which the borrower could have preserved it by making use of his own thing instead of the thing borrowed, or if, being able to save only one of the two things, he has preferred to save his own, he is answerable for the loss of the other.*

The obligation of preserving, preferably, the thing lent is based on the obligation of gratitude which the borrower is bound to perform towards the lender who has granted to him the use of the thing gratuitously.

c. If borrower has undertaken responsibility for all damages which may happen: Effect of valuation of thing lent at time of loan.

> **1831.** *A valuation of the thing, made at the time of the loan, shall have no other effect except that of determining its value at that time, in case the borrower should be answerable for any loss which may occur; and the borrower shall not, merely because the thing was appraised at the time of delivery, be answerable for any loss resulting from a fortuitous event, unless it is otherwise shown that an agreement to the contrary was made.*

The Maltese Code does not infer a tacit assumption of the risk on the part of the borrower from the mere fact of the valuation.[81]

Deterioration without fault of borrower

Article 1832 states:

> **1832.** *If the thing has deteriorated merely by the use for which it was lent, and without fault of the borrower, the borrower is not answerable for such deterioration.*

[81] V. Caruana Galizia, Notes on Civil Law, Year III: Obligations, p. 194.

"The borrower is not responsible for any deterioration caused by the lawful use of the thing because the contract of commodatum confers this on the borrower and *"qui suo jure utitur non videtur iniuriam facere"* (he who exercises his legal rights harms no one)".[82]

Borrower may not recover expense for use of thing

Article 1833 states:

> **1833.** *If in order to be able to make use of the thing lent, the borrower has incurred any expense, he cannot claim the reimbursement thereof.*

"Moreover, the essential requirement of free loan is not lost if ancillary services are charged to the borrower (e.g., the obligation to pay charges related to the property granted on loan), even if they are not such as to assume the character of a real consideration and remain within the scope of mere modal services".[83]

Obligations by the Lender

With regard to where extraordinary expenses have been incurred by the borrower, article 1836 states:

> **1836.** *If, during the continuance of the loan, the borrower had to incur, for the preservation of the thing, any extraordinary and necessary expenses of so urgent a nature that he was unable to give previous notice thereof to the lender, the latter shall be bound to reimburse such expenses to him.*

With regard to the liability of the lender in case of defects in thing lent, article 1837 states:

> **1837.** *When the thing lent has defects that may cause injury to the person making use of it, the lender is answerable for damages, if he knew of such defects and did not warn the borrower.*

"Extraordinary expenses are those which do not refer to the enjoyment of the thing, because these are at the charge of the borrower. The expense must also be urgent because otherwise the borrower is bound to notify the lender in order that the latter may provide for the preservation of the thing and incur the expenses himself".[84]

"Commodatum is said to be an imperfect bilateral contract. In fact, as a rule, an obligation arises only on the part of the borrower i.e., that of returning the thing, while that arising on the part of the lender is only potential. E.g., if the thing given on loan causes damage to the borrower (such as if a lender lends a car in the knowledge that such car is faulty and fails to notify the borrower, and the eventually borrower crashes into a wall and injures himself), the lender is obliged to pay compensation".[85]

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[82] *Ibid.*
[83] A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 819.
[84] V. Caruana Galizia, Notes on Civil Law, Year III: Obligations, p. 195.
[85] A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 267.

Cessation of commodatum

With regard to the restoration of thing to lender before expiration of time, article 1835 states:

> **1835.** (1) *The lender cannot take back the thing until after the expiration of the time agreed upon, or, in the absence of an agreement, until it has served the purpose for which it was borrowed.*
>
> (2) *Nevertheless, if during the time agreed upon, or before the borrower has ceased to need the thing, the lender happens to be in pressing and unforeseen need of making use of the thing, the court may, according to circumstances, compel the borrower to restore it to him subject to the obligation of the lender to reimburse to the borrower any expenses which the latter may have incurred to make use of the thing.*

"In case the lender is in a pressing and unforeseen need of making use of the thing before the terms agreed upon expires, the Court may at its discretion compel the borrower to return it as long as the need is urgent and was unforeseen at the time of the contract. In such a case of anticipated restitution, the lender is bound to reimburse the borrower of any expenses incurred by the latter in order to make use of the thing".[86]

In the case of ***Lucia Camilleri et v. Anthony Portelli*** (Court of Appeal (Inferior, Civil), 24 October1979, [NOT PUBLISHED]) plaintiff allowed defendant to fix a television aerial on his roof. No time for such use was agreed to, nor was any compensation fixed. Plaintiff eventually needed the full use of the roof to build thereon. Defendant refused to remove the aerial. The Court classified the agreement as a 'precarium' and allowed the plaintiff's demand for the removal of the aerial. Though not specifically saying so, the Court [remarked that the plaintiff required to develop the roof], in order to indicate that even if the contract were to be considered a 'commodatum', plaintiff could still demand back the full use of his roof owing to urgent circumstances.

Precarium (precarious loan)

Definition of *precarium*

Article 1839 states:

> **1839.** *Precarious loan or precarium is the same contract of loan for use defined in article 1824 with the only difference that the lender has the power to take back the thing when he pleases.*

Restitution on demand

Article 1840 states:

> **1840.** *The borrower of a thing by way of precarium cannot delay the restitution thereof, when demanded, on the ground of any prejudice which he might sustain thereby:*
> *Provided that if it appears that the restitution is demanded with intent to cause injury to the borrower, the court shall have power to grant him time for such restitution.*

Applicability of rules relating to *commodatum*

[86] V. Caruana Galizia, Notes on Civil Law, Year III: Obligations, p. 195.

Article 1841 states:

> **1841.** *Saving the provisions of the last two preceding articles, the rules laid down with regard to the contract of loan for use, shall apply to the contract of precarious loan.*

"Characteristics of the loan and its temporary nature: the limit of duration of the loan may result from a final term set by the parties or implicitly from the specific use for which the thing is loaned. If a term is not established, the borrower is obliged to return the thing as soon as the borrower requests it: then we speak of a precarious loan".[87]

"Precarium differs from the commodatum in that the party who lends the thing has it in his power to take it back when he pleases. The rules of commodatum, therefore, apply with the only difference that the borrower is bound to return the thing to the lender whenever the latter demands such restitution and he may not delay restitution on any grounds whatsoever, not even on the ground of the prejudice which he might sustain thereby. It is only in case where it appears that restitution has been demanded with intent to cause injury to the party who has received the thing, that the Court may grant him time, because *"malitiis non est indulgendum"* (indulgence is not to be shown towards those who are in bad faith)".[88]

In the case of ***Francesco Cassar v. Antonio Galea*** (First Hall (Civil Court), 24 March 1941, Vol. XXXI.ii.29) the Court held that when no term is agreed upon, the contract is deemed to be a *'precarium'* (Court refused defendant's claim that the term had to be implied from circumstances).

In the case of ***Lorenzo Zahra pro et noe v. Mary Zahra*** (Court of Appeal (Inferior), 6 October 2004, App. Civ. Nr. 427/2002/1) the Court stated the following:

> *"Isegwi minn dan illi jekk ma jkunx possibbli li tigi stabbilita d-durata taz-zmien, lanqas permezz tad-determinazzjoni ta' l-uzu, il-ftehim hu meqjus kommodat bla determinazzjoni ta' zmien ossija prekarju. Dan tal-ahhar, ghalkemm affini mal-kommodat, jiddifferenzja ruhu minnu ghall-fatt li f'tali ipotesi min jikkoncedi l-haga ghandu d-dritt li jitlob ir-restituzzjoni taghha fi kwalunkwe zmien. A propozitu, gie deciz illi "l-ezistenza taz-zmien hija mportanti ghad-distinzjoni bejn il-kommodat u l-prekarju. Ghax meta hemm iz-zmien il-kuntratt huwa ta' kommodat u l-kommodant ma jistghax jiehu lura l-oggett hlief fil- kaz ta' bzonn urgenti u mprevist sakemm jghaddi dak iz-zmien; mentri jekk ma jkunx hemm zmien, il-kuntratt ikun ta' prekarju u sid l-oggett jista' jiehdu lura meta jrid ... Li jfisser, ghalhekk, illi min jislef jista' jirrecedi 'ad nutum' mill-kuntratt f'kull kaz li ma jkunx stabilit zmien ghar-restituzzjoni tal-haga jew dan iz- zmien mhux dezumibbli mill-uzu li ghalih il-haga hi destinate".*

Difference between precarium and mere tolerance

In the case of ***Connie Cacciattolo v. Silvio Bonnici et*** (Court of Appeal (Inferior), 20 January 2003, App. Civ. Nr. 1264/2000/1) the Court stated:

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[87] A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 267.

[88] V. Caruana Galizia, Notes on Civil Law, Year III: Obligations, p. 196.

> *"L-attrici tistqarr illi peress li hi kienet toqghod San Giljan "ma sibtx oggezzjoni ghal din ir-rikjesta u kont hallejtha ghal xi perjodu tuza din il-kamra." Kien hemm li twieled il-prekarju. Titolu dan li fid-dritt u legislazzjonijiet moderni jippresupponi kuntratt jew konvenzjoni espressa, li b'necessita' ghalhekk bilfors irid jigi rikonoxxut id-dritt ta' haddiehor, kif hekk del resto tirrikonoxxi l-konvenuta. Fil-fehma ta' din il-Qorti ghalhekk dan it-titolu ma jistax jigi konfuz mat-tolleranza li jissupponi pussess tacitu".*

Precarium v. commodatum

In the case of ***Gaetano Sammut pro et noe v. Pauline Sammut et*** (Court of Appeal, 8 June 2005, App. Civ. nr. 1192/1987/4) plaintiff had allowed his son, who was also the defendant's former husband, to make use of one of his properties. After the marriage between the plaintiff's son and the defendant broke down, the latter remained in occupation of the property together with her daughter. The separation judgment had made no mention of the matrimonial home. Plaintiff claimed that the property had originally been delivered to his son by virtue of a precarium, specifically until the plaintiff needed it for himself, while the defendant maintained that the title by virtue of which she was in occupation of the property was that of commodatum. The Court stated:

> *"Hu biss fejn mhux possibbli li jigi determinat iz-zmien, lanqas permezz ta' l-uzu, illi allura hu ritenut li jissussisti l-kommodat bla determinazzjoni ta' zmien, ossija l-precarium li, ghalkemm affini mal-kommodat, jiddifferenza ruhu minnu ghall-fatt li l-kommondanti hu fakoltizzat bil-ligi li jitlob u jirrikjama r-restituzzjoni tal-haga f'kull zmien; Precizati il-premessi aspetti tad-dritt relattiv ghall-istitut tal-kommodat, jibqa' l-kwezit jekk tali ftehim, anke jekk jigi gratia argomenti accettat li si tratta ta' kommodat veru u proprju, u mhux dak tal-kommodat improprju jew il-prekarju, sarx biss bejn Gaetano Sammut u ibnu jew ukoll mal- konvenuta, jew estiz ghaliha biz-zwieg;*
>
> *"Fuq l-interpretazzjoni taghha tal-provi din il-Qorti hi tal-fehma li meta sar il-ftehim, dato ma non concesso, li si trattava ta' kommodat, il-konvenuta appellata lanqas biss kienet ghadha dahlet in xena. L-allegazzjoni ta' Gaetano Sammut u ta' ibnu li l-fond inghata lil Carmelo Sammut meta dan kien gharus lil certa Jane Zarb (u mhux lill-konvenuta) ma tinsab kontrastata mill-ebda prova. Huwa veru li l-presumibbli volonta ta' l-imsemmi Gaetano Sammut kienet li hu kien qed jislef l-uzu tal-fond lil ibnu meta dan kien qed jikkontempla zwieg izda hu daqstant iehor kristallin illi fit-termini ta' l-Artikolu 1824 tal- Kodici Civili Gaetano Sammut ikkunsinna l-fond lil ibnu u mhux ukoll lill-konvenuta li, fil-mument ta' tali konsenja, lanqas biss kienet tiffigura. Il-konsenja allura tar-res f' dak il- mument kellha tkun intiza li sservi biex telimina kull dubju in meritu ghall-volonta` effettiva tal- kommodant Gaetano Sammut li jinstawra vinkolu guridiku rilevanti, anke jekk kondizzjonat, mal-kommodatarju ibnu Carmelo Sammut u mhux ma' terzi ohra; multo magis, imbaghad, mal-konvenuta appellata;*

> *"Fil-fehma konsiderata tal-Qorti, ic-cirkostanzi kollha flimkien jikkostitwixxu prova sufficcjenti illi hawnhekk ninsabu fil-presenza tal-kommodat-prekariju ossia tal- "precarium" veru u proprju, statwit fl-Artikolu 1839 tal- Kodici Civili".*

Cessation of precarium

In the case of ***Mary Anderson v. Guza Jones et*** (Court of Appeal (Inferior), 7 December 2005, App. Civ. Nr. 504/2002/1) plaintiff demanded eviction of defendants from her property. Defendants claimed that their occupation was neither abusive or illegal, since it was specifically authorised by the plaintiff. The Court stated:

> *"Mill-analisi tal-provi ma jidherx li huwa kontestat illi l-konvenuti dahlu jabitaw fil-fond in ezami bil-kunsens pjen ta' l-attrici. Fil-hsieb tal-Qorti jidher li l-arrangament bejn il-kontendenti ahwa kien bazat fuq il-bona grazzja ta' l-appellata minhabba l-vinkolu ta' parentela. Huwa desumibbli minn dawn ir-riflessjonijiet illi kif korrettement irriteniet l-ewwel Qorti, il-ftehim konkordat ghandu analogija mal-prekarju u dan, una volta revokat, igib li l-okkupant tal-fond jisfa bla titolu;*
>
> *"A differenza tad-detenzjoni tal-haga b' titolu ta' kommodat, li hawnhekk jigi ripetut li mhuwiex qed jigi vantat, id-disponibilita` tal-fond bil-bwona grazzja ossija bit-tollerenza tal- proprjetarju tal-fond hi karatterizzata mill-intenzjoni. Fil-kaz ta' l-attrici jidher mill-provi illi din riedet tikkonserva l-kwalitajiet kollha ta' proprjetarja tal-fond.*
>
> *"Innegabilment, it-tolleranza jew il-prekarju sakemm jibqghu jezistu jiggustifikaw il-godiment fuq il-haga izda, una volta l-volonta` tal-koncedent li jtemm ir-rapport issir maghrufa, dan igib ic-cessazzjoni ta' dan l-istess dritt ta' tgawdija u mhux mistenni jew tollerat min, b'approfittar, jippretendi li jivvanta drittijiet proprji, li ma baqalux. L-uniku obbligu tieghu jibqa' dak tar-restituzzjoni lura tal-haga lil koncedenti".*

Commodatum in family relations [1]

In the case of ***Annunziata Galea et v. Carmen Borg et*** (First Hall (Civil Court), 4 June 2019, Rik. Gur. Nr. 870/18) the Court stated:

> *"Illi skont pronunzjament tal-Qorti tal-Appell (Civili) "In ġenerali, fir-relazzjonijiet normali bejn missier u uliedu kbar li jibqgħu jgħixu miegħu bħala familja waħda fl-istess dar, ma jistax jiġi ravviżat kuntratt ta' kommodat" – Antonio Vassallo v Edward Vassallo – 18.05.1964. u skont pronunzjament ieħor tal-Qorti tal-Appell (Sede Inferjuri) fir-relazzjoni bejn l-ulied u l-ġenituri "li tibda mit-twelid tat-tfal u tissokta oltre l-maġġor eta` saż-żwieġ tal-ulied, m'hemmx il- fattispeċje ta' ftehim jew rabta kontrattwali li hi neċessarja għall-kommodat kif hi neċessarja għal kull kuntratt" – Maria Pace v Anthony Pace 28.04.2004;*
>
> *...*

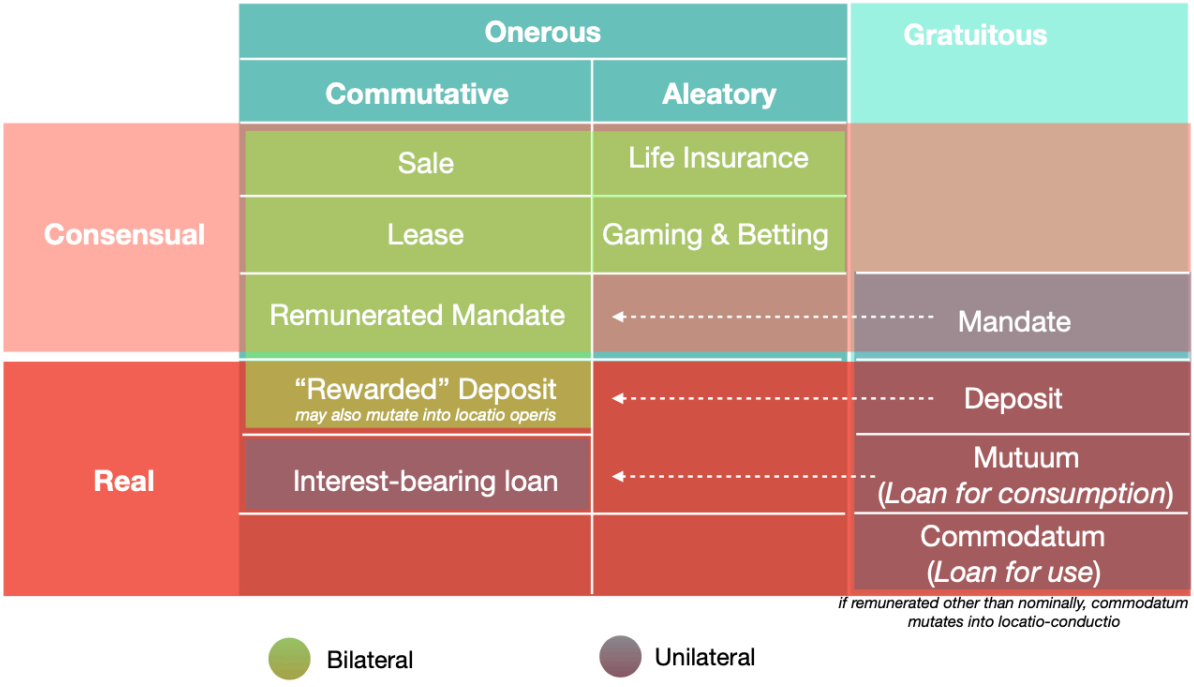
> *"Tilqa' t-tieni talba billi tikkundanna lill-konvenuti sabiex jipprovdu kopja ta' kull ċavetta u/jew sokor tal-fondi kollha formanti l-istess fond fi żmien tletin (30) jum mid-data ta' din is-sentenza".*

Commodatum in family relations [2]

In the case of ***Maria Sammut v. Lawrence Sammut*** (First Hall (Civil Court), 28 January 2004, Cit. Nr. 2268/1996) the Court stated:

> *"Posta l-kwestjoni li l-partijiet qed jikkontendu dwarha jinghad qabel xejn illi mhux rari illi genitur wiehed jew it-tnejn jaghtu lil uliedhom bi prestitu oggett jew fond ghall-uzu ta' dak li jkun bla hlas.*
>
> *...*
>
> *"Applikati s-suespressi principji ghall-kaz in diskussjoni mhux kontestat illi bejn il-partijiet ma kien hemm l-ebda zmien pattwit. Mhux l-istess jista' jinghad fil-kaz ta' uzu determinat, ghalkemm anke f'dan it-terminu huwa cirkoskritt proprju fil-limiti ta' l-uzu specifiku u ghalhekk jista' jinghad ukoll illi l-element taz-zmien kien jokkorri b' mod tacitu u mplicitu. Dejjem, in kwantu jikkoncerna l-garaxx, mis-sustanza tal-provi fuq elenkati, ma jistax ikun hemm dubju, fl-opinjoni ta' din il-Qorti, illi l-missier, bl-ghoti tac-cwievet tieghu lil uliedu, ried verament illi dan jikkoncedih lilhom bla ebda korrispettiv, ghall-iskop ta' garaxxjar tal-vetturi taghhom. Huwa sinifikattiv il-fatt illi l- konvenuti ilhom ghal certu tul ta' zmien jaghmlu uzu minnu".*

Topic V: Deposit



Definition of deposit.
Article 1891 states:

> **1891.** *Deposit, in general, is a contract whereby a person receives a thing belonging to another person subject to the obligation of preserving it and of returning it in kind.*

"The practical function of the contract (*causa*) of deposit consists in ensuring the custody of a thing, thereby guaranteeing the necessary vigilance for its conservation for the purpose of its restitution.

"The custodial duties do not arise until the delivery of the thing (the contract of deposit is a real contract); upon the delivery, neither the ownership nor the possession of the thing is transferred to the depositary; the latter would only be holding the object in the interest of the depositor, and he cannot transfer nor use the property deposited with him. In case the depositary transferred the property, he would be liable for misappropriation".[89]

In the case of ***Gabriel Zammit v. Rabelink International Freight (Malta) Limited*** (Small Claims Tribunal, 5 November 2020, Claim nr. 446/2016) the court stated:

> *"Hemm zewg obbligazzjonijiet inkombenti fuq id-depozitarju, wahda ta' indole principali, li hi r-restutuzzjoni tal-haga depozitata, u l-ohra ta' xejra accessorja – izda non di meno importanti – li hi l-kustodja temporanea tal-haga. Dwar l-ewwel obbligazzjoni inghad li, "È questa l'obbligazione finale, sia nel senso che la stessa obbligazione di custodia è funzionale proprio alla restituzione, sia nel senso temporale, in quanto l'avvenuta restituzione segna la cessazione del rapporto." Dwar it-tieni obbligazzjoni, jinghad illi, "la custodia altro non sarebbe se non un obbligo accessorio di protezione, espressione del principio della buona fede [...] il depositario deve tenere tutte quelle prestazioni che si impongono ai fini della restituzione del bene depositato." Agguntivament, il-kustodja tal-haga "si manifesta nell'insieme delle cure e delle cautele idonee a conservare la cosa, ed è comprensiva di ogni attività diretta a salvaguardare l'integrità fisica della cosa ed anche a preservare il valore di scambio e la destinazione economica (GIOVANNA VISINTINI, "Trattato Della Responsabilità Contrattuale", CEDAM, 2009 ed.; pp. 334– 337)"*

In the case of ***Paul Gauci et v. Joseph Mugliette*** (Court of Appeal, 9 Frar 2001, Cit. Nr. 712/82) the court stated:

> *"Id-depozitu in generali huwa kuntratt li bih wiehed jircievi l-haga ta' haddiehor, bl-obbligu li jikkustodiha jroddha n-natura (Artikolu 1891 tal-Kap 16). Meta d-depozitu jkun volontarju, il-kuntratt ghandu necessarjament min-natura tal-mandat, ghaliex id-depozitarju jkun obbligat li jezegwixxi l-volonta' tad-depozitant u jagixxi skond il-mandat lilu moghti fl-amministrazzjoni tal-oggett fdat f'idejh".*

Nature of deposit properly so called

Article 1892 states:

> **1892.** (1) *Deposit properly so called is a gratuitous contract, saving any stipulation to the contrary.*
>
> (2) *Only movable things can be the subject of such deposit.*

[89] A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 815

"Only corporeal movable things can form the subject-matter of deposit properly so called; incorporeal objects are not susceptible of custody and immovables, though corporeal things, may be preserved 'without the necessity of a deposit or delivery'.

"Deposit properly so called is a gratuitous contract, saving any stipulation to the contrary. It remains a gratuitous contract notwithstanding that the depositary stipulates for a reward; the reward, in fact, is not considered as the equivalent of that which is done for the depositor but as something which is given in return for a favour or even as the payment of the expenses necessary for the custody of the deposit. The contract, therefore, does not for this reason become one of letting of work and industry".[90]

In the case of ***Henry E. Zammit noe v. Anthony Camilleri noe*** (First Hall (Civil Court), 10 October 1962, Vol XLVI.ii.697) the court stated:

> *"Illi dwar dan l-istitut din il-Qorti tinklina ghat-teorija dottrinarja l-aktar akkreditata li ladarba d-depozitu volontarju huwa essenzjalment gratuwitu, meta jigi stipulat kumpens jew salarju a favur tad-depozitarju l-kuntratt "di quo" jitlef il-karatterirstika ta' depozitu pur u semplici, u jigi jippartecipa mill-kuntratt ta' lokazzjoni, u ma jibqghax depozitu hlief fis-sens improprju. Dan jimporta, del resto anki kif huwa ritenut skond id-Dritt Ruman li dan id-depozitarju salarjat, fis-sens li fuq intqal, jassumi responabbilta' aktar kbira minn dik li jkollu a karigu tieghu l-veru u proprju depozitarju. Din l-istess reponsabbilta' hija dik ta' diligenti "pater familias" aktar akkort minn dak ordinarju; u f'din il-materja la l-ligi u lanqas id-dottrina ma taghmel differenza bejn depozitarju u depozitarju ikun min ikun, kwindi anki jekk ikun il-Gvern. Din ir-responabbilta', fid-dawl ta' dak li fuq intqal dwar l-essenza tal-istitut, testendi ruhha ghall-fatti li setghu ghamlu l-kommessi u dipendenti tal-istess depozitarju".*

In the case of ***Eucaristico Zammit v. Eustrachio Petrococchino noe*** (Court of Appeal (Commercial), 25 February 1952, Vol. XXXVI.i.319) the Court of Appeal stated that gratuity is not of the essence in deposit and hence an agreement of payment does not transmute this contract to a *'locatio operis'.* Plaintiff deposited a large consignment of bananas with defendant for their cold storage. Service was given against payment. Bananas deteriorated and plaintiff alleged that this happened through defendant's fault. Court held that the contract was not merely a deposit against a reward.

Baudry-Lacantinerie: "The contract in virtue of which a trader or an industrialist, when exercising his profession, takes custody of certain things against payment is not a contract of deposit but of letting of work and industry; furniture and carpets are entrusted with a furniture dealer, fur coats are entrusted with a furrier."

In this case the service given was a commercial one against payment proportionate to the service. Thus, the contract was a 'locatio operis', not a deposit.

"The consequences are important. As mere depositary, the responsibility would have been regulated by law concerning a deposit against a reward. However, when the contract is a 'locatio operis' it involves a person who is offering his technical services.

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[90] V. Caruana Galizia, Notes on Civil Law, Year IV, p. 803.

"Defendant was surely offering his technical services since the bananas were kept in order to delay their ripening. Once defendant had assumed the task to delay the ripening of the bananas against a payment, he was implicitly assuring that this obligation would be performed according to standards of trade. He was, therefore, responsible for any shortcomings arising from lack of skill. The Court allowed plaintiff's demand. ...

"The Court of Appeal agreed that, taking into consideration the circumstances of the case and the nature of the transaction, the Court held that such contract could not be termed a deposit but a 'locatio operis'".[91]

The Court stated:

> Commentary
> *Meta d-depozitu jkun salarjat, imma r-rimunerazzjoni tkun ekwivalenti ghas-servizz li ghandu jigi prestat mid-depositarju, allura l-kuntratt, minn kuntratt unilaterali ta' depozitu, isir sinallagmatiku ta' lokazzjoni d'opera, fejn id-depozitarju jassumi li jaghmel certi servigi bi hlas. Liema distinzjoni hija importanti ghar-regolament tar-responabilita' tad-dipozitarju. Ghax mentri r-responsabilita ta' semplici depozitarju hija regolata mill-ligi bhala kaz ta' depozitu salarjat, fil-lokazzjoni d'opera l-lokatur ikun qieghed joffri l-kapacita' tieghu u jassumi impenn li jezegwixxi l-opra skond is-sengha, u huwa tenut ghal kull ma jsir mhux skond is-sengha; u jekk fl-ezekuzzjoni ta' l-impenn minnu assunt huwa jurimperizja, huwa jaqa' f'kolpa li tirrendih reponsnabbli ghad-danni li jidderivaw minn dinn l-imperizja.*
>
> *...*
>
> *Issa galadarba l-konvenut, bhala lokatur d'opera, assuma l-impenn tekniku, tigi l- konsegwenza l-ohra involuta f'dawn il-principji ...*
>
> 1. *Illi bil-fatt biss li l-konvenut assuma l-impenn li jirritarda l-maturazzjoni ta' dan il-frott b'kumpens, il-konvenut implicitament assikura li l-obbligu jigi ezegwit sewwa skond is- sengha;*
> 2. *Id-debitur f'dan il-kaz hu ghalhekk tenut ghal kull ma jsir mhux skond is-sengha. ...*
>
> *Illi t-tekniku adoperat mill-Qorti kkonkluda illi c-cirkustanzi tal-kaz jindikaw, bhala kawza probabbli tad-deterjorament li rrenda l-banana perdita totali, il-fatt li l-banana giet esposta ghal temperatura li ma kienitx adattat ghall-kondizzjoni li fiha kienet tinsab il-banana.*

In the case of ***Valhmor Borg noe v. Major Alfred Calascione noe*** (Commercial Court, 25 May 1961, Vol. XLV.iii.814) plaintiff sued defendant for payment of damages caused by

[91]P. Farrugia Randon, The Word of the Court, Vol XI: Pledge ~ Deposit, (Malta: Mid-Med Bank, 1993), p. 238-239

improper storage of a large quantity of pears in defendant's cold stores. Pears were to be stored at a temperature of 38F, however, defendant stored the pears at a higher temperature, which was not even kept constant, and failed to ensure proper air circulation. The consignment of fruit went bad. In this case defendant had entered a commercial transaction against payment of a proportional compensation. Once deposit cannot be of a commercial nature, the contract was deemed to be one of letting of work and industry. A contract in virtue of which a trader exercises his profession by taking custody of things is not a deposit but a letting of work and industry.

How deposit is perfected

Article 1893 states:

> **1893.** (1) *A deposit is only perfected by the delivery of the thing to the depositary.*
>
> (2) *The delivery is effected by the consent alone, if the thing is already in the hands of the depositary by any other title and it is agreed that it is to remain in his hands as a deposit.*

"The obligation of preserving and of returning the thing is impossible unless the thing be delivered to the person who is so bound. This contract is only perfected by the delivery of the thing to the depositary and is, therefore, a real contract. Delivery is affected *"brevi manu"*, or by consent alone, if the thing is already in the hands of the depositary by any other title and it is agreed that it is to remain in his hands as a deposit".[92]

What constitutes delivery?

In the case of ***Salvatore Desira pro et noe v. Brother Domenico Rosso*** (First Hall (Civil Court) 26 May 1953, Vol. XXXVII.ii.718) plaintiff's son attended De La Salle College of which defendant was the headmaster. The plaintiff's son, who went to school by bicycle, left it on school premises and one day, the bicycle could not be found. Plaintiff sued defendant for its return.

The Court had to assesses whether the defendant was a depositary or not. The Court held that for the contract of deposit to exist, there must exist the delivery of the thing to the depositary who must, in turn, accept the thing and bind himself to take care of the thing gratuitously and to return it in kind on a simple demand of the depositor. The deposit is perfected by the receipt of the thing deposited, and hence by delivery. Deposit is a real contract which cannot exist without delivery. In this case the facts did not point to an actual delivery of the thing, nor to the placing of the thing in the defendant's custody. Still less had the defendant bound himself to return it to some person. Defendant had merely permitted the child to leave the bicycle at the college. Plaintiff's son had left the bicycle where he deemed fit, from where he used to collect it after school without asking any permission.

There was no contract of deposit.

Proof of delivery

In the case of ***Albert Portelli v. Dr. Ricciardo Farrugia*** (Court of Appeal, 4 December 1998, Vol. LXXXII.II.1307) the court stated:

[92] V. Caruana Galizia, Notes on Civil Law, Year IV, p. 804.

> *"L-attur qieghed jallega li kien ghamel kunsinna li twassal ghall-obbligazzjoni ta' restituzzjoni u mix-xhieda tieghu tirrizulta l-allegazzjoni tieghu li l-kunsinna saret b'titolu ta' depozitu ...*
>
> *"Dawn il-konsiderazzjonijiet kollha flimkien iwasslu lill-Qorti biex tikkonkludi li l-attur ma sehhlux li juri li barra mill-kunsinna li kienet saret lill-konvenut biex jghaddi l-hwejjeg kunsinnati lil terza persuna, kienet sareg kunsinna ohra b'titolu ta' depozitu. Ghal din ir- raguni l-Qorti ma tistax tilqa' t-talbiet ta' l-atturi".*

Types of Deposit

A. Regular v. Irregular

With regard to when the depositary may make use of thing deposited, article 1894 states:

> **1894.** *A deposit of money or of other things which are consumed by use, is regulated by the laws relating to loan for consumption or mutuum, whenever power has been granted to the depositary to make use of the thing deposited on the sole condition of returning as much of the same kind and quality.*

"If the deposit is regular, the expository cannot make use of the thing deposited; but nothing prevents the depositor from granting such a faculty, in which case the deposit is termed irregular since, of its nature, the contract of deposit should be made in the sole interest of the depositor. When such a faculty is granted, the contract becomes very similar to loan for consumption or "mutuum" but it retains its nature in view of the depositary's obligation of preserving the thing, which obligation is in the interest of the depositor. However, an irregular deposit of money or other things which are consumed by use is regulated by the laws relating to loan for consumption".[93]

B. Voluntary v. Necessary

With regard to voluntary or necessary deposit, article 1895 states:

> **1895.** *Deposit is voluntary or necessary.*

With regard to the nature of a voluntary deposit, article 1896 states:

> **1896.** *A voluntary deposit takes place by the mutual consent of the person who makes the deposit and of the person who receives the thing on deposit.*

With regard to the nature of necessary deposit, article 1920 states:

> **1920.** *A necessary deposit is that which a person is compelled to make owing to some calamity, as, for instance, in case of a fire, destruction, pillage, shipwreck or other unforeseen emergency.*

A necessary deposit take place when a person is forced to entrust the custody of his property to the first person whom he happens to come across. The distinction between voluntary and necessary deposit is mostly nominal since the same rules apply.

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[93] V. Caruana Galizia, Notes on Civil Law, Year IV, p. 804.

Obligations of the Depositary

Deposit is, as a rule, a unilateral contract whereby only the depositary assumes obligations. These are:

(a) The preservation of the thing deposited.
(b) The depositary cannot make use of the thing deposited without the express or, at least, implied consent of the depositor.
(c) The depositary shall not attempt to discover what are the things which have been deposited with him.
(d) The depositary must restore the thing deposited.

Diligence to be used by depositary

Article 1899 states:

> **1899.** *A depositary must, for the custody of the thing deposited, use the same diligence which he uses for the custody of his own things.*

The preservation of the thing deposited is the very purpose of the contract. As to the degree of diligence required, section 1899 departs from the general rule that a person is only bound to use the same diligence as a "bonus paterfamilias" in the performance of his obligations and provides that a depositary must, for the custody of the thing deposited, use the same diligence which he uses for the custody of his own things (*"diligentia quad in suis rebus"*).[94]

Cases where a higher degree of diligence is required

Article 1900 states:

> **1900.** (1) *The provisions of the last preceding article shall be applied more rigorously -*
>
> (a) *if the depositary has himself offered to receive the deposit;*
> (b) *if he has stipulated for a reward for the custody of the deposit;*
> (c) *if the deposit has been made solely in the interest of the depositary;*
> (d) *if it has been expressly agreed that the depositary shall be answerable for every kind of negligence.*
>
> (2) *In each of the cases referred to in paragraphs (a), (b) and (c) of sub-article (1) of this article, the provisions of sub-article (1) of article 1132 shall apply; and in the case referred to in paragraph (d) of the same sub-article, the depositary shall be liable even for the slightest negligence.*

Degree of diligence required in the performance of an obligation

Article 1132(1) states:

> **1132.** (1) *Saving any other provision of this Code relating to deposits, the degree of diligence to be exercised in the*

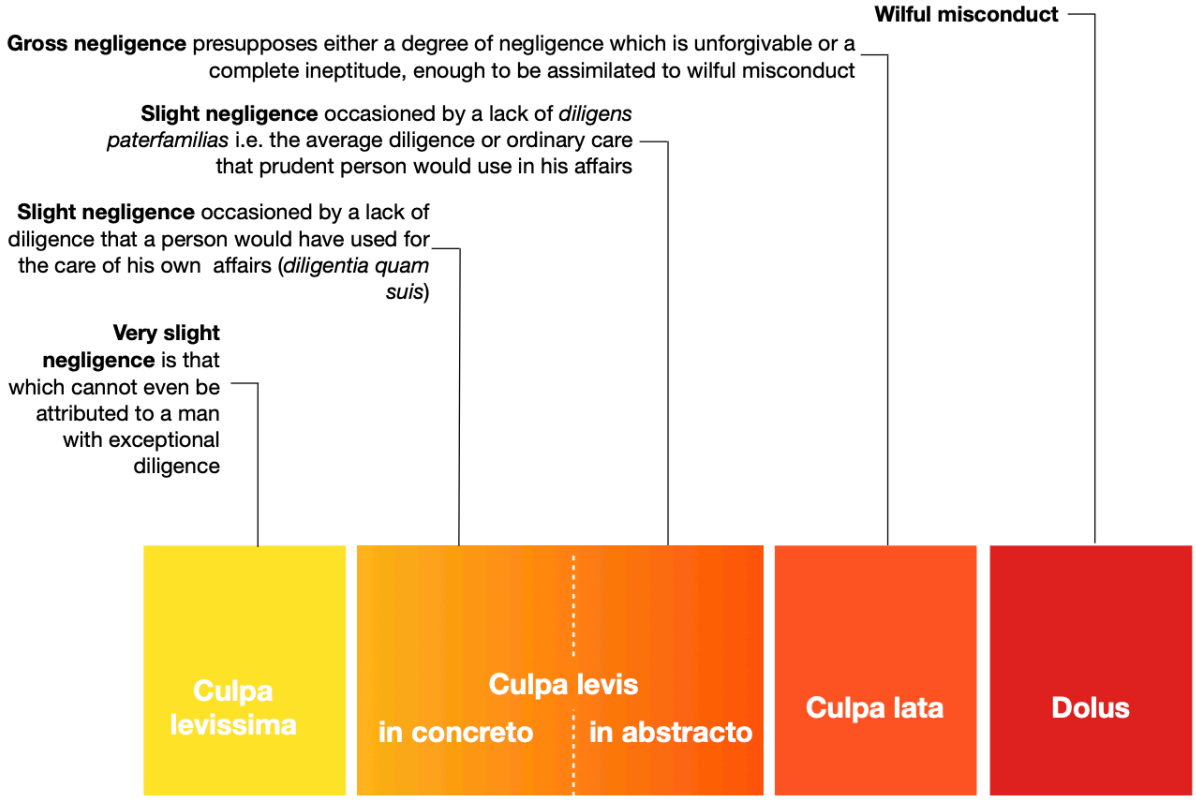
[94] V. Caruana Galizia, Notes on Civil Law, Year IV, p. 805.

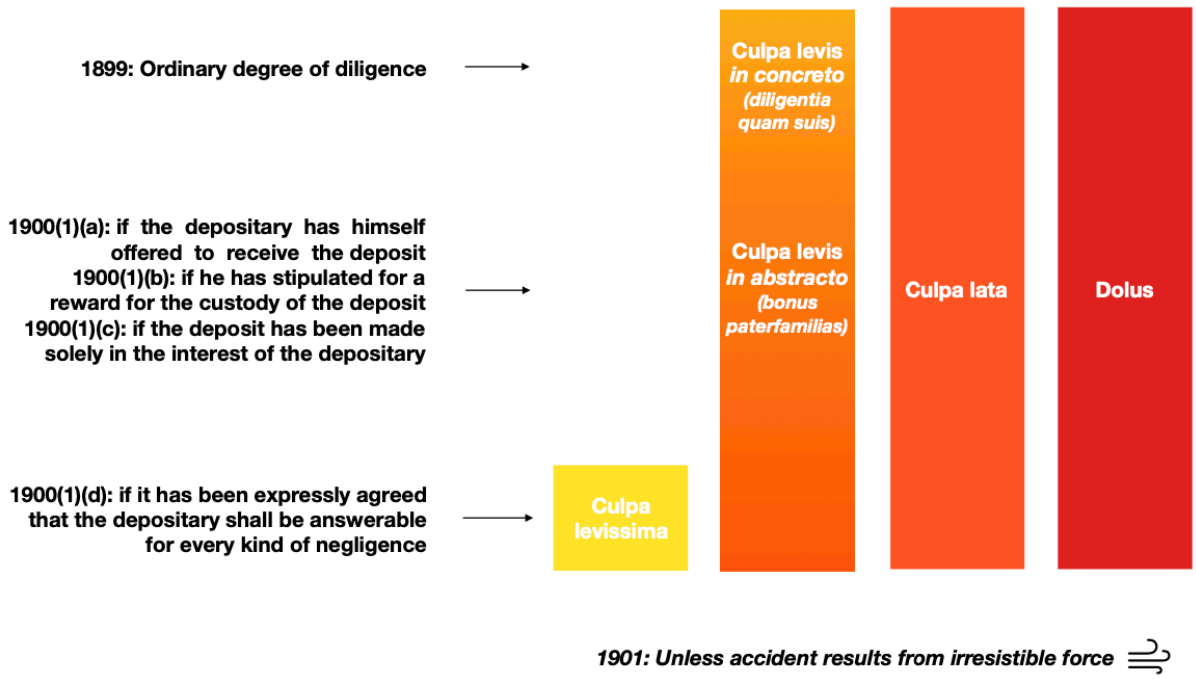
> *performance of an obligation, whether the object thereof is the benefit of only one of the parties, or of both, is, in all cases, that of a bonus paterfamilias as provided in article 1032.*

Depositary not answerable for casual misfortunes or loss

Article 1901 states:

> **1901.** *A depositary is in no case answerable for accidents resulting from irresistible force, unless he has been put in default for delay in restoring the thing deposited; nor shall he be answerable, in the latter case, if the thing would have equally perished in the possession of the depositor.*





"It is to be noted, however, that if, for the custody of his own things, the depositary uses a very high degree of diligence, he is bound to do the same for the custody of the deposit. This provision, in fact, is meant to increase and not to diminish liability, or as the law itself says, to apply more rigorously the provisions of the preceding section.

"It has been expressly agreed that the depositary shall be answerable for every kind of negligence, he shall be liable even for the slightest kind of negligence. However, a depositary from whom that thing has been taken away by irresistible force and who has received a sum of money or other thing in its place, must restore what he has received".[95]

Restoration of thing deposited, or of thing received in its place

Article 1905 states:

> **1905.** *A depositary from whom the thing deposited has been taken away by irresistible force, and who has received a sum of money or some other thing in its place, must restore what he has received.*

"As in the free mandate, in the free deposit the liability for fault is assessed with less rigour".[96]

Fiduciary obligations

The introduction of fiduciary obligations was mainly intended to cover financial services operations; however, the effect is more diffused.

"Fiduciary obligations impose a higher test or degree of good faith and assume honesty and loyalty so that conflicts of interest are totally eliminated".[97]

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[95]V. Caruana Galizia, Notes on Civil Law, Year IV, p. 805.
[96]A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 815
[97]Max Ganado (ed.), Introduction to Maltese Financial Services Law, (Valletta: Allied Publications, 2009), p. 61

"[The notion of fiduciary obligations] is very wide in scope and seeks to address the trust placed in one person by another and the reliance one generates through trust. This in turn creates dependence and a vulnerability which is what cannot be allowed to be abused for any reason, let alone for personal gain".[98]

"Fiduciary obligations are the type of obligations which impose on a person: duties of care, honesty, accountability, and loyalty in the handling of the property of another person. These obligations bind persons who are in control, directly or indirectly, through ownership or possession, of property belonging to another person or dedicated for the benefit of persons other than the fiduciary.

"... one set of rules which applies at the basis of (and runs through) all fiduciary civil law contracts (like mandate or deposit) ...".[99]

Applicability of the provisions of this Title

Article 1124J states:

> **1124J.** *In the application of the provisions of this Title the following principles shall apply:*
>
> (a) *when a fiduciary relationship is governed by particular rules, whether because of the source and type of the obligations or because of any special law, such particular rules shall apply to the context and these provisions shall apply as necessary to support the interpretation of the said rules;*
>
> (b) *it shall be presumed that these provisions operate consistently with particular rules applicable to any particular fiduciary relationship or obligation but, in case of inconsistency, the particular rules shall prevail over the provisions of this Title;*

Article 1124A states:

> **1124A.** (1) *Fiduciary obligations arise in virtue of law, contract, quasi-contract, unilateral declarations including wills, trusts, assumption of office or behaviour whenever a person (the "fiduciary") -*
>
> (a) *owes a duty to protect the interests of another person and it shall be presumed that such an obligation where a fiduciary acts in or occupies a position of trust is in favour of another person; or*
>
> (b) *has registered in his name, holds, exercises control or powers of disposition over property for the benefit of other persons*
>
> ...

[98]Max Ganado, "Fiduciary Obligations under Maltese Law", Trusts e attivita' fiduciarie, (Wolters Kluwer Italia: 2013), p. 356

[99]Max Ganado, "Fiduciary Obligations under Maltese Law", Trusts e attivita' fiduciarie, (Wolters Kluwer Italia: 2013), p. 354

> (4) *Without prejudice to the duty of a fiduciary to carry out his obligations with utmost good faith and to act honestly in all cases, a fiduciary is bound, subject to express provision of law or express terms of any instrument in writing excluding or modifying such duty, as the case may be –*
>
> (a) *to exercise the diligence of a bonus pater familias in the performance of his fiduciary obligations;*

Liability in deposit

In the case of ***Valhmor Borg noe v. Major Alfred Calascione noe*** (Commercial Court, 25 May 1961, Vol. XLV.iii.814) plaintiff sued defendant for payment of damages caused by improper storage of a large quantity of pears in defendant's cold stores. Pears were to be stored at a temperature of 38F, however, defendant stored the pears at a higher temperature, which was not even kept constant, and failed to ensure proper air circulation. The consignment of fruit went bad.

As a general rule a depositary is bound to exercise a lesser degree of diligence than that applicable to normal cases i.e., the *culpa levis in concreto*. However, there exist circumstances which increase the depositary's degree of diligence, for instance where the thing would be deposited against payment. In such cases, the normal degree of diligence is applied, namely that of a bonus paterfamilias. In this case the distinction between deposit or locatio operis was of little practical importance since the degree of diligence which should have been used by the defendant was the same in either case. A mandatary who acts against payment, and a depositary who is compensated for his service are responsible for culpa levis in abstracto i.e., that deriving from lack of prudence, diligence, or attention of a bonus paterfamilias. This was the degree of diligence which should have been exercised by the defendant in the transaction forming the contract of letting of work and industry i.e., in that commercial transaction for which he was adequately and proportionately compensated.

Liability in case of a gratuitous deposit

In the case of ***Maria Camilleri v. Duminku Attard*** (First Hall (Civil Court), 2 April 1992, Vol. LXXVI.iii.578) plaintiff left some items with defendant and tasked him with delivering them to his daughter. Defendant misplaced items, which went missing. The court stated the following:

> *"Il-konvenut jammetti li tilef l-oggetti li accetta in depositu. Jallega li setghu nsterqulu mill-hanut imma dwar dan ma gieb l-ebda prova. Zgur jirrizulta mill-fatti ppruvati illi l-konvenut ma hax il-kura debita ta' l-oggetti fdati f'idejh; ma hax hsieb li jpoggih f'post zgur w inaccessibbli ghal min jidhol fil-hanut tieghu appena gie fdat f'idejh.*
>
> *...*
>
> *"Anke jekk il-konvenut ma kienx konxju sewwa tal-valur ta' l-oggetti fil-borza, hu kellu bizzejjed pre-avviz biex messu jirrealizza li ma kellux ihalliha fil-qabda tan-nies fejn setghet facilment tintilef, tittiehed jew anke tinsteraq. Kieku kienu hwejgu, hu prezunt li l- konvenut ma kienx ser jagixxi b'tant leggerezza. Il-fatt li l-konvenut ried biss jaghmel pjacir lill-attrici huwa rrilevanti ghall-kawza, anke tenut kont ta' l-element tal-gratuwita tal-kuntratt tad-depositu volontarju kif fuq indikat. La accetta li jaghmel dan il-pjacir, il-ligi tghabbi lill-konvenut bil-piz*

> *li kellu jagixxi b'mod responsabbli daqs li kieku kien qed jindokra hwejgu".*

Liability in case where the depositary offers himself to receive the deposit

In the case of ***Peter Said v. Joseph Gauci*** (First Hall (Civil Court), 28 April 1987, Vol. LXXI.iii.663) defendant had offered to keep certain items forming the object of a court case. When the plaintiff demanded the items back, he found that their condition had deteriorated significantly. The Court ordered restitution of objects which had not deteriorated through defendant's fault, but ordered him to compensate the plaintiff for the items which had been worn out due to his negligent custody, stating:

> *"... [I]l-konvenut qua depozitarju li offra ruhu huwa nnifsu biex izomm l-oggetti fil-mori tal- kawza, kellu l-obbligu ta' bonus pater familias li jiehu kura ta' l-oggetti b'diligenza oghla, imma mhux talment li jwiegeb ukoll ghal kull negligenza tkun kemm tkun zghira, kif ikkontemplat l-art. 2002(1)(a). Dana peress illi f'dan il-kaz ma jirrizultax li kien gie miftiehem espressament li l-konvenut, bhala depozitarju, kellu jwiegeb ghal kull negligenza; ...*
>
> *L-konvenut huwa responsabbli ghad-deterjorament ta' whud mill-affarijiet in kwistjoni, pero mhux ghall-hwejjeg kollha".*

Liability in case of remunerated deposit [1]

In the case of ***Henry E. Zammit noe v. Anthony Camilleri noe*** (First Hall (Civil Court), 10 October 1962, Vol XLVI.ii.697) the court stated:

> *"Id-ditta attrici akkwista minghand ditta ohra partita Whisky li kienet depozitat "in bond" ghand il- kovenut nomine.*
>
> *"Illi fil-kaz in konkret ma jirrizultax li l-merkanzija ta' proprjeta' tal-instanti, li kienet depozitata b'kumpens ghand il-konvenut nomine, ghadha tezisti in depozitu, jew li nsterqet b'xi rottura jew sgassar tal-ambjent fejn kienet merfuha u kostodita, jew ta' xi rottura ta' ostakolu ordinarju, bhal ma huma bibien u twieqi inservjenti ghall-istore fejn kienet "in deposit". ... Imma huwa fatt li spariet minn dak il-mahzen, li qatt ma kien jittiehed "stock taking" tieghu. ... Jinghad, inoltre, il-fatt li kull impjegat tad-Dwana fid-departiment in kwistjoni kellu l-facilita' li huwa jiehu c-cwievet tal-istess merkanzija tal-istores minghajr ebda "entry" f'xi kotba tal-ufficcju, mhux konformi mad-diligenza rikjesta mill-konvenut nomine u dipendenti tieghu, li kien jigi mhallas ghas-servizz tieghu ta' depozitarju.*
>
> *"Taqta' u tiddeciedi billi tiddikjara lill-konvenut nomine responsabbli tan-nuqqas lamentat; tillikwida d-danni ghas-somma ta' £90.10".*

Liability in case of remunerated deposit [2]

In the case of ***C & B Autoparts Limited v. Emanuel Fenech*** (Civil Court (First Hall), 9 January 2004, Cit. 1031/1999) the owner of a car was claiming damages after it was destroyed

by fires while it was deposited at the defendant's panel beating garage. Burglars had broken into the garage and set fire to the vehicles that were deposit therein. The Court stated:

> *"Ir-relazzjonijiet bejn il-partijiet kienu dik ta' kiri ta' xogħol u industrja safejn il-ftehim kien illi l- konvenut jagħmel xogħol fuq il-vettura tas-soċjetà attriċi, u dik ta' depożitu bi ħlas safejn il-ftehim kien illi l-konvenut iżomm il-vettura għandu sakemm jitlestew ix-xogħlijiet. Ma nġiebet ebda xhieda illi l-konvenut żamm il-vettura għandu aktar milli kien meħtieġ u li għalhekk kien in mora.*
>
> *"Fin-nota ta' osservazzjonijiet tagħha s-soċjetà attriċi qalet illi l-konvenut ma mexiex bil-għaqal li trid il-liġi għax il-vettura ħallieha f'garage li kien ikun miftuħ u mhux indukrat għal sigħat sħaħ. Dan hu minnu, iżda ma hux relevanti għall-għanijiet tal-kawża tallum. Il-ħsara ma saritx għax xi ħadd daħal fil-garage li tħalla miftuħ; il-ħsara saret meta l-garage kien magħluq u msakkar, tant li min għamel il-ħsara kellu jisgassa l-bieb. Ma kienx minħabba xi nuqqas tal-konvenut li jieħu l-prekawzjonijiet meħtieġa iżda minħabba l-għemil doluż ta' terzi li saret il-ħsara. Dħul bi sgass dejjem jitqies forza maġġuri li għaliha d-depożitarju ma jweġibx. Fil-fehma tal- qorti, għalhekk, ladarba ma ntweriex li kien hemm xi nuqqas tal-konvenut, għax il-ħsara ġrat minħabba forza maġġuri, it-talbiet tas-soċjetà attriċi ma jistgħux jintlaqgħu".*

Liability in case of remunerated deposit [3]

In the case of ***John Mary Sammut v. Emanuel Fenech*** (Civil Court (First Hall), 29 October 2003, Cit. Nr. 1647/1999/1) the owner of a car (plaintiff) had left his vehicle at a panel beater (defendant). The panel beater finished the job and was duly paid by the owner, but they agreed that the panel beater would be delivering the same car to a sprayer. The car was destroyed by fires while it was still held by the panel beater. Car owner claimed that had the panel beater readily passed on the vehicle to the sprayer, the incident would have been avoided. The Court stated:

> *"Is-sid ta' garage fejn isiru tiswijiet tal-karozzi, apparti mill-kuntratt ta' kiri ta' xoghol ghandu jitqies ukoll bhala depozitarju bl-obbligu li jikkostodixxi u jrodd il-karozza fl-istat li kienet tinsab - salv it-tiswijiet li jkun gie mitlub jaghmel fiha. Dan mhux depozitu gratwitu, u ghalhekk igib mieghu l-konsegwenzi previsti mill-ligi fl-artikolu 1900 tal Kodici Civili.*
>
> *"Id-depozitarju pero' mhux responsabbli ghall-accidenti li jigru b'forza magguri. Is-serq ta' oggett depozitat jammonta ghal kaz fortuwitu meta d-depozitarju jkun ha l-prekawzjonijiet xierqa biex is-serq ma jsirx.*
>
> *"Fil-kaz in ezami minflok serq kien hemm nar li gie kagjonat dolozament u ghalhekk jista' jigi ekwiparat mas-serq. Fil-fehma tal-Qorti li gara kien imprevedibbili (il-konvenut ma kienx qed jistenna li ser jaharqulu l-garage) u inevitabbili (il-konvenut ha l-prekawzzjonijiet kollha rikjesti fic- cirkostanzi). Ma jirrizulta li hu*

> *naqas minn xi dover li kien impost fuqu. Hu kien halla l-karozzi ggaraxxjati u ma hallihomx barra. Inoltre ma jirrizultax li kien hemm xi ftehim li l-konvenut kien intrabat li f'xi gurnata partikolari l-vettura ta' l-attur kellha tittiehed ghand l-isprayer. Skond il-konvenut hu kien qed jistenna biex jiehu l-karozza ghand ta' hdejh*
>
> *...*
>
> *"Ghalhekk il-Qorti tikkonkludi li l-konvenut irnexxilu jipprova li l-hruq tal-vettura depozitata ghandu jammonta ghal kaz fortuiwtu u hu ha l-prekawzjonijiet xierqa biex l-incident ma jsirx".*

Liability in case of remunerated deposit [4]

In the case of ***Emanuel Cassar et v. Mario Aquilina*** (Civil Court (First Hall), 14 October 2005, Cit. Nr. 1932/1998/1) plaintiff delivered his car to a mechanic (defendant) for the purpose of carrying out repairs. Mechanic left plaintiff's car parked in the street, and while it was still under his custody, the car caught fire due to an arson attack. The Court stated:

> *"Issa, jirrizulta li l-konvenut ma dahhalx il-van ta' l-atturi fil-garaxx tieghu ghax qal li ma kellux post. Fil-fatt meta l-Pulizija acedew fuq il-post meta l-van imsemmi nhakem min-nar, sabu l-van f'ghalqa zdingata faccata tal-garaxx tal-konvenut. Meta l-konvenut beda jahdem fuq il-van, kien talab lill-attur jixtrilu xi parts. Dan hekk ghamel u kkonsenjahom lill-konvenut. Nonostante dan, il-konvenut baqa' ma lestilux ix-xoghol, u xi tliet gimghat wara li kien xtara l- parts gara l-incident in kwistjoni.*
> *...*
>
> *"Fil-fehma tal-Qorti, il-konvenut naqas li jimxi skond dan il-kriterju meta accetta li jzomm il- van fil-kustodja tieghu fi zmien li l-garaxx tieghu kien mimli. Ghalkemm l-attur seta' ma oggezzjonax ghall-bidu li l-van jibqa' barra, jidher car li wera l-preokkupazzjoni tieghu lill- konvenut ghall-fatt li dan baqa' jhallieh barra. Naqas imbaghad il-konvenut, meta, ghalkemm beda jahdem fuq il-van, ma kkonkludiex ix-xoghol tempestivament nonostante li l-attur kien ikkonsenjalu l-parts kollha li kellu bzonn biex ilesti x-xoghol. Lanqas jista' l-konvenut jeccepixxi l-forza magguri meta kien jaf li, almenu f'okkazjoni ohra kif jammetti hu stess, kienet saritlu vendikazzjoni fuq karrozza ohra li kienet ghandu ghat-tiswija u li kien halla barra. Konsegwentement il-konvenut ghandu jitqies responsabbli ghad-danni li garrbu l-atturi".*

Limitation of liability clauses does not exclude *dolus* or *culpa*

In the case of ***Joseph Darmanin noe v. Joseph Schembri*** (Court of Appeal (Commercial), 20 February 1953, Vol. XXXVII.i.440) plaintiff had deposited machinery with defendant during the war. Defendant signed a declaration stating: *"I declare to conserve at Villa Rosa the machinery and furniture of Mr. Darmanin without any responsibility and without payment, until the end of the war".*

During the war, some of the machinery was damaged due to the bombardments, other machines were delivered by defendant to third parties. Plaintiff sued for the return of the machinery transferred to the third parties. Court held that limitation of liability clause did not exclude 'dolus' or 'culpa lata' since this would mean that a depositary could relieve himself of his responsibility in case of fraudulent acts or serious negligence. Since deposit was gratuitous the provisions of section 1899 applied. Court stated that the majority of writers agree that, in deposit, the law departs from the normal principle advocating diligence of a bonus paterfamilias. In this case the diligence required is that which the depositary uses for the custody of his own things. Writers also agree that the depositary is responsible for 'dolus' or 'culpa grave'.

In terms of section 1901 the defendant was not responsible for the machinery destroyed by the bombings, however, with respect to other items, the defendant was found to have merely abandoned them in Villa Rosa. This was equivalent to gross negligence since he had neglected the more basic duties of custody.

Liability in case of *dolus* or *culpa*

In the case of ***Michael Micallef et v. George Sammut et*** (Court of Appeal, 7 July 1998, Vol. LXXXII.ii.210) an employee of the plaintiff association was tasked with depositing funds in a safe deposit box in a Bank. One day, the safe deposit box was found empty, and it resulted that the employee had left the key to the safe deposit box in his car, which he had left unlocked. The Court stated:

> *"Fil-fehma tal-Qorti, Frank Ciappara mexa bi traskuragni u b'nuqqas ta' responabbilita' enormi, u jista jkun mexa b'dolo ukoll. Hija haga li bil-kemm titwemmen li min ghandu f'idejh cavetta ta' safe ihalli din ic-cavetta f'karozza miftuha bil-lejl. Dan ma ghamlux ghax nesa jew bi svista, izda deliberatament. ... Wara li qieset dan kollu, il-Qorti hija moralment konvinta li kien Frank Ciappara, li jew wahdu jew ma' xi komplici, ha l-borza li ma nstabitx. Ukoll jekk is-serq tal-borza sar minn terzi li setghu hadu c-cavetta mill-karozza, Ciappara jahti ghal culpa lata ghax ma kien imissu qatt halla c-cavetta f'karozza miftuha. Fl-ahjar ipotesi, Ciappara ghandu jwiegeb ghal culpa lata, fl-aghar ipotesi ghandu jwiegeb ghal* dolus*.*
>
> *"[Il-Qorti tilqa'] l-istess talbiet safejn maghmulha kontra Frank Ciappara billi tikkundanna lill-istess Frank Ciappar jrodd Lm1,205 lill-assocjazzjonni attrici".*

Degree of diligence in shore handling [1]

In the case of ***Carmel Bugeja noe v. Godwin Abela noe*** (Court of Appeal (Commercial), 1 February 1988, Vol. LXXII.ii.391) plaintiffs were the owners of the ship, the charterer, and the consignee of the shipment. Items were mistakenly disembarked in Malta. The shore handling company (defendant) deposited, temporarily and against payment, the goods in a "Hazard Room" until they would be boarded onto another ship. The room was operated by the defendant shore handling company. Some items went missing, others were damaged. The Court stated:

> *Il-Kodici Civili jghid li "Id-depozitu in generali huwa kuntratt li bih wiehed jircievi l-haga ta' haddiehor bl-oggligu li jikkustodiha u li jroddha lura in-natura". Minn dan johorgu cari z-zewg obbligi*

tad-depozitarju u cjoe wiehed tal-kustodja tal-haga u l-iehor tarradd. Ghal dak li jirrigwarda l-obbligu tal-kustodja l-artikolu 1988 jiddisponi li d-depozitarju ghandu jiehu hsieb il-haga ddepozitata ghandu daqs kemm jiehu hsieb fil-kustodja ta' hwejgu. Fil-kaz kontemplat fis-subinciz (1)(b) ta' l-artikolu 1900 u cjoe "meta jkun ftiehem li ghandu jkun hemm hlas ghall-kustodja tad-depozitu dak li hemm dispost fl-artikolu 2001 ghandu jigi applikat b'mod aktar sever". Issa skond is-subinciz 2 ta' l-artikolu 1900 pero fil-kaz hemm ikkontemplat jghoddu wkoll id-disposizzjonijiet ta' l-artikolu 1132(1). Skond dan l-artikolu fl-esekuzzjoni ta' kull obbligazzjoni, id-diligenza ghandha tkun dik ta' missier tajjeb tal-familja. Kwindi fil-kaz in ezami fejn id-depozitu qed isir bi hlas il-konvenut nomine kellu l-obbligu li jiehu hsieb il-merkanzija "de quo" daqs kemm jiehu hsieb hwejgu u dana bhala "bonus pater familias" u di piu b'mod aktar sever".

Id-depozitarju mbaghad ma ghandu jweigeb qatt ghall-accidenti li jigru b'forza magguri jekk ma jkunx gie mqieghed in mora gharradd tal-haga jew inkella l-haga kienet tispicca xorta wahda kieku kienet f'idejn id-depozitant stess. ... jinkombi fuq id-depozitarju li jipprova l-merkanzija "de quo" ttiehdet mill-pussess tieghu b'accident minn forza magguri jekk huwa jrid jezimi ruhu mir-responsabbilita.

... [M]in ha l-merkanzija "de quo" x'aktarx li dahal fil Hazard Room permezz ta' cavetta minn dawk li kienu jigru fl-idejn. Wiehed jinnota f'dan il-kaz li kien hemm wisq cwievet fl- idejn u dan bi ftit jew xejn kontroll. Jirrizulta wkoll li kien hemm wisq nies li kellhom access facli ghac-cwievet tal-Hazard Room u n-nuqqas ta' kontroll fuq l-istess jidher li kien konsiderevoli. Dan jammonta ghal traskuragni u dana f'post fejn ikun hemm mahzuna merkanzija ta' valur konsiderevoli.
...

[On allegation of force majeure] ... skond il-gurispurdenza taghna "fl-ahhar mill-ahhar, is- serq ta' oggetti depozitat jammonta ghall-kaz fortwitu, meta d-depozitarju jkun ha l-prekawzjonijiet xierqa biex is-serq ma jsirx; u bahal tali s-serq ma jidholx fir- reponsabbilta' tad-depozitarju" (ara Elia Borg Bonaci v. Robert Biasini et noe deciza minn din il-Qorti fit-22 ta' Mejju, 1950). Fil-fatt pero fil-fehma ta' din il-Qorti l-konvenut ma rnexxilux jipprova kif kellu jipprova li hu applika d-diligenza rikjesta mil-ligi fil-kaz in ezami.
...

[M]ill-provi prodotti jidher li kien hemm laxkezza kbira fis-sistema tas-sigurta' fil-Hazard Room. Kien hemm ukoll di piu certa "noncuranza" wkoll da parti mis-socjeta konvenuta anki wara, firrigward ta' dak li gara. In fatti minn imkien ma jidher li sar xi sforz da parti tas-socjeta konvenuta biex din tirriklama dik il-parti talmerkazija li kienet giet elevata mill-puluzija.

Degree of diligence in shore handling [2]

In the case of ***Victor Azzopardi noe v. Godwin Abela noe*** (Court of Appeal (Commercial), 7 May 1984, Vol. LXVIII.ii.262) plaintiff was a car importer. While the car was being handled by defendant company and was, therefore, under its possession and custody, the keys were locked inside the car by the workers of the cargo handling company. Plaintiffs had no alternative but to attempt to force the car open by removing the windscreen, but during this operation, the glass broke. Plaintiff sued defendant for damages. Defendant was made to pay damages, with the Court stating:

> *"Skond xhud prodott mill-konvenut .... il-karozza ma kinitx maghluqa u huwa ta' istruzzjonijiet li ma jippruvawx isakkruha b'xi mod. Izda in segwitu ... il-karozza nstabet maghluqa bic-cwievet gewwa l-ignition hole ... Il-qorti hi tal-femha li l-konvenut appellant nomine kien responsabbli ghal dan il-fatt. Bhala depozitarju tal-karozza ... huwa kien obbligat juza d- diligenza ta' missier tajjeb tal-familja.*
>
> *...*
>
> *Il-Qorti ghalhekk tirritjeni li ma kienx bizzejjed li mpjegat tal-konvenut appellant nomine jaghti struzzjonijiet biex l-impjegati ma jippruvawx isakkru l-karozza b'xi mod, kif qed jigi pretiz fil-petizzjoni ta' l-appell' imma kien jehtieg li l-konvenut appellant nomine jiehu hsieb li l- karozza ma tissakkarx minn hadd, ikun min ikun, u aktar u aktar ma tissakkarx bic-cwievet gewwa billi, okkorrendo, jiehu hsieb li jalloka n-nies biex jissorveljawha. Il-konvenut appellant nomine naqas f'dan id-dover tieghu mpost lilu mil-ligi u ghalhekk kien negligenti u kwindi responsabbli ghall-konsegwenzi tac-cirkostanza li l-karozza inghalqet bic-cwievet gewwa.*
>
> *Il-Qorti hija sodisfatta ukoll li l-konvenut appellant nomine accetta li l-karozza tinfetah billi jinqala l-windscreen taghha u ghalhekk accetta ukoll li jkun responsabbli ghal hsara li setghet tigri".*

Degree of diligence: statutory exonerations

In the case of ***Gasan Insurance Agency Limited et v. The Cargo Handling Company Limited*** (Court of Appeal, 19 June 2001, Cit. Nr. 1836/96) plaintiff company imported 109 Ford cars from Southampton. The cars were transported to the port of Valletta by sea and were eventually handled by the defendant company. When plaintiff company collected the cars, it found several faults and defects in the cars. Plaintiff sued defendant for damages.

Defendant pleaded a statutory exoneration contained in the Ports Regulations:

> **Authority for Transport in Malta Act [Cap. 499]**
> *"warehouse" means any shed, building, place, wagon, ship or vehicle when used by the Authority, or a contractor for the purpose of warehousing or depositing goods for the purposes of this Act;*
> **Ports Regulations [Subsidiary Legislation 499.01]**
> Goods warehoused in the open.

> **95.** *At his discretion, the Authority may order that ... the goods specified in the Twelfth Schedule [among which vehicles] shall not be warehoused in buildings, but will be stored or deposited in the open, and always at the sole risk of the owner.*

The Court stated:

> *Ghandu jinghad, pero', li l-gurisprudenza l-aktar akkreditata u recenti tirritjeni li l-fatt li l- merkanzija tinhazen "in the open and always at the sole risk of the owner" ma jezimix lis-socjeta' konvenuta mill-atti kriminali tal-impjegati taghha jew ta terzi bhallikieku din flok fil-'kustodja' taghha kienet abbandunata f'xi ghalqa.*
>
> *[Court of Appeal]:*
> *Il-fatt li erbgha u tletin (34) karozza nstabu bit-tbajja tal-hmieg tal-ghasafar juri b'mod car li s- socjeta' konvenuta ma haditx hsieb il-vetturi taht il-kustodja taghha qishom kienu hwejjigha u ghalhekk it-tqharriq li rrizulta fil-vetturi ghandha tirrispondi ghalih hi ghaliex ma ppruvatx li nghatat xi ordni mid-Direttur tal-Portijiet li l-vetturi kellhom jinhaznu fl-apert.*
>
> *Jibqa x'jigi konsidrat aggravju iehor imressaq mis-socjeta' appellanti illi huma kienu ssodisfaw il- grad ta' diligenza impost fuqhom bhala depozitarji, u konsegwentement, ma kellhomx ibatu ghall-hsarat u nuqqasijiet. ... Pero' hi ssostni li ma kellha l-ebda kontroll fuq il-kawzi ta' hsara allegatament sofferta mis-socjeta' importatrici minhabba il-bird droppings. Xejn ma seta' jsir da parti taghha biex jigu kontrollati l-hamiem fl-area tal-port, li hija cirkondata minn silos tal- qamh li jattira bosta hamiem. Gustament pero' is-socjeta' importatrici ssostni li hi ma kellha l-ebda dritt jew kontroll fuq fejn jigu mahzuna l-vetturi gewwa l-port meta dawn jigu skarikati minn fuq il-vapur.*
>
> *Din kienet decizjoni li kienet tiehu s-socjeta' konvenuta li kellha l-obbligu li taghmel dak kollu li setghet taghmel u li kien ragonevolment mistenni li taghmel biex tassigura li l-vetturi ma jigrilhomx hsara kawza ta' event li kien, skond l-istess socjeta' konvenuta, facilment prevedibbli. Certament karozzi godda fjamanti, kif kienu dawk in konsenja, kellhom jigu protetti bl-istess mod kif bonus pater familias kien jipprotegi vettura gdida minnu akkwistata. Dan b'mod partikolari f'sitwazzjoni fejn ikun hemm possibilita' kbira illi l-hsara prospettata tavvera ruhha.*

In the case of ***Formosa & Camilleri Ltd v. Seamalta Company Limited et*** (First Hall (Civil Court), 29 November 2001, Cit. 2268/97) plaintiff insurance company, subrogated into the rights of a car importer, sued defendant company due to damages (dents, stolen steering wheels and hubcaps) that some vehicles sustained while under its custody. Defendant pleaded a statutory exoneration contained in the Ports Regulations. The Court stated:

> *[F]is-sentenza "Avukat Joseph Zammit Mckeon nomine vs David Jones nomine et" (K.(N.A) 16 ta' Ottubru 1996 –*

LXXX.ii.1319) inghad li bil-kliem ghar-riskju biss tas-sid fl-istess regolament, ifissru li l-istess kuntrattur u d-Direttur tal-Port huma mehlusa minn kull responsabilita' ta danni jew hsara fil-kaz biss ta' danni rizultanti minn force majeur, li ma huwa xejn hlief applikazzjoni normali tal-principju tal-kuntratt ta' depozitu, kif ukoll tal-principju legali li r-riskju, fis-sens legali, jibqa' mas-sid.

Illi izda l-istess sentenza marret oltre minn dan u sostniet illi:-
"Wiehed pero' irid imur oltre biex l-istess regolamenti jaghmlu sens guridiku. Huwa ovvju li meta merkanzija tigi depozitata fil-berah u mhux fil-mibni hija suggetta ghal possibilita' ta' hsara minn elementi naturali tax-xita, xemx, u r-rih aktar min-normali";

"Huwa ovvju ukoll li l-Ministru permezz ta' dawn irregolamenti irid jipprotegi lill-istess direttur (u il-kuntrattur tieghu) minn din l-eventwalita' u jezonerah minn kull hsara ikkagunata minn dawn l- istess elementi li jmorru ferm oltre l-'forza maggiore' normali pero' li kontra taghhom id-Direttur, fir-rigward ta' merkanzija, li minhabba n-natura taghha trid tinhazen fil-berah, ma jista' jaghmel xejn biex tigi evitata il-hsara".

"Il-Qorti pero' ma tasalx biex tinterpreta dawn ir-regolamenti li jfissru li d-Direttur m'hu qatt responsabbli f'dan il-kaz u li ma ghandhomx japplikaw il-principji tal-Kodici Civili fuq imsemmija ghaliex li kieku l-legislatur hekk ried dan kien jghidu fl-Att Principali fil-proviso ta' l- artikolu 6 kif qalu f'kazijiet ohra"

Illi dan ir-riskju imur oltre dak ta' force majeur u tal-elementi naturali tax-xita, xemx u r-rih aktar min-normal, imsemmija fis-sentenza citata, pero' m'ghandux iwassal sal-punt li l-istess kuntrattur huwa mehlus minn kull reponsabilita' rigwardanti l-istess merkanzija, u ghalhekk jibqa' responsabbli bl-obbligi tieghu ta' depozitarju, u dan bil-mod deskritt fil- Kodici Civili, u fl-istess grad ta' missier tajjeb ta' familja skond id-disposizzjonijiet tal-artikolu 1132 u 1900 (2) tal-Kap 16 ghal dawk ir-responsabbiltajiet kollha li ma humiex marbutin mal-fatt li l-istess oggetti jinsabu mahzuna fil-berah u fejn oggetti elenkati fl-istess skeda.

Illi fil-kaz odjern gja gie stabbilit li dawn in-nuqqasijiet u hsarat avveraw ruhhom waqt li l-istess vetturi kienu fil-kustodja tas-socjeta' konvenuta The Cargo Handling Company Limited, kif jirrizulta minn ezami tal-istess Gate Pass Out u Tally Sheets relattivi, u fl-opinjoni ta' din il-Qorti, ma inghatat ebda spjegazzjoni kwalunkwe ghaliex l-istess oggetti gratilhom il-hsara u n-nuqqas indikat fil-kustodja tal-istess socjeta' u ghalhekk ma inghatat ebda raguni ghaliex l-istess socjeta' ghandha tigi ezentata mir-responsabilita' taghha, iktar u iktar fid-dawl tal-kura li suppost li tigi adoperata f'kazi simili.

Defence of force majeure must be proven by defendant

In the case of ***Mediterranean Trading Shipping Company Ltd et v. Tristar Freight Services Ltd*** (Court of Appeal, 26 January 2018, Rik. Nr. 88/12) plaintiff company tasked defendant freight forwarding company with the delivery of certain equipment to Australia. Plaintiff took this equipment to a warehouse in Cospicua, as directed by defendant company, until the defendant would have had enough cargo to fill up a container. The equipment did not leave Malta on the agreed date and shortly afterwards it was destroyed by fires that erupted inside the warehouse. Plaintiff sued defendant for damages. The Court stated:

> *"Dan qieghed jinghad ukoll peress illi mill-perspettiva ta' kuntratt ta' depozitu l-obbligi tad- depozitarju huma delineati fl-Artikoli 1899 et sequitur tal-Kodici Civili Kap 16 tal-Ligijiet ta' Malta. Fost dawn l-obbligi l-ligi trid li d-diligenza li ghandha tigi ezercitata mid-depozitarju ghandha tkun dik ta' missier tajjeb tal-familja. Mill-fatti tal-kaz jirrizulta li s-socjeta` konvenuta appellanti kienet obbligata li tezercita l-massima prudenza biex tassigura li dik l-merkanzija depozitata fil-post maghzul minnha kienet qeghdha tinzamm f'post adegwat u sigur.*
>
> *... Inkwantu dak li gie sottomess dwar l-effetti ta' kaz fortuwitu fuq l-obbligi tas-socjeta` konvenuta appellanti, jigi osservat li ghalkemm huwa minnu li d-depozitarju ma jwiegeb qatt ghall-accidenti li jigru b'forza magguri, hlief jekk ikun gie mqieghed in mora ghar-radd tal-haga ddepozitata (li mhux il-kaz), din il-Qorti tosserva li persuna ma tistax teccepixxi l-forza magguri jekk l-akkadut kien direttament ir-rizultat ta' nuqqas ta' obbligu legali impost fuq l-istess depozitarju. Issa ghalkemm huwa minnu li mkien ma jirrizulta li s-socjeta' konvenuta appellanti kienet direttament responsabbli ghan-nar li hakem il-mahzen, meta wiehed iqis kemm ilkonsiderazzjonijiet tal-ewwel Qorti, li s-socjeta' konvenuta appellanti kellha tassigura li ma ssirx hsara lit-taghmir, kif ukoll taccerta ruhha li l-post indikat minnha fejn kellu jigi depozitat it-taghmir qabel jintbaghat barra minn Malta kellu jkun wiehed sigur, kif ukoll il-fatt li fil-gurnata li sehh l-incident it-taghmir suppost li diga` kien fi triqtu lejn l-Awstralja, din il-Qorti ma tqisx li s- socjet konvenuta appellanti adoperat il-hsieb ta' missier tajjeb tal-familja.*
>
> *... Din il-Qorti ma tqisx li s-socjet konvenuta appellanti hadet il-passi kollha mehtiega u ragjonevoli biex it-taghmir inkwistjoni tqieghed fiz-zgur, kemm minhabba l-ewwel episodju fejn it-taghmir intilef ghal xi granet wara li sar id-depozitu, kif ukoll peress li sussegwentement inghad li t-taghmir kellu jitlaq lejn l-Awstralja fl-14 ta' Awwissu, 2011, izda baqa' fil-mahzen li nhakem min-nirien fis-17 ta' Awwissu, 2011. Dan il-modus operandi tas-socjeta konvenuta appellanti mhuwiex wiehed ezemplari jew agir ta' missier tajjeb tal-familja".*

He cannot make use of thing deposited

Article 1902 states:

> **1902.** *The depositary cannot make use of the thing deposited without the express or implied consent of the depositor.*

He shall not attempt to discover what are the things deposited

Article 1903 states:

> **1903.** *He shall not attempt to discover what are the things which have been deposited with him, if they have been entrusted to him in a closed box or under a sealed cover.*

Restoration of thing deposited,

Article 1904 states:

> **1904.** (1) *The depositary must restore the identical thing which he has received, in the condition in which it may be at the time of its restitution.*
>
> (2) *Any deterioration which occurs through no fault of the depositary, shall be borne by the depositor.*

or of thing received in its place.

Article 1905 states:

> **1905.** *A depositary from whom the thing deposited has been taken away by irresistible force, and who has received a sum of money or some other thing in its place, must restore what he has received.*

"The thing deposited must be returned in the condition in which it may be at the time of its restitution, except for any deterioration which occurs through the fault of the depositary, which is borne by him".[100]

Depositary cannot make use of things deposited

In the case of ***Mary Hall v. Emmanuele Xuereb*** (Civil Hall (First Hall), 27 March 1946, Vol. XXXII.ii.294) plaintiff's property was destroyed during the war. She salvaged some articles (amongst which a coat) and a friend of hers deposited them with the defendant. Defendant eventually donated the coat to a friend's daughter. Plaintiff recognised the coat and requested it from defendant; however, it was returned in a badly damaged state since the donee had proceeded to make certain alterations to it.

Laurent: "If, in spite of the prohibition stated by the law, the depositary uses the deposit he would thus be in breach of his obligations and would consequently be responsible for damages and interest, if any."
The defendant had, without any due authorisation, donated the property to third parties, who had eventually caused the damages complained of. As to the other articles, which defendant claimed to have lost, the Court held that the depositary's conduct certainly fell below the standard of diligence required by the law.

The Court ordered defendant to pay a sum as damages.

To whom restoration is to be made

Article 1908 states:

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[100]V. Caruana Galizia, Notes on Civil Law, Year IV, p. 806.

> **1908.** *The depositary must restore the thing deposited only to the person who has entrusted it to him, or to the person in whose name the deposit has been made, or to the person who has been appointed to receive back the thing.*

Depositary may not require depositor to prove ownership of thing

Article 1909 states:

> **1909.** (1) *The depositary cannot require the depositor to prove that he is the owner of the thing deposited.*
>
> (2) *Nevertheless, if the depositary discovers that the thing has been lost or stolen, he must inform the person from whom it was stolen, or who lost it, of the deposit which has been made with him, allowing him a sufficient time to claim such deposit. If the person so informed fails to claim the deposit within the said time, the depositary is released by delivering the deposit to the person from whom he has received it.*

"The depositary must restore the deposit only to the person who has entrusted it to him, or to the person in whose name the deposit has been made, or to the person who has been appointed to receive back the thing.

"The depositary cannot require the depositor to prove that he is the owner of the thing deposited even though he knows or has reasonable grounds for believing that the thing belongs to another person. Nevertheless, if the depositary discovers that the thing has been lost or stolen, he must inform the person from whom it was stolen or who lost it, allowing him a sufficient term to claim such deposit. This obligation does not arise from the contract of deposit but is one imposed by law in the interests of the owner. If the person so informed fails to claim the deposit within the said time, the depositary is released by delivering the deposit to the person from whom he has received it".[101]

"The deposit can be affected by whoever has the possession or detention of the thing, ownership is not material. The obligation that arises from the contract is, therefore, that of returning the thing to the person who would have deposited the property with him: the depositary cannot expect the depositary to provide proof of ownership".[102]

In the case of ***Vitor Mercieca v. Concetta Pisani et*** (First Hall (Civil Court), 21 April 1961, Vol. XLV.ii.635) Tito Carafa: The depositor's action for the return of the thing deposited is not based on the right of ownership but on the delivery made to the depositary and on the latter's obligation to return the thing to the person who has entrusted it to him.

In the case of ***Saviour Attard v. Anthony Vella*** (First Hall (Civil Court), 20 October 2005, Cit. Nr. 282/2002/1) plaintiff (SA) claimed to be the owner of a car, which was held by a mechanic. After acquiring the car, plaintiff had given it to his grandson, who was meant to find a mechanic to carry out certain necessary modifications. Plaintiff's grandson allowed one of his friends (DM) to make use of it, and the latter, eventually, damaged it. The grandson's friend (DM) took the car to a mechanic (defendant). Plaintiff requested the car from the mechanic (AV),

[101] V. Caruana Galizia, Notes on Civil Law, Year IV, p. 807.
[102] A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 816

however, he refused to return it since he had not been paid for the services, and because he felt he had to return it to the depositary. The Court stated:

> *"Ladarba jirrizulta li l-karozza giet fdata f'idejn il-konvenut minn DM, il-konvenut ma jista jikkonsenjaha lill-hadd jekk mhux lill-istess DM. Jekk l-attur, bhala sid il-karozza, irid jiehu lura l-vettura jrid jagixxi kontra DM bhala l-pussessur tal-karozza, izda ma jistax jippretendi li ddepositarju jikser il-ligi u jikkonsenja l-vettura lilu u mhux lil min fdahilu f'idejh.*
>
> *...*
>
> *"[J]irrizulta b'mod car li l-karozza in kwistjoni hija registrata fuq isem l-attur, pero', xorta wahda ma ghandu ebda dritt jirkurpra l-karozza minghand depozitarju meta ma kienx hu li kkonsenja l-oggett lid-depozitarju.*
>
> *"Din il-Qorti tissimpatizza mas-sitwazzjoni li sab ruhu fiha lattur, pero', sfortunatament qed jitlob rimedju kontra l-persuna l-hazina, ghax din ghandha relazzjoni kontratwali ma DM biss, u l-konvenut, bhala depozitarju, ghandu jrodd il-vettura lill-dan u lill-hadd aktar.*
>
> *"Jigi precisat li din id-dikjarazzjoni mhiex wahda li tista' torbot erga omnes, ghax l-azjoni tal- attur mhix wahda rei vendicatoria in kontestazzjoni tal-possessur li qed jirreklama titolu ta' proprjeta' fuq l-istess oggett; il-konvenut f'din il-kawza mhux qed jghid li l-karozza in kwistjoni hi tieghu, izda li hu, bhala depozitarju, ghandu jroddha biss lil min fdahilu. Li qed jinghad biss hu li, ghal fini ta' dawn il-proceduri, l-attur wera li l-vettura in kwistjoni kienet u ghada registrata fuq ismu, pero', b'daqshekk ma jintitolahx jirreklama l-pussess tal- vettura minghand depozitarju meta ma kienx hu li kkonsenjha. Jekk il-vettura hijiex proprjeta' tal-attur jew ta' DM, li hekk qed jirriklama, jridu jarawha bejniethom dawn it-tnejn f'gudizzju ad hoc".*

Restitution of the Thing Deposited

When depositor dies, thing is to be restored to heir

Article 1910 states:

> **1910.** *In case of death of the depositor, the thing deposited can only be restored to his heir.*

Where there are several heirs

Article 1911 states:

> **1911.** *If there are several heirs, or if otherwise the thing deposited belongs to several persons the depositary may not restore the thing except with the concurrence of all of them, unless the share of each is determined.*

Does a co-heir require the consent of the other co-heirs in order to withdraw his share from the *decujus'* bank account?

In the case of ***Miggiani v. Gale noe*** (Commercial Court, 15 December 1900, Vol. XVII.III.105) the plaintiff's father held a Fixed Deposit account with defendant bank. Plaintiff attempted to withdraw one-fifth of the account, but defendant bank refused part payment and requested the consent of all the other co-heirs. Plaintiff refused to obtain such consent.

Court referred to article 1113(2) of the Civil Code:

> **1113.** (1) *An obligation, although susceptible of division, must be performed, as between the creditor and the debtor, as if it were indivisible.*
>
> (2) *The divisibility shall only be applicable in regard to their heirs, who can claim or are liable to pay the debt only to the extent of the shares competent to them, or for which they are liable as representing the creditor or the debtor.*

Thus, each co-heir can demand payment of the share due to him and could do so from the opening of the succession if the credit is due. The debtor who pays to a co-heir of the creditor such co-heir's share of the credit would thus be paying validly and would therefore be releasing himself in relation to such heir. Defendant pleaded article 1911 of the Civil Code. The Court observed that the said section of the law in fact clearly permits payment of a share when the shares can be determined. In this case such shares could be calculated by a mere mental exercise based on the share due to each heir by law. Court also noted that the contract in question was an irregular deposit and, therefore, regulated by the rules of mutuum. The Court stated:

> *"The reason why banks still require the consent of all the heirs in such cases stems from the fact that the account does not represent the whole estate of the deceased ... for example, [collation]. The banker, as a third party who is alien and extraneous to the estate of the deceased, may therefore find himself liable for having considered other elements which directly affected the amount due to the paid co-heir. ... These are only some examples of considerations which the paying banker is to keep in mind when partitioning the account without the consent of all the heirs. The heirs' rights are undivided and, it is felt, the proper way a partitioning of a common property should be affected necessarily requires the consent of the owners of such common property, which owners cannot be substituted by a third party who, oblivious of certain circumstances which directly affect the effective amount due to each owner, himself partitions the common property on a 'prima facie' easy mathematical exercise".*

Where restitution of deposit is to be made

Article 1914 states:

> **1914.** (1) *The restitution of the deposit must be made at the place where the thing deposited exists. If another place has*

> *been specified in the contract, the depositary is bound to take the thing to such place.*
>
> (2) *The expenses of removal shall be borne by the depositor.*

"The restitution of the deposit must be made at the place where the thing deposited exists. If another place has been specified in the contract, the depositary is bound to take the thing to such place; by the expenses of removal are borne by the depositor. The action available to the depositor is the *actio depositii directa*".[103]

Time for restitution

Article 1915 states:

> **1915.** *The deposit must be restored to the depositor as soon as he demands it, even though the contract has fixed a time for the restitution, unless there is opposition to its restitution, by a garnishee order or a judicial demand.*

Rights of depositary

Article 1916 states:

> **1916.** (1) *The depositary may compel the depositor to withdraw the deposit.*
>
> (2) *He cannot, however, without just cause, compel him to withdraw the deposit before the time agreed upon.*

Obligations of depositary to cease if he is the owner of the deposit

Article 1917 states:

> **1917.** *All the obligations of the depositary cease, if he discovers and proves that he himself is the owner of the thing deposited.*

"The deposit must be restored to the depositor as soon as he demands it, even though the contract has fixed a time for the restitution unless there is opposition to its restitution by a garnishee order or a judicial demand. On the other hand, the depositary may compel the depositor to withdraw the deposit since he is doing him a favour. He cannot, however, without just cause compel him to withdraw the deposit before the time agreed upon.

"The contract of deposit is terminated by the restitution of the thing deposited".[104]

"Since the deposit is concluded in the interest of the depositor, the depositary must return the thing as soon as the depositary requests it".[105]

In the case of ***Vitor Mercieca v. Concetta Pisani et*** (First Hall (Civil Court), 21 April 1961, Vol. XLV.ii.635) plaintiff sued her daughter for the return of £500 deposited by the former with the latter. Defendant alleged that the money belonged to her. In the meantime, evidence was pointing towards a contract of deposit.

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[103]V. Caruana Galizia, Notes on Civil Law, Year IV, p. 807.
[104]V. Caruana Galizia, Notes on Civil Law, Year IV, p. 807-808.
[105]V. Caruana Galizia, Notes on Civil Law, Year IV, p. 815.

Pothier: "In order to allow the defence plea of ownership, the depositary must be able to immediately and summarily prove his rights of ownership. Otherwise, the presumption favours the depositor who is deemed to possess it through the depositary, who in turn is to be condemned to provisionally return the thing, saving his rights to claim restitution thereof".

Defendant could not prove her claim of ownership, so plaintiff was still favoured by the presumption arising from the deposit. Plaintiff's right to file an action for the return of the money remained unprejudiced.

Reimbursement of expenses incurred by depositary

Article 1918 states:

> **1918.** *The depositor is bound to reimburse to the depositary the expenses which the latter has incurred for the preservation of the thing deposited and to make good to him all the losses which the deposit may have occasioned him.*

Depositary may retain deposit until reimbursement of expenses

Article 1919 states:

> **1919.** *The depositary may retain the deposit until full payment of what is due to him by reason of such deposit.*

"Strictly speaking, the depositor should have no obligations, but he may contract obligations in favour of the depositor *"per accipiens".* Thus, the depositor is bound to reimburse to the depositary any expenses which the latter may have incurred for the preservation of the thing deposited and to make good to him all the losses which the deposit may have occasioned him. The depositary is granted the *"jus retentionis"* in guarantee of the rights i.e., he may retain the deposit until full payment of what is due to him by reason of such deposit".[106]
In the case of ***Saviour Attard v. Anthony Vella***, (First Hall (Civil Court), 20 October 2005, Cit. Nr. 282/2002/1) a mechanic refused to return the car to its depositary since he had not yet been fully paid for his services. The Court stated:

> *"Barra minn dan, il-konvenut, bhala depozitarju, qed jinvoka l-ius retentionis, li hu d-dritt li taghtih il-ligi li jzomm l-oggett li fuqha jkun ghamel xi xoghol sakemm jithallas ta' xogholu. Kif qalet din il-Qorti fil-kawza "Ellul vs Micallef", decisa fl-24 ta' Frar, 1997, hemm dritt ta' ius retentionis kull meta dak li jippossjedi oggett ta' haddiehor "abbia fatto per la cosa posseduta una spesa, della quale ha il diritto di reclamare il pagamento dal propretario" (Zacchariae Vol II pag. 59). Il-konvenut wettaq xogholijiet ta' tiswija fuq il- vettura, u ghal dan ix-xoghol thallas mill-kumpanija assikuratrici hlief ghas-somma ta' Lm50, li ghaliha ghadu u baqa' skopert. Kwindi, l-istess konvenut ukoll mhux tenut jirrilaxxja l-vettura minn taht il-kustodja tieghu qabel ma jithallas dak kollu dovut lilu".*

Types of Deposit

Voluntary v. Necessary

[106] V. Caruana Galizia, Notes on Civil Law, Year IV, p. 808.

On voluntary or necessary deposit, article 1895 states:

> **1895.** *Deposit is voluntary or necessary.*

On the nature of voluntary deposit, article 1896 states:

> **1896.** *A voluntary deposit takes place by the mutual consent of the person who makes the deposit and of the person who receives the thing on deposit.*

On the nature of necessary deposit, article 1920 states:

> **1920.** *A necessary deposit is that which a person is compelled to make owing to some calamity, as, for instance, in case of a fire, destruction, pillage, shipwreck or other unforeseen emergency.*

A necessary deposit take place when a person is forced to entrust the custody of his property to the first person whom he happens to come across. The distinction between voluntary and necessary deposit is mostly nominal since the same rules apply.

Carriers by Land or Water

Liability of carriers,
Article 1628 states:

> **1628.** *Carriers by land or water are, in respect of the custody and preservation of the things entrusted to them, subject to the same liabilities as depositaries.*

for things delivered to them,
Article 1629 states:

> **1629.** *They are responsible not only for the things which they have received in their vehicle or boat or other vessel, but also for the things delivered to them in any place to be put in the vehicle, or boat or other vessel, or to be carried in any other manner.*

for loss.
Article 1630 states:

> **1630.** *They are liable for the loss of or injury to the things entrusted to them, unless they prove that such loss or injury was caused by a fortuitous event or irresistible force and without any fault on their part.*

In the case of ***Domenico Cassar v. Francesco Spiteri*** (Court of Appeal (Civil), 24 November 1911, Vol. XXI.I.367) plaintiff sued defendant for payment of the value of the merchandise that was never delivered. The responsibility of anyone entrusted with the transport of goods from one place to another is that of a proper "necessary depositary".

Carriage by Air (International and Non-international Carriage) Order [Subsidiary Legislation 499.24 transposing the Convention for the Unification of Certain

Rules Relating to International Carriage by Air known as the Montreal Convention]

Article 17, paragraph 2 (Death and Injury of Passengers - Damage to Baggage) states:

> 2. *The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier.*

Article 18 (Damage to Cargo), states:

> 1. *The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.*
>
> 2. *However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:*
> *-inherent defect, quality or vice of that cargo;*
> *-defective packing of that cargo performed by a person other than the carrier or its servants or agents; ...*

International Carriage of Goods by Road Act [Cap. 486 transposing the Convention on the Contract for the International Carriage of Goods by Road (CMR)]

Chapter II - Persons for whom the Carrier is Responsible, Article 3 states:

> *For the purposes of this Convention the carrier shall be responsible for the acts of omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his own.*

Chapter IV - Liability of the Carrier, Article 17 states:

> 1. *The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.*
> 2. *The carrier shall, however, be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.*

Carriage of Goods by Sea Act [Cap. 140]

Article III, on responsibility and liabilities, states:

> 1. *The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to -*
>
> (a) *make the ship seaworthy;*
>
> (b) *properly man, equip, and supply the ship;*
>
> (c) *make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.*
>
> 2. *Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. ...*

Article IV, on rights and immunities, states:

> 1. *Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier ...*
>
> 2. *Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from -*
>
> (a) *act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;*
>
> (b) *fire, unless caused by the actual fault or privity of the carrier;*
>
> (c) *perils, dangers and accidents of the sea or other navigable waters; (d) act of God; ...*

Liability of shipper

In the case of ***Dr Simon Micallef Starface noe v. James Gollcher et*** (First Hall (Civil Court), 13 June 2002, Cit. Nr. 1317/93) plaintiff imported a consignment of batteries on a ship, of which the defendants were the agents. When the container in which the batteries were transported was opened it was found that some pallets were damaged, and some items were missing. The Court stated:

> *[II]-Bill of Lading hija wahda "clean", u din, allura tindika li l-pallets gew mghobbija f'kundizzjoni tajba (ara "Mamo et noe vs Mifsud et noe" deciza mill-Onorabbli Qorti ta' L- Appell fil-5 ta' Gunju, 1987, u "Gatt noe vs Sciberras noe" deciza mill-Onorabbli Qorti ta' L- Appell fit-2 ta' Novembru, 1995), u la dabra l-vapur ma tax spjegazzjoni kif u ghaliex dawn il-pallets waslu Malta mqatta' u bin-nieqes, ir-responsabilita' ghal tali hsara trid tigi mixhuta fuq il-vapur. In-nuqqasijiet graw meta l-container kien f'idejn il-vettural u dana, bhala depositorju, huwa responsabbli li jikkonsenja l-merkanzija minghajr hsara. Kif qalet l-Onorabbli Qorti ta' l-Appell fil-kawza "Mamo et noe vs Mifsud et noe" decisa fil-5 ta' Ottubru, 1988, meta fil-Bill of Lading hemm indikat li l-merkanzija giet "shipped in apparent good order and condition", din tikkrea presunzjoni li lmerkanzija deskritta fil-polza giet karikata f'kondizzjoni tajba u ghandha tigi*

> *hekk skarikata. ... Darba li, bhala fatt, irrizulta li kien hemm xi uhud danneggjati u nieqsa, ghal dan ghandu jwiegeb il- vapur.*

Note that the bill of lading is a legally binding document that provides the carrier and shipper with all of the necessary details to accurately process a shipment. It has three main functions. First, it is a document of title to the goods described in the bill of lading. Secondly, it is a receipt for the shipped products. Finally, the bill of lading represents the agreed terms and conditions for the transportation of the goods.

Liability of carrier

In the case of ***Atlas Insurance PCC Ltd v. B.A.S. Limited*** (First Hall (Civil Court), 5 December 2019, Rik. Nr. 1175/08) plaintiff insurance company was subrogated to the rights of Intercomp, which had appointed defendant company B.A.S. to carry to Malta a consignment of laptop computers, from a warehouse in the Netherlands. Upon their arrival in Malta, one of the containers filled with cargo were taken to the B.A.S. warehouse inside Ħal Far, where it resulted that the pallets were torn. It turned out that there were ten missing boxes and four boxes which were delivered empty. Intercomp notified the Company Dell abroad which, in turn, confirmed that the goods had left the Netherlands. The Court stated as follows:

> *"Fi kliem B.A.S., filwaqt illi tagħraf li kellha obbligazzjoni li tiġbor merkanzija mill-Olanda u twassalha sal-maħżen ta' Intercomp f'Malta, twarrab l-obbligu ġenerali li bħala d-depożitarja tal-merkanzija li tkun intalbet iġġorr, hija responsabbli li tikkonsenja l-merkanzija bla ħsara lid-destinatarju tagħha, jew lil min sejjer jilqagħha f'ismu. Twarrab ukoll il-prinċipju li joħroġ mill-Konvenzjoni li jgħabbi lill-kumpannija mħarrka bir-responsabiltà għall-għemil tal- kumpannija li ġarr tal-merkanzija f'isimha.*
>
> *"Fil-fehma tal-Qorti, B.A.S. għandha tibqa' dejjem responsabbli għall-merkanzija anke jekk din tkun fdatha f'idejn terzi. Kien fl-interess tagħha li toħloq u tassigura sistema ta' trasparenza tajjeb biżżejjed biex teżoneraha minn kull responsabbiltà, ħaġa li ma seħħilhiex tagħmel, u għaldaqstant f'dan l-istadju ma jiswielha xejn li tittanta titfa' l-ħtija fuq l-imsejħa fil-kawża li qabbdet hi stess, u li wieħed jistenna li kellha fiduċja fiha tant li fdatha ġġorr merkanzija ta' ħaddieħor u li għaliha kienet responsabbli hi".*

Liability of carrier [2]: Terms of CMR Convention complement the general Codal rules

In the case of ***Atlas Insurance PCC Ltd et v. B.A.S. Limited*** (Court of Magistrates, 19 September 2012, Avv. Nr. 211/2009) the Court stated:

> *"Illi in oltre minn imkien ma jidher li s-socjeta' konvenuta ippruvat, dak li skond il-konvenzjoni huwa l-oneru taghha li tipprova, li kieku giet applikata l-attenzjoni necessarja u kura ragjonevoli li wiehed jistenna minn depositarju jew trasportatur tal-oggetti, tali nuqqas u serq kien xorta jsehh".*

Hotel keepers' Liability

"To complete the picture of the institutions that have reference with the obligation to keep the deposit characteristic, it is necessary to talk about the deposit in a hotel or in establishments or similar premises, such as nursing homes, public entertainment establishments, bathing establishments, pensions, trattorias, sleeping cars and the like. The matter is governed by articles 1783 ff. c.c. By virtue of these provisions, it is necessary to distinguish between things entrusted to the hotelier in custody (or that he has illegitimately refused to receive delivery) and those brought to the hotel, but not entrusted to the custody of the hotelier, or entrusted in custody outside the hotel or even in the hotel, but during the operations preceding or following the execution of the contract. In the first case (Article 1784 of the Civil Code), the hotelier, unless there is a case of force majeure or the fault of the customer, is without limitation responsible for the deterioration, destruction or theft of the thing; in the second case, the liability of the hotelier cannot exceed, at most, the equivalent of one hundred times the rental price of the accommodation per day (unless the damage is due to the fault of him or of his assistants). The agreements of preventive limitation of the liability of the hotelier are null and void".[107]

Article 1039 states:

> **1039.** (1) *A hotelkeeper shall be liable up to an amount not exceeding €174.70 for any damage to or destruction or loss of property brought to the hotel by any guest.*
>
> (2) *The liability of a hotelkeeper shall be unlimited -*
> (a) *if the property has been deposited with him; or*
> (b) *if he has refused to receive the deposit of property which he is bound under the provision of the next following sub-article to receive for safe custody; or*
> (c) *in any case in which the damage to, or destruction or loss of, property has been caused, voluntarily or through negligence or lack of skill, even in a slight degree, by him or by a person in his employment or by any person for whose actions he is responsible.*
>
> (3) *A hotelkeeper shall be bound to receive for safe custody securities, money and valuable articles except dangerous articles and such articles as having regard to the size or standard of the hotel are cumbersome or have an excessive value.*
>
> (4) *A hotelkeeper shall have the right to require that any articles delivered to him for safe custody shall be in a fastened or sealed container.*
>
> (5) *The provisions of sub-articles (1) and (2) of this article shall not apply if the guest, after discovering the damage, destruction, or loss, does not inform the hotelkeeper without undue delay, or if the damage to, destruction or loss of, property is due -*
> (a) *to a fortuitous event or to irresistible force; or*

[107] A. Torrente & P. Schlesinger, Manuale di Diritto Privato, (Milano: Giuffre Editore, 2017), Edizione XXIII, p. 816.

> (b) *to a reason inherent in the nature of the property damaged, destroyed or lost; or*
> (c) *to an act or omission of the guest by whom it was brought into the hotel, or of any person, other than the hotelkeeper, to whom such guest may have entrusted the said property or of any person in the employment of such guest or accompanying him or visiting him.*
>
> (6) *Any tacit or express agreement between a hotelkeeper and a guest entered into before any damage to, destruction or loss of, property has occurred and purporting to exclude, reduce or make less onerous the hotel-keeper's liability as established in this article shall be null and void:*
>
> *Provided that, in the cases referred to in paragraphs (a) and (c) of sub-article (2) of this article where the damage to, or destruction or loss of, property has not been caused by a person mentioned in the said paragraph (c) voluntarily or through gross negligence, any agreement signed at any time by the guest whereby the hotel-keeper's liability is reduced to an amount being not less than one hundred and seventy-four euro and seventy cents (174.70) shall be valid.*

In the case of ***Marco Vella et v. Dragonara Resort Ltd*** (Court of Appeal, 17 October 2008, App. Civ. Nr. 772/2006/1) whilst plaintiffs were staying at a hotel they deposit some valuable items inside a safe deposit box contained inside their room. One evening, upon their return to the room, they found that the items had been stolen. Guests had left the key to the safety deposit box unattended.

Was there a contract of deposit?
The Court stated:

> *"Jinsab provvdut fl-Artikolou 1893 (1) tal-Kodici Civili illi "d-depozitu hu perfett biss bil-kunsinna tal-haga lid-depozitarju". Fil-kaz prezenti dan id-depozitu hu eskluz ghaliex l-oggetti qatt ma ghaddew bit-traditio taghhom ghand is-socjeta` konvenuta. ...".*

Was there an omission by the guest?
The Court cited the case of ***Alfred Schembri nomine v. Tigne Development Co Ltd proprio et nomine*** (Court of Appeal, 6 October 2000):

> *"... kienet in-negligenza grossolana ta' l-attur li rrendiet possibbli ... avut rigward tal-fatt illi b'mod mill-aktar traskurat halla c-cavetta tas-safety box fil-kamra".*

To that end, the Court stated:

> *"Din il-Qorti, kif presjeduta, pjenament tikkondividi dawn ir-riflessjonijiet tal-Qorti Superjuri u taghmilhom, mutatis mutandis, applikabbli ghall-fattezzi rizultanti mill-atti istruttorji f'dan il- kaz. ... u b'hekk tichad it-talba ta' l-atturi".*

In the case of ***Victor Sant Manduca v Anthony Debono noe*** (Commercial Court, 21 April 1980 [NOT PUBLISHED]) plaintiff had left some books at the reception desk of defendant hotel for a guest. When the guest called at the reception, the books were not found. Defendant pleaded that the property was not brought in by a guest. Whilst 1039(2) did not apply to property brought into the hotel by any person, the words "property brought in by guests" should not be interpreted literally to apply only to things which the guest has himself personally brought in. These should extend to include also other objects which third parties deliver to a guest whilst the latter is staying at the hotel, and which the guest will retain in his possession. In this case when plaintiff delivered the books the guest was informed about this and accepted to collect the books later on, the books become "property brought in by guests". Defendant was therefore responsible for the loss even if occasioned by the slight negligence of his employee. The action under section 1039 does not limit the exercise of the action to a guest. Court awarded damages to plaintiff (unless defendant could return the books within a stipulated time).

Luca Camilleri

Topic VI: The Contract of employment

A contract of employment is a bilateral agreement. However, they have what many authors consider an unfair balance as, in practice, there is a lot of regulation to protect the employee, the weaker party in the negotiation. A contract of employment is one where someone agrees to work in exchange for a salary. Without the someone, the work, and the payment this contract cannot exist. Unless someone receives remuneration, they cannot be considered an employee. Probation is what we call the period where the employers and employees essentially 'try each other out', for lack of a better phase. As a standard this period is six months long during which either party can effectively stop the contract with one week's notice. After this period the job title is listed, linked with a legal requirement to provide a job description.

The pay is usually split into a number of optional layers: first, base pay (wages, as per Cap. 452), from which National Insurance and tax are deducted; second, allowances; third, fringe benefits. The contract of employment has a life of its own which continuously changes to meet the realities of one's working life. The base element is that the salary can never be touched unless the employee consents. Recently, the Predictable Work Conditions Regulations state that base salary cannot be touched unless the change is favourable to the employee.

Termination and the process thereof is one of the crucial parts to look at in a contract of employment. A definite contract has an end whilst an indefinite one does not. But the termination clause is usually reflective of the law but not always. The COE can perhaps be looked at as a conditional contract in the sense that if the employees do something which is classified as misconduct the employer can revoke the contract. In employment we do not only find damages, but also compensation. This is based on the employee's age, for how long he was with the company, damages caused, the methodology of how the person was dismissed. One of the main elements in employment is that of discrimination. The record for a tribunal in Malta is 14 months' pay. Fixed-term contracts offer far higher compensation if they were to be broken.

Another important clause is that of restraint of trade, also known as a non-compete clause, a type of clause that is not particularly common in general commercial clauses. These clauses usually involve very hefty penalties. Finally, there are situations where, in the field of employment, there is government intervention to make changes to the contract or to change the contract itself in two particular situations: first, with regard to the transfer of business and the protection of employees; second, the reclassification of employees (i.e., when someone who is self-employed becomes an employee).

The governing law and jurisdictional clauses determine which industrial tribunal has exclusive jurisdiction. There is no law stating that the contract of employment must be governed by Maltese law, but this problematic as the mandatory elements of the COEs must be governed locally.

Topic VII: The Contract of Works

Locatio operis is a contract of works. At both its simpler and more complicated levels it the essence remains that there is the engagement for work to be carried. In practice there are two questions which arise: first, *what is the difference between a contract of employment and a contract of works?* The answer involves the degree of control exercised in the case of a contract of employment by the party engaging the work. Where there is significantly more control it is obviously a contract of employment even though it is a service or work done for remuneration, but where the person known as the contractor enjoys a degree of autonomy and independence then it is a contract of works.

Second, *where does one draw the line between a sale and contract of works?* Take, for example, one who orders furniture. Is he buying it, or is he entering into a contract of works for the furniture to be made? The remedies in the case of a contract of sale are latent defects, not of the quality agreed, late delivery, warranty of peaceful possession, etc., and there are no obligations nascent in the contract of works, such as the obligation to deliver and perform properly and to guarantee the quality of one's work. Today, the argument is sometimes advances that the preponderant part paid is for the intellectual property of the design. This leads to a wider discussion. Historically, the articles are more or less of Napoleonic inspiration and project a contractual situation where a manual worker works with technical skills. The articles of the Civil Code are completely silent on issues of intellectual creation with respect to enforceability. The general rules strain to become applicable. The Italians have a specific title with respect to where it is recognised as work, service, or a professional performance but one cannot discipline manual work from creative work. The creation of a sculpture is manual but is at its heart an intellectual creation. The Civil Code is intellectually lacking and harks back to a time of engaging a carpenter and such.

There are two relevant provisions in the law, but it is necessary to be aware that today the articles of the Civil Code have two realities in practice: first, the *periti* contract, i.e., the traditional contract whereby a party engages a mason working under the supervision of a *perit* (not technically an architect), creating a tripartite relationship. Today, the contracts in *locatio operis* have been completely displaced by the *fidic.org* provisions, an organisation which

develops contractual language and practice. Contractual language in the more complicated contracts of works has been taken over by these provisions, having developed language for various areas, such as the handing over of the sight. Traditionally, the *perit* was used whilst in the FIDIC provisions there are numerous architects involved in a project. These agreements are also very detailed procedure-wise. These contracts are not drafted by lawyers, however, but are passed onto them when issues arise, in which case the difficulties of these contracts come to life.

With regard to the Civil Code, there are two important provisions, the first regards the dissolution of a contract of works. There was an amendment in 2004 when this was recast and modelled in the image of the corresponding Italian provision. This amendment gave the unilateral right of the employer to dissolve the contract. Prior to this, there was no right of the employer to unilaterally dissolve, and a consistent line of judgements existed where it was held that to dissolve a contract of works one has to go to court. Take, for example, a scenario in which one's contractor is in default, the former interpretation was that the employer had to take the matter to court, having the court declare that the contractor had failed its obligations, and dissolving the contract. Almost invariably, this situation explained how unacceptable the law was at the time. From a situation of total lack of performance, a contractor stood to gain on the basis of loss of profit because of the rule created by the courts that a contract of works could not be unilaterally dissolved.

In 2004 the employer was given the right always to, with or without good reason, dissolve the contract unilaterally. *Does this mean that the contractor has no rights or remedies?* He may challenge the existence of good grounds of dismissal. If the contractor does manage to show that there were no grounds for the dismissal, he is entitled to damages for a loss of profit. If, on the other hand, there were good grounds for the termination, the contractor is only entitled to payment for useful work (that work of utility to the employer).

The second provision regards the joint responsibility of architect and contractor. This article only comes into effect if either a building is in manifest danger of collapse or falling to ruin. The responsibility of the architect and the contractor is joint and several. Significantly, the article says that this provision comes into effect even if there is a defect in the ground, with the FIDIC contracts also referring to this. The moment there is delivery of the sight there is in both the Civil Code and the FIDIC the presumption that the condition of the ground has been surveyed and examined. The responsibility of the contractor and of the architect remains for fifteen years and an action for damages has to be commenced within two years from either when this building is in manifest danger. The architects complain that this is a very heavy responsibility on them because even when they retire, they must continue to pay professional insurance. This is an article of public policy, and the responsibility of the architect is not only towards the party engaging him but even to third parties if the building is sold or transferred. There exist of course defences of force majeure and a lack of maintenance by the owner/occupant. The remedy is for damages but criminal proceedings may also be instituted.