CML1001 BASIC NOTIONS OF COMMERCIAL LAW

The European Law Students' Association

MALTA

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<u>Duties of traders and commercial intermediaries</u>
<u>Dr Kris Borg</u>

The articles in the Commercial Code that we are concerned with are **<u>articles 13-36</u>** (these concern themselves with the duties of traders).

3 main duties of traders

1) **<u>Keeping within the limits of fair competition</u>**

2) **<u>Duty to publish marriage contracts</u>** – If you are a trader, the major advantage of being a trader is that the Commercial Code is applicable to you. As a result, if you go bankrupt **in good faith**, the Commercial Code allows you to have all your debts forgiven and you can start trading again afresh; you are a discharged bankrupt. Very often, when the trader is exercising these acts of trade, people are giving him credit and letting him trade with debt. If the trader wants to cheat his creditors, he might do a marriage contract, place most of the assets in his wife's name and none on his name and if his business goes bust, the third parties who would have trusted him would find no assets to turn to since they are in his wife's name. Third parties dealing with the trader have a right to know if a marriage contract is in place. In short, it is to **protect creditors**.

3) **<u>Keep trade books</u>** – The trade books are registers wherein traders keep a written and minute account of business transactions. They are important to be kept for three main reasons:
   a) Trade books constitute evidence of their content in terms of the law, and they are admissible as evidence in a court case and their content, unless rebutted, constitutes prima facie evidence.
   For example, there is a sole trader who sold goods to a company for 3 years. The sole trader claimed he was owed 17,000€ but the company claimed they only owed 10,000€. This sole trader filed a court case against the company and the sole trader was asked for the trade books which he did not have. The company, on the other hand, had. The fact that the sole trader did not keep trade books will prejudice his case immensely because he has **no evidence** to destroy the strength of those kept by the company. Hence, why a trader should keep trade books.
   b) They should be kept in the interest of third parties. Third parties are the people who are dealing with the trader and are the people who are giving the trader credit for his business to flourish. They are trusting him and therefore they have a right to know how the money they are entrusting at their debtor is being utilised by the trader. Cioè, they have a right to see that the money they are entrusting are being utilised for the purposes for which they were entrusted.
   c) In the interests of society at large. If the trader is no longer in a position to pay his debts and suspend payment of his debts, the trader has to file an application in court and declare himself bankrupt. If he does so, society at large has an interest to know whether that bankruptcy is a genuine one or a fraudulent one. It will know whether there has been any wrongdoing on the part of the trader by looking at the trade books.

KEEPING TRADE BOOKS
This concerns articles 13-26 of the Commercial Code. It is important to note that this situation of having the duty to keep trade books must not be limited to physical traders, but also to commercial partnerships (always remember that the term 'trader' includes commercial partnerships). Moreover, besides the relevant articles in the Commercial Code, one must also make reference to relevant articles in the Companies Act, mainly chapter X, which speaks of the duties of keeping proper accounting records as far as companies are concerned.

Article 13

13. Every trader is bound to keep the following books:
- (*a*) a waste-book;
- (*b*) a journal;
- (*c*) a cash-book;
- (*d*) an inventory-book;
- (*e*) a ledger.

Every trader has to keep 5 types of trade books. There is no exception to this rule **except in the case of companies**.

Article 14
Waste book

14. Every trader shall immediately enter in the waste-book every commercial transaction which he makes, showing all the conditions or terms to which it is subject.

This article states what the waste book is used for. Essentially, the waste book is like a scrap book to be kept at the side of the trader at all times. It is a sort of notebook where the trader puts in the key elements of every transaction. Of importance is that the trader keeps the waste book close to him when negotiating to be able to write ***'immediately'*** the terms of a particular transaction. In this sense, the legislator requires that as the trader performs transactions the trader takes not there and then of what the transaction is and what the terms and conditions of the transaction are. At law we use the term ***a tempo vergin*e** (evidence that is collected immediately upon the happening of an event is considered to be closer to the reality than a version which comes later on. The version given *a tempo vergine* is given more weight by the judge deciding the case). Since the trader has to record in the waste book the conditions of the transaction immediately, it has a particular weight because in it has *a tempo vergine* the conditions of that particular transaction.

Article 15
The journal

15. The journal must show day by day all the transactions concluded by the trader, his debts and credits, his negotiations, acceptances and endorsements of bills, and, generally, all that he receives or pays for any cause whatsoever; and must show month by month the sums disbursed for household expenses.

The journal is catered for in article 15. First of all, the term 'journal' is coming from the Italian '*giorno'*. It is something where one takes a daily ('*day by day'*) record. On a daily basis the trader has to take note of the things contained in article 15.

'*Acceptances and endorsements of bills'* deal with bills of exchange. When somebody issues a bill of exchange to you, you have to accept the bill. The bill of exchange is a document of entitlement giving the person the right of payment. Essentially, it is a piece of paper that has a particular legal significance whereby a particular sum is to be paid on a particular day by a particular person. Interestingly, one can transfer a bill of exchange to third parties by endorsing the bill.

'All that he receives or pays for any cause whatsoever; and must show month by month the sums disbursed for household expenses': Article 15 also tells you that once a month the trader has to render an account of what monies he has taken for his personal expenses/disbursements. This is done to show creditors a division between the monies being used for the business and those used for himself from the funds of the business. This helps keep a 'Chinese wall; (when within the same enterprise a division is kept between one thing and another) between the business part and his personal part whereby the two do not meet. In this way, a proper accounting record of how much monies were used for the trader's personal needs and how much monies were used for the business itself is to be kept. Of course, this is needed to see whether the trade has siphoned off money intended for the business for his personal needs instead.

Article 16
The cashbook

> **16.** The cash-book must show in detail, day by day, all the sums received and those paid out by the trader, compared with the journal; it must be balanced at least once a month.

Article 17
Duty of the inventory

> **17.** (1) The trader shall make every year an inventory containing a description and valuation of his whole estate, assets and liabilities, whatever may be their nature and origin.
>
> (2) The annual inventory shall be closed with a balance and with a statement showing the profits and losses, and shall be copied out year by year in the aforesaid inventory-book.

Essentially, this is the balance sheet and profit and loss account. The balance sheet has two sides made up of the assets and liabilities whilst the profit and loss account shows what profit is made against the losses and expenses. It is in the interest of creditors to know this information. In essence, the journal is a daily entry, the cash book must be balanced at least once a month and finally, at the end of the year the inventory is closed.

Article 18
Ledger

> **18.** The ledger shall show an accurate and up-to-date record of all transactions classified as personal and impersonal accounts and so kept as to render possible the drawing up of a true and correct picture of the state of affairs of the business or trade at any given time.

This is a very important section.

1) Once again, it introduces the notion of **a clear delineation between personal accounts and impersonal accounts**;

2) Trade books must know exactly and **allow you to extract a true and fair view of the financial situation**. Cioè, they must give a true and correct view of the state of affairs of the trader at a particular point in time. The moment the trade books are not doing this, problems arise as the trader is falling foul of the law. This notion of true and fair view permeates all the other sections.

Article 19
The optional trade books

> **19.** Besides the books mentioned in the foregoing articles of this sub-title, traders may keep other books and other papers wherefrom the extent and the progress of their business shall appear in a more detailed manner.

There are optional trade books that any trader can keep. The trader is free to have additional trade books but those 5 mentioned in article 13 are obligatory and therefore have to be kept at all costs.

Article 20
Duty of trader to keep letters, etc, received or forwarded by him

> **20.** Every trader shall keep, by order of date, the original of all letters, invoices and telegrams received by him, and a copy, whether hand-written or type-written, or a press-copy, of all letters, invoices and telegrams forwarded by him.

Our law was drafted around about 1927 and therefore, it speaks of telegrams.

Article 21

> **21.** (1) All books which traders are required to keep, with the exception of the waste-book, shall be numbered and kept, by order of date, without blanks or marginal notes.
>
> (2) Whenever it shall be necessary to make any cancellation, this shall be made in such a manner as to leave the cancelled words legible.
>
> (3) The provisions of this article shall not apply to such books as were already in use before the first day of January nineteen hundred and twenty-eight.

Article 21 lays down a formality which is required. You cannot ti-pex something or rub something off. If you want to delete something, that mistake has to remain there. A line has to be put on top and at the bottom of the word being deleted, attached with a cross-reference. This is the archaic way of having track changes.

Article 22

> **22.** (1) Trade books, whether obligatory or optional, shall constitute evidence in terms of the Code of Organization and Civil Procedure.
>
> (2) Nevertheless, it shall not be lawful to divide the contents of such books.

You cannot take an entry from your trade books without seeing the totality. That is to say, if you are going to exhibit an extract from a trade book, the whole trade book needs to be exhibited. Very often, in commercial cases it becomes important to ask for the exhibition of trade books to see whether a particular transaction was recorded in the trade books to prove that it actually took place. With that being said, the judge will not be able to interpret trade books and therefore, the court will appoint a person qualified in accounts to analyse the trade books.

In **Ramel u żrar Ltd v. Schembri & sons Ltd**, Ramel u Żrar Ltd made a claim against Schembri that it was owed around 30,000€. Schembri made a number of defences, the most important one being that everything there was, was paid. There is a general principle of law that *onus probandi incumbit ei qui dicit, non qui negat*. This means that the onus of proof is incumbent on the person alleging and not the person who is denying. Then there is another which is that if you claim that you have affected a payment, you have to get proof of payment. Ramel u Żrar Ltd said you are claiming that you defected payment through your payment. In this case, the Court took note of the fact that Schembri and sons Ltd did not present its book or accounts. It kept delaying while Ramel u Żrar Ltd exhibited its trade books, statements and in lieu of the fact that one party produced trade books and the other didn't, the Court held in favour of Ramel u Żrar Ltd and ordered Schembri & Sons Ltd to pay their due.
See also **SVS LTD vs TRIGANZA ADRIAN PRO ET NOE**.

Article 23

23. (1) In the course of an action, the court may, at the instance of one of the parties or of its own motion, order the production of all correspondence touching the question at issue, and of the trade books in order to abstract therefrom such portion only as relates to the controversy.

(2) In such case, a qualified accountant chosen by agreement between the parties or, in default, nominated *ex officio* by the court, may be appointed in order to ascertain, without removing the books and in the presence of the person producing them, whether such books are in order, and to abstract therefrom such entries as relate to the controversy.

(3) The opposite party may in counter-evidence produce his own books kept according to law.

Connected to this is article 23. Imagine, two people are against each other, one claiming payment from the other. One is saying the amount is due while the other is opposing this. Therefore, they are not in agreement. A judge, of course, does not understand in accounts. So, when a case is related to something technical, the court normally appoints a technical expert. In these matters, the court will appoint an accountant – *perit komputista* – to attain the financial position. Now, if one party has kept trade books and the other hasn't, the one that hasn't is at a major disadvantage.

Article 24

24. In cases of winding up or liquidation of a partnership, or of property in community or of successions, the court shall have power to allow the examination of all the books subject to such conditions and formalities as the court may in each case prescribe.

A trader has to keep those obligatory trade books:

Article 25

> **25.** Retail traders are not bound to enter in their books the sales made for ready cash: it will be sufficient for them to enter each day the total amount of the sales made on such day.

Article 25 tells you that retail traders are not bound to enter in their books the sales made for ready cash and so on. So, if you are a retailer, you have an exemption. It will be sufficient for them to amount the total amount of sales made on the day.

Article 26

> **26.** Traders are bound to keep their trade books, letters, invoices and telegrams received by them, for a period of five years to be reckoned, in the case of trade books, from the date of the last entry made in each book.

Specifies the period of 5 years for which you have to keep your trade books.

BANKRUPTCY

Traders have a massive advantage over non-traders since they have a particular legal regime applicable to them, granting them different rights and obligations. The biggest advantage of traders is in connection to bankruptcy since if it is a *bone fide* bankruptcy, the trader can be discharged by the court and rehabilitated to trade. In this way, the debts of the trader will be forgiven and therefore, won't chase him/her for the rest of his/her life. Remember that liability chases non-traders all their life and beyond since even after their death, the liability will move on to their heirs, unless the heir does not accept the will.

Moreover, these articles deal with bankruptcy and what happens to traders when they do not keep trade books as they should.

Article 477

> **477.** Every trader who suspends payment of his debts is in a state of bankruptcy.

Bankruptcy is not necessarily interpreted as your liabilities exceeding your assets. Once you haven't managed to liquidate those assets to pay your debts, you may still be in a position of bankruptcy. So, you are not in such state as long as you manage to make your payments and therefore, bankruptcy is determined by whether you are paying your debts or not. If you refuse to pay your debts in order to hold onto the assets that you have, you are still bankrupt. Similarly, if you are owed more monies than you actually owe, but you cannot affect payments as the people who owe you money aren't paying you, then you are still considered to be in a state of bankruptcy.

Article 478(1)

> **478.** (1) The trader or his lawful representative can, on the suspension of payments, make a declaration thereof in the Civil Court, First Hall.

Once you are in a state of bankruptcy, you have an option to go to court and make a statement of bankruptcy. **Article 480** comes into play here. Note that article 480 speaks of '*the trader SHALL*' meaning that THERE IS AN OBLIGATION. So, all your trade books and all your commercial papers have to be filed in court together with a declaration of bankruptcy. This is done so that the trader will be declared bankrupt and, if it is found that his bankruptcy is in good faith, will be rehabilitated to trade.

> **480.** On making the declaration mentioned in the foregoing articles, the trader shall, at the same time, file in the Civil Court, First Hall, all his commercial books and papers.

Article 494

> **494.** The books and papers of the bankrupt shall be open to inspection by all the parties interested, and, by permission of the judge, they may be delivered, wholly or in part, to the curators.

The fact that you are a trader gives you a huge advantage over a normal person because you are regulated by a specific regime and in terms of this regime there is the possibility that if you are a **bona fide bankrupt**, all your debts will be forgiven, and you will be rehabilitated to trade. Any assets that he has, he has to give as well as the trade books to see whether the bankruptcy was fraudulent or not. This is a situation whereby people would have trusted the trader by giving credit and are going to remain unsatisfied. Therefore, such creditors would want to know the reason behind the bankruptcy which is why the trade books are open. Only through this can a creditor challenge the declaration of bankruptcy. You will immediately start to appreciate the importance of keeping records. The situation becomes more important in **<u>article 539</u>** and **<u>article 540</u>**.

> **539.** (1) The benefits granted by law in favour of bankrupts shall not apply in the case of fraudulent bankruptcy.
>
> (2) A bankrupt shall be deemed to be a fraudulent bankrupt in each of the cases following:
>
> (*a*) if he makes an untrue statement in respect of the debts owing to or from him, or in respect of his insolvency;
>
> (*b*) if he has simulated any expenses or losses or if he fails to give a satisfactory explanation of the manner in which his receipts have been disposed of;
>
> (*c*) if he has concealed or removed any sum of money, or any debt due to him, goods, merchandise or other movable effects;
>
> (*d*) if he has made fictitious sales, transactions or donations;
>
> (*e*) if he has simulated collusive debts between himself and fictitious creditors, by simulated writings or by declaring himself debtor, without consideration or cause, in any public or private act;
>
> (*f*) if he has concealed or destroyed his books, documents or other papers relating to his accounts.
>
> **540.** A bankrupt may in the cases following be adjudged a fraudulent bankrupt, unless he sufficiently proves that he had no intent to defraud -
>
> (*a*) if he has not kept books or if his books do not show the true state of his assets and liabilities;
>
> (*b*) if, on being lawfully summoned for examination, he fails to attend;
>
> (*c*) if he has not aided in the making up of the inventory.

In all the cases in article 539, **the bankrupt shall be deemed ex lege to be a fraudulent bankrupt**. This relates to giving trade books which are not a true and fair view of his affairs. Once you are a fraudulent bankrupt, you cannot be rehabilitated to trade since the benefits granted by law in favour of bankrupts will not apply, and you can never have anything to your name as your creditor will take it immediately.

Then there is article 540. Right away, the burden of proof is shifted onto the trader. In these 3 cases, if the trader shows that he had no intent to defraud, then there is a discretion in the hands of the court to decide as to whether that bankrupt trader was a fraudulent bankrupt or not. Note that article 539 speaks of '*shall*', whilst article 540 speaks of '*may*.'

Cases

1) **<u>Il falliment ta' Charles Fiġġieri</u>** (2008)
2) **<u>Il falliment ta' Frederick u Rachel Cauchi</u>** (2016)

In both these cases, the trader in question had not kept trade books and they filed for bankruptcy. The issue which arose was whether a trader can still file for bankruptcy if that trader does not keep trade books and therefore is not in a position to file the trade books together with the declaration of bankruptcy, as stated in article 480. The Court held that the fact that you have not kept the trade books does not debar you from applying for the status of a bankrupt person. The importance of the trade books is there at a late stage to determine whether you can be rehabilitated to trade or not. So, they are important not to declare whether you are bankrupt or not as that is a matter of fact. The likelihood is that if you have not kept your trade books, unless you prove that you had no intention to defraud, you will be stuck with those debts for the rest of your life.

In **Mamo v. Barbara (App. 08/05/1967)**, he had trade books be the subject of the warrant of seizure (*il-Mandat ta' Qbid*). The issue that arose was whether you make a warrant of seizure on the trade books or the trader? The Court stated that no, trade books cannot be the subject of a warrant of seizure. Moreover, one must distinguish *il-mandat ta' Qbid* from *il-mandat ta' Sekwestru*.

What trade books and documents is a limited liability company bound to keep?
The commercial partnership is automatically ipso jure a trader, and when we saw articles 13-18, we had a list of trade books that every trader is bound to keep.

Limited liability companies are regulated by the Companies Act of 1995, Chapter 386 of the Laws of Malta. Prior to that, we had the Commercial Partnerships Ordinance of 1962 which was a cut and paste of the English Companies Act of 1948. When it comes to the obligations of a limited liability company, the major obligations are the keeping of trade books and the corporate documentation and that of keeping proper accounting records. In this respect, the duty imposed on limited liability companies emanates from two pieces of legislation namely, the Commercial Code and the Companies Act. Therefore, companies are not regulated exclusively by the Companies Act. In virtue of article 4 of the Commercial Code, a limited liability company is considered to be a trader. Therefore, it is safe to say that the obligations you find in the Commercial Code dealing with the keeping of trade books (articles 13-26) are also applicable to limited liability companies, but the Companies Act in virtue of article 163 onwards has imposed even more onerous obligations on a limited liability company. These more onerous obligations have superseded certain provisions that we find in the Commercial Code. In this way, the articles in the Commercial Code are applicable to companies so long as the Companies Act does not derogate from the contents of articles 13-26. In fact, articles 13-18 of the Commercial Code are superseded by article 163 onwards of the Companies Act, while **articles 19-26 apply to companies**.

Why do you think that the obligations insofar as keeping of trade books are concerned in the Companies Act relating to companies are more onerous than those in the Commercial Code?
In view of the fact that in the case of a limited liability company the liability of a shareholder is limited to the share capital that they have placed in the company, the legislator had to make sure that the regime is more onerous. In the case of the trader, the trader does not have limited liability. On the other hand, in the case of a limited liability company, if a company goes bankrupt the liability of the shareholders is limited and you have no way of retrieving anything.

The first section to look at is **article 163** of the Companies Act.

163. (1) In lieu of the requirements of articles 13 to 18 of the Commercial Code a company shall be required to keep proper accounting records with respect to -

(*a*) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

(*b*) the assets and liabilities of the company;

(*c*) if the company's business involves dealing in goods:

(i) statements of stocks held by the company at the end of each accounting period of the company;

(ii) all statements of stocktakings from which any such statement of stocks as is mentioned in sub-paragraph (i) has been or is to be prepared; and

(iii) except in the case of goods sold by way of ordinary retail trade, statements of all goods sold and purchased, showing the goods and the buyers and sellers in sufficient detail to enable all these to be identified.

(2) For the purposes of sub-article (1), proper accounting records shall be deemed to have been kept with respect to the matters aforesaid if such records are sufficient to show and explain the company's transactions and are such as to -

(*a*) disclose with reasonable accuracy, at any time, the financial position of the company at that time; and

(*b*) enable the directors to ensure that any balance sheet and profit and loss account prepared under this Chapter complies with the requirements of this Act.

'*Disclose with reasonable accuracy'* here you have two elements that are crucial:

1) At any point in time, by seeing these accounting records, you will be able to assess *with reasonable accuracy* the exact financial position of that company;

2) The directors must, with the accounting records which are kept, be in a position to ensure that the balance sheet and the profit and loss account comply with the requirements of the Companies Act. This is important because the directors are the people who sign the accounts and take responsibility for those accounts. They are entrusted with the administration and the management of the company while the shareholders are the people who own the company. There is this distinction. The shareholders can never assume personal responsibility for the debts of the company, except for one exception. The directors, on the other hand, can, under certain circumstances, assume personal responsibility for the debts of the company. This is not automatic due to limited liability. Three main cases when directors assume personal responsibility are: (1) responsible for fraudulent trading, (2) for wrongful trading or (3) if they have failed to keep proper accounting records in accordance with the provisions of the companies act.

Article 163(3)

> (3) The accounting records shall be kept at the registered office of the company or at such other place as the directors think fit, and shall be at all times open to inspection by the officers of the company:
>
> Provided that if accounting records are kept at a place outside Malta there shall be sent to, and kept at a place in Malta and at all times be open to the inspection of the officers of the company such accounts and returns with respect to the business dealt with in the accounting records so kept as will disclose with reasonable accuracy the financial position of that business at intervals not exceeding six months and will enable to be prepared, in accordance with this Act, the company's balance sheet and its profit and loss account.

The wording '*at all times*' literally means at all times.

Article 163(5)

> (5) Notwithstanding the provisions of article 26 of the Commercial Code, the accounting records of the company shall be kept for a period of ten years:
>
> Provided that where the accounting records are kept in a bound or unified form, the ten years shall commence to run from the date of the last entry made therein.

While in the case of a trader you have to keep accounting records for 5 years, in the case of a limited liability company it is 10 years. Notably, it is **more important for a company to publish its accounting records** when compared to a physical trader and other commercial partnerships since a company has limited liability. Moreover, an intrinsic part of the workings of a company is to ensure that before placing credit within the company, the creditor is able to see the current standing of the company.

As stated in **article 163(6)** and **article 163(7)** of the Companies Act, if a company fails to comply with the requirements of article 163, every officer of the company (directors and the company secretary) who is in default shall be guilty of an offence and be liable of conviction to a fine, unless he shows that he acted diligently and that, in the circumstances in which the company's business was carried on, the default was excusable.

> (6) If a company fails to comply with any provision of sub-articles (1) to (4), every officer of the company who is in default shall be guilty of an offence and liable on conviction to a fine (*multa*) of not more than eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87), unless he shows that he acted diligently and that, in the circumstances in which the company's business was carried on, the default was excusable.
>
> (7) If a company fails to comply with the provisions of sub-article (5), every officer of the company who is in default shall be liable to a penalty.

Besides the accounts and the accounting records that have to be kept by a company in terms of article 163, every company must also keep a register of members, debentures, minutes of proceedings, minutes of general meetings, and minutes of the board meetings. These minutes are important because they keep official record of what is said during the meetings and of the positions taken by either the shareholders or the directors at that meeting. This is your only point of reference on their position. When it comes to litigation in company law, the minutes are crucial. The secretary is bound to keep the minutes and before the next following meeting, the secretary has to circulate the draft minutes which are to be approved by the upcoming meeting (the role of company secretary has become a highly onerous role). On the agenda, at the next meeting, the very first thing that arises is the approval of minutes of previous meeting. If someone is not in agreement with the way the secretary has recorded the minutes, he/she must come forward. Even if the amendments do not happen, there is record that you are not in agreement.

With regards to the onerous role of company secretary see:
Il-Pulużija v. Robertino Tufigno
Il-Pulużija v. Jean Karl Farrugia
Il-Pulużija v. Audrey McCormick

Article 167

167. (1) The directors of every company shall prepare for each accounting period individual accounts comprising the balance sheet as at the last day of the accounting period to which they refer, the profit and loss account for that period, the notes to the accounts and any other financial statements and other information which may be required by generally accepted accounting principles and practice. These documents shall constitute a composite whole. The name, registration number, legal form and registered office address of the company and where appropriate, the fact that the company is being wound up shall be indicated in these accounts.

(2) The individual accounts shall be drawn up clearly in accordance with generally accepted accounting principles and practice and the provisions of this Act including, where applicable, the requirements of the Third Schedule.

What are the duties of the directors every year when it comes to financial records? So, every accounting period (normally of 12 months), the directors have to prepare the balance sheet, profit and loss account along with detailed notes explaining the figures in those accounts. The accounts have to be prepared in accordance with general accounting principles, in accordance with the provisions of the Companies Act and also in accordance with the content in the Third Schedule.

Article 167(3)

(3) The individual accounts shall give a true and fair view of the undertaking's assets, liabilities, financial position and profit or loss. Where the application of this Act would not be sufficient to give a true and fair view of the undertaking's assets, liabilities, financial position and profit or loss, such additional information as is necessary to comply with that requirement shall be given in the notes to the financial statements.

This article brings out the importance that **the accounts have to give a true and fair view**. If you have complied with the rules and still it is felt that the account is not giving a true and fair view, you have to specifically explain what that fact is. It has to be put there so anyone reading the accounts gets a true and fair view.

Article 167(5)

(5) Where in exceptional cases the application of a provision of this Act is incompatible with the obligation for the individual accounts to give a true and fair view, that provision shall be departed from in order to give a true and fair view. Any such departure shall be disclosed in the notes to the accounts together with an explanation of the reasons for it and a statement of its effect on the assets, liabilities, financial position and profit or loss.

The giving of a true and fair view is paramount and overrides everything else in the Act.

Article 168

168. (1) The provisions of this Chapter and the Schedules enacted under it shall apply only to the extent that they are not inconsistent with, or contradicted by provisions on the financial reporting of certain types of undertakings or provisions regarding the distribution of an undertaking's capital which are laid down in other legislative acts in force in Malta.

Special undertakings have special rules that regulate them. Article 168 allows for special undertakings to have an account drawn up in a special way.

In the case of a group of companies, see **article 170**.

These are the provisions that we are seeing that accounts have to be prepared, they have to be prepared according to the content of the Companies Act, according to accounting standards and according to the Third Schedule to the Companies Act. More importantly, that when they are prepared, they have to give a true and fair view.

Once the accounts are prepared, what happens with those accounts?
The directors who are responsible for the management of the company have to approve those accounts as stipulated in **article 176.**

176. (1) A company's annual accounts shall be approved by the board of directors and the balance sheet shall be dated and signed on behalf of the board by two directors of the company.

Just imagine you are two directors in a company, and you are not agreeing with the way the company is being managed by the other directors. One of the weapons we use to force an issue is that the moment you do not have two directors to sign the accounts of that company, the accounts cannot be filed. This is like a 'veto' you have as a director of a company. In this way, the directors have to take responsibility for the contents of those financial statements.

Article 176(2)

(2) Every copy of the balance sheet which is laid before the company in general meeting, or which is otherwise circulated, published or issued, shall state the name of the directors who

signed the balance sheet on behalf of the board.

A copy of the balance sheet is given to the general meeting and a copy is given to the registrar of companies because this is a limited liability company. Third parties will look at it before entrusting their money in the company. The public at large and the creditors of the company can check the financial status of that company and see whether it can be trusted or not with credit because it has limited liability.

If the directors approve accounts that are not in compliance with the provisions of the Companies Act, those directors become **liable to a penalty**. If you deliver for registration or deliver for discussion at general meeting a balance sheet or accounts not signed by the directors, one again that is an infringement of the law, and the directors will incur a penalty. The accounts are delivered to the general meeting of the company because the shareholders have stake. The directors are running the company for the shareholders, and this is why the accounts are laid for approval by them. It is the rendering of accounts for the shareholders.

Article 177

177. (1) For each accounting period the directors shall prepare a report, hereinafter referred to as "the directors' report".

(2) The directors' report shall state the names of the persons who, at any time during the accounting period, were directors of the company, the principal activities of the company and its subsidiaries in the course of the accounting period and any significant change in those activities during such period, and a fair review of the development of the business of the company and its subsidiaries during the accounting period, and of their position at the end of that period together with a description of the principal risks and uncertainties that they face.

The review shall be a balanced and comprehensive analysis of the development and performance of the undertaking's business and of its position, consistent with the size and complexity of the business.

To the extent necessary for an understanding of the undertaking's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters. In providing the analysis, the directors' report shall, where appropriate, include references to, and additional explanations of, amounts reported in the annual financial statements.

The Directors' reports vary. It must be approved by the board of directors, must be dated and signed on behalf of the board by two directors of the company. Every copy is laid before the general meeting and a copy is also delivered to the registrar of companies for publication.

Article 179

179. (1) A company's auditors shall make a report to the company's members on all annual accounts of the company of which copies are to be laid before the company in general meeting during their tenure of office.

(2) The auditors' report shall be drawn up in accordance with generally accepted auditing standards and shall state whether in the auditors' opinion the annual accounts have been properly prepared in accordance with this Act, and in particular whether a true and fair view is given -

(*a*) in the case of an individual balance sheet, of the state of affairs of the company as at the end of the accounting period;

(*b*) in the case of an individual profit and loss account, of the profit or loss of the company for the accounting period;

(*c*) in the case of consolidated accounts, of the state of affairs as at the end of the accounting period, and the profit or loss for the accounting period, of the undertakings included in the consolidation as a whole, so far as concerns members of the company.

Besides, there is also an **auditor's** (the persons who once a year will check the accounts of the company) **report**. The auditor is taking responsibility to ascertain whether the accounts are giving a true and fair view. It must also express its opinion whether the accounts are being drawn up in accordance with the requirement of the Companies Act and identify whether there is any material misstatement in the report.

Article 179(3)

(3) The auditors shall consider whether the information given in the directors' report for the accounting period for which the annual accounts are prepared is consistent with those accounts; and if they are of the opinion that it is not they shall state that fact in their report.

The auditors shall also:

(*a*) express an opinion on whether the directors' report has been prepared in accordance with the applicable legal requirements;

(*b*) state whether, in the light of the knowledge and understanding of the undertaking and its environment obtained in the course of the audit, they have identified material misstatements in the directors' report, and shall give an indication of the nature of any such misstatements:

Provided that the requirement mentioned in paragraphs (*a*) and (*b*) shall not apply to the non-financial information to be disclosed in accordance with paragraphs 8 and 11 of the Sixth Schedule, but the auditors shall check whether such information is provided.

The auditor's report must be laid before the company in general meeting and also given to the registrar of companies for publication. If the auditor feels that there is something wrong or that he is not in a position to confirm whether the accounts give a true and fair view, he must, for himself, the public and third parties, qualify those accounts. He must state why he is not in a position to confirm that the auditor's account gives a true and fair view. When you have a qualified auditors report, you have alarm bells. He is telling you be aware.

Article 179(10)

(10) If the auditors are of the opinion that proper accounting records have not been kept, or that proper returns adequate for their audit have not been received from branches not visited by them, or if the company's individual accounts are not in agreement with the accounting records and returns, the auditors shall state that fact in their report.

Article 179(1)(c)

(*c*) include an audit opinion, which shall be either unqualified, qualified or an adverse opinion and shall state clearly the opinion of the auditor(s) or the audit firm(s) as to:

(i) whether the annual financial statements give a true and fair view in accordance with the relevant financial reporting framework; and

(ii) where appropriate, whether the annual financial statements comply with statutory requirements.

If the statutory auditor(s) or the audit firm(s) are unable to express an audit opinion, the report shall contain a disclaimer of opinion;

The duty of the auditor is becoming always more onerous. In section 179A the legislator is forcing the auditor to take a position, he has to state whether the content of the accounts is giving a true and fair view. He has to take a stand, saying yes, no or that he is not in a position. Furthermore, if an auditor resigns from being an auditor, he must make a statement saying why he is resigning, and he must bring any matter which he feels should be brought to the attention of the shareholders of the company to their attention. If he feels that there is no matter that should be reported on, he must state it. The duties of the auditor are becoming more and more onerous. In the case of Price Club, a lot of suppliers remained unpaid. One of the suppliers said that according to the audit accounts of the company there was no sign of bankruptcy. He felt that the auditors of the company misrepresented it and that had a proper audit been carried out, he wouldn't have trusted the company with so much credit. He sued the auditors in tort (third parties can only sue the auditors in tort). The court partly found in favour of this creditor against the auditors and ordered the auditors to contribute because it held they were negligent – Valle Del Miele case (https://timesofmalta.com/articles/view/Auditors-found-negligent-over-work-on-Price-Club.499315).

According to **article 180** of the Companies Act, a copy of the annual accounts has to be delivered to every member of the company, every holder of the company's debentures and all other persons who are entitled to receive notice of general meetings at least 14 days before the meeting to allow them to analyse the accounts well and consult other people with regards to their concerns. Moreover, "*in respect of each accounting period of a company the directors shall lay before the company in general meeting for its approval copies of the annual accounts of the company for that period. There shall be annexed to the annual accounts, the auditors' report as specified in article 179 and the directors' report as specified in article 177*" as stipulated in **article 181**.

Besides the Companies Act, traders and companies have other obligations in so far as keeping trade books and accounts. Namely, these are provisions dealing with the Income Tax Management Act, the Value Added Tax Act, and the Duty on Documents Act.

- **Article 19** of **the Income Tax Management Act** – you have to keep the records for 9 years.

- **<u>Article 48</u>**, Part VI of **the Value Added Tax** – you have to keep records for 6 years. The 11th schedule of the Value Added Tax Act imposes what you need to keep for the purposes of VAT.
- **<u>Article 7</u>** of **the Duty on Documents and Transfers Act** – 4 years. A document is defined in terms of this law. You have to make sure that any document in respect of which stamp duty was paid, is preserved by you for 4 years.

DUTY OF PUBLISHING MARRIAGE CONTRACTS
Obligations on the notary
Articles 27-31 of the Commercial Code

Article 27

27. (1) Every notary receiving a marriage contract or any deed varying such contract between persons any one of whom is described in the deed as a trader, shall, within fifteen days from the date of such contract or deed, file with the Registrar of Courts of Malta or with the Registrar of Courts of Gozo, according to the residence of the party described as a trader, a note containing the following particulars:

(*a*) the date of the contract or deed and the name of the notary receiving such contract or deed;

(*b*) the name of the party described as a trader;

(*c*) the amount of the dowry and of the dower.

(2) The registrar shall cause a copy of the note aforesaid to be posted up at the Exchange and published in the Government Gazette.

This is not a duty on the trader but a duty on the notary. With the term 'marriage contract' we are not referring to the actual marriage certificate of the couple, but to a marriage settlement agreement or a prenup or an agreement done during the marriage whereby the couple are going to have separate estates.

In the past, they would have *il-kitba taż-żwieġ*. This is basically a prenup. The woman would have security that the value of the *dota* would be secured by a hypothec on the value of the husband. This would ensure that in the eventuality that the husband goes bankrupt, that amount of money is protected by the wife. The sections of the law originally tended to cover the *kitba taż-żwieġ*. The hypothec used to apply with the concept of dota (dowry). So, the wife would contribute to the house, she would normally get the biancheria, the furniture, and so on. Those have a value so to protect the investment that the wife has made into the marriage. So, prior to the marriage, the husband used to give the wife **a hypothec for the value of the things she brought into the marriage to safeguard her investment**.

Every marriage which is celebrated in Malta, or which is celebrated abroad, and the couple settle in Malta, from the date of celebration in the former case and from the date of settlement in Malta in the latter case, the community of acquests is presumed to apply between those spouses. Community of acquests is as though there is a pot and whatever the husband or wife earns is put in it and divided equally between the spouses. Property which either spouse had **prior to the marriage** or was donated to him or was inherited by him/her is called **paraphernal property**. This will remain belonging only to that spouse who owns it in the case of marriage breakdown under Maltese law. Naturally, this idea of community of acquests is not always appreciated or desired because you can have situations where the spouses will want to have a **separation of estates**. This can be done for a number of reasons, it could be the parties want to hold on to everything they have, it could also be that there is a big difference in the financial positions of the spouses, but it could also be that if the husband is performing a business in his own name he might be scared that if the business goes bust, his wife will end up losing whatever she has as well. Therefore, **it might be in the interest of both parties that they will shield some property by doing the separation of estates**.

In the case of a trader, separation of estates becomes important because of third parties. The legislator has specifically catered for an obligation that when there is a marriage contract, therefore when the matrimonial regime has been treated in a particular way between the spouses, **they have to make this fact public so that anyone dealing with that trader can know what the situation is between the husband and wife**. It might be that there is a marriage contract between them whereby the trader has nothing to his/her name.

Article 28

28. (1) The Registrar of Courts of Malta and the Registrar of Courts of Gozo and Comino shall keep an Index, in alphabetical order, of the notes filed with them respectively under the provisions of the last preceding article.

(2) The Index shall be open to inspection by the public.

If I am dealing with a particular trader, I can go to court and check whether that trader has a marriage agreement or not.

Article 29

29. Every notary who fails to comply with the provisions of article 27 shall be liable, on conviction, to a penalty not exceeding twenty-three euro and twenty-nine cents (23.29), at the suit of any interested party, or of the Attorney General, by summons before the Civil Court, First Hall, or before the Court of Magistrates (Gozo) in its superior commercial jurisdiction, as the case may be.

If a notary does not honour his/her obligations, he/she has a minor penalty.

Article 30

30. (1) Where any one of the spouses engages in trade after the marriage, or although already engaged in trade has not been so described in the marriage contract, the obligations mentioned in article 27 shall devolve upon such spouse.

(2) If such spouse fails to carry out the said obligations, such spouse shall be liable to the penalty prescribed in the last preceding article and may, moreover, in the event of bankruptcy, be adjudged a fraudulent bankrupt.

The only obligation imposed on the trader really and truly is article 30. If you would have entered into one of these agreements and then you become a trader subsequently to having entered into this agreement, then it is the duty of the spouse who has become a trader to ensure that it is made public.

Article 31

31. (1) The registrar shall cause every demand for the separation of property between spouses any one of whom is described in the Index mentioned in article 28 as a trader, to be published in the Government Gazette.

(2) The registrar shall likewise cause the judgment on the said demand to be published in the Government Gazette, and shall enter a reference to such judgment in the said Index.

Article 31 is the separation of estates.

PERSONS AUXILIARY TO TRADE
Articles 49 onwards

The other people who owe their existence to the fact that there is a trader are persons auxiliary to trade. We are going to start seeing article 49 onwards of the Commercial Code. The idea of having persons auxiliary to traders is due to the fact that as traders grow, the trader needs other people to help him with his activities.

There are two classes of person auxiliary to trade:

1) **Those who have a limited function but who's actions have no legal purport vis-a-vis third parties**. For example, an employee who cannot bind his boss with third parties, a secretary, a skilled labourer and so on. Whatever these people do, although they owe their existence to a trader, **they have a limited function that does not lead to the trader entering into a legal obligation with any third parties**.
2) **Those whose actions create a legal relationship with third parties**. For example, agents, managers and so on. These people, **in the name and for and on behalf of the trader, will bind the trader with third parties**.

There is another sub-division that one has to make. The first category of this sub-division is persons auxiliary to trade dependant on other persons for example, the agent who is dependent on the principal. And the second sub-division is persons auxiliary to trade who are independent of other persons. The typical case is the broker who is a middleman.

Law governing mercantile agency
Article 49

> **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:
>
> 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.

From an analysis of this article, there are two main observations to make:

1) This relates to the sources of law insofar as mercantile agency is concerned. The sources are three-fold: (1) **the law of agency itself** (specific provisions or commercial custom dealing with agency), (2) **the law of mandate** (authorisation to do things on someone else's behalf), and (3) **the provisions of the Employment and Industrial Relations Act** (the law dealing with employment in Malta). A mercantile agency is dependant in part on the rule you have in the Civil Code dealing with mandate. This is the reference made in article 49.

   The main distinction between an agency and a mandate is that in an agency situation, I appoint someone as my agent. **My agent has the power to negotiate and conclude business on my behalf**. While in the case of a mandate, you are given strict instructions and **do not have the power to negotiate anything**. There is no power to negotiate and conclude business on behalf of the principal as the mandatory. The mandatory will promote the business of the principal but has no power to decide, negotiate and conclude business but will have to refer them back to the principal. The difference between agency and an employee is glary. An employee isn't doing anything for and on behalf of the principal. But mercantile agency has elements from all three in it.

2) This results from '*with the exception of section 1861*'. (1861. *"Mandate is gratuitous, unless there is a stipulation to the contrary."*) This section is **not applicable to a mercantile agency**. Under the civil law, the person who acts as a mandatory has no right to be paid for what he performs under the mandate, therefore, it is gratuitous. On the other hand, **mercantile agency can never be gratuitous** because the legislator has specifically excluded article 1861. Mercantile agency must always be against payment because ***finis mercatorum lucrum est***. The mercantile agent has to make a profit by acting in this way. He is taking certain risks and responsibilities and devoting time to it, so, has to be paid.

Definition of agency by Professor Micallef – *'agency is a contract whereby one person, the principal, authorises another, the agent, to act in his own name and on his behalf in a legal relationship between the principal and the third party.'* Therefore, there are three characters at play: **<u>the principal</u>**, **<u>the agent</u>** and **<u>third parties</u>**. You have three different relationships: (1) the relationship between the agent and the principal, (2) the relationship between the agent and third parties and that (3) between the principal and third parties. There is a legal relationship between each one of them. By and large what we are concerned with is when you are dealing with somebody's agent, <u>to what extent is the principal bound by the contract which the agent is signing for and on behalf of the principal?</u> A part of this question is answered in article 50.

<u>Article 50</u>

> **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.

<u>There are two main points that come out:</u>

(1) That the act must be done by the agent on behalf of the principal. **The agent must make it clear that he is acting on behalf of the principal**,

(2) Secondly, **the act which is performed by the agent must be within the scope of his authority**. For the principal to be bound by the acts of the agent, the acts of the agent must firstly be done for and on behalf of the principal and must be done within the scope of his authority. So, if the agent acts within the scope of his authority and the act is don for and on behalf of the principal, that act produces a direct effect on the principal, meaning that it as though that act was done by the principal himself.

'*All acts done by the agent on behalf of the principal*.' Therefore, **the agent must act**, he must do something. When the agent acts, he must be exercising some form of decision making. He must exercise some discretion as to the conclusion of the contract and the principal must have *a priori* authorised him to exercise this discretion in this manner. In this way, the question that arises is **if he did not exercise that discretion, would he be an agent?** If the agent is not exercising any discretion, he won't be an agent at all but a mandatory. An agent is being given a spectrum of authority and within that spectrum, whether narrow or broad, which is within the scope of his authority, and within that spectrum he is going to exercise some form of discretion as to whether he will conclude or not a transaction for and of behalf of the principal. The decision making, which is done by the agent, for it to be binding on the principal must have been delegated by the principal, otherwise the principal is not bound.

'*Produced directly their effect in favour of or against the principal'* refers to the fact that if you have a principal who appoints an agent, and the agent signs an agreement with a third party for and on behalf of the principal and the discretion exercised is within the scope of authority given to him by the principal, that agreement is as though it was signed directly by the principal. It also means that any profits or losses made out of that transaction will belong to the principal and not to the agent. So, a contract concluded by an agent is considered to be a contract *inter-presentes*.

In **Cool Operators Ltd v. John Caruana**, Cool Operators Ltd was a company that used to supply air conditioning equipment to large premisses. John Caruana was an auditor. There was a company that had a hotel in San Pawl il-Baħar which was not in the best of shape. The owner, Mr Vella, had to give a lot of money to the bank. The bank thought that if they were to sell the hotel in the state that it was, it would fetch this much but if they upgraded the hotel, it would fetch much more. But the bank was reluctant to trust Mr Vella with the funds needed to upgrade the hotel. Instead, the bank helped upgrade the hotel on the condition that on the board of directors of the company there has to be an independent auditor and any payments have to be signed by him and he would be the signatory for and on behalf of the company. Cool Operators Ltd supplied new air conditioning to the hotel which cost a large sum of money. For Cool Operators Ltd to be protected, they asked the company to give them a bill of exchange (a document of title to money, it is considered to be an executive title under our law. At the time it still had a huge strength. The person who signs it is confirming that he owes that amount of money to you). The signatory for this company John Caruana was an auditor by profession and had nothing to do with the hotel except that he was employed by the bank, and he signed. He acted as an agent at this stage with one problem. John Caruana **did not specify that he is acting for and on behalf of the company**. So, **article 50 would not come into play because he is not saying that he is signing for and on behalf of his principal**. You have to inform the third party or else you are bound personally. The company defaulted on the payment and Cool Operated Ltd sued John Caruana directly. John Caruana on the day of the hearing, was called and did not reply. Therefore, he ended up with a judgement of 130,000£ against him personally because **he did not indicate that he was acting for and on behalf of the principal**.

Article 51

> **51.** For the purpose of establishing the validity and the effects of the act done by the agent, regard shall be had to the capacity of the principal and to the intention of the agent:
>
> Provided that where at the time of the conclusion of the transaction the principal is in bad faith, he cannot set up the good faith of the agent.

Article 51 tries to see the **validity** (whether something is legally binding or not) of the acts performed by the agent and the **effects** (whether the acts of the agent produce their effect on the principal) of the acts done by the agent. Depending on the formality that is required to perform the act which has been entrusted to the agent, then that formality must also be reflected in the authorisation given to the agent

In order to determine whether an act of the agent is valid or not and what effect it has, one has to look at two things:

(1) The **capacity of the principal** – The whole idea is once the agent is signing on behalf of the principal and it is the principal who is going to be bound, the agent cannot do a contract on behalf of the principal if the principal himself has no capacity at law to perform that act. **The agent can only sign for the principal if the principal himself has the capacity to enter into that agreement**. If the principal is interdicted, he cannot conclude any transaction and therefore he cannot appoint an agent to conclude a transaction for and on his behalf.

(2) The **intention of the agent** – When it comes to the agent, you only have look at the intention of the agent and not the capacity of the agent. You can have a situation where the agent is legally incapable of doing anything, but the principal has the capacity, and the acts of the agent will be binding **because he is not signing in his own name** but for and on behalf of somebody else. So, if I am somebody who is interdicted, I can go work as an agent. You can even have an agent who is a minor. This is derived from article 1869 of the Civil Code (1869. "*Minors may be appointed mandataries; but in any such case the mandator cannot maintain an action against the mandatary except in accordance with the general rules relating to the obligations of minors"*). What we mean by the intention is that **the consent of the agent cannot be vitiated**. If I know something about the agent's personal life and I am blackmailing him to sign a contract for and on behalf of his principal, and the agent signs out of fear, in that scenario the consent of the agent is a vitiated consent meaning it is not binding. **The acts performed by the agent whose act are vitiated will not be binding on the principal and will not be considered to be valid acts**.

So, the act signed by the agent for and on behalf of the principal can be valid once you look at both the capacity of the principal and the intention of the agent. The status of the principal is relevant for the purpose of determining whether a transaction is civil or commercial in nature. If the principal is a trader, then the transactions concluded by him are commercial since they are acts of trade.

Moreover, the proviso ensures that the principal does not abuse of the fact that the agent is in good faith.

The form of the authority of the principal
Article 52

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.

Article 1857(2)

(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.

There are certain transactions that must necessarily be done in writing. Where the law expressly requires that the form required for a particular transaction has to be in writing, then the mandate given to the agent to perform such an act must also be in writing.

I employ an agent and make him go and buy, on my behalf, 20 televisions. The authority that I need to give to my agent to perform that particular transaction does not need to be in writing because the act is not one that has to be done in writing.

I employ an agent to negotiate and buy, in my name, a piece of land. The act of purchasing land is in writing. The authority that you have to give your agent in that case cannot be verbal but must be in writing **because the act that you are going to perform must be in writing**. In various provisions of the law, one will come across a requirement that a particular transaction must be done in writing.

For example, the transfer of a car is not valid if it is not done by means of a private writing, the assignment of a debt or assignment of a right have to be in writing and so on. **Article 1233** of the Civil Code gives a list of transactions which on pane of nullity must be done in writing.

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

Article 1233(1)(a): refers to the fact that unless you have actually signed a promise of sale (*konvenju*) in writing, there is no binding element at all. If there is no legal value as to why the promise of sale should fall (remember that *konvenji* tend to have certain conditions), it is enforced.

Article 1233(1)(b): you have a normal bank loan. The bank manager has to say in writing that he is giving you the loan.

Article 1233(1)(c): one finds suretyship.

Article 1233(1)(d): you are settling a dispute.

Besides compromise, you have another two limbs in this article.

Article 1233(e): you have a lease agreement which must necessarily be done in writing for it to be valid. This is also in terms of the law relating to lease. Originally, it did not have to be in writing, this was only so if it were for a period exceeding two years but then there was an amendment.

Article 1233(f): is the penultimate paragraph. A civil partnership is a partnership which is not a commercial partnership as is found in the Companies Act. Three lawyers joining and forming a partnership is a civil partnership, for example. Even traders joining together in a partnership but not registering as a commercial partnership is a civil partnership. In **Alexandra Sammut v. Ian Sammut**, you have a mother who had two children a son and a daughter. The mother kept running a business but was involving the children in the running of the business and things turned sour between the daughter and the mother and the daughter and the son. The daughter filed a court case against the mother and the brother on the basis that 'we had a partnership between us, I am no longer involved now, and I want to have my share from the partnership and be paid that amount for being excluded from this partnership.' The defence raised by the brother and mother is 'show us the partnership agreement because article 1233(1)(f) makes it very clear that a civil partnership must be in writing.' So, if she does not have it in writing, she has nothing.

Article 1233(g): speaks of promises of marriage law which is engagement.

Object of mandate

> **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.

The object of the mandate must be something lawful which the principal may do himself. This ties up with article 51 relating to the capacity of the principal and it arises in virtue of article 1857 of the Civil Code.

Article 1856(2)

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

The agent situation does not arise until the agent has accepted the mandate being given. This arises in virtue of article 1856(2).

Article 1858

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

Article 1858 tells you that the acceptance might also be tacit. How can you infer tacit acceptance? If you've started executing the instructions that I've given you, it is obvious that you have accepted.

Article 1859

> **1859.** Any person carrying on trade or exercising a profession who, without just cause, fails to give notice to the mandator, without delay, of his refusal to accept a mandate relating to commercial or to professional business, as the case may be, is answerable to the mandator for damages occasioned by the delay.

You can end up being held liable in damages vis-à-vis the mandator who gave you those instructions because you did not tell him to appoint someone else because you can't. There was once a ship that had to give a big sum of money to its insurer. It was noted that this boat would come into Malta at midnight and by 8am he would have left. He would do it to avoid being arrested over here. A lawyer was given instructions to expect the vessel to arrive at a given time and to be arrested. The vessel came in on a holiday. These are sting operations where you have to organise everything in a few hours. If you are given instructions to do this and you sleep on it, you can be held liable for damages.

The example when a person carrying on a profession does not inform the person giving him the mandate that he will not be accepting the mandate on time. There is tort.

THE DUTIES OF THE AGENT
The duties of the agent divide into two: **special duties** and **general duties**.

Special duties of the agent
Article 54 of the Commercial Code

> **54.** (1) The agent is bound to furnish to the third party every information as to the extent of the authority conferred on him by the principal and, if the third party so requires, the agent is bound to deliver to such third party a declaration duly signed by him to the effect that a given transaction is comprised within the said authority.
>
> (2) Any false statement wilfully made by the agent in the said declaration shall be considered as a forgery of a commercial document within the meaning of article 183 of the Criminal Code, and shall be liable to the punishment therein prescribed, without prejudice to any action for damages and interest.

The first special duty is that arising in virtue of article 54. It is the duty of the agent towards third parties. You have the agent who is representing the principal who goes to a third party to conclude business for and on behalf of the principal. In such scenarios, the third party will need to be sure that the individual is actually the agent of the principal and not somebody merely claiming to be so. In this case, there is a duty of the agent to '*furnish to the third party every information as to the extent of the authority conferred on him by the principal…*'

Furthermore, the third party can also ask the agent to show him a declaration signed by the principal confirming that the transaction that the action which the agent is doing is comprised within the authority which the principal is giving to the agent. It could be that the third party asks the agent for this declaration or for confirmation that the transaction is comprised within the authority that the agent has and, subsequently, the agent does not comply with that request. Obviously, if the third party asks the agent for certain confirmation and the agent doesn't comply, the third party has every right to think that he is lying. Consequently, the third party will not conclude any transaction with the agent.

Article 54(2) where the agent gives a false declaration that the principal has authorised him to perform certain transactions when this is not the case. In this case, the agent shall be considered as having committed a forgery of commercial documents, as laid down in the Criminal Code.

Article 56 of the Commercial Code

> **56.** It shall not be lawful for the agent to transact with himself a business of his principal, whether on his own behalf or on behalf of any other person, directly or through the medium of a third party, without the authority or ratification of the principal.

Article 56 of the Commercial Code imposes a negatived obligation on the agent. This is due to the fiduciary character of the agent because the agent has a fiduciary principle that **he must be acting in the interest of the principal and for and on behalf of the principal**. If he is transacting with himself, there is a **conflict of interest**. It forbids the agent, once he is wearing the hat of the agent of the principal, to conduct with the agent personally. This is because either I am acting in the interest of the principal, or I am acting in my own personal interest.

General duties of the agent
<u>Article 1873 of the Civil Code</u>

> **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.

The first general duty of the agent is that of carrying out the mandate which is given to him. This duty results from article 1873 of the Civil Code.

Article 1873(2) is an exception to the rule. There exists the general principle that when you give a power of attorney to somebody else, very often, what happens is that if the person who gives the power of attorney dies, that power of attorney is immediately terminated. So, this is an exception to the rule because, in this case, the power of attorney is going to survive the death of the mandator. This is only if the delay may be prejudicial. If not, it will terminate and follow the basic rule.

<u>Article 1874 of the Civil Code</u>

> **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.

The agent is answerable for negligence in article 1874. All the rules in mandate are applicable to the agent except article 1861 (that mandate can be onerous and gratuitous). This means that in the case of an agent, in so far as negligence is concerned, it is going to be enforced more rigorously than in the case of a gratuitous mandate situation because the agent is going to get paid for his services. Article 1874 relates to the degree of negligence for which an agent is responsible. And article 1874 tells you that **the agent is not only responsible for fraud but also for negligence**. There are different degrees of negligence. Slight negligence in the case of a gratuitous mandate will not constitute responsibility. But in the case of an agent even if the negligence is slight, since he is being paid, then you expect no negligence whatsoever on his part.

<u>Article 1876</u>

> **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.

This is the notion of ***delegatus non potestas delegare***; someone who is a mandatory cannot appoint another mandatory to perform the mandate that was given to him. This arises in virtue of article 1876 of the Civil Code. The first principle that you have is that the mandator is not authorised to appoint another person instead of him to perform the mandate unless the mandator specifically authorises him to do so. The second point is that if the mandator has authorised the mandatory to appoint someone in his stead without mentioning who can be appointed in his stead, if the mandatory appoints someone who is incompetent, then in such a case, the mandatory will also be answerable for all the shortcomings of the person who he has chosen to substitute him.

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.

The last general duty is a duty to render an account. There is a clear duty for the agent to render an account.

THE DUTIES OF THE PRINCIPAL
Article 1881 of the Civil Code

> **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.

The first duty is that of reimbursing the agent. The principal must pay to the agent any expenses which have been incurred by the agent to perform the mandate given and any advances that the agent might have made in order to comply with the instructions given to him by the principal.

Article 1882 of the Civil Code

> **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.

The second duty of the principal is a duty to indemnify the agent for any losses incurred by the agent.

Lastly, the agent has a right to be renumerated for performing the service of the agent. He has to be paid for the services.

So, his 3 duties include:
1. Reimbursement
2. Indemnification of any losses
3. Renumeration for services rendered

Article 1885 of the Civil Code

> **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.

To safeguard the agent that the principal will definitely comply with these 3 duties, the legislator has established that the agent has a ***ius retensionis***. For example, I took a car to be repaired and the bill came €1,500. The mechanic can tell me that before you pay me, I won't give you the car. **It is the right to retain something that belongs to your debtor**. The legislator, in the case of mandate, has given this right to the mandatory by virtue of article 1885. He has a right to hold onto any merchandise or monies that belong to the principal to make sure that he gets paid.

The effects of acts done by agent within the scope of his authority
Article 50 of the Commercial Code

> **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.

When the agent does something, what are the effects of such an act? The general principle is that contained in article 50.

Requisites:
(1) First and foremost, **the person who performs the act must be an agent who is duly appointed in terms of the law**. If somebody says that he is my agent and he isn't, I as a principal cannot be bound by that act. What happens if someone concludes a transaction on my behalf in this case? The principal, who is not really the principal, is definitely not bound but the person who is pretending to be an agent is referred to as a ***falsus procurator*** and that person would have concluded a transaction for and on behalf of a third party. So, strictly speaking you cannot sue him directly because he never signed in his own name. In such a scenario, the third party has a claim for damages against such *falsus procurator* because that person was fraudulent and, therefore, there is a claim in damages against such person. It is **a claim in tort** not in contract.

(2) The second requisites to produce an effect is that **the agent is to act in the name of the principal**. This is referred to as ***contempltio dominii***. The fact that the agent is acting in the name of the principal must result either expressly or impliedly. Normally, the agent would sign for an on behalf of the principal.

(3) The third element is that **the agent is bound to act solely within the scope of the authority**. As we saw in article 54, the agent, if he is asked to furnish evidence of his authority, is bound to do so and he can only act within the scope of his authority.

Termination of agency
How does an agency relationship terminate?
The Commercial Code does not mention how this is done. The only mention it makes, in **article 55**, is a mechanism of how the principal frees himself from liability vis-à-vis third parties.

> **55.** Where the agency has been conferred in general terms, the principal who withdraws the agency, may relieve himself from all liability towards third parties for any further acts done by the agent, by giving notice of such withdrawal by means of a note filed in the Civil Court, First Hall, or in the Court of Magistrates (Gozo) in its superior commercial jurisdiction, as the case may be, and causing such note to be published in the Government Gazette and in another newspaper, and affixed in the Exchange.

The articles dealing with agency only give you a way how the principal can relieve himself of being bound vis-à-vis third parties for acts performed by the agent.

Since the Commercial Code does not tell you how an agency relationship is terminated, once again we have to refer back to the provisions of the Civil Code dealing with mandate.

<u>Article 1886 of the Civil Code</u>

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:

When you look at the law of mandate, an agency situation is terminated in two ways: either by **an act of the parties** or by **operation of the law**.

When you look at **the acts of the parties**, it can be one of three possibilities:

(1) By mutual agreement of the parties;
(2) By an act of the principle who will terminate the agency, either expressly or tacitly (by appointing a new agent to perform the role of the previous agent);
(3) By the agency himself who renounces to the agency and informs the principal.

By operation of the law, on the other hand you have:

(1) By the death, interdiction, or incapacitation, or declaration of bankruptcy of the principal or of the agent. Bankruptcy cannot apply to the agent.
(2) By the termination of the powers of the principal. Therefore, if the principal no longer has powers, then the agent cannot have powers since his powers arise solely and exclusively from the principal and
(3) By the expiration of the period of time for which the agency was agreed between the parties. Because if the parties had agreed that the agency relationship had a particular amount of time, once that time expires, then the mandate and the agency is terminated.

Until the agency is terminated, and third parties are made aware of its termination, the principal can remain bound by the acts of the agent vis-à-vis third parties. Moreover, the principal has a cause of action against the agent if the agent knows that the agency is over and yet still goes on with the transaction which he was no longer authorised to do.

THE NOTION OF THE MANAGER
Under Roman law, the manager is referred as the '*infintor*.'

Article 57

> **57.** A manager is a person who is placed, personally and permanently, in charge of the business or of a branch of the business of the principal in one or more fixed places.

Article 57 provides a definition of manager. Prof Micallef, however, also gave a definition: "*the function of the manager is to substitute the principal in the management of the business which has been entrusted to him and as such he is entitled to perform and conclude in the name and on behalf of his principal all acts pertaining and necessary to the exercise of the business or branch of the business in respect of which he has been appointed subject to any limitations imposed on him by the principal*."

Notes
1. The first point of article 57 is that the manager is placed **personally** and **permanently**. '*Permanently*' does not mean forever but it shows that he is not there just for one specific job, but he is employed by his principal.
2. It also speaks of '*one or more fixed places*.' Therefore, he is not roaming around like the commercial traveller but there is a geographical attachment; either one or more fixed places.
3. It also tells you that he is being placed '*in charge of the business or of a branch of the business*.' Therefore, he is being given wide powers if he is being placed in charge of the business and if he is in charge of a branch of the business. An example would be a sales manager, a purchase manager and so on.
4. The manager is placed personally in charge of the business and therefore, has personal responsibilities.

When you look at the manager, the legal characteristic of it partakes of, **the notion of agency** (he is concluding transactions with third parties for and on behalf of the principal), **the notion of mandate** (he is entrusted with managing the business of the principal) and **the notion of employment** (most often the manager is employed by the principal and receives some form of renumeration). He has all three elements. With that being said, the manager is not a trader since he owes his existence to the fact that there is a trader who has appointed him as a trader. He is not performing acts in his own name. Even if the manager is given a share of the profit, by way of renumeration, that does not make him a trader.

See **Michele Mariachi v. Farrugia** (volume 18, part III Pg. 58) and **Zammit v. Galea** (volume 20, part III Pg. 21).

Who may appoint the manager?
The principal who is going to appoint the manager must be a person who has the capacity of exercising acts of trade himself. If the principal does not have this capacity, he cannot appoint a manger.

Who may be appointed as manager?
Article 58

> **58.** Any person, whatever his or her age, may be a manager.

A minor could necessarily be a manger as well.

What form of authority must be given to the manager?
Article 59

> **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 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.

Article 59(1) speaks of the authroity to act as manager being **express**, either verbally or in writing (such as a contract), or **implied** (somebody is employed as a clerk and slowly he is taking over a department and managing it and the principal gives him instructions and before you know it, he has grown into the role of a manager). See **Borg v. Schembri (CA 16/06/1958)** which tells you '*Biex wieħed nominat institur ta' aġenzija kummerċjali ma hemmx bżonn ebda kelma…*' The law does not cater for a mechanism as to how the manager is going to make public his authority as a manager. It merely caters for making public limitations to the manager's authority.

If you have appointed a manager and you want to make sure that the manager will not conclude a transaction with third parties on your behalf that goes beyond the authority given to that manager, you have a mechanism in **article 59(2)**. If the principal does not use the procedure that you have in this article, this limitation of authority and making it public, it is presumed that the authority given to the manager is a general authority.

You arrive at this conclusion, that there is this presumption, in virtue of **article 59(3)**. Therefore, the general presumption is that the manager has a general authority. There is a presumption that the authority given to the manager by the principal is a general authority to do all matters pertaining and necessary to the exercise of the busines or the branch of the business. The exceptions are either the principal uses the procedure in article 59(2), or he might also notify a particular third party that that manager has certain limitations in the authority which have been given. If the principal adopts the procedure in article 59(2), in that scenario he is creating a presumption iuris et de jure that third parties are presumed to know that there is a limitation. See **Emanuele Micallef v. Alfred Tonna (V 35 part I pg. 272 CA 30/April/1951)** and **C&L Calleja Trading v. Victor Aquilina (CA Mr Justice Phillip Sciberras)** and **Paul Pullicino v. Ray Davidson Distributors Limited (01/07/2003)**. **Article 59(3)** lays down two important terms which denote what a general authority of a manger includes, and these are the words 'pertaining' and 'necessary'. Therefore, a general authority of the manager includes all matters pertaining and necessary to the exercise of the business or branch of business in respect of which it has been confirmed. Therefore, the manager cannot do acts of a civil nature on behalf of the principal because it has nothing to do with the business. He cannot do acts that favour his personal interests, he cannot self the business because he must remain within the confines of the business. It must be pertaining to the business and necessary for the business. See the cases where a manger of a company had grated a pension to employees in both cases and the Court held that these cats were not pertaining and necessary to the business.

Joseph Pace v. Ferguson (V.32 P1 CA 20/April/1945) and **Oreste Caruana Scicluna v. Edward Funicane (16/07/1956)**.

There are some limitations found in the Code regarding transactions that the manager can sue or regarding transactions that will not be binding on the principal.

Article 61

> **61.** A loan (*mutuum*) made to the manager is not binding on the principal except when the object for which it has been made has been stated, and such object actually relates to the business or branch of business in charge of which the manager has been placed.

Conditions:

(1) The object for which the loan has been made must be stated;

(2) Such object must actually relate to the business or branch of business in charge if which the manager has been placed. See **Micallef v. Farrugia (V 16, P III Pg. 65)**.

There is a rule of the law of procedure in Malta which is that a person who is present in Malta cannot be represented by someone else to file proceedings. He must file proceedings himself. The law has been amended, and now a legal procurator can go to the house of the person and give him the oath, meaning that he doesn't have to go the Court. If the plaintiff is present in Malta, the plaintiff has to file the proceedings.

Article 64 is an exception to this rule.

> **64.** The manager may sue or be sued in the name of the principal for any obligations arising out of the acts done by him in the exercise of the business or branch of business with which he is charged, even if the principal is present in Malta.

'*Even if the principal is present in Malta*' shows that this is a departure from the normal rules of procedure. This applies in so far as the manager is concerned.

See **Borg nomine v. Schembri (V. XLII, PI pg. 364)** and **Portelli nomine v. Vella (V. XXXVII, PIII pg. 948)**. If you are a manager and somebody sues you for and on behalf of your principal, can you say you do not want to be sued? The answer is no. See **Said v. Tanti Bellotti (V. XXVIII, PIII pg. 968)**.

A very important judgement is **Denise de Giorgio bħala General Manager ta' Bank of Valletta v. Adrian Busietta u Phillip Attard Montalto en nom Tagliaferro & Sons Ltd (FH 23/02/1976 & CA 25/02/1977)** (https://timesofmalta.com/articles/view/The-saga-of-the-National-Bank-of-Malta.427298). In this case, BOV had loaned money to Tagliaferro & Sons Ltd and attached to this loan they had made the condition that they retain the right to appoint directors on the board of Tagliaferro & Sons Ltd if they felt the need to do so. When BOV took over National Bank, it tried to appoint this director on the board, however, Tagliaferro &

Sons Ltd resisted this move. Consequently, BOV sued Tagliaferro & Sons Ltd to be able to appoint this director. BOV's general manager, Denise de Giorgio, utilised article 64 and brought the court case for and on behalf of BOV. BOV was and still is a company registered under the Companies Act, at the time the Commercial Partnerships Ordinance (CPO). And when you have a company, the legal representation of the company is specifically catered for in the memorandum of the company. It is a *sine qua non* that you will establish who has the right to represent the company in judicial proceedings and who has the right to conclude transactions for and on behalf of the company. So, in their memorandum, the company has to lay down who is vested with the legal representation of the company. BOV, in this memorandum, had a legal and judicial representation clause establishing that the representation of the bank was vested in the directors of the bank. Taglaferro & Sons argued that Denise de Giorgio is the manager and so it goes against the provisions of the Commercial Partnerships Ordinance because the Ordinance is specifically laying down who is vested with the legal land judicial representation of the bank and the manager does not result to be vested with such representation. BOV relied on article 64 of the Commercial Code which says that the manager can sue and may be sued for and on behalf of the principal. So, you have two pieces of legislation that are saying different things. The FH decided that the Commercial Partnerships Ordinance did not do away with the content of article 64 and the two sections could co-exist. The CA, however, ruled otherwise and said that the company had to be represented by its directors because the Commercial Partnerships Ordinance is a specialised law and therefore ***lex specialis derogate lex generalis***. That is, when you have a specialised bit of legislation that is dealing with a particular matter, that piece of legislation overrides the general law. In truth, they could have passed a directors resolution authorising Denise de Giorgio to represent the Bank.

What are the duties of the manager?
<u>Article 62</u>

> **62.** (1) The manager shall always deal in the name of the principal, and when signing shall, besides his own name and surname, indicate the name and surname or the firm name of the principal, with the clause *per procura* or some equivalent clause.
>
> (2) In default of such indication, the manager shall be personally liable; but in such case, third parties may bring, also against the principal, any action arising from the acts of the manager pertaining and necessary to the exercise of the business with which he is charged.

This is exactly the case of John Caruana, that it is important that when you are acting for and on behalf of somebody else, you indicate it. More or less, the duties of the manager are very similar to those of the agent, so, he has general duties as well as specific duties.

<u>General duties:</u>

1) He has to obey the instructions of the principal;
2) He has to act diligently;
3) He has to render an account;
4) He is responsible for the smooth running of the business;
5) He is also responsible for protecting the assets of the business.

Specific duties:

1) **Article 65**

> **65.** The manager is jointly and severally liable with the principal for the observance of the provisions contained in Title II of this Part of this Code in regard to all matters relating to the business or branch of business with which he is charged.

'*Joint and severally liable*' means you have three debtors, and between them three they have borrowed €1000. If they have borrowed this amount, logic would dictate that each one is responsible for $1/3^{rd}$ of that amount. When you have joint and several liability, however, the creditor can claim the full amount from just one of those debtors. Article 65 makes **the manager jointly and severally liable with the principal**.

2) **Article 63(1)**

> **63.** (1) The manager shall not, either on his own behalf or on behalf of others, without the express consent of the principal, carry on or have any interest in any business of the same nature as that in charge of which he has been placed.

The manager is in a position of trust and therefore once he is in this position he cannot compete with the principal. If you have a look at article 63 it is clear that the manager cannot compete with the principal without the express consent of the principal. When we looked at article 56 dealing with agent, the wording was much more relaxed speaking of 'authroity' while in the case of the manager we speak of requiring the express consent of the principal. If you breach this article, you face the consequences of sub-article 2.

3) **Article 62(1)**

> **62.** (1) The manager shall always deal in the name of the principal, and when signing shall, besides his own name and surname, indicate the name and surname or the firm name of the principal, with the clause *per procura* or some equivalent clause.

The rights of the manager
These are just like those of the agent.
1) The right to be reimbursed,
2) The right to be indemnified for losses,
3) The right to be renumerated for his services and
4) The *ius retensionis*.

How is the authority of the manager terminated?
The office of the manager is terminated in the same way as agency, either by a revocation of the authroity on the part of the principal, or by interdiction, or if the manager is incapacitated, or if the manager renounces to the appointment, or if the appointment was made for a limited period of time upon the expiry of that period of time. There are two further points to make regarding the manager and termination of his authroity. Very often the manager is an employee therefore the rules dealing with employment law, that is, the Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta are applicable.

However, you have two departures from the normal case of employment. The first one deals with the probation period and the second deals with the reinstatement following an unjust termination.

Article 36

36. (1) Saving the provisions of sub-article (16), the first six months of any employment under a contract of service shall be probationary employment unless otherwise agreed by both parties for a shorter probation period:

Provided that in the case of a contract of service, or collective agreement, in respect of employees holding technical, executive, administrative or managerial posts and whose wages are at least double the minimum wage established in that year, such probation period shall be of one year unless otherwise specified in the contract of service or in the collective agreement.

If you do not say anything, your first 6 months of employment are on probation, but you are free to agree whatever you want, say that it is 3 months. But there is an exception to the rule; when you have a contract of service in respect of employees holding administrative or managerial posts and whose wages are at least double the minimum wage, the probationary period shall be of one year, unless you agree otherwise.

The second point to make is **article 81** of the Employment and Industrial Relations.

81. (1) Where on a complaint for unfair dismissal referred to the Tribunal under article 75, the Tribunal -

(*a*) finds that the grounds of the complaint are well-founded, and

(*b*) on the specific request of the complainant to be reinstated or re-engaged made in the referral or in the statement of his case,

the Tribunal considers that it would be practicable and in accordance with equity, for the complainant to be reinstated or re-engaged by the employer, the Tribunal shall make an order to that effect, stating the terms on which it considers that it would be reasonable for the complainant to be so reinstated or re-engaged:

Provided that where the complainant is employed in such managerial or executive post as requires a special trust in the person of the holder of that post or in his ability to perform the duties thereof, the Tribunal shall not order the reinstatement or re-engagement of the complainant; but where the complainant was appointed or selected to such post as aforesaid by his fellow workers the Tribunal may order his reinstatement or re-engagement in the post held by him before such appointment or selection.

(2) Where on a complaint made under article 75, the Tribunal finds that the grounds for the complaint are well-founded -

(*a*) in cases of unfair dismissal, if there is no specific request for reinstatement or re-engagement or the Tribunal decides not to make an order for reinstatement or re-engagement as aforesaid, the

> Tribunal shall make an award of compensation, to be paid by the employer to the complainant, in respect of the dismissal:
>
> Provided that, in determining the amount of such compensation, the Tribunal shall take into consideration the real damages and losses incurred by the worker who was unjustly dismissed, as well as other circumstances, including the worker's age and skills as may affect the employment potential of the said worker;
>
> (*b*) in all other cases other than cases alleging a breach of articles 26, 27, 28 or 29, the Tribunal may make such order as it deems necessary in order to remedy the breach or it may make an award of compensation to be paid by the employer to the complainant, or it may award such compensation and make such orders as it may deem necessary in order to remedy the breach; and
>
> (*c*) in cases alleging a breach of articles 26, 27, 28 or 29 the provisions of article 30(2) shall apply.

When you have a contract of employment, and you fire an employee, that employee can challenge the dismissal by going to the Industrial Tribunal claiming that there wasn't a good and sufficient cause to terminate his/her employment. One of the remedies that the Industrial Tribunal can order the employee if it finds that there wasn't a good and sufficient cause is that it will order the employer to reinstate the employee in his employment. But there is an exception to the rule. If the person dismissed from his employment is a manager or an employee of a higher level, therefore he is in a position of trust, then the Industrial Tribunal cannot order the reinstatement of that person because, at that stage, the trust has been lost and therefore, it won't make sense to reinstate. So, the remedy is usually monetary compensation.

If you are an employer and you want to terminate the authroity you have given to the manager, how do you make it public?
Article 66 of the Commercial Code

> **66.** The determination of the manager's authority shall be made public with the same formalities prescribed in sub-article (2) of article 59, even where the grant of the authority had not been so made known.

This is the provision whereby you file a note in court, and you have it notified and published in the Government Gazette, local newspapers and so on, saying that that person is no longer entitled to act as your manager. In this way, you have created a presumption to everyone that that person is no longer entitled to act as your manager.

The manager has another duty towards the principal, and this is a fiduciary duty. You have two important cases that bring out the fiduciary relationship of the manager:

1) **Vascas enterprises limited v. Adrian Ellul (13/11/2014)**, and
2) **Anthony Caruana & Sons limited v. Chris Caruana (CA 28/02/2014)**.

Both cases dealt with people who were employed as managers with a company, they left their employer and started competing with their employer. They were competing not at the time of employment but following their termination of employment. In both cases they both utilised information that they had acquired during their employment as a manager.

OTHER PERSONS AUXILIARY TO TRADE

These are of far less important than the manager and the agency in general. These are firstly, the (1) commercial traveller and secondly, (2) the salesman.

(1) THE COMMERCIAL TRAVELLER

The commercial trader, also referred to as il-*vjaġġatur*, is a person entrusted by a trader with the authority to act and conclude business on behalf of the trader and in the trader's name, **either in the place where the trade himself exercises his business or in other places**. Traditionally, this used to be more common where somebody comes from a foreign country representing a firm that you are doing business with to discuss on behalf of his principal, who is the trader, the way business is being conducted, possible new business deals and so on. So, he used to represent the principal in foreign countries. But he could also be in the same place where the trader exercises his business. For example, a trader imports a product from abroad, and the commercial traveller goes to every market in Malta selling this product to shops in the trader's name.

When it comes to the commercial traveller, there are two types:

(1) One who is authorised to promote business and transmit orders for acceptance by the principal. Therefore, this type of commercial traveller is not authorised to conclude business himself, but every time has to refer to his principal;

(2) One who is a pure agent who has the power to sell and to conclude transactions for and on behalf of the principal.

Duties of commercial travellers

Article 67

67. *(1) Commercial travellers shall produce to the customers with whom they deal in the name of the principal, the instrument creating their authority and defining its limitations.*

If somebody comes along from abroad and says I am representing company X you are entitled to ask for his authorisation and the commercial traveller is supposed to have that authorisation in hand to show it to the person who requests it. In the absence of an express authority, they cannot receive the price of goods unless they personally deliver the sale, nor can they grant time for payment or allow discount in respect of transactions concluded by them. therefore, for the commercial traveller to be allowed to take monies for and on behalf of the principal he must be given specific authorisation receive monies for and on behalf of the principal. Otherwise, he is only entitled to accept money for an on behalf of the principal if simultaneously he is parting with the goods that the principal is selling. Remember that the transaction is being performed by the principal and not the commercial traveller; the real seller is the principal, the commercial traveller is an agent, a representative of the principal.

Section 67(3)

(3) They may receive complaints addressed to the principal, and may sue or be sued in the name of the principal in respect of obligations arising out of transactions concluded by them in the name of the principal himself.

You appreciate that the commercial traveller has a substantially higher degree than a salesman and he comes very much close to being an agent. To a very large extent, he is an agent of the principal.

(2) <u>THE SALESMAN</u>
He is found in **<u>article 68</u>** of the Commercial Code.

68. *(1) Salesmen entrusted with wholesale or retail sales, are empowered to receive within the warehouse or place of business, the price of goods sold by them, unless the receipt of payments is entrusted to some other person as cashier.*
(2) They cannot receive such price outside the warehouse or place of business, unless they produce the power giving them authority so to do or deliver a receipt signed by the principal.

Normally, the salesman is limited to being within a physical, confined place, *"a warehouse or place of business."* It is only there that they can receive the price for the goods that are sold.

Commercial travellers and salesmen may not exercise same trade as principal
The duties of the commercial traveller and the salesmen are similar to those of the agent. The general duties are exactly similar to those of the agent. When it comes to special duties, you have **<u>article 69</u>**.

69. *(1) Commercial travellers and salesmen shall not, without express authority, exercise the same trade as the principal, either on their own behalf or on behalf of others, and shall not communicate information about customers to the detriment of the principal.*
(2) Whosoever acts in contravention of this prohibition shall be liable for damages and interest; and shall moreover be liable to a penalty of not less than eleven euro and sixty-five cents (11.65) and not exceeding two hundred and thirty-two euro and ninety-four cents (232.94), on proceedings taken at the suit of the principal, before the Court of Magistrates.

If you breach this duty, there is a sanction contained in **<u>section 69(2)</u>**. Article 69 is also of a fiduciary nature – you cannot be competing with someone you are representing and trying to conclude transactions on his behalf because you are privy to information which gives you an unfair advantage.

(3) <u>THE BROKER</u>
(See Trade book dissertation page 64).

The broker is a person who is totally independent. He is the middleman between two traders, he is facilitating the conclusion of transactions between two different traders, but he himself is not performing acts of trade (**<u>article 88</u>**).

The Commercial Code regulates the broker in a very detailed way. The provisions that we have are hardly utilised anymore because the whole idea was that a person who acts as a broker had to be seriously regulated with a list of duties and obligations and he had to be duly licensed so that to ensure that no one will act unfairly or take sides of one side or another. But as time went by, this profession has gone unregulated without any sanction being meted out.

Broker is regulated in **<u>article 79</u>** onwards of the Commercial Code.
79. *(1) Any person desiring to act as a public broker shall* ***notify the Council of the Chamber of Commerce****, Enterprise and Industry, as the authority regulating this activity, requesting* ***registration****, within thirty days of starting such an activity.*

(2) In order to be registered as a public broker with the regulatory authority, an applicant shall ***inform the authority in writing*** *in such form as the regulatory authority shall prescribe, containing the full name and surname, age, private and business addresses of the applicant and such other particulars concerning his business or occupation as the regulatory authority shall require.*
(3) Brokers complying with all the aforesaid formalities shall be registered in a register administered by the regulatory authority. Notice of any registration under this article shall be published in the Gazette. In the month of January of each year, a complete list of registrations then in force shall likewise be published in the Gazette.

Not everyone suddenly becomes a broker, you have to register and be accepted to act as a broker. Furthermore, there were disqualifications to act as a broker – **article 80**.

80. *If a public broker is convicted of any of the crimes provided for in Sub-titles I, II and III of Title IX of Part II of Book First of the Criminal Code, he shall, ipso facto, forfeit his office, and his name shall be struck off the register.*

So, there was a certain seriousness by being a broker.

He also had to keep a memorandum or daybook of all his brokerages and certain provisions of keeping of trade books also applied to him. the moment he concludes a transaction, for example, see also **article 83**, he has to record the transaction so that if there is a problem in the future regarding that transaction, he will be called as a witness in that particular case.

83. *Every public broker, on the conclusion of every transaction, shall forthwith note it down in his memorandum or day-book, and shall, day by day, enter every transaction in his book of brokerages. He shall state in both such books, the date, the name of the contracting parties, the nature of the transaction and, generally, every stipulation and condition agreed upon by the parties, and, in the case of merchandise, he shall particularly state the quality, the quantity, the price and the marks, if any, and the mode of payment.*

Remember that a broker is not a trader – **article 88** – '*for his own account*'.

88. *No public broker shall transact any commercial business for his own account, or have any interest therein, either directly or indirectly, in his own name or through the medium of a third party, whether alone or in partnership with others; nor shall any public broker lend his name for any transaction whatsoever to any person not authorized to exercise the office of a public broker:*
Provided that two or more public brokers may form a partnership between them for the purpose of brokerage only.

As a broker you cannot perform any acts of trade in your own name. This was the basis of the broker that if he sees a business opportunity, he is not supposed to venture forward and do the business transaction himself. That is the ethos behind the broker. This does not seem to be the way things are going. What has happened that in the most lucrative area of transactions, when it comes to property, we have departed totally away from this.

A client had a pharmacy in a small village. One fine day, she sees on the door right next to it a sign that the property was for sale at an estate agency. She contacted the agency, viewed the property, and said it is her only opportunity of expanding. The asking price was €12,000. The day after she received a call saying the property is not on the market anymore, the seller had second thoughts. A few months later, she saw the sign again. This time, the asking price was 32,500€. She saw the property and had no choice but to purchase this property. She discovers that the agency bought the property themselves, knew she needed this property and put it on the market themselves. They made a large profit. It was not fair for the original owner of the property and for her. This is the most callas way of acting as a broker because under the guise that we are not brokers but estate agents we have gone against all the provisions of the Commercial Code which provisions were there to ensure the protection of traders on the market, that no one is given any undue advantage, and that confidential information imparted to the broker will not be utilised by the broker so that he will make a profit at the expense of the traders. This notion of estate agency has now become like a commercial practice. Most property transactions take place through estate agents. Estate agents do not charge the same rights as the brokers used to charge because the rate of fee of the brokerage is one, but the rate of fee of the estate agents is different. See article 92 and compare to estate agency fees which are paid from the side of the seller. The brokerage fee is 1% of the value of the immovable property now it has increased immensely because an open agency is 5% and a sole agency is 3.5% of the value of the property. This has gone directly against the provisions in the Commercial Code dealing with brokerage.

Besides article 88, that the broker cannot transact business for his own account, you have for example **article 89**.

89. *A public broker is not the agent of the parties in concluding any transaction; and if in concluding any transaction he acts as agent of one of the parties, he shall not be entitled to the commission as broker.*

So, if you are acting as a broker, you should not take any particular side, you have to be totally independent from any party.

Article 90

90. *(1) A public broker who does not disclose to one contracting party the name of the other contracting party shall be personally liable for the performance of the contract, and shall be subrogated to the rights of the contracting party who has been paid by him, as against the undisclosed contracting party.*
(2) If the public broker discloses the name even after concluding the business, the one party may directly sue the other party, saving the public broker's liability in case of non-performance.

As a public broker, you are supposed to tell the other side who the trader is on the other side. Estate agents don't tell you who the owner is. While the law wanted total transparency over here.

Article 91

91. *(1) A public broker who acts in contravention of any of the obligations mentioned in the foregoing articles shall, at the instance of any interested party or of the Attorney General, be liable to a penalty of not less than fifty euro (€50) and not exceeding five hundred euro (€500) on proceedings taken before the Civil Court, First Hall, or the Court of Magistrates (Gozo) in its superior commercial jurisdiction, as the case may be, saving any other action arising from this Code or any other law.*

(2) The court may, moreover, order the interdiction of the public broker for a period not exceeding two years, in which case the provisions of article 81 shall, during the time of interdiction, be applicable.

So, you will immediately appreciate how the legislator wanted to seriously regulate brokers and how over the years, we have departed from this regulation and accepted an unregulated environment in the most sensitive of areas when it comes to the brokerage to the acceptance of estate agents.

There is nothing that regulates estate agents, it is just commercial practice. The real issue as to whether estate agents are breaching the contents of the Commercial Code is definitely there. With every transaction that takes place, the price is inflated by a minimum of 3.5% and, it creates also a huge incentive for the estate agents to inflate the prices because naturally, their commission is going to be even larger.

(4) <u>COMMISSION MERCHANT</u>

This is an anomalous person auxiliary to trade because it is regulated from article 96 onwards. The commission merchant is a person who transacts business in his own name or under a firm name for and on behalf of a principal. So**, he is acting for and on behalf of a principal but is acting in his own** name really and truly. So, he is entitled to go and speak to someone, sell the products of his principal, and concludes transactions in his own name.

A debate exists as to whether he is a trader or not since he is concluding transactions in his own name. The legislator has chosen to put him with the persons auxiliary to trade because since he is acting for and on behalf of someone else, the ultimate benefit of the transaction will be derived by somebody else. In point of fact, **<u>article 97</u>** says that,

97. *A commission merchant is not bound to disclose the name of the principal for whom he acts. He is directly liable to the person with whom he deals, as if the transaction were his own.*

This is like a cover up. Somebody is fronting you when you don't want to show yourself. There is no legal relationship, therefore, between the principal and the third party. In the case of agency, we had made the three different relationships that arise. But, in this case, there is no legal relationship between the third party and the principal, everything stops with the commission merchant and vis-à-vis third parties there is this relationship between the commission merchant and third parties. So, the principal has an action against the commission merchant himself if he does not pass on the proceeds of the transaction to the principal. This is the most important characteristic of the commission merchant.

(5) <u>THE SELF-EMPLOYED COMMERCIAL AGENT</u>

This is dealt with in article 70 onwards of the Commercial Code.

This person of the commercial agent was introduced in 2003. It was introduced as part of the procedure undertaken by the Maltese Government to bring into our law the '*a qui communite'* when Malta was going to become a member of the EU because there is an EU directive 86/653 on self-employed commercial agents.

There is a basic distinction between an agent and a distributor. For example, I am the agent of Mercedes in Malta. Is there a different between being the agent of a foreign country and being a distributor? As an agent you will only get some agreed form of renumeration on the sales you are performing. When it comes to the distributor, you are purchasing the goods from the foreign supplier, and he gives you the right to sell them in a particular territory. Whether you sell them or not is your problem. The contract of sale between third parties and the seller of the goods is between the distributor and the third parties whereby the foreign supplier will not feature at all. So, the responsibilities of the seller fall upon the distributor and not upon the foreign supplier.

There is also a distinction between sole distributor and exclusive distributor. If you are settling to be just a sole distributor, the foreign supplier can compete with you in the jurisdiction while exclusive, he cannot compete with you, it is only you since you are given exclusivity.

Sub-title IV of Title IV, titled *'Of Commercial Agents',* regulates relations between commercial agents and their principals and the activities of commercial agents in Malta.

Section 70(2)
This sub-title shall not apply to:
(a) commercial agents whose activities are unpaid;
(b) commercial agents when they operate on commodity exchanges or in the commodity market; and
(c) persons whose activities as commercial agents are secondary. (So, it's not their primary activity).

Whether it falls as a primary activity or secondary activity is something you have to refer to part 1 of the schedule of the Commercial Code to see it is constitutes a primary or secondary activity.

Section 70A
"commercial agent" means a person not being a person in the employment of the principal, who has continuing authority to negotiate the sale or purchase of goods or services on behalf of another person (the principal), or to negotiate and conclude such transactions on behalf and in the name of that principal, but does not include:
(i) a person who in his capacity as an officer of a company or association is empowered to enter into commitments binding the company or association;
(ii) a partner who is lawfully authorised to enter into commitments binding on his partners;
(iii) a person acting as an insolvency practitioner in Malta or in an equivalent position in any other jurisdiction;

If you are in the employment of the principal, you cannot be the commercial agent. *'An officer of a company'* is referring to directors in a company. He is authorised to conclude transactions for and on behalf of the company but is not considered to be a commercial agent.

"commission" means any part of the remuneration of a commercial agent which varies with the number or value of business transactions;

It is clear that commission means something which is not a fixed payment. A fixed salary is not a commission. it has to vary according to the number of tractions or according to the value of transactions.

There is a regulatory authority before whom a person needs to apply – the regulatory authority mentioned over here is the Counsel of the Chamber of Commerce, Enterprise and Industry.

Article 71
(1) Any person desiring to act as a commercial agent, whether alone or in partnership with any other person, shall notify the regulatory authority requesting registration, within thirty days of undertaking this activity.

There is an obligation that if you want to be a CA you have to register yourself within 30 days from when you commence activities.

(3) The regulatory authority shall not accept an application for registration to act as a commercial agent from any person who is in the employment of the Government of Malta or of any financial institution (if I work with a bank)*, or from any person holding a warrant to practise a profession in Malta and actually practising such profession* (for example, a lawyer)*, or from stockbrokers or from any person who, whether in Malta or abroad, has been found guilty of fraudulent bankruptcy.*

4) Notice of any registration under this article shall be published in the Gazette. In the month of January of each year, a complete list of registrations then in force shall likewise be published in the Gazette.

In January of each year, a complete list of registrations will be published in the Government Gazette indicating the validity registered commercial agents in Malta.

(5) Any registration carried out under this article may be withdrawn or suspended by the regulatory authority, if the person registered -
(a) is convicted of any crime against property;
(b) is adjudged bankrupt;
(c) accepts employment under the Government of Malta, or with any financial institution, or becomes the holder of a warrant to practise a profession and actually practises such profession or becomes a stockbroker;
(d) is proved, to the satisfaction of the court, not to be a fit and proper person to act as a commercial agent.

Article 71(5) gives the right for the regulatory authority to withdraw the registration of somebody who is already registered as a commercial agent. This right is given to the regulatory authority in certain cases.

73. *Without prejudice to the provisions of article 71(1), any person who, without being registered, represents himself to be, or acts or undertakes to act as a commercial agent, shall be liable:*
(a) on a first conviction to a fine (multa) not exceeding two thousand and five hundred euro (€2,500); and
(b) on a second or subsequent conviction, to imprisonment for a term not exceeding three months or to a fine (multa) not exceeding five thousand euro (€5,000).

If somebody promotes himself as a commercial agent or acts as one, without being registered with the regulatory authority, then there are serious fines. First time round it is 2500€, second time there is a possibility of imprisonment or to a fine not exceeding 5000€.

The duties of the agent
<u>Article 74</u>
Generic:

1. That of looking after the interests of his principal and to act dutifully and in good faith. This is the only generic duty.

Specific:

1. To make proper efforts to negotiate and where appropriate conclude the transactions he is instructed to take care of;
2. To communicate to his principal all the necessary information available to him;
3. To comply with the **<u>reasonable</u>** instructions given by his principal (if the principal gives him instructions which are not reasonable, he is not bound to comply with them).

The duties of the principal
<u>Article 75</u>
Generic:

1. He has to act dutifully and in good faith

Specific:

1. He is to provide the commercial agent with all necessary documentation relating to the goods concerned;
2. He is to obtain for his commercial agent the information which is necessary for the performance of the agency contract.

If he thinks that he won't be in a position to furnish sufficient goods which are the subject for the agreement between them, he has to notify the agent right away that there are going to be production issues, and so on.

Then there is an **additional duty** for the principal that id the agent transmits an order for acceptance he mustn't delay in saying whether he has accepted an order or not. And if tare going to be problems in supplying an order that has been made, he has to inform the agent right way.

What is very important is that the parties, neither the principal nor the agent, can derogate from the content of articles 74 and 75. Their content is sacred. You cannot contract out of those agreements. You cannot say I don't have these duties; I am going to be exonerated from them because the law specifically does not allow you to do this.

<u>Article 76</u>
76. *(1) The parties may not derogate from articles 74 and 75.*
(2) The law applicable to the contract shall govern the consequence of breach of the rights and obligations under articles 74 and 75 above.

A crucial part of commercial agency is the renumeration that the agent is going to be paid. If no renumeration has been agreed, the mode of renumeration of the agent has not been agreed, what is the renumeration that the agent is going to be entitled to? **Article 77**

77. *(1) Without prejudice to the application of any enactment or rule of law concerning the level of remuneration of commercial agents, in the absence of any agreement as to remuneration between the parties, a commercial agent shall be entitled to the remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carries on his activities and, in the absence of such customary practice, a commercial agent shall be entitled to such reasonable remuneration taking into account all the aspects of the transaction to be agreed to between the parties or in default by the court.*
(2) Where the remuneration of a commission agent is not fixed in whole or in part as a commission the provisions of articles 77A to 77F shall not apply.

If I have been appointed by an agent for Perrier to find people ready to buy it, one has to see what the normal renumeration of commercial agents for bottled water products is. If there is no custom in the place where the agency is being performed dealing with the renumeration, then a commercial agent shall be entitled to such reasonable renumeration taking into account all the aspects of the transaction to be agreed to by the parties or in default by the court. So, the legislator has catered for a mode of renumeration where it has not been agreed between the parties.

When you have agreed on the mode of renumeration, and you have agreed that this is going to be by way of commission, then articles 77A-77F apply to establish when the right to commission arises, what happens when a transaction is concluded after you stop acting as a commercial agent, etc.

Article 77A establishes when does the right to a commission arise.

Article 77B
77B. *Subject to article 77C, a commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has terminated if -*
(a) the transaction is mainly attributable to his efforts during the period covered by the agency contract ***and*** *if the transaction was entered into within a reasonable period after that contract terminated; or*
(b) in accordance with the conditions mentioned in article 77A above, the order of the third party reached the principal or the commercial agent before the agency contract terminated.

This tells you what happens in the case of transactions which are concluded after the agency agreement has been terminated. So, I have been working on a particular sale all year, my agreement as a commercial agent with you as my principal has terminated and you conclude a sale a week after I would have terminated my relationship with you. Do I have a right to be paid a commission if I did most of the work? There are two possibilities. The latter – the foreign order came through before; they wait for you to terminate, and they went ahead to sign an agreement.

Article 77C

77C. *(1) A commercial agent shall not be entitled to the commission referred to in article 77A if that commission is payable, by virtue of article 77B, to the previous commercial agent, unless it is equitable because of the circumstances for the commission to be shared between the commercial agents.*
(2) The principal shall be liable for any sum due under sub- article (1) to the person entitled to it in accordance therewith, and any sum which the other commercial agent receives to which he is not entitled shall be refunded to the principal.

This also caters for a possibility that the commission will be shared between two CAs. Say there is a large transaction, and both have contributed to the successful conclusion of the transaction even if one has terminated.

Article 77D

*77**D.** (1) Commission shall become due as soon as, and to the extent that, one of the following circumstances occurs:*
(a) the principal has executed the transaction; or
(b) the principal should, according to his agreement with the third party, have executed the transaction; or (c) the third party has executed the transaction.
(2) Commission shall become due at the latest when the third party has executed his part of the transaction or should have done so if the principal had executed his part of the transaction, as he should have.
(3) The commission shall be paid not later than on the last day of the month following the quarter in which it became due, and, for the purposes of this sub-title, unless otherwise agreed between the parties, the first quarter period shall run from the date the agency contract takes effect, and subsequent periods shall run from that date in the third month thereafter.
(4) Any agreement to derogate from sub-articles (2) and (3) to the detriment of the commercial agent shall be void.

This tells you when the commission becomes due. In line with sub-article (2), if your principal keeps delaying and he should have concluded the transaction, you still have a right for a commission to avoid the possibility of abuse. so, the principal does not try to avoid paying you a commission.

Make a distinction between when the commission becomes due and when the commission becomes payable. I may become entitled to the payment of a commission today, but the commission may not be payable today but at a date in the future. Section 77D(3) brings out this distinction. Therefore, it is not immediately due. The principal is given a period of time within which to pay the commission.

It is not possible to derogate from the right to be paid a commission as it arises in article 77D(2) and (3). The former is what happens when the principal delays his execution, but the third party has executed, and at that stage a commission becomes due. On the other hand, article 77D(3) deals with when the commission becomes payable which is at the end of the month following that particular quarter. You cannot say I will pay you in a years' time, or six months' time, or I will only pay you if I conclude the transaction even a third party would have been ready to conclude. You cannot prejudice the rights of the commercial agent in any way because this directive is there to protect his interests.

The agent or the principal has the right to demand from the other a document setting out in writing the terms of the agreement between them. So, this can happen from the principal to the agent and vice-versa.

If the agency is for a fixed term and it expires and the agent continues to act as an agent, then that agency contract becomes an agency agreement of an indefinite duration. This is very similar to the case of employment because in the case of employment, if you have a contract of definite duration and when it expires you continue working, then you become an employee with a contract of indefinite duration.

<u>Where the agency agreement is for a term of indefinite duration, how can you terminate that relationship?</u> This is catered for in **<u>article 78B</u>**.

78B. *(1) Where an agency contract is concluded for an indefinite period either party may terminate it by notice.*
(2) The period of notice shall be –
- *(a) one month for in first year of the contract;*
- *(b) two months after the commencement of the second year but before the commencement of the third year;*
- *(c) three months after the commencement of the third year;*

and the parties may not agree on any shorter periods of notice.
(3) The parties may agree on longer periods than those laid down in sub-article (2), provided that the period of notice to be given by the principal may not be shorter than that to be given by the commercial agent.
(4) Unless otherwise agreed by the parties, the end of the period of notice must coincide with the end of a calendar month.
(5) The provisions of this article shall also apply to an agency contract for a fixed period which in virtue of article 78A is converted into an agency contract for an indefinite period and for the purposes of calculating the period of notice the term of the fixed period contract shall be deemed to be part of the agency contract for an indefinite period.

So, in such a scenario, either party may terminate the relationship by giving notice to the other party. The period of notice varies according to how long you would have been an agent for that principal. The shorter you were, the less notice period you have to give.

<u>Article 78C</u>

78C. *This sub-title shall not affect the application of any enactment or rule of law which provides for the immediate termination of the agency contract -*
(a) because of the failure of one party to carry out all or part of his obligations under that contract; or
(b) where exceptional circumstances arise.

There can be situations where there is a summary termination without a notice period but that happens either where one party has not performed the obligations under the agreement or where there are exceptional circumstances. These would be I get to know that there is fraud, for example. That my agent has committed some serious illegality. In those circumstances, you are entitled to terminate without giving a notice period.

Article 78D

78D. *(1) Subject to sub-article (7) and to article 78E, the commercial agent shall be entitled to an indemnity if and to the extent that -*
(a) he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and
(b) the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.
(2) The amount of the indemnity shall not exceed a figure equivalent to indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.
(3) The grant of an indemnity as mentioned above shall not prevent the commercial agent from seeking damages.
(4) Subject to sub-article (7) and to article 78E, the commercial agent shall be entitled to compensation for damage he suffers as a result of the termination of his relations with his principal.
(5) For the purpose of this sub-title such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which -
(a) deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or
(b) have not enable the commercial agent to amortize the costs and expenses that he had incurred on the advice of his principal in the performance of the agency contract.

There are circumstances as well where the commercial agent is entitled to an indemnity in the case that his agency has been terminated by the principal. In point of fact, he is entitled to either an indemnity or to compensation for damages suffered. This right arises in circumstances where the agent has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers which the agent has brought forward. The indemnity must also be equitable having regard to all the circumstances and in particular, to the commission which has been lost by the commercial agent on the business which was transacted with such customers. Normally, the amount of indemnity cannot exceed – you take the last 5 years of the commercial agent and see what kind of commission he is getting, and you take an average of an annual commission based on those last five years and you give that indemnity to the commercial agent if you terminate, and those circumstances exist. If he has been your agent for less than five years, you base it on how long he has been your commercial agent. the agent can also be entitled, rather than for an indemnity, for compensation for damages which he has suffered as a result of the termination of his relationship with the principal. Damage is deemed to have occurred when the termination has deprived the commercial agent of commission that he would have earned notwithstanding the fact that the principal is still going to make a substantial income out of the customers that have been brought forward by the agent or in circumstance where the agent proves that he has incurred certain costs thinking the he is going to remain an agent in the foreseeable future and suddenly his agency is terminated. Therefore, he is allowed compensation to make good for the costs that he would have incurred. The original EU directive catered for either an indemnity or for a compensation. Under our law, the drafting is not very clear, and one can argue that under our law, you are entitled to both under our law which is not what was envisaged in the EU directive.

(6) Entitlement to the indemnity or compensation for damage as provided for under sub-articles (1) to (5) shall also arise where the agency contract is terminated as a result of the death of the commercial agent.
(7) The commercial agent shall lose his entitlement to the indemnity or compensation for damage in accordance with the provisions of the foregoing sub-articles if within one year following termination of his agency contract he does not make a claim to his principal therefor.

There is also a right for indemnity or compensation for damages if the agency is terminated as a result of the death of the commercial agent so that his widow or children will not end up overnight without any kind of income and they will still benefit from the efforts that would have been made by the father or the mother who was acting as a commercial agent. Your right to claim this indemnity or compensation expires after one year from date of termination. So, the prescriptive period is that of one year.

Article 78E
78E. *The indemnity or compensation referred to in article 78D shall not be payable to the commercial agent where -*
(a) the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract in accordance with article 78C; or
(b) the commercial agent has himself terminated the agency contract, unless such termination is justified -
(i) by circumstances attributable to fault of the principal, or
(ii) on grounds of the age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities; or
(c) the commercial agent, with the agreement of his principal, assigns his rights and duties under the agency contract to another person.

Where the termination is due to the fact that the agent fell short of his obligations or where the agent himself has terminated the agency, then there is no right of claiming this indemnity or compensation.

There are article 78F-78J of minor importance.

Duties of traders and commercial intermediaries
Dr Richard Camilleri (Articles **32 – 37** of the Commercial Code: *Of Limits of Competition*)

UNFAIR COMPETITION

PP 1: INTRODUCTION TO UC

Competition is one of the essential elements of a Free Market Economy. In a free market economy, everyone is entitled to compete; of course, certain areas are regulated where one would need an authorisation from the authorities. In reality, a trader has the freedom and therefore the right to compete in the marketplace (when speaking of markets, we speak of different markets). Freedom to carry out economic activity very often means that economic entities will be competing against each other in the 'market'. Since everyone is free to compete, potential conflicts with others may arise and this owing to the fact that within any marketplace, the sole aim is to try to enlarge the share of the marketplace one is in, and so-to-speak take the largest slice of the cake. Of course, this would mean more for you but less for the others. In other words, competition means striving to gain something by establishing superiority over others. In a Free Market Economy, this means striving for custom in the market to acquire a greater market share than your competitors.

It is generally (though certainly not universally) recognised/acknowledged that Competition is useful/beneficial both for the economy in general, as well as for consumers in particular (more choice, better price, better quality etc). Having said that, Competition may be misused/abused in one of two ways –

1) Economic entities may act unfairly in relation to the legitimate interests of their rivals i.e. use 'dishonest practices' to gain an advantage over their rivals. Competitors may act **dishonestly** amongst each other; in bad faith. For example, creating a similar design of another brand in order to confuse consumers
2) Economic entities may act in such a way as to eliminate or weaken competition in the market.

These two potential abuses are the subjects of two different areas of law –

1) **The Law of Unfair Competition**: which determines the proper limits of competition between traders. It is concerned with acts whereby one trader through 'dishonest practices' takes unfair advantage over another trader e.g. Using a trademark which is similar; denigrating his rival's products. In simple terms, it deals with dishonest practices between traders such as when someone takes advantage of another traders advertising, reputation and so on by creating a similar tradename/mark.
2) **Competition Law**: which seeks to ensure the maintenance of workable competition and thus (i) prohibits agreements or any form of collusion that distorts competition e.g. Price-fixing and (ii) prohibits abuses by dominant firms e.g. Excessive pricing or refusal to supply in order to eliminate competition. In simple terms, its aim is to ensure that there is competition in the market. Competition law isn't concerned with dishonest practice between traders as such, but rather with making sure that <u>the market remains competitive</u> (the Competition Act). An example would be a situation whereby a dominant player in the market abuses such a position. This is anti-competitive because it weakens competition in the market, as is stipulated in article 9 of the Competition Act & article 102 TFEU.

In second year, we cover dishonest practices only, and therefore, the Law of Unfair Competition ('UC') which is dealt with in Sub-Title II of Title II of Part I of the Commercial

Code, entitled 'Of Limits of Competition', Articles 32-37. Consumer law frequently overlaps with UC law because the 'dishonest practices' very often are also harmful consumer interests.

Position prior to Act XXX of 1927
Articles 32-37 weren't introduced in the original commercial code which was enacted in the 19th century. Rather, they were introduced into the Commercial Code by virtue of Act XXX of 1927. Having said that, our courts had already developed the notion of unfair competition way before 1927, having recognised such a notion. Therefore, we find a number of pre-1927 cases dealing with UC. In particular, most of the cases deal with '*trade indicia'* (an umbrella term used to cover trade names, trademarks and trade signs). In this case the unfair advantage is gained by a firm misrepresenting its goods or business or shop as someone else's or as connected to someone else's business.

Trade name = name of a firm which is in business.
Trademark = the mark which identifies a product/service. The mark may be the same as the trade name, but it can also be different. The name of the firm and the trademark need not be the same. Note that 'trademark' is not just goods but also services, such as banking services.
Trade sign = the name of a shop. This could be the same as the trade name or different.
When we are dealing with the protection of trade indicia, the prot4ection is identical to all three (article 32).
Pre the introduction of article 32, we already had a number of cases which protect trademarks and tradenames.

Cases
1. **Smith noe v. Galea (10/04/1867)**: This case concerned the trade sign of a shop in Valletta. The court made the point that as soon as a trader uses a trade sign on the market it becomes that trader's property whereby, he exclusively has the right to use it.

2. **Somerbille v. Schembri (05/03/1887)** (a Privy Council decision – the case was decided on by the Commercial Court and then in 1887 it was decided by the Privy Council): This case concerned the market for cigarettes. In brief, the plaintiff marketed a brand of cigarettes, '*KAISAR – I – HIND'*, and the defendant started marketing cigarettes with a similar brand name. The Commercial Court decided in favour of the plaintiff, but the Court of Appeal reversed this decision, and the Privy Council overturned the Court of Appeal decision therefore, reinstating the same principle as the Privy Council, the principle being property rights to the person who first used the trademark on the market.

> *"As soon, therefore, as a trade mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm it becomes, to that extent, the exclusive property of the firm, and no one else has a right to copy it or even appropriate any part of it if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the Trade mark belongs"* (XI.i.259 – 05/03/1887)

The court explained that the company acquires ownership of the trademark meaning that company can exclude other companies from using it. It becomes an **exclusive right**. Notice that the emphasis is that if a trader uses a particular trademark FIRST, and therefore once it has been established as a primary user, another company cannot use it; it is **exclusive PROPERTY**.

3. **Huber v. Agius (17/01/1891)**: this case related to a restaurant in Strait Street, Valletta. The principle stated in this case is that once you've used a name of a shop or the trademark of goods, if you are the first to use it, it becomes your exclusive property and no one else has the right to use it.

4. **Attard noe et v. Pace noe et (28/03/1893)**

5. **Candachi noe v. Zikalaki (08/06/1893)**: this case related to cigarettes and trademark boxsa. The court stated that the trademark becomes the property of the person who first uses it. It went on to say that the owner, therefore, is capable of all the rights and protections given by the law of property.

6. **Atkinson noe v. Attard noe (30/05/1901)**

7. **Bonello noe v. Cauchi et (30/06/1909)**: this case related to butter and margarine, with the brand being Crown brand. In 1899, Ordinance XI of 1899 was the Industrial Property Protection Ordinance and protected trademarks which were registered, as well as patent and industrial designs. The protection was given on the basis of registration. In this case, plaintiff had registered the trademark *'Crown'* for the butter and margarine that they were marketing, and they sued the defendant since he was using a name which was very similar to theirs. Subsequently, the defendants gave the plea that the registration of the plaintiff's trademark under the Ordinance IPPO was not regular. The defendants attacked the registration with the intention of cancelling it since if it is concluded that the registration of Crown brand by plaintiff was not done according to law (irregular), the plaintiff would have no right of action. If as soon as you use a mark in such a way that the consuming public associates the mark with that a particular product, that mark becomes the exclusive property of the product first launched with that name. The court immediately distinguished between the protection given by the Act which provides for registration and the protection given by the ordinary law. The plaintiff brought an action both on the fact that his Crown brand was registered in terms of the IPPO and also on the basis of the ordinary law because he was the first user of that trademark.

All these cases are based on the principle that prior use of a mark, name or sign in trade gives you property rights and, therefore, exclusive use of that mark, name or sign. The Courts used the ordinary law and remedied (property and tort law) to control these 'unfair' commercial practices.

Fundamentally, one would need to establish two basic elements in an action for unfair competition (**Curmi v. Mizzi (18/10.1957)**) -

1) That the plaintiff suffered damage as a result of an act or conduct by the defendant.
2) The damage was the result of unlawful means used by the defendant.

Problem 1

The Civil Code, in **article 1030** stipulates that

> **1030.** Any person who makes use, within the proper limits, of a right competent to him, shall not be liable for any damage which may result therefrom.

The problem that arises is *what are the proper limits*? *When does the use of a right to carry out an economic activity become an abuse of that right* (other than for the use of someone else's trade indicia)?

If one is competing within the proper limits, any possibilities of liability for damages are discarded. Therefore, the problem that arose pre-1927 revolved around the meaning of 'proper limits.' Cioè, *when is an exercise of a right a use and when is it an abuse? You have a right to compete, when are you using it such right properly and when are you abusing of it?*

Articles 32 – 36 of the commercial Code are the section which identify those acts which are beyond the proper limits; those acts which are unlawful because they exceed those limits. In this way, the legislator has identified them as being dishonest practises. In this way, Act XXX of 1927 defined the limits of competition by laying out sections which prohibit certain acts.

Problem 2

Difficulty in establishing damages suffered as a result of an act of UC. *How do you prove loss of clientele, loss of sales and the quantum of such loss?*

The second problem that would arise is how to prove damages. In Malta, some cases involve moral damages, but in general if you file an action for damages, you have to prove actual damages (actual losses or loss of profit). In the case of copying a trademark, it is difficult to prove what damages are actually suffered because it is impossible to find the exact amount of people that bought one product over another due to mistaking the trademark.

Article 37 gives you the remedies that a plaintiff can request in an action for UC (if someone is in breach of **articles 32-36**), **article 37** gives the injured party (the plaintiff) particular remedies. With respect to damages, the law gives the plaintiff a choice between either suing for actual damages and **proving such damages**, or else in the case that it is thought difficult to prove actual damages, the law gives the plaintiff the right to ask for **a penalty** (a penalty fixed by the court and that amount would be awarded instead of damages – the plaintiff because of this difficulty in proving damages has a choice).

The introduction of **articles 32-37** addressed these two problems:

1) The law provides a list of acts of UC – these are listed in articles 32-36.
2) The law allows the 'injured trader' a choice: either (i) sue for damages or (ii) sue for penalty established by the Court in lieu of damages.

> *"Qabel il-promulgazzjoni tal-Att XXX ta' l-1927 kienet kwistjoni wisq spimuża sabiex jiġi stabbilit meta jispiċċa l-użu tad-dritt proprju u tobda l-vjolazzjoni tad-dritt ta' ħaddieħor" (Curmi vs Mizzi – XLI.iii.1848 – 18/10/1957)*

Competition law in the sense of anti-trust law, are public law rules whereby the state wants to ensure that there is workable competition in the market (the policy maker needs to ensure that, for instance, there are no cartel arrangements). We are dealing with a different sort of rules; B2B rules – business to business rules. They are **dishonest practices** whereby one tries to get a competitive advantage over his competitors by unfair means. Moreover, as already discussed, **<u>Articles 37</u>** gives the injured trader the remedies.

PP 2: GENERAL OBSERVATIONS WHICH APPLY TO ALL THE ACTS OF UC

(i) **<u>The acts of UC are exhaustively listed</u>**

- They are considered as '*delitti commerciali*' and the Court cannot add any other act to the ones listed.
- They should not be extensively interpreted, as was stated in **<u>Darmanin v. Cachia noe</u>**, "*Illi li każijiet ta' konkorrenza sleali…huma tassativi u għalhekk ma tapplikax ir-regola estensiva tal-ejusdem generis'.*
  That is, there is no room for creating another act of UC. The judgements say these are 'quasi-delitti/quasi-offences.' In Criminal law, you wouldn't extend an offence and say this is similar to this, and therefore it is also an offence. That is to say, you can't apply an extensive rule of interpretation.
- **Cases**
  A number of these cases deal with **parallel trading** (a situation where a supplier, say a foreigner supplier, appoints in Malta an exclusive distributor, for instance, Hotpoint fridges. The supplier or the manufacturer of Hotpoint appoints company X in Malta to be its exclusive distributor. It happens frequently where other traders in Malta might be able to obtain that product not directly from the supplier, in this case Hotpoint, but from a parallel source. Notice that from the point of view of contractual law, the contract is between the supplier and company X, all the traders in Malta are not party to that contract; it is binding with the parties and no one else). The question is, is it an act of unfair competition? If you look at **<u>articles 32-36</u>**, none of them prohibit the situation as an act pf UC and therefore there is no particular remedy against this situation. This point was made in **<u>Camilleri pro et noe v. Bonnici</u>** (07/05/1934), which related to bicycles. Moving on, in **<u>Gauci noe v. Scerri</u>** (29/04/1955), the product in question was a magazine and also related to parallel trading. The court stated that parallel trading is not an act of UC and therefore they have no remedy. In **<u>La Rosa v. Borg</u>** (05/03/1956), the plaintiff was the exclusive distributor of 'Bata' and again, the defendant was purchasing goods from parallel importers. Cioè, the defendant originally used to buy 'Bata' goods from the plaintiff and then switched and started buying them from a parallel importer. The Court decided that the acts of UC are exhaustively listed, and since the situation is not contemplated in **<u>articles 32-36</u>**, one has no remedy.

  In **<u>Manduca noe v. Bezzina Wettinger</u>** (16/12/2004), the plaintiff Manduca was representing L'Oréal and the defendant, at a point in time, tried to set up a business in Bulgaria trying to open up a shop in the airport of Sofia to sell these products. In anticipation of this, he purchased a large number of products from L'Oréal in Bulgaria to stock his shop. Unfortunately, he got stuck with the authorities, so he brought all this stuff to Malta and put it in his garage only to start selling them later on. L'Oréal, directly, sued. Mainly they sued on the fact that he was distributing branded products (part of this was a trademark case). The Court made reference to 'the doctrine of the exhaustion of rights' (if I am a trademark owner, so I have rights over my trademark, and therefore I have exclusive rights. If the product is put into the market with the consent of the trademark owner, in this case L'Oréal, which in this case it was since it came from L'Oréal in Bulgaria, then you can't later on try to stop it; you have exhausted your rights. **It was put legitimately into the market with the consent of the trademark owner**. They can't stop it from travelling freely within any jurisdiction). Besides that, the court also made reference to the cases we dealt with before and another case, of 2003, and quoted and said that this is not unlawful.

In **<u>La Rosa de Cristofaro v. Farrugia</u> (09/05/1933)**, the plaintiff, La Rosa, by virtue of an agreement signed in 1932 with the defendant, granted the operation of his business. The plaintiff didn't sell the business as an ongoing concern but 'leased' it out. Cioè, he gave the operation of the business to someone else, the defendant. Six months later, the agreement for some reason was terminated. What happened here was that the defendant, now had the knowledge of the trade secrets he knew because he operated the business such as who the business's suppliers were and the prices, the customers, the profit margin etc. Subsequently, he actually poached some suppliers who used to supply this business by virtue of the inside knowledge that he had of the business. **The plaintiff sued for UC**. The Court stated that the cases specified in the law are, as in any other law of a criminal nature, exhaustive and **the judge cannot without committing an injustice condemn a trader to a penalty for a fact that is not contemplated in the cases of UC**. The court went on to say that although the acts/conduct of the defendant are reprehensible and certainly not inspired by principles of good faith, however, this case is not contemplated by the legislator and therefore one cannot award a penalty and the plaintiff doesn't have the action as contemplated in the rick of summons.

In **<u>Darmanin v. Cachia noe</u> (04/05/1950)**, the defendant engaged with his daughter and an Italian man to go to Darmanin shoe store, purchased a couple of pairs of shoes which had been designed purposely by Darmanin in conjunction with an Italian manufacturer. When they bought them, Cachia, the defendant, had already made arrangements with another Italian manufacturer and started taking orders for shoes copying the design of the plaintiff. The plaintiff sued on two grounds: on an action of UC, **<u>article 37</u>**, and the courts stated that the acts of UC are exhaustively listed, the facts of the case do not fit within any of the acts in the list and therefore the court cannot grant a remedy for the breach of UC. However, the court noted that in the rite of summons (the document by which the plaintiff institutes an action) the plaintiff also referring to the allegation that it was an act of UC, he also alleged that the act amounted to dolus. The court agreed and granted a remedy on this basis. The court latched onto these words and said that there is no doubt that according to the general principles of law everyone is responsible for the damages caused either negligently or through dolus. Likewise, there is no doubt that these were acting in bad faith, with dolus. This would amount to **tort** in terms of the Civil Code which gives an action for damages.

- **Should the law prohibit acts of unlawful competition generally?**
  The Italian Civil Code does specify acts which are acts of UC, but at the end it has a wide provision which gives the court the possibility of extending the list. This is found in article 2598 which lists a number of acts which are deemed unfair but also covers any act that: *"si vale direttamente o indirettamente di ogni altro mezzo non conforme ai principe della correttezza professionale e idoneo a danneggiare l'altrui azienda"*. It states that any act which directly or indirectly uses means that are not in conformity with professional correctness and which can damage the business of another person would also be acts of unfair competition. This is in contrast to our law which just has a list of acts. The Italian courts can use its discretion which is based on principles to interpret what is professional misconduct. It isn't limited because the final article gives the court this opportunity. The same applies for Germany whereby the German Act against Unfair Competition (2004) prohibits acts of unfair

competition generally ("*unfair commercial practices are prohibited, if they are likely to significantly affect the interests of competitors, consumers or other market participants")* but also provides a non-exhaustive list of acts deemed 'unfair'. Moreover, the Paris Convention, in article 10(2) *bis* states that, "*any act of competition contrary to honest practices in industrial or commercial matters*."
The Maltese law is limited by a list, missing a general provision limiting professional misconduct. This might be a problem. Such general provisions give the courts discretion in determining an act which is unfair.

- England: tort of passing off but no general tort of 'unfair competition'.
  L'Oréal v. Bellure ((2007) EWCA Civ 968 – English Supreme Court per Jacob LJ):
  "138. The rejected complaint shows just how anti-competitive a law of unfair competition would or might be. What one man calls "unfair" another calls "fair" …
  139. So I think there are real difficulties in formulating a clear and rational line between that which is fair and that which is not, once one goes outside the requirement of no deception."

  In England they do not have the concept of UC, but they have the tort of passing off which depends on deception. As you can see from the paragraphs quoted from such judgement, there is a resistance from English judgments from actually accepting a notion of UC.

(ii) **Plaintiff and defendant in an action for UC must be traders**

- Defendant: (i) these are duties of traders (ii) the articles which lay down the duties start with the words: "*Traders shall not…*" and (iii) **article 37** which deals with the action for UC refers to "*traders who contravene any of the prohibitions*."
- Plaintiff: **article 37** which deals with the action for UC used the words "*at the choice of the injured trader*."

  In an action for UC, both the plaintiff and the defendant must be traders. If you look at most of the sections, they all start off with '*traders shall not…*' so clearly, the obligations and duties of these sections fall upon traders. Article 37 also makes it clear that a defendant in an action for UC is a trader. that is, you cannot sue anyone other than a person who has a status of a trader on the basis of article 37 which regulates UC. In the case of the plaintiff, one must also look at section 37 which regulates the action for UC whereby 37(1), when setting out the choice between the action can be one either for damages in which case you must prove actual damages or for a penalty to be fixed by the court, which penalty is payable to the plaintiff. Now, the law says the 'injured trader' when referring to the plaintiff. Again, the plaintiff has to be a person who satisfies the requirements of article 4. This creates some difficulties.

> **37.** (1) Any trader who contravenes any of the prohibitions contained in articles 32 to 36 inclusively, shall, at the choice of the injured trader, be liable either to an action for damages and interest or to a penalty. The injured trader may, further, demand that every thing done contrary to the said prohibitions be destroyed, or that any other remedy be applied capable, according to circumstances, of removing the act constituting the unlawful competition.
>
> (2) Any action for damages and interest brought under this article shall be governed by the rules of the civil law.
>
> (3) The penalty, however, shall be fixed by the Civil Court, First Hall, or by the Court of Magistrates (Gozo) in its superior commercial jurisdiction at the suit of the injured trader, and shall not be less than four hundred and sixty-five euro and eighty-seven cents (€465.87) nor more than four thousand, six hundred and fifty-eight euro and seventy-five cents (€4,658.75), having regard to the seriousness of the fact, to its continuance, to the malice of the offending party and to all other particular circumstances of each case. Such penalty shall be paid to the injured trader in settlement of all his claims for damages and interest.

- Points on the problem:
    1) **<u>Arts. 32A and 32B</u>** were added as acts of unfair competition to transpose Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising BUT the definition of 'trader' in the Directive is different to that contained in the Commercial Code.
    2) The Directive (art. 2(d)) defines a 'trader' as "*any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader*" while the Code (art.4) defines a 'trader' as "*any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership"* (acts of trade are those listed in **<u>art. 5</u>** of the Code).
    3) If the Court adopts the definition in the Code, this would mean that Malta has not correctly implemented the Directive.
    4) Can the Court adopt the Directive definition for the purposes of **<u>Arts. 32A and 32B</u>**? – the European Union Act (Cap. 460) provides:

> (2) Any provision of any law which from the said date is incompatible with Malta's obligations under the Treaty or which derogates from any right given to any person by or under the Treaty shall to the extent that such law is incompatible with such obligations or to the extent that it derogates from such rights be without effect and unenforceable.

If you look under the short title of these articles, these were introduced relatively recently. In fact, they were introduced to transpose a directive of the EU. That directive is of 2006. The problem is that that directive contains a definition of trader. If you compare article 4 of our commercial code with this definition, they do not match. The definition in the directive is wider. First of all, the Maltese definition is much more restricted because it is linked to acts of trade(?). It is a problem because as it is Malta is duty bound by the Treaty to transpose the directives correctly. This is an incorrect transposition of the directive for the simple reason that potentially a judge would interpret trader because article 2(d) is not included in the code. It is likely that the court might say look the only definition of trader is in article 4 therefore I can only interpret articles 32A and 32B in terms of article 4. This creates a problem.

(iii) **<u>No need to prove dolus</u>**

- There is no need to prove dolus or any unlawful intent:
  <u>Article 37(3)</u> indicates that intention – "*the malice of the offending party*" – is only relevant as a factor to determine the amount of the penalty and not as a requisite to file an action for UC.
  There is no need to prove intent in these cases, no need to prove that you had the intention of competing unlawfully. In fact, the malice of the defending party is only mentioned in connection with the establishment of the penalty. Cioè, if you look at article 37, which gives the plaintiff a choice, the court calculates the penalty and the court does so by taking into account several considerations. One of which is the malice of the defending party. It is only relevant for the purposes of establishing the penalty and NOT for establishing the breach. This point is made in all the below cases.
- **Cases**
  <u>Thiellay v. Sammut</u> (11/11/1971)
  <u>Sommerville v. Schembri</u> (Commercial Court decision – 18/11/1884)
  <u>Barbara v. Barbara</u> (31/05/1932)
  In **<u>Marpierre Estates Lts v. Grech et</u>** (App: 16/02/2004), the plaintiff had a restaurant, he had opened up this establishment in 1995 and traded under that name ever since that day. The defendants opened up a catering establishment very close to the plaintiff's and they called it a very similar name. The plaintiff filed an action for UC. Immediately after, the defendant changed the name of his establishment. The Civil Court did fine the defendant in breach of article 32 but didn't grant any damages to the plaintiff and the plaintiff appealed because he said there was a breach of UC, the fact that he changed the name and therefore showed that he had no malice, is neither here nor there because I do not need to prove malice or intent in order to establish a breach of article 32. The court agreed, stating that "*il-qrati tagħna dejjem…*" Our court shave always maintained that as soon as you establish an act of UC, the courts enquiry stops there in the sense that there is no need to enquire whether there was an intentional element to establish bad faith because the intentional element is only material in the case when one determines the liquidation of damages or of the penalty. The court still rejected the appeal on the basis that the plaintiff had sued for damages not for a penalty.

  <u>Spiteri v. Cachia</u> (Civil: 10/06/2004)

PP 3: ARTICLE 32 (TRADEMARKS AND TRADE NAMES)

> **32.** Traders shall not make use of any name, mark or distinctive device capable of creating confusion with any other name, mark or distinctive device lawfully used by others, even though such other name, mark or distinctive device be not registered in terms of the Trademarks Act, nor may they make use of any firm name or fictitious name capable of misleading others as to the real importance of the firm.

Article 32 mentions two acts as is evident from the word 'nor'. These acts cover:

- Obtaining clients from competitors by using confusingly similar names or marks;
- Obtaining 'credit' under false pretences (**Sammut v. Cuschieri (31/10/1958)**)

The similarity between these acts is that they both attempt to increase goodwill by misinterpretation.

This section mentions two acts of UC in this one section. Professor Mallia was the one who promoted the act through the legislative assembly. If you look at his notes of that period, he says that the first part of section 32 is like you're trying to take clients form your competitors by confusing consumers on the name/mark or device. So, by virtue of a confusing similarity the consumer would buy product A instead of product B because the trademarks have a similarity. On the other hand, the second act involves using a name which tells a lie about the importance of a firm. Professor Mallia gives two examples in his notes. One is when you have a firm, and the firm name gives the impression that you've got a number of partners when you are really a sole trader. Secondly, is if in your firm name you mention a person who is notable for being honest or trustworthy etc to give the impression that you are associated with that person and therefore, enjoy more trust.

The 'first limb' of article 32

Names and marks play a fundamental role in a free market economy – hence, the importance of protection.

Focus will be on the 'first limb' of article 32 (which is the most commonly used) but the following are some examples of acts that could fall under the 'second limb':

- Giving the impression that the firm is a partnership of a number of persons when it not;
- Using the name of someone who has a reputation to give the impression that he is associated with the business of the firm.

The majority of cases are on the first limb. Tarde marks, trade names, and trade signs are extremely important to trade, so much so that the most famous marks jealously protect them. Besides the design and technology and the research and development, the rest is marketing and the market. For example, the swoosh sign of Nike. You see the importance of the name in this. Clearly, this section is particularly important.

<u>If we look at the wording of the first limb, we can identify two requirements:</u>
<u>Essential requisites to ground an action under the 'first limb' of art. 32 (hereinafter art. 32 will be used unless otherwise specified to refer to the 'first limb':</u>

1) **The existence of a "*name, mark or distinctive device lawfully used by [plaintiff];*** There is the use of a name, mark or distinctive device capable of creating confusion. One would need to establish that someone using a name, mark or distinctive device capable of creating confusion; <u>and</u>

2) **The making use by the defendant of a "*name, mark or distinctive device capable of creating confusion*" with that 'lawfully used' by plaintiff.** You must also show that the other name, mark or distinctive device is lawfully used by someone else.

<u>What a lawyer would need to establish when defending the plaintiff:</u>
1) Whether our client has the lawful use of a name, mark or distinctive device.
2) The defendant is using a name, mark or distinctive device capable of creating confusion with the name, mark or distinctive device of your client.

Prior use
The first question that naturally arises when dealing with the first requirement, is what we mean by 'lawful use'. Cioè, what does the words '*lawfully used by others*' [i.e. By the plaintiff] mean? The use of the past sentence means that the plaintiff has been using the name/mark/device before or prior to the defendant. By this, we mean <u>**prior use**</u>. Whether it was in operation pre-1927. The plaintiff must prove he has prior use of the name, mark or device – "*Prior in tempore in iure*".

Priority of use confers ownership of a mark, name or device and, consequently, its <u>**exclusive use**</u> – the right to exclude others from using that name or mark. This principle was established before Act XXX of 1927. This was stated in <u>**Sommerville v. Schembri (05/03/1887)**</u> where the Privy Council said

> *"as soon as a trademark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the property of the firm."*

So, if you've used the mark in a way that the consuming public associate that mark with a particular trader, then you have the exclusive use of that name, mark or device which means that no one can use that name because you have the exclusive use. The maxim is '*prior in tempore, potior in iure*' which means that if you have priority in points of time, then you have a greater ground. Moreover<u>**, ITC Limited et v. LBM Breweries Ltd (976/2005, PA 30/04/2013)**</u> – point made *obiter.*

Requisite (1) – Prior use and registered trademarks
Art. 32 protects names, marks and devices against unlawful use "*even though such other name, mark or distinctive device be not registered in terms of the Trademarks Act*" (prior to the enactment of the TM Act in 2000 – replaced in 2019 – the article referred to the Industrial Property (Protection) Ordinance ('IPPO').

Initially, before the Trademarks Act, we had the Industrial Property (Protection) Ordinance. This is important because it shows you that trademarks are protectable irrespective of registration. Whether it not it is registered, it is protected under article 32. If you have lawful use, it is protectable. Cioè, **the protection enjoyed by a mark on the basis of prior use (ownership) exists independently of registration of that mark/name under the TM Act.**

- A registered TM enjoys protection BOTH under art. 32 and the TM Act.
- A mark may be not registrable under the TM Act and still be entitled to protection under art. 32.

Obviously, if you register under the Trademarks Act, you have added protection. Also, technically, only trademarks can be registered. The Trademarks Act caters for the registration of trademarks and not trade names. Having said that, very frequently the names of businesses would also be trademarks, and secondly, sometimes lawyers file an application for registration under class 16 (stationary) so they will still have registration. **The point here is that the protection under article 32 depends on prior use and NOT registration**, since *prior in tempore, potior in iure.*

We are speaking of dual protection under article 32 and trademarks Act, but even if it is not registered it is still protected under article 32. Even if it cannot be registered, it is still entitled to protection under article 32 on the basis of prior use. Remember trademarks are really marks for goods and services. Notionally, article 32 is wider because the Trademarks Act protects trademarks while article 32 covers not only marks but tradenames.

Cases

- **Bonello noe v. Cauchi et (30/06/1909)**, note pre 1927 but the courts had already recognised prior use. this illustrates the point of whether or not it is registered, a mark which has a prior use is still entitled protection. The plaintiffs were the owners of the trademark Crown Brand. They sued the defendants because they were using as trademark for their products which was very similar to theirs. This mark was registered by the plaintiffs, and they sued on both under the IPPO as well as on the basis of UC. One of the defences raised by the defendant was the formalities for registration of the trademark Crown brand by the plaintiff were not satisfied and therefore the trademark should be cancelled from the registrar. The court said even if the registration is invalid, because the plaintiff has prior use of that mark, it is still protected. Even if it is held that the formalities laid down. by ordinance XI of 1899 for the registration of marks were not observed it is however, certain that irrespective of the provisions of the Ordinance, the defendant is suing a mark which is similar to the mark which the plaintiff has prior use of. Even before article 32 was introduced into the Commercial Code, prior use was recognised.

- **Benjacar noe v. La Rosa de Cristofaro (15/10/1931)** the plaintiff was representing a firm that produced whiskey and they registered a mark with the letters OVH as well as another mark Greer's OVH. The defendant was using a mark with the label yellow cap OVH and the plaintiff's filed the sanction against the defendants both on the basis of their registered trademark OVH as well as on the basis of UC. This is 1931 so post 1927. One of the pleas raised by the defendant was that the mark was irregularly registered. In this case, the court actually decided that the mark was irregularly registered, that the letters OVH could not be registered under the Ordinance as a trademark per se. The court said irrespective of this, the plaintiff has prior use, which gives the plaintiff property rights which gives plaintiff exclusive use and therefore, on the basis of law of UC the plaintiff succeeded in the action.
- **Farrugia noe v. Benjacar noe (21/03/1949)**

- **Spiteri v. Cachia (10/06/2004)**, Spiteri operated a mechanics business with the trade name and trademark Car Clinic. The defendant was using a similar trademark Leli Car Clinic. The plaintiff sued both under article 32 as well as under the Trademarks Act 2000. In the meantime, the defendant obtained registration of his mark Leli Car Clinic. Plaintiff was suing on the basis that he had prior use and registered, but in the meantime, the defendant also registered Leli Car Clinic. The court first looked at the registration issue and said the plaintiff's action cannot succeed on the basis of the Trademarks Act 2000 because Leli Car Clinic is also registered. But the court said the action is also based on article 32. The court said the plaintiff is prior in time and has the right to file an action for

UC under the Commercial code. In this case, the plaintiff did not succeed under the Trademarks Act, as the court could not give the plaintiff a remedy under this Act, but it succeeded under article 32.

- **See also for a different view: Messina noe et v. Mizzi pro et noe (31/05/1902)**, after the ordinance was enacted actually had a different result. The court said once we have a system of registration now, you can only protect a registered trademark if you register it. It said this applies to trademarks and trade names. Clearly, now article 32 says whether or not it is registered so this is not good law.

Prior use and registered trademarks
If there are competing rights i.e. an unregistered mark having prior use vs. a registered mark, it is prior use that prevails. In these cases (i.e. when another mark has prior use), registration does not create ownership rights:

- **Micallef v. Bonello (10/07/1916)**, the plaintiff Micallef had registered a trademark consisting of the picture of a sheep with a ribbon and they registered this mark in December 1914. In April 1915 they sent a judicial protest to the defendant alleging that he was using a confusingly similar mark. The defendant rebutted this allegation stating that he has prior use despite the plaintiff's registration. The plaintiff sued. The Court had to determine whether it was the registered trademark or the prior user which had the better right. There were a number of problems – when the defendant sent to register the trademark, the plaintiff didn't oppose the trademark. The Court said registration is there to confirm your ownership rights and not there to create them. This is wrong in the sense that if I invent a new trademark and no one has ever used it, if I registered it, I acquire a right because I registered it. What the Court is saying is that **registration does not guarantee title to the mark nor that is validly registered**. **Prior use is the better right**. The fact that the plaintiff did not oppose the application within the two-month period, did not mean that he lost that right. The basic point is that here prior user gives you a better right over a registered trademark.
- **Mamo noe v. KPI (Comm. 03/12/1986)**, the plaintiff were an Italian brand and the Maltese Franchisee of the Italian company. Sometime before that, one of the defendants had registered as a trademark *Stefanel* and obtained the registration with distinctive lettering. this case was an action but the Italian company and the franchisee to cancel the registration of *Stefanel* from the register. The court, using Micallef v. Bonello said registration does not guarantee title, the prior users, clearly the Italian company and therefore, they have title.

These cases are pre trademarks Act 2000.

The provisions of the Trademark Act confirm that the principle has not changed post-2000 (note: the TM Act 2000 – Cap. 416 – was replaced by TM Act 2019 – Cap 567).

> (4) A trademark is not to be registered or, if registered, is liable to be declared invalid where, and to the extent that:
>
> > (a) rights to a non-registered trademark or to another sign used in the course of trade, were acquired prior to the date of application for registration of the subsequent trademark, or the date of the priority claimed for the application for

> registration of the subsequent trademark, and that non-registered trademark or other sign confers on its proprietor the right to prohibit the use of the subsequent trademark;
>
> (b) the use of the trademark may be prohibited by virtue of an earlier right, other than the rights referred to in sub-articles (2) and (4)(a), and protected by means of:
>
> (i) copyright;
>
> (ii) registered designs;
>
> (iii) other rights which the Minister may prescribe by regulation.

A right to a non-registered trademark is acquired by prior use and article 32 gives the non-registered trademark holder – if a prior user – the right to prohibit the use of the subsequent trademark.

> (3) (a) A trademark shall not entitle the proprietor to prohibit a third party from using, in the course of trade in Malta, an earlier right, if the right is recognised by law and if, or to the extent that, its use is protected by virtue of any rule of law.
>
> (b) For the purposes of this sub-article an "earlier right" means an unregistered trademark or other sign continuously used in relation to goods or services by a person or his predecessor in title from a date prior to whichever is the earlier of -
>
> (i) the use of the first-mentioned trademark in relation to those goods or services by the proprietor or his predecessor in title; or
>
> (ii) the registration of the first-mentioned trademark in respect of those goods or services in the name of the proprietor or his predecessor in title.

Say someone has obtained registration of a mark and someone else has prior use. Under the Trademarks Act, if you have a registered trademark, you can sue on the basis of that registered trademark. But you can also sue under article 32. Who has the better right?

What is the position now under the Trademarks Act 2000?

1) PRE-REGISTRATION
2) POST-REGISTRATION, IF REGISTERED SHOULD BE DECLARED INVALID.

We are speaking of a non-registered trademark. Pre-registration if these circumstances exist, then it should not be registered. Post registration, it can be declared invalid.

According to **Article 16(3)(a)(b)**, if I have a registered trademark, I cannot use it to prohibit an earlier right. You cannot bring an action for infringement against a prior user who is protected under article 32.

Loss of rights
Abandonment refers to the fact that the right to exclusive use may be lost as a result of non-use when circumstances show that the right-owner had the intention to abandon the mark/name. But, as stated in **Sammut noe v. Salamone noe (03/03/1953)**, '*biex ikun hemm l-abbandun biċ-ċessazjoni.* There is a principle at law that unless a renunciation is explicit/expressed then you cannot infer it unless there are very strong circumstances from which to infer it. As a trademark can be acquired by prior use, it can be lost by non-use. There are some judgements which indicate that non-use signifies an abandonment of the right to a trademark. Most of these cases really paint the picture that to prove abandonment of rights, so a renunciation of rights by virtue of not using it.

Cases
Caruana v. Portanier noe (07/01/1935): Portanier produced mineral water in trademark bottles. Caruana had a large number of these bottles and he entered into an undertaking to return these bottles to Portanier within a period of time. Caruana failed to do so, and the defendant sent Caruana an invoice which represented the price/value of those bottles, and it was as if Caruana was purchasing the bottles. Subsequently, Caruana started selling mineral water in these bottles, with the brand name of Portanier. As a consequence, those goods could be seized. Caruana sued saying he purchased those bottles and wants them back. An issue arose whether by the fact that Portanier had sent this invoice for the bottles, whether he had renounced for his right to the trademark. The Court said that what Portanier was doing was that he was trying to get compensation for the cost of the bottles, and this did not mean that he wanted to renounce his trademark, therefore, giving the right to Caruana to market his goods with the trademark of Portanier.

Sammut noe v. Salamone noe (03/03/1953), **Sammut noe v. Trapani noe (20/10/1953)** and **Staines noe v. La Rosa noe (13/12/1950)** concern a period of non-use during WWII. The first two cases concerned German trademarks. Clearly, Germany was an enemy and therefore, they couldn't export goods to Malta during the period of WWII causing their marks not to be used. In the meantime, you had companies which started using these German trademarks and the issue of non-use arose in these cases. The defendants claimed that the German companies did not use the mark for a period of 6 years and therefore, they abandoned their rights. The Court concluded that they did not use their rights not because they didn't want to, but because they were in a situation of impossibility to use their rights, therefore there was no intention to renounce of their rights and therefore, the plaintiffs (German companies) had not renounced their rights.

The Prior User loses his right to apply for the invalidity of a later registered trademark where '*[she] has acquiesced for a period of five successive years, in the use of a latter trademark registered in Malta'* (Art. 11(1) and (2) of the TM Act). The bottom line is that you acquire rights by prior use, but you can lose them by non-use.

PP 4: WELL-KNOWN NAMES/MARKS
The problem

- A name or mark which has a reputation in Malta but the trader who owns the well-known name or mark has no place of business in Malta and does not trade in Malta.
- Is reputation alone, without actual trade within the jurisdiction, sufficient to give the name/mark legal protection?

Clearly, laws are territorial. Maltese laws essentially apply to the Maltese territory. We know and even more so now, but this was always the case, that there are some marks which have a reputation, could be world-wide, European, southern Europe etc. A reputation which goes beyond the normal place of busines of the busines in question. The issue if if we suppose that we have a trader who has no place of business in Malta, does not have an outlet in Malta, doesn't have a branch in Malta, and yet the tradename/mark in question is well-known in Malta. There is no actual trade in Malta of the goods or services of the business, but yet the Maltese public know the reputation, perhaps from aboard.

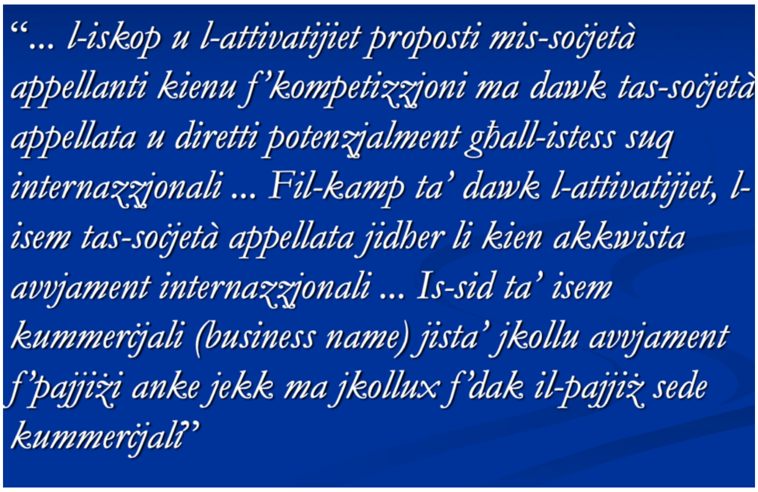
Cases
A chronological account of the cases shows that our Courts had initially taken a 'soft-line' approach and established that reputation was sufficient to give protection to the well-known mark but, subsequently, adopted a 'hard-line' approach arguing that article 32 was not applicable, even if the mark was well known, since if there was no trade within the jurisdiction one could not speak of competition whether fair or unfair.

By 'hard-line' one means an approach by the courts which is in substance that unless you are trading within the jurisdiction you do not have protection under article 32. You need some trading activity within the Maltese jurisdiction, otherwise article 32 cannot apply. The 'soft-line' approach is in the sense of you do not need trading activity if the Maltese public associate that mark/name by reputation with a particular trader, then that is enough. The court started off with the soft-line approach and then switched to the hard-line approach.

'Soft-line' approach
For a number of years, the view was that reputation in Malta was sufficient for an action under article 32. This case related to a tradename which had a wide reputation in Europe.

In the case **Frendo Randon noe v. Gatt noe (App Kum 21/06/1968**) ('the Club Med Case'), plaintiff was the French company Club Mediterranée ("Club Med"), a company **well-known all-over Europe**, in the tourism business. It had no place of business in Malta and did not trade in Malta. Their only activity in Malta had been two brief visits by foreign tourists booked through them. The defendant company, after trying unsuccessfully to be appointed as plaintiff's agents for Malta, then registered a company in Malta, under the Commercial Partnership's Ordinance, with the same name i.e. Club Mediterranee Ltd. Plaintiff sued on the basis of article 32. Both the Commercial Court and the Court of Appeal held for the plaintiff French Company. The defendant's defence was that since Club Med did not carry-on business in Malta, it was not in competition with the defendant Maltese company and therefore article 32 was not applicable. The Court rejected this argument. It said that the name of the French plaintiff company had **an international reputation** and was well known in Malta. A trademark or trade name could have goodwill in Malta even though no business was carried on in Malta. Furthermore, since both plaintiff and defendant companies were in the tourist business they were potentially competing in the same international market.

The defendant appealed and their principal ground for appeal was they are dealing with laws of unlawful competition and if this French company is not trading in Malta, it is not competing with them. How can you apply a law of UC when they are not competing? The court of appeal rejected this plea on the basis of the French company had a reputation in Malta, but when it came to consider the plea as to lack of competition, the Court said they are in the tourist business, therefore they are potentially in the same market. So, potentially, you are in competition of one another.



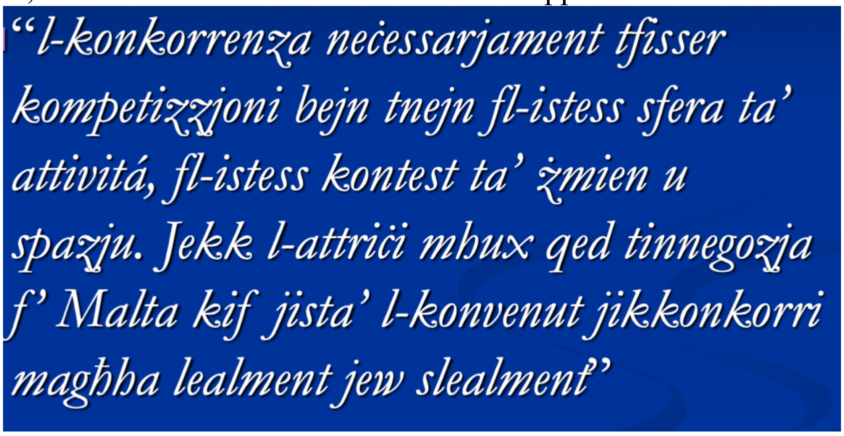
The court is saying that the objects and activities of the defendant company who is appealing are in competition of those of the plaintiff company and are potentially aimed at the international market.

This approach was adopted in subsequent cases.
In the case **Grech noe v. Mangion (Kumm 16/11/1987)** ('the Bodyshop Case'), the defendant had a shop named 'Body Shop'. At the time The Body Shop International plc (plaintiff) was not operating in Malta. The Body Shop International plc had a number of franchises throughout the world and sometime before this case was decided, The Body Shop International plc had appointed a Maltese company as its franchisee in Malta. When the founder came to Malta, it became apparent that the defendant had opened a shop with the same name also selling cosmetics. This was a case of unfair competition where The Body Shop International plc and the Maltese franchisee sued the owner of this shop in Valletta on the basis of article 32 claiming prior use. The Court held, following the 'Club Med' judgement, that the name 'Body Shop' was well known internationally including Malta and defendant's act was in breach of article 32.

'Hard-line' approach
Our courts shifted to the 'hard-line' approach in the Court of Appeal decision in the Tanti McDonald's case.
In the case **Valletta noe v. Tanti (App Kum 11/03/1992)**, the plaintiff was the US company McDonald's corporation, a company well known in the fast-food business but at the time they did not carry-on business in Malta. The defendant Tanti was a Maltese trader who was using the McDonald's name and the so-called Golden arches 'M' sign in his business in Malta which consisted principally in selling snacks and ice-creams from mobile kiosks.

Plaintiff sued on the basis of article 32. The Commercial Court decided the case primarily on the same lines as the Club Med case. It also held, however, that the use of the name McDonald's amounted to the use of a firm name *"capable of misleading others as to the* *importance of the firm*” in breach of the second limb of section 32. The first court judgement said not only is it in breach of the first part of article 32 but also in the second part. The kiosk was claiming an association with McDonalds. On both parts of section 32, therefore, the plaintiff succeeded.

The Court of Appeal reversed the decision on the basis that since this was an action for unfair competition, if the plaintiff was not in competition with the defendant because it was not trading in Malta, then the action under article 32 was inapplicable.



(Court of Appeal)

We are dealing with the rules of competition, so if the parties are not in competition can you apply the rules of unlawful competition? Competition necessarily involves competition between two traders in the same sphere of business and in the same context of time and space. You are competing in the same/similar type of business at the same time and the same space. The Court is saying how can you argue that someone is competing lawfully or unlawfully if he does not have these requisites, same space, business, and time. The Court didn’t deal with the second part of article 32 but really this argument applies to all the acts of Unfair Competition. The Court is saying that you need to be competing to invoke the rules of Unfair Competition.

You need to see what the type of business is. Clearly, when we are dealing with online trading, why should limit space simply to the Maltese islands particularly when there are Maltese citizens who purchase from the online retailer. The online retailer is offering these goods to the Maltese public. These clearly are offering their goods or services to the Maltese consuming public and if their name is known to the Maltese consuming public, and they purchase from them, then in someone in Malta opens a physical shop in Malta, the online retailer would be able to institute a case under article 32. For example, ‘Sports Direct’ is an online UK shop. If someone were to open a shop with the same name in Malta, that would constitute unfair competition as this is causing confusion. The argument is if it is an online retail outlet that the Maltese public buy from, they are in competition with Maltese shops.

In the case **Valletta noe. v. Muscat pro et noe (Kumm 22/10/1992)** (‘the McBennies case’), the plaintiff was also McDonald’s but in this case the defendant was operating a snack bar with the name McBennies and was using the words ‘Big Mac.’ The Commercial Court followed the line adopted by the Court of Appeal in the Tanti McDonald’s case and the end result was that McDonalds lost the case. It isn’t a question of prior use; all the Court is saying is you cannot invoke the rules of unfair competition if you are not competing.

Second limb of article 32
The Commercial Court decision in the Tanti McDonald's case held that Tanti was also in breach of the second limb of article 32 in that by using the name 'McDonald's', he was using a "firm name capable of misleading others as to the real importance of the firm". Unfortunately, this point was not discussed in the Court of Appeal judgement. In a subsequent case, **Valletta nominee v. Emmanuel Galea** (29/04/1994 – 1296/90FGC), which concerned the use of the name 'Tesco' on a shop in Sliema, the UK company Tesco successfully brought an action for unfair competition which the Commercial Court decided on the second limb of article 32. The Court said that the use by the defendant of the word 'Tesco' was capable of misleading as to the importance of the firm. This is post Court of Appeal case in Tanti McDonalds, but the Court didn't really go into this issue. It is the same argument – if you are not competing, how can you go into this limb?

What we really need to see is the type of business. It is one thing selling hamburgers, and another thing selling clothes since people can buy clothes online, unlike burgers. It depends on the product, if it is available to Malta via website whereby, they are trading in Malta since it is offering the goods to the Maltese public. If that website, that online retailers, are offering these goods, they are trading in Malta. What do we mean by space nowadays when we have an online retail system?

The Trademarks Act
- Until the year 2000 then, it seems that well known marks had no protection in Malta unless they were registered. The position changed in the year 2000 with the coming into force of the Trademarks Act (cap. 416) replaced in 2019 by the trademarks Act (Cap. 597)
- Although the Trademarks Act deals principally with the registration of trademarks and the protection of registered trademarks, it does contain provisions which provide some protection to well-known marks, even though they are not registered.

> **126.** (1) References in this Act to a trademark which is entitled to protection under the Paris Convention as a well-known trademark are to a mark which is well-known in Malta as being the mark of a person who is a national of a Convention country, or is domiciled in, or has a real and effective industrial or commercial establishment in a Convention country, whether or not that person carries on business, or has any goodwill, in Malta, and reference to the proprietor of such a mark shall be construed accordingly.

This article is making reference to the Paris Convention which has article 6 which deals with well-known marks. Article 126(1) is the definition of well-known marks as found in the Paris Convention. '*Whether or not…accordingly'* - this is the definition which addresses the problem which we posed at the beginning of this topic.

When this act was introduced in 2000, it introduced a provision to protect well-known marks, such as 'McDonalds', which is not dependant on registration. The Trademarks Act primarily deals with registration of trademarks and the protection of them but there is a provision in there which, technically speaking, could have been contained in the Commercial Code. This provision, article 126, basically protects well-known mark. In sub-article 1 there is a definition of well-known marks, '*referring…accordingly.*' It is well-known but has no business. This is the problem we had before. Had this provision been there during the time of the McDonalds case, they could have invoked article 126(2). Clearly, here it is giving the right to stop. The problem of well-known marks was addressed in this provision which depends on REPUTATION and is not dependant on the mark being registered even though it is found in the Trademarks Act.

Under article 6(1) a trademark shall not be registered or, if registered, shall be liable to be declared invalid where it is identical or similar to an earlier trademark and, under article 6(2) 'earlier trademarks' includes,

> (d) trademarks which, on the date of application for registration of the trademark or, where appropriate, of the priority claimed in respect of the application for registration of the trademark, are well known in Malta, in the sense in which the words "well-known" are used in Article 6*bis* of the Paris Convention.

Article 126(2) & (3),

> (2) Subject to the provisions of article 11, the proprietor of a trademark which is entitled to protection under the Paris Convention as a well-known trademark is entitled to restrain by injunction the use in Malta of a trademark which, or the essential part of which, is identical or similar to his mark, in relation to identical or similar goods or services, where the use is likely to cause confusion.
>
> (3) Nothing in sub-article (2) shall affect the continuation of any *bona fide* use of a trademark begun before the coming into force of the Trademarks Act.

Article 126(2) allows the proprietor of a well-known trademark the right to restrain by injunction (*jiribixxi*) the use in Malta of a trademark which is similar to the well-known trademark (the definition of this specifically states that you do not need an establishment or trade in Malta). Had we had this provision at the time of the McDonalds case, then McDonald's would have referred to this article. Although this is found in Trademarks Act, it is not dealing with registered trademarks. In truth, it could have been made as a sub-section of article 32. This applies, like article 32, whether the trademark is registered or unregistered. It applies independently of registration.

Article 6(1)

> **6.** (1) A trademark shall not be registered or, if registered, shall be liable to be declared invalid where:
>
> (a) it is identical with an earlier trademark, and the goods or services for which the trademark is applied for or is registered are identical with the goods or services for which the earlier trademark is protected;
>
> (b) because of its identity with, or similarity to, an earlier trademark and the identity or similarity of the goods or services covered by the trademarks, there exists a likelihood of confusion on the part of the public, including the likelihood of association by the public with the earlier trademark.

Under this article, a trademark shall not be registered or, if registered, shall be liable to be declared invalid where it is identical or similar to an earlier trademark and, under art. 6 (2), 'earlier trademarks' include:

> (d) trademarks which, on the date of application for registration of the trademark or, where appropriate, of the priority claimed in respect of the application for registration of the trademark, are well known in Malta, in the sense in which the words "well-known" are used in Article 6*bis* of the Paris Convention.

Registered Trademarks

What about the situation with respect to registered trademarks?

- Contrast the position taken by our Courts in connection with the registration of trademarks under the Industrial Property Protection Ordinance (replaced by the Trademarks Act).
- The registration of a trademark, which is identical or similar to a trademark which is well known in Malta, is invalid even though the proprietor of the well-known trademark has no trade or business in Malta.

In **<u>Mamo noe v. Kontrollur Proprieta Industrijali et (16/11/1992)</u>** ('the Stefanel case') Cancellation of the registration of the well-known mark 'Stefanel' which is a Maltese trader had managed to register in his name without the knowledge of the Italian company. The court said that the principles underpinning trademark registration were different from those which applied to article 32 actions. The fact was that the Maltese trader was not the owner of the mark and registration of trademarks should not be reduced to a race in which the first person to register acquired the rights in trademark. The Commercial Court gave judgement in favour of the Italian company on the prior use principle since registration does not guarantee title. Note that this case was not based on article 32 but on the Ordinance. At the time, it was uncertain how this was going to be decided because under the Ordinance, the Ordinance also used the words 'lawful use'. So, under the Ordinance there was a provision that you're not allowed to register a trademark if it is already legally used by others. The Court of Appeal said we need to distinguish article 32 from the rules relating to the registration of trademarks. The court made reference to the fact that when you apply to register a trademark, you are claiming you have lawful use of that trademark. So, when the defendant did so, it unlawfully said it was the owner of that trademark when it wasn't. the plaintiff succeeded.

In **Valletta noe v. Muscat Scerri noe (15/02/1995)**, the application of registration for 'muppets' by Muscat Scerri went to court because Henson Associates opposed it. Initially, the Commercial Court said you have no presence in Malta; therefore, you have no remedy. The Court of Appeal, on the other hand, said we need to distinguish article 32 from the registration of a trademark and here, the lawful use or the legal entitlement to the trademark 'muppets' belongs to Henson Associates and therefore it disallowed the application made by the defendant. The Court of Appeal upheld the opposition filed by Henson Associates, creators of the well-known TV puppets 'the Muppets' which also owned trademark rights in the name in several countries around the world against an application by a Maltese trader to register 'Muppets' as a trademark for its food products. The Court re-affirmed the distinction between article 32 actions for UC and the right to register a trademark and recognised the international reputation of a well-known brand and its commercial value.

Note the term 'character merchandising' which refers goods which are based on particular characters, say from a book or a film. Essentially, you use the popularity of the character to sell goods. What they do, because they use them on products which are sold, they register trademarks). In this case, Henson Associates produced around 50 registrations of their marks all over the world but not in Malta. The business gets royalties from people using their characters and this is owing to the fact that they have exclusive rights.

PP 5: DISTINCTIVENESS, UNOFFICIAL MARK, GET-UP AND USE OF OWN NAME

Distinctiveness

- Essential function of a Name/Mark: it is a 'badge of origin' that enables the consumer to distinguish goods or services of a particular trader from those of others.
  It is commonly said that the principal function of a trademark is that it serves as a 'badge of origin' of goods or services. In fact, even when we saw the notion of prior use, this is what we meant. The whole point is that you are the prior user, the public associate that mark with your goods/services and, therefore, that mark is distinctive of your goods/services. Because that mark/device is distinctive of your business, then if someone is going to use a mark which is similar, he is going to create confusion which undermines the distinctiveness of that mark.

- Distinctiveness is acquired by use in the market but there is no specified time period: *'ma hemmx żmien speċjali preskritt mill-liġi biex ikun hemm il-protezzjoni…Jiġifieri wara kemm żmien l-użu tagħha jagħti esklusivita."* – **Chirchop v. Galea.**
  Distinctiveness is acquired through use. When you use it in the market, then you acquire property rights on that mark. Of course, there is no fixed period of time.

- Certain names or marks may not easily acquire distinctiveness. Names/Marks that are descriptive generally lack distinctiveness e.g. Words in common use, words that describe the goods, geographically descriptive words. Notionally, certain names and words inherently have a difficulty in acquiring this function of being a badge of origin. For example, if I am a producer of whiskey and I try and launch a brand called 'Whiskey' it will most likely fail since it identifies generically the type of product that I am producing. Nevertheless, the cases have indicated that words in common use can acquire distinctiveness, essentially via the notion of secondary meaning.

- Secondary meaning prima facie non-distinctive names/marks (e.g. Descriptive) can acquire a secondary signification whereby they acquire the essential function i.e. a badge of origin that distinguishes those products/services from others.

  There are certain names or marks which by their nature, in themselves, are difficult to acquire distinctiveness. This is particularly true of words in common use or descriptive marks. For example, I am in the business of selling bananas and I try to use a trademark for my bananas using the wordmark 'banana'. Cleary, banana is a generic name that describes the goods so it will be difficult for that word to acquire distinctiveness. In this case, the word in common use such as banana for banana. It is words in common use with respect to that particular trade. So, in the case of 'apple' for computers, it is not a word in common use. Descriptive words, so words that describe that particular product, are 'weak' marks. It is going to be difficult to acquire distinctiveness, but not impossible. The law contemplates the possibility which marks of their nature are difficult to acquire distinctiveness, can, through use, become distinctive. We call this 'secondary meaning'. So, besides the ordinary meaning of the word in common use, they acquire secondary meaning as being a brand.

In the case **Colombos v. Lee (14/02/1933)**, the plaintiff produced cigarettes with the brand name 'Turkish' since these cigarettes used Turkish tobacco. The defendant started producing cigarettes called 'Mascot', but he also used the word 'Turkish' both on the filter paper and on the packet. The plaintiff filed an action for UC, and the court agreed that the word 'Turkish' was prominent on the defendants' cigarettes. The main issue was that the defendant said that he is using Turkish tobacco and that the plaintiff has no right to appropriate the word in common use. The court said 'Turkish' is now associated with the cigarettes of plaintiff, **through use it has acquired secondary meaning and therefore, the plaintiff has exclusive rights to use it in Malta**. The plaintiff succeeded for his action in UC.

In the case **Chircop et v. Galea noe (27/06/1955)**, the Court stated,

> Chircop et vs. Galea noe (XXXIX.i.401 – 27/06/1955) "*Xejn ma jfisser li l-kliem 'Florentine Art' huma, kif jingħad 'geographically descriptive' għaliex anki isem ġeografiku jista' jakkwista 'distinctiveness' billi jakkwista 'secondary meaning' fis-sens li kif ġara f'dan il-każ parti sostanzjali tal-pubbliku, fl-idea tagħha, tassoċja l-isen ġeokrafiku man-negozju ta' negozjant partikolari*"

In this case, plaintiffs had a shop in Archbishop Street Valletta called 'Florentine Art.' In this shop, plaintiff sold products which are typical of Florence. The plaintiffs, besides using the name of the shop, also used the emblem of Florence. The defendant was in the same line of business and already had a few shops in Valletta called C Galea and at a point in time the defendant opened another shop which he called the Florentine. Also, he also started using wrappers with this name and also with the Florentine emblem. This ensued in this case that the plaintiff filed an action for UC because of the possibility of confusion. A number of issues were raised including that of deceptive resemblance. One of the defences that was raised by the defendant was that these were words in common use used to describe the types of goods that both parties sold, and that therefore he was entitled to use that. However, the court said notwithstanding it was geographically descriptive, even a geographical name can acquire distinctiveness by virtue of acquiring secondary meaning. In this case, a substantial part of the public associate this geographical name with the business of the trader in question.

Spiteri v. Cachia (10/06/2004)

Unofficial or Popular Trademark
Article 32 protects a name which a product/service is popularly identified by the public even though that popular name is not the actual trademark.

In **Mifsud noe v. Nicosia noe (11/06/1923)**, the plaintiff company was the owner of the trademark relating to tins of condensed milk. A label on the tin depicted the figure of a woman holding a pale in one hand and another which she held onto her head. That was the main representation on the label. The defendant had another trademark which depicted the figure of a woman holding a bunch of flowers. Both of these were legitimate labels, both registered in the UK. At any rate, the plaintiff's trademark, that is the one with the woman with the pale, was registered also in Malta and the plaintiff filed an action against the defendant on the basis of the Ordinance. The judgement was not decided on the Ordinance, since the Court said that implicit in this claim there was also a claim of UC. Therefore, the Court decided on the principle of UC, not on the basis of registration since the trademarks are substantially different. The label itself of the plaintiff is substantially different from that of the defendant. However, there was evidence in court that the plaintiff's product was commonly referred to, both by people in the trade and by consumers, as *tal-mara* because it depicted the figure of a woman. Moreover, plaintiffs' products had been on the market since the 1900s in Malta. At the time, if you wanted to buy products like these you would go to a small grocer. The Court noted that the fact that for a number of years the people referred to the product as *tal-mara*, resulted in that defendant's mark was causing and could cause confusion. Therefore, the plaintiff had acquired in the local trade for his product, apart from the exclusive property of the mark (the label), even the exclusive property of the trademark in virtue of which his product is requested both by consumers and also as it is offered by retailers. So, even the retailers referred to it as *tal-mara* and the end result was that the plaintiff succeeded in his action.

> 'Tal-Mara': "*la ditta attrice ha acquistato nel commercio locale del suo prodotto, oltreche la proprieta esclsuiva del marchio da esso usato … anche la proprieta' esclusiva del nome commerciale col quale il suo prodotto e' richiesto dai consumatori ed e' offerto dai rivenditori*"

Mizzi noe v. Frendo noe (30/10/1933) referred to the trade in tinned condensed milk. The plaintiffs marketed a brand called 'The Dutch Baby' and the label depicted a woman in Dutch costume holding a baby in her arms and below there was the actual name. The defendant also marketed tins of condensed milk, again the actual brand name was different, 'Bonnie', and the label depicted the picture of a baby with stretched arms. The plaintiff's product with that label had been used in Malta for a long period of time. Similarly to the previous case, evidence was given that consumers and retailers, that is grocers, would refer to the plaintiff's brand as *tal-baby*, in fact there was some confusion so much so that some retailers started referring to the second defendants brand as *tal-baby l-oħxon*. At any rate, the same principle was applied that aside from the actual trademark, this product had acquired an **unofficial trademark** '*tal-baby*.' Article 33 also protects this. It doesn't stop at the official trademark. Article 32 extends its protection way beyond registration. This is based on what the public identify as a badge of origin.

Get-up

Article 32 protects 'get-up' or 'trade dress' e.g. shape or colour or design of the package or product can acquire distinctiveness and act as a badge of origin. Article 32 gives protection to a wild range of what is distinctive to a product. Through use, even the wrapping, not just the trademark but the actual trade dress of the product. Besides the official trademark, what also serves to distinguish the product is the dress itself in which the product is contained.

In **Hammer v. Gatt (07/10/1920)** there were opposition proceedings (remember when we had the Industrial Protection Ordinance, anyone who wanted to register a mark would file an application that would be published in the Government Gazette or newspaper and anyone who wished to oppose could have and it could ultimately go to court). The plaintiff was the proprietor of a well-known trademark in Malta at the time called 'GIP tips', and besides that, they had a distinctive wrapping and with a red seal with the words GIP on it. The defendants then applied to register a trademark which although it had different letters, its packaging was similar. The court on that basis said, referring to the notion of UC, it would also be a case of

UC if the marketing of products in packaging or a shape or colour could be easily confused with packaging of a similar product marketed by another firm.

In **Lee v. Galea(20/07/1933)**, plaintiff had a trademark 'Lucky Strike' with the packaging having a red circle with a yellowish gold circumference. The defendants started marketing cigarettes with the name 'Lucky Day' and packaging which was similar. The Court reached the conclusion that this amounted to UC both on the basis of the name and on the basis of the packaging.

Sammut noe v. Mizzi pro et noe (28/01/1960) relates to these cubes for soup with packaging coloured in yellow and green. The defendants were in competition with these dried soups in cubes and this case related to action against the defendants for using packaging that was similar. The defendant pleaded that there were a number of differences. **The same principle that prevents confusing similarity, what deceives the buyer, must also be observed when the probability of deception arises not only where the similarity or the imitation of the mark proper but also from copying the get-up of the goods**, that is the dress in which the goods are presented to the public; the shape, size, colour of the packaging. The Court concluded that there was UC because the general impletion was capable of creating confusion with that of plaintiff.

> "... L-istess prinċipju li jimpedixxi dal li jista' jinganna lill-kompratur għandu jiġi osservat meta l-probabbilità tal-ingann tqum mhux biss mill-imitazzjoni tal-marka proprja imma mill-kupjar ta' dak li l-Ingliżi jgħidulu l-'get up' tal-merċi li huwa wieħed jista' jgħid il-libsa li fiha l-merċi tiġi preżentata lill-pubbliku – il-forma, d-daqs, il-kulur tal-oġġett jew tal-pakkett li jikkontejenih." –

Agius Vadala v. Mizzi (08/08/1990) was about 4 types of cubes of stock. The Court only found confusing similarity with respect to one of the products. The Court reached the conclusion that **everything depends on the psychological impression created with respect to the form in which it is represented to the public**. The Court continues by saying that plaintiffs have for a long time used on a number of products in this line of dried soups the colour scheme where on a yellow background you have in contrast dark green. This get-up is distinctive of the plaintiff's product and is therefore protectable under article 32.

Darmanin v. Busuttil (22/10/1973) related to rice. The plaintiffs marketed rice and this brand had been sold for a number of years. The get-up, so the packaging of this rice, had a boarder with colours which were white, red and dark blue. The plaintiffs packaging also had on the left a figure of a person in a turban and at the back they also had a recipe for the rice. The defendant started marketing another brand of rice, the actual trademark was different, but the packaging was exactly the same size, it also used very similar three colours. Instead of the figure of a man with a turban, they had the figure of a man with a cook's hat. Again, at the back they had a recipe, and the lettering was quite similar. **Although the trademarks were different, the fact that the two packaging were similar amounted to UC**.

Macpherson Mediterranean Limited v. Conquest Limited (11/01/2002) related to paint. The plaintiffs were Macpherson, and the defendants produced another brand of paint. You had the tins of paint whereby the courts reached the conclusion that the brand name is different, but the get-up, the colours used, could be confusingly similar. On this basis, the court granted action in favour of plaintiff.

Use of One's Own Name
One is entitled to use one's own name even if some confusion is caused provided that one does so honestly and provided the other name has not acquired secondary meaning.

Am I entitled to use my name even though it may cause confusion with the name of a prior user? The two judgements **Dimech v. Chretien** and **Grech v. Galea** properly lay down the law.

In **Cachia v. Azzopardi (04/11/1871)** it was said that if someone has used a name in trade, even if you're using your own name, if it creates confusion, you cannot do that. The principle is different nowadays.

Similarly, **Fenech v. Formosa (25/06/1919)** isn't in line with today's principle. In this case the plaintiffs were the siblings Fenech. Two men had set up a firm called S. Navarro & Co. At a point in time, Navarro sold his shares, and the brand name remained the same. The defendants were two persons, one was Formosa and the other one was a certain Navarro. They were partners and their actual firm name was J. Formosa & Co. At a point in time, they started trading also with the name SRE. Navarro & Co and the plaintiffs filed this action to stop the defendants from using that particular name. The Court said that since the plaintiffs had been using that firm name for a number of years, they acquired ownership of that name. Besides that, the defendants clearly weren't in good faith because the actual name of their firm was J. Formosa & Co. **Prior use prevailed over the use of one's own name**. In this case you could not argue that the defendants were using their own name honestly.

In **Dimech v. Chretien et (Privy Council 16/10/1930, App 07/05/1928)**, Goffredo Chretien and the other defendants were partners with John Chretien. John had a business with them called 'The Empire Studio' and the nature of the business was as photographers and sale of photographic goods and materials. In June 191, John Chretien retired from the partnership and transferred his share of the business to the defendants. The defendant continued trading with the name 'The Empire Studio' and the firm name Chretien & Co. John Chretien also carried on separately another business with the firm name Chretien's and also the name 'The Empire Press' which was a stationery. In 1921, John Chretien decided to sell the stationary business, but not the printing business, to the plaintiff, William Dimech and he did so as a going concern with the firm name Chretien and as well as the trademark. He retained ownership of the printing business and the name 'The Empire Press.' The business of photographers belonging to Goffredo and the plaintiff had acquired the stationary business from John Chretien. The defendants, the photographers, decided to also start running a stationary. The plaintiffs filed this case for UC. The Court decided in favour of the plaintiffs saying that **the use of one's own name is not always lawful in trade, and it finds its limitation in the prior and lawful use of the name made by others**. But the Court of Appeal refers this judgement, quoting an English court judgement saying that '*a man, so long as he acts honestly, may trade under his own name even though similarity of such name to the name under which another person has previously been trading may occasionally lead to confusion*.' This case then went up to the Privy Council which upheld the judgement of the

Court of Appeal but to a certain degree the judgement is slightly different to that of the Court of Appeal. It said that in order to justify the court at the plaintiffs instance from prohibiting that firm from using its own name, in all or any of its busines transactions it is essential for that plaintiff to establish two facts: (1) he must first prove that the word Chretien's and Chretien & Co are so alike that the latter will be taken as the same or equivalent to the former and (2) he must further prove that Chretien's has acquired a secondary meaning, that is, that the word when applied to the goods are the goods of the plaintiff and no one else's. So, here he didn't base it on honest use; the Court added another element.

In **Grech nominee v. Galea (05/06/1980)**, plaintiff's company was called Ed. T. Agius & Co Ltd. The defendants also represented a company, and it was called E. Agius & Co Ltd. The histories of these two companies were that the plaintiff company initially was a firm name, and the name was E. T. Agius & Co. You could trace its origins to 1900s. The defendant's business was also relatively old and although it had a very similar name, it didn't seem that there was a problem because E. Agius, as a firm at least dating back to 1939, there was a record of an application for a commission agency license. In 1972, Emmanuel Agius, the owner of the firm E. Agius, so the defendant, passed away and his spouse who didn't want to run the business sold it as a going concern to the husbands of her granddaughter. None of them had the surname Agius. Moreover, as soon as they acquired the business, they set up a company with the same name, E. Agius & Co Ltd and continued trading in the same line of business now using this company. When this company was set up, the plaintiffs sued for UC. The plaintiffs lost this case on two grounds: (1) **they weren't in the same line of business**, the plaintiffs principally operated in the tourism sector, but they also imported tinned food as well as toiletries. On the other hand, the defendant also imported and sold different stuff from that of the plaintiff mainly watches, smoking articles and so on. (2) The Court also argued that even though Gabarretta and Galea were not using their own name but that of E. Agius for their company, nonetheless, because they were successors in title to Emmanuel Agius, then they inherited the right to use that name and the same principle applies even to the successor in title to the business. They were legitimately successors to title to the business which carried on the name E. Agius. The Court said that the judgements related to the use of one owns name extends even to successors in title to the business. It then continued to say that it observes as well that this principle of the right to the use of one's own name is also applicable under the same caveats that are mentioned in the judgement Dimech v. Chretien, that is that **there must not be bad faith and that there is no intention to deceive or create confusion**.

PP 6: CAPACITY TO CREATE CONFUSION
Article 32

> **32.** Traders shall not make use of any name, mark or distinctive device capable of creating confusion with any other name, mark or distinctive device lawfully used by others, even though such other name, mark or distinctive device be not registered in terms of the Trademarks Act, nor may they make use of any firm name or fictitious name capable of misleading others as to the real importance of the firm.

We are now going to deal with the second requirement; the notion of '***capable of creating confusion***.' Here, not actual confusion must be proved but rather the likelihood of creating confusion.

This issue raises three questions,

1. **Comparison of names/marks:** When we speak of the capacity to create confusion between one mark/name and another we need to compare the marks or names. The first thing we must deal with is this comparison of names or marks. What principles do we use to determine when a name or mark is capable of creating confusion with another? When we compare the marks are there any principles that we need to use to make a reasoned comparison?

2. **Is proof of actual confusion necessary?** In doubtful cases the courts have said that proof of actual confusion can tip the scales. If you can prove actual confusion in the market, then the scales will be tipped in your favour.

3. **Is it necessary for the goods or the business of the plaintiff and the defendant to be identical or at least similar?** (Common field of activity). Must they have a common field of activity for there to be a capacity to create confusion? isn't there the possibility of tarnishing of a mark. Take Armani for instance which are mainly in the fashion business, and I start using the name Armani for rubbish bins. Surely, Armani would not want their name to be associated with rubbish bins since there name is associated with high value fashion products. So, there are question marks even in relation to this.

Confusion – Comparison of Marks

- The determine whether a mark or a name is capable of creating confusion with another mark or name, it is necessary to compare the marks.
- The issue also arises in the context of applications to register trademarks and alleged violations of registered trademarks under the Trademarks Act (prior to 2000 under the Industrial Property Protection Ordinance).
- The issue is one of fact not law.
- Although the issue is not a question of law, our Courts have developed guiding principles which assist the Courts in making a determination of likelihood of confusion. Our Courts have developed a number of these principles. Some also refer to English judgements and the leading English textbook – "Kerly's Law of Trademarks and Tradenames". Recently, our Courts have also referred to European Court judgements relating to the trademarks Directive and the Community Trademark regulation (see Valletta v. Busuttil (App 2001) regarding the trademarks Nutella/Nutina).

The first thing to do if someone alleges that there is a capacity to create confusion is that you need to compare the two devices. This issue doesn't arise only in the context of article 32, it also arises in the case of the registration of trademarks. It also arose pre the year 2000 in relation to 'opposition proceedings.' That is, in most jurisdictions when you apply for a trademark, that trademark is published somewhere and anyone who thinks he has a prior right to that trademark or because he thinks it will cause confusion with his own trademark, can oppose. A lot of the old Maltese cases relate to 'opposition proceedings' always on the basis that there is confusing similarity. Substantially, it involved the comparison of trademarks. **Whether a mark is capable of creating confusion with another mark is an issue of fact**.

Although **the issue is one of fact and not of law (you need to prove as a matter of fact that one mark is confusingly similar to another mark)**, nonetheless, the Court over the years both in relation to article 32 and in relation to 'opposition proceedings', have developed a number of principles which are guidelines that assist the courts in determining this issue of fact. So, rather than just looking at them. These guidelines are common sense rules. Even as a consumer, one would have the same reaction as to when a mark is capable of creating confusion with another mark. Having said that, if you go through other Maltese cases and then look at the cases of the Court of Justice of the European Union in relation to the Trademark Directive and Community Trademark Regulation, although the wording they use is different, the principles are relatively similar.

Over the years, out courts have developed a number of guidelines to determine whether there is the capacity to create confusion. Our courts have done this from the very early stages, form the late 19th century, even the early 20th century. They have also relied occasionally on English cases, apart from creating its own rules. Finally, because now our Trademarks Act is a result of a trademarks directive which harmonises trademark registration law in all Member States, and since the issue of likelihood of confusion arising in the context of this Act, the courts have also started referring to cases of the Court of Justice of the EU. The reasoning is similar. They seem to be common sense principles.

These guidelines are used in article 32 as well as in the context of registration of trademarks. Moreover, our courts have developed these principles very early on. Moreover, they are interlinked.

Guidelines

1. **<u>The assessment is to be made from the point of view of the average consumer.</u>**

- Who the 'average consumer' is depends on the type of product or service. For instance, a bottle of lemonade could be purchased by anyone while a large photocopier would normally be purchased by a business firm or professional office.
- The average consumer carries out a normal examination of the product – neither very careful nor very careless.
- An average consumer is neither unusually intelligent nor is he 'unusually stupid.'

This is relative because the average consumer of for instance, a laptop, isn't the average consumer of a soft drink. Soft drinks are purchased by people who use laptops but also by very young children, for example. In this way, certain goods are so-to-speak specialised. And therefore, what we call the average consumer in relation to those goods would be special persons. Also, some writers will also say that even the type of goods are important in this sense because for medicines you need to be extremely careful about the likelihood of confusion due to their effects. For most goods such as products at supermarkets, you can take the general population. But for more specific goods, you'll take the average consumer in relation to the population of that product. Having said that, we can identify two extremes: you can have the extreme where a person who goes to a supermarket and examines very attentively every single item he is going to buy, and, on the other hand, the consumer who is unusually stupid. The courts have emphasised that the average consumer is neither of these extremes. 'Average' is somewhere in between. It is a person of ordinary intelligence who is capable of distinguishing one word/design/sound from another. The protection for UC doesn't cover cases of extreme ignorance or gross distention or negligence.

So, what we mean by average consumer depends on the type of product. Something purchased solely by architects, for instance, has an average consumer of an architect. On the other hand, everyone buys food, so we are talking about the general population. Secondly, the average consumer is neither someone who is scrupulously diligent, but neither is he unusually stupid.

In **Cutajar v. Caruana (App 1988)**, the courts held that the mark COUNTRY CASUALS was not capable of creating confusion with the mark COUNTY LEATHER, the Court referred to the

> "*average man in the street ta' intelligenza ordinarja li jara, jifhem u kapaci jiddistingwi bejn kelma u ohra, bejn disinn u iehor, bejn hoss u iehor*" and said that "*il-protezzjoni kontra l-konkorrenza sleali ma tkoprix la kazijiet ta' injoranza akuta u lanqas ta' disattenzjoni jew negligenza grassa*"

The court is defining the average consumer as the average man in the street of ordinary intelligence who is capable of understanding, capable of distinguishing one word from another, one sign from another, one sound from another. Protection given for UC does not cover cases of acute ignorance nor cases of dis-attention or gross negligence.

- **Maltese judgements**
  1. **Hammer v. Gatt (1920)** refers to "*acquirenti di media intelligenza*".
  2. **Said v. Ellul (1954)** says that the average consumer has "*intelliġenza u diliġenża ordinarja*".
  3. **Agius Vadala v. Mizzi (1990)** refers to the *"xerrej komuni"*.
  4. **Portanier v. Abela (1950)** states that the law is not there to protect *"ignorant or careless people."*
  5. **Vassallo v. Caruana (1950)**, quoting an English case, states that the law is not intended to protect "*unusually stupid people, fools or idiots*".

- **EU law:** judgements state that an average consumer "*is deemed to be reasonably well informed and reasonably observant and circumspect*". This is the definition of the Court of Justice of the EU.
  1. **Sabel v. Puma (1997)**
  2. **Canon v. MGM (1988)**
  3. **Lloyd Schuhfabrik v. Klijsen (1999)**
  4. **Marca Mode v. Adidas (2000)**

2. **The 'Idea' of the mark is to be regarded**

- *"Two marks when placed side by side may exhibit many and various differnences yet the main idea left on the mind by both may be the same"* (Kerly).

The important thing of the idea of the mark having to be regarded is that you need to identify what is called the '***l-idea dominanti***'. This is especially true when a mark has some distinctive feature. This point was made in a number of cases.

The case **Sansone v. Cassar Torreggiani (App 2005)** deals with the famous trademark of 'NUTELLA.' In this case, the Italian owners of the trademark 'NUTELLA' filed a case against the defendants both on the basis of the fact that they had a registered trademark in Malta and also on the basis of UC, therefore on article 32, that the defendant's trademark was confusingly similar to the that of the plaintiffs. The Court in this case went through a number of principles and a number of cases. What the Court felt here was that the confusing similarity wasn't in the actual word, since one would not confuse 'CHOCOTELLA' with 'NUTELLA', but that the idea of the mark with respect to the label was confusingly similar. The Court, after outlining a number of principles, stated that it is of the opinion that when one compares the label of the product 'NUTELLA' manufactured by the plaintiff, the dominant idea that remains in the mind of the ordinary consumer, he who is neither extremely intelligent nor grossly stupid, is of a piece of bread spread with chocolate with a nut next to it and with the name of the product written partly in black and partly in red. The same dominant idea was also found in the label of CHOCOTELLA manufactured by the defendant's company. Notwithstanding the various differences, that was the dominant idea and therefore, it was decided that the marks were confusingly similar. **In this way, the Court decided the case on the basis of *'l-idea dominant li tibqa' f'moħħ il-konsumatur ordinarju.'***

Valletta noe v. Busuttil et (App 2001) is another Nutella case, however this was not an article 32 case. What happened was that the defendant's applied to register the wordmark 'NUTINA', while the plaintiff Italian company was the registered owner of the trademark 'NUTELLA'. Plaintiffs opposed (we still had opposition proceedings) and the Court had to decide on the basis of confusing similarity. The Court noticed that the word 'nut' is common to both products, in the sense that an essential ingredient of both products are nuts and therefore the defendant couldn't be precluded from making use of the word 'nut' in the tradename. However, the Court felt that the dominant idea was the same in this case because both in Italian and in Maltese we use the words 'ina' and 'ella' as terms of endearment. The dominant idea invoked by the second syllable is one of affection and therefore, it might create confusion between the two products. The Court, in this case, referred to ***'l-idea dominanti taż-żewġ marki indipendentement mid-dettalji li jkunu jakkumpanjaw dik l-idea dominanti.'***

In **Page v. Tanti Bellotti (1905)**, the plaintiff had a trademark for candles and the label on the packaging was of a sailing vessel. The defendant also started selling candles with a label which depicted a sailing vessel. The Court recognised that there were differences in the sailing vessels. Yet the Court, again referring to the '*idea dominanti'*, stated that the **dominant idea** was a sailing vessel and therefore, there was the capacity to create confusion.

Other cases

- **Pulis noe v. Tabone et (27/12/1922) 'Three Crowns'.**
- **Mifsud noe v. Nicosia noe (11/06/1923) 'Tal-Mara'.**
- **Barbara v. Barbara (31/05/1932)**

- **Salamone noe v. Borg noe (05/02/1952).**

EU law judgements state that the *"**global appreciation** of the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components"* (Sabel v. Puma (1997)).

This EU law position is not on article 32 since article 32 does not arise from any directive in EU law. Here the Court is referring to judgements relating to the Trademarks Directive or else the Community Trademarks Regulation. Therefore, they would be relevant not in the context of article 32 but in the context of the Trademarks Act. Nonetheless, it is good to see what they are saying since the method of analysis is similar. As in article 32 we have to determine whether there is the capacity to create confusion, under these we have to determine whether one mark is likely to create confusion with another mark. So, it wouldn't be wrong for the Court when dealing with an article 32 case to borrow from these cases because what we are doing here is comparing marks to see whether any confusion arises. EU laws argues that when comparing marks, one must have a global appreciation. Here, you have the same concept as in **Page v. Tanti Bellotti (1905)**. Sometimes what remains in your mind is some dominant characteristic of the label and not all the details.

3. **The mark must be seen as a whole**

- *"The trademark is a whole – the whole picture on each has to be considered"* (Kerly).
- This principle is particularly relevant where the similarity is in the get-up (i.e., the way the product is "dressed") rather than a word mark. Examples are the cases relating to the packaging of KNORR and LOMBARDI products:
  - **Sammut noe v. Mizzi noe (Comm 1960)** and
  - **Agius Vadala v. Mizzi (Comm 1990)**
  - **Vella Zarb noe v. Portelli pro et noe (30/06/1936)**
  - **Micallef et noe v. Camilleri et noe (23/02/2001)**

When considering the mark as a whole, it is also important to take into account not only visual but also aural similarity; "the ear as well as the eye". So, the whole picture has to be considered and this will give you a general impression. This is what happens when the Court decides that there is capacity to create confusion not on the mark itself but on the get-up, '*il-libsa tal-prodott.*'

Sammut noe v. Mizzi noe (Comm 1960) was a case filed by KNORR on the basis of the dried chicken soups, versus LOMBARDI. In this case, the question arose as to the get-up since the name was different, yet the cube was in the same colour. Again, the Court confirmed this in a subsequent 'rematch' of KNORR versus LOMBARDI in 1990 in **Agius Vadala v. Mizzi (Comm 1990)**. The Court mentioned that the get-up, the green and yellow, was distinctive of the plaintiff's product. In this way, one must look at the mark as a whole and the impression that it leaves on the mind.

In **Vella Zarb noe v. Portelli pro et noe (30/06/1936)**, the plaintiff imported and sold in Malta talcum powder. The trademark was Cinq and Flares made by a French firm called Forvil. It was packaged and sold in boxes which had gold stripes. The defendant started selling powder in a very similar box, its mark was not Cinq Flares, but Almy and the Court decided that the get-up was similar and that therefore, it was in breach of article 32. The Court decided on another ground here because there was a wrongful indication of origin

under article 33. The Court said one doesn't need to look at the details. If it is quite easy from the general impression to get confused, then it is enough.
On this point, in **Micallef et noe v. Camilleri et noe (23/02/2001)** the plaintiffs represented the Italian firm that produced the drink 'APEROL'. The defendant was using the trademark 'APERITIV' and again, this was based on the label. The Court based itself on the general impression left by the mark. The general impression and the power of association.

When dealing with the mark as a whole we don't only mean visually. That is, it entails not only a visual consideration but also an aural consideration. Some English judgements say that one must take into account the ear as well as the eye. This point was made in a case **Valletta noe v. Busuttil et (App 2001)** but was also made in previous cases for example in **Farrugia v. Bonaci (Comm)**, which was not an article 32 case but opposition under the IPPO. In this case, plaintiffs were Farsons who own the trademark 'KINNIE', and they had registered this trademark in 1951. The defendant applied to register as a mark a 'CHIN-8.' Visually there is nothing similar. The Court noted that the consuming public would aurally confuse these two marks. Therefore, looking at it from an aural perspective, the Court reached the conclusion that there was the possibility of creating confusion.

Miceli Farrugia noe v. Vassallo noe (05/12/1966) was also on 'KINNIE', plaintiffs were also Farsons, and these were also opposition proceedings under the IPPO. In this case, the defendants applied to register the mark Kin and the plaintiffs opposed on the basis that they had the registered trademark 'KINNIE.' The question was whether they were capable of creating confusion. The court debated whether 'KINNIE' and 'KIN' were capable of creating confusion and the Court also mentioned that if you refer to KINNIE in the plural you would say KINNIJIET. If you are going to use KIN in the plural, you would probably also use the Maltese plural of KINNIJIET. So, the idea here is that you use the ear as well as the eye.

In **Vassallo v. Caruana (Comm 1950)**, where the plaintiffs were the owners of 'COCA COLA' which had a registered trademark and the defendants applied to register the trademark 'LOLA COLA'. The Court felt that there was the capacity to create confusion.

The EU law judgements state that '*The average consumer normally perceives the mark as a whole and does not proceed to analyse its various details.*'

- **Sabel v. Puma (1997)**
- **Lloyd Schuhfabrik v. Klijsen (1999)**

4. The average consumer has imperfect recollection

"Marks are remembered rather by general impressions or by some significant detail than by any photographic recollection of the whole" (Kerly). Consequently, if the average consumer has imperfect recollection normally, he is struck by the elements as a whole and the leading characteristics. In Sansone v. Cassar Torreggiani (App 2005), the Court held that the word 'CHOCOTELLA' was not confusingly similar to the mark 'NUTELLA', but the confusing similarity arose from the similarity of the labels.

EU law judgements state that '*The average consumer has to place his trust in the imperfect image of them he has retained in his mind.*'

- **Sabel v. Puma (1997)**
- **Canon v. MGM (1998)**
- **Lloyd Schuhfabrik v. Klijsen (1999)**
- **Marca Mode v. Adidas (2000)**.

5. <u>Marks are to be compared as they would be seen in actual use</u>
Very often the court in article 32 cases would not simply look at the labels printed on a piece of paper but when the need arises, the parties would exhibit the products as they would be seen in actual use.

6. <u>All circumstances of the trade to be considered</u>
e.g. Nature of market; other similar marks; usages etc.

- **<u>Vassallo v. Caruana (07/06/1950)</u>**
- **<u>Sammut v. Mizzi (28/01/1960)</u>**

Confusion – Capacity not Actuality
This is the second question; whether or not we need proof of actual confusion. The law itself speaks of '*capable of creating confusion*' therefore, not of actual confusion but capacity to create it. This indicates that proof of actual confusion is not necessary.

In the **<u>Vadala v. Mizzi (1990)</u>** cases, which refer to the second round of KNORR and LOMBARDI, the Court said that the action for UC is based on the potentiality and not the actuality of damages. It is essentially an action to prevent UC, although, it also has punitive aspects. In this case, the Court held that,

> *"… L-azzjoni kontra l-konkorrenza sleali hija bażata fuq il-potenzjalità u mhux l-attwalità tad-dannu. Hija essenzjalment azzjoni preventiva għalkemm għandha wkoll aspett punittiv"* (Vadala vs. Mizzi – Comm 09/08/1990)

See also **<u>Lee v. Galea (20/07/1933)</u>**.

However, the Courts have said in a number of cases, that when it is a board-line case or when there is a doubt as to whether there is a capacity to create confusion, **proof of actual confusion could tip the scales**.

In **<u>Montanaro Gauci noe v. Cassar (20/01/1964)</u>**, the plaintiffs represented SEVEN-UP while the defendants started bottling a lemonade drink with the name BUBBLE-UP. The plaintiff sued for UC and the Court ultimately reached the decision that the defendant's mark was not capable of creating confusion with that of the plaintiffs. The plaintiffs argued that the use of the word 'up' could create confusion in the sense of an association between the two marks. That is where the Court noted that certainly the proof of actual confusion is not necessary however when there is the absence of proof of actual confusion even though the two products had been concurrently on the market for some time, this fact can also be taken into consideration as an indication of the incapacity, of the lack of capacity, to create confusion. The BUBBLE-UP brand had been on the market for over a year and there had been no confusion.

<u>Tanti Palmier v. Caruana Curran noe et (14/01/1965)</u> related to the trademark LION. The plaintiffs used the trademark LION for ice-creams and the defendants sold LYON'S ice-creams. The Court first noted that it is true that they sound similar, but the word 'lion' is a very simple word and it noted that these marks had been on the market for quite some time. It noted that in border-line cases, in the case of lack of proof of actual confusion, it will tip the scales in favour of the defendant.

Confusion – Common Field of Activity
The third question that we asked ourselves is whether for there to be the capacity to create confusion, the good or services have to be in the same line or at least in a similar line of business. The answer is that yes, they must be.

In **Frendo Randon v. Gatt et** and **Valletta noe v. Tanti**, it was clear that the field of activity was the same, but this wasn't the *racio decidendi* (the reason for the decision). On the side, the Court did note that it needs to be a similar field of activity.

On the other hand, in the cases, **Grech noe v. Galea (05/06/1980)** and **Muscat Xerri noe v. Bonnici (08/07/1980)**, plaintiff and defendant were in different lines of business. Consequently, in both cases the Court stated that for there to be the capacity to create confusion you have to be operating in the same line of business. In Grech noe v. Galea, the Court stated that it is implicit in the issue of confusion that this must be of a type that can prejudice the business of the other party with which one is in competition. From this fact, one can infer the need that the business operated by the two competitors is similar in nature and in the line of business that is the object of their business. In Muscat Xerri noe v. Bonnici, the plaintiffs manufactured and marketed potato puffs under the trademark SNAX, while the defendants imported, and marketed biscuits called SMAX. Undoubtedly, both visually and phonetically, they are quite similar. The Court felt that since potato puffs were savouries, these were different products that could not be confused. In fact, the Court of Appeal said, '*independent of the analysis of the ingredients of the two products which is not necessarily determining, the fact remains that one is biscuits, and the other are potato puffs*.' These as such are distinguishable.

With respect to well-known marks, the position under article 126(2) of the Trademarks Act solves the problem of Tanti McDonalds case. In truth, it is a provision relating to UC because it is not dependant on registration but on whether one is a party to the Paris Convention. Article 126(2) allows for the possibility of a well-known mark.

Why criticism? The reason is especially with well-known marks, because it is very frequent for well-known marks to be used for different products so, for example, FERRARI also has watches and perfumes. Obviously, the brand is associated with a certain type of product, of high-quality products. Imagine anyone can use the trademark, the first problem would be that it is stopping FERRARI from entering into that market and using it. Secondly, there is another problem because especially with these high products in fashion, they might not want their names to be associated with certain particular goods. **It might have the effect of tarnishing the value/name of the product**. In certain jurisdictions, there is the possibility of preventing the use of a mark, particularly those which have a reputation, from tarnishing or from dilution. Even in the Trademarks Act there are provisions to that effect, but that applies to registration and not to article 32 cases or article 126(2) cases. Perhaps there should be a rule to not allow others to use well-known trademarks even in different fields of activity.

PP 7: UNFAIR COMPETITION – FALSE INDICATION OR ORIGIN – ARTICLES 33, 34(2), 35 AND 36

Article 33

> **33.** Traders shall not make use of any false indication of origin of the goods:
>
> Provided that a designation which according to commercial usage is considered as a common designation, shall not be deemed to be a false indication.

Article 33 covers false indication of origin of goods, cioè, that goods were made in a country which enjoys a reputation for particular goods. For instance, if Germany is famous for engineering products and you are producing such products and say *made in Germany* when it is not, it falls foul of article 33.

Barbara v. Barbara (30/06/1933) related to naval caps that the defendant was producing in Malta but was putting British make. At the time, Malta was a colony of the UK, therefore, the defendant argued that since we were a colony, they were British make. Although Malta was a British colony, British make was a false indication of origin.

In **Vella Zarb v. Portelli (30/06/1936)**, the plaintiffs marketed in Malta talcum powder which were made in Paris. On the other hand, the defendant marketed a talcum powder product which was made in Japan stating that it was made in Paris. The Court concluded that this amounted to a false indication of the origins of the good.

Does it cover products of a particular character or composition, but which are not linked to a particular locality? E.g., Advocaat
The answer is no. There are British judgements, not on unfair competition, but on the tort of passing off, which isn't only limited to trademarks. Rather, it is passing off of your product as something which it isn't. This was seen in **Erven Warninck B.V.V.J. Townsend & Sons (Hull) Ltd (1979) FSR396**. Our article wouldn't extend to cover these cases.

Article 34(2)
Use of Honours etc.

> (2) Moreover, they shall not make use of honours, patents, medals, prizes or other distinctions to which they have no claim or which have been obtained for some other branch of business or trade.

- Use of deceitful means gives an unfair advantage over competitors who trade honestly;
- Does not prohibit exaggerated praise of one's own goods or business.

Sometimes, products mention certain honours or prizes that they won. This rule says that you cannot advertise or say that you have certain honours to which you have no claim. This is also covered by article 33(b) on misleading advertising. It is when you are promoting your products deceitfully.

Article 35
Subornation of Employees

35. Traders shall not suborn persons employed in the trade or business carried on by a competitor for the object of knowing or exploiting his customers.

- Employees, especially key employees, over time acquire confidential commercial information e.g. about know-how, customers and suppliers.
- The word '*suborn*' implies some form of bribery or corruption, but the law here does not specify the means. It could be by the promise of anything of value – need not be money but could be the offer of employment.

Employees, especially those in delicate positions, would have good confidential information about the business and they could harm you. So, say for example, a competitor offers money to an employee to leave one employer to go to another employer. If that is done for the purpose of acquiring confidential secrets, it might be an issue. It is true that employees would be bound by confidentiality and would be sued. So, there are issues here which would arise. The idea is don't bribe or corrupt employees of your competitor in order to gain secrets.

Article 36

36. A trader shall not, in the exercise of his trade or business, issue certificates of honesty or competency contrary to the facts as known to him and capable of imposing upon the good faith of others.

This provision doesn't mention employees but frequently, when an employee leaves a particular employment, especially if he leaves on good terms, he will ask for a letter of reference. What if you write a goof letter of reference for an employee whom you dismissed for misappropriating some money? With such letter of reference, the person can get a job with another firm and therefore, that would be fooling the other firm. Although the trader's intention may not be reprehensible, his certificates are capable of misleading others. Ultimately one has no obligation to write a letter of reference to begin with, so, the answer would be not to write a letter of reference at all rather than writing a false one.

PP 8: SPREADING OF NEWS PREJUDICIAL TO TRADERS

<u>Article 34(1)</u>

> **34.** (1) Traders shall not, for the purpose of competition, spread news capable of prejudicing the business or trade carried on by other persons.

Elements of article 34(1)
Essential requisites to ground an action under article 34(1):
(1) Spreading of news;
- Meaning of 'spreading of news'
- Must the news be false?

(2) Capable of prejudicing the trade or business of another trader;
(3) For the purpose of competition (intentional element).

- See **<u>Alfred Gera & Sons Limited v. Casingena et (287/2003; PA 08/10/2004)</u>** for an overview of the elements. This case related to baby feeding bottles and a circular was sent to pharmacies saying that the product of the plaintiff was harmful to babies. The case started on the basis of this circular.

(1) <u>Spreading of news</u>
The wording speaks of the spreading of news. Of course, one needs to establish and understands what this means for the purposes of this article in order to apply it. Secondly, it also speaks of news capable of prejudicing the business or trade of another trader. And thirdly, we have an intentional element, '*for the purpose*'.

Before going on to consider these requirements, it is interesting to point out that in the Media and Defamation Act which covers similar ground, in article 16(1), we have a penalty which is fixed by the court similar to that of an action of UC. It refers to '*publication*' which includes online spreading of news. Again, it covers similar ground since publishing means spreading. Also, a similarity is seen in the likelihood of damaging '*any business concern or any other property*.' With that being said, there are differences. For instance, here there is the requirement that he knew or could have known to be false. In this way, in this article, the implication, since the requirement is that you know or should have known that it is false, is that the news is false. Article 34(1) does not speak of this. Also, this article speaks of '*whosoever*'. In articles 32-37, however, it is not anyone but only a trader (remember we are dealing with duties of traders).

Must the news be false?
The law speaks of '*spread news*' and doesn't specify the means by which news is spread. **'News' covers a variety of means: word of mouth, circulars, letters, adverts etc**. In this way, once the law is not specifying the means by which it is spread then it can be by any means. Therefore, any means whether written or verbal. Secondly, when we speak of spreading of news, the judgements consistently state that **'spreading' need not be 'widespread'**. That is, there are judgements which make it clear that even one letter or even one conversation could be tantamount to the spreading of news, provided that the second requirement is fulfilled. Therefore, to link the two requirements, if that one letter or one conversation is capable of prejudicing the business of another person, then that one letter or one conversation is enough. On the other hand, if that one letter isn't capable of prejudicing the business of another person, it does not suffice.

In the case **Distefano v. Gauci (16/04/1931)**, Distefano was an exporter of Maltese and Gozitan lace and one of his clients was a firm in London. At a point in time, one of his ex-employees who had left his employment wrote a letter to this customer saying that he can supply the firm with better items and the following cheaper prices. This letter doesn't identify the plaintiff per se, but the implication is that it is about the plaintiff since he was the supplier of this firm. Although this is one letter, because this was an important customer of the plaintiff, then the Court felt that this one letter amounted to spreading of news.

Falzon v. Nani (27/03/1953) concerned the sale of pianos. The plaintiff was the distributor of pianos supplied by a London firm, as well as of musical instruments. At a point in time, besides other facts, the defendants went to London and told this London firm who supplied pianos to the plaintiff that their pianos weren't being sold from a proper shop selling musical instruments but that they were being sold from a shop also serving as a bar. A day later, this London firm wrote to the plaintiff actually giving notice of termination of their agreement and one of the reasons that they gave was that "the welmare piano should be represented by a firm occupying a more central position in Valletta…" Again, although this was one letter, since it was capable of causing a prejudice, it amounted to spreading of news.

In **Mizzi v. Vella**, which related to the last requirement, it was one letter to the suppliers of the plaintiff that caused prejudice.

The second point is that although **denigration** (saying bad things about your competitor or your competitor's product) **is the most common form of spreading of news, the law does not limit the spreading of news to denigration**.

In **Nani v. Arrigo (20/07/1950)**, the plaintiffs were the sole distributors of a particular brand of pianos and in 1949, a famous opera singer was about to visit Malta and give a concert. The defendant issued an advert which purported to say that the defendant was a distributor of new pianos of the brand of which the plaintiff was the sole agent. The plaintiff filed an action for UC and the defendant argued that he had every right to sell that brand of pianos. This is true, since when dealing with the general consideration of UC, there is no act of UC that prohibits parallel trading. The Court, however, said that this was not the issue. Rather, the issue was the way defendant advertised since he gave the impression that he was an authorised agent of that piano brand when he wasn't. Therefore, the issue was the advert that represented the defendant as being some sort of authorised distributor of this brand of pianos, and not the actual parallel trading. The Court made this point and said, it is true that the defendant did not denigrate the business of the plaintiff, but it is equally true that the law does not limit itself to cases of denigration.

Vella v. Guillaumier (27/02/1997) follows Nani v. Arrigo. This case concerned a brand of ceilings whereby the defendants had the brand ARMSTRONG plastered on their vans and their showrooms in an attempt to try to give the impression that they were the authorised distributors of these ceilings when the plaintiff was. This was held to be a breach of article 34.

Likewise, in **Gauci Maistre v. Mizzi (31/01/2003)**, the plaintiff was the sole distributor of computers known with the brand name AMIGA and they had just launched a brand of computers called the AMIGA 500+. The defendant also had this particular brand of computer and also on his shop, he was giving the impression that he was an authorised agent of AMIGA 500+ computers when that was not the case.

In **<u>Anthony Caruana & Sons Limited v. Caruana (28/02/2014)</u>**, the defendant Caruana's family originally owned Anthony Caruana & Sons Limited. The Caruana family sold the shares of the company to Farsons but they also kept in employment the defendant. At a point in time, the defendant's contract of employment was terminated and after the contract of employment was terminated, amongst other things, he started spreading news about the business of the plaintiff that was damaging that particular business. One of the arguments that defendant made was that there was no denigration. The Court made it clear that the section wasn't limited to denigration.

Must the news be false?
Truth or falsity of news is irrelevant except for penalty under article 37.
The judgments consistently state that the truth or falsity of the news is irrelevant, it is relevant only for the purpose of article 37 and the fixing of the penalty. That is to say, the fact that the news is false is going to be a consideration for the Court to increase the penalty.

In one judgement, **<u>Grech v. Micallef (26/10/1937)</u>**, the Court quoted Carlo Mallia who made the point that words contrary to the truth were originally in the draft but were removed to remove any doubt. The Court said that from this it is clear that the legislator did not want to give the opportunity to the person who spread the news to prove the truth of the fact because otherwise it would get the Court into complications of the technicalities of the product. In this case, plaintiff had started importing a light bulb which had two filaments and when one filament is exhausted then the second takes over. Defendant, on the other hand, imported single filament light bulbs. Plaintiff, when it introduced its twin filament lamps, published an advert in the Times of Malta which read DOTO CRYSTAL LAMPS THEY SAVE YOUR MONEY THEY PERFORM THE FUNCTION OF TWO LAMPS…SINGLE FILAMENT LAMPS ARE NOW OBSOLITE. Subsequently, the defendant published an advert after seeing this advert issued in the Times by the plaintiff and the on this point, the defendant argued that **he can prove these dual filament lamps do not save money at all and that the heat of one filament affects the other and you have more consumption**. The Court said that it didn't want to go into this because this is specifically why the legislator didn't specify that the news must be false.

See also **<u>Curmi v. Mizzi (18/10/1957)</u>** & **<u>Vincenti Kind v. Manche (10/12/1957)</u>**.

(2) <u>Capable of prejudicing the trade or business of another trader</u>
The second point is the capacity to create prejudice. The wording speaks of '*capable*' of prejudicing and not the creation of *actual* prejudice. Therefore, if you merely prove that it is capable of creating damages, it is enough. You would need proof of actual damages if you were suing for actual damages rather than for a penalty. Article 37 is the provision that provides for remedies; it regulates the action. This article gives the injured trader the option of either suing for damages or suing for a sum of money which the court must establish, and it has a minimum and a maximum. If you sue for the penalty, you do not need to prove actual damages.

In **<u>Curmi v. Mizzi</u>** the fact that this second point is also relevant for the purpose of competition came to the fore. In this case, the defendants were a number of companies in what we know today as the Mizzi group. The Hillman at that time had started producing and marketing a new popular car called the Hillman Minx. It also started selling in Malta. When the defendant started selling this vehicle, they fixed a sticker on the windscreen which read, '*as recommended the engine of this car has been designed and tuned to run on SHELL super.*

Should a lower grade fuel be used, returning of the engine will be essential.' This case was filed by the plaintiff who was the agent or the official branch office of a brand of fuel, ESO. What they meant by 'super' was that you should buy a higher-grade fuel, but all the petrol distributors sold these grades of fuel, so, the plaintiffs filed this case in court arguing that this was in breach of article 34(1) and a number of issues arose, one of which relates to intention. Mizzi were importers and dealers in motor vehicles and did no per se import SHELL petrol which was imported by someone else. Because they were simply selling petrol rather than importing, the question of damages arose. The court said, however, *'…hija biżejjed skond il-liġi l-possibilita ta' din il-ħsara għall-konkorrenza illeċita."*

An interesting case in this regard is **Scicluna noe v. Cachia noe (11/03/1987)**, where in this case both competitors sold windsurfers. Both of them were established in the market; the plaintiff sold three brands of windsurfers while the defendant was already marketing two brands of windsurfers in Malta. The Maltese importer of another brand packed up, so the brand was up for grabs, and both wrote to the owner of this brand of windsurfers, TORNADO. In this way, they were competing to get the exclusive distributorship of this particular brand. What happened was that the plaintiff, when giving information to the owner of this brand, told the owner that he marketed only one brand and he said that it was not a popular brand, hiding the fact that he was supplying two popular brands. The defendant, on the other hand, was totally truthful. The defendant found out and subsequently, told the foreign supplier that in truth, plaintiff sold two major brands. Consequently, plaintiff alleged that this was spreading of news by the defendant, since it was capable of causing prejudice. In this case, both the defendant and the plaintiff had not yet got the brand, they were merely competing to get it. The court noted that it's true that the defendant gave information to the supplier, but he did that in order to balance out the misinformation that was being supplied to the supplier by the plaintiff. The court, therefore, questioned how this could cause damage since the defendant merely corrected the information that the plaintiff had supplied to the supplier. So, once the supplier then had the correct information how can the plaintiff argue that he suffered damages as a result? There was no question of capacity to cause damage by this act.

Capacity to create prejudice might arise even if plaintiff is not actually named in the 'news'. You need not be named in the news if you are identifiable or if you are in a class of traders who are identifiable. In **Grech v. Micallef (26/10/1937)**, the first advert was by the plaintiff who was marketing twin filament light bulbs. At the end of the advert plaintiff said, 'SINGLE FILAMENT LIGHTS ARE NOW OBSOLETE.' The question arose that the defendants who sold Phillips single filament light bulbs were not mentioned but the court said once you said, 'single filament lights are no obsolete', that means that **anyone** who sells Phillips single filament lamps is impliedly affected by that advert and has a right to sue under this section. The defendant, in retaliation, issued an advert where you had 'BEWARE TWIN FILAMENT LAMPS WHICH ARE TWIN FACED.' The plaintiff sued because of the advert issued by defendant who said he was simply reacting to protect his business interests. The court does accept the notion of **self-defence**, but in this case the court felt that there was an excess of self-defence.

See also **Distefano v. Gauci**.

(3) Intentional element for the purpose of competition

- News is spread for purpose of competition not any other purpose e.g., out of vindictiveness.
- Not necessary to prove intention/purpose of causing damage.
- Question of fact deducted from the circumstances.

Professor Mallia said that we added this particular 'intentional element' because a distinction needs to exist between two people fighting about something personal, even though they are competitors, and two people fighting because one person said something for the purposes of competition. The idea is that this is aimed at things you say **for the purposes of competition** and not out of vindictiveness. Notice that the law says, '*for the purpose of competition*' and not that you must prove the intention to cause damage. ***'For the purpose of competition'* does not imply that you need the intention to cause damage**. All you need to show is that it is done for the purpose of competition. If two people are in the same line of business and we see an advert, clearly this is done for the purpose of competition.

In **Curmi v. Mizzi**, Mizzi was selling motor vehicles but as a side-line they had petrol stations selling SHELL petrol, earning a minimal profit. The court aid even though the return they get is minimal it is still done for the purposes of competition. The court is saying is although it may be true that the defendant company didn't have the principal intention of competing with the plaintiff company, ESO, the court said it did have this intention because it also sold SHELL petrol from its petrol station.

In **Mizzi v. Vella** (most important case)
An act done for the purpose of competition is any act which is done for **the purpose of promoting a trader's interests in the market**. It is not limited to acts done for the purpose of undermining clientele or goodwill of others.

This case it concerned the sale of household goods, with the Mizzi group as the plaintiffs. Mizzi imported a number of brands and what happened was that Vella, who represented the defendant company, had been a short while before this case started the manager of the household goods section of the Mizzi group. He was in charge of the household goods that Mizzi sold in Malta. One of the brands was INDESIT.

At a point in time, the defendant started approaching dealers and when Mizzi saw that defendant was approaching these dealers to sell INDESIT, plaintiff retaliated by sending a circular to their resellers telling them that if they stock INDESIT goods, it will not supply them with Hoover and Kenwood products. Obviously, these resellers in various parts of Malta did not want to lose the possibility of selling these products in their shops and this was affecting the defendant.

In retaliation, the defendant wrote a letter to Hoover and Kenwood alleging a number of things such as that one of the directors of the Mizzi group was acting childishly. Therefore, Mizzi sued for UC under this provision of spreading of news because of these two letters that defendant sent to Kenwood and Hoover. The First Court decided in favour of the defendant on the grounds '*l-atti projbiti mill-liġi huma dawk li għandhom l-iskop li jnaqqsu l-ambjament jew li jsirqu…'* meaning that the acts prohibited by law are those that have the purpose of reducing or negatively effecting the goodwill of a competitor or to entice a way or to poach the clients of a competitor. So, the commercial court seems to be interpreting for the purposes of competition in this restrictive manner, it is restricted to undermining the goodwill of the competitor or the poaching of clients of a competitor. The CA disagreed with the FH, and this was the substance of the court's decision: 'do not restrict the purpose of competition simply to negatively effecting the goodwill or to enticing away the clients. Anything done for the purpose of promoting a trader's interest is done for the purpose of competition. It said that that letter was sent for the purpose of promoting the business of the defendant, and therefore, it was done for the purpose of competition. The CA gave this wide definition of purpose of competition, promoting your interest in relation to your competitor.

The CA said there is the purpose of competition when the spreading of news is done in the exercise, or in connection with the exercise of a person's trade or industry with the purpose of promoting his interests in competition with and also capable of prejudicing the business of a competitor.

See **Conti v. Borg (15/03/1948)**, **Grech v. Micallef**, and **Vincenti Kind v. Manche**.

Self-defence refers to acts done to prevent damage. In **Mizzi v. Vella**, one of the claims made by the defendant was that he had acted in self-defence; that he wrote this letter to defend himself against the circular affecting his business since dealers were not buying his goods. Probably under a different law, the Competition Act, the refusal to supply, today might be illegal. At the time it wasn't. In this case, the court made the point that in order for the plea of self-defence to succeed, the act that caused the person to act in self-defence must be illegal. In this particular case, there is nothing illegal about that circular and if there is nothing illegal in the act of the plaintiff, how can you speak of self-defence?

See **Mizzi v. Vella**.

PP 9: MISLEADING AND COMPARATIVE ADVERTISING; ARTS. 32A & 32B

Article 32A

32A. (1) Traders shall not engage in any comparative advertising.

(2) Notwithstanding the preceding sub-article, comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:

(*a*) it is not misleading within the meaning of article 32B or within the meaning of articles 51C and 51D of the Consumer Affairs Act;

(*b*) it compares goods or services meeting the same needs or intended for the same purpose;

(*c*) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(*d*) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

(*e*) for products with designation of origin, it relates in each case to products with the same designation;

(*f*) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(*g*) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;

(*h*) it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor.

(3) Any comparison referring to a special offer shall indicate in a clear and unequivocal way the date on which the offer ends or, where appropriate, that the special offer is subject to the availability of the goods and services, and where the special offer has not yet begun the date of the period during which the special offer shall apply. "Special offer" in this sub-article refers to the price of the goods or services or any other specific condition under which the goods or services will be supplied.

(4) For the purposes of this article "comparative advertising" means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.

<u>Article 32B</u>

> **32B.** (1) Traders shall not engage in any form of misleading advertising.
>
> (2) An advertisement is misleading if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches, and if by reason of its deceptive nature, it is likely to affect their economic behaviour or is one which for those reasons, injures or is likely to injure a competitor of the person whose interests the advertisement seeks to promote.
>
> (3) In determining whether an advertisement is misleading account shall be taken of all its features, and in particular of any information it may have about -
>
> (*a*) the characteristics of goods or services, including their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;
>
> (*b*) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;
>
> (*c*) the nature, attributes and rights of the advertiser, including his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or any awards and distinctions made to him.

While the format of article 32B is correct, the way article 32A, is structured is in a way that is misleading. The idea of 'comparative advertising' is not that it is prohibited, the purpose of the Misleading and Comparative Advertising Directive is that if a comparative advert complies with all the paragraphs, if all these conditions are met, then it is legal. The idea, therefore, was to provide for comparative advertising rather than '*shall not engage*.' **The purpose was to regulate comparative advertising**.

Origin of the Provisions
These particular provisions are taken from the **Misleading and Comparative Advertising Directive** 2006/114/EEC. The purpose of this Directive is *"to protect traders"* (Art.1) and it is really a codified version of an original directive which was passed in 1984, Directive 84/450/EEC, and which was amended in 1997 by virtue of Directive 97/55/EC. These covered both misleading and comparative advertising and covered both B2B (business to business) and B2C (business to consumer) relations. Primarily they fell under consumer affairs legislation but at a point in time, the EU decided to create the Unfair Commercial Practice Directive which is essentially a B2C directive; it regulates the relations between business and consumers. And then, it changed the purpose of the directive we are dealing with, although there was no change in substance. Now, it is essentially a B2B directive. So, it was changed to a B2B in 2005 when the Unfair Commercial Practices Directive was issued.

This is relevant to Malta since because of this, when the Directive was a B2C directive, and therefore, before the switch in 2005, the relevant sections were contained in the Consumer Affairs Act which are the transposition of the Unfair Practices Directive. But when there was the switch to B2B and the Unfair Commercial Practice Directive was issued by the EU, then the latter directive was integrated into the Consumer Affairs Act, and articles 48, 49, and 50 were struck off from this Act and they were introduced as sections 32A and 32B and some others under the acts of UC. In fact, the **World Marketing Services v. Cross crafts (2001)** case was decided under the Consumers Affairs Act. The case **Green Dot Malta Limited v. Green.Mt Limited (2705/2010)** also makes this point.

Interpretation
Interpretation in line with the Directive, see **Pippig v. Hartlauer (C-44/01 – 08/04/2003)** and **Carrefour v. ITM (C-562/15 – 08/02/2017).**

The first case was a comparative advertising case. Plaintiff, Pippig, was a specialist optician in a town in Austria and it filed this case because the defendant, Hartlauer who had branches all over Austria and sold an assortment of goods not just optician things but they also had a section which sold cheap spectacles and sometimes sold well known brands at a discount, issued a leaflet which had 52 price comparisons between its spectacles compared to specialist opticians, one of them being Pippig. It compared the price charged for a particular brand of spectacles by Pippig with lenses sold by Hartlauer. That is to say, they compared it to the same brand and same type of spectacles sold by Hartlauer but with different lens brand.

One of the questions that arose related to the scope of the Misleading Advertising Directive and the Comparative Advertising Directive. This was a preliminary reference. There is a difference in approach when it comes to these two: while with respect to misleading advertising there is minimal harmonisation, whereby the Member State is not prohibited from going beyond that minimal protection, with respect to comparative advertising, the directive carried out an exhaustive harmonisation. If a comparative advert complies with the conditions mentioned in the directive which are reflected in article 32A(2), then that comparative advert is legal all over the EU. It is an exhaustive harmonisation. The issue arose because if you look at article 32A(2)(a), which is also found in the directive, one of the conditions of a comparative advert to be lawful, is that "*it is not misleading within the meaning of article 32B or within the meaning of articles 51C and 51D of the Consumer Affairs Act*."

The question that arose was that in the case that the legislation of the Member State goes beyond the minimal harmonisation, what do we do? The answer of the court was that you do not apply the extra protection, but you apply the minimal conditions for misleading advertising set out in the directive.

Definition of Trader
Directive article 2

(d) 'trader' means any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader;

<u>Commercial Code article 4</u>

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

Remember that when the directive became B2B, the sections from the Consumer Affairs Act were moved to the Commercial Code. The problem is that in the former act, we had a definition of 'trader' which was nearly identical to that in the directive, "*any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader.*" As you know, the Commercial Code also provides a definition of 'trader' in article 4. When the Commercial Code refers to acts of trade in the definition, it is referring to the list of objective acts of trade.

In this way, the definition of 'trader' in the Commercial Code is much more limited than that found in the Directive. The Directive speaks about "*purposes relating to his trade, craft, business or profession.*" So, while crafts per se might not be considered to be acts of trade under the Commercial Code, such as a sole carpenter is not considered to be a trader, that carpenter would fall under the Directive. This creates a problem of transposition. It could lead, if a case arises, and it is not addressed by these provisions, to a complaint to the EU that the transposition of the Directive is erroneous. It is not this problem alone, there is another problem which arises also from when these sections were moved to the commercial code.

Definition of advertising
<u>Article 36A</u>

> **36A.** For the purposes of this subtitle, "advertising" means any form of representation, including a catalogue, a circular and a price list, about a trade, business, craft or profession in order to promote the supply or transfer of goods or services, immovable property, rights or obligations and "advertisement" shall be construed accordingly.

<u>Elements of the definition:</u>

- The making of a representation in any form: covers all kinds of communication not only visual or graphic but also oral representations.
- Done in connection with a trade, business, craft or profession.
- To promote the supply or transfer of goods or services, immovable property, rights or obligations.

Misleading advertising
<u>Article 32B(1)</u>
<u>Article 32B(2)</u>
The most important question here is what constitutes misleading advertising. Sub-article 2 actually gives us a definition. Notice when there is 'and' that means there is another condition. There are these two conditions. Notice also "*the persons to whom it is addressed or to whom it reaches…*"

<u>Elements of the definition of 'misleading advertisement':</u>

- **It deceives or is likely to deceive [the average consumer]:** That has been defined as the average consumer **for those goods**. You need to see the average consumer for the type of goods mentioned. We dealt with this point when dealing with article 32 and also the EU cases. In fact, the EU judgements adopt the same definition.

In **Estee Lauder v. Lancaster Group (C220/98 – 16/09/1999)**, the defendant was marketing a product which was called 'Montel Firming Action Lifting Extreme Crème'. Estee Lauder complained and filed an action that this was tantamount to misleading advertising because of the word 'lifting' giving the impression that this was a permanent fix for sagging skin like surgical lifting procedures. The court gave these criteria and then said that the average consumer for the product obviously depends on the social, cultural or linguistic factors that may be different from Member State to Member State. It did, however, note that *prima facie* it does not appear that an average consumer would think that the word 'lifting', when referring to a crème, would refer to permanently solve the problem of sagging skin. It said that one must look at it from the average view of the consumer taking into consideration certain factors aforementioned, "*it is necessary to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect.*"

Kram Trading v. Oleg Barkov (PA 390/2014; 28/05/2015) is a comparative advertising case. One of the conditions in article 32A(a) is that it is not misleading so, very often you get issues of misleading advertising under article 32A also.

- **AND by reason of its deceptive nature it (a) is likely to affect the economic behaviour of average consumer; OR (b) injures or is likely to injure a competitor**. This refers to likely to affect the economic behaviour of average consumer

Article 32B(3)

(3) In determining whether an advertisement is misleading account shall be taken of all its features, and in particular of any information it may have about -

(*a*) the characteristics of goods or services, including their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;

(*b*) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;

(*c*) the nature, attributes and rights of the advertiser, including his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or any awards and distinctions made to him.

Has article 33 (false indication of origin) been rendered superfluous?

Article 32B(3) gives quite a long list of features and information in paragraphs (a), (b) and (c). If you look at article 33 of the Commercial Code, article 33 says '*traders shall not make use of any false indication of origin*.' Article 33B(3)(a) specifically refers to "*geographical or commercial origin*" as a factor to be taken into account in determining whether an advertisement is misleading. In a way, article 33 becomes superfluous because it is covered also by this provision. So, there is double protection under article 32B and article 33.

Has article 34(2) (use of honours etc) been rendered superfluous?
Likewise, article 34(2) of the Commercial Code says, "*traders shall not make use of honours, patents, prizes…*" Article 32B(3)(c) specifically refers to *"any awards and distinctions"* made to a trader as a factor to be taken into account in determining whether an advertisement is misleading. So again, if you are deceiving by this way, that would amount to misleading advertising. Therefore, we have a double protection.

Cases
Malta

- Green Dot Malta Limited v. Green. Mt Limited (PA 903/2008; 27/05/2010);
- Beer House Limited v. Max Diner Limited (PA 1083/2011, 27/01/2014);
- Kram Trading v. Oleg Barkov (PA 390/2014; 28/05/2015);

EU

- Estee Lauder v. Lancaster Group (C-220/98 – 13/01/2000);
- Lidl v. Vierzon (C-159/09 – 18/11/2010).

Beer House Limited v. Max Diner Limited is useful under the spreading of news provision because this is similar to the Nani v. Arrigo case where the spreading of news was that the defendant was, by virtue of advertising, giving the impression that he was an authorised agent when he wasn't. That sort of breach of article 34(1) would also fall under this misleading advertising. So, besides spreading of news under 34(1), when your advert is giving the impression that you are an authorised agent when you aren't, that would also be tantamount to misleading advertising. In fact, in this case the court considered this kind of conduct as being in breach not only of article 34(1) but also of 32B relating to misleading advertising.

Comparative advertising
When you start reading article 32A(1), one would get the impression that the purpose of this section is to prohibit comparative advertising when really, the main point of the Directive was to lay down conditions that if the comparative advert complies with them, they would be legal. If not, they would be illegal. So, those conditions are cumulative; they are all necessary and they are sufficient in the sense that if you comply with all of them, then it is lawful and it cannot be attacked. It is a complete harmonisation and therefore, is lawful.

Issues

- Definition of Comparative Advertising.

The first issue is what is comparative advertising?
In **Toshiba Europe v. Katun Germany**, Katun Germany produced consumables for electronic and computer products, and it produced spare parts which were compatible with other photocopiers, printers etc. One of the catalogues had a list of consumables compatible with Toshiba photocopiers and listed them according to the Toshiba product and the OEM number. Toshiba argued that this was tantamount to unlawful comparative advertising, but the court disagreed. It is not unlawful to mention the brand when you need to.

One of the issues that arose before the court decided that issue was whether this amounted to comparative advertising per se. So, the court gave a minimal definition of what comparative advertising is, "*in order for there to be comparative advertising within the meaning of [the Directive], it is therefore sufficient for a representation to be made in any form which refers, even by implication, to a competitor or to the goods or services which he offers. It does not* *matter that there is a comparison between the goods and services offered by the advertiser and those of a computer."*

The test is whether the advert "*identifies explicitly or by implication a competitor or goods or services offered by a competitor."* A catalogue with a list of spare parts and consumables compatible with Toshiba photocopiers listed according to particular model with columns indicating Toshiba's OEM number and Katum product number amounted to comparative advertising. So, the court said that even by referring to the EOM number, **once there is a reference to a competitor or the good or services that are offered, that is comparative advertising**. This is the criterion one must use to identify when to apply article 32A.

There is a general principle of interpretation mentioned in all the following cases:
- **Carrefour v. ITM (C-562/15 – 08/02/2-17);**
- **Toshiba Europe (C-112/99 – 25/10/2001)**, paragraphs 36 & 37;
- **Lidl Belgium (C-356/04 – 19/09/2006)**, paragraphs 22;
- **Lidl v. Vierzon (C-159/09 – 18/11/2010)** paragraphs 20 & 21.

"Since comparative advertising contributes to demonstrating, in an objective manner, the advantages of various comparable goods and thus to stimulating competition between suppliers of goods and services to the consumer's advantage, the conditions to be met for such advertising must be interpreted in the sense most favourable to that advertising, while ensuring at the same time that comparative advertising is not used anticompetitively and unfairly or in a manner which affects adversely the interests of consumers."

Lidl v. Vierzon (C-159/09 – 18/11/2010) concerned price comparison of a list of products (mainly foodstuffs) from a Vierzon and Lidl store respectively. Court considered three conditions for the legality of comparative advertising i.e. Art. 4(b), (a), and (c) of the Directive.

Vierzon are a company that owns a supermarket chain in France. One of Vierzon's comparative adverts included a number of products from Lidl and a Lidl till receipt compared to a till receipt for what they claimed were similar products purchased at a Vierzon store. The total of the till receipt was €46 for Vierzon and €51 for Lidl. It also had a slogan at the bottom claiming that Vierzon is the cheapest and has best discounts.

A number of questions were referred to the French court, starting with article 4(b) of the Misleading and Comparative Advertising Directive 2006/114/EC, "*it compares goods or services meeting the same needs or intended for the same purpose."*

Re article 4(b) (comparison of goods or services meeting the same needs or intended for the same purpose), the test is whether there is a sufficient degree of interchangeability. Food products are not excluded simply by virtue of the fact that they differ with respect to the preferences of consumers based on place of production, ingredients etc.

The Court said that the issue here is **interchangeability**. "*Same needs or intended for the same purpose*" doesn't mean the same brand or necessarily the exact same ingredients. So, it was held that products which are interchangeable aren't assessed in terms of paragraph (b). This is one of the points that Lidl raised. In fact, the court said 'the issue arose where the products were foodstuffs in view of the fact that food products differ in terms of the extent to which consumers would like to eat them according to the place of production, their ingredients, who produced them, etc. For instance, if you are buying oats, you might prefer Quaker than a generic brand, but the court said that this doesn't fall under paragraph (b) because it isn't meant to judge that sort of provision. For sub-article (b) to be applicable, all that needs to be assessed is **whether they are interchangeable**, so, one does not go into ingredients, brand, origin and so on.

The second point that the court made related to article 4(a) which states that, "*it is not misleading within the meaning of Articles 2(b), 3 and 8(1) of this Directive or Articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive')*."

Re Article 4(a) (not misleading), court must take into account:

- **Perception of average consumer;**
- **All relevant factors including any omission that could deceive. In this case:**
    - **If a significant number of average consumers would mistakenly believe that the selection of goods is representative of general level of prices;**

    We need to see the perception of the average consumer as seen when dealing with article 32B(3), all relevant factors must be taken into consideration including any omission. It's not only what you say in the advert what it is also relevant is what you omit to say. Lidl raised the point that if when seeing the till receipts, you as an average consumer are being misled into thinking that generally speaking your purchase at Lidl would be more expensive than our purchase at Vierzon, than that may be misleading if that would the impression on the average consumer. It could deceive if it gives the impression that the general level of prices is cheaper in Vierzon when that would be false. Here, **falsity** does come into it, it is not like article 34(1).

    - **If products selected were objectively different in a way that could affect buyer's choices e.g. omission of brand name or other features if omitted could be misleading.**

    For instance, if you are buying cereal, and it will make a difference to you if it is an established brand as opposed to a generic supermarket brand, then the comparison could be misleading because you might prefer paying extra to get an established brand than a bran which is not. So, here sub-article (b) does not come into it but sub-article (a) does come into it.

Finally, there was an issue under article 4(c) which states that, *"it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price."*

Re article 4(c) (objective comparison of one or more features): The court considered the requirement that the features compared must be verifiable.
"for the prices of the goods comprising two selections of products to be <u>verifiable</u>, it is a necessary precondition that the goods whose prices have been thus compared must be capable of being individually and specifically identified on the basis of information contained in the advertisement." (Para. 60).

There must be an objective comparison. In this case, the court considered the requirement that the features compared must be **verifiable**. For it to be verifiable, it must be verifiable on the basis of the information contained in the advert.

In the **Carrefour v. ITM (C-562 – 08/02/2017)**, the issue arose because in supermarkets in the EU there are different types of supermarkets, and the level of prices sometimes depends on the type of supermarket. There are three types, the hypermarkets, the mid-level and the smaller ones. The question arose was whether you need to mention this. The end result was that it can be a feature but a priori it is not something that needs to be mentioned unless the average consumer could be deceived as to price with respect to what you are comparing.

"*Article 4(a) and (c) of [the Misleading and Comparative Advertising Directive], read in conjunction with article 7(1) to (3) of [the Unfair Commercial Practices Directive], must be interpreted as meaning that advertising, such as that at issue in the main proceedings, which compares the prices of products sold in shops having different sizes or formats, where those shops are part of retail chains each of which includes a range of shops having different sizes or formats and where the advertiser compares the prices charged in shops having larger sizes or formats in its retail chain with those displayed in shops having smaller sizes or formats in the retail chains of competitors, its liable to be unlawful, within the meaning of article 4(a) and (c) of Directive 2006/114, unless consumers are informed clearly and in the advertisement itself and the comparison was made between the prices charged in shops in the advertiser's retail chain having larger sizes or formats and those indicated in the shops of competing retail chains having smaller sizes or formats.*"

The spreading of news provision (article 34(1)) does not require the news to be false. However, if the comparative advertising is lawful because it complied with the requirements of article 32A(2), it would not be an act of unfair competition despite article 34(1):

- Supremacy of EU law; European Union Act, Chapter 460 of the Laws of Malta.
- *Lex Posterioris.*

This clashes with the spreading of news provision since in article 34(1), the spreading of news must be false. You can have a comparative advert, its true the comparative advert is objectively verifiable, but that would still fall foul of article 34(1). And unfortunately, when these provisions were moved to the Commercial Code the article in the Consumer Affairs Act which stated that these provisions superseded any provisions in the Commercial Code or the Civil Code, making it clear that if there is a clash between these provisions, misleading and comparative, with any article in the Commercial Code then these provisions would prevail, was not included.

Cases

- **World Marketing Services v. Crosscrafts (Decree 415/01 – 11/04/2001)**;
- **Kram Trading v. Oleg Barkov (PA 390/2014; 28/05/2015)**, "*An objective test is taken…by reference to the reasonable reader of the advertisement"; "the general public is taken to know the ways of advertisers and to expect hyperbole"; "They will judge the advertisement as a whole. As a result, dishonesty will only be found when there is a significant misleading in the advertisement.*"

In **Kram Trading v. Oleg Barkov**, the question arose out of the objective comparison. In this case, the comparison was of two products which served both as an undercoat of metal as well as a paint. The plaintiff issued an advert comparing the product that he sold with that of the plaintiff's and part of the advert said that you needed to apply three times the number of coats to a particular service if you use the plaintiff's product more than if you used the defendant's product. The court looked into the research made and it felt that there was an objective comparison, since this was true, and therefore, this was not tantamount to unlawful comparative advertising and the claim issued by the plaintiff was rejected.

MARTINA CAMILLERI (1ST YEAR)

1. **UNDER ARTICLE 5(A) OF THE COMMERCIAL CODE, "ANY PURCHASE OF MOVEABLE EFFECTS FOR THE OBJECT OF RESELLING OR LETTING THEM, WHETHER IN THEIR NATURAL STATE OR AFTER BEING WORKED OR MANUFACTURED" IS AN ACT OF TRADE. ANALYSE AND DISCUSS.**

When defining the domain of commercial law, the commercial code in article 2 speaks of 'trade', which in its ordinary meaning would refer to the exchange of goods and services. Despite this instant connotation, the term 'trade' in commercial law goes way beyond its ordinary meaning, but that is not to say it does not include it. That is to say, while it is not limited to its ordinary definition, it nevertheless encapsulates it, and this is seen by virtue of article 5(a) of the commercial code which is the act of trade *par excellance* as it involves purchasing with the intention of re-selling. Moreover, here we are dealing with objective acts of trade. Of particular importance here is the purchase of moveable effects stipulated in sub-article (a) of this article.

The acts of purchase and sale/lease do not exist in isolation, but rather are closely linked since one purchases a movable with the intention to re-sell and then the movable that was purchased with the intention to re-sell is sold. Here, however, the focus is mainly on the purchase of movables as opposed the sale, the former of which is interpreted widely, resulting in article 5(a) being applied to far more acts than mere purchase. Essentially, a purchase involves the buying of something in return for money, along with the transfer of ownership, but this needn't be so. So long as the movable is acquired for its use and enjoyment, and more importantly, for value, then that transaction would fall under the definition of 'purchase' and, consequently, under article 5(a). Testimony to this would be hire, provided that the thing being hired is done so with the intention of being re-hired. Here, the act of hiring does not involve a transfer of ownership as in the case of purchase, but instead it is an onerous acquisition of the use and enjoyment of the movable being hired. The same would apply to lease when the movable being leased is done so with the intention of re-leasing it, and of course, it is leased for a price. Therefore, here we are interpreting widely within the limits of price.

It is important to recognise that the law emphasises that the purchase must be that of a 'movable effect' and therefore does not apply to immovables, which is the subject matter of article 5(h). That being said, whilst uncertainty has arisen as to whether 'movable effect' refers to both movables by nature as well as movables by regulation of law, this uncertainty is quickly clarified under article 316 of the Civil Code which makes it clear that when interpreting moveable effects, one must include both. Similar to the abovementioned wide interpretation, in the past the concession of a quarry was also widely interpreted as a purchase of movables, specifically, the purchase of un-quarried stone. The Court, in *Briffa et v. Schembri et,*[1] declared this with the reasoning that upon entering the contract, the quarrier would have done so with the intention of quarrying the stone and subsequently, would re-sell that quarried stone. Although this right to quarry was widely interpreted as being a purchase, essentially it is simply the acquisition of a right to re-sell the stone that was quarried since the land remains the property of the owner. Therefore, because of this wide interpretation, this would be considered an objective act of trade under article 5(a).

[1] (XXX.ii.76-1938)

While still under the topic of movables, it is pertinent to point out that here, *"after being worked or manufactured"* is referring to the state of the movable that has been purchased when it is re-sold. Here, the law is allowing for the movable to be changed to a very limited degree in the sense that mere value can be added to the moveable. That is to say, an element of transformation is allowed but this, in the words of Navarrini, is *"una semplice operazione"* and therefore, not a complete transformation. The reason as to why this provision completely rules out a complete transformation is for the simple reason that once the transformation is no longer 'simple', the speculation no longer remains on the movable but on its manufacture. That is to say, if a movable is purchased with the intention of changing it completely by some process, then it cannot be said that that person purchased the movable with the intention of re-selling it because in truth, the movable was purchased with the intention to manufacture it. In this way, as illustrated in *Azzopardi v. Camilleri* (X.iii.741 – 1885), the carpenter who purchases wood to carry out his trade cannot be said to be carrying out acts of trade under article 5(a) because not only is there a complete transformation of the wood, but the carpenter also lacks the intention of re-selling that wood upon purchasing it. This would bring us to the last requisite of article 5(a), that of the intention of re-sale.

Finally, *"for the object of re-selling or letting them"* is of considerable importance as it is ultimately what distinguishes an act of trade from a purchase of a civil nature. In this way, the transaction that falls under article 5(a) is not done for one's personal consumption but is done with the intention of eventually re-selling that moveable. Indeed, it is worth drawing attention to the fact that it is essential that the object of re-selling or letting exists upon purchasing the movable. That is to say, so long as one purchases with the intention of re-selling the movable that is being purchased, the act will remain an act of trade even if subsequently the person who purchased decides to keep the movable. In the words of Vivante, *'l'intenzione di rivendere deve esistere e basta che esiste al momento dell'acquisto'*. While the object of re-selling is undisputed, whether the act of speculation has to co-exist with such intention is a matter that has sparked much debate. On the one hand, some argue that the profit motive is the essence of re-sale, while on the other, some argue *ubi lex voluit dixit*, maintaining that if the law intended such a requirement, it would have specified it. Though the former argument carries a lot of weight, the latter argument would make sense in the light of article 5(h) considering *'the object of commercial speculation'* is explicitly laid down. With that being said, ultimately, the fact that a loss is made does not change the nature of the act.

Moreover, the requisite of the object of re-sale is so strong that in the case of a dual intention when purchasing a moveable, in order for that purchase to fall under article 5(a), the intention of re-sale must always be the principal intention. In the case *Farrugia v. Bonello*, the Court said that the purchase of animals for the principal purpose of obtaining manure is not an objective act of trade, even if the purchaser purchased the animals with the intention of eventually selling the animals after having fattened them. Therefore, though at the time of purchase there was both the intention of using the moveable as well as of re-selling the moveable at some point in time, the former intention was much stronger than the latter and therefore, the act did not constitute an act of trade under article 5(a).

2. <u>COMPARE AND CONTRAST OBJECTIVE ACTS OF TRADE AND SUBJECTIVE ACTS OF TRADE.</u>

Essentially, acts of trade are divided into two main, distinct categories, those of objective acts of trade and subjective acts of trade which are dealt with by articles 5, 6 and article 7 respectively. With that being said, it should be mentioned at the outset that at no point does the commercial code provide a definition of an act of trade. Instead, the law adopts a twofold approach whereby it creates an exhaustive list of acts of trade that would amount to objective acts of trade, and it also creates a rebuttable presumption stating that every act of a trader is a subjective act of trade, unless it is proven otherwise.

First and foremost, it is pertinent to point out that whilst subjective acts of trade are based on a rebuttable presumption, since if it is proven that such acts are extraneous to trade, they no longer remain subjective acts of trade, in the case of objective acts of trade, no such presumption exists. That is to say, objective acts of trade are presumed be to so *iuris et de iure* in the sense that so long as the act falls within the list, there is no question as to whether the act is an act of trade or not. That is, it cannot be argued that such acts are extraneous to trade because it is made clear in the law that this is not so. On the other hand, article 7 stipulates that every act of a trader is presumed to be an act of trade *'unless from the act itself it appears that it is extraneous to trade'.* Here, not only is the law presupposing the existence of a trader, but it is also presuming that any act performed by that trader is an act of trade. Unlike in the case of objective acts of trade, here, if it is proven that the act is extraneous to trade, say in the case of marriage, then the presumption no longer holds.

On this point, one of the main differences between the two types of acts of trade is precisely in who can perform such acts. While anyone can perform objective acts of trade, article 7, and therefore the rebuttable presumption, cannot even begin to be considered unless it has been established that the person performing such acts is a trader. That is to say, if an act falls within the list laid down in article 5, that act is an objective act of trade irrespective of the status of the person performing the act. On the other hand, only by virtue of acquiring the status of a trader can one perform subjective acts of trade and therefore, it is not anyone. So much so that article 7 presupposes that the person performing the act has satisfied the requirements laid down in article 4.

Perhaps, one of the main differences between the two types of acts of trade, at the same time, brings out the link between the two. As above mentioned, in order to perform subjective, it has to first be established that the person performing such acts, has satisfied the criteria laid out in article 4 and subsequently, has acquired the status of a trader. With that in mind, it is to be noted that one of the major requisites in acquiring the status of a trader is precisely in performing objective acts of trade. Of course, article 4 does not specify that the acts of trade being performed are objective acts of trade, however this is presumed considering that the status of the person has not yet been established and therefore, article 7 cannot yet begin to be considered. In this way, objective acts of trade constitute the starting point for acquiring the status of a trader, and in the same, for performing subjective acts of trade. On this point, Vivante rightly points out that objective acts of trade actually give life to a trader as a trader would not exist in their absence.

Another major contrast is found in the nature of objective and subjective acts of trade. Whilst article 7 expressly states *'Every act of a trader',* objective acts of trade are not any act of any nature but rather are limited to those acts listed within article 5 and article 6. In the case of the former, there is nothing provided for in the law that would limit the act being performed. In this way, so long as the act is performed by a trader and is not proven to be extraneous to trade from the act itself, then no justification would exist as to remove the act from the possibility of being a subjective act of trade. On this point, in the past it was thought that acts arising out of tort, quasi-tort, contract or quasi-contract could not amount to subjective acts of trade. With that being said, the general understanding nowadays, as further illustrated in *Muscat v. Cremona,* is that such acts can be considered to be subjective acts of trade so long as the conditions stipulated in article 7 are satisfied. Of course, it is to be noted that *'Every act'* does not include objective acts of trade. Whilst article 7 encompasses a rebuttable presumption, the fact that an act performed falls under the list of articles 5 and 6 is irrebuttable in the sense that so long as the act falls within the list, no question can arise as to whether or not that act is an act of trade or not because this is presumed to be so *iuris et de iure.* Therefore, such an irrebuttable presumption cannot be made to dependant on the rebuttable presumption found in article 7 because article 5 and 6 do not allow the possibility of an objective act of trade to be 'extraneous to trade'. It would be incorrect to make article 5 depend on the rebuttable presumption contained in article 7 because article 5 itself does not allow for any such rebuttal. In this way, contrary to subjective acts of trade, objective acts of trade are not of whatever nature because they are fall within an exhaustive list. That being said, though acts of trade cannot be added to the list in article 5 and 6, such acts of trade are interpreted widely. For example, in the case of article 5(a), an act of leasing a car for the purpose of sub-leasing it would be considered to fall under 'purchase' as essentially, they perform the same socio-economic function.

Of course, both objective acts of trade as well as subjective acts of trade are acts of a commercial nature. Whilst it is true that perhaps such a statement is not as relevant nowadays, with the unification of the Civil Court and the Commercial Court, it is interesting to remark that in the past this gave rise to a jurisdictional issue. Prior to 1995, Malta had both a Civil Court as well as a Commercial Court which gave rise to a situation whereby commercial issues would be sued in the Civil Court and vice-versa. In this way, the so to speak status of being a commercial matter of both subjective acts of trade as well of objective acts of trade was crucial in the past. That being said, with regards to differentiating the two from acts of a civil nature, the distinction is still important when it comes to applicable law.

In light of all that has been said, it can be concluded that whilst the commercial nature in the case of objective acts of trade derives precisely from the fact that the act performed fall within the list stipulated in articles 5 and 6, in the case of subjective acts of trade, the commercial nature of the act derives from the person performing the act. In this way, the same act that does not fall within objective acts of trade and is performed by a non-trader, can very much be an act of a commercial nature provided that it is performed by a trader.

3. WRITE SHORT NOTES ON ANY TWO OF THE FOLLOWING:
   (a) USAGES OF TRADE
   (b) ACCESSORY ACTS OF TRADE
   (c) MIXED ACTS OF TRADE
   (d) THE NOTION OF 'UNDERTAKING' UNDER ARTICLE 5(G)

<u>Usages of trade</u>

It should be mentioned at the outset that the term 'usages of trade' is found in article 3, the article that so to speak 'navigates' and individual to which law shall apply when dealing with a particular commercial matter. Usages of trade finds itself in the second tier of the three tiers, with commercial law above it and civil law below it. Moreover, it is pertinent to point out that usages of trade differ from the other two sources of commercial law by their very nature since they are unwritten. Though occupying the position under commercial law, the importance of usages of trade must not be underestimated. The reality is that commerce, trade and business are dynamic and as a result, at times it may be difficult for legislation to keep up with the fast pace in which they change. Consequently, many new developments that take place are regulated by usages and not by written legislation. In truth, what is meant by the fact that usages occupy the second tier laid down in article 3 is that it is conceptually impossible for a usage to be contrary to a commercial rule, and, in the same way, it is conceptually impossible for a civil law to run against a usage of trade, providing that public policy is not being dealt with. In Mid-Med Bank v. Teg Industries, the concept of the hierarchy of sources of commercial law, more specifically that usages of trade are 'above' civil law come to the fore when dealing with usages that exist in relation to overdraft facilities. In brief, it was declared that such rules found in the Civil Code restricting interest, are not applicable to overdraft facilities because of the existence of such usage. Therefore, here usages of trade are being given priority. Of course, one cannot simply allege that a usage of trade exists and therefore takes precedence over civil law, but this must be proven, *allegazio incumbit ei qui dicit.* In order to prove a usage in court, both the objective and the subjective requisite must be proven. In other words, it has to be proven that that particular rule has been regularly observed for a period of time (there is no fixed period of time) and that this uniform continuous observance is a result of the fact that the people subject to it treat it as a rule of law. Lastly, because usage is law, it must be treated as such and therefore, ignorance of such usages is no excuse, rules of legal interpretation apply and so on.

<u>Accessory acts of trade</u>

With respect to accessory acts of trade, no provision under subjective acts of trade exists, but the rule is specified under article 5 which speaks of objective acts of trade. Article 5(i) reveals the nature of an accessory act of trade, describing it as a '*transaction ancillary to or connected with any of the above acts.'* Therefore, it immediately becomes evident that accessory acts of trade are not acts of trade by nature but because they are connected to an act of trade, they derive their legal nature from the principal act they are connected to. To give an example, a power of attorney does not fall under article 5 of the Commercial Code and therefore, is not an objective act of trade. However, in the case that a power of attorney authorises another person to take a bank loan, that power of attorney no longer remains of a civil nature because it is now totally ancillary and connected with the principal act which is an objective act of trade under article 5(b). Consequently, the power of attorney assumes the character of an objective act of trade by virtue of article 5(i) of the Commercial Code. In light of this, in *Castillo v. Grech*, a contract of suretyship relating to a bank loan was declared an objective act of trade under article 5(i) precisely because the principal act, the bank loan, is an act of trade. It is worth drawing attention to the point made above that there is no specific provision regarding accessory acts of trade in relation to subjective acts of trade. Despite this, logic would argue that just as accessory acts of trade are capable of existing in relation to objective acts of trade, the same applies to subjective acts of trade.

Mixed acts of trade

A mixed act is not an act of trade. On the contrary, what is meant by 'mixed' is that from the viewpoint of one party, the act is of a civil nature, and from the perspective of the other party, the act is of a commercial nature. For example, if party A buys something from party B for personal consumption, while for Party A that is an act of a civil nature because party A is not speculating on the object being bought as he has no intention of re-selling it, Party B has carried out an act of trade and therefore, from party B's viewpoint, the act is of a commercial nature. In the past, the issue with mixed acts related to the fact that pre-1995 amendments, two separate courts existed and therefore, the so-called jurisdictional issue would arise. To solve this, the rule adopted at the time was *actor sequitur forum rei* which meant that the jurisdiction depended on whether it was an act of trade for the defendant, in which case, the commercial court would have jurisdiction. Not only that but, this rule also extended to applicable law whereby in this case, because the act is of a commercial nature for the defendant, the applicable law would be commercial law. Of course, nowadays with the abrogation of the Commercial Court, jurisdiction no longer remains an issue, but applicable law does. Here, there is a lacuna in the law.

The notion of undertaking under 5(g)

An undertaking is a complex activity involving the organisation of the factors of production for a specific purpose. It must be mentioned at the outset that the law is very specific when it comes to which spheres of activity can an undertaking relate to in order to fall under article 5(g) of the Commercial Code. That is to say, not every undertaking falls under this provision. So, for example, in the case that the factors of production, say machinery, employees, premises and so on, are organised for the purpose of manufacture, that undertaking does not specifically fall under article 5(g) because of such organisation of such elements but more so because it is done with a purpose that is specified in the law. In other words, it is not given the 'status' of an objective act of trade simply by virtue of being an undertaking. Moving on, Bolaffio, an Italian author, identified three requisites for establishing an undertaking, namely, the organisation of factors of production, that what is produced satisfies the needs of the consumer, and lastly that the person organising the factors of production is taking a risk. The latter is referring to a substantial investment, which under any circumstances, always involves an element of risk. Moreover, by virtue of this definition, one can distinguish an undertaking from a *locatore d'opera* which is an individual who depends mainly on himself. Of course, this does not rule out the possibility that the *locatore d'opera* can hire a few people to help him, but it won't involve an element of speculation on the investment, nor the production in advance which are two key characteristics emphasised by the Court. Moreover, perhaps another requisite can be added to Bolaffio's definition, and this is the necessary element of profit, as laid down in Azzopardi v. Agius Ferrante. In this case, it was declared that the Monoel Theatre, though technically speaking an undertaking, is not organised for the purpose of profit and therefore cannot be a commercial undertaking falling under article 5(g).

4. WHAT IS REQUIRED FOR A PERSON TO BECOME A TRADER?

As laid out in article 2 of the Commercial Code, besides acts of trade, commercial law also relates to the trader. It must be mentioned at the outset that by virtue of acquiring the status of a trader, a different regime of law is invoked and, therefore, a trader has different rights and obligations when compared to a non-trader. Moreover, here the term 'person' relates to both physical as well as legal persons as article 4 of the Commercial Code makes it clear that commercial partnerships are also included, aside from physical persons.

Although both physical as well as legal persons can acquire the status of a trader, while physical persons have to satisfy three main requisites as stipulated in article 4, commercial partnerships do not. That is to say, while physical persons have the choice of becoming a trader, commercial partnerships acquire ex lege the status of a trader upon registration with the Malta Business Registry (MBR). Moreover, it is pertinent to point out that the Companies Act lays down and regulates three types of commercial partnerships; the partnership en nom collectif, the partnership en nom commandite and lastly, the company, all of which having a legal identity that is separate and distinct from that of the people that form them. That being said, each commercial partnership is different, and this is evident in the way they are validly constituted, and in the same way, in the manner by which they attain the status of a trader. In the case of partnerships en nom collectif and en nom commandite, they must first enter into a deed of partnership while in the case of limited liability companies, two documents are drawn up, the memorandum and the articles of association. It is only by way of drawing up these documents that commercial partnerships can attain a certificate of registration, and, consequently, the status of a trader.

When it comes to commercial partnerships, there exists an ongoing dispute regarding whether or not general partners, in the case of partnerships en nom collectif and partnership en nom commandite, are traders in their own right. It is pertinent to draw attention to the fact that general partners, unlike limited partners in the case of partnerships en nom commandite or shareholders in the case of companies, guarantee the obligations of the partnerships with their personal assets and therefore, do not enjoy limited liability. Most French commentators, in light of this, argue that general partners are in fact traders in their own right. This position is justified by articles 478 and 493 of the Commercial Code whereby the general partner is brought at par with the partnership meaning that for all intents and purposes of law, the general partner is treated as though it were a partnership. Vivante, on the other hand, gives an alternative view arguing that so long as the commercial partnership has a legal identity that is separate from the person constituting it, the general partners can never be said to carry out acts of trade in their own name and by profession because it is the partnership itself that is carrying out acts of trade by virtue of its distinct legal personality. In line with Vivante's view, if a general partner were to be considered a trader, this would create a situation whereby a person who has never carried out acts of trade in his own name has acquired the status of a trader.

As already mentioned, physical persons, unlike legal persons, are not entitled to the status of a trader by way of merely existing but must first satisfy the conditions laid down in article 4 of the Commercial Code. Firstly, article 4 speaks of *'exercises acts of trade.'* Here, despite the fact that the law does not specify whether such acts of trade are objective or subjective, it is evident that what is being referred to is the carrying out of objective acts of trade. The simple reason behind such a conclusion is that only by virtue of acquiring the status of a trader can a person begin to perform subjective acts of trade, and, up till this point, it has not yet been established whether or not the person is in fact a trader. That is to say, it is only once the requisites found in article 4 are satisfied that article 7 can even begin to be considered. It is also pertinent to point out that one is not considered to be a trader as a result of carrying out a one-off objective act of trade, but there must be a certain level of continuity. That being said, there is no fixed number of objective acts of trade that one must carry out in order to acquire the status of a trader, but this depends on the nature of the act itself and on the decisions of the Court.

Secondly, article 4 maintains that in order to acquire the status of a trader, the person must exercise acts of trade *'in his own name'*. It should be mentioned at the outset that in order to acquire the status of a trader, the acts of trade must be performed, be it by the principal himself or by an agent on his behalf, with the intention of speculation. Therefore, here the profit element is detrimental. Moreover, performing acts in one's own name does not necessarily mean that that person has to exercise acts of trade personally. That is to say, a person will still be subject to acquiring the status of trader in the case that he/she hires an agent to perform acts of trade for and on his/her behalf. Such agents are known as persons auxiliary to trade, and include the broker, commercial agent, the commission merchant and so on. It is important to point out here that the principal assumes responsibility for the acts performed by such agents, vis-à-vis third parties even though it is someone else performing such acts of trade. This is because such acts are performed for and on behalf of the principal. Moreover, because persons auxiliary to trade do not perform acts of trade in their own name, they can never become traders themselves. That being said, perhaps the commission merchant provides an exception in this regard as unlike the broker and commercial agent, the commission merchant does in fact perform acts of trade in his own name, only for and on behalf of the principal, whereby the ultimate profit goes to the principal. In this respect, authors, namely Bolaffio and Vivante are divided because while the commission merchant does satisfy the requisites laid down in article 4, namely that he performs acts of trade in his own name, ultimately the commission merchant simply earns a commission from the profit earned from the transaction. That being said, Vivante's argument that a commission merchant is not a trader is the prevailing view.

Lastly, the performance of objective acts of trade must be done *'by profession'*. In other words, the law isn't satisfied simply with a certain degree of continuity, but such continuity has to result in the only, or at least primary source of income of the person. In light of this, in *Dr Edward Amato v. Spiro Xuereb*, the Court declared that for a person to become a trader, *'he must devote his services to trade in such a way that it becomes his only or principal occupation.'*

Interestingly, with respect to the requirements needed in order to become a trader, the law does not stop at article 4 of the Commercial Code. While the rule as laid down in article 8 of the Commercial Code is that any person capable of contracting may trade, there are certain professions which the law precludes from carrying out trade, and consequently, from becoming traders altogether. Some examples include judges and magistrates, public servants and of course, public officers in order to maintain total impartiality. Similarly, as a rule, minors are not capable of contracting, and therefore, not capable of trading, however certain exceptions do exist. Such an exception would be in the case that the minor has attained the age of sixteen and has been emancipated to trade either by his/her parents or else by the judge of the Civil Court. Once the minor is emancipated to trade, he/she is a major for all intents and purposes of trade. With that being said, the emancipation per se does not in itself render the minor a trader, but rather it simply gives the minor the right to start carrying out objective acts of trade with the possibility that that minor eventually becomes a trader.

In light of all that has been said, the onus of proof always falls on the person making the allegation. That is to say, whoever alleges that one is a trader must prove it by simultaneously proving the existence of the conditions laid down in article 4 of the Commercial Code.

5. WHAT ARE THE SOURCES OF COMMERCIAL LAW? HOW DO THEY INTERACT WITH EACH OTHER?

Contrary to probable initial understanding, the commercial code does not encapsulate all commercial law. In fact, if one were to find themselves in doubt, article 3 of the Commercial Code instantly makes this clear, and even goes beyond this by creating an order of priority, and consequently, a hierarchy, of all the sources of commercial law. Of course, whilst the image of a hierarchy creates a sense of compartmentalisation, this is not to give off the impression that the three main sources exist in watertight compartments. Indeed, the three sources of commercial law interact with each other so much so that it is a result of this interaction that commercial law exists.

Unsurprisingly, the most important source of commercial law, as stipulated in article 3, is the commercial law itself. Undoubtedly, the main piece of legislation regulating commercial law is the commercial code which at the outset defines the boundaries of commercial law, relating it to traders and acts of trade. Moreover, by virtue of articles five and six, and seven one differentiates between objective acts of trade and subjective acts of trade, the former capable of being performed by anyone, and the latter specifically relating the traders. Moreover, article 4 lays down the conditions that one must satisfy in order to acquire the status of a trader. Therefore, if the act being considered either falls under articles 5 or 6 or is committed by someone who falls under article 4, and is therefore a trader, there is no further question as to whether or not the matter is of a commercial nature. Similarly, any legislation, whether primary or subsidiary that deals principally with acts of trade or the trader also falls under commercial law. A prime example here would be the Companies Act which lays down as well as regulates the three forms of commercial partnerships, which, upon registration become a trader *ex lege*. Not only this, but commercial partnerships also make an appearance in article 5(e) of the Commercial Code, and therefore, this leaves no doubt that commercial partnerships are a commercial matter. Moving on, provisions in civil law which cater specifically for commercial matters also fall under the source that is commercial law as such a provision in itself constitutes a commercial matter, even though it is included in the Civil Code. For example, article 1141, though it falls within the Civil Code, regulates interest charged on commercial obligations, and therefore, such a provision cannot be said to fall under the source of civil law. Lastly, within the Commercial Code exist cross-references to provisions found within the Civil Code, and such provisions are considered to fall within the parameters of commercial law. For example, article 49 of the Commercial Code cross-refers to a civil provision that governs mercantile agency.

Moving on to the second source of commercial law, it is pertinent to point out that usages of trade differ from the other two sources of commercial law by their very nature since they are unwritten. The reality is that commerce, trade and business are dynamic and as a result, at times it may be difficult for legislation to keep up with the fast pace in which they change. Consequently, many new developments that take place are regulated by usages and not by written legislation. As a consequence of being unwritten, one cannot simply allege that a usage of trade exists, but this must be proven, in line with the Latin maxim *allegazio incumbit ei qui dicit.* In order to prove a usage in court, both the objective and the subjective requisite must be proven. That is to say, it has to be proven that that particular rule has been regularly observed for a period of time (there is no fixed period of time) and that this uniform continuous observance is a result of the fact that the people subject to it treat it as a rule of law. If such requisites fail to be proven, no usage exists, but if they are proven that usage becomes law and is treated as such, meaning that ignorance of such usage would not constitute a defence, rules of legal interpretation would apply and so forth. Moreover, since according to article 3 of the Commercial Code usages of trade are to be considered after commercial law but before civil law, it is conceptually impossible for a usage to be contrary to a commercial rule, and, in the same way, it is conceptually impossible for a civil law to run against a usage of trade, providing that public policy is not being dealt with. In *Mid-Med Bank v. Teg Industries*, the concept of the hierarchy of sources of commercial law, more specifically that usages of trade are 'above' civil law came to the fore when dealing with usages that exist in relation to overdraft facilities. In brief, it was declared that such rules found in the Civil Code restricting interest, are not applicable to overdraft facilities because of the existence of such usage.

Lastly, if all else fails, the civil law is to be taken into account. By elimination, what is being referred to here is the civil law excluding the above-mentioned provisions found in the Civil Code, yet which appertain to commercial law. That is to say, the last source of commercial law refers to all enactments of a civil nature. Perhaps, one can argue that here the civil law is indirectly dealing with commercial matters as in the case of the law of obligations, which though regulated by the Civil Code plays a vital role in commercial matters, considering that a good chunk of business dealing with goods and services is contractual in nature. Similarly, as stipulated in article 5(b) of the Commercial Code, any banking transaction constitutes an objective act of trade, and, when engaging in a banking transaction, one is actually entering into a contract with the bank. Moving on to the notion of a trader, the commercial law in article 8, explains that any person capable of contracting may trade, but the conditions which must be satisfied in order for a person to be considered capable of contracting are actually stipulated in the Civil Code and not in commercial law.

In light of all that has been said, the three sources of commercial law interact in the sense that it is the cumulative effect of them that makes up the commercial law. Moreover, it can be argued that their interaction lies in the fact that a usage of trade cannot be argued in the case that a commercial law on the matter exists, and, in the same way, it is impossible to argue that a civil law regulates the matter at hand, in the existence of a usage of trade. In this way, article 3 creates an order of priority.

6. **<u>"EVERY ACT OF A TRADER SHALL BE DEEMED TO BE AN ACT OF TRADE, UNLESS FROM THE ACT ITSELF IT APPEARS THAT IT IS EXTRANEOUS TO TRADE" (ARTICLE 7 OF THE COMMERCIAL CODE). ANALYSE AND DISCUSS.</u>**

Indeed, not only does article 7 of the Commercial Code relate itself only to traders but it also creates a rebuttable presumption that every act performed by that trader is an act of trade. That is to say, this provision presupposes that the person performing the act has satisfied the requirements stipulated in article 4, and as a result, all the acts of that trader are presumed to be acts of trade. Of course, this can be rebutted but only so long as it can be proven that such act is extraneous to trade and, in addition, such evidence is limited to the act itself. In this way, the commercial nature of the subjective act of trade, unlike that of an objective act of trade, derives from the fact that the subject who is performing it is a trader.

The corollary of the fact that the very existence of article 7 presupposes that the person performing the act has satisfied the requirements laid down in article 4, and is therefore a trader, is that if the act is not performed by a trader, then it cannot be considered a subjective act of trade and in this way, no such presumption will exist. Ultimately, this very dependence on the person being a trader is what differentiates subjective acts of trade from objective acts of trade. In the case of the latter, the status of the person performing the act is of no significance in the sense that so long as the act falls within the list laid down by article 5, no further questions are asked as to whether that act is an act of trade or not. On the other hand, it is only by virtue of being a trader that article 7 can even begin to be considered, and this is what gives reason as to why the acts of trade being referred to in article 4 are objective and not subjective acts of trade. That is to say, in article 4 it has not yet been established that the person is a trader and therefore, article 7 is still so to speak 'off limits.'

Indeed, before delving deeper in the analysis of article 7, it is pertinent to point out that *'any act of a trader'* does not refer to objective acts of trade. The simple explanation behind this reasoning is that objective acts of trade are deemed to be so *iuris et de iure* meaning that once an objective act of trade is performed, nothing can be proven otherwise. That is to say, an act of trade listed under article 5 cannot be said to be extraneous to trade, since the law does not allow that possibility. Moreover, because of the fact that article 5 does not take into account who is performing the act of trade, whether the person is a trader or not is irrelevant and therefore would have no effect on the status of the act. In light of this, it would be incorrect to make article 5 depend on the rebuttable presumption contained in article 7 because article 5 itself does not allow for any such rebuttal. With that being said, when excluding objective acts of trade, *'any act'* here refers to any act of any nature. That is to say, subjective acts of trade are arguably unlimited, so long as they fall within the limits of trade. On this point, a subjective act of trade can be any act including those that arise out of contract, quasi-contract, tort and quasi-tort, despite uncertainty in the past. The law does not specify any such exceptions and therefore, no such justification exists as to exclude such a possibility. Of course, this does not go to say that all acts of such a nature are subjective acts of trade but rather, the point being made here is simply that if acts arising out of tort, quasi-tort, contract or quasi-contract are performed by a trader and are not extraneous to trade, then there is no reason to exclude them from falling under subjective acts of trade. This point is further illustrated in *Muscat v. Cremona* where the Court rejected the argument that because the act was a tortuous act, it was incapable of being an act of trade.

After having considered the first part of article 7, one is faced with possibility that an act performed by a trader is not an act of trade, provided that certain conditions are met. This is where the rebuttable presumption, which comes missing in the case of objective acts of trade, lies. Firstly, it is important to recognise that when it comes to acts that are extraneous to trade, two types exist, those that are extraneous to trade from their very nature and those that are extraneous to trade as a result of the circumstances surrounding the act. In the latter case, the evidence that will be put forward in order to rebut the presumption will have to derive from the act itself. With regards to acts that are extraneous to trade by their very nature, such acts are automatically excluded from being subjective acts of trade and therefore, the presumption is automatically rebutted since no other evidence, other than the act itself, is needed. Such acts would be for example, the act of adoption and marriage.

On the other hand, in the case of that the act can be both of a civil as well as of a commercial nature, and that the person performing such act is a trader, in order to rebut the presumption it must be shown that the act is extraneous to trade, and that this arises *'from the act itself'*. Firstly, the act has to be proven to be extraneous to trade in general and therefore, not extraneous to trade that that particular trader is in. Secondly, in order to come to the conclusion as to whether the act is extraneous to trade from the act itself, one would need to ask whether or not the parties knew or ought to have known that the act was extraneous to trade at the time that the act occurred. In the case that at the time the act was committed they did know or ought to have known that it was extraneous to trade, the presumption is rebutted. In this way, the parties have to be aware of the nature of the act at the time the act occurs and not afterwards. With that being said, the difficulty in this respect arises when there is no written agreement between the parties. In *Cremona v. Ciantar,* although there was nothing on paper saying that at the time the two parties were aware that the act was extraneous to trade, the defendant had made it clear to the plaintiff that he needed these works urgently so that he would be able to move into the premises. In this way, because the conversation took place at the moment the defendant was engaged to carry out the work and not afterwards, the evidence proved to be from the act itself that the act was extraneous to trade, and therefore, the presumption was rebutted. Conversely, in *Drago v. Bonavia,* the Court declared that because there was no indication of the purpose of the loan at the time that it was entered into, and because Bonavia was a trader, there was no evidence from the act itself that proved the act to be extraneous to trade, and therefore, the presumption found in article 7 was maintained.

Had the law created an irrebuttable presumption, that would have meant that the trader cannot perform acts otherwise than acts of a civil nature.

7. **A PERSON WHO PURCHASES MATERIAL (EX. WOOD) FOR THE PURPOSES OF MANUFACTURING AND SELLING THE MANUFACTURED ARTICLES (EX. FURNITURE) IS NOT CARRYING OUT AN ACT OF TRADE UNDER ARTICLE 5 OF THE COMMERCIAL CODE (CAP. 13) UNLESS THE MANUFACTURING ACTIVITY CONSTITUTES AN "UNDERTAKING" IN TERMS OF THE SAID ARTICLE 5. DISCUSS.**

Although article 5(a) of the commercial code speaks of *'after being worked or manufactured'*, in the words of Navarrini, what it is referring to is *"una semplice operazione"* and therefore not a complete transformation as would be the case of wood transformed into furniture. In this way, a person who purchases with the intention of manufacture and not re-sale is exempt from article 5(a), but not necessarily exempt all together from article 5. Provided that the individual satisfies the criteria of an undertaking, and that it relates to one of the spheres of activities stipulated in article 5(g), that individual would be considered to carry out acts of trade under article 5.

In order for a purchase to fall under article 5(a) of the commercial code, that purchase must necessarily co-exist with other conditions, namely the fact that the thing purchased is a movable and that it was purchased with the intention of re-selling. When it comes to these two conditions, perhaps there is a connection between the two whereby the extent of the transformation of the movable has a direct indication as to whether or not the movable was purchased with the object of re-selling. In the case that the movable purchased with the object of re-selling is added value through some additional works, it cannot be said that the ultimate intention when purchasing the movable wasn't re-sale because ultimately, it is the same object that was purchased being re-sold only with some minor adjustments. With that being said, in this particular scenario, that of transforming the movable that was purchased to such a degree that one can no longer say that the thing purchased is the same thing be sold, it cannot be said that upon purchasing the wood, the individual had the intention of re-selling that wood. In other words, once there is a total transformation, it becomes evident that the purchase of the movable was done with the intention of manufacture and not of re-sale. In this way, one of the major requisites of article 5(a) comes missing and therefore, article 5(a) does not apply. This point was further illustrated in *Scicluna v. Diego* where the Court said the defendant, a carpenter, cannot be said to be carrying out acts of trade because the acquisition that he makes of material is done principally for the purpose of exercising his craft, even though ultimately that material will be re-sold in the form of something else. With that being said, it is pertinent to point out that just because a given act is not considered an act of trade under one sub-article of article 5, that does not necessarily mean that that act is exempt from the entire list. It could very well be that the act is still considered to be an act of trade, only by virtue of a different sub-article.

As already stated, it could very well be that although the individual who purchases material for the purpose of manufacturing it and selling the final product does not fall under article 5(a), provided that that person satisfies certain conditions, those acts could be considered acts of trade under article 5(g). Article 5(g) speaks of undertakings however, it is not any undertaking that is an act of trade in terms of this paragraph, but it must be an undertaking relating to one of the spheres of activities specified. In this way, aside from establishing the existence of an undertaking, in order for that undertaking to be regulated by article 5(g) such a sphere of activity also has to be established.

Essentially, an undertaking is a complex organisation of the factors of production done for economic purposes, that is to satisfy the needs of the market and to make a profit, the acts of which are commercial in nature. Bolaffio, an Italian jurist, identified three main requisites that need to exist in order to successfully establish the existence of an undertaking: the organisation of factors of production, the satisfaction of the needs of the market through producing a good or service for a price and lastly, the element of risk as a result of a substantial investment. Aside from these three conditions, Maltese case law also points towards a fourth condition, that of making a profit. In *Azzopardi v. Agius Ferrante*, the Court declared that an undertaking for cultural purposes would not constitute an undertaking regulated by article 5(g). With that being said, in *Despott v. Borg noe,* the Court ruled that *'huwa* [the element of profit] *konnaturali għall-intrapriża, imma m'huwiex fattur determinanti...'* Therefore, here one is faced with two contradicotry judgements with the latter arguing that the elment of profit is not a determining factor.

Once an undertaking has been established, one can move on to see whether or not such undertaking satisfies one of the spheres of activities specified in article 5(g). On this point, it is pertinent to point out that once the existence of an undertaking that relates to one of the spheres specified in article 5(g) has been established, any act relating to that undertaking is also an act of trade under article 5(i). Essentially the undertaking extends its commercial nature to the acts carried out by virtue of that undertaking.

In the scenario being dealt with here, that of the transformation of materials, that would fall under manufacture. In this way, if the person buying the materials and transforming them has organised the factors of production, sells the products to consumers at a price, and has taken a risk in the investment made, the acts that are exercised through the undertaking are acts of trade. In other words, the act of manufacturing material and subsequently selling the end product by means of an undertaking, is an act of trade. In light of this, if the person who carries out a complete transformation of materials and consequently does not fall under article 5(a) is merely a locatore d'opera, the acts of that person neither fall under article 5(g). That is to say, a locatore d'opera is distinguished from a person who is carrying out an undertaking as he/she lacks the essential requisites put down by Bolaffio. In this way, it is not every act of manufacture which is an act of trade under article 5(g) but it has to be a result of an undertaking. Essentially, the comparison being made here is between the person who invests in capital, in wages, and in raw materials and that person who merely hires out his own labour for the purpose of executing an order. This does not rule out the possibility of the locatore d'opera hiring one or two people to help him in his manufacture but that in itself would not be sufficient to establish an undertaking. With that being said, it is the Court that will determine the dividing line. In *Camilleri v. Spiteri*, the Court said that while a carpenter is not essentially a trader, if that same carpenter becomes an enterpriser whereby he speculates on the work of his employees and the material that he buys, in that case he becomes a trader for all intents and purposes of law.

Limited Liability Companies

Article 67: "A company is formed by means of a capital divided into shares held by its members. The members' liability is limited to the amount, if any, unpaid on the shares respectively held by each of them."

Without a doubt, limited liability companies take the throne when compared to other commercial partnerships, with over 90,000 registered limited liability companies in Malta. Having originated from the joint stock company, limited liability companies nowadays have grown in unthinkable ways, becoming, as F. Cremona rightly stated, "so gigantic as to be beyond the financial capacity of individuals or the combined powers of a few persons." Moreover, besides its main attraction, that of limited liability of its shareholders, its flexibility, resiliency, and limitless options in conducting business are only a few of its main attractions.

First and foremost, the limited liability company, as its name implies, confers upon its shareholders limited liability. As laid down by article 67 of the Companies Act, *'The members' liability is limited to the amount, if any, unpaid on the shares respectively held by each of them'.* Essentially, what this means is that in the case that the company's assets prove to be insufficient in meeting the legitimate demands of the company's creditors, the shareholders have no obligation to make good for any balance. In this way, even if the personal assets of the shareholders are sufficient in paying off the creditors of the company, they cannot be 'attacked'. This by far constitutes an exception to the cardinal rule in civil law, that whoever enters into an obligation is obliged to fulfil that obligation with all their property both present and future. Of course, this is the rule but there are exceptions in the case that significant abuse is discovered in the course of the winding up of the company. By way of comparison, the partners of the partnership en nom collectif established by article 7 of the Companies Act do not benefit from limited liability as the partners guarantee, unlimitedly and joint and severally the obligations of the partnership. Similarly, the general partners of the partnership en nom commandite do not benefit from unlimited liability however, in this case, the partnership en commandite is also constituted of limited partners whom, like shareholders, enjoy limited liability. Here, it is pertinent to point out that shareholders are only limited to their share in the company and therefore, are not responsible for the actions of others as is the case in the other two partnerships.

Another major characteristic of the limited liability company is that its capital is divided into shares. Essentially, what this means is that through contributing to the company, shareholders obtain a share of the ownership of the company, which in turn results in control over the company. In light of this, the more shares one has in the company, the more powerful and the more control he/she has. This makes sense since the more shares one buys in a company, the bigger risk they take as although in the case of insolvency their personal assets will always remain so-to-speak 'out of bounds' there is still a possibility that they lose their share in the company. That is to say, the bigger the share the more there is to lose. The fact that a company's capital is divided into shares also allows for greater flexibility as such shares can be transferred from one person or one company to another through the act of sale or purchase. This creates a stark comparison with partnerships en nom collectif which are formed through the contributions in money, in kind or in future personal services by each partner. By way of this comparison, the extent of the flexibility of the transferability comes to the fore when compared to the scenario of trying to assign one's interest in a partnership.

When viewed from the standpoint of taxation, limited liability companies are also seen from a positive light in this regard as the company is taxed in its own right as opposed to the other two forms of partnerships. In this way, companies are seen as tax efficient which is a major consideration when deciding on a business model as taxes take up a large chunk of earnings.

Of course, like with anything else, limited liability companies also have their disadvantages. In line with article 163 of the Companies Act, companies are required to keep proper accounting records if they are to remain in good standing. In this way, the Companies Act, in order to compensate for the limited liability of the shareholders, and therefore for the lack of protection vis-a-vis third parties, stringently regulates companies. In filing annual returns as well as audit accounts, a company faces hefty fees, making companies overall more costly to run. Of course, this is seen as a disadvantage when compared to the other two forms of partnerships, provided that the partnership en nom commandite opts not to divide its capital into shares, since they operate in the absence of the obligation to file audit accounts, mostly due to the fact that their creditors are widely protected by virtue of the unlimited joint and several liability of the partners. If worse comes to worse, creditors of such partnerships can always turn to the personal assets of the partners to make good the balance that exists between them, a protection that comes missing in companies. Besides the filing of such accounts, the Companies Act also is more stringent in the way it imposes formalities and procedures. To give an example, chapter VII of the Companies Act is solely dedicated to meetings and resolutions of companies. In this respect, partnerships en nom collectif and en nom commandite are more flexible in the sense that the Companies Act leaves a lot to the discretion of the partners, who can adjust the deed of partnership upon agreement of the partners. This is also seen in the way companies are wound up, which is regulated by Title II of the Companies Act, titled *'Dissolution and consequential winding up of companies.'* Among such strict requirements, a company also has to appoint a liquidator.

A last major disadvantage of companies is that they are greatly subject to abuse. Over here, it is pertinent to point out that limited liability and separate juridical personality are very much linked. In the case that separate juridical personality is abused of, *'the members' liability is limited to the amount, if any, unpaid on the shares respectively held by each of them'* as established in article 67 becomes subject to what is known as the piercing of the corporate vail which involves pushing the separate legal personality of the company aside, or rather to maintain the metaphor here, the lifting of the vail, in order to reveal the members and directors of the company. Of course, there have to be grounds on which such lifting of the corporate vail is justified such as in the case of fraudulent trading. In the case that the corporate vail is lifted, a judgement is issued against the members whoever they may be, in their personal capacity, hence the abrogation of separate juridical personality in this case. In the landmark judgement of the *Price Club* case, the fact that Price Club Operators Ltd continued trading and incurring debts when they were well aware that company was insolvent, amounted to fraudulent trading under article 315(1) of the Companies Act. In this case, the corporate vail was pierced resulting in the personal liability, and not that of the company, *'without any limitation of liability'* (Article 315(1)) for the debts of Price Club Operators Ltd.

The notion of lifting of the corporate vail

The concept of separate juridical personality, whereby a company has a legal personality that is separate and distinct from the persons constituting it, has often been described as 'opaque and impassable' (Gower). While the fact that separate juridical personality has allowed for more flexible means of doing business is generally uncontested, it has also taken the form of a 'protector' for wrongdoers. In this way, the lifting of the corporate vail is essential so that this notion which has resulted in so much good, will not, simultaneously be the cause of so much bad.

Before analysing the notion of the lifting of the corporate vail further, it is essential to give a brief understanding on what separate juridical personality entails. By virtue of article 4(4) of the Companies Act, upon registration, a company is bestowed by law a legal personality of its own whereby for all intents and purposes of law, it is considered a person in its own right. In practice, what this means is that a company has a set of assets and liabilities that are separate from those of its shareholders and consequently, it can own property in its own name, sue and be sued, be a plaintiff or defendant in its own name and so on. In the case of companies, as opposed to the situation in partnerships en nom collectif and the general partners of the partnership en nom commandite, separate juridical personality is highly linked with limited liability which is enjoyed by its shareholders. Of course, the two mustn't be misunderstood to be interdependent. That is to say, while separate juridical personality can exist in the absence of limited liability, limited liability depends on the fact that the company has a legal existence separate of its shareholders. Therefore, the fact that the shareholders of a company do not assume the role of guarantors of the company is only possible because the company has a separate existence from them. Conversely, partners in a partnership en nom collectif and the general partners in a partnership en nom commandite very much guarantee the obligations of the partnership with their personal assets in the case that the debts of the partnership go beyond its assets, even though the partnership is a separate legal person. With that being said, neither separate juridical personality nor limited liability in the case of companies is absolute whereby there exists situations which justify the lifting of the corporate vail.

It is to be mentioned at the outset that the corporate vail can be 'lifted' or 'pierced' in two ways, namely by virtue of statutory inroads or else, judicial inroads. The former refers to when the lifting of the corporate vail is justified, or permitted, by an express provision in the law. For example, articles 315(1) and 316(1) cater for fraudulent trading and wrongful trading respectively. In the case of fraudulent trading, if in the course of the winding up of the company it appears that there has been some form of fraudulent trading, any persons who knowingly took part in such fraudulent trading will be held personally liable and therefore, the separate juridical personality of the company is set aside. Similarly, article 316(1) refers to the situation where a company has been dissolved and is insolvent, and it appears that the directors of the company new or ought to have known prior to the liquidation that this would be the case. It is to be noted that only the liquidator has the right to file such an action and that this also provides for a situation where the corporate vail can be pierced. In the landmark judgement of the *Price Club* case, the fact that Price Club Operators Ltd continued trading and incurring debts when they were well aware that the company was insolvent amounted to fraudulent trading under article 315(1) of the Companies Act. In this case, the corporate vail was pierced resulting in the personal liability, and not that of the company, *'without any limitation of liability'* (Article 315(1)) for the debts of Price Club Operators Ltd. Therefore, in this situation, as a result of the fact that the separate juridical personality of the company was pushed aside and the directors, or whoever they may be, of the company are being dealt with in their personal capacity, the personal assets of those individuals were 'attacked' to make good for any balance vis-a-vis third parties. On the other hand, judicial inroads refer to when certain circumstances exist that would justify the lifting of the corporate vail, yet no such provisions, or statutory inroads, exist. Therefore, the court does so on its own accord. In the case *Dr Jose Herrera noe et vs Tancred Tabone et noe* (Court of Appeal) (1992), the Court of Appeal declared that *'il-konvenuti nominee jidher li mxew b'mala fede kbira'*, further illustrating that good faith is supreme and must always be observed and preserved, even if this means lifting the corporate vail.

MARTINA CAMILLERI (1ST YEAR)

Short essays

1. **WHAT, IN YOUR VIEW, ARE THE MAIN DISTINGUISHING FEATURES BETWEEN THE THREE TYPES OF COMMERCIAL PARTNERSHIPS RECOGNISED UNDER MALTESE LAW? EXPLAIN WHY YOU CONSIDER THEM SO.**

When in the realm of commercial partnerships, the most referred to law is undoubtedly the Companies Act which came into being in 1995, but since then has undergone numerous amendments. That being said, the three types of commercial partnerships identified in the Companies Act in article 4(1), namely, the partnership en nom collectif, the partnership en nom commandite/limited partnership and the company, were essentially transposed lock, stock and barrel from its pre-cursor, the Commercial Partnership Ordinance. Moreover, it is important to recognise that whilst these kinds of partnerships may share some similar features, they are very different from each other, and such differences are to be highlighted.

Perhaps, whilst at the same time pointing out clear distinguishing features, it is of outmost importance to give a brief overview of each type of commercial partnership. The first kind of partnership listed in the Companies Act is the partnership en nom collectif which, according to article 7, *"obligations are guaranteed by the joint and several unlimited liability of the partners themselves"*. It is worth drawing attention to the fact that this provision outlines two major determining characteristics of the partnership en nom collectif, namely that all the partners have unlimited liability meaning that if the assets of the partnerships do not suffice to meet the legitimate demands of creditors, then the partners have to make good for any balance and that they are joint and severally liable meaning that creditors can essentially pick and choose who to sue in the case that the assets of the partnership have already been distinguished and the creditor still has left what is owed to him. Moving on, the second type of commercial partnership is the partnership en nom commandite/limited partnership which has common characteristics but is different from the partnership en nom collectif. Contrary to the partnership en nom collectif, according to article 51 of the Companies Act, the partnership en nom commandite is made up of at least one general partner as well as a minimum of one limited partner. The general partners are essentially the same as the partners making up the partnership en nom collectif in that they have unlimited joint and several liability, while the limited partners differ since they have limited liability. Limited liability partners, unlike general partners, are limited to the share they have in the partnership, and, therefore, in the case that the assets of the company do not suffice its creditors, the personal assets of the limited partners cannot be 'attacked'. Here we see a distinguishing factor between the two in that a partnership en nom collectif is solely made up of general partners and therefore, no partner benefits from unlimited liability. Lastly, the limited liability company again differs from the other two types of commercial partnerships because in this case, in line with article 67 of the Companies Act, all shareholders benefit from limited liability whereby the liability of the members is limited to the part unpaid on the shares they hold. In the case that the company is wound up, if the assets of the company do not suffice its creditors, even if the members have in their personal capacity enough assets to do so, those assets cannot be attacked. Here, it is essential to point out that it is not the company itself that has limited liability, as the company itself is still fully responsible for its liabilities.

Another distinguishing feature between the types of commercial partnerships is precisely the way in which they are validly constituted, maintaining that in order to be validly constituted every commercial partnership has to be registered with the Malta Business Registry. In the case of both a partnership en nom collectif and a partnership en nom commandite, in line with article 14 of the Companies Act, a deed of partnership must be entered into and signed, and this must be accompanied by a certificate of registration. Moreover, the deed of partnership is only registered so long as the Registrar is satisfied that all the conditions stipulated in article 14 are abided by. With that being said, while partners cannot remove from the list in article 14, such list is not exhaustive and therefore, other conditions may be added. By contrast, a company is constituted by way of entering into a memorandum of association along with a certificate of registration. Moreover, the partners will also draw up the articles of association which is the so to speak rule book by which the company will run. Upon registration, companies are given a registration number, known as the 'C' number.

Besides, it is worth drawing attention to the fact that, according to article 67, *"a company is formed by means of a capital divided into shares held by its members"*. This is undoubtedly a major advantage of the limited liability company as it allows for more flexibility. Perhaps, this way in which capital is divided in a limited liability company only poses a contrast with regards to the partnership en nom collectif because while the partnership en nom collectif is formed by the contribution in money, in kind or in future personal services, according to article 66 of the Companies Act, the partnership en nom commandite actually has the option of dividing its capital into shares. Here, it is pertinent to point out that once a partnership en nom commandite opts for its capital to be divided into shares, provisions of Chapters IX and X of the Companies Act regarding the filing of audit accounts become applicable to it. In the case of a partnership en nom collectif, there is no need to file audit accounts as the unlimited liability of the partners provides the creditors of such partnership with a great deal of protection. In this way, partnerships en nom collectif are less stringently regulates then companies and partnerships en nom commandite that opt for diving their capital into shares.

Other distinguishing features would include the fact that a limited liability is taxed in its own right whereas in the case of the other two types of partnerships, the income of a partner is to be included in the personal income tax return of the partners.

2. WHAT ARE THE MAIN COMMON FEATURES OF THE THREE FORMS OF COMMERCIAL PARTNERSHIP? DESCRIBE ANY TWO OF THEM.

When in the realm of commercial partnerships, the most referred to law is undoubtedly the Companies Act which came into being in 1995, but since then has undergone numerous amendments. That being said, the three types of commercial partnerships identified in the Companies Act in article 4(1), namely, the partnership en nom collectif, the partnership en nom commandite/limited partnership and the company, were essentially transposed lock, stock and barrel from its pre-cursor, the Commercial Partnership Ordinance. Moreover, it is important to recognise that whilst these kinds of partnerships may, at face value, appear to be extremely different, upon further analysis it quickly becomes evident that they have their similarities.

Highlighted by article 4(4) of the Companies Act, perhaps the most distinctive common feature between the three types of commercial partnerships is the bestowal by law of separate juridical personality. In this way, regardless of whether a partnership has limited liability or unlimited liability, that partnership has a legal personality that is separate and distinct from that of the partners forming it. As a result, commercial partnerships can do a number of things that were initially attributed only the physical persons. Here, it is to be noted that not all entities are bestowed such legal personality and therefore, this is seen as an exclusive honour, so to speak, of commercial partnerships. Across the board, the general consequence that is attributed to separate legal personality is that a given commercial partnership has its own assets and its own liabilities that are separate from the assets and liabilities of its members. Consequently, a commercial partnership is capable of owning property in its own name, can sue and be sued, can enter into contracts, is a plaintiff or defendant in its own name and so on. In other words, a commercial partnership is to be considered a separate person for all intents and purposes of law.

Perhaps separate juridical personality is even further highlighted in partnerships en nom collectif and partnerships en nom commandite in that before the assets of the general partners, in the case of partnerships en nom commandite, and those of all partners in the case of partnerships en nom collectif, can be attacked, the assets of the partnership must firstly be exhausted. That is to say, the personal assets of the partners can only be resorted to once the assets of the partnership no longer suffice the creditors and this is precisely because a commercial partnership has a legal personality separate from that of its partners. That being said, in the case of a limited liability company the personal assets of the shareholders can never be resorted to.

It is pertinent to point out that a commercial partnership only acquires separate juridical personality upon registration, and this no longer continues once the name of the commercial partnership is struck of the registrar. Therefore, no matter what type of commercial partnership is being dealt with, in order to come into existence, it must be registered at the Malta Business Registry (the MBR). In any case, when a commercial partnership starts operating before having been registered, certain consequences laid down in the law will ensue. Furthermore, in line with article 5 of the Companies Act, once the commercial partnership is registered, it is governed by the Companies Act.

Moreover, in the case of all commercial partnerships, upon registration with the Malta Business Registry (MBR), the commercial partnership acquires, ex lege, the status of a trader and this is by virtue of article 4 of the Commercial Code. Consequently, all commercial partnerships are subject to the provisions of the law governing traders, bestowing on them certain rights and obligations. Of importance here is namely article 7 of the Commercial Code, whereby every act of a commercial partnership, unless proven otherwise is presumed to be an act of trade. Moreover, such acts can be of whatever nature and do not include the objective acts of trade listed under article 5 and 6 of the Commercial Code which cannot be made to depend on a rebuttable presumption.

Ultimately, regardless of the type partnership, in order for it come into existence, there pooling of capital is needed and there is always the common aim among the partners of making a profit.

3. **<u>GIVE A BRIEF HISTORICAL OUTLINE OF THE DEVELOPMENT OF THE CONCEPT OF A COMMERCIAL PARTNERSHIP LEADING UP TO THE THREE TYPES OF COMMERCIAL PARTNERSHIPS RECOGNISED UNDER MALTESE LAW AND DESCRIBE WHAT ARE THEIR MAIN COMMON FEATURES AND THE MAJOR FACTORS THAT DIFFERENTIATE ONE FROM THE OTHER TWO.</u>**

<u>Distinguishing features</u>

When it comes to the three types of partnerships found under the Companies Act, it is worth noting that although subject to some amendments, the provisions in relation to them remain largely unchanged from the Commercial Partnerships Ordinance of 1962. One of the main distinguishing features is that while all the members of a limited liability company enjoy limited liability, in the case of the partnership en nom collectif, all partners are general partners, and therefore subject to unlimited liability, while in the partnership en nom commandite at least one partners has to be a general partner. This is a relevant distinction so much so, that over 90,000 limited liability companies are registered in Malta, and this is primarily due such limited liability enjoyed by the shareholders. Other distinguishing features include tax advantages whereby in a limited liability company the company is taxed in its own right while in the other two types of commercial partnerships, the income of the partners is included in the personal income tax of the partner. Moreover, the capital of a company is divided into shares. While partnerships en nom commandite have this option, partnerships en nom collectif are limited to each partner putting in his contribution in money, in kind or in future personal service and receiving interest on such input. Lastly, while limited liability companies have to file audited accounts, the general rule is that the other two types of partnerships do not, making them cheaper to run.

Similar:

1. Separate juridical personality
2. The fact that all commercial partnerships become traders ex post facto
3. All need to be registered in the MBR.

4. CRITICALLY DISCUSS THE ECONOMIC AND LEGAL RATIONALE UNDERPINNING COMMERCIAL PARTNERSHIPS.

Perhaps nowadays it is easy to take for granted societal developments which many cannot imagine living without. Commercial partnerships, though easily considered as fundamental in the workings of society, have not always existed. That is to say, the phenomenon of a legal person living side by side with physical persons is revolutionary but can only be understood once having considered the reasons behind its creation. It is pertinent to point out that economic developments and legal developments go hand in hand. Moreover, as a result of such developments, nowadays our Companies Act lays down three types of commercial partnerships: the partnership en nom collectif, the partnership en nom commandite and the company.

The notion of associating oneself is, and has always been, a natural instinct, be it in the form of religious groups, friendships, marriage and so on. That being said, the commercial field was no exception to this natural instinct, with the consequential development of associations of persons for the purpose of trade. While prior to the development of commercial partnerships the main focus was on sole traders, it soon became apparent that much greater benefits are reaped through the pooling of capital, labour and initiative of several persons when compared to what a single person can achieve. It became clear that through the organisation of factors of production, more capital will allow for more production, and more production would allow for an increase in the overall acts of trade. In this way, if a sole individual was capable of carrying out say twenty acts of trade a year, an association of persons would be able to carry out two-hundred acts of trade a year. This realisation was crucial towards both economic and legal development. In the words of Professor F. Cremona, *"trade became in due course the principal object of such associations, for it was realised that only by such means traders could satisfy adequately the increasing needs of consumers."* Because commercial partnerships and the regulation by law of which are very much a development in themselves, it is pertinent to point out that in early times the operation of such associations of persons existed in the absence of necessary laws. In this way, laws gradually were developed to cater for such developments but did not create those same developments.

Building on this realisation, under Roman law existed the idea of *societas*, which nowadays, would equate to the concept of a partnership. The *societas* was recognised under law as being a consensual contract where two or more persons would come together and agree to work towards a common goal for their mutual benefit. Here, it is pertinent to focus on the fact that the common goal of association under Roman law was mutual benefit. Although partnerships were sometimes formed to carry out transactions for a profit, which is an essential element in commercial partnerships nowadays, this was the exception and not the rule. Moreover, two types of partnerships existed, the universal partnership and the particular partnership with the latter still maintaining its validity today as seen in the creation of companies to bid for a particular tender. It is pertinent to point out, however, that such associations under Roman law were not bestowed separate juridical personality, as are commercial partnerships today. What this meant was that, under Roman law, the *societas* did not have rights and obligations in its own legal capacity but rather the rights and obligations regarding the partnership itself existed within the individuals making up that same partnership.

With the lapse of time, the partnership 'en nom collectif' was developed which as is still the position today, rendered the partners joint and severally liable for the obligations incurred by the partnership. This form of partnership owes its existence to families in the Medieval Ages who started working towards trade and industry. Moreover, the partnership en nom collectif also resulted in the contract of partnership, showing legal developments as a result of economic developments. Soon later, the partnership en nom commandite would come into existence as a reaction to the fact that the partnership en nom commandite was not sufficient for large amounts of capital and labour. Moreover, it came about as a so-to-speak initiative to encourage people pertaining to the upper class to invest as under the partnership en nom commandite, one could enjoy the benefits of limited liability under the title of a limited partner. In this way, both the partnership en nom collectif as well as the partnership en nom commandite came as accommodators of the every-developing economy through the ever-expanding development of trade. The limited liability company appeared later, with the first one being the East India Company, and now it finds itself in the position of the most popular vehicle of trade in Malta with over 90,000 registered limited liability companies. As Professor F. Cremona rightly stated, *''limited liability companies have developed considerably, and they have become a factor of paramount importance in the economic, industrial and commercial life of all nations.'*

Of course, Malta does not exist in a vacuum and therefore, with time, was developed by the ever-expanding and maturing of the notion of association of person. Needless to say, the Commercial Code has stood the test of time, but after the atrocities that took place in the Second World War, it was felt that Malta desperately needed to modernise its existing legislation with the hopes that it would result in economic growth. This gave rise to the Commercial Partnerships Ordinance of 1962 which would eventually be superseded by the Companies Act of 1995. While the Commercial Partnership Ordinance was a huge quantum leap, including the involvement of the three types of partnerships, it was nevertheless lacking in important areas, namely the winding up of companies, and the duties of liquidators and directors, which are all essential areas that desperately needed to be regulated. Consequently, the Companies Act came into force in 1995, which both transposed provisions from the previous law lock, stock and barrel, namely the three types of partnerships, as well as included new provisions, in particular with relation to winding up and insolvency, solving the deficiencies that existed in the Commercial Partnerships Ordinance. Moreover, the

Companies Act of 1995 is still found in Maltese legislation, of course, subject to amendments over the years.

- **<u>"A COMMERCIAL PARTNERSHIP IS AN ASSOCIATION OF PERSON CARRYING ON BUSINESS IN COMMON WITH A VIEW TO MAKING A PROFIT." CRITICALLY ANALYSE THIS STATEMENT IN THE LIGHT OF THE DEVELOPMENTS THAT HAVE TAKEN PLACE IN THE FORMATION OF COMMERCIAL PARTNERSHIPS.</u>**

5. **<u>CRITICALLY EXAMINE THE ECONOMIC AND LEGAL JUSTIFICATION UNDERPINNING THE FORMATION OF COMMERCIAL PARTNERSHIPS UNDER MALTESE LAW.</u>**

Perhaps nowadays it is easy to take for granted societal developments which many cannot imagine living without. Commercial partnerships, though easily considered as fundamental in the workings of society, have not always existed. That is to say, the phenomenon of a legal person living side by side with physical persons is revolutionary but can only be understood once having considered the reasons behind its creation. It is pertinent to point out that economic developments and legal developments go hand in hand. Moreover, as a result of such developments, nowadays our Companies Act lays down three types of commercial partnerships: the partnership en nom collectif, the partnership en nom commandite and the company.

Before focusing on Maltese law and the situation as it were in the introduction of commercial partnerships, it is crucial to understand the reasons behind the creation of commercial partnership in antiquity since these same reasons apply to commercial partnerships regulated by Maltese law. The notion of associating oneself is, and has always been, a natural instinct, be it in the form of religious groups, friendships, marriage and so on. That being said, the commercial field was no exception to this natural instinct, with the consequential development of associations of persons for the purpose of trade. While prior to the development of commercial partnerships the main focus was on sole traders, it soon became apparent that much greater benefits are reaped through the pooling of capital, labour and initiative of several persons when compared to what a single person can achieve. It became clear that through the organisation of factors of production, more capital will allow for more production, and more production would allow for an increase in the overall acts of trade. In this way, if a sole individual was capable of carrying out say twenty acts of trade a year, an association of persons would be able to carry out two-hundred acts of trade a year. This realisation was crucial towards both economic and legal development. In the words of Professor F. Cremona, *"trade became in due course the principal object of such associations, for it was realised that only by such means traders could satisfy adequately the increasing needs of consumers."* Because commercial partnerships and the regulation by law of which are very much a development in themselves, it is pertinent to point out that in early times the operation of such associations of persons existed in the absence of necessary laws. In this way, laws gradually were developed to cater for such developments but did not create those same developments.

Simply put, due to the fact that the Maltese Islands do not exist in a vacuum, the Roman notion of *societas*, the partnership en nom collectif introduced in the Medieval era as well as the partnership en nom commandite and later on the limited liability company, all played a role in the necessity of recognition of such partnerships under Maltese legislation. Here, it is pertinent to point out that due to the fact that Malta was once a British colony, Maltese Company Law, unlike Maltese Public law, is heavily common-law based meaning that it draws heavily on its English counterparts. Needless to say, the Commercial Code has proved sufficient for countless of years but after the atrocities that took place in the Second World War, it was felt that Malta desperately needed to modernise its existing legislation with the hopes that it would result in economic growth. This gave rise to the Commercial Partnerships Ordinance of 1962 which would eventually be superseded by the Companies Act of 1995. Undoubtedly, the Commercial Partnership Ordinance was a huge quantum leap, successfully regulating the limited liability company and resulting in greater legal as well as commercial developments overall. That being said, the Commercial Partnership Ordinance was severely lacking in essential departments, namely with regards to laws regulating insolvency, the duties of liquidators as well as the duties of directors which are so stringently regulated nowadays. It came to be understood that while the regulation of companies by law was a huge achievement, the existence of commercial partnerships in the absence of a legal framework catering for liquidation needed to be addressed. Consequently, the Companies Act came into force in 1995 which transposed provisions regarding partnerships en nom collectif and en nom commandite lock, stock and barrel from the Commercial Partnership Ordinance yet, at the same time, introduced a number of new provisions. Such developments included the *ultra vires* doctrine, and new provisions relating to liquidation, including the bankruptcy regime. Here, the concept of accountability of companies was born in Maltese legislation, illustrating the needs of society.

Nowadays, whilst it is important to understand the Maltese Companies Act 1995 in its rudimentary form, as well as the reasons as to why its existence was deemed so essential, one mustn't stop there. Firstly, although today the Companies Act that regulates commercial partnerships is essentially the same Act that was introduced in 1995, it has undergone a series of amendments along the years. In this way, it would be incorrect to amalgamate the Companies Act that existed as it were in 1995, and the Companies Act that exists today, in 2021. Moreover, with Independence in 1964, Malta has subjected itself to a number of international obligations, one of the major ones being the membership of the European Union in 2004, the legal order of which is binding over Maltese legislation. Of relevance here is the Second Directive relating to Company Law which highlighted the need for harmonisation. In this way, when in the realm of commercial law, one mustn't solely focus on local legislation as it isn't the sole legal order regulating it. With accession into the European Union, the Companies Act had to be brought in line with European Union law, a relatively easy task considering that Maltese private law is heavily common law based and the United Kingdom was already a member of the EU. Moreover, one must also keep in mind that while the Companies Act is the main piece of legislation regulating commercial partnerships, other special laws exist such as the Financial Market Act. Such acts of legislation assist in the understanding of how business organisations operate, and therefore their importance mustn't be undermined.

6. HOW IS THE LEGAL PERSONALITY ATTRIBUTED TO A COMMERCIAL PARTNERSHIP CREATED; AND WHAT ARE ITS CONSEQUENCES?

Having been established by the landmark judgement of *Salmon v. Salmon* decided by the House of Lords in 1897, today separate juridical personality is a cardinal principle in Company Law, allowing for more flexibility as a means of doing business. It should be mentioned at the outset that under Maltese Law, each of the three commercial partnerships these are bestowed by law a legal personality that is separate and distinct to the personality of the physical persons making up the given commercial partnership. As a result, nowadays, commercial partnerships can do a number of things that were initially attributed only to physical persons.

As above-mentioned, the notion of separate legal personality is one that is common amongst the three forms of commercial partnerships. Moreover, the Companies Act, by virtue of article 4(4), lays down this principle, along with the manner in which it comes about. Upon registration, similar to the acquirement of the status of a trader, commercial partnerships bestowed ex lege a legal personality distinct from that of its members, and such personality shall continue to exist up until the given commercial partnership is struck off the register, in which case the partnership would cease to exist. What this means is that the existence of legal personality is very much dependant on the existence of the commercial partnership. In the case that a commercial partnership is liquidated, that legal personality too shall cease to exist, but this is only so once the process of completed. In light of this, it is to be noted that not all entities are bestowed such legal personality and therefore, this is seen as an exclusive honour, so to speak, of commercial partnerships.

Of course, with being given separate juridical personality comes certain consequences, which both portray legal personality as a commonality between the commercial partnerships as well as brings out their differences. Across the board, the general consequence that is attributed to separate legal personality is that a given commercial partnership has its own assets and its own liabilities that are separate from the assets and liabilities of its members. Consequently, a commercial partnership is capable of owning property in its own name, can sue and be sued, can enter into contracts, is a plaintiff or defendant in its own name and so on. In other words, a commercial partnership is to be considered a separate person for all intents and purposes of law. In one case, that of *Macura v. Northern Assurance Co Ltd* (1925), Lord Wrenbury declared *'the corporator even if he holds all the shares is not the corporation'* encompassing the true meaning of separate juridical personality whereby one has to make a distinctive differentiation between the assets and the liabilities of the commercial partnership and the assets and liabilities of the partners or shareholders.

With that being said, it is pertinent to point out that the fact that a commercial partnership has a legal identity that is separate from that of its partners takes on a new level of importance in the case of partnerships en nom collectif, and, to a more limited extent, partnerships en nom commandite due to their members having unlimited liability. Limited liability and separate juridical personality are not interchangeable as one can exist without the other. In the case of a partnership en nom collectif, and the general partners in a partnership en nom commandite, separate juridical personality assumes special prominence because the law only grants an action to the creditors of the partnership against the individual partners so long as the creditors have exhausted the assets of the partnership. That is to say, no action lies against the owners of the partnership unless the assets of the partnership are discussed. In this way, a creditor cannot seek payment from the personal assets of a partner if the assets of the partnership itself suffice that creditor. Of course, here the focus is on the first two forms of commercial partnerships because so long as there isn't the lifting of the corporate vail, in any case the assets of the members of a limited liability company are not subject to its creditors.

While separate juridical personality can exist in the absence of limited liability, limited liability cannot exist if the entity is not bestowed a legal personality separate from that of its members. In light of this, it should be noted that while separate legal personality has resulted in a great deal of flexibility and ultimately, economic growth, this can greatly be abused of. As established in article 67 of the Companies Act, *'the members' liability is limited to the amount, if any, unpaid on the shares respectively held by each of them.'* This, although rare, is subject to what is known as the piercing of the corporate vail which involves pushing the separate legal personality of the company aside, or rather to maintain the metaphor here, the lifting of the vail, in order to reveal the members and directors of the company. Of course, there have to be grounds on which such lifting of the corporate vail is justified such as in the case of fraudulent trading. Therefore, even if legally speaking, separate juridical personality seizes to exist only with the name of the commercial partnership being struck of the register, this isn't, in the words of Gower, as 'opaque and impassable' as one may think. Moreover, in the case that the corporate vail is lifted, a judgement is issued against the members whoever they may be, in their personal capacity, hence the abrogation of separate juridical personality in this case. In the landmark judgement of the *Price Club* case, the fact that Price Club Operators Ltd continued trading and incurring debts when they were well aware that company was insolvent, amounted to fraudulent trading under article 315(1) of the Companies Act. In this case, the corporate vail was pierced resulting in the personal liability, and not that of the company, *'without any limitation of liability'* (Article 315(1)) for the debts of Price Club Operators Ltd.

<u>The Oversee company</u>

1. Write about **what amounts to an oversea company** for the purposes of the Companies Act (Chapter 386, Laws of Malta), giving at least one example. Please also indicate two of the main **obligations** that such companies face under the Act. Done
2. Describe four salient **features** which relate to the regulation of oversea companies having a place of business in Malta in terms of the Companies Act. You may frame your answer in bullet point form. Done
   a. Legal personality
   b. Constituted outside Malta
   c. Direct operation
   d. Place of business
   e. Registration as if a national company
3. Describe briefly **how and why** 'oversea companies' are regulated under the Companies Act, 1995
4. What are the main objectives of regulating oversea companies?
   - **Since oversea companies establish a branch or place of business in Malta and are operating directly and not through a registered Maltese company, it is essential that oversea companies are regulated in a similar way as national companies would be, as illustrated in articles 385 and 387 in order to protect third parties that may have any dealings with such company**.

- **Moreover, one of the main obligations conferred upon oversea companies includes the filing of documents with the MBR and this is done for the benefit of the general public, in particular third parties and this is known as the disclosure of information.**
- Transparency
- Creditors have a right to know a number of things including whether or not the company is in good standing, whether it is doing well financially, hence article 387.
- Another thing to mention aside from creditors is the fact that like with any national company, oversea companies too have the possibility of being abused and therefore, it is essential that they are regulated. Although oversea companies can be companies, commercial partnerships and so on, here what is being referred to mostly are companies which benefit from limited liability. such limited liability can be abused by virtue of enjoying separate juridical personality and therefore, it is important that the law recognised oversea companies in order to be able to stipulate any consequences.

5. Describe what may qualify as an "established place of business" for the purposes of the provisions governing Oversea Companies in the Companies Act 1995. In your answer, please give a few examples. Done
6. Discuss the notion of a "branch or a place of business" for the purposes of the rules governing oversea companies in the Companies Act, giving at least two brief examples. Done

QUESTION 1

Write about **what amounts to an oversea company** for the purposes of the Companies Act (Chapter 386, Laws of Malta), giving at least one example. Please also indicate two of the main **obligations** that such companies face under the Act.

At the outset, article 384 of the Companies Act lays down the definition, and, in the same way, the characteristics that make up an oversee company. Moreover, once a foreign company satisfies the conditions laid down in article 384, the rest of Part XI becomes applicable. Namely, article 385 and article 387 stipulate the two main obligations that are conferred upon an oversee company by virtue of its title.

Firstly, in order to satisfy the requirements of an oversee company, the legal organisation has to enjoy legal personality. What this means is that the organisation needs to have a juridical identity that is separate and distinct form the members constituting it. In this way, the organisation, be it a company, commercial partnership and so on, is capable of entering into contracts, suing and be sued, owning property in its own name and so on. In other words, unincorporate entities would not fall under Part XI of the Companies Act. Secondly, as described by article 384 of the Companies Act, an oversee company is *'constituted or incorporated outside Malta'*. What this means is that an oversee company is not set up in Malta, and therefore was never subject to the Maltese provisions constituting that particular legal organisation, but rather was registered oversees in order to come into existence. On this point, it is to be noted that a company can only have one nationality which depends on the place where it was registered and, therefore, at no point in time does an oversee company become a local company. Thirdly, in order to amount to an oversea company, it is essential that that company is operating in Malta directly. Here, one needs to make a distinction between foreign companies that operate by means of intermediaries, franchises or agents, and companies which operate directly. Unlike, for example, McDonalds which operates in Malta through a Maltese company, an oversee company directly opens a branch or place of business in Malta and satisfies the needs of consumers directly. Therefore, taking the example of McDonalds again, had McDonalds been set up in Malta directly, and therefore not through a Maltese company, it would have amounted to an oversee company but because the restaurant is not owned in its own name, but rather by a Maltese company, it does not. Therefore, it is imperative that the company directly opens a branch or place of business in Malta, in its own name, and carries out transactions directly.

On this point, the law specifies that in order to establish an oversee company, the company must *'establish a branch or place of business within Malta'*. With regards to the oversee company, everything revolves around the branch or place of business because it is only by virtue of this that the required degree of permanence and visibility is satisfied. That is to say, there has to be something concrete in order for the company to be consider an oversea company and not simply a sole individual who comes here and carries out transactions directly. Ultimately, it is the establishment of a branch or place of business that makes the oversea company regular and habitual. In this regard, a branch or place of business is not limited to a shop or an office, but essentially it encapsulates anything that is permanent therefore including, building sites, warehouses, factories and so on. Moreover, it is pertinent to point out that business is actually carried out within such premises on a regular basis.

Lastly, once the oversee company has established a branch or place of business, it becomes subject to two obligations. Firstly, upon establishment of the branch or place of business, the oversea company has the obligation that within one month, it files a number of documents to the Registrar for registration. What this entails is very much similar to what the registration of a national company would entail, including a copy of the instrument constituting the oversee company, a list of the directors and company secretary if any, and the persons having the legal representation of the oversee company, as well as information such as the name of the branch or place of business, the address, the activities to be carried out and so on. In this way, once it is established that the foreign company is an oversee company, article 385 and all the obligations that come with it, become applicable. Moreover, documents are filed with the Registrar for the benefit of the general public, also known as the notion of disclosure of information. Secondly, article 387 confers upon the oversea company the obligation to prepare accounts at the end of every financial year, as a Maltese registered company would have to do. It expressly provides that *'as, under the provisions of this Act, the directors would, if the company had been a company formed and registered under this Act be required to make out and lay before the company in general meeting.'* Therefore, oversea companies are no exception to the stringent financial rules found in the Companies Act.

In light of this, the Phoenicia Malta was the first oversea company registered in Malta and continues to exist as one. In this way, the Phoenicia Malta has a nationality that is not Maltese, meaning it was set up abroad, it operates directly in Malta without the use of any intermediaries, it established a place of business and of course, registered its place of business in Malta and files financial accounts on a yearly basis.

By having these provisions which are specifically applicable to oversea companies, it is made clear that foreigners are able to carry on business here in Malta in a multitude of ways. In this respect, Malta is extremely liberal, excluding the creation of unnecessary barriers to foreigners wishing to carry on business here altogether.

QUESTIONS 5 & 6

- Describe what may qualify as an "established place of business" for the purposes of the provisions governing Oversea Companies in the Companies Act 1995. In your answer, please give a few examples &
- Discuss the notion of a "branch or a place of business" for the purposes of the rules governing oversea companies in the Companies Act, giving at least two brief examples.

One of the major requisites needed to be satisfied in order for a foreign company to amount to an oversea company is that of the establishment of a branch or place of business. Indeed, this condition must co-exist with others but for the most part, so long as the company has not incorporated a new company in Malta, it can register a branch or place of business here and consequently, it will be subject to Part XI of the Companies Act.

In order to amount to an oversea company, it is essential that that company is operating in Malta directly. Here, one needs to make a distinction between foreign companies that operate by means of intermediaries, franchises or agents, and companies which operate directly through establishing a branch or place of business. Unlike, for example, McDonalds which operates in Malta through a Maltese company, an oversee company directly opens a branch or place of business in Malta and satisfies the needs of consumers directly. Therefore, taking the example of McDonalds again, had McDonalds been set up in Malta directly, and therefore not through a Maltese company, it would have amounted to an oversee company but because the play of business, that being the restaurant, is not owned in its own name, it does not. Therefore, it is imperative that the company directly opens a branch or place of business in Malta, in its own name, and carries out transactions directly.

In this way, the fact that the foreign company must *'establish a branch or place of business within Malta'* is a crucial element of an oversea company. It should be mentioned at the outset that the law does not specify what qualifies as a branch or place of business but simply states that it must be established. In this way, a foreign company operating directly in Malta is not limited in this respect. So long as the branch or place of business is an actual physical place, connoting something regular and habitual, then what the place actually is irrelevant. Therefore, a branch or place of business could be for example, a shop or even a hotel such as in the case of Phoenicia Malta. What is important here is that the actual carrying out of business takes place within such premises and not elsewhere, on a regular basis.

Not only is the requirement of an established branch or place of business laid out in the definition of an oversea company by virtue of article 384, but it is also mentioned in article 385(c). One of the main obligations of an oversea company is the fact that within one month of establishing its branch or place of business, it must deliver a number of documents to the Registrar for registration. Here, among other things, the law requires that the address of the branch or place of business is included, as well as the name under which the branch or place of business will be operating, and the activities to be carried out by such branch or place of business. In this way, it is made clear that the existence of an oversea company depends on the permanence of its branch or place of business and that the activities which are carried out by that company are done through the branch or place of business. In this way, the sole trader who comes to Malta to carry out business directly in an irregular manner and without an established branch or place of business would not be subject to Part XI of the Companies Act.

The Cooperative society

1. Write brief notes that explain the **salient features** of a co-operative society and **how it is regulated by law. Done**

2. (Examine two essential requisites for the valid formation of a commercial partnership.) Describe briefly a few points of **similarity** between a limited liability company and a co-operative society, and a few instances where they **differ**. Done
3. Describe briefly how Cooperative Societies are regulated under Maltese law. Same as number 1
4. What are the main objectives of regulating cooperative societies?
5. Briefly describe the various ways in which a cooperative society differs from a company. Same as number 2
6. What in your view are the advantages that companies have or appear to have over cooperative societies? Mention and briefly describe at least four, enumerating them appropriately.

QUESTION 1
Write brief notes that explain the **salient features** of a co-operative society and **how it is regulated by law.**

According to the International Co-operative Alliance, as well as article 21(1) of the Cooperatives Act, *"a society is an autonomous association of persons united voluntarily to meet their economic, social and cultural needs and aspirations...through a jointly-owned and democratically-controlled enterprise."* One of the salient features of a co-operative society is the fact that rather than being regulated by the Companies Act 1995, it is regulated by an Act which is peculiar to cooperatives, the Cooperatives Societies Act 2001.

Through the definition given of a cooperative society in article 21(1) of the Cooperatives act, the provision itself lays down key features which are peculiar to cooperatives. At the outset, it becomes clear that cooperatives differ from other vehicles for carrying out commercial activities as rather than focusing on making a profit, its activities are directed to achieving these aims, giving reason as to why cooperatives are often referred to as a 'business with a special mission'. Furthermore, cooperatives stand out in the commercial field as they work towards such aspirations by complying with certain principles, as stipulated in article 21(2), including voluntary and open membership, democratic member control and member economic participation to name a few, totalling to seven principles. Besides, the concept of a cooperative is also mentioned in the Constitution of Malta among the declaration of principles.

Another salient feature of cooperatives is the fact that they have a Co-operatives Board which is established by article 3 of the Act, and which registers cooperatives and overall acts as a watch dog, ensuring that the existing cooperatives comply with the provisions of the Cooperatives Societies Act. In this way, the Cooperative Board is extremely important because while it is a registrar, it is much more than that. With that being said, the registration of cooperatives tends to be much lengthier than say, the registration of a company which is regulated by the Companies Act, as a result of being a much longer process and therefore, it takes more time. The Cooperative Board, in line with article 27(2) actually has the power to register the cooperative, reject its application or may opt to register it provisionally (article 28) and see how it plays out before registering it as a fully-fledged cooperative. Moreover, the prospective members have to make their purpose clear to the Board which has the power to reject the application on the basis that the persons lack the 'cooperative spirit'. This is seen in the First Schedule to the Cooperatives Societies Act which takes the form of an application form which would need to be filled in prior to the commencement of the registration procedure. Such form includes giving "detailed reasons for forming the society", "attitude towards community projects", and "the main purpose for which the society is to be organised." Moreover, it is pertinent to point out that the fact that the Board can opt for provisional registration, as laid down in article 28 of the Act, is a salient feature in itself, as this does not exist in the registration of companies or other commercial partnerships.

In Malta, unlike other corporate vehicles, cooperatives do no pay tax. Instead, cooperatives have what is known as the Central Cooperative Fund which is established by article 91(1) of the act and cooperatives pay 5% of their annual income to this fund. In Malta, the largest contributor in this regard is, without a doubt, the KPH. Furthermore, coops also have an APEX organisation by virtue of article 106, which in brief is an organisation which groups the existing 70 cooperatives in Malta. This can be seen as a sort of 'trade union' for cooperatives which carries out activities for the cooperative movement.

Rather than a board of directors as is the case in a company, a cooperative society appoints, by virtue of article 71(1) of the Cooperative Societies Act, a committee of management. Some of the functions of the committee of management include the opening and operation of bank accounts, taking immediate action to correct mistakes, presenting reports to the annual general meeting and so on. What is a peculiar to cooperatives in this regard is that a cooperative can also opt for a supervisory board which acts as a second tier, and which needn't be composed of members of the cooperative. In this way, every cooperative must have a committee of management, but it is up to discretion of the cooperative when opting to have a supervisory board.

Lastly, cooperatives tend to be particular in the way they are wound up, with a great contributor being the Co-operatives Board. In line with article 100(1), only the Board can issue a dissolution order, and this may be done on its own motion, provided certain circumstances exist. Moreover, the Board also chooses the liquidator and, according to article 102, oversees the entire procedure. Upon liquidation, the society is struck off the registrar, and therefore seizes to exist, and any monies remaining shall be deposited in the Co-operative Societies liquidation Account. In this way, the Board cannot be compared to the Registrar as the Registrar does not take part to such an extent in the winding up of a company.

QUESTIONS 2 & 5

- Describe briefly a few points of **similarity** between a limited liability company and a co-operative society, and a few instances where they **differ**.
- Briefly describe the various ways in which a cooperative society differs from a company.

A company is not compared to a cooperative, but rather a cooperative is compared to a company. In this way, while companies live by themselves, cooperatives tend to live in their shadow. With that being said, while cooperatives resemble companies in some respects, it greatly differs from them in others and therefore, the analysis of such distinctions and comparisons is imperative for one's understanding of a cooperative.

Similarities:

1. Both a cooperative as well as a company are vehicles by which commercial activities are carried out. Although regulated by different legislation, this fact still stands. Upon registration, both companies as well as cooperatives are bestowed a legal personality whereby the two vehicles have a separate and distinct legal identity from the members in the case of a cooperative, and the shareholders in the case of a company. By virtue of this separate juridical personality, they are capable of entering into contracts, suing and be

sued, owning property in their own name and so on. Although the fact that a cooperative is aimed towards more social aspirations, a commonality between a company and a cooperative does exist here as without earning a profit, a cooperative would not survive and therefore, the profit element is shared among the two.

2. Similar to a company, a cooperative society appoints, by virtue of article 71(1) of the Cooperative Societies Act, a committee of management which is the equivalent of a company board of directors. Some of the functions of the committee of management include the opening and operation of bank accounts, taking immediate action to correct mistakes, presenting reports to the annual general meeting and so on. With that being said, the two also differ in this regard because while in a company a board of directors can be constituted of one person in the case of a single member company, this cannot be the case for a cooperative. Moreover, unlike a company, a cooperative can also opt for a supervisory board which acts as a second tier, and which needn't be composed of members of the cooperative.

3. Very similarly, both companies and cooperatives have auditors and have to keep accounts. In this respect, both the rules regulating companies as well as those regulating cooperatives are stringent with regard to audit accounts and this can be both time consuming as well as pricy. In the case that a company fails to file such annual returns, it is no longer deemed to be in good standing.

<u>Differences:</u>

1. Cooperatives are united to *'meet their economic, social and cultural needs and aspirations…in accordance with co-operative principles'*, as stipulated by article 21 of the Cooperative Societies Act. It is made evident at the outset that Cooperatives differ from companies because rather than focusing on making a profit, its activities are directed to achieving these aims, giving reason as to why cooperatives are often referred to as a 'business with a special mission'. Furthermore, cooperatives stand out in the commercial field as they work towards such aspirations by complying with certain principles, as stipulated in article 21(2), including voluntary and open membership, democratic member control and member economic participation to name a few, totalling to seven principles. Besides, the concept of a cooperative is also mentioned in the Constitution of Malta among the declaration of principles. Companies, on the other hand, are more seen as capitalist vehicles with the sole purpose of making a profit. In this way, while cooperatives are seen as a 'business with a mission', and this mission is economic, social, and cultural in nature, the only mission of a company is to make a substantial profit.

2. This is further illustrated by the fact that while in general meetings, members of a cooperative all have one vote each, in the case of a company, a shareholder is given as many votes as shares. Therefore, the concept here is the bigger you are, the more power you have.

3. Companies provide more flexibility in the way that they are constituted. Although in the past the minimum number of members of a company was two, hence the name commercial partnership, developments in Company law have paved the way for what is now known as the single member company, as seen in article 212 of the Companies Act. On the other hand, the minimum number of members constituting a cooperative is currently five, according to article 22 (2) (a) of the Cooperatives Societies Act. Here, it is

interesting to note that in the past, the minimum was seven but was decreased to five in an attempt to make the idea of forming a cooperative more appealing.

4. The two also greatly differ in the way they are registered. While the company is registered by the Registrar, the cooperative is registered by the Cooperatives Board which is a registrar but is so much more. The registration of cooperatives tends to be much lengthier than the registration of a company which is regulated by the Companies Act, as a result of being a much longer process and therefore, it takes more time. The Cooperative Board, in line with article 27(2) actually has the power to register the cooperative, reject its application or may opt to register it provisionally and see how it plays out before registering it a fully-fledged cooperative. Moreover, unlike in companies, the prospective members of a cooperative have to make their purpose clear to the Board which has the power to reject the application on the basis that, in its opinion, the individuals lack the 'cooperative spirit'. Moreover, it is pertinent to point out that the fact that the Board can opt for provisional registration, as laid down in article 28 of the Act, is a salient feature of cooperatives in itself, as this does not exist in the registration of companies. Therefore, the Cooperatives Board does the work of the registrar, but it is also a pure regulator, whereas the Registrar has no choice but to register the company, provided that the certain conditions are met. On this point, article 15 of the Companies Act simply says: '*the deed of partnership shall be delivered for registration to the Registrar who, being satisfied that it complies with the requirements of article 14 and of sub-article (2), shall register it*'. Therefore, so long as all the requisites listed under article 14 are satisfied, the Register has no right of discretion on deciding whether or not to register the company.

5. Another major difference is that while companies pay tax, cooperatives do not. Instead, cooperatives have what is known as the Central Cooperative Fund which is established by article 91(1) of the act and cooperatives pay 5% of their annual income to this fund. In Malta, the largest contributor in this regard is, without a doubt, the KPH. Furthermore, unlike companies, coops also have an APEX organisation which in brief is an organisation which groups the existing 70 cooperatives in Malta. This can be seen as a sort of 'trade union' for cooperatives which carries out activities for the cooperative movement.

6. Lastly, the two differ in the way they are wound up. In the case of a cooperative, the Cooperatives Board takes a much greater role in the winding up as opposed to the registrar in the case of a company. In line with article 100(1), only the Board can issue a dissolution order, and this may be done on its own motion, provided certain circumstances exist. Moreover, the Board also chooses the liquidator and, according to article 102, oversees the entire procedure. Upon liquidation, the society is struck off the registrar, and therefore seizes to exist, and any monies remaining shall be deposited in the Co-operative Societies liquidation Account. In this way, the Board cannot be compared to the Registrar as the Registrar does not take part to such an extent in the winding up of a company. Moreover, the liquidation process in the case of companies is a far more complex and detailed procedure as is regulated by Title II of the Companies Act, titled *'Dissolution and consequential winding up of companies.'* Among such strict requirements, it is up to the company to appoint a liquidator.

MARTINA CAMILLERI (1ST YEAR)

QUESTION 6

What in your view are the advantages that companies have or appear to have over cooperative societies? Mention and briefly describe at least four, enumerating them appropriately.

1. Perhaps due to the fact that in Malta the most popular form of commercial vehicle is without a doubt the limited liability company, with over 90,000 registered when compared to 70 registered cooperatives, most lawyers probably never had experience with cooperatives. Due to this, lawyers would be more likely advise their clients to set up a company as opposed to a cooperative. This creates a continuous cycle whereby people are inevitably more directed to setting up companies. Similarly, with regards to books and literature, one is more likely to find a great amount of information on companies but very little on cooperatives. As a result, companies are subject to more extensive research and legal developments when compared to cooperatives. While new solutions are constantly being developed with regards to companies, this is less so for cooperatives.

2. Companies also provide more flexibility in the way that they are constituted. Although in the past the minimum number of members of a company was two, hence the name commercial partnership, developments in Company law have paved the way for what is now known as the single member company, as seen in article 212 of the Companies Act. On the other hand, the minimum number of members constituting a cooperative is currently five, according to article 22 (2) (a) of the Cooperatives Societies Act. Here, it is interesting to note that in the past, the minimum was seven but was decreased to five in an attempt to make the idea of forming a cooperative more appealing.

3. Perhaps, the main advantage of companies over cooperatives is precisely the fact that the process of registering a cooperative is so much lengthier and cumbersome than that of a company. In a cooperative, before obtaining registration, members have to show that they have a clear idea as to why they are forming a cooperative, and these ideas have to attain the approval of the Cooperatives Board. This is seen in the First Schedule to the Cooperatives Societies Act which takes the form of an application form which would need to be filled in prior to the commencement of the registration procedure. Such form includes giving "detailed reasons for forming the society", "attitude towards community projects", and "the main purpose for which the society is to be organised." In this way, the Board can reject the application merely because it isn't convinced that such persons have the so-called 'cooperative spirit'. This differs greatly from the registration procedure of companies in terms of the Registrar because whereas the Registrar has no choice but to register the company, provided that the conditions stipulated by the Companies Act are in check, the Cooperatives Board also acts as a pure regulator because its approval is needed. The cumbersome nature of the procedure of registration with regards to cooperatives is highlighted in the stark contrast that is created by virtue of Article 15 of the Companies Act which simply states that '*the deed of partnership shall be delivered for registration to the Registrar who, being satisfied that it complies with the requirements of article 14 and of sub-article (2), shall register it*'. Therefore, so long as all the requisites listed under article 14 are satisfied, the Register has no right of discretion on deciding whether or not to register the company. Perhaps this gives an explanation as to why Malta only has 60-70 registered cooperatives.

4. Companies are not obliged to abide by any of the seven principles that cooperatives are obliged to abide by as laid out by article 21(2) of the Cooperatives Societies Act. Such principles include voluntary and open membership, democratic member control and member economic participation to name a few. In this regard, companies are far less limited when compared to cooperatives. Essentially, once companies are registered by the MBR through signing the memorandum of association and articles of association and, subsequently obtaining the certificate of registration, companies are left on their own accord, of course maintaining that they operate within the parameters of the law. In the case of cooperatives, they are far more regulated in the sense that the functions of Cooperative Board go far beyond those of the Registrar. Although it is up to the Board to register the cooperative, according to article 3 of the Cooperatives Societies Act, its functions also include the monitoring and exercising of supervision over the cooperatives. In this way, the Board plays a distinct role in the lives of cooperatives.

5. Moreover, the Board can dissolve a cooperative on its own motion.
6. All profits are distributed among the shareholders.
7. Companies are more flexible since their capital is divided into shares and these can be sold.

VALID FORMATION OF COMMERCIAL PARTNERSHIPS

- The contribution of the partners or members and the view of profit to be shared among the partners or members are two essential requisites for the valid formation of a commercial partnership. Explain.
- Examine two essential requisites for the valid formation of a commercial partnership.
- Briefly outline the requisites for the valid formation of a commercial partnership.