CML 2010
DUTIES OF TRADIES AND COMMERCIAL INTERMEDIARIES

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MALTA

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Duties of Traders and Commercial Intermediaries

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Introduction

A trader is entrusted several duties which emanate and emerge from the Commercial Code, with the most important duty being that of maintaining fair competition, without falling foul of any of the provisions combatting unfair competition.

Competition is one of the key elements of a free market economy, sometimes, the abbreviation FME is used (free market economy). In successive weeks, we will be trying to understand what competition is fair and what competition is unfair. In order to do so, it is essential to embark on this journey by understanding that **in a free market economy, competition is indispensable.**

Put very simply, ***competition is the freedom to carry out economic activity***. This freedom presupposed within it the fact that very often, economic entities will be competing against each other in the market.

How does one gain competition?

Elements that make one person more competitive than another is that in a competition in a Free Market Economy (FME), there is striving for custom in the market to acquire a greater market share than your competitors. Within a FME what is important is to have a greater market share, in terms of competition.

In general it is acknowledged that competition is beneficial to society in general, particularly to consumers. If we don't have competition we have a monopoly, meaning we have one company that dictates the market. In certain isolated cases this may work, but in general competition is deemed to be beneficial and necessary for the industry to strive. Economic entities may act unfairly in relation to the legitimate interest of the rivals. It could be the case that certain economic entities are uses dishonest practices to gain an advantage over their rivals. A second danger where there can be the misuse of competition would occur when an economic entity would act in such a way to eliminate or weaken competition in the market.

These concerns give rise to 2 related but distinct spheres of law - **the first being the law of unfair competition and the second being competition law.**

Brief Overview on Competition Law & Unfair Competition Law

Unfair competition law and competition law, although sounding similar, are regulated by different and distinct bodies of law. Both are equally important, and are very related and similar to each other, but they are not interchangeable. For the purposes of traders and Commercial Law, we shall shift our focus onto Unfair Competition Law. Unfair Competition Law determines the proper limits of competition between traders. Its main concern deals with acts whereby one trader, through dishonest practice, takes unfair advantage over another trader. One example of such behaviour is the use of a trademark which is similar to that of another existing trademark.

In the past, there were numerous enterprises which copied the McDonalds logos and design before McDonald's were introduced in Malta. One of the questions which arises is whether the laws of unfair competition could be breached had McDonald's not been physically operating in Malta. This shall be tackled hereunder. Another case of unfair competition is when you try to put down one's rival products, either through word of mouth or through targeted marketing which deprives a competitor of his market value.

On the other hand, Competition Law serves to **prevent firms from illicitly working together to distort or disrupt the competitive market**. Thus, the first difference which emerges between unfair competition law and competition law is that in the former, traders are adopting illicit behaviours and practices to **go against** or to **gain undue profits** from another trader, whereas in the latter case, entities seek to **work together and collude** in order to enhance their share over the market or to prevent smaller firms from growing within the same market.

There have been multiple examples whereby companies of a sector tried to collude (illicitly join forces) and decide on a particular price, which could be so reduced that it would eliminate all other competition, to the extent where the colluding entities are strong enough that even with that reduced price, it would still completely win over the market share. Alternatively you could have everyone come together to raise the price together. This concept of **Price fixing** is to be avoided in order to have *workable competition*. Competition law also places a **prohibition of abuses** by dominant firms - such as the excessive pricing or the refusal to supply in order to eliminate competition. Competition law, although we can recognise some appreciable similarities between it and between the law of unfair competition, is separate and distinct.

Another difference between the two spheres of law pertains to the sources governing both. Unfair Competition Law is governed by the Commercial Code, whereas Competition Law is a product of the European Union, namely through **articles 101 and 102 TFEU.**

Sources of Unfair Competition Law

Unfair Competition is governed by the Commercial Code - particularly sub-Title 3 of Title 2 of Part 1, being Articles 32-37 of the Commercial Code.

If we had to go through the legislative development of the law of unfair competition in Malta, you will notice that these provisions have long been part of the law - so much so that they were introduced by virtue of **Act 30 of 1927.**

However, it is relevant to notice that this notion of unfair competition was long recognised e**ven before the enactment of the law.** The courts ensured that competition was fair even before legislative intervention - most of the cases before Act 30 1927 dealt with what we refer to as **trade inditia** (trade indicators). **Trade indictia** comprises within it trademarks, trade names, and trade signs. In this case, unfair competition advantage is gained by a firm who misinterprets his goods, business, shop as someone else's or as connected to someone else's business.

Somerville vs. Schembri
18th November 1884

A Maltese firm brought action against another firm in the commercial courts alleging that they had the exclusive use of a trademark (KAISAR-I-HIND) and the defendants had infringed such rights and asked that they should be retrained from using this mark. The defendants alleged that the plaintiffs had no rights to use the mark, that they used the mark in such way that it was impossible that any purchaser should be deceived.The court ruled in favour of the plaintiffs. Upon appeal, the decision was reversed, as further evidence showed that the mark had been used in London from 1866 to 1883 on cigarettes. Subsequently, the plaintiffs appealed to the Privy Council. Such Privy Council held that as soon as the trademark had been employed in the Market as to indicate to purchasers that the goods to which it is attached are the goods of a particular firm, it becomes, to that extent, the exclusive property of that firm. The Privy Council held that the appellants had established such a right in the market in which their cigarettes had been sold under the name KAISER-I-HIND, and so the decision of the court of appeal was reversed and the decree of the commercial court in Malta varied.

We have here a recognition that there was an exclusive right, which was deemed to have been awarded in too wide a manner and should be narrowed and restrained in the sense that in practical terms, the respondent (Schembri) had to stop from using the label on the lid of their products or any similar label. The defendant was to stop using the trademark (KAISER-I-HIND) on things other than cigarettes manufactured by themselves. They agreed with the defendant, that the product operating under that trademark was their property, but they limited the applicability and operation ability of the trademark to those cigarettes only.

"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 to 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."

The significance of this case is that it established certain principles of unfair competition law which prevailed in Local Courts even before Act 30 of 1927. Such case represents the dynamic nature of Commercial Law, in which trade practice is placed nearly on the same level as legislation.

The scope of unfair competition law may be argued to be twofold. Primarily, it serves to protect traders from being abused of by other traders. Secondly, it also protects the consumers from being deceived by such abusive practices, thus creating **a dual effect (protection of both trader and consumer)**

Besides the case of Somerville vs. Schembri, there are other cases where the law courts recognised and respected the law of unfair competition even prior to act 30 of 1927. The common thread, tying together, all these cases prior to Act 30 1927 is the fact that they are all based on the principle that the **prior use of a mark, name, or sign, in trade, gives you property rights, and therefore exclusive use of that mark, name, or sign.** What the courts did prior to the enactment of Act 30 of 1927 is that they applied existing principles in order to stop any possible abuse. The laws cited were found in property and tort law (civil law principles) in order to control these unfair commercial practices.

Essentially, two basic elements had to exist in order for there to be a case for unfair practices;

Curmi vs. Mizzi *- 2 elements comprising an unfair practice*
18th October 1957

L-estremi li fil-konkors tagħħom tivverifika ruħha l-konkorrenza illeċita huma tnejn: id-dannu, jiġifieri l-preġudizzju li l-kummerċjant jarreka lil kummerċjant ieħor b'dik il-konkorrenza, u l-użu ta' mezzi illeċiti, ta' mezz kuntrarji għal-liġi, li jivvjolaw id-dritt ta' ħadd ieħor. Fi kliem ieħor, biex ikun hemm konkorrenza illeċita jeħtieġ illi d-dannu li kummerċjant jarreka lil kummerċjant ieħor bil-konkorrenza jkun dovut għal mezzi diżonesti, illegali, magħmulin bl-abbuż tad-drittijiet tiegħu.

Thus, ***Curmi vs Mizzi*** held that 2 elements comprise an act of unfair competition, being 1) that a **damage is sustained** by a trader, and 2) that such damage is a **direct result of an illicit practice or behaviour adopted by another trader**. Fundamentally, there must be a **nexus** between the damages and the unlawful act.

In a sense, although these criteria were defined, certain problems arose in the application of them - the first that has been identified was by reference to article 1030 of the Civil Code, dealing with damages. Such article holds;

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.

Therefore, damages cannot arise where a right is being proportionally utilised. The question that arises is when the right of a trader to carry out an economic activity crosses the border of lawfulness and enters the threshold of unlawfulness. How does one determine the damages when it comes to suffering damages resulting from unfair competitions? In Malta we have the notion of real damages. How can a trader, in tangible terms, prove loss of client, loss of sales and the quantum of such sales?

It is for this reason that active, positive, legislation was introduced in order to better define the limits of unfair competition. The law provides a list of acts of unfair competition. These acts of unfair competition are expressly laid out in Articles 32-36 of the Commercial Code. Article 37 then discusses the claim which may be brought by the injured trader prejudiced with another's acts of unfair competition. When it comes to damages, the law (**Article 37 of the Commercial Cod**e) provides the *injured trader* with a choice. An injured trader can choose alternative remedies to be granted by the court in the case of a successful action. **Firstly, the trader may either sue for damages (in this case, he must prove as in any other case), or he may opt to sue for a penalty established by the court in lieu of damages.**

So a trader suffering from unfair competition may either

- Sue for damages
- Sue for a penalty.

This fact, how the courts worked pre and post legislation, was the subject matter of a number of judgements. The trader must be careful in selecting his claim, whether it be for damages or for penalty, since both choices carry different requirements of proof, as shall be seen hereunder.

Curmi vs Mizzi *- notion of damages vis-a-vis unfair competition*
18th October 1957

Qabel il-promulgazzjoni tal-Att 30 tal-1927 kienet kwistjoni wisq spinuża sabiex jiġi stabbilit meta jispiċċa l-użu tad-dritt proprju u tibda l-vjolazzjoni tad-dritt ta' ħadd ieħor; iżda l-liġi viġenti - Kodiċi tal-Kummerċ, li kkonsolidat il-liġijiet dwar il-kummerċ, fosthom l-Att fuq imsemmi, neħħiet dawk l-inċertezzi, billi hija tipprevedi u tippunixxi l-varji forom li fihom ordinarjament timmanifesta ruħha l-konkorrenza illeċita. U għalkemm il-liġi tipprevedi biss il-forom l-aktar soliti ta' dik il-konkorrenza, iżda mhux leċitu li l-każijiet jiġu estiżi oltre dawk minnha preveduti, għaliex trattasi ta; veri u proprji delitti kummerċjali, li jagħtu lok għal konsegwenzi wisq Serji. Dawn il-varji forom huma dawk imsemmijin fl-artikoli 32-37 tal-Kodiċi tal-Kummerċ.

Curmi vs Mizzi importantly held that it was difficult to decide when proper use stopped and when improper use commenced - this is why the law was promulgated. Furthermore, one must note that ***bad faith*** is irrelevant in ascertaining whether a breach of unfair competition law subsisted, except when determining the penalty (and not the damages) for the purposes of article 37. In the case where the claimant seeks for damages, the Civil Law rules on damages applies, per article 37 of the Commercial Code.

Additionally, this case confirmed that for an action of unfair competition to succeed, actual damage need not ensue - the mere possibility of damage suffices.

Columbus vs Lee *- raison d'etre behind law on unfair competition*
14th February 1933

This underlines the *raison d'etre* of the laws that we have today. Our new law underlines the legislative norms and principles which were established by previous jurisprudence regulating unfair competition law. The objective of the new law is to regulate by means of specific provisions of law with determined civil penalties, certain principles that had already been recognised by the courts even before the passing of Act 30 1927, with the objective to stop unfair competition to the prejudice of a rival trader.

Duty of a trader not to engage in unfair competition

Prior to the enactment of express statutory provision, we had a situation where our courts have already developed a series of laws that protected the trader from prejudice that they may encounter in regards to unfair competition. Prior to the law, we had problems relating to the lack of list of acts that would be deemed to fall foul or to breach the rules on unfair competition. Essentially, owing to Act 30 of 1927 we have a list of acts that fall foul of such rules.

There are 3 general observations pertaining to all acts of unfair competition;

1) An Exhaustive List of Unlawful Acts

The acts of unfair competition are **exhaustively listed.** This means there is no element of discretion that could be exercised by the courts in interpreting unfair competition. These acts of unfair competition, both in some judgements and by our Italian counterparts, are referred to as *delitti commerciali* and the court cannot add any other act to the ones listed. Furthermore the court has come to the conclusion that they should not be interpreted **extensively.**

Darmanin vs Cachia - *exhaustive list of unfair competition breaches*
(1950)

"Illi li kazijiet ta' konkorrenza sleali (unfair competition) huma tassativi u għalhekk ma tapplikax ir-regola estensiva tal-ejusdem generis"

The rule of *ejusdem generis* is not a rule of commercial law but a rule of interpretation. The exact definition is as follows:

"*Where a general word or phrase follows a list of specific terms (an umbrella provision), the general word would be interpreted to include only items of a similar nature to the terms specified.*

This principle has been confirmed by the Maltese courts. The situation in Malta is that acts of unfair competition are exhaustively listed. What about other jurisdictions?

When dealing with competition, particularly unfair competition, the international instrument that is sited time and time again is the so-called ***Paris Convention***. Its full name is the **Paris Convention for the Protection of Industrial Property.** This Paris Convention dates back to 1883. In the Paris Convention article 10 (2) bis: "*any act of competition contrary to honest practices in industrial or commercial matters*".

The **German Unfair Competition Act (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"*, and also provides a non-exhaustive lists of acts deemed unfair.

The **Italian Civil Code, Article 2598**, lists a number of acts which are deemed unfair but also covers any act that "*directly or indirectly uses means that are not in conformity with professional correctness and which can damage the business of another person".* This means that the courts have the right to use its discretion when determining whether an act is unfair or not.

Another heavily important jurisdiction that our courts refer to is that of the United Kingdom. In England, there exists the tort of passing off but no general tort of '*unfair competition*. In the case of ***L'Oreal v Bellure*** the supreme court ruled that ***"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'… 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"* - Lord Justice Jacob.**

Deception is never tolerated by the courts because it goes against the idea of protecting consumers.

L'Oreal vs Bellure *- fine line between a fair act and an unfair act*

L'Oreal manufactured a number of perfumes. Bellure produced perfume that were not in competition with L'Oreal, but were packaged and smelled very similar. The difference is that the two brands were in different price and markets sector - the markets were different. Not only did they use the same packaging, but the defendant also produced a comparative table converting and analysing the smell similarity, but they never said that they were a cheap imitation of the original. Put simply, the issue that was brought by L'Oreal was the following: whether the use of L'Oreal's word marks in the comparison table amounted to an infringement. This takes us back to the terminology used in the English Jurisdiction; whether there was passing off and whether passing off should be extended into a general law of unfair competition. The court held as follows: "*the use of the comparative lists enables the consumer to compare smells, but nobody was deceived and nobody thought any less of L'Oreal's brand.*". The Court referred to the ECJ, whether the use of the lists and the packaging were in accordance to honest practices. The UK courts said there was no passing off. The European Court was open to invent a tort of unfair competition. The Courts in England highlight the element of subjectivity in determining what is fair and unfair, but one important feature highlighted is whether or not there is **deception**.

From all this we can see that there doesn't seem to be a system that is quite similar to the Maltese List of Acts of Unfair Competition.

Different jurisdictions afford a combination of general language as well as a non-exhaustive list of what would amount to Unfair Competition. The Maltese legislator swayed away from this position and produced an exhaustive and finite list. This assists and pushes for the notion of **judicial certainty**. This is a disadvantage because there is no discretion in the hands of the court, and this may result in a situation which may be blatantly unfair but not covered by the law. If this case arises, the court cannot apply its discretion to deem the act unfair.

2) The Requirement of 2 Traders

The Plaintiff and Defendant in an action for unfair competition must be both **traders.** The definition for what a trader is will be dealt with. When it comes to the defendant, firstly, the defendant is **obliged to act in accordance with the duties incumbent on all traders**. Secondly, and related to the first, the **articles of law which lay down the duties of traders start with the words "*traders shall not*", meaning that the defendant must be a trader.** The third indication we have that the defendant in such suits must be a trader as defined by laws is found in **article 37 of the Commercial Code**, which holds that:

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.

From Article 37 we can denote that the Plaintiff in such suits must also be a trader, because of the term "***injured trader***".

Articles 32A and 32B (2 out of the 7 acts that constitute unfair competition) **were added as *acts of unfair competition* to transpose, into Maltese Law, Directive 2006 / 114 / EC of the 12th December 2006.** This directive concerns misleading and comparative advertising, but the definition of '*trader*', in this Directive, is **completely different** to what we find in the Maltese Commercial Code. The differences in definition is replicated below:

"*any natural or legal person who is acting for the purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader"* - **Article 2 (d) of Directive 2006/114/EC**

"*any person who, by profession, exercises acts of trade in his own name and includes any commercial partnership*" - **Article 4 of the Commercial Code.**

The incorrect transposition of this directive is evident in the fact that our Commercial Code Section 4 does not consider persons auxiliary to trade to be traders ("in their own name"), while the directive does ("and includes anyone acting in the name of or on behalf of a trader").

To that end, if the courts adopt the Directive definition found in the Commercial Code it would mean that Malta had not correctly implemented the Directive. This begs the question as to whether the Court can adopt the Directive Definition only for the purposes of article 32A and 32B, which both pertain to comparative and false advertising. The European Union Act (460) holds that "*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*".

3) No need to prove dolo

The third observation is that when it comes to the element of proof for the action of unfair competition, there is no need to prove ***dolus***. However, through a reading of article 37 (3), one may induce that intention ("*the malice of the offending party*"), is only relevant as a factor to determine the amount of the **penalty** and not as requisite to found an action for unfair competition. Furthermore, cases assert that unfair competition does not require a proof of an actual prejudice to be suffered, so long as there is a capability or probability of confusion.

Dr David Tonna noe vs Nicholas Young
12th October 2006

"*Ghalkemm l-azzjoni tal-attur nomine mhix wahda ta` konkorenza sleali fit-termini tal-artikolu 32 tal-Kap. 13, l-azzjoni proposta tisbah l-azjoni ta` konkorrenza sleali, ghax iz-zewg azzjonijiet itendu lejn il-projbizzjoni ta` uzu ta` disinn jew markju b`mod li jinholoq konfuzjoni fil-pubbliku dwar l-origini tal-prodotti jew servizz li dwarhom it- trademark tkun registrata. Ghaldaqstant, il-Qorti tqis li certi principji stabbiliti fil-kuntest ta` konkorenza sleali jistghu jigu applikati anke fil-kuntest ta` azzjoni bazata fuq l- artikolu 10 tal-Kap. 416. Il-Qorti izid li, fil-fehma taghha, l-azzjoni taht il-Kap. 416 hija aktar wiesgha, peress li tipprojbixxi uzu ta` markju meta jkun hemm probabilita` ta` konfuzzjoni min-naha tal-pubbliku, minghajr htiega li din il-konfuzzjoni tinholoq b`rizultat ta` rabta zbaljata ma` trademark registrat, kif, min naha l-ohra, jesigi l-artikolu 32 tal-Kodici tal-Kummerc.*".

This case held that that we do not need a perfect copy, but merely a similarity capable of creating confusion. The court explains the reason why we have the idea of konkorenza sleali. The court then refers to **Vivante,** who holds that the unfair act is ascertained according to the perspective of the ordinary man, as shall be hereunder tackled.

Article 32 - Prior Use

Sub-title III

OF LIMITS OF COMPETITION

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 refers to **two actions** which are prohibited by law:

1. The obtaining of clients or similar benefits from a competitor through the use of *any name, mark or distinctive device capable of creating confusion* with any other name, mark or distinctive device which is lawfully authorised and used by that competitor.
2. The use of any firm name or fictitious name which is capable of misleading others as to the actual being and importance of the firm.

The words *lawfully used by others* in the first action highlights the concept of ***prior use.*** Prior use refers to when a trader (normally the plaintiff in the case) has been using the name/mark/device before or prior to the defendant. The *onus probandi* rests in the Plaintiff, who must prove (probable) that he has been using the mark/device/name before the defendant.

But before tackling this question, one must understand that names and marks (ex. Nike, PlayStation, etc.) play a fundamental role in a **free market economy**. Therefore, it is intrinsically important to protect such names and marks.

***Prior in tempore, potior in iure*.**
He who comes first is he who has powers and rights in law. This founds the principle of prior use.

Priority of use confers ownership of a mark, name, or device and, consequently, in its exclusive use - the right to exclude others from using that name/mark/device. This principle was established before Act XXX of 1927:

***Somerville vs Schembri** - prior use prior to Act 30 of 1927*
Privy Council, 18 November 1884

"*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 that firm.*

LBM Breweries Ltd vs ITC Ltd
30th April 2013

The parties to these cases both opened a court case against each other at the same time in 2013. In both cases, the notions of ***Prior Use and konkorrenza zleali*** (unfair competition) were acknowledged by law. LBM Brewers Ltd. argued that they had the exclusive right over the usage of the word 'Octoberfest', whereas ITC Ltd. argued inversely, claiming that such a coinage was in common and public use. Therefore, this case highlights that although the principle of Prior Use has been addressed from as early as at least 1887, modern courts are still exploring all avenues pertaining to the notion of exclusive rights by virtue of established usage.

This case established that a lack of distinctiveness of the Plaintiff's name, mark, or distinctive device, would negate the protection of prior use.

Very importantly, this case asserts that the law of Unfair Competition **seeks to protect the owner** (of a name, mark, or distinctive device) from the usurpation of his property. This protection was given by the courts even prior to Act 30 of 1927.

This case also held that the raison d'etre behind excluding common words (Oktoberfest) from registration is that if such words would be registered, then a monopoly would be created over words of common use.

Article 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"*. The protection enjoyed by a mark on the grounds of prior use exists independently of whether that name, mark or device is registered.

To that end, a registered trademark enjoys protection both under 32 and the Trademark Act. A mark may not be recognisable under the Trademark Act but it may still be protected by article 32.

If there are competing rights (an unregistered mark that has prior use vs a registered mark), ***prior use will always prevail***.

REGISTRATION DOES NOT CREATE OWNERSHIP RIGHTS

Micallef vs Bonello
10th July 1916

In this case, the plaintiffs had registered a trademark consisting of a picture of a sheep with a ribbon in December. In April of the following year, they sent a judicial letter (rikors) to the defendant alleging that he was using a confusingly similar mark. The defendant rebutted the allegation arguing that although the mark was registered by the plaintiff, the defendant enjoyed the right of prior use, holding that he had been using the mark for long before. The court had to determine who had prior use, but there were a number of problems, such as the fact that the defendant did not object to the plaintiff's registration of the trademark. The court held that registration is there to *confirm* ownership rights and not to *create* them), which isn't a totally correct statement to make. The Court ruled in favour of the defendant.

Mark A. Attard Trading company Ltd. vs Shoe Market Retail Stores Ltd.
25th November 2016

This appeal relates to the use of a particular trademark.The plaintiff company had been using a trademark since 2003 for its shoe-selling business. The defendant company also operated a business similar to that of the plaintiff. Therefore, the plaintiff alleged unfair competition with the real risk of creating confusion in the market because there was a false representation between the business of the plaintiff and the defendant company. In this instance, the court demarcated the difference between the provisions embedded within the Trademarks Act and Art. 32 of the Commercial Code, stating that, **there is no time limit to the establishment of Prior Use**. The fact that it has been used before the other is already enough to establish Prior Use. However, **the holisticness of the situation has to be considered** in order to determine whether the alleged party tried to seek an undue advantage over a prejudiced trader.

This case stated that when determining whether a mark could give rise to confusion when placed next to another mark, the whole picture is to be taken into consideration. This includes the fact that when purchasing a product that is relatively expensive, the consumer is going to be more attentive in his selection of product, which is a factor to be considered. Since, as Kerly teaches, the consumer's recollection is imperfect, it is the idea left imprinted in the consumer's mind that should be considered (as established in Sabel vs Puma), but with goods such as a car, which is more expensive, the consumer is going to ascertain certain differences more carefully.

The provisions of the Trademark Act confirm that the principle had not changed post-2000 (note that the TM Act, Chapter 416, was replaced by the TM Act of 2019, which is now Chapter 596). The Trademark Act (Chapter 596) Article 6(4) holds that:

(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.

Abandonment & Prior Use

Under the principle of abandonment / non-use, the right to exclusivity may be lost as a result of such non-use when circumstances show that the right owner had the intention to abandon the mark/name. The prior user loses his rights to apply for the invalidity of a later registered trademark where that mark was abandoned by the user.

Sammut noe vs Salamone noe
3rd March 1953

"***Biex ikun hemm l-abbandun biċ-ċessazzjoni tal-użu, hemm bżonn illi l-intenzjoni tal-abbandun tiġi provata***"

Unfair Competition Article 32: Well-known Names & Marks

A problem may arise whereby a name or mark that has a reputation in Malta is not owned or has no business in Malta itself, and does not trade in Malta. The name or mark has a **reputation** on 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. The question is therefore whether **reputation alone, without actual trade, should be protected by law**. Having a thorough look at what jurisprudence comments on the issue, we shall see how the Maltese courts initially adopted a *soft-line approach* (wherein the Maltese courts established that a reputation was sufficient to give protection to the well-known mark), but then shifted to opt for a *hard-line approach* (wherein the courts explained that article 32 was not applicable even if the mark was well-known). This shift, from the soft-line to the hard-line approach is a *chronological one*, for the courts moved gradually from the former to the latter as time passed.

Let us take the McDonald's case. Let's say that a local entrepreneur decided to replicated McD in Malta. Under the soft-line approach, the reputation was enough. Whether or not there was a physical presence in Malta, if the brand was well-known in Malta, then that mark should be protected.

The Soft-Line Approach

The soft-line approach was when reputation in Malta was enough to invoke article 32. ***Frendo Randon noe vs Gatt noe*** is the most well-known case pertaining to this. In short, this is referred to as the ***Club Med Case.*** The French plaintiff (Club Mediterranee) was a company well known in the Tourism business. At the time, it had no place of business in Malta and did not trade in Malta. Their only activity in Malta was limited to 2 brief visits by foreign tourists who booked through them. The defendant company, after trying unsuccessfully to be appointed as plaintiff's agents for Malta then registered a company in Malta with the same name - Club Mediterranee Limited. Both at first instance (Commercial Court) and at the Court of Appeal, the Court found in favour of the plaintiff French Company. The defendant company, in its argumentation, brought up the defence 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. The court was of the opinion that the name of the French plaintiff had an international reputation and was well-known in Malta. A trademark or a trade name could have goodwill in Malta even though no business was carried on in Malta. Furthermore, since both the Plaintiff and the Defendant were in the tourist business, they were potentially competing in the same international market. Two key phrases that emerge that the Court relied on are:

1) The Plaintiff's international reputation
2) The international market

Frendo Randon noe vs Gatt noe - soft-line approach
7th October 1967

"l-iskop u l-attivatijiet proposti mis-socjetà appellant kienu f'kompetizzjoni ma' dawk tas-socjetà appellate u diretti potenzjalment ghall-istess suq internazzjonali ... Fil-kamp ta' dawk l-attivatijiet, l-isem tas-socjetà appellate jidher li kien akkwista avvjament internazzjonali ... Is-sid ta' isem kummercjali (business name) jista' jkollu avvjament f'pajjizi anke jekk ma jkollux f'dak il-pajjiz sede kummercjali"

Grech noe v Mangion - the Body Shop Case - soft-line approach
16th November 1987

The defendant had a shop named 'Body Shop'. At the time The Body Shop International PLC (plaintiff) was not operating in Malta. The Court held that the name 'Body Shop' was well known internationally, including in 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 ***Valletta noe vs Tanti*** plaintiff was the US company McDonald's corporation, a company well known in the fast-food business but that 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 and vans. 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 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 at the time, then the action under article 32 was inapplicable. The court is quoted as saying:

Valletta noe vs Tanti *- Hard Line Approach*
11th March 1992

"il-konkorrenza necessarjament tfisser kompetizzjoni bejn tnejn fl-istess sfera ta' attivita, fl-istess contest ta' zmien u spazju. Jekk l-attrici mhux qed tinnegozja f'Malta kif jista' l-konvenut jikkonkorri maghha lealment jew slealment".

Valletta noe vs Muscat pro et noe - Hard Line Approach
22nd October 1992

This is often referred to as the McBennies Case. Here, plaintiff was also the US corporation 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 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 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. What has complicated the issue is the dawn of e-commerce which allows a corporation to sell its products to Maltese consumers without explicitly having a foothold in the Maltese marketplace

There are also cases whereby an action is brought both by Article 32 of the Commercial Code as well as the Trademarks Act. Our focus is not related to the Trademarks Act, but where there are judgements which involve both Article 32 and the Trademarks Act, then we cannot ignore such act.

With regards to registered trademarks, one ought to 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.

Mamo noe vs Kontrollur Proprieta Industrijali
16th November 1992

This case is referred toas **The Stefanel Case**, which relates to the cancellation of the registration of the well-known mark 'Stefanel', which 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 sections. The fact was that the Maltese trader was not the owner of the name and registration of trademarks should not be reduced to a race in which the first person to register acquired the rights of the trademark.

Valletta noe vs Muscat Scerri noe - the Muppets Case
15th February 1995

The Muppets Case, 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 reaffirmed the distinction between article 32 actions for unfair competition and the right to register a trademark and recognised the international reputation of a well-known brand and its commercial value.

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 of the Laws of Malta), replaced in 2019 by the Trademarks Act (Cap. 597 of the Laws of Malta). 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.

Protection by the Trademarks Act

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.

(2) "Earlier trademarks" within the meaning of sub-article (1) means:

(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 6bis of the Paris Convention.**

Article 126(1) of the TM Act states:

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.

Therefore, well-known marks are protected under the Trademarks act, even of they are not physically present in Malta, by virtue of Article 6 (1), which allows the revocation or declining of an application of a registration for a trademark, Article 6 (1) (a) and (b), which states that 6 (1) applies if the trademark is identical or confusingly similar to an earlier registered or used trademark, and section 6 (2) (d), which includes trademarks which are ‘well-known’ in Malta, as defined under the Paris Convention s 6bis, as an ‘earlier trademark’.

Y Plan Events Limited vs. I do Weddings Malta Limited
13th October 2022

Illi dan l-agir da parti ta’ l-imharrkin jikkostitwixxi ksur tad-drittijiet ta’ l-istanti fuq il-markju taghha skond il-provvedimenti tal-“Att dwar it- Trademarks” (Kapitolu 416 tal-Ligijiet ta’ Malta), u jammonta ukoll ghal konkorrenza zleali a dannu ta’ l-istanti skond id- disposizzjonijiet relattivi tal-“Kodici tal-Kummerc” (Kapitolu 13 tal- Ligijiet ta’ Malta).

Kerly is cited as follows;

Il-Qorti tirreferi wkoll ghal kawza Burberrys v Cording (1909) (ara Kerly’s Law of Trade Marks and Tade Names) fiha jinstab fil-fehma tal-Qorti l-iskop ahhari wara l-artikolu 32: “The principles of law applicable to a case of this sort are well known. On the one hand, apart from the law as to trade marks, no one can claim monopoly rights in the use of a word or name. On the other hand, no one is entitled by the use of any word or name or indeed in any other way to represent his goods as being the goods of another to that other’s injury. If an injuction be granted restraining the use of a word or name it is no doubt granted to protect property, but the property, to protect which it is granted is not property in the word or name, but property in the trade or goodwill which will be injured by its use. If the use of a word or name be restrained, it can only be on the ground that such use involves a misrepresentation, and that such misrepresentation has injured, or is calculated to injure, antoher in this trade or business.”

Dr Melvyn Mifsud noe vs. Dr Anthony Cutajar noe
23rd November 2020

In this case, the court established that well-known marks were very much protected by virtue of the Trademarks Act. In summary: Section 6 Trademark acts protects well-known marks, even if not physically present in Malta, applying ‘well-known’ as defined in the Paris Convention s 6bis.

Distinctiveness, unofficial mark, get-up and use of own name

Distinctiveness is an essential function of a name/mark as it is a badge of origin that enables the consumer to distinguish goods or services of a particular trader from those of others. Distinctiveness is acquired by use in the market but there is no specified time period with the Court stating, in ***Chircop vs Galea noe***, "***ma hemmx zmien specjali preskritt mill-ligi biex ikun hemm il-protezzjoni … jiggifieri wara kemm zmien l-uzu taghha jaghti esklusività***".

Certain names or marks may not easily acquire distinctiveness. Names/marks that are descriptive generally lack distinctiveness (take, for example, words in common use, words that describe the goods, and geographically descriptive words). With regards to a secondary meaning, prima facie non- distinctive names/ marks (e.g., descriptive ones) can acquire a secondary signification whereby they acquire the essential function i.e., a badge of origin that distinguishes those products/services from others. An example that could fall under secondary meaning is that of the brand ***The North Face***, which is a descriptive word (not a name, such as McDonalds) which is immediately associated with outdoor clothes. Going back to ***Chircop et vs Galea noe***, one of the central issues was the use of the words *Florentine Art*, wherein the Court held the following:

"Xejn ma jfisser li l-kliem 'Florentine art' huwa kif jingħad 'geographically descriptive', għaliex anke isem ġeografikju jista' jakkwista 'distinctiveness' billi jakkwista 'secondary meaning', fis-sens illi kif ġara f'dan il-każ, parti sostanzjali tal-pubbliku, fl-idea tagħha tassoċja l-isem ġeografiku man-negozju ta' negozjant partikolari".

In terms of Article 32, there is a protection to a name by which a product or service is identified by the public.

Mifsud noe vs Nicosia noe
11th June 1923)

In this case, there was no official trademark, but rather an unofficial trademark under the phrase *Tal-Mara*. "la dittaattrice ha acquistato nel commercio locale del suo prodotto, oltreche la proprieta esclusiva del marchio da esso usato … anche la proprietà esclusiva del nome commerciale col quale il suo prodotto e' richiesto dai commerciante ed e' offerto dairivenditori"

Article 32 includes **get-up** or a **trade dress**. These refer to the shape, colour or packaging that can be identifiable as distinct in respect to a particular product. Such shape or design acts as a badge of origin.

Hammer v Gatt - *application of bonus paterfamilias*
7th October 1920

Here, plaintiff was the proprietor of a well- known tea producer which had a distinctive wrapping with a red seal with the words G.I.P. on it. The defendants applied to register a trademark with similar packaging and the Court on this basis referred to the notion of unfair competition when saying "it would also be a case of unfair competition, the placing on the market of products with packages in a shape or colour that could be easily confused with packaging of a similar product marketed by a different firm".

One is entitled to the use of one's own name even if some confusion is caused provided that one does so honestly and provided that the other name has not acquired secondary meaning. Furthermore, a man may only trade under his own name in the face of confusion so long that he trades in a manner that is honest. The test adopted to ascertain confusion is that of the bonus paterfamilias

Capacity to Create Confusion for the Purposes of Prior Use

Article 32 holds that no trader shall make use of any name, mark, or distinctive device, which is **capable of creating confusion with any other name, mark, or distinctive device**. Thus, one must consider the element of confusion which may be created by one name, mark, or device, when compared with another. To this, reference is often made to the works of ***Kerly***, in ***Kerly's Law of Trademarks and Trade Names.***

To determine whether a mark or a name is capable of creating confusion with another mark or name, it is necessary to compare marks. The issue is one of fact not of 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 the likelihood of confusion.

The crux of article 32 is that traders shall not make use of any mark, name or distinctive device that is **capable of creating confusion**. If we had to include in the texts of the law, the parties to a lawsuit, then article 32 would read:

Essentially, in dealing with the concept, the capacity to create confusion, it is possible to identify 3 main issues:

1) A Comparison of the names or marks
2) The issue as to whether it is necessary to prove actual confusion
3) Is it necessary for the goods or the business of the plaintiff and the defendant to be identical or at least similar - do they need to share a common field of activity.

Requirements for the comparison of marks

<u>1) The assessment is to be made from the point of view of the average customer</u>

The assessment is to be made from the point of view of the average consumer. We must therefore establish an average consumer, as this will serve as a test, and this all largely depends on the type of product or service. ***Cutajar vs Caruana*** - *the Court held that the mark COUNTY 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***".

The average man in the street thus possesses the adequate intelligence able to defer from one design and another, one sound and another, one word and another. The court proceeded to explain, in further detail, this notion of the average man, for the purpose of comparison and capability to create confusion by stating "*il-protezzjoni kontra l-konkorrenza sleali ma tkoprix la kazijiet ta' injoranza akuta u lanqas ta' disattenzjoni jew negligenza grassa".* There is no distinction therefore between negligence and ignorance, in that they are both excluded from the test of the average man.

Local law judgements state that an average consumer "is deemed to be reasonably well informed and reasonably observant and circumspect":

In ***Hammer vs Gatt,*** the Maltese courts referred to purchases who had an average intelligence.
In ***Portanier vs Abela,*** it was expressly stated that the law is not there to protect ignorant or careless people.
In ***Said vs Ellul,*** the court observed that the average consumer had "*inteliġenza u diliġenza ordinarja*".
In ***Agius Vadala vs Mizzi***, there is an express reference to the *xerrej komuni*.

EU law judgements state that an average consumer "is deemed to be reasonably well informed and reasonably observant and circumspect":

2) The 'idea' of the mark is to be registered

Sansone vs Cassar Torreggiani - *Nutella Case 1 - Nutella/Chocotella*
15th November 2005

In this case the court held that the confusing similarity of Chocotella arose from the idea imprinted in the mind of the Consumer in relation to Nutella. Again, the idea of the average consumer with imperfect recollection, as taught by Kerly is applied. Kerly is cited as follows;

Two marks, when placed side by side, may exhibit many and various differences, yet the main idea left on the mind by both may be the same. A person acquainted with one mark, and not having the two side by side for comparison, might well be deceived, if the goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted. Thus, for example, a mark may represent a game of football; another mark may show players in a different dress and in very different positions, and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trade-marked goods, and relying, as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing. Marks are remembered rather by general impressions or by some significant detail than by any photographic recollection of the whole. Moreover variations in details might well be supposed by customers to have been made by the owners of the trade mark they are already acquainted with for reasons of their own.

*In **Valletta noe vs Busuttil et** - Nutella Case 2 - Nutella/Nutina*
12th April 2005

On the basis of this principle the Court held that the mark NUTINA was confusingly similar to the mark NUTELLA.

"Din il-Qorti allura ma tistax teskludi ċertu grad ta' "visual, oral and conceptual similarities of the mark" li jistgħu jwasslu ghal konfużjoni fis-suq, fis-sens li wieħed jista' effettivament jasal biex jakkwista prodott flok ieħor. Dana mhux biss minħabba l-fatt illi wieħed jista' ma jkunx f'pożizzjoni jagħmel paragun bejn iż-żewg marki, jew minħabba aljenazzjoni momentarja komprensibbli fil- mument ta' l-akkwist, imma wkoll għaliex ix-xerrej jista', żbaljatament, jassoċja l-prodott "Nutina" bħala li hu manifatturat mid-ditta attriċi li kienet ben stabbilita fis-suq bħala produttur ta' oġġetti ta' dik ix-xorta u natura taħt l- isem stabbilit "Nutella".

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 **get-up** (i.e., the way the product is "dressed") rather than a word mark. When considering the mark as a whole, it is also important to take into account not only visual but also aural similarity.

4) The average consumer has an imperfect recollection

This notion is based on the teachings of Kerly, who holds that "M*arks are remembered rather by general impressions or by significant detail than by any photographic recollection of the whole".* One example where the Courts have applied this principle is the case of ***Sansone vs Cassar Torreggiani***, where the court held that Chocotella was not confusingly similar to Nutella, but the confusing similarity arose from the similarity of the labels. Again, this idea of having an imperfect recollection arises from EU Courts, which tell us that the average consumer has to place his trust in the imperfect image he has retained in his mind. He has to place his trust in the imperfect image he has retained in his mind.

5) Marks are to be compared as they would be seen in actual use

This means that if you see two products in front of you, isolated from the context where they would be displayed, this would not give the court a correct impression of an imperfect recollection that an average consumer might have. But if we see these two products in a particular supermarket aisle, it would be in that context of seeing the marks in actual use where the court can determine whether or not there is capability to create confusion.

6) All circumstances of the trade are to be considered

The circumstances of trade would include elements such as the nature of the market, similar marks, and possibly even commercial usages. What is interesting is that the **courts do not require proof of actual confusion**. This element was included in ***Vadala vs Mizzi***, wherein the court states that "*L-azzjoni kontra l-konkorrenza sleali hija bbażata fuq il-potenzjalita' u mhux l-attwalita' tad-dannu. Hija essenzjalment azzjoni preventiva għalkemm għandha wkoll aspett punittiv".* An action based on unfair competition is based on potentiality rather than actual damage. It is an action which is of a preventative nature, even though it has a punitive element. Having said this, in borderline exceptional cases, where it is not clear cut whether there is capability of confusion, the element of proof of actual confusion might tip the scales or tip the balance in favour or against one of the parties. There is a trend where essentially the goods or the businesses must be identical or at least in a similar business. Some hold that this is too in favour of one party, and some hold that it could lead to a dilution of the mark or the brand.

Starbucks / Strabuono (***Dr Luigi Sansone noe vs Strabuono Coffee International Limited***
1st Hall, Civil Court, 12th January 2022

In this case, the **Strabuono Coffee** establishment in St Paul's Bay was ordered, by the Court, to adhere to a totally new rebranding, owing to the inherent similarities and comparisons which could be made with the Coffee Giant Starbucks. The Court adopted several indicators of confusion, including;

- The Reasonable Man Test,
- The Overall Appreciation of the marks compared,
- The Visual and Aural elements to the mark, and
- All the circumstances surrounding the mark (in this particular case, including the style of the Coffee Shops and the names associated with the drinks sold).

Sabel vs Puma - *CJEU*
11th November 1997

This case pertained to Sabel, who applied to register a trademark consisting of a leopard which was contested by Puma. This is a very important case pertaining to the confusion of marks. The ECtHR held that:

- As Kerly teaches, the signs must be seen and compared in their entirety, and no confinement must be made to their individual characteristics.
- Global appreciation must be made to all visual, aural or conceptual similarities to the signs
- One must compare the overall concept and impression given by the marks.
- The average consumer normally perceives the mark as a whole and does not analyse in detail the constitutive elements.

The question was whether **likelihood of association by the public** was enough to constitute **likelihood of confusion** which is required to strike off or deny registration. The ECtHR held that **likelihood of association is not sufficient as proof of confusion**.

Articles 32A - Comparative Advertising

Articles 32A and **32B** were introduced to transpose **EU Directive 2006/114/EC**, providing for comparative and misleading advertising respectively.

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.

For comparative advertising, therefore, regulated by 32A, the law is not absolute. There are exceptions. The origins of this law is found in an EU Directive - *Misleading and Comparative Advertising Directive*. If one has a look at this directive, it is clearly stated, in article 1, that the principle objective of the directive is that to protect traders. Subsequently, a development in the law meant that under EU law, it is not only the trader that must be protected, but also consumers and the general public. Even more recently, business-to-business relations were being put as the focus of these provisions. The origins of these provisions is the EU directive. **In Malta, the implementation of this directive was not smooth - there was a period of uncertainty where these provisions should be found. Originally, the provisions we are discussing today were contained originally in articles 48, 49, and 50, of the Consumers' Affairs Act**. Essentially, it was felt that it was the consumer who was being protected by these provisions, and so there are cases where these provisions were invoked in order to protect the consumer, as opposed to the trader. In order for comparative advertising to be permissible, all the conditions under Article 32A must be satisfied **cumulatively**.

World Marketing Services vs CrossCrafts
11th of April 2001

In this case, a number of warrants that were issued by *World Marketing Services* against *Cross Crafts Company Limited* alleging that there was comparative advertisement. The defendants were using appliance by the plaintiff company to show how theirs were better. CrossCrafts (who was the defendant) submitted a request for the revocation of these warrants, because they were damaging the business. Quite interestingly, a point brought up by Cross Craft, in countering these warrants, was that essentially, World Marketing Services Limited's claim holding that comparative advertising was not allowed by the law was not true - in fact, this form of advertising is allowed.

In this case, the provisions on comparative and misleading advertising were originally found within the Consumer Affairs Act. This provdes confusion relating to the understanding of the raison d'etre to these provisions - whether they protected the trader or the consumer.

Green Dot Malta Limited vs Green.Mt Limited
27th May 2010

Illi oltre minn hekk is-socjeta` intimata a sua sponte u/jew tramite l-azzjonista ewlenija taghha "il-Kamra Maltija ghan-Negozji Zghar u Medji (GRTU)", ilha ghal diversi xhur taghmel reklamar qarrieqi ai termini tal-artikoli 32B u 36A tal-Kap 13 tal-Ligijiet ta' Malta, konsistenti inter alia fi stqarrijiet u press releases mwassla lil firxa wiesgha ta' nies inkluz negozjanti lokali illi jqarrqu jew probabbilment iqarrqu bihom u li jaghmlu l-hsara jew probabbilment jaghmlu l-hsara lis-socjeta` rikorrenti bhala kompetitrici tas-socjeta` intimata, kif ukoll ilha ghal diversi xhur ixxerred ghal skop ta' konkorrenza notizzji li jisghu jaghmlu hsara lill-kummerc tas-socjeta` rikorrenti ai termini tal-artikolu 34 tal-Kap 13 tal-Ligjiet ta' Malta, kif ukoll ilha ghal diversi xhur taghmel reklamar komparattiv projbit ai termini tal-artikolu 32A tal-Kap 13 tal-Ligjiet ta' Malta

The general principle of comparative advertising, as established by the CJEU in the case of ***Carrefour v. ITM*** *(C-562/15) (08/02/2017)*, is as follows: "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".

Carrefour vs ITM
8th February 2017

Essentially, this judgement sheds light on the amount of flexibility each member state has in the implementation of the directive. With respect to misleading advertising, the court of justice of the EU observes that the directive carried out a minimal harmonisation of national rules and therefore allowed member states to apply stricter provisions in that area.

By contrast, with respect to comparative advertising, the directive carried out an exhaustive harmonisation of the conditions under which comparative advertising in member states might be lawful.

As always, when implementing EU Directives, problems arise when it comes to basic definitions, as we had in the case of the definition of trader, which remains unharmonised - our article 4 of the Commercial Code ("any person who by profession exercises acts of trade in his own name and includes any commercial partnerships") differs from the definition of trader provided by article 2 of the Directive ("a trader is to be understood as being any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name or on behalf of a trader"). The definition in the EU directive is thus much more wide than what we have in our Maltese Code.

Toshiba Europe vs Katun Germany
(C112/99) (25th October 2001)

"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 competitor"

The defendant company had produced a catalogue which included a list of spare parts that were compatible with Toshiba Photocopiers. This was deemed to be comparative advertising.

Lidl vs Vierzon
18th November 2011

This case pertained to price comparison in a list of products (mainly foodstuffs) from a Vierzon and Lidl store. The Court considered 3 conditions for the legality of Comparative advertising, namely 4(a) (b) and (c) of the Directive. The Court must take into account: Perception of the 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.
- 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.

Article 4(b): 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. Article 4(c) (objective comparison of one or more features): The Court considered the requirement that the features compared must be verifiable, stating that "for the prices of the goods comprising two selections of products to be verifiable, 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". The casus classicus is this case. In this case, Lidl accused the defendant that it published a misleading advertisement in a French newspaper. It was misleading according to Lidl because it compared prices without naming the brands. The European Court held that the brand names should be mentioned in the advert since the consumer should be able to identify the product mentioned in the add where the consumer goes to the supermarket in order for him to check whether the advertisement was correct.

Article 36A - Definition of Advertising

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.

Elements to this definition:

1) “representation of any form” - this covers representation whether it is visual, graphic, oral, written, etc
2) This is done in connection with a trade, business, craft, or profession
3) To promote the supply or transfer of goods, services, rights, property, obligations, etc.

This definition of advertising leads us straight into 32B.

We said that misleading advertising is prohibited by law. The problem is thus “what constitutes misleading advertising”.

32B - Misleading Advertising

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.

Element 1: The first element is the element of deception. We must be able to provide certain conditions that constitute deceptions. The first of which is always that the leading advertisement *deceives or is likely to deceive*. The test is that of the average consumer. The case of ***Estee Lauder vs Lancaster Group*** *(c220-98) (16th September 1999),* wherein the court recognised that it was necessary to take into account the presumed expectations of an average consumer, who is reasonably well informed and reasonably observant.

First, you must prove the deceiving nature, and secondly, you must show that by reason of deception, one or two or both of these ensue:

Element 2: The second element is that by reason of the deceptive nature of the advertisement, one of two things must happen - either the consumer's economic behaviour is effected or likely to be effected by reason of the deceptive nature or a competitor is injured or is likely to be injured by reason of the deceptive nature.

So there must be deception and there must be one or both of the above in order for there to be breach of this law. In determining whether an advertising is misleading, there are a number of factors that must be, according to law, considered:

32B (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.

The final factor, that of the nature, attributes and rights of the advertiser is interesting because the law considers whether the advertiser has any global awards or certain qualifications or any special other circumstances attributed to his identity.

Article 32B (3) (a) specifically refers to geographic or commercial origin as a factor that should be considered in determining whether an advertisement is misleading.

Article 32B was introduced in 2008, so it may be a the case that the introduction of this law rendered other articles, such as 34(2) redundant. **34 (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.*

Articles 33 - False Designation of Origin

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.

This covers place of origin. The false indication of origin covers geographical indications and the designations of origin.

Council Regulation (EU) No. 1151/2012 of 21st November 2012 on Quality Schemes for Agricultural products and foodstuff speaks of:

1) **Protected Designation of Origin (PDO)** - Foodstuffs which are produced, processed, and prepared in a given geographical area using recognised know-how (e.g, Mozzarella Di Bufala Campana)
2) **Protected Geographical Indication (PGI)** - Foodstuffs which have a link with the area in at least one of the stages of production, processing, or preparation (e.g, Turron de Alicante)
3) **Traditional Speciality Guaranteed (TSG)** - Highlights traditional character, either in the composition or means of production.

The issue is whether this provision that deals with false indication of origin covers also products of a particular composition that which are not linked to a particular locality. A case that pertains to this and that relates to *Advocaat,* a particular Dutch liquor that is heavily popular in the Netherlands. This case is that of ***Erven Warnink B.V vs J. Townend & Sons (Hull) Ltd*** *decided by the House of Lords 1979*. Informally, this is known as the ***Advocaat*** case. This leading decision further developed what is referred to as the Common Law Tort of Extended Passing of. Collected goodwill in this case only applied to names indicating geographic origin. The word *advocaat* did not have geographic origin. In this case, the House of Lords held that goods whose name falsely suggests its character or quality can be prevented from selling the product under that name. The plaintiff Dutch company was one of the primary market producers of a Dutch Liquor. Lord Diplock established 5 criteria for a claim of extended passing off:

1) Misrepresentation
2) By a trader in the course of trade
3) To prospective customers of his or ultimate consumers of goods or services supplied by him
4) Calculated to injure the business or goodwill of another trader
5) Which causes actual damage to the business or goodwill of the trader bringing the action.

Article 34 (1) - Spreading of news prejudicial to other traders

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

There are 3 constituting elements for this provision:

1) Spreading of news
2) The defendant must be a trader (& plaintiff)
3) Capable of prejudicing the trade or business of another trader
4) For the purpose of competition

There is thus an intentional element.

Spreading of news

The word 'news' is to be understood in its widest context. There is no specific means used referred to by the law - it could be by word of mouth, texting, social media, etc. Spreading of news need not be widespread, meaning that one letter to one person can be enough if it is capable of causing prejudice. This was explained in a Maltese court judgement of ***Falzon vs Nani*** *(27th March, 1953),* wherein the *spreading of news* was characterised as *in-numru żgħir ta' persuni li magħhom tiġi mxerrda n-notizja ma jneħħix li n-notizja ġiet imxerrda*.

There is thus a very loose interpretation of this particular section. Denigration is the most common form, but the article is not limiting or restricting.

It is important to note that the news spread need not be false, it is considered a breach of the law even if the news is spread for the purpose of competition which subsequently damages or is capable of damaging the trade or business of another trader. The malice behind the spreading of news which is false is only rendered relevant in the context of 37(3), wherein such malice is considered in determining the amount fined to the defendant should the plaintiff opt for a penalty as opposed to damages as stipulated by 37(1).

Anthony Caruana & Sons Limited vs Caruana - *news need not be false for breach to subsist*
28th February 2014

In this case, the defendant was an employee at the Plaintiff Company who had his employment terminated.

Il-Qorti irriteniet illi l-attur kellu jipprova li l-konvenut kien xandar notizji u li dawn in-notizji setghu jaghmlu hsara lill-industrija ta' haddiehor.

Fil-kawza Edward Vincenti Kind pro et noe vs Joseph Manche Pro et noe deciza fl-10 ta' Dicembru 1957 [XLI-III-1259] mill-Qorti tal-Kummerc inghad li mhuwiex necessarju li n-notizzji divulgati jkunu foloz u l-anqas huwa necessarju li l-kummercjant li jsofri d-dannu jipprova li huwa sofra danni: "“Wahda mill-figuri ta' konkorrenza sleali kontemplati mill-ligi taghna hija d-diffuzjoni, maghmula ghal skop ta' konkorrenza, ta' notizzji li jistghu jaghmlu hsara lill- industrija jew kummerc ta' kummercjant iehor. **Il-ligi taghna ma tezigix illi l-fatti divulgati jkunu falsi,** u tippunixxi anki d-diffuzjoni ta' fatti veri; il-verita' jew falsita' tal-fatti attribwiti tista' biss tinfluwixxi fuq il magguri jew minuri mizura tas-sanzjoni li tigi applikata ghall-kaz. **Pero', il-ligi trid l-intenzjoni specifika fil-propalatur, jigifieri f'dak li jaghmel il-konkorrenza sleali;**

Alfred Gera & Sons Limited vs Mario Casingena - *elements to article 34*
8th October 2004

For a breach of article 34 of the Commercial Code to subsist, 4 elements must be proven, being;

"i. Il-konvenut irid ikun kummercjant.;
"ii. Huwa jrid ikun agixxa b'intenzjoni specifika;
"iii. Irid ikun hemm tixrid tan-notizji; u
"iv. Li dan it-tixrid tan-notizji jrid ikun jista' jaghmel hsara lin-negozju ta' l-attur.

"Fin-nota tieghu l-konvenut qabel li dawn huma l-elementi li jridu jiġu ippruvati sabiex tirnexxi l-azzjoni ta' konkorrenza zleali.

The truth or factuality behind the news is irrelevant in terms of breaching the law, but relevant in terms of the penalty stipulated by article 37.

In **Curmi vs Mizzi,** the court stated that the possibility of damages is enough to result in unfair competition. This capacity to create prejudice might also arise even if the plaintiff is not even actually named in the news.

An act done for the purpose of competition is any act that is done for the purpose of promoting the traders' interests in the market, meaning that it is not limited to acts done for the purpose of undermining clientele or the goodwill of others. Furthermore, the intention of spreading such news must necessarily be of competition. The ground of vindictiveness, for example, is not sufficient.

Proving damages is not necessary in filing a case under 34, but is necessary if the claimant sues for damages as opposed to the penalty stipulated in s 37

Afred Gera & Sons Limited vs Mario Casingena et posited 4 elements which must be concurrently met in order for a breach of 34 to be proven:

1) **The defendant must be a trader**
2) **The defendant must have been acting with specific intent to spread news for the sake of competition (as reiterated in Anthony Caruana & Sons Limited vs Caruana)**
3) **There must be a spreading of news**
4) **This spreading of news must be capable of causing harm to the business of the plaintiff.**

Articles 34(2), 35, & 36

S. 34 (2) - Use of honours

34. (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.

Essentially, this provision tries to prohibit the use deceitful means which are intended to give an unfair advantage over competitors who trade honestly. There must therefore be an element of prejudice to another competitor. There does not seem to be a provision that prevents the exaggerated praising of one's own product, so long as the honours and medals are recognised.

S.35 - Subornation of other Traders' 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, such as that relating to know-how, supplies, and information. This section takes more context and importance when put into the context of how important data is in today's day and age. The word *suborn* implies bribery or corruption, but the law does not specify the means. What is included in this bribery or corruption could also thus include the promise of anything of value. It is not limited to a pecuniary advantage, but it could also be an offer of employment.

S. 36 - Certificates of honesty or competency

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 article means that a trader is not allowed to issue any misleading certificates. Traders do not have a duty to issue certificates, so if they do, they must be done in *bona fide*.

The Duties of Traders

There are 3 main duties attached to each trader. The first of which is to remain within the limits of fair competition. The second is the keeping and maintaining of trade books, while the third is the duty to publish marriage contracts.

The Obligation to keep Trade books

Trade books are the registers wherein traders keep a written and up to date account of their business transactions.

Why does the trader have the duty to keep such trade books? There are 3 main reasons:

1. A first justification to this obligation is that trade books, if maintained according to law, are admissible and constitute evidence of their contents in terms of the Law of Civil Procedure.

2. The preservation of trade books also serve an interest to third parties. Third parties, which in this context are to be understood as being creditors, would have a record as to how the money advanced by them to the trader is spent. It is only fair that they are given transparent indications as to where their money is going.

3. Keeping trade books is also in the interest to society at large. In the case of suspension of debts, it is important for society to establish whether bankruptcy is genuine or fraudulent. The importance of determining whether it is genuine or fraudulent is evident in the repercussions that will ensue. This will also indicate to society where the trader has gone wrong, or whether he was acting falsely or not.

Section 13 of the Commercial Code establishes the trade books which must be kept and maintained by the trader:

Types of trade books

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.

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.

The waste-book is a diary which is updated on a daily basis, listing the commercial transactions that were carried out on each particular day. Traditionally, the waste book was of a temporary nature, because the transactions would be subsequently included in the journal. The waste book is thus a pro memoria. This thus gives a daily diary listing chronologically daily transactions.

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 must show, day by day, all the transactions concluded by the trader. His debts, endorsements of bills, every received or payed transaction must be listed within the journal. The journal is more formal than the waste-book, for it not only contains a daily listing of commercial transactions, but also a monthly expenditure section. The transactions to be annotated in the journal would obviously include debts and credits, but it is wide enough so as to also include all payments disbursed by the trader. The journal must also establish the money used by the business and the money used by the trader for his personal disbursement.

Cash-book

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.

The principal purpose of a cash-book is that it is a way for every trader to manage and account for cash-related transactions, including receipts and payments. The spirit of the article is thus to help the trader in his everyday commercial use. The cash-book contains within it an overlap with the journal. There is another element of specificity that would be included in the cash-book and not the journal, in that details of all sums received must be clearly specified. A cash-book is usually organised to include all cash transactions made within an accounting period and are to be included in a sequential order.

Inventory-book

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.

Article 17 entails the traditional understanding of the inventory-book, that which contains the trader's estate, assets, liabilities, etc, whatever their origin in relation to the trader. There is a complete picture of the patrimony of the trader, including both the assets and the liabilities. If in the assets or liabilities it is clear that the liabilities clearly surpass the assets, if the trader still chooses to continue to trade, that may be indicative of possible fraudulent activity on the part of the trader himself or herself. Article 17 (2) provides the obligation of the trader to draw up a profit and loss statement, which must be updated yearly.

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.

The Ledger essentially contains an accurate and up to date record of all the transactions classified as personal and impersonal accounts and so kept as to render possible the drawing up of a true and correct picture of a state of affairs of the business or trade at any given time.

In the more traditional business structures, the opportunity to keep such trade books is perhaps easier than the contemporary emerging commercial structures. If we consider crypto trading, for instance, the commercial model that is based on such virtual assets renders the maintenance of such trade books essential for society at large. The trade books of such emerging crypto trends is important now more than ever before, especially when considering the virtual and paperless environment that is arising.

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.

Keeping of letters, invoices and mails

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.

Article 20, in its marginal note, refers to the duty to keep letters, the duty to keep correspondence. This perhaps reflects upon the considered duty to keep emails. There is an obligation, in article 20, to keep supporting documents.

Formalities to be observed in book keeping

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.

These requirements stipulated to formalise trade books apply also *mutatis mutandis* to vat books.

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.

Trade books thus serve as *prima facie* evidence in accordance with the COCP. Article 22 (2) contains an important proviso that holds that these books cannot have divided contents.

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.

This article elaborates upon a salient procedural element pertaining to trade books when they serve as evidence. It is important to remember that the *extract* must relate solely to the controversy that subsists between the parties to the lawsuit. In the case where an extract is required, a qualified accountant chosen by agreement between the parties, and in the default of such agreement the accountant shall be appointed *ex officio* by the court, will confirm and ascertain the contents of the book.

23 (3) manifests the principle of *audi alteram partem*, allowing the defending party to produce his own books in order to establish counter-evidence, provided that they are kept according to law.

Trade books and Bankruptcy

The importance of trade books is given further importance under the light shed by bankruptcy. Note that there is a change in language used and terminology when it is a legal person or a natural person when it comes to bankruptcy - **for a natural person, we refer to bankruptcy, when we refer to legal persons, we speak of dissolution and consequential winding up as well as liquidation.**

The importance of trade books can be demonstrated under the sections of Title 1 of Part III the Commercial Code, that *of the declaration of bankruptcy.*

S. 477 holds that when a trader suspends payments of his debts, he is deemed in a state of bankruptcy. In such case, by 478, he must make a declaration in the Civil Court, First Hall.

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 477 refers to the declaration of bankruptcy, which is then further explained in s 478 (1), which holds that the trader or his lawful representative can, on the suspension of payments, make a declaration thereof in the Civil Hall, First Court. Article 480 demonstrates, in practical terms, the importance with which the law regards trade books. The moment in which the trader declares bankruptcy, there is the obligation on the bankrupt to submit to the authorities **all his trade books**, because it is only through these trade books that he can be rendered bankrupt.

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.

Once there is a declaration of bankruptcy, certain rights kick in to protect the trader involved. This is not the same when considering fraudulent bankruptcy, so much so that article 539 holds that the benefits granted by law in favour of bankrupts shall not apply in the case of fraudulent bankruptcy, which is defined and established by means of 539 (2)

Trade books, therefore, when kept in line with the law, constitute *prima facie* evidence in support of the Trader's position when declaring or attempting thereof bankruptcy.

The question arises whether trade books may be subject to warrants of seizure Since the documents have a value, technically, they may be subject to warrant of seizure (mandat ta' sekwestru). We will learn that warrants can be issued in a precautionary manner, and they may be revoked. The issue in this case was whether the mandat ta' sekwestru applies to trade books. The court, in this instance, of appeal, held that **a warrant of seizure of trade books could not subsist and therefore revoked the said warrant**. Essentially, this reflects the fact that there is still sensitive information that ought not be the subject to a warrant of seizure. This is an indicator to the importance and relevance of trade books, especially in the context of bankruptcy.

Retailers

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.

Period for preserving books - the retention period of trade books

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.

In terms of article 26, the retention period of trade books (5 yrs) is that traders are bound to keep trade books, letters, invoices and telegrams must be kept for a period of 5 years from the date of the last entry made in each book.

Trade books are thus books of account wherein traders keep a detailed record of all their commercial transactions. If trade books are kept according to law, they constitute *prima facie* evidence of their contents in terms of COCP, at least at Maltese Law. Book-keeping, or rather, recording the monetary aspect of commercial or financial transaction, establishes the economics of a business enterprise, in a way that facilitates the preparation of reports which summarise its financial status at any given time, as well as its financial operations during a period of time.

These trade books are not only required for the purpose of sending out periodical statements to a particular customer, showing how much they owe, but also for the purpose of enforcing payment, should it be necessary to invoke the process of law for that purpose. All business transactions have a legal status, in the sense that how much is due from a given customer will be more conveniently presented if a list of transactions is prepared. Book keeping thus maintains a series of accounts, recording all the activities of a business.

Limited Liability Companies and Trade-books

Our analysis will not solely be limited to the Commercial Code. Since we are dealing with a special part of corporate law, we will be dealing with special laws - introducing thus the law of Commercial Partnerships. Any Limited Liability Company registered must comply with all the corporate legislation which is applicable to them. The major obligation of the LLC, with respect to corporate documentation, is the keeping of trade books and proper accounting records. Since we have a corporate entity, the assumption is that the level of transaction is more complex, so there is an additional legal level of obligation that pertains to book-keeping.
The 2 main sources of legislation concerned with LLC book-keeping are the Commercial Code and the Companies Act.

Commercial Code

In virtue of article 4 of the Commercial Code, the LLC is *ex lege* considered to be a trader. One of the basic duties of a trader, in terms of the Code, is the keeping of trade books.
However, most of the duties related to the keeping of trade books found in the Commercial Code have been superseded by more onerous duties introduced by the Companies Act, namely articles 136 and the ensuing articles.

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.

This article of the Commercial Code implies the keeping of emails. Article 20, despite the superseding obligations stipulated by the Companies Act subsists even today. S.26 holds that the retention period of such books is of 5 years. **Article 20 applies to both natural and legal persons. 13-18 applies only to natural persons, as we will see, by virtue of 163 of the Companies Act.**

Companies Act

Chapter X of Part 5 of the Companies Act deals with **Accounts, Audit and Annual Return**. The provisions run through s.163 - 191 (inclusive).

S 163 - Maintenance of Proper Accounting Records to replace trade books for LLCs

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.

Note that the duty to keep letters, invoices, telegrams, etc, as per section 26 of the Commercial Code is not abrogated. Furthermore, the retention period remains of 5 years for such letters, despite the provisions of s 163 (5).

S 163 (1) + (2) - Proper Accounting Records - defining proper

163 (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.

Therefore, 163 (1) shows and defines what information is to be collected within the accounting records, while 163 (2) reflects the constitutive considerations that render an accounting record ***properly kept***. If a record is able to, at any given time, disclose the financial position of the L.L.C., and is ensured by each director to be in line with the requirements at law, then the accounting record is properly kept. **S. 163 (3)** encompasses the rule already expressed, that the accounting records **shall be kept at the registered office of the Company or at such other place as the directors deem fit**, **and shall be at all times open to inspection by the Company's office.**

163 (5) - Retention Period for Accounting Records

S. 163 (5) holds that notwithstanding s.26 of the Commercial Code, the **retention period for the LLC's accounting records is of 10 years**. The proviso to this holds that the 10 years shall run from the last entry included.

The retention period for letters and invoices kept by virtue of 26 Commercial Code, which is still a duty of traders, even if L.L.C,, is still of 5 years.

S 163 (6) - Penalties for Default

163 (6) If a company fails to comply with any of the provisions 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**.

The officer thus has 2 possible defences:

1) That he acted diligently; and
2) That the circumstances so permitted the mistake or default.

The Companies Act also compels the LLC to keep;

- a register of members
- a register of debentures
- minutes of proceedings of general meetings
- minutes of proceedings of board meetings.

These requirements emanate from different parts of the Companies Act.

The Duties of Directors of a Company - S 167

S 167 provides a glimpse as to what the Directors' duties are in relation to these books.

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.

(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.

(4) Where the application of the provisions of this Act would not be sufficient to give a true and fair view within the meaning of sub-article (3), additional information shall be given.

The duty lies on the director, in the sense that it is clearly stated that the **director 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 that may be required as deemed fit by the general accounting principles and practices.**

S. 167 (3) contains within it a very important rule - ***a true and fair view***. This is absolutely crucial - the records must be kept and maintained in *bona fide*.

Article 168 contains the rules pertaining to the requirements that must be satisfied in the annual accounts of special types of undertakings, When we speak of the Companies Act, this law applies to the traditional LLC. The realm of company law, however, is so broad that even though there is the special law of the Companies Act, there are other laws that regulate financial institutions. For instance, s. 168 deals with *banks and financial institutions*, to which the Banking Act and the Financial Institutions Act would burden entities of these caliber with further obligations.

S. 169 deals with investment companies, which are an exception to the rule that an LLC must have a fixed share capital - investment companies can have a *variable* share capital.

S 177 - Directors' Report

S. 177 deals with the contents of the Directors' Report.

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 review included in the Directors' report reflects the growth of the company.

- **Name**
- **Registration**
- **Legal form**
- **Registered office**
- **If the company is being wound up**

All of the above shall be included in the Directors' report.

S. 178 deals with the approval and signing of the Directors' Report. This is crucial because it is to be submitted to the General Meeting. In a company, there are 2 main organs - the Board of the Directors and the Shareholders acting in the General Meeting. The Board of Directors take care of the day-to-day operations of the Company. The Shareholders acting in the General Meeting are vested with residual powers, such as that to appoint a director and to remove a director. **178 (2)** holds that every copy of the directors' report shall state the name of the person who signs - there is an element of accountability. **179** deals with the **auditors' report**. There is again the requirement of a *true and fair view*. Subsequently, the way things unfolded resulted in a certain set of requirements that pertained to this report, which is what led to the introduction of s. 179A, which imposes a further set of requirements. 179A thus specifically requires that the report be in writing and stipulates a set of important criteria which must be met *ad validitatem*. This allows for a standardisation of the style of auditors' report.

179A (1) (c) provides an important requirement that must be met for an auditors' report to be valid:

179A (1) (*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.

S. 181 holds that Directors must lay, before the company in general meeting, copies of the annual accounts for the company, and s. 184 creates the obligation of the company to make a return in the form set out in the 7th Schedule of the Act.

Additionally, there are additional fiscal obligations, which emanate from 2 main pieces of legislation: the Income Tax Management Act, and the VAT Act.

Income Tax Management Act

19 (1) Every person carrying on a trade, business, profession or vocation shall keep proper and sufficient records of his income and expenditure to enable his income and allowable deductions to be readily ascertained

These obligations, when not satisfied, are serious enough to warrant punishment by imprisonment.

VAT Act

Part 6 of the VAT Act deals with records and information. The 11th Schedule to the VAT Act also deals with the documentation that is to be kept by every VAT registered person.

There are more acts - the Electronic Commerce Acts (s 8), the Duties on Documents and Transfers Act (s. 7 & 2) are also pieces of legislation that confers upon the LLC Obligations which must be met throughout operations.

Persons Auxiliary to Trade - Title 4 of Part 1

There are some professionals (agents, commercial brokers, managers, etc) who owe their existence to the presence of traders. Such professionals may be split into 2 classes.

1) Persons of a limited function and who are not legally recognised as third parties (employees, labourers, etc)
2) Persons whose relationship with traders is recognised to be legally established.

An important note to make is that Our Commercial Code (s.4) does not consider persons auxiliary to trade to be traders. This is because such persons come short of satisfying the latter part of section 4, that they must be "Acting in their own name".

However, **EU Directive 114/2006**, Concerning Comparative and Misleading Advertising, holds otherwise. This definition states and includes "**anyone acting on behalf or in the name of a trader**" is considered a trader for the purpose of the Directive.

Thus a clash exists, between our Commercial Code and the EU Directive, with regards to whether persons Auxiliary to Trade are considered to be traders. We have already seen that another incongruence is evident in the fact that Our Commercial Code article 4 classifies "**any commercial partnership**" to be a trader, whereas the Directive does not hold the same, and allows that a commercial partnership not concerned with trade be a non-trader.

Despite the person auxiliary to trade not being recognised as a trader under Maltese law, certain professionals, such as the Manager (by virtue of s 65) are still obliged by the duties to traders, in this case with the keeping of trade books and with the duty to maintain within the limits of Fair Competition and to publish marriage contracts, for all purposes related to the business or branch of business entrusted to him.

Mercantile Agency

S 49 - Sources and Non-gratuity

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.

This is a very wide proviso - "any agreement, law or custom to the contrary". A subsequent proviso adds that mercantile agencies that involves the obligation of performing services, then the EIRA applies to such agencies. This provision is of pivotal importance, for it establishes 2 crucial elements to mercantile agency - 1) its sourcing and 2) its non-gratuity (exclusion of art 1861).

Element 1 - Sources

- The Law of Agency (lex specialis)
- The Law of Mandate (legi generali)
- Employment Law (EIRA)

The main difference between an agency and a mandate is that in an agency, the agent has the power to negotiate and conclude business on behalf of the principal. In a Mandate, there is a power to promote a business without the power to negotiate, decide, and conclude the business. He will only refer back the business opportunities to the principal person. This distinction is made in ***Anna Diso vs Francis Zahra***

Anna Diso vs Francis Zahra
Court of Appeal on the 22nd April 1960

"Għaldaqstant, azzjoni ta' kummerċjant kontra persuna li mpjegat ruħha miegħu bħala "barmaid" għar-restituzzjoni ta' self li huwa agħmlilha, u li hija kellha troddlu ftit ftit mis-salarju tagħha, hija ta' kompetenza ċivili, jekk dik il-"barmaid" kellha l-inkombenza biss li tkompli man-nies u ma kellha x'taqsam xejn mal-flus u max-xogħol tal-prinċipal. Ir-relazzjoni bejn dik il-"barmaid" u l-prinċipal kienet sempliċi lokazzjonni d'opera, li fir-rigward tal-"barmaid" kienet relazzjoni ta' natura prettament ċivili. Il-fatt li l-ħlas lura tas-self kellu jsir b'deduzzjonijiet mis-salarju ma jbiddilx in-natura ta' dan il-kuntratt"

In this case, the court decided that an action taken by the trader against an employee for a restitution of a loan done for the pay of a salary was of a civil nature, not a commercial one. The fact that the repayment of the loan had to take place by monthly reductions of the salary in no way altered the nature of the contract. The relevance of this case is to denote the distinction that exists between an agent and an employee. Both are regulated by two different pieces of legislation (employee - EIRA, agent - Commercial Code).

Agency - Defined

"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 a third party." - Prof Micallef.

From this definition we can establish three distinct persons - the principal, the agent, the third party.

Element 2 - Non-gratuity

A second point is that ***in Commercial Law, Mercantile agency cannot be gratuitous, but it must be onerous. It must be paid.***

The fact that Mercantile Agency must be onerous emanates from the final phrase of s 49 - "with the exception of article 1861 of the Civil Code."

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

Title 18 of Part 2 of Book Second of the Civil Code, applies to mercantile agency except for s 1861, which holds that mandate is gratuitous. **Therefore, a contrario senso, mercantile agency necessarily requires payment, it cannot be gratuitous.**

S 50 - The Effects of Agency

> **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.

Irrespective of the impact they will have on the principal, the acts of the agent done within the limits of his powers have a direct effect. Article 50 thus posits 3 main notable observations:

1) Acts must be done by the agent on behalf of the Principal, provided that the acts must be within the scope of the authority. If an act done on behalf of an alleged principal by a *falsus procuratur*, then the act is not binding upon the principal, because it is crucial that the agent is bound in correct form according to law (as per s 1857 Civil Code)

2) The Acts of the Agent produce a direct effect on the Principal. Whether the agent's actions benefit or prejudice the principal is irrelevant - it is the principal who bares loss and who accepts profits on actions done by the agent in his authority to act in the principal's name.

3) The Agent is bound to act solely within the scope of his authority. We have seen that the agent is duty bound to furnish any information requested from the third party concerning the powers of his authority (section 54(1)). If the agent exceeds his authority, the principal is not bound by the actions unless the principal has expressly or tacitly ratified (give consent) such actions. A second consequence ensuing from the agent who exceeds his authority is that the agent is not liable for damages if he acted in excess of actual authority and the person dealing with him (third party) had notice or reason to believe that in doing such an act, the agent was exceeding his authority. Thus if the third party transacts in *mala fide*, the liability is incurred by him.

The Key criteria are that it is instrumental, in the context of agency, that the agent must act and exercise some form of decision-making. Some discretion must be left and vested within the agent that pertains to the conclusion of contracts. Additionally, the principal must necessarily delegate such discretion to the agent. If the agent is not exercising some form of discretion, he stops being an agent and becomes a mandatory or an employee. The principal does always has the right to nullify acts done by false agents (*falsus procuratur*). For such nullification, the principal must prove that the false agent acted in his name, expressly or implied. When an agent acts in the name of the principal, it is referred to as *contemplatio domini*. On to the second observation one must add that if an agent makes a profit or a loss, such profit or loss is rendered effective to the principal - it is the principal who bares profits and who bares loss.

S 51 - The Capacity of the Principal & the intention of the agent

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.

S 51 thus deals with the principal's capacity. This means that the principal cannot authorise an agent to do something which the principal himself is not capable of doing. This brings about a range of issues - can you have a minor principal? Can an interdicted person be a principal? Can a person who has a legal impediment authorise an agent to purchase property on his behalf? The whole understanding of what an agent can or cannot do is centred around the capacity of the principal. To determine, for instance, whether an agent is capable of buying or selling, one does not look at **whether the agent is capable of doing so, but rather whether the principal is capable**.

One question that arises revolves around the scenario wherein the principal is capable, but the agent is a minor (thus incapable). One looks at s 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.

The intention of the Agent

Vitiation occurs when something is wrong with consent. By Law, consent is vitiated when there are instances such as fraud of bad faith. In such cases, the contract is rendered null and void. There is one exception - the proviso to s 51. For the purposes of law, a contract entered into by an agent is not a contract concluded by the parties at a distance, but it is as if the principal is present in the person of the agent who acts in his name and on his behalf. Good faith is an overriding principle of civil law.

Form of authorising an agent

To determine the form in which the principal may authorise the agent to act in his name, one must look at two articles of law.

S 1857(2) of the Civil Code: 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.

S 52 of the Commercial Code: 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.

Therefore 1857(2) and 52 both assert that a verbal agreement may authorise a person to serve agent to a principal - except when the law requires that the act agreed upon requires the agent to be authorised in writing. Thus for instance, one cannot transfer or purchase a car by verbally mandating another to go and purchase such car.

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

S 1858 holds that the acceptance of the mandate from the part of the mandatary may be implied or express. And so tacit acceptance also suffices. This article further establishes that a mandatary's commencement of the mandate infers implied acceptance. The element of acceptance from the part of the mandatory is important because as per section 1856 (2), the mandate (in our case the agency) is not effected unless the mandatary (in our case the agent) has duly accepted the mandate (agency).

The Termination of Agency

The commercial code does not speak of any manner in which agency is terminated. The only reference made is found under s 55, which holds the following:

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.

Thus we fall onto the general principles of Civil Law, which hold that obligations end either by acts of the parties or ipso jure. This is enshrined in Article 1886 of the Civil Code.

Acts of parties that terminate agency

1) By mutual agreement;
2) By the act of the principal who may revoke the agency expressly or tacitly (if the principal appoints a new agent, it would be deemed tacit termination);
3) By the act of the agent who renounces to the agency and informs the principal.

S 1886 - Termination of agency ipso jure

1) Death, interdiction, incapacitation, or other cessation of obligations by Civil Code procedure;
2) Termination of powers of the mandator;
3) Expiration of the time during which the mandate was to continue;
4) The renunciation on the part of the mandatary, by the giving of notice to the mandator.

Specific duties of the Agent - Articles 54 & 56 Commercial Code

S 54 - Duty of an Agent to inform third parties

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.

This **specific duty** of the agent clearly explains the relationship between an agent and a third party, relating to the obligation of the agent to provide information as to the extent of the authority to third parties. It could be the case that a third party is reluctant to perform a transaction with an agent because he is under an impression that the agent is acting beyond his powers. Thus the agent is obliged to inform the third party with all his powers and authorisations. The question is then what happens if the agent refuses to inform the third party regarding his power and authority? There seems to be a lacuna in our law, in the sense that there is no express sanction in our law. In practice, however, a refusal on the part of the agent to provide the information laid out in s 54 should alert the third party of a possible issue with the agent's authority. Another issue that emanates from this duty is the circumstance wherein the agent releases a **false statement**. The law does cater for this section, in 54 (2), which states that any false declaration or statement wilfully made by the agent in the declaration per 54 (1) is deemed **forgery by means of s 183 of the Criminal Code, and bares upon the agent the punishment for s 183.** S 183 of the Criminal Code refers to ***forgery of public, private, or commercial bank documents by a person not a public officer***. This punishes with imprisonment of 13 months to 4 years.

S 56 - Duty of the agent not to transact business of the principal

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.

In an agent-principal relationship, the agent must look after the interest of the principal. This idea emanates from the law of fiduciary.

General duties of the Agent - The Civil Code

The general duties of an agent are defined and outlined in the Civil Code. Section 1873 of the Civil Code, entitled "A duty to carry out the mandate given" is the most important general duty of an agent found within the Civil Code. The specific duties of the agent are outlined in the Commercial Code, and include the duty not to compete with the principal (56) and the duty to inform third parties of authority (54).

S 1873 (2) continues to hold that the said mandatory is also bound to conclude any matter which he may have commenced before the debt of the mandator if delay might be prejudicial. The function of the mandatory is so important that even in the case that the mandator is deceased, he is bound to conclude the mandate.

An Agent is answerable for negligence. Section 1874 of the Civil Code stipulates the liability of a mandatory

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.

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.

An important proviso to 1874 holds that in the case of negligence, if the mandate is gratuitous, the enforceability is less rigorous. This, however, does not apply to the case of agency, since we know that agency cannot be gratuitous, since the law of mandates applies to agency except for section 1861, which states that mandates are gratuitous (a contrario senso - agency is not gratuitous). Furthermore, a mandatory cannot delegate his authority, as per section 1876 of the Civil Code. **Delegatus non potest delegare**.

S 1875 - Duty to render an account to the mandator

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.

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.

Duties of the Principal / Mandator

S 1881 - duty to reimburse

The first duty is the **duty to reimburse the agent**. It stands to reason - the agent cannot be gratuitous (s 1861 does not apply to agency), and so the agent must be paid. This is enshrined in s 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.

1881 (2) clarifies an important aspect - if no negligence be imputable to the mandatory, the mandator is not allowed to refuse reimbursement - **even if the mandatory did not complete or commit what was agreed upon and what he was bound to do**. Reimbursement is not based thus on the success of the transaction.

A contrario senso - if the mandatary has failed by reason of negligence, the mandator is allowed to refuse payment.

S 1882 - duty to indemnify the mandatary for any losses

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.

Therefore, the range of reimbursements is not limited to renumeration, but extends also to losses suffered by the mandatary that are not suffered by reason of negligence.

These provisions are very important in regards to agency, since agency cannot be gratuitous, and thus the provisions regarding the payment of remuneration and expenses relating to mandators and mandatories apply *mutatis mutandis* to agents and principals.

S 1885 - Remedy for the agent / mandatary - jus retentionis

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.

The Mandatary has the right to keep for himself what is possessed by him so long as he is not paid what is due to him. If this special provision did not exist, the actions would be tantamount to ***ragion fattasi***, and so this law poses an exception to the rule.

The Notion of the Manager

Under Roman Law, the manager was referred to as the instator.

Section 57 of the Commercial Code defines "manager" as ***a person who is placed, personally and permanently, in charge of the business or branch of the business of the principal, in one or more fixed places.***

Professor Muscat holds that **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 business in respect of which he has been appointed, subject to any limitations imposed on him by the principal**.

Section 57 thus attaches an element of permanency to the manager, for he is legally bound by his relationship to the principal.

The manager is not considered to be a trader, because his function and power in relation to the business is delegated to him by the principal. Thus he does not satisfy the element of "**performing acts of trade in his own name**" as stipulated by **section 4** of the Commercial Code, which defines 'trader'.

S 58 - Any person, whatsoever his age, may be a manager - Thus minors may be instated as managers to a business.

Assumption of the manager's authority - express or implied

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.

As stated in **Borg vs Schembri**, the agreement in which a person is instituted manager of a principal's business may be written down, verbally expressed, or even tacitly expressed. This means that a principal may appoint a manager through non-written or non-verbal agreements.

When the authority to act as manager is express - 59 (2) - Juris et de Jure Presumption

However, if the principal would like to **create a presumption that third parties are aware of the restrictions and limitations to the manager's functions and powers**, he must, by virtue of **section 59 (2),** file, to the courts, a note that highlights and clearly dictates all the restrictions of the manager. Such note must then be published in the Government Gazette, affixed in The Exchange, and where possible even published to any newspaper, even if commercial.

When the authority to act as manager is implied - 59 (3) - Juris Tantum Presumption

S 59 (3) holds that the authority to act as a manager, when such authorisation is implied, with regards to third parties shall be deemed to be general and to comprise all matters pertaining and necessary to the exercise of the business or branch in respect to which he has been entrusted, unless the principal proves that such third parties were aware of the limitations at the time of transaction.
Therefore, the general assumption bestowed upon third parties upon the implied authority to act as manager as per 59 (3), is that third parties consider the manager's powers to be wide enough so as to include any act necessary and pertaining to the operations of the business. This presumption is, however, rebuttable, since the principal is allowed to bring proof that the third party knew, at the time of the transaction with the manager, of any limitation imposed upon the manager.

Therefore when the authority of the manager is express - 59 (2) - juris et de jure presumption
Therefore when the authority of the manager is implied - 59 (3) - juris tantum presumption

This is always in relation to third parties.

Acts which bind the manager and not the Principal

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

Thus any liability or owing contracted by the manager in his duties pertaining or necessary to the operations of the business entrust to him are to be incurred by the principal.

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.

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.

This latter part, "even if the principal is present in Malta" is emphasised because the law of procedure holds that no one present in Malta may be represented by another in any judicial proceeding or filing, and thus s 64 is an exception to the rule. By 64 the manager is therefore vested judicial representation in the name of the principal for liabilities or assets owing to him by virtue of acts done by the manager in his duties as a manager.

General Duties of the Manager - Commercial Code

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.

Section **62 (1)** holds that **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.**

Therefore section 62 places the duty on the manager to sign any and all documents in his name and in the name of the principal or the principal's firm, when such signing pertains to an act relevant in his duties as a manager.

Section 62 (2) states that **in default of such indication, the manger 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**.

The duties of the manager are generally the same as those of the agent, and are typically comprised of the following:

1) To obey the instructions of the principal
2) To act diligently
3) To ensure the smooth operations of the business or branch of business entrusted to him
4) To issue an account of all his acs done necessary and pertaining to the business
5) To protect the assets of the business

Specific Duties of the Manager - Commercial Code

Section 65 - Duties applicable for traders

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.

Title 2 of Part 1 of the Commercial Code relates to sections 13-37 of the Commercial Code, and deals with the duties of traders. Thus the manager shares the duty of the principal to:

- Keep trade books (13-20)
- Publish Marriage Contracts (27-31)
- Maintain within the limits of fair competition (32-37)

Section 63 - Duty not to compete

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.

(2) If the manager acts in contravention of this prohibition, the principal may, at his option, either take action for damages and interest or demand payment of any profits made by the manager in any transaction entered into in violation of his duty.

Therefore without the principal's permission, this provision prohibits the manager from carrying on or from finding interest in any business which is in competition with the business entrusted to him by the principal. The *raison d'etre* is very clear - to protect the principal, who has entrusted the manager with a position delicate to his business. In fact, section 63 (2) speaks of the remedy for a breach in 63 (1).

63 (2) If the manager acts in contravention of this prohibition, the principal may, at his option, either take action for damages and interest or demand payment of any profits made by the manager in any transaction entered into in violation of his duty.

Thus the principal has the remedy of action in the case where his manager has sought interest or competed against the business which he entrusted to him. Generally, the manager is employed, and so the EIRA is often applicable where managers are involved. This is subject to certain exceptions, such as that relating to the probation period or the exception relating to the reinstatement of a person wrongfully terminated.