CML3009
COMMERCIAL OBLIGATIONS, COMMERCIAL SALE & CREDIT, INSTRUMENTS

The European Law Students' Association

MALTA

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Commercial Obligations, Commercial Sale, Commercial Instruments

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Introduction

We will discuss the ways in which commercial obligations are considered distinguished from regular civil obligations. Thus we will see how, if at all, commercial obligations depart from civil obligations. A starting point is to note that the general concepts relating to commercial obligations are carried through **articles 110 to 118 of the Commercial Code.** The articles mentioned only regulate the very basics. What is not regulated by the commercial code is regulated by usages of trade and then if there is no usage then it is then regulated by the civil code.

This is in fact what section 3 of the commercial code posits:

> **3.** In commercial matters, the commercial law shall apply: Provided that where no provision is made in such law, the usages of trade or, in the absence of such usages, the civil law shall apply.

It posits the 3 sources of commercial law in order of applicability, starting from the commercial code, then moving to usages and then in the absence of such usages the civil law applies.

Commercial obligations vs Civil obligations

- From first glance we can see that commercial law is a **section of private law.** Public law as we know regulates the relationship between you and society or the government. Conversely in private law what is regulated is the relationship between **two private individuals**.

- For many, commercial law and private law overlap but in reality, they are different. In commercial obligations and therefore under commercial law **you must have a trader** defined by the commercial code of Malta **or an act of trade.** In civil obligations there is no trader or act of trade.

- When we have commercial obligations thus the commercial code will apply, the provision of which are slightly different from the civil code. Though, you can also have certain provisions in the commercial code that you cannot find in the civil code. Like one can see in **article 115 of the commercial code**, which reads as follows:

> **115.** (1) In commercial obligations, co-debtors are, saving any stipulation to the contrary, **presumed to be jointly and severally liable.**
>
> (2) The same presumption shall extend to a surety, even if not a trader, who guarantees a commercial obligation.

- Another thing only found in the commercial code is **the emancipation of minors.** →→→→→→→
- There are also other provisions that **apply to commercial obligations but are regulated by the civil cod**e like the interest rate set out in **article 1141 of the civil code.**

Once you determine that the obligation is a commercial one then you have to see which law, provision or usage is going you apply for that obligation. The point of departure is previously mentioned article 3 of the commercial code which lists in order the sources that regulate commercial obligations.

Commercial Law as the lex specialis

Commercial Law refers to **any law regulating commercial matters**. In Malta, commercial matters are often covered by the Commercial Code, which pertains to traders and to acts of trade done by any person even though not a trader. The Commercial Code refers to the definitions of trader and acts of trade under articles 4 and 5. Apart from the commercial code you can have other contracts that are governed by other specific legislation such as the **banking act** or the **company's act.**

Usages of Trade as a source of Commercial Law

Commercial **usage is a practice or method of dealing, having such regularity of observance in a place, vocation or trade, as to justify an expectation that it will be observed with respect to the transaction.** However, keep in mind that *the commercial code or any other code do not interpret what the usages of trade are.*

In **Halsbury's Law of England,** we find that *usage* may be broadly defined as ***a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life*** *or more fully as a particular force of dealing or line of conduct* ***which has acquired such authority*** *that where persons enter into contractual relationships, in matters respecting the particular branch of business life, where the usage is alleged to exist, these persons must be taken to have* ***intended to follow the course of dealing or line of conduct unless they have expressly or tacitly stipulated otherwise***.

→That is to say that a rule of conduct amounts to a usage **if so, generally known in the particular department of business life** in which the case occurs that *unless expressly or implicitly excluded* it **must be considered as forming part in the contract.**

Navarrini also provides for the same definition as that of **vivante**. **Maltese legislators don't define usages of trade** whilst referring to foreign writers they provided a list of requisites that mut be fulfilled to state that you have a usage of trade.

1. A usage must be **observed over a period of time** however none of the judgments have ever indicated what should be this amount of period of time. Furthermore, hold that one must look at the *nature* of the usage, rather than the time per se.

   Baldacchino vs pace. 6th November 1940. This judgement simply states that this usage must be **over a period of time**. Other judgements say that you must not look at the period of time but the nature of the usage.

2. The usage must be **uniform**, **reiterated** and **continuous.** Professor Cremona stated that *it must be borne in mind that such requirements, in connection with the usage of trade, should be considered from a general point of view*.

The criteria to be used should be wide and relative and each case should be decided on its own merits. This being a question of fact.

Our courts have taken this one step further and add that *there must be an objective and subjective approach for usage*. The **Objective Approach is applied when the subject matter is an act of trade**. The **Subjective Approach is applied when the parties of the transaction are traders**. Defining 'trader' is not completely straight forward (Article 4 vs EU Directive 114/2006, of Comparative and Misleading Advertising).

3. The usage is followed because **there is an obligation to do so**. Which means that whatever is performed by mere courtesy or tolerance may never be regarded as a usage of trade.

4. The usage of trade **must also be lawful**, such lawful usage thus also **includes public policy** which refers to rules and guidelines that may become law in the future but are not promulgated by the government as law at this moment in time.

> ***Avukat dominic cassar nomine vs Lawrence Farrugia pro et nomine,*** 2002
>
> Here the court sought to make the distinction between an overdraft and a loan, quoting authors such as **Baudry-Lacantinerie** and **Pardessus**. The latter propounded the view that: "*fil-kont korrent il-kapitalizzazzjoni ta` l-interessi tmur sabiex tifforma kapital gdid".* The court also made the following observation: "*Fin-nuqqas ta` provvediment tal-ligi tal-kummerc japplikaw l-uzu tal-kummerc li jiehdu precedenza fuq il-provvedimenti tal-Kodici Civili. Huwa minnu illi, kif gustament sostniet l-ewwel Qorti, li uzu tal-kummerc ma jistax imur kontra l-ordni pubbliku."*

> ***Av. Dominic Cassar LL.D. noe vs Lawrence Farrugia pro et noe et*** *(529/1988/1 [2002])*
>
> *''L-Uzu tal-Kummerc ma jistax jmur kontra l-ordni pubbliku''*

One classic example of a usage is an **overdraft facility** whereby if you had to analyse all the legislation that you have in Malta there's no legislation that regulates the concept of an overdraft facility.

An overdraft is different to a loan, for the overdraft provides more leeway with regards to loan repayment, but at a higher risk and at higher interest. A simple loan, in our Civil Code is referred to as *mutuum*. The *locus classicus* for usages of trade pertains to interests - banks normally charge interest twice a year, and a question arose as to the legality of charging interests twice a year.

> **HSBC bank Malta plc vs Teg industries limited.** Decided on the 29th November 2001.
>
> The court states that an overdraft facility is a commercial obligation and therefore it must be regulated by article 3 of chapter 13 and that in only in the absence of law and usage that it

shall be regulated by the civil code. The court held that *l-obligazzjoni ta' overdraft facilities hija ta' natura kummerċjali, u għalhekk hija regolata skond l-artikolu 3 tal-kapitolu 13, u għalhekk regolata mill-kodiċi kummerċjali. Fin- nuqqas tad-dispożizzjonijet ad hoc mill-użu kummerċjali, tapplika l-liġi ċivili. Fil-ġurisprudenza lokali, is-sistema ta' komputazzjoni ta' imgħaxijiet ta' overdraft facilities, fejn l-imgħaxijiet jiġu miżjuda fil-kapital kull 6 xhur, u għalhekk jiffurmaw parti mill-kapital, ġiet aċċettata bħala użu, u għalhekk hija legali*. It stated that under our laws, **it is legal because adding interest twice a year to the capital is recognised as a usage in the case of overdrafts.**

3. The civil law

The main act which regulates civil law is the civil code.

→The law says the obligations may arise

- Out of law
- Out of contract,
- Out of *quasi-contracts*,
- Out of tort, and
- Out of *quasi-torts*.

Bank of Valletta Limited vs 'Anna's Trading Company Limited' et(160/1997/1) [2002]

•''Kif ighid l-art. 3 tal-Kodici tal-Kummerc, f'affarijiet tal-kummerc il-ligi civili **tghodd biss fejn ma hemmx uzu tal-kummerc,** fil-kaz ta'llum il-ligi civili ma tghoddx, ghax hemm uzu tal-kummerc. Huwa minnu li, kif qieghda tghid is- socjetà attrici, il-ligi civili ma teghlibx l-uzu tal-kummerc, izda mhux meta l-ligi civili tiddisponi dwar materja ta' ordni pubbliku''

1. **Out of law.** When you have a specific commercial obligation arising from the law and you have to abide by that.

E.g. A **bank must be licensed** to operate. This obligation is dictated by law and **emanates from legal provisions**.

2. Obligations arising **out of contract** are imposed through agreement *inter partes*. It is binding solely between the parties, and every right and obligation agreed upon are enforceable. Contracts are barred after 5 years. A contract which may be classified as a commercial contract in one of two ways; **objectively** (in that the contract's subject matter equates to an act of trade) or **subjectively** (in that the contracting parties are traders, as defined under Article 4 of the Commercial Code).

This will be spoken about in further detail shortly

3. Arising out of **quasi-contracts** are governed by the law in 3 instances:

s.1013 - ***negotorium gestor*** (management of another's affairs), which contemplates a situation wherein a person voluntarily undertakes the managing of those affairs until the

person on whose behalf he has acted is in a position to take charge of such management himself.

s.1021 - ***indebiti solutio*** (the restoration of payment not due to him), which contemplates the restoration of a payment not due to the receiver.

In 2007, **article 1028A** was introduced to the section of the Civil Code governing quasi-contracts, providing for the **actio de in rem verso**, an action available to recover patrimonial loss suffered against a person who enriched himself unjustly and to the detriment of others.

4. **obligation in tort** refers to the obligation arising from one's misconduct. A person who crashes into another, when in the wrong, owes the victim money or compensation. There is no agreement, but there is tort. Tort is time-barred after 2 years.

Can you have a commercial obligation in tort? Yes. Originally, it was thought that commercial obligations can never arise out of tort, for tort often referred to a person causing damage. However, owing to the developments of the separate legal personality and the corporate veil, and since they are considered traders under s.4, they can cause damage which gives rise to commercial obligations. This idea has evolved over time, whereby in the case of companies, directors (who used to sue in their own name) now sue in the name of the company. It is the company who sues, not the director, today.

The first case in Malta that recognized this principle was **Jones vs Mifsud Bonnici.**.

Jones vs Mifsud Bonnici was one which initially introduced the idea of commercial obligations arising from tort.

1. That because of the ultra vires rule no corporation can be liable for a tort or crime. Logically, a strong case can be made out in support of this theory ... But despite logic and despite dicta in some of the earlier cases, it is abundantly clear that this is not the law for companies are daily made liable in tort and convicted of crime. Indeed, if it were otherwise it is difficult to see how any unlawful act [even a breach of contract] could ever be imputed to a company.

2. That **the ultra vires doctrine has no application except to contract and property and never applies to tortuous or criminal liability**. This is the view taken by the overwhelming majority of academic writers ...

3. **That companies can be liable in tort and crime but only if these are committed in the course of the intra vires activities ... In principle this seems to be the soundest view. A Company may be liable for torts or crimes committed in pursuance of its stated objects but should not be liable for acts entirely outside its objects.'**

5. A commercial obligation arising out of a **quasi-tort**.

For example, a company who employs an incompetent person and obviously **the company is responsible for any damages caused by that person**. That particular provision which speaks about this incompetence arises out of **the civil code** itself.

Commercial Contracts

In relation to commercial contract as we have said we focus on articles 110-118.

Articles 110-113 deal with the moment of conclusion of the contract however *they will not regulate the moment of creation of the contract.*

Article 114 then deals with **the formality** in concluding the contract -
Here you can have contracts in writing or verbally and unless the law stipulates otherwise a verbal contract is a contract as much as a written contract. A written contract can be a simple private writing or a public deed.

Article 115 then deals with **the presumption of joint and several liability**-
That debtors are joint and severally liable and thus you can file an action against any one of them for the fully owed amount.

Article 116 deals with **the rate of exchange-**
This article governs the applicable exchange rate in commercial transactions involving different currencies.

Article 117 deals with the notion of **the tacit resolutive condition**

Article 118 deals with **pre-emption in litigious rights**. This means that in specific cases before the court, one party may have a priority right over another in acquiring certain rights.

Back to **Articles 110-113**

Article 110 deals with **the theory of information.**

110. *A contract stipulated by means of correspondence, whether by letter or telegram, between parties at a distance, is not complete if the acceptance has not become known to the party making the offer within the time fixed by him or within such time as is ordinarily required for the exchange of the offer and the acceptance, according to the nature of the contract and the usages of trade generally.*

Basically, saying that to form a contract to be formed you need an offer and acceptance. In the theory of information that **the person accepting the contract must inform the person who submitted the offer of his acceptance.**

Under this theory, the **offeree** *(the person accepting the offer)* must explicitly **inform the offeror** *(the person making the offer)* **of their acceptance**. If the offeror is not informed of the acceptance, the contract is not considered concluded. This means that even if the offeree **internally decides to accept**, the contract is **not valid unless the offeror is notified**.

Article 111.

111. (1) Until the contract is complete, both the offer and the acceptance may be revoked. If, however, the person making the offer declares that he will keep it open till a certain time, or if a time is implied by the nature of the contract, the revocation thereof before the lapse of such time will not prevent the completion of the contract.

Until you have both of them coming together you can take your offer back and your acceptance back so to speak. It also says if you say the offer is valid up until a certain date you cannot revoke it before the stipulated dated even if that time is an implicit time.

(2) If the offer empowers, even impliedly, the other party to carry out the contract without previously communicating his acceptance, the contract is complete as soon as its execution has commenced within the customary or prescribed time.

Article 112.

112. A delayed acceptance or an acceptance subject to conditions, additions, restrictions or alterations shall be deemed to be and shall count as a refusal of the original offer and as a new offer.

If you want to accept the offer you must accept it with all its terms and conditions, i.e fully. If one accept the full contract and modifies any part of it is considered a counter offer.

Article 113. invitation to offer.

113. (1) An offer made to the public by means of catalogues or other advertisements is not binding unless it has been expressly declared to be so; it only amounts to an invitation to offer.

Distinction between contracts and agreements

In general, a contract is a **legally enforceable agreement** that gives rise to **obligations** between the parties.

It is a *voluntary undertaking* between the 2 parties which means that no one is obliged to enter into a contract. But if you enter into a contract you need to fulfil your obligations as an offeror or an offeree, obligations which you are legally bound to fulfil.

A party is not obliged to enter into an agreement, but if the party chooses to enter into an agreement, then the party is bound by that contract. Therefore, contract law deals with which agreements are legally enforceable, in turn establishing remedies available for breach of contract. Typically, contracts are formal documents drafted by lawyers. Specific contracts must be in writing, but generally, contracts can be made verbally without legal jargon or formality. There are specific provisions which establish the formalities pertinent to the creating of contracts. However, if the law is silent, then contracts may be carried out verbally.

Every person, whether natural or legal, may enter into contracts. Contracts are merely a method of conducting commercial transactions. Transactional complexity and value vary enormously from one contract to another. Within the Maltese Civil Code, one finds **article 960,** which provides the definition of a contract;

960. A contract is an agreement or an accord between two or more persons by which an obligation is created, regulated, or dissolved.

Therefore, our civil code doesn't differentiate between the term contracts and the term agreement, they are used **interchangeably.** What is important is to not look at the word used

per se but rather at **the intention of the parties**. In fact the civil code makes it clear that the intention of the parties also prevails over the wording of the contract. If something is written and does not express the true intent of the parties then it is their true intention which is regarded

However, many ***legal writers*** claim that they are two distinct words. Certain legal writers state that all contracts are agreements, but not all agreements are contracts. This means that an agreement **can be classified as not a contract if it is not a legally binding contract.**

Certain legal writers state that a common example is when two parties enter into a verbal agreement, but the **law requires the agreement to be in writing** for it to be legally **valid and enforceable**. In such cases, even if the parties agree verbally, the contract does not come into fruition because it fails to meet the legal formalities.

Raymond J. Friel, in ***the Law of Contract***, holds that a Contract, by definition commonly accepted, refers to ***an enforceable promise.***

He refers to it as such, because he distinguishes between a contract and a promise, in that a promise may in **fact contain most of the requisites required to form a contract, but it will never be governed under contract law** because it lacks **enforceability**. This distinction is not recognised under Maltese Law, for Article 960 of the Civil Code places *an agreement* onto the same binary as a contract, so long as the **condition that it creates, regulates, or dissolves obligations** is satisfied.

Moreover, **Raymond J. Friel** asserts that a contract intended to **produce future effects by means of future promises (such as a future promise to sell) is still enforceable as a contract.**

People use the two interchangeably though they do not mean one and the same thing.

Requisites which validate a Contract

- **Consent** from both parties – *(both parties must willingly and freely consent to the contract)*,
- **Legal capacity** of both parties – *(the parties must have the legal ability to contract (e.g., being of legal age and sound mind)*
- **Subject matter** – *(The contract must have a clearly defined and lawful object)* and;
- A **lawful consideration** for a contract to be legally valid – *(A contract is based on an illegal purpose such contract will be rendered void)*

Furthermore, the contract must satisfy the external requirement that the contract must be done either verbally or in writing, with the latter taking the form either of a private writing or else of a public deed.

The Intention of the parties

As we said our civil code doesn't differentiate between the term contracts and the term agreement, they are used **interchangeably.** What is important is to not look at the word used per se but rather at **the intention of the parties**. In fact the civil code makes it clear that the intention of the parties also prevails over the wording of the contract. **If something is written and does not express the true intent of the parties then it is their true intention which is regarded. Intent is the cornerstone of agreement.**

In fact the civil code makes it clear that the intention of the parties also prevails over the wording of the contract. If something is written and does not express the true intent of the parties ***then it is their true intention which is regarded***. If this situation ends up in court, each person alleging something must prove their case. They must prove their case on a balance of probabilities and with a potential use of evidence consiting either in;

- **Witness testimony** (e.g., a third party who was present during negotiations).
- **A notary public** or another impartial observer who can testify to what was agreed.
- **Written communications** or actions that indicate the parties' intentions in regard to what is written in the contract.

If the person <u>*cannot prove that the contract does not express their intentions*</u> then the contract will prevail over any allegations.

Adrian Camenzuli v Mitul Dave and Alpharize Management limited, ***C78168*** decided on the 23rd september 2022 by the civil court 505/2021.

In this case the court pointed out that a contract cannot be lawfully formed without the ***idem facitum consensus***, being the binding intention of the parties.

The dispute arose when the parties signed an agreement allowing the **plaintiff to purchase a car** from the defendant. However, the defendant company also informed the plaintiff that, apart from the signed agreement, a **company resolution** was required for the sale to be valid. The **company's directors failed to pass this resolution**, leading the court to rule that the **sale could not proceed**.

The court reasoned that, since the necessary resolution was not obtained, there was **no clear intention on the part of the defendant to sell the car to the plaintiff**. The existence of a signed agreement alone was not sufficient, as the sale required **both a contract and a resolution** to reflect this intention. Since **one of these elements was missing**, the court **ruled that there was no intention to sell the car**.

Objective vs Subjective Test

To understand the intention of the parties, the most effective method is to ask the parties directly about their intention and that is what we call the **subjective test**. However, the reality is that the parties will not agree amongst themselves therefore you must apply the **objective test** which is a rebuttable presumption where one looks at *all available evidence presented by the parties to determine the intention of such parties.*

This objective test was applied in the case

Paul Fenech v Carmel Cortis decided on the ***16th September 2022 by the first hall civil court 1249/2011***

In this case there was an agreement between the plaintiff and the defendant that the defendant would transfer 3 immovable properties to the plaintiff after performing woodwork for the defendant. They agreed that instead of paying cash he would simply transfer the properties. The plaintiff claimed to have completed all of the works and even though he completed them, the defendant had only legally transferred two out of the three immovable properties.

After examining all the evidence the court determined that the plaintiff was correct therefore and proved his case that he was entitled to receive the third property as well. The court also said that the defendant could only declare a right not to pay the plaintiff *if it was proven that the works did not reach the expected standard.*

Bank of Valletta PLC v Monica Magro et decided in the 29th february 2016 410/2014. - *highlighted the importance of the intention of the parties.*

"This means that, due to the very nature of the business, the final obligation requires certain formalities to be valid in order to come into effect. **The mere communication from one party to the other of their intention to accept the right of choice does not fully establish that obligation**. In such a case, the right of option is considered to still be at the level of a preliminary agreement, at least concerning the legal transaction to which that choice refers."

That said, however, there are certain contracts where no matter what you want to call them and **no matter what the parties' intention**, they can still create legal issues—especially in relation to **family agreements** In Maltese courts, as well as in foreign jurisdictions, courts have established a general principle:

--there is never the intention to create a contract ***unless it is specifically written down***—

The casus classicus in this respect is the UK judgement:

Balfour vs Balfour, decided in 1919 by the English courts.

In this case the husband promised the wife to pay maintenance while he worked in another country however he said there was no intention to be legally bound by these payments even though his wife would rely on these payments. The judge claimed in these contexts the agreements do not apply and agreed with his argument.

Thus, to **avoid disputes**, it is essential that any **agreement within a family context must be in writing** to be **legally enforceable**.

There have been recent cases where a husband and wife—who were still unmarried in the 1980s—were enjoying a night out at a pub when the husband, celebrating a promotion at work, promised his wife a large sum of money. Years after they had separated the court in this instance ruled in her favour claiming he had made a promise that he was now obligated to fulfil.

Another case like the above was also;

Jones v Padavatton decided in 1968

This case applied the *Balfour principle* which essentially states that contracts between families must be written. In this case the mother allowed her daughter as allowance the use of a house in exchange for her studying in the USA and it was deemed to be **unenforceable** by the courts as it was deemed to be in a family context.

Formation of a Contract: Essential Elements

A contract is formed as soon as there is **both an offer** and **an acceptance**. However, for a **contract to be legally valid**, it must meet **four essential requirements**:

1. Capacity

Under Article 967 of the Maltese Civil Code, the following persons **lack legal capacity** to enter into a contract:

1. **Minors** (persons under the legal age).
2. **Interdicted or incapacitated persons** (those declared legally incompetent to contract).
3. **Persons prohibited by law** from contracting.

e.g., Under the Companies Act, a **disqualification order** may prohibit a person from acting as a company director for a period of up to **15 years**. If a person under such a disqualification order signs a contract **on behalf of a company** during that period, the contract may be **invalid**.

When a contract is **declared null and void**, it means that **it has never legally existed**. Any obligations or transfers made under the contract must be **reversed**.

Article 967 of the Civil code
(1) All persons not being under a legal disability are capable of contracting.

(2) The disability of persons sentenced to any punishment whatsoever is abolished.

(3) The following persons are incapable of contracting, in the cases specified by law:
(a) minors;
(b) persons interdicted or incapacitated; and
(c) generally, all those to whom the law forbids certain contracts.

967 3(a)

What is a Minor?
According to **Article 157 of the Civil Code**, a minor is a person who has **not yet reached the age of 18**.

*"**157**. A minor is a person of either sex who has not yet attained the age of eighteen years".*

However, there are several exceptions to this rule that minors cannot enter into contracts.

969. (1) Any obligation entered into by a child under the age of fourteen years is also null.

(2) Nevertheless, where the child has attained the age of nine years, the agreement shall be valid in so far as it relates to the obligations entered into by any other person in his favour.

Persons who have not attained the age of fourteen years. *Amended by: XXXVII.1975.23.*

For the purpose of simplicity, it may be better to create 4 different age groups:

→up to 9 always null
→9-14, (969(2)) obligation entered into are null, but obligations related to the other person are valid.
→14-18, as in 9–14-year-olds, if not subject to parental authority and has no curator, can contract but cannot sell or hypothecate immovable property and is protected from lesion (an unreasonable advantage in favour of one contracting party)
→18, a major at law, can contract as they please

This principle was examined in ***Tabib Principali tal-Gvern vs Christopher Camilleri***, decided on 15th July 2002, Court of Appeal (208/89). In this case, the father had to endorse the contract signed by his 17-year-old son. The court ruled that the **contract was legally binding**, provided it was **approved by the parent**.

Furthermore, the Civil Code allows minors **to be emancipated at the age of 16**, providing them the capacity to enter into commercial transactions. It is important to understand that such emancipated persons may only make offers in relation to their business. The legal obligation to undertake education in Malta is until the age of 16. Thus the law allows 16 year olds to enter into their own business.

This right to start a business at the age of 16 comes with the right to be emancipated (to be considered as legally valid in the eyes of the law to enter into contracts with a sole signature). There is no need for a parent to sign along with an emancipated minor. This power is tied

solely to contracts in connection with the emancipated minor's business, and nothing more. There is a lacuna - for persons between the age of 16 and 18, in which various legal confusion arises - you can vote, you can become a mayor, you can only contract if it ties into your business, etc.

967 3(b)- Interdicted or Incapacitated Persons

The second category of individuals who **cannot place or accept an offer** includes those who are interdicted or incapacitated. These individuals are **over 18 years old** but **are legally restricted from entering into contracts due to an impediment**.

Maltese law does not provide a definition of interdiction, but since the Civil Code is heavily and primarily influenced by the Code Napoléon, we refer to **Article 509 of the Code Napoléon**, which defines an interdicted person as *"legally dead or more precisely, that the person bears likeness to a minor*. The person therefore cannot place any offers to another person.

Having said that while Maltese law does not provide a definition of interdiction, it does define **incapacity** under **Article 524 of Ch. 12 of the Laws of Malta** (COCP).

*"**524**.(1) If no sufficient cause for the interdiction is made to appear, it shall be lawful for the court by a decree to order, if the circumstances of the case so require, that the person whose interdiction is demanded be **incapacitated from suing or being sued, from effecting any compromise, borrowing any money, receiving any capital, giving a discharge, transferring or hypothecating his property, or performing any act other than an act of mere administration, without the aid of a curator to be appointed in the same decree.***
(2) It shall also be lawful for the court, if it deems it necessary, to incapacitate any person from performing all or any of the acts of mere administration, entrusting the performance thereof to a curator in such manner as the court may deem fit to direct."

Thus, according to sub article 2 of 524, a curator is appointed so the curator can enter into the contract instead.

Lawrence attard vs George attard et. 30th june 2011.

He alleged that his father who was one of the defendants suffered from dementia and because of this mental impediment his father could not enter into a contract of sale however after reviewing all the evidence the court concluded that **George Attard suffered only from a physical and not a mental illness**. To establish mental incapacity the court stated that the following conditions must be met;

1. **At the time of the placing of the offer and entering into the contract the person must be mentally incapacitated.**
2. **Grave consequences** must demonstrate a person's mental incapacity.
3. **A specific and certain set of facts** is required to establish the person's mental incapacity and otherwise the court won't allow it.

Since the plaintiff failed to satisfy these conditions, the **court rejected his claim**.

Frank Cristiano vs Raymond Portelli *- conditions for mental incapacity*

1. Capacity is the rule and incapacity is the exception; therefore, the presumption is in favor of capacity. This presumption is *juris tantum* (a rebuttable legal presumption).

2. Those who are incapable at the time of the act are those who are not in their right mind, and it is up to the person challenging the act to prove the incapacity.

3. For a person to be considered capable of performing an act, it is not necessary for them to be perfectly and rigorously sound of mind. It is sufficient that they have the use of reason to a degree that allows them to understand what they are doing.

4. To establish a person's mental incapacity, there must be serious indicators.

5. Our Courts have always been reluctant to accept requests to annul an act on the basis of mental incapacity unless such incapacity clearly results from precise and unequivocal facts, and unless it is proven that it existed **at the exact moment** the person performed the act.

967 3(c): Prohibited by any other law

This is an **umbrella clause** that allow the courts to apply it and interpret it as necessary. When a **disqualification order** is issued by the courts against a company director they cannot act as a director or a company secretary for up to 15 years. So, in this period anything signed by him will be rendered **null and void.**

2. Consent

Consent regulated by article 974 of the Maltese civil code and it states that consent can be vitiated by ***error, violence*** **or** ***fraud.***

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

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

976. (1) An error of fact shall not void the contract **unless it affects the substance itself of the thing which is the subject-matter of the agreement.**

(2) The agreement shall not be void if the error relates solely to the person with whom the agreement has been made, unless the consideration of the person has been the principal inducement thereof.

→There is an error of fact or of law.

In the case of either, if they do not change *the substance of the contract,* it will not lead to the nullity of the contract. Errors of law may only serve as grounds to nullify a contract if the error of law pertains to the subject matter. With regards to error of fact, a contract may be annulled on the grounds that had a party known of the fact beforehand, he would not have entered into the contract.

Joseph Mifsud vs Justin Mifsud (31st of May 2022, First Hall Civil Court (219/2017).

The court concluded that only a significant fact of the contract may result in the repudiation of the contract. In fact, the court ruled that an **error of fact should be of such a substantial aspect** that had the party known it beforehand, they would not have agreed and entered into the contract. In this case, the court concluded that there was no substantial error of fact existed that could lead to the nullity of the contract, therefore, the contract remained valid.

In this case, the plaintiff and the defendant entered into various loan agreements, and the plaintiff requested repayment of these loans. The court declared that only an error of fact is of such a substantial aspect such that the party would not have agreed if it had been aware of this fact in advance. Therefore the court will examine each case **on a case by case basis** to determine whether the error of fact is substantial enough so as to nullify a contract. From the evidence presented, the court concluded that there was no error of fact.

→*Violence*

977. (1) The use of violence against the obligor is a cause of nullity, **even if such violence is practised by a person other than the obligee.**

(2) Nevertheless, an obligation entered into in favour of a person not being an accessory to the use of violence, in consideration of services rendered for freeing the obligor from violence practised by a third party, may not be avoided on the ground of such violence; saving the reduction of the sum or thing promised, where such sum or thing is excessive.

978. (1) Consent shall be deemed to be extorted by violence when the violence is **such as to produce an impression on a reasonable person** and to **create in such person the fear of having his person or property unjustly exposed to serious injury**.

(2) In such cases, the age, the sex and the condition of the person shall be taken into account.

979. (1) Violence is a ground of nullity of a contract even where the threat is directed against the person or the property of the spouse, or of a descendant or an ascendant of the contracting party.

(2) Where the threat is directed against the person or property of other persons, it shall be in the discretion of the court, according to the circumstances of the case, to void the contract or to affirm its validity.

Apart from error, violence is another factor that can lead to the nullity of the contract, meaning it can invalidate a contract, as it **can have an impact on free consent**. Although the Civil Code **does not explicitly define what we mean by violence**, it establishes the following rules:

1. Violence Against a Contracting Party.

If violence is **used against a party to the contract**, it automatically leads to the nullity of a contract.

2. Violence Against a Spouse, Descendant, Ascendant, or Their Property.

While, if violence is used on any spouse, descendant, or ascendant or their property, the contract is not automatically null. Instead, **the court has discretion to decide whether the violence renders the contract void and null**.

Violence vitiates consent because it **creates fear**, which may cause a party to act involuntarily. The **Civil Code** further clarifies that factors such as:

- **Age**,
- **Gender**, and
- **Mental Condition**

also play a **vital role** in determining whether **violence has affected consent**

Maria Francesca Stevens vs Caroline Gatt, 31st of January 2019, Court of Appeal (481/2013/1). The court acknowledged that violence should not be taken lightly when deciding whether to invalidate consent. The court also determined that it is not only physical violence **but moral violence that can vitiate consent in a contract**.

To constitute a defect of consent that leads to the nullity of a contract, **moral violence must be the determining cause of the contract**, and the consent must be the result of the violence exercised in order to obtain it.

"For moral violence to amount to a defect of consent, it **must be determining, unjust, and serious, and of such a nature as to make an impression on a reasonable person** and to generate fear that unjustly exposes the person or their property to serious harm... The question of **whether violence exists is a matter left entirely to the discretion of the judge**."

Reverential Fear: When Fear Does Not Invalidate a Contract

The Civil Code states that reverential fear does **not** amount to violence and **does not lead to the nullity of a contract** as it does not feature as violence.

980. Mere reverential fear towards any one of the parents or other ascendants or towards one's spouse, shall not be sufficient to invalidate a contract, if no violence has been used.

What is Reverential Fear?

Referential fear occurs when a person **acts out of fear of disappointing or upsetting another party** but is not directly forced or coerced into doing so. In such cases, the person is **conditioned to act in a certain way**, but not necessarily against their will. Thus, reverential fear alone **is not enough** to claim **violence** as a ground for nullity of a contract.

Dr. Mark Chetcuti Nominee vs Franca Pia Di Donna Et, 16th of December 2004, Court of Appeal (1854/2001/1). This case provides a clear example of reverential fear and how it **differs from actual violence**.

In this case, both the plaintiff and one of the defendants were **heirs to four properties**. There was the selling of one of these properties, but instead of the plaintiff signing the contract, it was **signed by her mother**. The plaintiff was not aware of this sale, and after carrying out her research she found out that there was not even a power of attorney which was granted to allow her mother to sign on her behalf. When the plaintiff confronted her mother, her mother explained that:

- The plaintiff's sister (one of the defendants) needed money to get married,

- She had repeatedly asked their mother to sell the property to provide her with the money.
- The mother felt compelled to sign the contract on behalf of her daughter (the plaintiff), this contract of sale, without legal authorization.

The problem became more complex because, during the proceedings, the mother passed away. The court ruled **in favour** of the plaintiff, recognizing that her signature had been unlawfully substituted by her mother's. However, since the mother had passed away, and the other sister was not part of the case, the plaintiff was **only awarded one-third of the money** from the sale.

The court discussed reverential fear, concluding that:
The mother was **not coerced or threatened**—she acted out of a desire to help her daughter. The pressure from the sister did not amount to actual violence, but rather **a strong emotional influence**. The mother **voluntarily signed the contract** without legal authority, but not under duress or force.

Another case which reached similar conclusions was **Lino Sammut Et vs Kenneth Gafa,** 26th October 2022 (120/2012).

→Fraud

Besides errors of law, fact, and violence, **fraud** may also serve as a ground to invalidate a contract, because there is the implication that the consent was never truly given, owing to deceit.

981. (1) Fraud shall be a cause of nullity of the agreement when the artifices practised by one of the parties were such that without them the other party would not have contracted.

(2) Fraud is not presumed but must be proved

Maria Francesca stevens vs caroline gatt

The court conclude that for fraud to be proven there must be 4 elements

1. **fraudulent intent**
2. frauduelent act itself must be grave in nature while also applying ***the bonus pater familias*** principle
3. the fraudulent act **must be the sole reason** that the parties entered into that contract.
4. the fraudulent act must have been committed **by the other party, either actively or passively**

The court after considering these elements considered that there **was no fraud**. The notary public explained the terms of the contract to the plaintiff and thus the plaintiff knew what was being signed

David Pace vs Jamie Vella *,13th of July 2020*

Illi biex id-dolo jirnexxi ma jridx ihalli lill-vittma zmien u hsieb biex jirresisti.

This judgement asserts that the argument of fraud **must be brought as soon as the fraud is discovered**. As soon as the party realises that an act was fraudulent, then the contract may be argued to be nullified. If, however, the party prolongs the procedure and does not bring up the argument immediately, then the court assumes that the party accepted the fraud and thus does not nullify the contract. When contemplating the 4 elements of fraud, **the fraud must be determined on a balance of probability whether the adopted methods are tantamount to deception which is sufficient to constitute an invalidation**. The court must analyse the behavioural pattern over time to **determine whether the person's actions were coupled with intent to deceive**. **The court applies the bonus paterfamilias principle, in order to determine how a reasonable person would have behaved to ascertain the gravity of the actio**n. It is essential that the measures employed by the offeror **has the effect of misleading the party's decision to enter into a contract** and thus whether it could have been possible to enter into the contract without using certain gimmicks. Finally, the contracting party **must use a fraudulent device.**

Rita Debono vs Lombard Bank Plc et , *Court of Appeal 9th January 2009*

In order for it to be said that there is a defect in consent as a result of fraud, the deceit must be practiced by one party against the other party. Any act of this kind by a third party cannot affect the validity of consent, without prejudice to the right of the deceived party to claim damages against the third party who committed the fraud. Therefore, since what the plaintiff is attacking is the contract insofar as it concerns only the agreement between her and the bank (the registration of the special hypothec), any fraud that may have been committed by her husband is immaterial, because for the purposes of this agreement, he must be considered a third party.

3. Lawful consideration

A contractual consideration must not be:

- Unlawful,
- Contrary to Morality or;
- Against Public Policy.

This is a problem in itself because **morality and public policy are broadly** and **subjectively defined**, depending on one person to another, making their interpretation difficult. These terms were introduced in the 1800s by Sir Adrian Dingli at a time when where society's moral standards were different from today. What was considered immoral in the past, may not necessarily be immoral today. ***Raymond J. Friel***, in *the Law of Contracts*, holds that under Common Law, certain types of contracts which, on the surface, appear to be legitimate have not been enforceable, **owing to an underlying illicit cause.**

Tied to this concept, making this issue further complicated and complex in Malta is that, in our country, we do not have a strict system of the law of precedent. Different judges may interpret and decide differently. This can happen as although everyone tries to apply the law, **everyone is influenced by his personal background and legal reasoning influence judicial decisions,** therefore the conclusion may be a bit different.

Oleg Anatolyevich Shklyarov vs Anthony mallia et, 26th October 2020.

In this case there was a contract to lend money between the two parties. The contract stipulated an annual interest rate exceeding 8%. However, under the Civil Code the legal maximum interest rate which applies for any obligation is 8% per annum. **The court realised that instead of declaring the contract in its totality null and void, the court adjusted the interest rate**. The court accepted the contract in favour of plaintiff but ruled that:

- The **plaintiff was entitled to receive the loaned amount**.
- The **interest rate must be limited to 8% per annum**.
- Any **interest exceeding 8% was illegal** and therefore **unenforceable**.

In the past, court would have declared such contract null and void from the outset *ab initio*, meaning the lender would recover nothing. However, modern courts now uphold the contract but adjust the unlawful elements—in this case, **limiting the interest rate to 8%,** nothing more nor less.

There exists also the notion of **contracts under seal**, in which a contract is enforceable **without the need to delve into consideration**. They are often referred to as *covenants*. Previously, a contract done under seal would require several formalities, having to conform to certain standards. Today, companies tend to sign a contract using certain officiated seals. Today, in America, a contract under seal with respect to the sale of goods is still subject to consideration and scrutiny.

Article 990 of the Civil Code defines what constitutes *unlawful consideration* under Maltese Law;

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

Gratuitous Contracts

Gratuitous contracts seem to lack lawful consideration, yet they are still validly construed, since both parties agree to bind themselves to the contract.

4. Subject Matter

The subject matter refers to **the core of the contract;** what the contract is all about. e.g. if the contract involves the sale of a car, the subject would be the car itself and the payment of money for the car. Subject matter refers to the object of the contract, which object can only be *in commercio* (extra commercium being those not mine) but mere possession or use is enough to give the right to transfer the thing.

The Offer and Acceptance

Arthur L. Corbin defines *offer* and *acceptance* as follows:

An offer is an act on the part of one person whereby he gives to another the legal power of creating the obligation called contract*. An acceptance* ***is the exercise of the power conferred by the offer, by the performance of some other act or acts.*** *Both offer and acceptance must be acts expressing assent*.

According to **Raymond J. Friel**, a Contract is comprised of 2 parts; the **offer** and the **acceptance**. When you accept, you accept a contract in its entirety. When these 2 parts exist, there is a validly construed contract, provided there isn't a lacking requisite such as capacity or formality, as discussed.

A contract thus will not exist if the offer is not accepted by the other party. Maltese law considers an agreement concluded **when one party offers a thing which is accepted by the other party**. Therefore, contracting involves one party proposing the contractual terms (such as price, delivery date, etc) and **express intention to be bound by such terms upon acceptance by the other party**. The Civil Code does not refer to the issues of offer and acceptance, and so we refer to the Commercial Code.

When discussing the formation of contracts it is wise to pay mention to the writings of **Carrara** in his book '***La formazione dei contratti'****,* in which he says the following; ***A contract is formed ... at the point*** **[that]** ***there is consensus between the contracting parties, and this is usually when there is an unconditional acceptance of an offer.***

It is only when you have **the unison of an offer and acceptance** that a contract is formed and under the **theory of information** we stated that article 110 outlines that **the offeror must be informed by the offeree of his intention.** Thus we can conclude the following 3 points under the theory of information in article 110.

- The **offeror places an offer** with all its **terms** and **conditions**.
- The **offeree must accept the offer** in its entirety—*partial acceptance is not valid*.
- A **contract** is only **formed** when the offer and acceptance meet, meaning when there is a **union of both elements**.

Article 110 of the Commercial Code
A contract stipulated by means of correspondence, whether by letter or telegram, between parties at a distance, is not complete if the acceptance has not become known to the party making the offer within the time fixed by him or within such time as is ordinarily required for the exchange of the offer and the acceptance, according to the nature of the contract and the usages of trade generally.

Article 110 of the Commercial Code governs the **conclusion of a contract**, holding that an **accepted offer** constitutes a binding contract, so long as the nature therefore is one founded at law.

An offer is a clear and specific proposal made by one party to another party to enter into a legally binding contract, while an invitation to offer, also known as an invitation to treat, is an

expression of willingness to negotiate or enter into a contract. A difference is made between an offer and an invitation to offer, in that an invitation to offer is not sufficient to constitute a contract, **owing to the lack of acceptability.**

A test adopted to determine whether there was a simple offer or an invitation to offer is **to analyse the communication between the parties in attempt to ascertain the intentions of the parties**. For instance, one may refer to a series of statements or letters between the parties during the negotiating process. One must add that offers may be made by any person, whether natural or legal, and may be made to any person, group, or even to the general public (as in the case of Government Tenders). An offer may be expressed verbally, in writing, or tacitly. It may be difficult to understand when an offer is made. There may be extensive communication between the parties, during negotiations, to reach a final agreement. In such situation, it may be challenging to determine at what point in time there was an offer and an acceptance. One possible test is to determine **whether further bargaining was expected**. Notwithstanding this, in practice it is easier said than done to establish the point in which an offer was made.

Theories on the moment of a contract formation

Although Malta applies the Theory of Information, different countries adopt **different theories** regarding when a contract is **concluded**.

1. The First Theory is The Theory Of Declaration.

According to this theory, a contract is concluded as soon as the **offeree simply manifests the intention to accept** (this is enough), even though the acceptance or declaration is **not communicated or made known to the offeror**.

E.g., If the offeree simply says ***"I accept"***, the contract is legally binding and concluded, **even if the other party,** being the offeror **never hears** or is informed about **it**.

2. The Second Theory is The Theory of Transmission.

This theory applies in the **English legal system**.

It requires that a person to whom the offer is made has declared the intention of accepting it and sent the declaration to the offeror. Thereby, a contract is **concluded** as soon as the **offeree declares acceptance and sends it** to the offeror.

E.g., If the offeree sends a **letter** or **email accepting the offer**, the **contract is formed at that moment**; that is the moment of conclusion of the contract, regardless of whether the **offeror actually receives it**. There is no need for the offeror to be explicitly informed of this acceptance.

Certain legal scholars **support** the applicability of this theory, arguing that once the offeree has sent their acceptance, **they cannot revoke it**.

3. The Third Theory is The Theory of Reception.

This theory states and requires that a contract is concluded when the **acceptance is received,** either by a letter or otherwise by the **offeror's residence or business**, even if the offeror has **not** yet read and have **knowledge of it**.

E.g., If a registered letter containing acceptance is sent to where the offeror resides and is **signed for by someone on his behalf,** such as an assistant or secretary at the offeror's residence, the contract is **concluded** at that moment, even if the **offeror has not personally seen** or know of it.

4. The Last Theory is The Theory of Information
This is the **strictest** of all theories.

According to this theory, a contract is **only concluded** when:
a) The **offeree communicates** and **sends acceptance** to the offeror, and
b) The **offeror** himself actually **becomes aware** of the acceptance.

E.g., If the offeror **has not read the acceptance** and is not specifically informed, the contract **has not yet been concluded**. The offeror has to actually **open the accepted offer** and say okay – that is when the moment of conclusion of the contract actually occurs.

Theory	Description	Moment of Contract Conclusion	Applied in
Declaration Theory	The offeree's mere expression of acceptance is sufficient, even if the offeror is not informed	As soon as the offeree declares acceptance	Some jurisdictions that follow a more subjective approach
Transmission Theory	Acceptance is effective once the offeree sends the acceptance (eg. by letter or email)	When the acceptance is sent	English Legal System
Reception Theory	The acceptance must be received by the offeror (e.g delivered to their address) but they do not need to be the ones to accept it necessarily.	When the acceptance is received	France, Germany
Information Theory	The offeror must personally become aware of the acceptance	When the offeror is explicitly informed	Stricter legal systems such as the Maltese legal system

The four theories ***all build on each other.*** Let us reaffirm again that article 110 only applies to **commercial contracts.**

The theory of information started to apply in Malta when there was the introduction of this theory by ***act 37 of 1939***. Therefore prior to 1939 in Malta we used to apply the theory of declaration. Therefore the theory of information is also **adopted in Italy** and they have articles 1235 and 1236 which are very similar to article 110 of the commercial code, which refelcts this theory of information, the strictest approach.

The Offer

The commercial code **does not refer to or provide any definition of an offer**, and **neither does continenetal law provide such defintion.** However, in general terms an offer is a *promise by one party to enter into a legally binding contract on a particular set of terms with another person who is known as the offeree*.

- A proper definition of an 'offer' is provided by the ***Restatement (Second) of Contracts* in US law**. Here 'offer' is defined as ***"the manifestation of willingness** to enter into a bargain, so made as to justify another **person in understanding that his assent to that bargain is invited and will conclude it"***

- **Raymond J. Friel** defines ***offer*** as ***a manifestation of intent to act or refrain from acting in a specified way, so made as to justify a person in understanding that a commitment has been made***.

An **offer** may be made by any person:

- to **any other person**,
- **To specific groups**, or
- **To the general public**.

Additionally, an **offer** may be expressed:

- **Verbally** (by word of mouth),
- In **writing**, or
- **Implied** through the **conduct of the offeror**.

Challenges in Identifying an Offer

Determining **when an offer has been made** can sometimes be **challenging**.

Why?

If there is extensive communication between the parties, but they are still in the **negotiation phase**, it may be difficult to determine the **exact point at which an offer was made**. If two parties are discussing terms, adjusting conditions, and exchanging proposals, it can be **unclear** when the **offeror has formally placed an offer**. A test adopted to determine whether there was a simple offer or an invitation to offer is **to analyse the communication between the parties in attempt to ascertain the intentions of the parties**. One other possible test is to determine whether further bargaining was expected.

To complicate matters further, the commercial code also regulates offers by *correspondence* and by means of *advertisements*. It also only speaks of invitation to offer. When an offer is made via a catalogue or advertisements, then that offer may be considered **an *invitation to offer***, *unless the person presenting the offer expresses otherwise*. Such an approach is necessary because catalogues and advertisements must be made without expressly indicating that an offer is made.

Having said that, what may be helpful is to look at what ***Vivante*** said with regards to this '*negotium juridicum'* where he stated ***for an offer to be valid it must have the following characteristics ;***

1. ***It must be a complete offer and therefore with all the terms and conditions***
2. ***It must be done with the intention to be bound in case there is acceptance***
3. ***It must be done in a proper format - if the law specifies that it must be written down it must be so,*** for example if a promise of sale must be done in written formal and not verbally it will not be enforceable and would simply be a promise of a promise of sale.
4. The fourth element from Vivantes definition is that the **offer must be directed to another person or persons**

These elements can be extroplated from his chracterestics include:

1. **External Manifestation**

There must be an external indication that an offer to something is being made. This can be expressed either: **verbally** (by word of mouth), or **through conduct** (the behaviour of the individual must demonstrate an offer).

2. **Intention to Be Bound**

The **offeror** must have the **intention** to be legally bound if the offer is accepted.

3. **Completeness of the Offer**

The offer must **include all essential elements of a contract**. This means that for a contract to be formed, **four legal elements** must be present:

- The offeror must have legal **capacity** to contract. A person under the age of 16 cannot make an offer. A person who is interdicted or incapacitated cannot legally make an offer.
- The subject matter must be **lawful**. An offer cannot involve illegal activities (e.g., importing drugs).
- The offer must be made **voluntarily** without coercion. If a person is forced to make an offer (e.g., after being physically assaulted), the offer is not valid.
- The offer must contain **clear and specific terms** to form a contract.

In fact one of the cases that discusses in general terms what an offer is is the case;

Emmanuele Grech vs Giuseppe Borg, decided by the commercial court. This states that the offer for it to be binding must be *precise*(contain definite terms) and *determining*(clearly identify what is being offered), and it must also show the intention of the offeror to be bound by that offer.

4. Directed **to a Specific Party**

A fourth element that can be deducted and inferred from Vivante's definition is that the offer must be **directed to another person or persons**.

If an **offer is made to an unspecified audience** (e.g., through **advertisements**), it does not always fall under **Article 110 but** may instead be classified as an **invitation to offer under Article 113** of the **Commercial Code**.

Article 113 of the Commercial Code
(1) An offer made to the public by means of catalogues or other advertisements is not binding unless it has been expressly declared to be so; it only amounts to an invitation to offer.

(2) The exhibition of goods constitutes an offer binding the person exhibiting them if it is accompanied by an indication of the price and all other conditions of the sale.

Revocation of an Offer

One must keep in mind that there is also the application of **article 111 of the commercial code, which is modeleld on italian law,** which provides that until there is acceptance the offeror can withdraw the offer, **of course in line with the terms offered**. This means that if for example the offeror specifies that the offer is open until thursday he cannot withdraw the offer before the stipulated date.

According to article **111** of the Commercial Code, an offer **may be revoked if it has not been accepted;**

111. (1) Until the contract is complete, both the offer and the acceptance may be revoked. If, however, the person making the offer declares that he will keep it open till a certain time, or if a time is implied by the nature of the contract, the revocation thereof before the lapse of such time will not prevent the completion of the contract.

(2) If the offer empowers, even impliedly, the other party to carry out the contract without previously communicating his acceptance, the contract is complete as soon as its execution has commenced within the customary or prescribed time.

According to **Daniel Ryan**, an offer can also be terminated when the **offeror dies** or **becomes incapacitated.**

An offer may also be revoked in the case **wherein the subject matter is destroyed**. Another circumstance in which an offer is nullified is in the case of legal amendment, which would make the offer illegal.

Furthermore, if the offeror has made the offer by written correspondence between distant parties, according to the theory of information which the commercial code embraces, the offeree must inform the offeror of one's explicit intention to accept the written offer.

A fundamental principle underlying contract law is that **upon acceptance, the offer can never be revoked or amended**. The Commercial Code does not specifically regulate offers placed firmly. Still, however, the same theory of information would apply which means that the offeree, must demonstrate their acceptance of the offer. Therefore as a result, **acceptance of the offer involves the final expression of consent to the offer through words or actions**. To acknowledge formal acceptance, the offeror must do so transparently (clearly) using as well an appropriate method of communication. In addition, **the offeree must accept the proposal without altering or adding details because an acceptance that attempts to introduce new terms will be regarded as a counter offer and not as an acceptance**.

Laurent and **Sacco** hold that an offer to **contract is made up of two offers**, an **offer to conclude the principal contract** and an **offer to maintain this principal offer open for a reasonable time**. They go on to hold that, whereas the principal offer to conclude the principal contract requires an express acceptance, the auxiliary offer relating to the time of acceptance is to be deemed tacitly accepted as soon as it is made. Thus, in the view of

Laurent and Sacco, an offer is automatically irrevocable up to a reasonable period of time. **Prof. Ganado** points out that the applicability of this principle of having the offer irrevocable for a reasonable period of time should be **limited to offers to the public**

Accountant General vs Carmelo Penza, decided on the 6th of April 2006

- In this case, it was found that a **letter of acceptance was never issued**.
- The **court concluded that, under Article 111**, **Penza had the right to withdraw his offer**, as there was **no acceptance** at the time of withdrawal.
- This ruling also ties into **Article 110**, which requires **communication of acceptance for a contract to be formed**.

Acceptance of an offer

Once an **offer is made**, it must be **accepted** for a **contract to be formed**. *"ll-kuntratt (ta' bejgh) mhux perfett qabel ma jkun hemm l-accettazzjoni tax-xerrej. "* ***Agostino Azzopardi vs Giuseppe Bonnici****,* Qorti ta' 1-Appell

Vivante provides a definition of **acceptance**:

Vivante states that acceptance is a **declaration directed to the offeror**, stating the intention to conclude a contract **in accordance with the offer made**.

The same problems that arise under *offer* tend to arise under *acceptance*. Under British Law, a contract done without acceptance is still deemed to be a contract, yet it is not **enforceable**. Under Maltese Law, as per article 110, a contract is not complete unless and until there is acceptance. Furthermore, article 110's use of the words ***acceptance known to the party making the offer*** confirms the Maltese legislator's **theory of information** approach.

Corbin states that acceptance is ***a voluntary act of the offeree whereby he exercises the power conferred upon him by the offer and thereby creates the set of legal relations called a contract****.*

An acceptance is a reply to an offer, and thus there can be no valid acceptance if there is no valid offer.

Therefore since article 110 regulates this conclusion of a contract by correspondence it does not regulate what happens in relation to verbal contracts. However, in cases of doubt, the court will still apply **the theory of information.**

The importance of establishing whether an acceptance has actually been made, or whether the communication merely constituted a counter-offer, is evidenced in the ***'battle of the forms'*** wherein the two parties try to force each other to adhere to their own pre-determined clauses. Thus, the courts must look at the whole course of negotiations to determine whether, and, if so, exactly at what moment the parties reached an agreement.

Delayed Acceptance

In this respect **article 112** comes into play. It holds the following:

112. A delayed acceptance or an acceptance subject to conditions, additions, restrictions or alterations shall be deemed to be and shall count as a refusal of the original offer and as a new offer.

Thus when negotiations come into play, the Commercial Code holds that each additional or subsequent term is **deemed to be a new offer.** The same applies for acceptances **which are delayed,** in which case the law deems the offeree to have refused the first and original offer.

Determining whether the original offer has in reality been subjected to conditions, additions, restrictions or alterations is a delicate matter. **Prof. Cremona** gives the example of an acceptor who, after having manifested his acceptance to all the elements of the offer, which acceptance is perfectly in line with the terms of the offer, goes on to request the expeditious delivery or the supply of goods of good quality. Cremona argues that, notwithstanding these additional conditions, the acceptance should be deemed **valid** and **unconditional.**

Silence as a form of acceptance

The general rule is that **silence does not amount to consent.** This was confirmed in ***Agostino Azzopardi vs. Giuseppe Bonnici decided on the 22nd of January 1947.***

In the judgement ***Azzopardi vs Bonnici*** , our courts also expressly held that, *"l-accettazzjoni tista tkun anki tacita."* However, **the unequivocal nature of acceptance is fundamental to the validity of this juridical *negotium.*** Hence, the said judgement went on to state that, an acceptance is tacit only if *"rizultanti minn atti tax-xerrej li jkunu inkompatibbli mal-volonta tieghu li jopponi l-bejgh.* Our courts thus hold an opinion akin to that of the French courts.

One must however note that controversy over the matter is not lacking and exceptions to the general rule that silence does not constitute acceptance seem to be becoming more frequent. As **Prof. Cremona** states, *the controversy may be traced back to Roman and Canon law*.

Many argue that the crux of the matter when deciding *whether silence has given rise to valid acceptance, or otherwise, is that of determining whether the acceptor's passive attitude could have sufficiently communicated to the offeror his intention of concluding the contract.*

Thus, French authors go through great pains in distinguishing between tacit acceptance, on the one hand, and silence, on the other. **Carbonnier** comments that, *"A tacit will materialises in an attitude, while silence has no exteriorisation."* In his view, the main difference lies between a **'tacit will'** and what he calls **'silence pure and simple'**, which has no outward manifestation and is therefore ineffective, while a 'circumstantial silence' may amount to a tacit acceptance.

The issue of whether silence amounts to acceptance generally arises when there is a ***renunciation of rights*** and therefore the court has to interpret the silence.

This was discussed in the case of ;

Sammut vs Azzopardi, decided on the 29th of December 1993.

Facts of the Case

The **defendant** rented a **premises** from the **plaintiff**. After the first **five-year lease expired**, the **plaintiff accepted** a cheque from the defendant, covering six months' rent for the following term.

The plaintiff decided to increase the rent, but **private agreement** between the parties stated that:

- Rent was **payable per annum**, six months **before the commencement** of the act of each lease period.
- The lease could be **extended beyond five years**, provided the rent was increased according to the value of the Maltese Lira.

Weeks after signing the lease, **Chapter 158 of the Laws of Malta** (which controlled property leases and prevented rent increases) came into force.

Legal Issue

The defendant based his argumentation that the **rent increase should be based on the law**, rather than on the private agreement. The **plaintiff**, however, argued that by **accepting** the cheque for the six-month rent payment, following the lapse of five years, the defendant had **renounced his right to increase the rent**, which right existed both in the **private writing** and the **law itself**.

Decision of the Rent Board

The Rent Board ruled and concluded that by accepting the cheque, the plaintiff had renounced his right to increase the rent. As a result, the **rent could not be increased for another five-year period**.

Court of Appeal Judgment

As the court decided in favour of the defendant, the **plaintiff appealed**, and the Court of Appeal addressed the issue of **tacit renunciation**.

The Court of Appeal held that when a right is renounced tacitly, such renunciation must clearly demonstrate **the precise will to abandon that right**. This intention to renounce must be **motivated by clear reasoning**. In this case, the court found that **there was no such clear motivation** to renounce the right to increase the rent.

The same principle was confirmed in the case of ***Vella vs Jones,*** where the **court** reaffirmed the Rent Board's decision and declared that:

"He who is silent is not deemed to consent."

Having said that, there are 2 exceptions to the rule;

1. When there **has been an exchange of correspondence** between the parties and **at the end of the exchange one of the parties remains silent.** In this case one can see that there was acceptance through the offeree's conduct.

2. If the agent concludes a **contract beyond his authority** and **there is silence on the part of the principal.**

On the above points we can look at;

David Ebejer vs John Aquilina, decided on the 1st of March 1950.

Ebejer was leasing out small trucks to the defendant Aquilina, and at one point in time Ebejer wrote to Aquilina that there would be an increase in rent. Aquilina did not reply and after a few days Ebejer sued for an increase in rent. Aqulina alleged that he never had a contract for an increase in rent as he had never replied back to the letter. In this case the court considered whether silence amounts to acceptance and concluded that **once you have been notified with an increase in rent and you have remained silent, in this case there was tacit acceptance and therefore you have consented to such an increase in rent.** Therefore in certain scenarios silence could indicate tacit acceptance. In this case it could not be argued that Aquilina did not know the conditions and terms as he had been renting out the trucks for a period of time.

***Marianna Carabott vs Giuseppe Farrugia,* decided on the 31st of March 1955**.

The plaintiff had given a piece of land by emphyteusis to Farrugia. In emphyteusis you become the owner but you still are required to pay rent. Part of the price was that Farrugia would build his property while Carabott would have the right to use the common wall (the partition wall between two properties, in the normality there is one partition wall, someone builds it and the other would pay half of the expenses) without paying compensation. Farrugia never built this wall and Carabott could not wait any longer and built it herself. After building it she claimed compensation from Farrugia. The issue at hand was that while building it, ***Farrugia never said anything***. The court said silence cannot amount to acceptance, however, **it depends on the circumstances of the case as sometimes it could amount to acceptance.**

The court's decision

To determine when silence amounts to acceptance and be in effect, the **court established three criteria**:

1. The person who remains silent must have **known the facts of the case** and **could have rebutted them but chose to remain silent.**
2. The fact itself **must not be illegal.**
3. The silence must have **given the person some form of advantage.**

In Carabott vs Farrugia, the court found that **Farrugia had an advantage** because the **construction of the partition wall benefited his building**. This means that the wall would have close his building; an advantage to him. Since Farrugia remained silent despite knowing that Carabott was building the wall, his **silence was interpreted as tacit acceptance**.

However, the court clarified that just because one party remains **silent**, this does **not automatically mean the other party's claim is proven**. Under the Code of Organisation and Civil Procedure (COCP), the burden of proof lies with the party making the allegation. This

means that Carabott, as the **plaintiff, still had to prove her case**, even though **Farrugia remained silent**.

Another case decided on the same reasoning was that of;

Dr Alfred Parnis nominee vs Carmelo Arpa, whereby Arpa remained silent and Parnis sued him for the money invested and again the court held that **from the evidence brought forward it showed that silence was tantamount to acceptance.**

The External Requisites: Written and Unwritten Contracts

→*Article 114 of the commercial code*

An agreement may be done verbally and it may be enforced, despite no written agreements being done. However, should the parties wish to reduce an agreement into writing, then they may do so by virtue of article 114 of the Commercial Code, which says **that if parties agree to reduce a contract to writing then the validity of said contract is subjected to the observance of it being done in writing**. Notwithstanding this, there are certain scenarios in which an agreement **must** be reduced into writing, as will be hereunder discussed.

> **114.** Where the parties have agreed that the verbal agreement should be reduced to writing it is presumed that they desire to subject the validity thereof to the observance of such formality.

There are three main reasons why written contracts are preferred:

1. Legal Certainty:

Written contracts cultivate legal certainty by eliminating ambiguity and requiring clear, unambiguous and precise contractual terms. Clarity in written contracts **mitigates the risk of misinterpretation or misunderstandings** between the parties.

2. Evidentiary Protection:

A written contract provides evidentiary standards to strengthen the contract's authenticity, provide stronger legal evidence, **protecting it from deception, misrepresentation or baseless claims**.

3. Third-Party Reliability:

Written contracts create **formal and evidentiary requirements**, establishing a trustworthy framework allowing third parties (e.g., banks, regulatory authorities) to assess and rely beyond the immediate parties involved in contractual obligations.

In general, **verbal contracts are valid** between the parties unless the law requires them to be in writing. Unless the law says otherwise, those contracts are valid in their entirety. **Article 1233 of the Civil Code** lists and specifies which contracts needs to be in writing to be valid. Thus, if a contract falls under Article 1233 and is not in writing, *a contrario sensu* it is automatically null and void – they cannot be enforced verbally.

*"**1233**. (1) Saving the cases where the law expressly requiresthat the instrument be a public deed, the transactions here under mentioned shall on pain of nullity be expressed in a public deed or a private writing:*
(a) any agreement implying a promise to transfer or acquire under whatsoever title, the ownership of immovable property, or any other right over such property;
(b) any promise of a loan for consumption or mutuum;
(c) any suretyship;
(d) any compromise;
(e) any lease for a period exceeding two years, in the case of urban tenements, or four years, in the case of rural tenements;
(f) any civil partnership; and
(g) for the purposes of the Promises of Marriage Law, any promise, contract, or agreement therein referred to
(2) Where, in the case of a private writing, the writing is not signed by each of the parties thereto, it must be attested in the manner prescribed in article 634 of the Code of Organization and Civil Procedure."

There are 2 types of written forms.

(1) Normal Private Writing

A simple agreement between two parties where **no formalities are required within it**. Can be written down on any piece of paper with basic conditions, signed by both parties.

(2) Public Deed

This type of contract is executed before **a notary public** where specific legal formalities are required, that one needs to abide by. One key requirement one enters into a contract, is that **all details about the contracting parties must be fully provided** (e.g. next of kin, birthplace, address, etc.) In the past, this was how people identified in legal documents. If the notary public does not specify such requirements, the contract is null and void.
When a contract is executed as a public deed, it must be **enrolled in the Public Registry**.

The Public Registry records all public documents that affect a person's legal status. However, in the case of contracts in relation to title of **immovable property transfers**, the **Land Registry** is also involved.

- **Not all of Malta** is mapped under the Land Registry.
- If a conflict arises between the Public Registry and the Land Registry, the **Land Registry prevails**.
- Therefore, **it is important to notify the Land Registry** of any changes in property title.

Unless stipulated by law, contracts do not have to be in writing. Under Maltese law, parties may enter into verbal contracts. Despite this, formal and evidentiary requirements are fundamental, serving as the basis of contract law, as they impact the legitimacy and effectiveness of business contracts as well.

The Formalities Construing a Contract

Under Maltese law, two distinct forms of contracts emerge based on the formal requirements which are:

1. Contracts Under Seal

A contract under seal or sealed contract is very rare in Malta. The only examples in Malta are: in the case of **secret will** or else a situation where a hotel keeper receives articles for the safekeeping.

2. Solemn Contracts

By contrast, a solemn contract refers to contracts where the **law itself determines** and prescribes **how the contract must be entered into** by the parties for its **validity**. If a contract does not follow the required form, it is declared **null and void**. This applies to all contracts that are not sealed contracts.

Solemn contracts refer to **public deeds or private writings (and sometimes even verbal agreements).**

It is important to discuss that the Civil Code *determines which contracts can be carried out verbally, unless a specific law requires them to be in writing.* These include:

These contracts are **the contract of letting and hiring, payment for rent, and mandate contracts. Having said this, if one rents out a property, there are other laws which hold that this must be reduced to writing** (and *lex specialis derogat legi generalis*).

There are other various contracts that the Maltese civil code at least requires a private writing for their validity and therefore this means that if these contracts are done verbally, they are null ab initio because the law says they must be in writing.

Article 1233 as we have seen provides a list of contracts that have to be in writing, therefore a private writing or public deed. However, this list must be **read in conjunction with any other act and laws** that may be enacted from time to time. There may be other laws which states that for a contract to be valid, they must be executed by a public deed, making a private writing insufficient. If a contract must be executed as a public deed, but is instead done **as a private writing**, it is **null and void**.

Miriam frendo vs agatha agius et.

Court of first instance and appeal concluded that a written contract is ideal because it demonstrates **the true intention of the parties.**

Apart from Article 1233 of the Civil Code, there are other provisions that mandates specific contracts to be in private writing or executed by public deed:

1) **Assignment of Debt** – **Article 1470 of the Civil Code**

All assignments of debt must be in writing to be valid.

*"**1470**.(1) The assignment is not valid unless made in writing.*
(2) The assignment of hereditary rights, or of debts, rights or causes of action arising from public deeds is void unless made by a public deed."

2) **Leases and Life Insurance** – **Article 1525 of the Civil Code.**

This article stipulates that in certain lease agreements must be in contract. Life insurances contracts must also be in writing.

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

3) Contracts That Require a Public Deed

Article 1232(2) of the Civil Code defines what a public deed is.

*"**1232(2)** A public deed is as an instrument drawn up or received, with the requisite formalities, by a notary or other public officer lawfully authorised to attribute public faith thereto."*

Our law also states that certain contracts are only valid if they are carried out and executed by a public deed, which means that a contract must be:

- Drafted by a Notary Public which can be capable of being registered in the Public Registry.

Although most public deeds ***must be registered in the Public Registry***, there are **exceptions** where:

- The **law permits** a public deed to remain **unregistered**, ***AND***
- The **parties agree** not to register it in the Public Registry.

One example where there must be a public deed registered in the Public Registry is reflected in **Article 351 of the Civil Code.**

*"**351**. (1) The inventory shall be made up in the presence of the owner, or after his having been called upon to attend even by means of a judicial letter.*
(2) It must be made by a public deed unless in the act creating the usufruct power has been given for it to be made by means of a private writing, and the owner consents that it be so made.
(3) Unless otherwise provided in the act creating the usufruct, the expenses of the inventory shall be borne by the usufructuary."

This article **refers to an inventory that must be drawn up by a usufructuary in the case of usufruct rights**. Usufruct allows a person (usufructuary) to use and enjoy property while ownership remains with someone else.

Example- A person in leaving their property to their daughter and heir, at the same time, they may grant usufructuary rights to their sister, meaning the sister can live in the property during her lifetime. This allows the heir to retain ownership while another person enjoys its use.

In Malta, immovable property transactions are strictly regulated to maintain legal control over ownership and usufructuary rights. A person may leave property to an heir, granting them full title, while also granting another person usufructuary rights. This arrangement ensures that the heir holds ownership, but the usufructuary retains the right to use the property during their lifetime. This is done to be able to control such property. This inventory **must be done by a public deed and only if the usufruct owner allowed a private writing, then the inventory can be done by private writing.**

Contracts that require a public deed

As we said (*3. Contracts that require a public deed*) certain contracts **must be executed by public deed as required by law**:

1. **Annuity Contracts for Immovable Property – Article 1690 of the Civil Code**
"1690. *A contract creating an annuity is **null** if it is not made in writing, or, where an immovable thing is assigned**, if it is not made by a public deed***."

2. **Privileges and Hypothecs.**

3. **Contracts Affecting Third Parties**
Any contract that affects third parties must be executed by a public deed and enrolled in the Public Registry.

The role of notaries in public deeds

Since public deeds are **executed before a notary**, they must also be **signed by the notary** to be legally valid.

Notaries in Malta are considered to be **'Commissioners for Oaths'**, meaning they:

- Attribute **public faith** to the document.
- With the signature, the notary personally entails and **verifies the identity of the contracting parties**.
- **Request official documentation** (e.g., ID card, birth certificate) to confirm the parties' details

Thus, a notary's signature certifies that what is written in the deed is **accurate and legally binding**.

Witnesses

Some contracts **require the presence of witnesses** for **legal validity**.

Example: Mandate Contracts
A mandate contract can generally be verbal. However, when a **mandator is declared interdicted or incapacitated**, the Civil Code requires witnesses to be present.

This means that, in such cases, although at face value a mandate contract can be done verbally as a first step; the Civil Code explains that **witnesses must be present** meaning that such contracts must **be in writing and signed by all parties** and witnesses.

N.B The law specifies a **list** of elements that must be specifically **included in a public deed** for their validity and if any required element is missing, the contract is null and void. These elements ensure that the contract is legally enforceable and complies with public record requirements.

The Notion of Void and Voidable.

Article 40 of the Commercial Code establishes that public deed they are null *ab initio* if:

- They are not dated, or
- If the required witnesses fail to sign.

If a contract **lacks these essential formalities**, it cannot be legally validated—it is **void**.

> *"**40**. Any person desiring to be registered in the aforesaid register shall make an application before one of the courts mentioned in article 38, as the case may be, producing all the requisite documents, and, in the case of a commercial partnership, a copy of the statement published in the Government Gazette in terms of sub-article (1) of article 192 of the Commercial Partnerships Ordinance , showing the date of registration of the partnership and the date on which the relative certificate of registration was issued."*

However, in the other cases, contracts may be voidable, in the sense that nullity arises only if the parties say something, meaning by the **party raising the issue**. If no one challenges the contract, it remains valid.

Certain laws and acts **regulate how public deeds must be structured** and outline the notary public's role and function. This list must be put down within the public deed.

Let us use the case of separation proceedings. Separation proceedings, for example involve lawyers' negotiation upon agreeing on terms and conditions through mediation but the final agreement must be:

- Formalized by one notary public
- Structured and changed in a format accepted by law to be a public deed.
- Follow a specific template on how it should be written.

So long as it has nothing to do with the date or witnesses, the contract is valid *so long as they say nothing about the nullity.* Therefore, if a contract is missing details other than date or witness signatures, it **remains valid unless a party actively challenges its nullity**.

The issues of nullity and annullability where held in the case of:

> ***B. Grima and sons limited vs Carmel Grima et.***
>
> In this case the plaintiff company alleged that part of the property did not belong to the defendants and sought to rescind the contract because the plaintiff company said that the defendant company did not say the truth. The court concluded that the side plan said that it did not form an integral part of the property, and the parties cannot simply refer to a side plan

to describe a part of the property but the details of the property have to be in the contract itself.

The court said the contract itself is what binds the parties **and not the side plan.**

Evidential Requirement.

In conjunction with the argument on contract validity, there is the evidential requirement which refers to the **concept of proof**. The evidential requirement is commonly referred to as ***the parol evidence rule*** which states that:

1) **Written contracts are crucial** in expressing the **intentions of the parties**, meaning as well that
2) This rule **restricts the introduction of external evidence** that could alter or contradict the terms of a written contract

There can be situations whereby in negotiation stages say something and then at one point in time decide something else and write it down. That is why that particular clause is included- that whatever is discussed before or after is not relevant but what the parties write down is.

Having said that he Maltese civil court refused the presumption of the parol evidence rule in the sense that **article 1003 of the civil code** states that **the party's intention must always prevail over the literal meaning of the contract.**

"***1003***. *Where the literal meaning differs from the common intention of the parties as clearly evidenced by the whole of the agreement, preference shall be given to the intention of the parties.*"

This principle was discussed in the case of:

Christoper Cassar vs Josianne Bigeni:
The written down terms of the contract was different from the parties' true intentions. The court concluded that **the intentions of the parties must always prevail, provided that both parties agree over what is written down,** meaning on what was intended.

Giuseppe Vella Gatt vs Giuseppe Darmanin, decided on the 23rd of November 1956.

This is another case in relation to Art. 114 of the Commercial Code
In this case, Vella Gatt entered into a verbal agreement with Darmanin which stated that the plaintiff would carry out construction works in Senglea. They also agreed on the method of payment for the work. Unfortunately, Darmanin did not honour this obligation, leading to legal action and suing by the plaintiff, Vella Gatt.

In this case it resulted that although the parties had verbally agreed to all of the terms and conditions, **they had also agreed that they would reduce such agreement into a written format. Since they had agreed to a written contract but never drafted it, the verbal agreement was deemed invalid.** The court applied Article 114 of the Commercial Code,

holding that "*if parties agree that a contract should be in writing, but they fail to reduce it to writing, the court will not consider that verbal agreement to be valid."*

Hard Rocks Limited vs Francesco Fenech, decided on the 1st of December 2004.
Hard Rocks Limited was owned by two shareholders. When the company Hard Rocks Limited sued Francesco Fenech, the defendant pleaded that one of the company's shareholders owed money to him – therefore he alleged that **he attempted to make some form of offset for the debt**. However, the set off principle does not apply in that way, unless the creditor and debtor are the same person and, thus be in the same concept.

In this case, the defendant argued that the agreement between the parties was that it should reduce the conditions in writing. However, **the written contract was never signed by all the involved parties,** including the by defendant, shareholder, and the plaintiff. The court again referred to Article 114 ruling that "*If the parties agreed that the verbal agreement must be formalized in writing, the contract is only valid if there is a written agreement between the parties*".

The strict interpretation of Article 114 comes into play ***only in relation to commercial obligation,*** *meaning not all contracts fall under this provision. There may be some contracts that do not fall under such article,* ***in which case this strict interpretation does not apply.***

Modifications of the contract

Once you agree to something written you can modify the contracts so long as obviously all the parties to the contract agree with it. Having said that the Maltese civil code and any other code **does not specify how parties can modify a contract.** In fact, in the normality of instance when you have written contracts there is usually a clause included that says that if parties want to amend something **both parties** will then sign again in relation to that amendment.

Linked with this fact is **Article 992(2) of the Civil Code.** This article reinforces the principle that **parties can only revoke contracts mutually**. Although the law does not regulate how amendments should be carried out, it makes sense for both parties to agree to any modifications.

"*(2) They may only be revoked by mutual consent of the parties, or on grounds allowed by law.*"

While the courts can easily verify the legality of written modifications, **verbal modifications are harder to prove.** The challenge and main issue with verbal changes is determining and proving whether both parties had approved such modification.

This this was discussed in;

Panoutsos vs Raymond Hedly, Court of New York, 1917.
In this case, the seller agreed to make multiple flowers deliveries. In exchange, the buyer was required to pay for each shipment through a conferred banker's credit arrangement. Despite the buyer making the payments for each shipment, **the seller was unaware that the buyer had**

yet to open the necessary credit arrangement. When the seller got to know of this fact, they attempted to terminate the contract. However, the court ruled against the seller because:

- The **seller continued delivering shipments** even after discovering the issue.

By **continuing to perform the contract**, the seller **effectively waived their right** to terminate it and could not rely on such breach.

Stilk vs Myrick, 1809

Unfortunately, a sailor alleged that a captain promised him more wages but unfortunately from the evidence brought forward, the court couldn't deduce such a fact and decided against the sailor

Summary of Article 114 of the Commercial Code:

1. Contracts **can be done verbally**, unless and until there is specific provision, in any Act, that state otherwise.
2. If the parties agree to have that contract in writing, they **have to do it in writing** for its validity.
3. Contracts in writing can be of two forms: (1) **private writing** or (2) **public deed.** While there is no specific requirements in relation to private writings; the Public Registry Act specifies what the public deeds should contain – the requirements. Failure to meet certain formalities can lead either to the nullity of the contracts, whilst others lead to the annullability of the contract.
4. Contracts **can be modified, but both parties must agree**. Although there is no Act or legal provision that so specifies how contracts can be verified at face value, the Civil Code states that contracts can only be revoked mutually. It stands to reason that if you ultimately want to modify a contract, it has to be agreed by both parties. If in the contract there is written that one of the parties can unilaterally change the contract and all the parties sign to that, so be it, the modification is legally valid.

The Obligation of co-debtors

Article 115 of the Commercial Code *-joint and several liability*

115. (1) In commercial obligations, co-debtors are, saving any stipulation to the contrary, presumed to be jointly and severally liable.

Joint and several liability means that if multiple people are co-debtors with each other, they are joint and several liable in the sense that, the creditor has the right to sue any one of them for the full amount of the debt. By default, when two or more debtors exist, they are presumed to be jointly and severally liable, unless something else was agreed upon. They **must also prove such an agreemen**t. This presumption also **extends and applies to a surety** *(a person who guarantees another's debt)*. The term "guarantor" is not explicitly found in Maltese law, but the concept of suretyship serves the same function.

An example of joint and several liability is the following: If there are three co-debtors (A, B and C), the creditor can sue debtor A alone for full payment, even if B and C were also responsible for the debt.

Article 115(2) of the Commercial Code extends this presumption to a surety, even though the surety may not be a trader.

(2) The same presumption shall extend to a surety, even if not a trader, who guarantees a commercial obligation.

A surety is a person who guarantees the repayment of a debt if the principal debtor fails to fulfil the obligation. This means that, if the principal debtor does not honour the obligation, the surety will guarantee the payment of debt. In commercial obligations, the surety is presumed to be jointly and several liable with the principal debtor. This means that the **creditor can demand payment from the surety**.

The same principle of joint and several liability is also found in the Civil Code, under **Articles 1094** and **Article 1096**.

Articles 1094 of the Civil Code

*"**1094**. Debtors are jointly and severally liable when they are all bound to the same thing in such a way that each of them may be compelled to discharge the whole debt, and the payment made by one of them operates so as to release the others as against the creditor."*

Articles 1094 mirrors the principle emanating from the Commercial Code, stating that the **creditor may at his own choice choose to sue any one** of the joint and several debtors for the full amount.

Articles 1096 of the Civil Code

*"**1096**. The creditor may enforce his claim against any of the joint and several debtors, at his option, and it shall not be lawful for the debtor **to set up the benefit of division**."*

Soilidarity in civil obligations must be agreed between the debtor and the creditor, in commercial obligations it is presuemd.

In a case of debtors insolidum, although the creditor can sue and demand the full amount from one of the co-debtors, that debtor would have the **right to file a recourse against the other co-debtors for compensation.** This is called a ***ribalta*** *(niftah kawza kontra l-ohrajn)* .

In some cases, joint and several liability may not apply – this is called **the benefit of division**. Under the benefit of division, the creditor can only sue **each debtor for the specific amount they agreed to pay** *a priori* to the creditor. However, in commercial obligations, the benefit of division only applies if the debtors would have agreed beforehand.

It is important to understand that in commercial obligations, **solidarity is presumed**, which means debtors insolidum can each be constrained to pay the full amount of the debt by the creditor saving the right of the person who has paid to recover from the other co-debtors that due by each such co-debtor. Where debtors are not insolidum, each one can only be constrained to pay his share. If it is a commercial obligation solidarity is presumed and will exist unless excluded. In **civil obligations it must be stipulated between the creditor and the debtors**.

Surety, what is it?

Suretyship is a situation wherein A borrows money from B, with the guarantee that the money will be paid by a third party, if not A. A is thus the debtor. A may bring another person to act as the surety. **The creditor shall first go against the principal debtor, and then the surety.** However, under Commercial Obligations, the Surety is joint and severally liable, and thus the creditor may go against the surety directly. In civil law, the creditor must first go against the principal debtor before turning to the surety. All of this results from article **1934** of the Civil Code.

All the above emanates from **Article 1934 of the Civil Code.**

*"**1934**. The surety is only bound to pay in the event of the default of the principal debtor whose property must first be discussed."*

The suretyship provisions as enacted from the Civil Code have never been amended from the time they had been enacted by Sir Adrian Dingli in 1835.

With regard to joint and several liability, there is article 1941 of the Civil Code;

1941. In commercial matters, the surety is always, in the absence of an agreement to the contrary, presumed to be bound jointly and severally with the debtor.

Article 1925 of the Civil Code provides the legal definition of a surety.

*"**1925**. Suretyship is a contract whereby a person binds himself towards the creditor to satisfy the obligation of another person, if the latter fails to satisfy it himself."*

Article 1929 of the Civil Code clarifies that suretyship cannot be assumed but, it must be expressed and agreed upon. It cannot extend beyond the contract's terms.

*"**1929**. Suretyship cannot be presumed, it must be expressed; and it cannot be extended beyond the limits within which it has been contracted."*

Article 1233 of the Civil Code further clarifies and specifies that such expressed consent must be in writing and cannot be agreed upon verbally.

*"**1233**. (1) Saving the cases where the law expressly requires that the instrument be a public deed, the transactions here under mentioned shall on pain of nullity be expressed in a public deed or a private writing:*
(a) any agreement implying a promise to transfer or acquire, under whatsoever title, the ownership of immovable property, or any other right over such property;
(b) any promise of a loan for consumption or mutuum;
(c) any suretyship;
(d) any compromise;
(e) any lease for a period exceeding two years, in the case of urban tenements, or four years, in the case of rural tenements;
(f) any civil partnership; and
(g) for the purposes of the Promises of Marriage Law, any promise, contract, or agreement therein referred to.
(2) Where, in the case of a private writing, the writing is not signed by each of the parties thereto, it must be attested in the manner prescribed in article 634 of the Code of Organization and Civil Procedure."

Miksons Transport Company Limited Et vs Anthony Stivala Et.
The court confirmed **that a private written agreement between the parties is sufficient to establish suretyship**. The court also acknowledged that an email can serve as valid evidence of a suretyship agreement. This modern judicial interpretation aligns with the practical realities of commercial transactions, recognizing electronic communication as legally binding evidence.

Paolo Inguanez vs Joseph Cremona, decided on 25th October 1954.
In this case, the court had to discuss and determine the validity of joint and several liability in suretyship Article 1233 of the Civil Code. In this particular case, the court ruled that a **suretyship must be in writing to be valid**. Since it was not in writing, suretyship cannot be valid, and thus it was deemed **invalid**. If a party wants to be released from a suretyship obligation, they must prove that it was a civil obligation rather than a commercial one.

Article 1942 of the Civil Code – Right of Recourse Against the Principal Debtor.

*"**1942**. (1) A surety who has paid has a right to relief against the principal debtor, whether the suretyship has been contracted with the consent of the debtor or without his knowledge.*
(2) This right of relief shall extend both to the capital and to the interest and expenses:
Provided that with regard to expenses, the surety has no right to relief except for those incurred after he has, by means of a judicial act, given notice to the principal debtor of the molestations which he has sustained."

This article states that when the surety pays the debt on behalf of the principal debtor, the surety has the **right to sue the principal debtor to recover the money paid**.

Article 1943 of the Civil Code – Right to Claim Interest.

> *"**1943**. (1) He may also claim relief for interest on any sum that he has paid for the debtor, although the debt did not yield interest, as well as for damages, if any.*
> *(2) The interest, however, which was not due to the creditor, does not run in favour of the surety, except from the day on which the latter shall have, by means of a judicial act, given notice to the debtor of the payment made."*

This article allows the surety with the right to claim and **receive any interest from the principal debtor, even if the creditor received the principal sum without interest**. Interest starts to run ***from the date when the surety was judicially compelled to pay the creditor***.

Article 1944 of the Civil Code – Surety's Limitations.

> *"1944. If the suretyship has been contracted against the will of the debtor, the surety shall not be entitled to relief against the debtor except to the extent of the advantage accruing to him"*

This provision goes on to add that the surety cannot sue the principal debtor for the reimbursement of payment to be paid back **if the surety paid the debt against the debtor's will**.

Article 1948 also allows the surety to claim indemnification from the debtor before paying the debt in certain specific circumstances, such as when the surety has been sued for payment.

Article 1948 of the Civil Code – Right to Indemnification Before Paying the Debt.

> *"**1948.** A surety, even before paying, may proceed against the debtor to be indemnified by him –*
> *(a) if he has been sued for payment.*
> *(b) if the debtor has become bankrupt or insolvent, or his condition has altered and there is a reasonable apprehension of insolvency*
> *(c) if the debtor has undertaken to release him from the suretyship within a specified time, and such time has elapsed.*
> *(d) if the debt has become due by the expiration of the time agreed upon for payment.*
> *(e) if the debtor is in default for delay in payment.*
> *(f) at the expiration of two years, where no time has been fixed for payment, and the obligation is not, of its nature, such that it cannot be extinguished before a longer time."*

Article 1956 of the Civil Code states that suretyship obligations are extinguished in the same manner as any other obligation.

> *"**1956**. The obligation which arises from suretyship is extinguished for the same causes as all other obligations."*

This therefore refers to **Article 1948 of the Civil Code**, which provides a list of ways in which obligations can be extinguished. The most common method is **payment** – once the debt is fully settled, the suretyship ceases to exist. Recitation *(rescission)* means that it is if the contract had never existed, rendering the contract un-existable.

Although there are some technical differences between suretyship and a guarantee-guarantor relationship, **the Civil Code only regulates suretyship.**

Article 115 of the Commercial Code and Article 1941 of the Civil Code *(benefit of division, suretyship etc)* both establish a **legal presumption** regarding joint and several liability and suretyship. Two types of presumptions exist in law:

1. **Iure Et De Jure Presumption** *(irrebuttable presumption)*

This means that nothing can be said to the contrary; it is so clear that it cannot be rebutted.

2. **Iuris Tantum Presumption** *(rebuttable presumption)*

Evidence to the contrary can be provided to disprove the presumption.

Commercial Code 115. (1) In commercial obligations, co-debtors are, saving any stipulation to the contrary, presumed to be jointly and severally liable.

(2) The same presumption shall extend to a surety, even if not a trader, who guarantees a commercial obligation.

Civil Code 1941. In commercial matters, the surety is always, in the absence of an agreement to the contrary, presumed to be bound jointly and severally with the debtor.

Azzopardi et vs Grech discusses this presumption, which essentially creates the presumption of co- liability between the surety and the principal debtor, unless evidence is brought to the contrary.

It is crucial to distinguish suretyship from guarantee. In the case of suretyship, the surety is liable to the debtor automatically, while in guarantee, **the guarantor becomes responsible only if the principal debtor is in default and the creditor informs both parties in writing that the debtor is in default.** Having said that, there may be situations wherein both terms are used interchangeably. Furthermore, the Maltese Civil Code governs suretyship, and not guarantee, yet the difference must still be made for academic purposes.

Payment

When the subject matter of the obligation is limited to the payment of a determinable sum, the damages arising from the delay of the person's performance thereof shall only consist in the interest of the sum due.

Article 1141 holds that interest rates shall run from the date when the obligation *should have been performed*. Further, **S.L 16.06** (interest rate exemptions regulations) may provide for different interest rates. If the S.L is not applicable, the interest rate is generally calculated at 8% p.a., subject to one exception, governed by the Civil Code under the provisions dealing with Contracts of Sale, wherein the interest rate is of 5% p.a.

> *"***1141.** (1) Where the obligation is of a commercial nature, or the law provides that interest is to run *ipso jure*, interest shall be due as from the day on which the obligation should have been performed.
>
> (2) In any other case, interest shall be due as from the day of an intimation by a judicial act, even though a time shall have been fixed in the agreement for the performance of the obligation.

There Is Also A Distinction From When Interest Rate Starts To Accrue.

In **commercial obligations,** as a rule interest starts to accrue **from the moment that the payment of the obligation is due,** meaning was supposed to be paid.

Example: If I finished by job for you today, and you knew that you were supposed to pay me today, interest rate starts accruing today. Even if I file an action in court six months later, it will not change anything – meaning that interest still accrues from the original due date.

In **civil obligations,** interest rate starts to run **from the moment that you are requested to pay by a judicial act.** A judicial act can be: (1) Filing of an action in court, or (2) Sending a formal letter through the court system. Article 1141 of the Civil Code specifies when interest start to run, and it differentiate between commercial and civil. In the case of civil obligations, interest rate only starts to accrue from the moment a judicial act requests payment – the moment the debtor is notified and not the moment s/he is asked to pay.

Example: If I file a letter through the court for payment today, but you are ultimately notified by the letter one month later, interest rate starts to run from the date of notification, not from the filing date. This is a problem within itself.

What happens if there is some form of legal impediment which is beyond you – does interest still start to run?

This was discussed in the case of;

Wathen vs Alex Cutajar.
In this case the court ruled that: Even if a debtor is notified or not officially, **if they know that they must pay, there is no excuse not to pay** and therefore, interest rate start to accrue from the moment that you are notified.

Fenech vs Ciappara.
The court clarified that rule of interest rate in relation to a commercial obligation starts to automatically run and accrue the moment that the obligation had to be fulfilled, thus there is no need for formal notification to pay.

Compound Interest

This is catered for in Article 1142 of the Civil Code.

1142. The interest fallen due may bear other interest either, in virtue of the foregoing provisions, from the day of a judicial demand to that effect, or in virtue of an agreement entered into after the interest has fallen due, provided, in either case, interest be due for a period not less than one year.

However, Article 1142 of the Civil Code states that compound interest *(interest on interest)* can never be added more than once in a year, and it **can only come into effect if a judicial letter is sent** clearly stating that compound interest will be applied.

This is also regulated by **Article 3 of the Commercial Code**, wherein Article 1142 finds application in the context of overdrafts as banking practices, which are regulated by usage. In these instances, the Court accepts that banks may compound interest twice a year, and that it is only an exception to the banks.

In relation to other contracts regulated by the Civil Code that are considered as loan, one may find the *mutuum contracts,* which is a loan for consumption contracts, pertaining to situations wherein one takes a loan from the bank. Further, there are *commodatum contracts*, which are loans for use contracts, as well as the *precarium contracts*, which are loans similar to commodatum contracts but which may be taken by the lender at any time upon his exigences.

Maximum Interest Rate and Exceptions

Under the Civil Code, for any type of obligation, the **maximum interest rate is 8% per annum**. However, **Subsidiary Legislation 16.06** provides exceptions to this rule, where interest can exceed 8% per annum. These exceptions apply in two main cases:

1. When the creditor is a **bank**.
2. When the contract is **regulated by foreign law**.

In these cases, **the 8% cap does not apply**.

The concept of an **overdraft** is also **excluded** from the scope of Article 1142, as it falls within banking activity. Anything that applies to **banks is exempted from the Civil Code**, including interest limitations and compound interest rules.

Article 1169 governs appropriation of payments.

1169. (1) The debtor of a capital sum bearing interest cannot, without the consent of the creditor, appropriate the payment to the principal in preference to the interest.

(2) Any part-payment made generally on account of principal and interest shall be first applied to the discharge of the interest.

The legislator has established that any **payment made must first go against the interest**, and only in such case can there be appropriation.

Article 116 of the Commercial Code.

*"**116**. Where the money expressed in a contract is not legal tender in Malta, and the exchange thereof is not stated, payment may be made in the money of the country according to the rate of exchange at sight at the due date and at the place fixed for the performance of the obligation, and, if there is not at such place a course of exchange, according to the rate of exchange in the nearest market, unless the clause "in cash" or an equivalent clause is contained in the contract."*

Article 116 of the Commercial Code deals with **payments**, specifically where foreign currency is involved.

This article played a larger role prior to 2008, before the Euro was adopted, owing to the reason that under the EuroZone, there were several countries adopting the same currency. Article 116 holds that when money expressed in a contract is not expressed in terms of its exchange, **then one must look at the destination of the contract, the place of the performance of the obligation, and then the nearest market, from which one will obtain the exchange rate**. There will also be situations wherein it is very difficult to issue rates of exchange. For example, the Central Bank of Malta does not issue rates of exchange with South Korea. In these instances, **one must refer to the closest market to Malta which will have an applicable rate of exchange for the currency in which the contract is denominated and in respect of which there would be no exchange in Malta.** This is not applied in Malta as much as it used to be in the past.

This is a problem in itself. Rates of exchange, in the normality of instances, are influenced by supply and demand, however not all. For instance, **Saudi Arabia's exchange rate is fixed**, not dictated by supply and demand

Kris Borg vs Air Malta PLC – decided on the 27th of June 2003.

In this case, there was an Italian company that sued a Maltese company, and the dispute concerned the Italian lira and the Maltese lira. **The court had to evaluate which date's exchange rate should be used.**

The Court Considered:

1. The date when the incident occurred.
2. The point in time when the court case was filed.
3. The date of the judgement was delivered.
4. The date when the payment was effected.

Since **exchange rates vary daily**, selecting the correct date has a material impact—some dates may be more favourable than others.

In relation to this, the court quoted;

***Dr. Ian Refalo vs Dr, Carmelo Agius*,** decided on the 26th of April 1998.

The court referred to this judgment when deciding which date to consider for applying the exchange rate. It concluded that the applicable date is the **date when the incident occurred**.

This principle **clarifies that the value of a payment in foreign currency should be determined by the exchange rate on the date of the originating event, not the date of judgment or payment**. If you have a judgment which ultimately allows you to be paid in a foreign currency, you can request the court to fix the rate of exchange.

Litigious right

Article 118 of the Commercial Code discusses the concept of the *litigious right* (il dritto litigioso). A litigious right, per se, can be transferred, and thus a case may be assigned to someone else. This is also confirmed by Article 1483 of the Civil Code.

Commercial Code 118. The right competent to a debtor under article 1483 of the Civil Code, in the case of assignment of a litigious right, cannot be exercised where the litigious right so assigned arises from a commercial transaction.

Civil Code 1483. (1) Where a litigious right has been assigned, the debtor in the obligation may obtain his release from the assignee by reimbursing to him the actual price of the assignment together with the expenses and interest to be reckoned from the day of the payment of the said price by the assignee.

(2) A right is deemed to be litigious, if there is a contested suit as to the existence thereof or if the debt due is not liquidated and is difficult to liquidate.

Article 118 states that if someone has a case against you, or you open a case against someone, you **cannot transfer that right to someone else**. This is opposed to Article 1483 of the Civil Code which allows for the transfer of such right.

How is this allowed?

Basically, the debtor must match the price paid to the creditor, and the matter ends over there. Under the Commercial Code, Article 118 does not allow this to happen. Under Article 118 one cannot assign their right due to the fact that commercial obligations per se are there to **make a profit**. The legislator decided not to allow any profit in those scenarios.

Resolutive conditions

117. In commercial contracts, the implied resolutive condition referred to in article 1068 of the Civil Code produces the dissolution of the contract *ipso jure*, and it shall not be lawful for the court to grant to the defendant a time for clearing the delay:

Provided that this article shall not apply to contracts of letting of immovable property or to contracts of emphyteusis or to contracts the dissolution whereof, in the event of failure by one of the parties to fulfil his engagements, is specially regulated by law.

A resolutive condition is a condition that brings the termination of a contractual relationship which consequently dissolves the matter. The definition of a resolutive condition is provided in **article 1066** of the Civil Code, which states;

1066. (1) A resolutive condition is that which, on being accomplished, **operates the dissolution of the obligation, and replaces things in the same state as though the obligation had never been contracted.**

(2) Such condition does not suspend the performance of the obligation, but, if the event provided for by the condition happens, the creditor shall be bound to restore that which he may have received.

E.g., A contractor is hired to build an extra room in a house; he is bound that he must come within one month from the date to build it, otherwise the contract will be terminated. There are three so to speak obligations:

1. **The contractor is engaged** for the work.
2. **He must commence the work within one month** from the agreement date.
3. If he doesn't show up within the stipulated period, the contract will be **automatically terminated.**

The **Civil Code** distinguishes two types of resolutive conditions:

1. Express Resolutive Condition

- Clearly and expressly **included as a clause in the contract**.
- Article 1067 of the Civil Code deals specifically with this type.
- If the contractor does not begin work within one month, this contract shall be **considered terminated.** If he does not show up, the contract is automatically terminated and there will be no time for the contractor to change his position
- **No opportunity** is given to the contractor to change his position.

2. Tacit or Implied Resolutive Condition

- Not stated explicitly but **inferred from the nature of the agreement** or **the conduct of the parties.**
- It operates **silently** if the required action is not fulfilled.

Article 1067 of the Civil Code: Express Resolutive Condition

> *"**1067.** Where the resolutive condition is expressly stated in the agreement, such agreement shall, upon the accomplishment of the condition, be dissolved ipso jure, and it shall not be lawful for the court to grant any time to the defendant."*

The court relies on the written terms of the contract. The court considers that what is written reflects mutual agreement and **must be adhered to**. Whatever is agreed upon by the parties must be **put in writing**, as that is **what governs** their contractual relationship.

Article 1068 of the Civil Code: Implied or Tacit Condition.

> *"**1068**. A resolutive condition is in all cases implied in bilateral agreements in the event of one of the contracting parties failing to fulfil his engagement:*
> *Provided that in any such case, the agreement shall not be dissolved ipso jure, and it shall be lawful for the court, according to circumstances, to grant a reasonable time to the defendant, saving any other provision of law relating to contracts of sale."*

Article 1068 then deals with the implied resolutive condition. In every bilateral contract, it is implied that if one party does not perform their obligations, then the other party is not bound to perform theirs. Thus, one cannot sue for the performance of a contract by the other party if he himself was in breach of contract.

Inadempleti Contractus. This concept means that **a party in breach of a contract cannot sue the other party for breach**. A person cannot demand performance if they themselves have failed to perform. This means that if you are in breach of your contract, you cannot sue the other party for any potential breach.

> **Sare vs Ellul** (1953).
> The concept of *'inadempleti contractus'* was applied to this case. In this case, the court clarified that a person who is sued may, in his defence, raise the plea that the other party was in breach of the contract before him. Therefore, he **did not have any obligation on his part to carry out his obligation with respect to the contract**. Having said that, it is not always easy to determine who was in breach first. Not it is not always clear and easy to determine and understand whether the reaction of the other party was proportionate or not.

E.g. In a contract for works, if a builder is not paid on time, they **cannot simply stop work**—they must first seek other legal remedies.

It is not always easy to determine which breach happened before the other. It is equally difficult to determine whether the reaction was proportionate or not. In an implied resolutive condition, Article 1068 of the Civil Code includes a very **important proviso**, which states that:

*"Provided that in any such case, the agreement **shall not be dissolved ipso jure**, and it shall be lawful for the court, according to circumstances, to grant a reasonable time to the defendant, saving any other provision of law relating to contracts of sale."*

The Civil Code allows the court the possibility to grant time to the other party to remedy the situation. In commercial obligations, **Article 117 of the Commercial Code** states *that one does not have the possibility to be granted time to remedy the situation.*

"***117****. In commercial contracts, the implied resolutive condition referred to in article 1068 of the Civil Code produces the dissolution of the contract ipso jure, and it shall not be lawful for the court to grant to the defendant a time for clearing the delay:*
Provided that this article shall not apply to contracts of letting of immovable property or to contracts of emphyteusis or to contracts the dissolution whereof, in the event of failure by one of the parties to fulfil his engagements, is specially regulated by law."

Article 117 of the Commercial Code only deals with implied (tacit) resolutive conditions. Since Article 117 is silent about express resolutive conditions, the **same concept found in Article 1067 of the Civil Code applies**.

Article 117 of the Commercial Code

This provision deals with tacit (implied) resolutive conditions in commercial obligations and their effect on contract dissolution. To fully understand its application, it is necessary to first distinguish between the **types of resolutive conditions** and how they apply in different contexts.

Whereas in express resolutive conditions, the conditions are the same, in both commercial and civil obligations, in the case of tacit resolutive conditions, the civil court may grant time, **but in the case of the Commercial Court, the Court cannot grant time unless the contract is one of lease or emphyteusis**.

Article 117 thus provides that i**n commercial contracts, the implied resolutive condition produces the dissolution of the contract *ipso jure*, and it shall not be lawful for the court to grant the defendant a time for clearing the delay**. This means that in commercial matters, there is no distinction between *express and implied resolutive conditions*. This means that even if it is not stated that a party has arrived to an agreement, if the other party fails to honour his obligations, it is automatically presumed that such failure will lead to the automatic termination of the contract between the parties.

Abela vs Bonello, decided on the 31st of May 2002. -unclear express resolutive conditions

The condition related to the payment of rent, and there was a clause in the contract stating that if rent was not paid on time, the landlord would have the right to terminate the lease. The issue arose as to whether this was an expressed resolutive condition. The court concluded that this clause did **not give rise to an expressed resolutive condition** for the simple reason that, it was up to the landlord to dissolve the contract if there was no payment of rent or otherwise. Therefore, the court said that for it to be an expressed resolutive condition, **the parties should have written down that if the lessee does not pay rent, the contract will terminate** *ipso jure.*

In ***Chetcuti vs Farrugia*** *(6th October 2000)*, the plaintiff and the defendant signed a contract of lease for a shop. The defendant, the owner of the shop, sent a letter to Chetcuti, demanding that anything attached to the windows of the shop be removed. The plaintiff demanded that the Court declare the letter sent by the defendant to be deemed unfounded and unjust. The **defendant argued that these conditions were stipulated in the Contract of lease and that both parties agreed to them**. The contract held that the lessee would only be able to fix a shop sign onto the outside windows and that he cannot fix other decorations on the outside. It seemed that Chetcuti had attached several other effects to the property which seems to go against the contractual agreement. Chetcuti argued that this was done because the word ***biss*** was not written in the contract. Farrugia, however, held that the wording was sufficiently clear in order for the contract to be declared null and Chetcuti evicted.

The first Court **ordered the plaintiff to be evicted within 2 months**. Among other motivations for the decision taken, the Court quoted that it had been stipulated in the contract the following: "***jekk jikser xi kondizzjoni tal-preżenti lokazzjoni u jibqa' ma jirrangax, il-kondizzjoni li tkun ġiet miksura fi żmien xahar minn meta jkun irċieva avviż b'ittra uffiċjali mill-proprietarju, f'dan il-każ il- proprietarju jkollu d-dritt li jittermina l-lokazzjoni***". The decision was appealed, and the Court of Appeal analysed the violation alongside the conditions.

The Court on appeal considered that the lessor and the lessee were in the same business and that they had expressly inserted an agreement so as not to hinder each other's business. Because of this, the Court argued that a violation would be tantamount to financial loss, and thus once again the Court of Appeal held that that Chetcuti's **infringement was one of substance**, and that the contract thus had to be terminated.

***Brincat vs Mifsud* –** Court of Appeal, 16th of April 2004.

In this case, the court acknowledged that it was a commercial obligation, but since the matter concerned rent payments, the court applied the proviso under Article 117 and **granted time to the defaulting party** to remedy the situation, not rescinding the contract automatically.

This case highlights that in specific instances *(e.g. rent),* the rigid application of Article 117 may be relaxed under the proviso. The proviso is the following:

"*Provided that this article **shall not apply to contracts of letting of immovable property or to contracts of emphyteusis** or to contracts the dissolution whereof, in the event of failure by one of the parties to fulfil his engagements, is specially regulated by law."*

Whereas in express resolutive conditions, the conditions are the same, in both commercial and civil obligations, in the case of tacit resolutive conditions, the civil court may grant time, ***but in the case of the Commercial Court, the Court cannot grant time unless the contract is one of lease or emphyteusis.***

Blye Engineering vs Pawlu Bonnici – 30th of March 2001.

This case further reinforced the **strict application** of implied resolutive conditions in commercial obligations. The court again applied Article 117 rigidly, underscoring the importance of compliance in commercial contracts.

Holland vs La Rosa *,3rd December 1954*

In this judgement, the court made it very clear that the legal provisions dealing with rent shall prevail over article 117. Therefore, unless in the contract of lease there is an express resolutive condition, the Court held that it is entitled to grant a period of time for the defendant to rectify the situation.

Mgr Vincenzo Refalo vs Alfred Cini

This case decided differently. In this case, the court concluded that the Commercial Code shall prevail over the provisions of the Civil Code in all matters, including leases and emphyteusis. This is the reason that the legislator then enacted the proviso to article 117 of the Commercial Code, which holds that it does not apply to contracts of letting of immovable property, or lease, or emphyteusis.

Thus for lease or emphyteusis, there should not be the automatic termination of contract. Therefore, these conditions lead to contracts being referred to as conditional contracts.

Acquisitive Prescription

It is possession of a certain thing for a *defined period of time*. Prescription is important as through prescription you acquire a right. If someone does not file an action within the prescribed time in the law then this leads to the loss of said right.

Though under the civil code you are able to interrupt a prescriptive period by filing a judicial act, this is not the case in the commercial code which says that prescription may not be interrupted in commercial transactions. Prescription can come into play in any action where you have a contract, as where there is an obligation there is prescription applied to it.

The Civil Code has provided for methods on how **prescription** can be interrupted(articles 2127-2136 of the civil code), and in general there are **three methods** to interrupt prescription:

1. If the **debtor acknowledges** the debt or any part of the debt.
2. Not simply acknowledging but simply through **payment** (part or all of the debt).
3. By **filing a judicial act**. A judicial act is defined by the subsidiary legislation under Chapter 12, COCP, which states that it can be **any form of paper which has to go through the court** – be it a judicial letter under a certain procedure or by filing a purely civil action, it is a judicial act ***(ittra ġudizzjarja)***.

Article 2128 speaks of interruption of prescription by judicial act;

2128. Prescription is also interrupted by any judicial act filed in the name of the owner or of the creditor, served on the party against whom it is sought to prevent the running of prescription, showing clearly that the owner or creditor intends to preserve his right.

There exists also the suspension of prescription, wherein the prescription is paused until an issue is resolved, but without restarting. For commercial matters, prescription cannot be interrupted or suspended, by virtue of Article 541 of the Commercial Code;

541. All times fixed by any express provision of this Code for the exercise of any action or right of recourse arising from commercial acts, are peremptory; and the benefit of the *restitutio in integrum* by reason of any title, cause or privilege whatsoever shall not apply.

Therefore, it is not possible to interrupt the period of time to exercise actions established in the Commercial Code, rendering their **time barres peremptory.**

Article 544 holds;

544. The following actions shall be barred by prescription by the lapse of the times stated hereunder:

(a) actions for payment of freight, by the lapse of one year from the completion of the voyage;

(b) actions for the payment of victuals supplied to seamen by order of the master, by the lapse of one year from the day of such supply;

(c) actions for payment of timber and other things necessary for the construction, equipment and provisions of a ship, by the lapse of two years from the date on which such timber or other things have been supplied;

(d) actions for payment of wages of workmen and for work done, by the lapse of one year from the completion of their work or the delivery of the work;

(e) actions for the delivery of goods, by the lapse of one year from the arrival of the vessel.

United Acceptance Finance vs John Borg *, 25th March 1989*

Under ordinary circumstances, the prescription period is of 5 years. When the plaintiff realised that it cannot bring an action against the defendant, it filed an action in relation to bills of exchange. The plaintiff also argued that it had filed the judicial letters, thus interrupting the prescriptive period. **The Court concluded that this was a commercial obligation, and thus by virtue of article 541, the time barre was rendered preemptory, thus not being allowed to be interrupted or extended.**

→Another point to keep in mind is **that in general, prescriptive periods regulating commercial obligations are much shorter than the Civil Prescriptive Periods**. By virtue of **2156 (f)** of the Civil Code, actions for payment of debt arising from commercial obligations are barred after 5 years.

One should also note that if by any means you may have a commercial obligation which is not covered by the commercial code provisions then you will have to look at the civil code provisions. If the particular action falls under the commercial code, that is to say ***the lex specialis*** then that is what will apply first, NOT THE CIVIL CODE.

2156. The following actions are barred by the lapse of five years:

(a) actions for payment of yearly ground-rent, perpetual or life annuities, interest on annuities ad formam bullae created before the 14th August, 1862 and for the payment of fines due upon a sale or other alienation of emphyteutical tenements;

(b) actions for payment of maintenance allowances;
(c) actions for payment of rent of urban or rural property;

(d) actions for payment of interest on sums taken on loan or for any other cause, and, generally, of any other thing payable yearly or at other shorter periodical terms;

(e) actions for the return of money given on loan, if the loan does not result from a public deed;

(f) actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed;

(g) except as provided for in any special law, actions of the Government of Malta for the payment of judicial fees, customs or other dues:

By virtue of Article 546 of the Commercial Code, prescription runs also against minors, unlike in the Civil Code, wherein Article 2124 precludes prescriptions from running against minors.

Credit Instruments

We will speak about 3 types of credit instruments which are contemplated and governed by Articles 123-236 of the Commercial Code, namely ***Bills of Exchange, Promissory Notes, and Cheques***.

We will firstly dissect what is understood by *credit* and *credit instruments* within the Commercial Sphere. To start, credit refers to a right to obtain or receive a payment at a future date. It is an agreement whereby one person grants another the right to pay or repay later on. One may procure and provide the goods to a person who will pay a week later, for instance, with the expectation and right to receive the money in exchange.

The right to credit is **actionable**, meaning there are remedies at law to enforce the payment promised. It is also **transferrable**, meaning that you can **assign** the right to another person. The element of **transferability** is one of the most important and valuable characteristics of credit instruments, which have rendered them popular over the years. Credit is important because it is considered to be the backbone of business, for it is of value for the businessman. Today, most of the construction projects financed today are financed by credit from the bank. Many businesses operate using the funds of other people, even within their day-to-day operation.

It is also beneficial to the consumer, for credit allows for the consumer to purchase a product which they do not presently have enough cash to buy it.

One must ascertain the following distinctions;

1. **Credit Agreement - these instruments take the form of loan agreements, overdraft facilities, etc. Such agreements are bilateral, and require the signing of both parties.**
2. **Credit Instruments - these *documents of title to money,* such as bills of exchange, promissory notes, and cheques. They are unilateral documents which need not be signed by the person entitled to receive the money. In such cases, it is only the person who is borrowing (debtor) who must sign the document. The person who holds this document is entitled to receive payment.**
3. **Guarantee - i.e, suretyship. Guarantees are not credit related. These take place when a third party steps in and guarantees the payment of another.**
4. **Security or Priority - these take the form of privileges, hypothecs, and pledges. A security is slightly different concept, for it involves the holding of rights over a thing in the case of non-payment. This differs to suretyship because in the latter case, a person is personally guaranteeing the payment of the obligation, whereas in the case of security, there is a thing which is promised as a *compensation* in the case of non-payment.**

Documenting Credit

Documentation of credit may take various forms, including loan or facility agreements, deeds of acknowledgement of a debt, overdraft facilities, letters of credit, or credit instruments.

A deed of acknowledgement of debt is a document drawn up whereby **one party acknowledges that he owes money to another party and promises to pay him over a period of ti**me. This is often done through a **notarial deed**, for these documents are vested with executive title, being as strong as a judgement in its binding. **An overdraft facility** is a document issued by the bank which **allows a person to make use of money over and beyond that which he has in his account,** up to certain limits. A cr**edit instrument** is another way of documenting credit, being **documents of title to money. He who possesses the Credit Instrument is vested the right to receive.**

History of Credit Instruments

The first credit instrument which originated was the Bill of Exchange which was used in the exchange in the trade of goods in the 1400s. The custom of using bills of exchange originated way before our Civil Code was enacted. In fact, historians think that it originated in circa the 1400s in the mercantile cities of Venice, Genoa and Florence which were trading a lot with the Orient.

Back then, what would happen was that if I need to go and purchase goods from the Orient and bring them back to sell them in Florence, I had two problems: Firstly, there is a certain difficulty and risk associated with transporting large sums of money, at the time coins, and secondly, it was likely that the other country wouldn't recognise my money. So, they created a system whereby in my home country I would go to a money changer saying that I need to buy goods from the Orient. He would give me (the trader) a bill which he would issue to the order of somebody he knows in the Orient. So, the money changer would give the trader this Bill of Exchange and the trader would take it to the other country and give it to the person nominated on the bill to pay him back on the currency of that country. So, there are 3 parties involved: (1) the trader who wants to buy the goods, (2) the money changer and (3) the person in the other country. Indeed, this is the 3-party bill of exchange which exists till today. Subsequently, Promissory Notes (this is an I owe you) were recognised in the UK in the 1700s. These are a piece of paper which says, 'I promise to pay you this amount on this date'. Therefore, it is a unilateral declaration acknowledging a debt. And then, cheques were developed by the Bank of England in the 1700s.

Defining Credit Instruments

Credit instruments are not defined by the Commercial Code. They were developed through **usages of trade**, and thus when they were implemented by the law their respective understandings were already well known.

The proposed definition from **1926** was that they are ***documents in virtue of which the issuer gives to the lawful holder of the right therein literally described which is not issuable or assignable without the document itself***.

Vivante defines them as ***un documento necessario per esercitare il diritto litterale e autonomo che vi e' menzionato***. - "a document necessary to exercise the literal and autonomous right mentioned therein."

Among the various definitions pertinent to credit instruments, one may extract a common set of criteria, being that the credit instrument must be **necessary, literal, negotiable, autonomous, and fungible**.

Necessity

The document itself is necessary to establish the rights stated in or emanating therefrom. **Without the document, there cannot be a transfer or enforcement of rights**. The exercising of the right requires the presentation of the document. Unlike many types of agreement that can be established verbally, a credit instrument must necessarily be documented **in writing**. Thus, the transfer of rights in terms of the transfer of credit instruments necessitates the **physical transfer of the document in question**. Consequentially, **when one loses a credit instrument, they lose and forfeit all attributed rights**. Furthermore, the exercise of payment rights on a credit instrument requires the physical presentation of the document. In essence, to receive payment, the holder must surrender the document to receive the funds. Legal action may ensue following non-payment after the presentation of such document, owing to their legally binding force.

Literal

The rights which may be exercised are **restricted solely to the rights enlisted on the credit instrument.** The creation, existence, exercise and enforcement of the rights in a Credit Instrument cannot be broadened beyond those defined by the credit instrument. **The establishment of these rights lies in the same document which allows for the enforcement of those rights.**

Autonomous

Autonomy is a very important feature of a credit instrument. **When a bill of exchange is drawn up, a separate and independent right and obligation is being created, irrespective of the underlying transaction**. We will eventually distinguish between strict autonomy (wherein a transfer of the credit is given by one person to another without the use of fraud - fraus omnia corrumpit - which is based on the good faith of the parties, as per article 197 of the Civil Code), and relative autonomy. Although avenues may exist to seek the restitution for the damaged goods, the obligation to pay remains autonomous once the credit instrument is issued.

Fungibility

Bills of exchange may be substituted with something else of a similar value. There is a difference between a credit instrument and cash. **The delivery of money as payment extinguishes an obligation immediately. With a credit instrument, on the other hand, upon delivery thereof, the obligation is not extinguished until the money is paid**. The value and issue of money is ascertained by the Central Bank. Credit instruments are conversely determined by the individuals. Further, money is a legal tender, and thus the person receiving has the obligation to accept the payment, unlike a credit instrument, which **need not be obligatorily accepted.**

Nowadays, since 2004, the bills of exchange and promissory notes have received further legal strength, since they are **attributed the same strength as a judgement**, owing to them being classified as a document **of executive title**. Today, cheques have decreased in use. *Promissory notes* are unilateral declarations, signed by one person, **declaring a payment to be made on a future date**. A practical example of a *bill of exchange* occurs when a person wants to buy a laptop without having enough cash to effect the payment immediately. He may **either go to a bank to seek a loan, or else he may effect payments over certain periods of time.** In the latter case, a credit instrument may be issued, in order to confirm via executive title, that the payment will be made eventually. Furthermore, the seller is able to cash out the bill of exchange, in order to have the cash immediately received and effected. Credit instruments are instruments which **document credit**, thus being documents **which vest a right to receive money.**

Michael Attard vs Grazia Meilak et

In this case, a cheque was issued by someone before it was effectively cashed. The Court held that since it is a credit instrument, and thus an attestation of payment, the heirs were to effect the payment in lieu of the deceased.

Therefore, from the above mentioned characteristics, one may extract three **advantages** to the issuing of credit instruments.

1) The instrument grants **executive title**;

2) The instrument is **easily transferable and negotiable;** and

3) It may be cashed out at the bank to receive **immediate cash**.

Despite these advantages, credit instruments have seen a decline in use over time. While cheques remain the instrument the most utilised, their applicability is facing new restrictions owing to the newer notions of **money laundering** and **fraud**. Recently, the Central Bank issued new directives further limiting their use. **Cheques** have also seen a decline, owing to the constraints being imposed by the banks owing to the aforementioned risks. This is also to be considered alongside the technological advancements which introduced the concepts of debit and credit cards, electronic payments, and standing orders.

Bills of Exchange

A bill of exchange is an instrument, created by **usage of trade**, which allows the holder to receive payment. A definition may be found under the **UK Bill of Exchange Act of 1882;**

> *"An unconditional order in writing addressed by one person to another signed by the person giving it requiring the person to whom it is addressed to pay on demand at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer"* - **UK Bill of Exchange Act**

The definition contained in this act can sit very nicely in our Commercial Code, since it shares most of the features contained in **article 123 of the Commercial Code;**

> **123.** A bill of exchange must be dated, and must specify the place where it is drawn, the sum to be paid, the name of the person who is to pay, and the name of the person to whom or to whose order payment is to be made, the time and place of payment, and the value given, whether in cash, in goods, in account, or in any other manner; and must be signed by the drawer. - **Commercial Code**

Similarly, **Navarrini** defines the instrument as;

> Un titolo di credito all'ordine essenzialmente commerciale, munito di particolare forza processuale, contenente l'obligazione letterale, formale, astratta, incondizzionata, e non sottoposta, a contro prestazione di pagare o di far pagare al portatore alla scadenza, in un luogo determinato una somma di denaro" - **Umberto Navarrini**

Navarrini thus speaks of a document of credit used in trade which vests strong rights which are described in it, being construed formally and unconditionally.

Thus, a bill of exchange may be defined as a **document** that evidences an **undertaking** by the person issuing it **to pay**, or to order someone else to pay, **at a certain time,** to the order of that specific person. It serves as a credit instrument and a document of title to money. Through a Bill of Exchange, the holder is entitled to payment, which can be transferred through endorsement and delivery of the document. It functions as a substitute for money, but is distinct from currency. A bill of exchange often contains two dates - the **date of issuance**, and the date **date of maturity**. It also includes the sum of money both in numerical form as well as in writing, and must include the elements outlined in Article 123. Further, it may be done in writing **on any medium**. It must also contain a description which indicates the goods or services received in exchange for the promise of payment. On a Bill of Exchange there is always a person drafting (the drawer) and a person receiving (payee). The drawee only becomes obliged to pay **upon acceptance**, at which point they become the acceptor. The payee is the recipient entitled to receive payment, often being the first holder of the bill. In a two-party the issuer of the bill of exchange may also be the payee.

Types of Bills of Exchange

The Law (123) lays out the formalities required for a bill of exchange to be validly construed, apart from the fact that it must be done in writing, it must contain the place where it was drawn, the sum to be paid, the name of the person to pay and to receive, the value given, the form, etc.

The person who is ordered to pay is referred to as the **drawee**. The **payee** is the person to receive the money. Our law contemplates 2 types of bills of exchange; **2 party** and **3 party** bills of exchange. In a 2 party bill of exchange, there is merely a debtor and a creditor, whereas in a 3 party bill of exchange, there is an additional third party involved. **Articles 124-128 of the Commercial Code establish the types of bills of exchange**.

124. A bill of exchange can be drawn by a person upon himself, and can be made payable at the same place where it is drawn.

125. A bill of exchange signed by means of a cross or any other mark is null.
126. (1) Where in a bill of exchange the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

(2) Where the amount is repeatedly expressed in figures or in words, and there is a discrepancy, the smaller amount is the amount payable.

127. A bill of exchange may be drawn to the order of a third party, or to the order of the drawer himself.

128. (1) A bill of exchange may be drawn on a person, and made payable at the place of residence of a third party.

(2) It may be drawn by order and for account of a third party.

Articles 124 and 127 delineate the **two forms** of **two party bills of exchange** applicable under Maltese Law. The former provision allows for the **same person to be both the drawer and the drawee**, while the latter provision states that the bill of exchange may be **drawn to a third party or to the drawer himself**.

A practical example of the application of **article 127** is that of Person X, who draws up the bill of exchange (rendering him the drawer) which states that Person Y owes him money in exchange for goods to be delivered to such person Y. In this case, Person X is both the drawer and the payee, for he created the document which establishes a payment owed to himself. These are often utilised by car dealers.

Edward Vincenti Kind vs Carmelo Abdilla *- types of bills of exchange*

"A bill of exchange consists of the obligation of someone, called the 'drawer' or 'issuer', to cause payment to be made, or to pay himself, to another person, called the 'payee', a determined sum to the holder of the same bill upon maturity...

The bill of exchange can be drafted and conceived in two forms: the person issuing it can bind himself to pay personally, and in that case, the bill is a **genuine bill of exchange**... but it

can also indicate a third person as the one who is to pay, and to whom the issuer gives an order to pay, and in that case the bill is an **improper bill of exchange**, and it is called a 'draft', because it is drawn upon someone else."

123. A bill of exchange must be dated, and must specify the place where it is drawn, the sum to be paid, the name of the person who is to pay, and the name of the person to whom or to whose order payment is to be made, the time and place of payment, and the value given, whether in cash, in goods, in account, or in any other manner; and must be signed by the drawer.

The Law, namely Article 123, provides for the formalities which constitute a bill of exchange. Yet, the courts tend to hold that certain formalities are not fundamental, in that a lack thereof would not nullify a bill of exchange.

Article 123 enlists 9 requirements;

1. The Date of Issue
2. The Place of Issue
3. The Sum to be paid
4. The Drawer
5. The Payee
6. The time of payment
7. The place of payment
8. The value given (cash, goods, services, etc)
9. The signature of the drawer/issuer.

Despite the use of the word *must*, certain formalities are not as important as others, in that jurisprudence shows that in the shortcoming of some formalities, the bill of exchange is not nullified. Thus, not all formalities are considered to be *ad validitatem*.

Martyn Attard noe et vs Alfred Cachia pro et noe - not all requirements are ad validitatem

According to the law and jurisprudence, the two essential elements for the validity of a bill of exchange are the **signature of the drawer** – the person issuing the bill, the one who is to pay – and the **indication of the amount**, how much is to be paid.

The other elements are important but not essential for the validity of the bill of exchange. Their absence does not render the bill null.

In this case, there was the signature of the drawer – the one who is to pay – as well as the indication of the amount. Therefore, the bills of exchange in question were not null.

Although the law does not allow **bills "to bearer"**, bills in which the name of the payee is not entered are still used, and the name can be inserted subsequently.

Article 123 of the Commercial Code: the Requirements

1. The date of Issue

The date of issue must be distinguished from the date of maturity. The date of issue, as per **article 123,** *must* be included on a bill of exchange. However, the courts have nonetheless accepted certain bills of exchange **even if the exact issue date was not enlisted, so long as they had a rough idea of when the bill of exchange was issued**. The importance of the date of issue ties into the capacity of the issuer, in that **if the issuer was legally incapacitated at the time of issue, then the bill is not valid.** The same applies if the drawer was a minor at the time of issue, or if the drawer, who is signing in the name of a company, was not a legal representative of the company at the time of issue. Under French or Italian Law, the date of issue is a *sine qua non* for a bill of exchange to be valid. Under Maltese Law, Article 123 holds that the date of issue *must* be included in the bill of exchange. However, ***Martyn Attard noe et vs Alfred Cachia pro et noe*** implies that **the date of issue is not a fundamental requirement which invalidates the bill of exchange** in its shortcoming.

2. The Place of Issue

Another one of the requirements which the law contemplates to constitute a bill of exchange is **the place of issue**. The reason for this requirement is rather historical, since the place of issue would facilitate international trade. Under Private International Law, the validity of a bill of exchange used to be determined by the place of issue. Today, if the place of issue is not included in the bill of exchange, it may still be subject to validation, since the Courts do not consider the shortcoming as one which necessitates invalidity. This is because bills of exchange are often used in the local context, and thus the place of issue is not as important as before, wherein the place would determine the applicable jurisdiction. **The requirement of a place of payment is not as important today, since the main issue is whether the payment has been effected, and not where it has been so affected.**

> **224.** The presentment of a bill for acceptance or payment, the protest, the request for a duplicate of the bill, as well as all other acts against a particular party with regard to a bill, shall be made at such party's place of business or otherwise at his residence. - Civil Code

Article 224 residually prevents a bill from being invalidated on the grounds of lack of place of payment, since it holds **that in such shortcoming, the bill shall me presented at the place of business or residence of the person accepting or paying**.

3. Sum to be paid

One of the **fundamental requirements which constitute a valid bill of exchange** is the money specified to be paid by the drawee. This is a requisite *ad validitatem*, and a *sine qua non* for the constitution of a bill of exchange.

> **183.** A bill of exchange must be paid in the money specified therein. Nevertheless**, if the money specified in the bill is fictitious or is not legal tender in the place where payment is to be made,** and the value thereof has not been stated in the bill, the **payment shall be made in the money which is legal tender at the place of payment**, in an amount corresponding to the value of the money specified in the bill at the time of maturity, unless the drawer, by the use of the clause "in cash" or other

equivalent clause, shall have expressly required payment to be made in the money specified by him, not being fictitious money.

Article 183 of the Commercial Code elaborates on the **form** in which money may be paid. It must be a **legal tender** in the place of payment in order for it to be acceptable, and in the case where it is not a legal tender, or in the case wherein the money specified in the bill is fictitious and when the value was not stated in the bill, then the payment shall be made in the money which is a legal tender in the place of payment in an amount equal or roughly corresponding to the money specified in the bill at the **time of maturity.** This is unless the drawer expressly stipulates that the money be paid in a specific quantity, without being fictitious.

Furthermore, **Article 126** governs situations of discrepancy, between numbers and words.

126. (1) Where in a bill of exchange the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

(2) Where the amount is repeatedly expressed in figures or in words, and there is a discrepancy, the smaller amount is the amount payable.

Thus if the amount in words and the amount are not identical, then **the amount written in words shall prevail**. Further, in the case of discrepancy between repeated figures or words, the **smaller amount shall be payable**.

The **sum of money indicated by the bill is the only thing entitled to by the drawee**. He may not demand or enforce any other right besides the sum indicated. The bill of exchange may indicate only one maturity date, and so in the case of the payment of the sum on different days (i.e instalments), the trader would have to issue various or multiple bills of exchange.

4. Name of Payee

• The person entitled to receive payment

• Person named on the face of BoE [Note: Endorsee of BoE becomes entitled to payment and can also be called payee', but is not the original payee]

• Can BoE be innominate, i.e. issued 'to bearer'?

• UK law allows issue to bearer • BoEs to bearer **not recognised as valid in Malta**

• Art 123 requires name of payee to be included

• ***Vincenza Xuereb vs Cecil Pace***

In this case, the Bills of Exchange were issued with the name of the drawee who was subsequently also the drawer, albeit without the name of the payee. In this case, the court held that the bill functions merely as an **acknowledgement of the debt owed by the drawee**. While it could serve evidence of the debt's existence, it lacked the capacity to initiate an action on the BoE (actio cambiara).

Plaintiff had to prove right to payment (i.e. that he was payee) by reference to underlying obligation Plaintiff could not rely on the BoE for payment. BoE only document in evidence. **No actio cambiaria [action on the BoE itself] due to missing name of payee.**

*** Will absence of name of payee on issue invalidate BoE?**

• Name of Payee may be added later - see Martyn Attard noe et vs Alfred Cachia pro et noe (13.11.1995)

• **Payee may be a person other than the drawer or may be the drawer himself** • Payee **must be identifiable with certainty and must result from BoE itself and not with reference to something else** • Fictitious payee renders BoE invalid / unenforceable

5. The name of the Drawee

• Person who is to pay the bill - (may be issuer himself - 2 party BoE)

• Signature of Drawee not required

• Drawee not bound until he accepts by signing bill

• On signature Drawee becomes Acceptor and bound to pay • Joint drawees - joint and several liability

• Fictitious Drawee? • Bill assumes effect of promissory note - drawer remains bound

• If accepted by a person, that person becomes bound on signing it

A bill of exchange may feature **multiple drawees**, particularly in cases where **joint and several liabilities are established**. In such cases, both the drawees share the responsibility over the payment.

In the case where the drawee is fictitious, the law **deescalates the bill to the level of a promissory note, maintaining the drawer's obligation to fulfil the payment**. If the fictitious drawee fails to sign in acceptance, the payee retains a residual right against the individual who issued the bill.

The bankrupt drawee

182. A bill shall be deemed to be due from the moment the drawee is adjudged bankrupt, and in such case the holder may protest the bill as provided in article 191; but the drawer and the endorsers may, if called upon to pay the bill, postpone payment until the day on which the bill shall be due according to the terms in which it is drawn, **on giving the security mentioned in article 154.**

If the drawee is deemed bankrupt between the date of issue and the date of maturity, the bill falls due **immediately**. Thus notwithstanding any agreed date of maturity, upon declaration of bankruptcy, the payee may present the bill and demand payment. The drawer and endorser, in these cases, may opt to postpone the payment until the day on which the bill shall be due according to the terms in which it was drawn, on **giving adequate security.**

6. The Place of Payment

The inclusion of the place of of payment is included under the requirements of **article 123**, yet this requirement finds minimal important both in terms of legal statues as well as court interpretations. In fact, the law offers a **fallback position** in the case where this requirement is left out of the bill of exchange, governed by **Article 224** of the Commercial Code;

224. The presentment of a bill for acceptance or payment, the protest, the request for a duplicate of the bill, as well as all other acts against a particular party with regard to a bill, shall be made at such party's place of business or otherwise at his residence.

The place of payment as a requirement owes its origin to the traditional uses of credit instruments, which would often pertain to international promises or declaration of payment obligations. Its importance would thus pivot around the jurisdiction governing the payment made.

7. The Date of Maturity

The **maturity date** is the date at which one can demand payment of the bill. This is elaborated on by article 172 of the Commercial Code;

172. A bill may be expressed to be payable –

(a) at sight;
(b) at a certain time or on a certain day;
(c) at a certain time after sight;
(d) at a certain time after date;
(e) at usance.

A bill is payable **at sigh**t when it is paid upon presentation thereof, with the obligation arising out of presentation. This thus indicates that the obligation to pay matures upon presentation. This in turn means that the bill becomes payable immediately upon presentation. A bill may also be made payable **at a certain time** or on a **certain day**. This could include less-specific time frames, such as "mid-May" or "by the end of the next month" It may also be issued **at a certain time after sight** or **after date**, in which the maturity date is linked to the date of issue.

A bill which is expressed at usance is defined as **21 days from when the bill is presented for acceptance to the the drawee.** While presenting the bill for acceptance is not mandatory, it provides the holder with certainty regarding the obligation to pay.

If date of maturity is not included on the bill of exchange, it is not immediately inapplicable. This is because Article 180 provides for a residual classification of the bill of exchange, holding that;

> **180.** In the absence of any of the indications mentioned in article 172, the bill shall be payable at sight.

Carmel Muscat vs Anthony Micallef

• Facts

• Muscat and Micallef were shareholders in a company• They entered into a SPA - Muscat agreed to sell shares to Micallef

• Micallef signed BoE in favour of Muscat for payment - maturing on 20.09.1989

• Sale of shares subject to suspensive condition - procure release of Muscat from personal guarantees • Guarantees were not released by the maturity date - 20.09.1989. Therefore, transfer of shares could not be completed. Micallef argued that case was filed prematurely because Muscat could only sue for payment once the suspensive condition in the underlying SPA came into effect

• **Muscat argued that BoE created automonous and distinct obligation between the parties not subject to suspensive condition** • Guarantees released pending case, in December 1989 (three months after maturity of BoEs) • Question - Interest on payment due from date of maturity or from date - of release of guarantees?

• Held: Interest only due from December, date of release of guarantees • **Court ignored maturity date on BoE in calculation of interest and referred to underlying obligation • Applied interest from the date when the suspensive condition was fulfilled** • Equitable result, but legally correct? • **Court did not treat the BoE as creating strictly autonomous rights between the parties**

8. The Value Given in exchange of the bill of exchange

The value given refers to the value in exchange of the bill of exchange. This requisite for a value given emanates from the Civil Law principle that **an obligation without a consideration is invalid**, as per article 987;

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

An obligation must only arise in exchange for something else in return. The only exception to this rule is the case of donation. Thus a bill of exchange must state the reason for payment (i.e the reason which is giving rise to the obligation). The value need not necessarily be expressed, so long **as there is a consideration which may be proven**. The failure to specify

the value of the consideration **does not invalidate a bill of exchange**, as per **article 988 of the Civil Code**.

> **988.** The agreement shall, nevertheless, be valid, if it is made to appear that such agreement was founded on a sufficient consideration, even though such consideration was not stated.

9. The Fundamental Signature of the Drawer

As previously mentioned, the signature of the drawer is **the most important requirement for a valid bill of exchange**. It is deemed a *sina qua non,* and is an **added requirement** to the mere name of such drawer. It is not sufficient for the BoE to merely list the name of the drawer, for it must be accompanied by the signature. This was reiterated by **Prof Caruana Galizia**.

Prof. Cremona (Notes on Commercial Law): *"The drawer of a bill must put his signature thereon in order* ***that his intention of binding himself thereby quoad any holder of the bill may result in a formal and unequivocal manner****; without it no action may be maintained against the acceptor, either ... In fact, the endorsement by the drawer of the bill to his order [as payee] would not remedy the absence of his signature as drawer.* ***Again, a bill signed by the drawer as such is, though unaccepted by the drawee, a complete and regular bill for all intents and purposes at law".***

UK Law, as stated by **Byles** in *Bills of Exchange*, underscores the importance of this element. Without it, **legal recourse becomes impossible**. One must remember that the drawer, even when nominating a third party to pay, still remains bound on the bill, which is why the law requires his signature thereon.

> ***John Giordimaina et vs Joseph Pace*** , *7th July 2006*
>
> The law requires that a bill of exchange be signed by the person who issues it, and **not necessarily** by the person who accepts it; what matters is that the person who is to be bound under the bill has signed it, as a solemn form indicating that he agrees to pay the amount specified. A passage was then cited from the notes of **Professor Felic Cremona**, where on page 274 he states:
>
> **"The drawer of a bill of exchange must put his signature thereon in order that his intention of binding himself quoad any holder of the bill may result in a formal and unequivocal manner."**
>
> An action based on a bill of exchange **cannot succeed** against the acceptor if the bill is not signed by the drawer, as required by law, because the document would be **null as a bill of exchange**, and therefore **cannot be granted executive force**, which entitles the creditor to be paid simply and solely on the strength of the bill itself.

There have been some judgements which discuss the situation in which the bill was issued, accepted by the drawee, but signed by the drawer **at a later date**. In the ***Giuseppe Said vs Rafaelle Debono*** judgement, the court held that the fact that the drawee had signed in acceptance before the drawer does not invalidate the bill of exchange, nor did it release the acceptor from his obligation to pay. This position is the same as adopted in the U.K, according to **Byles**. Thus, *a bill may be accepted while incomplete before it has been signed by the drawer*.

There are other judgements which took a contrary approach, asserting that a bill of exchange accepted prior to the signing of the drawer is not valid. This was demonstrated in ***Phoenix Domestic Appliances Limited vs Joseph Vassallo***. This conflict of jurisprudence represents the discretion vested in the Courts in this regard, owing to the lack of legal provision for this situation.

The Court, to this extent, tends to apply the doctrine of *ius superveniens firmat actionem et exceptionem*, which states that where there is a change of circumstances during legal proceedings which represents a defect, then the action which was previously defective may be remedied. This was deemed necessary, in judgements, to assert and uphold the **economy of justice**. The prevailing approach is therefore that the signing of the drawer completes the bill of exchange, independently of whether it was accepted prior to the signing or not.

Effects of the Drawer's signature

131. (1) The drawer, or, where a bill is drawn for account of another party, the party for whose account the bill has been drawn, engages that at the time when the bill becomes due there shall be on his account in the hands of the drawee a supply of funds sufficient for the payment of the bill, even if such bill is payable at the place of residence of a third party.

(2) Nevertheless, the drawer for account of another person remains personally liable towards the payee, the endorsers, and the holder of the bill.

This article holds that when the bill is issued, the drawer gives a warranty that at the time the bill will become due, he shall have ensured that the drawee is supplied with the sufficient funds to pay the bills. This is, however, a legal presumption which may be rebutted. The presumption holds that when the drawer signs the bill and nominates a new payer, **he is giving a guarantee to the holder of the bill that the obligation remains untouched**. The drawer remains liable on the bill because when he issues the bill nominating someone else to pay, he is giving a guarantee that by the date of maturity, the drawee will have the money to pay.

As between the drawer and drawee(in a three-party bill)

132. The drawee shall be deemed to have been put in funds if, at the time the bill becomes due, he owes a debt to the drawer, or to the party for whose account the bill was drawn, in an amount not less than that specified in the bill.

Article 132 places a presumption that if someone draws a bill of exchange asking the drawee to pay a certain amount, the drawee is considered "funded" if **he already owes** that same amount (or more) to the drawer (or to the person the drawer is acting for).

133. (1) An acceptance implies the supply of funds, and constitutes a proof thereof as regards the holders and the endorsers.

(2) The drawer alone, whether the bill be accepted or not, is bound to prove, in case of dispute, that the persons on whom the bill was drawn were provided with the necessary funds for the payment of the bill at maturity; otherwise he is bound to

warrant the bill, even though the protest is made after the lapse of the prescribed times.

Article 133 states that the acceptance of the bill of exchange, on the part of the drawee, **implies the supply of funds**. The document also **serves as proof of such supply of funds**. In the case that disputes arise, **the drawer is bound to prove that the drawee was provided with the necessary funds for the payment of that bill at maturity**. This presumption, that the person was provided with the necessary funds for the payment of the bill, may be rebutted with evidence to the contrary. What this essentially means is that **when a bill of exchange is accepted, there is a presumption that the drawee carried the sufficient funds to ensure and effect the payment on the date of maturity.** Further, in the case of disputes between the drawer and the drawee, it is the drawer who must prove that the drawee had such supply of funds. If the drawer fails to effect such proof, then the drawer is bound to warrant the bill.

135. When the drawer has prohibited the transfer of a bill by an express declaration on the bill itself, and this notwithstanding a transfer is made, the endorsee acquires no rights other than those of the payee.

Article 135 holds that it is possible for the drawer of a bill to prohibit endorsements. This is described, under English Law, as the **destruction of transferability**. This means that the drawer may express a declaration on the bill which prohibits the bill from being transferred between payees. In the case that a transfer is made regardless of this declaration, the law prohibits the endorser from acquiring any rights.

When a bill is drawn ***to the order of*** a payee, it means that the bill may be transferred. If, on the other hand, the bill is drawn and marked as ***pay only***, then the bill is not endorsable.

Endorsement

One of the fundamental features of credit instruments is the ***element of transferability*** attached thereto. Such transferability is only made possible through the endorsement mechanism. We have previously seen how **Article 135** allows for the drawer **to prohibit a credit instrument from being transferred from one payee to another**. The endorsement and transferable nature of credit instruments is captured through articles 136-147 of the Commercial Code.

136. The holder of a bill can transfer the property in it by endorsement.

The words *to order* represent the right of the payee to transfer the BoE to another payee, via endorsement. **In the absence of this term, the bill may still be transferable.** Thus, in the case of a bill of exchange which does not specify whether it is transferable or not, t**he law presumes that it is capable of endorsemen**t The drawer may block the transferability of a bill of exchange through the use of the term ***only*** in relation to the payee.

Umberto Navarrini defines endorsement as ***La girata e' un negozio cambiario accessorio*** *a mezzo del quale il girante con una dichiarazione scritta o sottoscritta nel titoli, e con la consegne del titolo stesso trasferisce nel giratoria la proprieta' della cambiale e tutti i diritti ad essa inerenti, rimanendo, per di piu', il girante solidariamente responsabile per l'accettazione ed il pagamento*.

Translation:"Endorsement is an accessory negotiable instrument transaction by means of which the endorser, through a written or signed declaration on the instrument, and **by delivering the instrument itself, transfers to the endorsee the ownership of the bill of exchange and all rights attached to it, while also remaining jointly liable for its acceptance and payment."**

This explicitly represents the delivery of the document itself. One must remember that credit instruments are **literal** and **necessary**, and thus by signing and delivering it, it transfers the title of ownership to the endorsee and all the rights pertaining thereto**. Nonetheless, even though the endorser has transferred the BoE, he remains responsible for the acceptance and payment of the bill.** Thus, an endorser will remain liable on a BoE, owing to the fact that a transfer of it represents the transfer of money. **The endorser would be deemed joint and severally liable with the drawer or other endorsers.**

When a bill is transferred by endorsement, unless the endorser says otherwise, it may be transferred once more, with no limit pertaining to the number of endorsements which a bill may pass through. The first endorser is always the **original payee**.

138. The endorsement is made on the back of the bill, or on a slip of paper called an *allonge* which, when necessary, is attached to the bill itself.

Article 138 describes the **method of endorsement**, stating that the endorsement must be made on the back of the bill, or on an *allonge* (a slip of paper) which is attached to the bill itself. The endorsement must be signed in writing by the endorser.

There exists 2 types of endorsements, being **specific,** and **blank**.

A **specific endorsement** is one which specifies the name of the person being endorsed and the date of endorsement.

A **blank endorsement** refers to the signature by the endorsement which is subsequently passed on without a new payee being named. This creates somewhat of a *legal lacuna*, since Maltese law does not permit a bill of exchange to be addressed *to bearer*. **Thus, in the case of a blank endorsement, the document takes the form of a bill of exchange to bearer, in that the title of ownership is acquired by the person to whom it is passed on.**

Alfredo Sultana vs Joseph Lanzon (21st October 1932):

"Although our law, like that of the Continent and unlike the English system, characterizes the bill of exchange as an order instrument, all authors... agree in recognizing that a bill which is endorsed in blank acquires the negotiability and some of the effects of a bearer instrument, in the sense that whoever lawfully possesses [the bill] can, upon maturity, demand payment even if their name does not appear on the document."

The question then arises as to the situation wherein an endorser transfers the bill of exchange to a third party, **who does not sign the endorsement.**

Alfonso Maria Farrugia vs Eduardo Demarco *- not signed by second payee 6th March 1903*

In this case, the plaintiff was the holder of a bill of exchange, which was given to him by the payee against a payment, but which was not endorsed. The bill itself fell true to the conditions laid out under Article 123 of the Commercial Code, and thus the plaintiff sought to declare the bill of exchange valid on the grounds that it was validly construed and that it was purchased by the holder, thus vesting him the original right of ownership. This argument was not upheld by the court, since it asserted that **the only way to acquire the right to sue for the redeeming of a bill is by endorsement**.

One must also consider the **rights of the holder** when the bill is not endorsed to him. Article **147** holds;

147. The mere possession of a bill of exchange not endorsed to the holder entitles the holder to present such bill for acceptance, and to protest it for non-acceptance.

This provision holds that if the bill has not endorsed the possessor may present the bill for acceptance. **The holder, however, does not have right to payment, nor does he have title over it.**

Article 192 clarifies that a person who holds a bill which has not been endorsed to him but who proves that the bill was entrusted to him to receive its payment, may demand the payment of the bill. In order for this demand to be successful, the holder must prove that the bill was, in fact, remitted to him by the payee. He must also **give sufficient security** in order for the demand to be made.

192. A person who claims the payment of a bill which has not been endorsed to him, but who, at the same time, proves that the bill was remitted to him to receive payment thereof, may, **upon giving sufficient security, demand payment of the bill, and protest it in case of non-payment.**

The endorser may opt to effect ***endorsement for collection only***. This is a specific type of endorsement which allows for the appointment of an **agent or mandatary** to **collect on behalf of someone else**. This is equivalent to a mandate appointed to receive payment on behalf of the endorser. In this case, the endorsement describes itself as useful ***for collection only***. Thus, the endorser is not only transferring title to the person to receive payment, but also to collect it for him. This is stipulated under **article 142;**

142. Where the endorsement is made with the order "for collection" or any other expression implying an order by the endorser, such endorsement does not pass the property in the bill, but merely transmits to the endorsee the order therein contained, and in such case the endorsee can only transmit to other parties the same order by a similar endorsement.

This is contrasted with **article 192** in that under article 142, **there is no requirement to give security in the case of endorsements for collection**. So much so, that under **article 192**, the endorsement is **not made to the holder**, while under article 142 the endorsement is made to the holder for the purposes of receiving payment for the endorser.

The payment of bill to endorsee releases the drawee completely. This was confirmed in ***Chev. Reginald de M Smith noe vs Thomas Borg et***.

The Effects of Endorsement

The Transfer of the Right to Receive Payment

Endorsement is the **only means** of transferring rights under the remit of bills of exchange. This was reiterated in ***Alfonso Maria Farrugia vs Eduardo Demarco***. The signature of the endorser must accompany the bill, whether specified or blank. The delivery of the bill without endorsement does **not effect the transfer of the payee**, as confirmed in ***Dr Giovanni Sammut vs Ignatio Pecorella***. The Court, in this case, confirmed that **the mere delivery only of the bill of exchange does not constitute endorsement.**

One must distinguish this concept from the transfer on the **right of payment from assignment** under the law of obligations. In a BoE, **no separate agreement is required**, and there is **no need to inform the debtor** (drawee), contrary to the assignment of payments under Civil Law.

The Acquisition of Strictly Autonomous Rights

While there are conflicting judgements in relation to the autonomy of a Bill of Exchange insofar as original parties are concerned, there is consistency in case law which holds that **Bills of Exchange confer strictly autonomous rights on endorsement in good faith**. This is another characteristic exclusive to bills of exchange, and **what separates the transfer of rights to receive payment under BoEs and under Civil Law,** the latter of which requires notification to the debtor.

197. Pleas which are personal to the endorsers may not be set up against the holder of a bill.

Article 197 of the Commercial Code states that a distinction must be made between pleas which are effective against the endorser and pleas which are effective against the holder of the endorsed bill. *Endorsers* is to be understood as *the person who held the bill prior to the endorsement,* in most cases being the original payee enlisted on the Bill of Exchange. **Article 197 admits no exceptions**.

Major Hannibal A. Scicluna noe vs Charles Valletta noe:

"The purpose of a bill of exchange is that it can be quickly endorsed, and when endorsed, it acquires an autonomous character.
Without a bill of exchange, a creditor can enter into a contract of assignment of rights under civil law, but in relation to a third-party acquirer, the debtor can still raise objections relating to the underlying transaction. That is why the bill of exchange was created.
Since the person buying a bill of exchange is acquiring an autonomous credit instrument, they know that the issues arising from the obligations that led to that credit remain irrelevant to them, because as a third-party acquirer, they may claim payment **solely on the basis of the bill of exchange itself**."

Autonomous Character means the following in relation to bills of exchange:

When a **bill of exchange is endorsed and passed on**, each new holder (the person receiving the bill) is treated **legally as if they have an independent and self-contained right to payment**, regardless of the underlying deal or contract that originally created the bill.

One of the features which renders the BoE significantly useful in the trading world is that they can be easily transferred, and when endorsed, it acquires an autonomous character. Without a credit instrument, **a creditor may enter into a normal assignment of rights under Civil Law, wherein the assignee simply steps into the shoes of the assigner, in turn absorbing all of the possible actions which could have been instituted against the assignor. The Court recognises that this is the reason for which bills of exchange were created.** The purchaser or transferee of a Bill of Exchange knows that any underlying issues existing prior to the transfer are owed only against the endorser, and not against the endorsee.

Vivante adds, holding that "*the ordinary endorsement, both in full and in blank, invests the endorsee with an autonomous right.* ***Other exceptional, anomalous forms of transfer only transfer to the holder the title derived from their own author"***

The Transfer renders the Endorser Accountable for the BoE

The endorser remains liable to every succeeding holder of the bill. This is enshrined under **Article 140 of the Commercial Code;**

> **140.** (1) The endorser is liable to every succeeding holder for the acceptance and payment of the bill.
>
> (2) Nevertheless, where the endorsement is qualified by the words "without recourse" or by some other form of words implying a like qualification, the endorser who has so qualified the endorsement is exempted from all liability on his endorsement.

By virtue of article 140 (1), **the payee may demand the payment from the endorsers where the drawee refuses to pay or accept the bill of exchange, unless the endorsement is qualified with the words "without recourse".**

Notwithstanding this autonomy, the endorser is **permitted to restrict his liability,** as per **article 140 (2)**, by qualifying the endorsement with the term *without recourse* or with some other term which implies a like qualification. In such case, the endorser is relieved from all liability subsequent to the endorsement.

Acceptance of a Bill of Exchange

The acceptance of a bill of exchange is governed by **articles 148 to 157 of the Commercial Code**, and are applicable exclusively **to the drawee**. Acceptance is defined as ***the confirmation by the drawee of his assent to the order given by the drawer,*** being **the order to pay the payee or holder on the date of maturity.**

> **148.** The acceptance of a bill of exchange must be made on the bill itself by the signature of the acceptor, with or without the words "I accept" or "accepted".

Article 148 lays out the **form of acceptance,** in that the bill of exchange must be accepted by the signature of the acceptor, with or without the words *I accept* or *accepted*. One must note that the drawee is not obliged to sign on the bill, but once he does, he becomes liable for the payment on the date of maturity.

An acceptance may be made **partially**, by virtue of **Article 150**;

150. (1) An acceptance cannot be conditional, but it may be partial as to the amount to be paid.

(2) A conditional acceptance shall be deemed to be a refusal to accept

A conditional payment is invalid, to the extent where a conditional acceptance is deemed to constitute a refusal to accept. It may, however, be **partially** accepted as to the amount to be paid.

151. (1) A bill of exchange **shall be accepted on presentment, or at the latest within twenty-four hours after presentment.**

(2) Where, after the expiration of the said time, the bill is not re-delivered, accepted or unaccepted, the party who retained the bill shall be liable in damages and interest to the holder.

Article 151 establishes the **time of acceptance**, in that it must be accepted on presentment, or at the latest **within 24 hours after presentment**. The drawer is thus allowed a whole day to accept the bill, to start running from the moment of presentment. A failure to return the bill accepted within the time frame renders the drawee liable for damages.

The effect of acceptance is governed by the following provision;

152. (1) The acceptor of a bill by accepting it engages that he will pay the amount thereof, and cannot be relieved from such engagement, even though the drawer, or the party for whose account the bill was accepted, may, without his knowledge, have become bankrupt previously to the acceptance of the bill.

(2) Nevertheless, when the acceptor has not been put in funds, he may resort to the drawer or to the party for whose account the bill was accepted; in any such case the acceptance raises only a rebuttable presumption against the acceptor, who shall have the right to prove the contrary.

Upon the acceptance by the drawee, he becomes liable for the payment to be made on the date of maturity. The obligation must be satisfied by or at the date of maturity, and not on the date of acceptance. As previously mentioned, **Article 133** creates the *juris tantum* presumption that when a bill is accepted, the law presumes that the acceptor has the supply to effect the payment at the date of maturity.

Furthermore, by virtue of **article 168**, in the case of multiple drawees and multiple acceptors, all parties are deemed to be **jointly and severally liable for warranty to the holder**.

157. A promise to accept a bill of exchange does not amount to an acceptance, but the promisee may maintain an action for damages and interest against the promisor if the latter refuses to perform the promise.

Article 157 holds that a promise of acceptance is not tantamount to acceptance, but that the promisee may maintain an action for damages and interest in the case that the promisor refuses to perform the promise.

Presentment

The notion of presentment refers to the act of the holder of the Bill of Exchange who presents the bill for acceptance or payment. One must note that the Bill of Exchange as a credit instrument is a **necessary document**, and thus the attributed rights may only be invoked or enforced **upon presentation of the bill**.

The law distinguishes between **two types of presentments,** being the **presentment for acceptance** (at a time that there is a drawee who has been nominated but who has not yet accepted) and the **presentment for payment**.

Presentment for acceptance

This is presentment of the bill to the drawee to accept the BoE by signing it. So, the drawer issues the bill, and nominates the drawee as a person who is going to pay in favour of the payee. Upon presentment, the drawee has not yet signed. One has to keep in mind that the drawee has no obligation to sign, but once he sings, he becomes liable.

As the holder of the bill, if the BoE has not yet been signed by the drawee, I can but I am not obliged, present bill for acceptance in order to get certainty as to whether or not that drawee is going to accept. So, it is not due yet, but I want to make sure that the drawee is going to accept it. The holder is not obliged to present the bill for acceptance; he can **choose to wait to the maturity date and then just present it for acceptance and payment.**

Presentment for Acceptance

221. The holder of a bill drawn at a certain time or at a certain day, or at a certain time after date, is not bound to present the bill for acceptance, but if he elects to present it, he is bound to protest it in case of non-acceptance.

Article 221 states that where a bill is drawn at a certain time, day, or time after date, the holder is **not bound to present the bill for acceptance**. If the bill is, however, presented by the holder, the holder is bound to protest it in the case of **non-acceptance**, in order to preserve his recourses and remedies applicable against the drawer and endorsers.

146. Where the endorser has in his endorsement specified the time for the presentment of the bill to the drawee, the liability created by the endorsement ceases, if the bill is not presented for acceptance within the time so specified.

Remember that the endorser is going to remain liable on the bill. So, in the case that he says he imposes a time within which the person he is going to give the bill to has to go to the drawee and present it to him for acceptance. **In this way, he will know whether or not it has been accepted**.

The endorser is free to specify a time frame for the presentment of the bill to the drawee, in order to protect himself from **indefinite liability.**

Presentment for Payment

The Bill of Exchange may only be presented for the payment thereof on the date of maturity, as per **article 223;**

223. The holder of a bill shall present it for payment on the day it falls due.

Unless the bill is payable at sight or at a time after sight or at usance, the bill may only be presented at the time it falls due. We have already contemplated the scenario where the **drawee falls bankrupt**, in which case **article 182** abolishes the time frame established on the bill of exchange, and declares that the bill falls due **immediately**. This is the only exception to the rule stipulated under **article 223**.

Conversely, in the case where the bill is presentable on sight, at a time after sight, or at usance, the **bill may be presented at any time**.

Article 173 holds that **where a bill is payable at sight**, then it becomes payable on presentment;

173. A bill expressed to be payable at sight is payable on presentment.

In this case, a **refusal to pay is tantamount to a refusal to accept**, leaving the holder the remedy of action by recourse. With regards to a bill payable **at sight**, if the bill is not accepted within due time, then it is deemed to have been refused by the drawee. In such case, the action of recourse is available by the payee.

One must distinguish between a direct action and an action for recourse. A direct action is filed against the **acceptor of the bill**, ***only if the bill has been accepted.*** If a bill is accepted, and the bill is presented when presentable, and the acceptor refuses to pay, a **direct action is invokable against the acceptor.** On the other hand, **an action for recourse** cannot be instituted **before a required protest is made**. Thus, if the bill has not been accepted, or if the holder wishes to seek an action against the drawer or the endorser, then ***the holder must first protest the bill,*** and then he may seek an action for recourse. This is thus deemed a **secondary action**, which may only be invoked after the protest procedure has been effected.

218. The holder of a bill of exchange payable in Malta at sight, or at a certain time after sight, or at usance, is bound to present it for payment or for acceptance, within the times prescribed in the next following article, to be reckoned from the date of the bill, under penalty of forfeiting his right of recourse against the endorsers, and even against the drawer, if the latter has provided funds to meet the bill.

219. The times referred to in the last preceding article are-
(a) six months, if the bill is drawn at a place in Europe, Asia Minor, Syria, Egypt, Tripoli, Tunis, Algiers or Morocco;
(b) one year, if the bill is drawn at any other place;

(c) one month, if the bill is drawn and made payable in Malta: Provided that in time of maritime war, the times mentioned in paragraphs (*a*) and (*b*) shall be doubled.

220. The same forfeiture mentioned in article 218 shall be incurred by the holder of a bill drawn in Malta, and payable, whether at sight, or at a certain time after sight, or at usance, in any of the countries mentioned in the last preceding article, if the holder shall not present it for payment or acceptance within the times stated in that article.

Presentment of BoE payable at sight or at a time after sight or at usance [without maturity date] can be made at any time • BUT, **to preserve right of recourse against drawer and/or endorser** BoE must be presented within prescribed time** (one month in case of BoE issued and payable in Malta) - Arts 218 - 220 ・ Intended to avoid leaving persons liable on bill exposed indefinitely.

The holder may **lose his right of recourse**, as per **article 235**;

235. It shall not be competent to the holder of a bill, in case of non-payment, to exercise his right of recourse against the drawer or the endorsers -

(a) if the bill was not presented for acceptance, where necessary, or for payment, to the drawee or the parties mentioned in articles 228 and 229;

(b) if the holder has refused acceptance or payment by a party intervening for the honour of the drawer or of any of the endorsers.

Thus, in the case where the bill was never presented for acceptance, where necessary, or where the holder has refused acceptance or payment by a party intervening for the honour of the drawer or any of the endorsers, the holder **loses the right of recourse**. When a person who is primarily liable on a bill, being the drawee, who accepts a bill of exchange, the right of recourse becomes applicable only after the holder attempts to receive payment from the acceptor.

No Opposition to pay the Bill of Exchange

199. No opposition to the payment of a bill shall be allowed except in case of loss of the bill or bankruptcy of the holder.

Article 199 holds that, except for the case of loss of the bill (owing to the **necessary** characteristic) or the bankruptcy of the holder, no one can oppose the payment of a bill of exchange which was accepted. **In the case of bankruptcy of the holder, a curator would be appointed who administers the affairs of the bankrupt**. This gives the curator the power to enforce the bill in lieu of the holder.

Actions of Enforcing a Bill of Exchange

We have previously made the distinction between a **direct action** (i.e when the action is directly enforceable against the acceptor) and an **indirect action** (i.e when there is an action of recourse, but which is subject to the protest procedure). The indirect action is available against **all other parties to the bill**. This is extended also against the **acceptor for honour** and the **avaliseu** (surety), except against the endorser who signs *without recourse*.

Acceptor for Honour

If the bill of exchange has been presented for acceptance to the drawee, who consequently refuses to accept, then the holder must protest the bill of exchange in order to acquire the right of recourse. At this stage, any third party may intervene to accept the bill of exchange for honour of the drawer or any endorser. The drawer or endorser may introduce an external party to accept the bill **in lieu of the drawee**. This person is not deemed the **drawee**, but rather is signing for a third party, in turn **accepting for honour**. Acceptance for honour must be written on the bill and signed by the acceptor, and consequently returned to the holder. A protest must be done for non-payment in order to preserve the right to sue the **acceptor for honour**.

When the bill matures, it is first presented to the acceptor for honour, and if he does not pay I will protest the bill and have a right of action against him, as I will have the same right of action against the drawer or any endorser.

Avaliseur - the surety

A third party may guarantee to pay the bill. This guarantee may be done on the bill itself or by a separate act. This person stands in a surety so that if the drawee does not pay, there is a right of recourse against the surety. Indeed, the avaliseur becomes **jointly and severally liable on the bill with the drawer and the endorsers.** The holder must first protest the bill for non-payment by in order to preserve action for recourse against the avaliseur.

One must note that **the direct action** and **the recourse** are **not mutually exclusive**. The holder of a bill can invoke both types of actions. He may file an action against the acceptor (direct action), as well as against other persons on the bill (indirect action). Though as we have established protest is required for recourse against any parties liable on the BoE. This is made possible by **article 168**;

> **168.** All parties who have signed, accepted, or endorsed a bill, are jointly and severally liable for warranty to the holder.

The creditor can thus sue either one or all of the acceptors or endorsers, owing to this provision. This does not mean that each creditor will pay the same amount of money immediately, but rather that the action will result in one or more debtors settling the payment, with the remaining debtors sorting out the shares and payments due between themselves.

How a right of recourse may be exercised

> **237.** The holder of a bill protested for non-payment may exercise his right of recourse against all the obligors jointly, or against only one or some of them, without forfeiting his right of recourse against the others not sued on the bill, and he shall not be bound to follow the order of the endorsements.

Article 237 lays out that if a holder of the bill, who has received the bill via endorsement, is taking an action of recourse, the holder does not necessarily require to file the action against the predecessor endorser, but rather any preceding endorser which effected the endorsement which resulted in the possession being vested in the current holder. Such holder may also sue all of the previous endorsers together, without being bound to follow the order of endorsements. This is all subject to the condition that the holder has first protested the bill of exchange.

Action Triggers

When the bill is presented for acceptance, but is not accepted

If the bill of exchange is presented for acceptance but is not accepted within the 24 hours of presenting the bill as per **article 151,** then article 153 becomes applicable;

> **153.** (1) A refusal to accept shall be proved by means of a protest termed protest for non-acceptance.
>
> (2) Where the bill is not accepted for the whole amount for which it is drawn, a protest for non- acceptance of the balance shall be made.

The protest procedure is described by **article 233;**

> **233.** (1) The holder of a bill protested for non-acceptance or non-payment shall, without delay, **give notice thereof in writing to the endorser immediately preceding him**.
>
> (2) Every endorser on receiving such notice shall, without delay, communicate it to the endorser immediately preceding him.
>
> (3) The notice referred to in this article shall be accompanied by the protest.

Article 233 thus states that the holder who protests a bill must **give notice to the endorser immediately preceding him** (i.e the person who effected the endorsement which resulted in the possession of the holder). The notified person must then communicate the notice to the endorser preceding him, until the notice reaches the **first and original payee**. The notice must be transferred **in conjunction with the protest**. **Article 221** holds that there is no obligation to present the bill for acceptance where the bill is drawn at a set date, time, or time after date, but if so presented, and is not accepted, then the holder **has 24 hours to begin the protest procedure**.

> **226.** (1) The protest for non-acceptance shall be made on the day next succeeding that on which the bill was presented for acceptance.
>
> (2) The protest for non-payment shall be made on the day next succeeding that on which the bill becomes due.

When the bill is presented for payment, but the payment is not made

In this case, presuming that the bill was accepted, the bill is presented to the drawee or acceptor for payment, who then has 24 hours to effect the payment. **Assuming the payment is not made, the**

direct action against the acceptor becomes available. Alternatively, **the bill may be protested to preserve the right to sue other people involved in the bill of exchange.**

223. The holder of a bill shall present it for payment on the day it falls due.

As previously discussed, the bill of exchange may only be presented for payment **on the day it falls due** (i.e - the maturity date). If the bill is endorsed, then the aforementioned protest procedure and action for recourse may be sought out, but not via direct action. **Direct action may only be brought against the drawer or acceptor**.

In the case that the acceptor's financial position deteriorates following the acceptance, in a manner which is **not tantamount to the declaration of bankruptcy,** we refer to **article 155**;

155. Where, after the acceptance of the bill, it is proved that the acceptor's condition, with regard to his commercial affairs, has so changed as to give rise to a reasonable fear that the bill will not be paid at maturity, it shall be lawful to demand against the drawer, the endorsers, and even against the acceptor himself, the same security as that mentioned in the last preceding article.

Article 155 holds that in this case, the holder has the right to demand against the drawer, endorsers, or acceptor, for a **security** from other people liable on the bill. This situation should be distinguished from the provision carried by **article 182**, in which case the drawee is declared **bankrupt** following the acceptance. In the latter case, the bill falls due immediately, and the holder may protest the bill to be able to seek recourse and to preserve his rights against other parties.

Article 155 must be read in conjunction with **article 227 (2)**

227. (1) The protest for non-acceptance, or the death or bankruptcy of the party on whom the bill is drawn, shall not excuse the holder from protesting the bill in case of non- payment.

(2) Where the acceptor becomes bankrupt before the bill falls due, the holder may protest the bill and exercise his right of recourse.

Thus, in the case that the acceptor falls bankrupt after having accepted and before the bill falls due, the holder may protest the bill and exercise the action of recourse. Unlike article 182, **there is no reference to postponing the payment, and thus the payment may be demanded immediately.**

Action for Recourse

In practice, most bills of exchange are classified as **two party bills of exchange**. Thus, the minute they are drawn up, they are accepted. It is quite uncommon, thus, for the lack of an acceptor which would result in the need for recourse. It is necessary that the action for recourse is directed **towards the drawer and/or the endorser**, in the case that the bill has been endorsed. This procedure is applied if;

1) The bill was presented for acceptance to the drawee, and it hasn't been accepted (s. 153); or

2) The bill is presented for payment, and the acceptor hasn't paid (or in the case that the drawee has been presented a bill presentable at sight, when the drawee does not effect the payment, thus refusing)

The **formal procedure** is as follows;

- The holder goes to the notary, for the protest must be drawn up by the notary;
- At the place of business or residence of the drawee (for non-acceptance) or other party to whom payment is sought (for non-payment);
- A copy of the BoE, the acceptance, and the endorsements must be attached;
- The name of the protesting party (often the holder) must be specified;
- There must be a formal demand to seek acceptance or payment of the bill;
- The protest must state whether the protested party was present or not;
- It must also state the reason for refusal, if any or if known; and
- It must be dated.

Once the protest is formulated, the document **is filed by the holder before the Court**, for the action to be formally filed.

Article 154 establishes the effect of the protest for **non-acceptance.**

154. Upon notification of the protest mentioned in the last preceding article, the endorsers and the drawer are respectively bound to give sufficient security for the payment at maturity of the amount of the bill or of the amount for which it was not accepted, or to pay the bill together with the expenses of protest and of re- exchange.

Article 237 establishes the effect of the protest for **non-payment.**

237. The holder of a bill protested for non-payment may exercise his right of recourse against all the obligors jointly, or against only one or some of them, without forfeiting his right of recourse against the others not sued on the bill, and he shall not be bound to follow the order of the endorsements.

The notion of Retour sans Protet

232. A request or direction contained in a bill that it shall be returned without protest (*retour sans protêt*), excuses the holder from the obligation of protesting the bill, but shall not excuse him from the obligation of presenting the bill in due time.

It is possible to exclude the formalities of the protest procedure when a bill of exchange is issued. This obligation to protest may also be excluded all together. Thus the bill of exchange, when drawn by the drawer, may declare that it may be returned without protest excuses the holder from this obligation to the formalities, but it does not exclude the holder from making the presentations in due times.

Article 226 holds and establishes **when the protest is to be made**;

> **226.** (1) The protest for non-acceptance shall be made on the day next succeeding that on which the bill was presented for acceptance.
>
> (2) The protest for non-payment shall be made on the day next succeeding that on which the bill becomes due.

The law establishes a time frame within which the protest must be made, being; 24 hours following **presentment, in the case of non-acceptance;** and

24 hours following the **date of maturity**, **in the case of non-payment**.

Thus one must ascertain whether the action for recourse pertains to a **non-acceptance** or to a **non- payment**, since the time frames for protest are **significantly different**. This is especially important because **a late protest nullifies and excludes the right for recourse**.

There is an exception to the rule that late protest annuls all actions for recourse. We have previously referred to **article 133**, which creates the presumption that an accepted bill of endorsement creates a presumption that the drawer ensured that the drawee was sufficiently funded to be able to effect payment on the day of the maturity. The second sub-article to this provision holds that the burden of proof in this case lies within the drawer. In the case **where the drawer fails to rebut this presumption, the late protest does not nullify the rights of the holder to seek recourse.**

Mode of Action

Prior to 2004, the only option available to enforce bill of exchange rights were through the ***actio cambiaria***, an action for payment of a bill of exchange. This was because the bill of exchange did not confer the executive title status, and thus the holder would proceed via the filing of this action. Today, this action still exists, but there is another step which alleviates the burden of seeking judicial recourse.

Whatever action, whether against the acceptor or indirectly, is deemed today to be an ***actio cambiaria,*** an action competent to the holder of the Bill of Exchange. This action is instituted by ordinary mode of commencing judicial action, governed by the **COCP's Article 161***,* being instituted by sworn application.

The action may also be filed as a ***special summary proceeding***, coined the **giljottina**, via **article 167 COCP**. In this case, the filed action requires the statement to the **best knowledge of the holder**, with the respondent not being allowed any defences against the payment of the bill.

Claims on Bills of Exchange

Within the actions to enforce bill of exchange rights, the claim may contain;

1. The payment of the bill of exchange (i.e the amount stated on the bill);
2. The expenses of protest (i.e those paid to the notary);
3. The expenses of court action; and
4. The interests on the amount.

The issue of accrued interest has been a controversial subject in judicial actions. The question arises as to the date on which interest begins accruing on an unpaid bill of exchange. We refer to **articles 1139 and 1141 of the Civil Code;**

> **1139.** Saving any other provision of law relating to suretyship or partnership, where the subject-matter of the obligation is limited to the payment of a determinate sum, the damages arising from the delay in the performance thereof shall only consist in the interests on the sum due at the rate of eight per cent *per annum.*

In this provision, it is established that interest on payments in civil obligations is calculated at **8% per annum.**

> **1141.** (1) Where the obligation is of a commercial nature, or the law provides that interest is to run *ipso jure*, interest shall be due as from the day on which the obligation should have been performed.
>
> (2) In any other case, interest shall be due as from the day of an intimation by a judicial act, even though a time shall have been fixed in the agreement for the performance of the obligation.

Article 1141 then states that **interest will only start to run from the date of notification that the debtor is in default**, as per **article 1141 (2)** (*in any other case*). This interpretation was initially confirmed in ***Joseph Rutter Gatt noe vs Francis Vella***.

In another case, ***Joseph Rutter Gatt noet vs Edward Galea***, which surrounded a case of non-payment of a bill of exchange, the court held that the interest was due from the **start of the protest, per s.258 of the Commercial Code, and not from the date of maturity**.

> **258.** Interest on the sum specified in the bill protested for non- payment, on the expenses of protest, and on all other lawful expenses, shall be recoverable as from the day of the protest.

The court stated that because the right of action against the other person liable on the bill is not triggered on the date of payment, but rather on the date of protest, the interest should be calculated in the same way.

2004 Amendments to the COCP

These amendments sought to widen the scope of **article 253 COCP,** by including ***bills of exchange*** and ***promissory notes*** within the list of **executive titles.** An executive title is one which gives right to enforce one's claim against a third party. This list is **exhaustive**, and cannot be widened without amending the law. The inclusion of BoE and promissory note is exceptional, because they are **the only executive titles that lack a public or judicial character**. All other titles (i.e *res judicata*

judgements, contracts received before a notary public, etc) are either judicial or quasi-judicial instruments.

One must note that while BoEs and promissory notes fall within the classification of executive title, **cheques do not**.

Enforcing executive titles

> **256.** (1) Any other definitive judgment which does not contain any suspensive condition, and which condemns a debtor to pay a liquidated sum, or to deliver up or surrender a specific thing, or to perform or fulfil any specific act or obligation whatsoever, may be enforced after two days from the day of its delivery.
>
> (2) The enforcement of any other executive title may only take place after the lapse of at least two days from the service of an intimation for payment made by means of a judicial act.

S. 256 (2) COCP states that an executive title is enforceable after the lapse of at least two days from the service of a judicial intimation for the payment (demand to be paid). By application of **253 (3),** however, in the case of BoEs and Promissory Notes, the law has granted further leeway. The law thus affords a **20 day period** within which a person who receives the judicial letter may stop the process, with the 20 days beginning to lapse following the service of the judicial intimation.

Regarding BoEs and promissory notes, s.253 carries a proviso specifically catered for these credit instruments;

> Provided that the court which is competent according to the value of the bill of exchange or promissory note may, by decree which shall not be subject to appeal, **suspend the execution of such a bill of exchange or promissory note in whole or in part and with or without security, upon an application of the person opposing the execution of such bill of exchange or promissory note**, to be filed **within twenty days from the service of the judicial letter** sent for the purpose of rendering the same bill of exchange or promissory note executable, on the grounds that the signature on the said bill of exchange or promissory note is not that of the said person or of his mandatory or where such person brings forward grave and valid reasons to oppose the said execution and in such case any person demanding the payment of the bill of exchange or promissory note shall file an action according to the provisions of the Commercial Code.
>
> The judicial letter referred to above in this proviso shall, under pain of nullity, notify the debtor of the right given to him by this proviso;

Thus the grounds for opposing a bill of exchange are very limited:

Ground 1: the signature of the BoE is not that of the respondent. The respondent may be the acceptor, drawer, endorser, or avaliseur. This ground pertains to the absence of a formal requirement for the bill of exchange, as required by **s. 123 Commercial Code**.

Ground 2: where the respondent brings forward **grave and valid reasons** to oppose the execution. This ground is vaguely described and non-specific. The law tries to preserve the autonomy of a BoE, and thus the law seeks to allow the Courts discretion to ascertain whether something falls under this broad category of fault. In the case where, for instance, the goods exchanged for payment are defective, it is unclear as to whether this would constitute a grave and valid reason to invalidate an actio cambiaria, since there seems to be conflicting jurisprudence.

Defences for the Enforcement of BoEs

Articles 197 and 198 of the Commercial Code establish the pleas which may or may not be raised to combat a demand for the payment of a Bill of Exchange.

197. Pleas which are personal to the endorsers may not be set up against the holder of a bill.

198. (1) Pleas which are personal to the holder of a bill cannot delay the payment thereof, unless the pleas are such as can be conveniently and speedily disposed of in the pending action.

(2) Where such pleas require a prolonged enquiry, the examination thereof shall be referred to an independent action and, meanwhile, the judgment ordering the payment of the bill, with or without security, as the court shall deem fit, shall not be delayed.

These provisions refer **both to personal pleas** (i.e pleas which relate to a relationship between 2 or more parties) and to **real pleas** (i.e pleas which relate to the formalities of the bill of exchange).

Personal pleas are referred to as *exceptio in personam*, and refer to the parties to the bill of exchange. **Real pleas** are referred to as *pleas in rem*, and attack the essential requisites of a valid bill of exchange. Additionally, there are **general pleas**, which attack the bill of exchange itself in a manner which extends beyond the form thereof. General pleas would encompass **consent obtained by fraud or violence**.

Courts need to ascertain whether or not the plea brought constitutes a **grave and valid reason** for invalidating a bill of exchange, as stipulated and governed by **article 253 (e) COCP**.

Real Pleas

Real pleas pertain to the validity of the Bill of Exchange. It may be raised by the party sued on a bill. Moreover, the law does **not prescribe any limitation or exception to real pleas**. The proviso to **Article 253 (e) of the COCP** refers to the signature of the respondent. Contextualising this reference with article 253, if there is a problem with the legal formality (for instance, the non-signing by the drawer), the Court will consider the lack of formality to be **a grave and valid reason for its invalidation.**

Joseph Mamo vs Joseph Zammit

27/09/2019

"The first ground of appeal concerns that part of the judgment which states that the fact the currency mentioned in the bills of exchange is the Maltese lira — at a time after the lira was no longer legal tender in Malta — does not lead to the nullity of the notes. The appellant argues that: '… this fact alone is a "serious and valid" reason for the suspension of the bills of exchange in question, because the document exhibited as bill of exchange does not, legally, qualify as such.' — **The Court agreed and suspended the Bills of Exchange.**

In the present case, the bills of exchange refer to the Maltese lira, which today is no longer legal tender in Malta; therefore, payment is to be made in the currency that has legal tender in Malta today, namely the euro, according to the exchange rate of the Maltese lira to the euro."

Personal Pleas

Article 197 establishes that personal pleas against the endorser **may not be set up against the holder of the bill**. This ties in with the notion of **autonomy** as attributed to Bills of Exchange. The holder of the bill acquires an **independent and autonomous right to receive payment on that bill**, barring any preceding fraud.

Louis Galea noe vs Alfred Bartolo, *4th Novembre 1968*

In this case, a car was sold to Bartolo, and the BoEs were issued and signed by the seller as the drawer and payee. The BoE was signed by Bartolo as a drawee and acceptor. The BoEs were endorsed by the seller to a Bank which discounted them, so when the date of maturity came, the bank sought Bartolo's payment. Bartolo never received the car in question, and thus refused to pay. The bank sued Bartolo, and Bartolo argued that the underlying agreement for the sale of the car had been rescinded and that the seller should not have endorsed BoEs in which the other party failed to fulfil their obligations. The Court held that once the BoE was endorsed and acquired by the bank in good faith, the payment must have been effected to the bank, notwithstanding the seller's failure to deliver the goods promised. *The bank's autonomous right to receive payment, falling in line with the principle governed by **article 197**, was enforced by the Court, for the plea was a personal one against the seller, and not against the bank.*

Bank of Valletta p.l.c. vs Carmel Ray Micallef , *18th February 2004*

In this case, the defendant had signed as a drawee and acceptor around 27 BoEs for payment of works carried out by a company. The company sold the BoEs to BOV, via endorsement. The Defendant failed to pay the BoEs, and thus BOV sued for payment. One of the pleas raised was that the works carried out by the company were defective. The Court adopted the same line of reasoning as the case of ***Louis Galea noe***, holding that;

"This Court notes that this exception concerns the merits of the underlying obligation that gave rise to the issuance of the bills of exchange. However, since this action is a bill of exchange action, based on bills of exchange endorsed in favour of the plaintiff Bank, **it is not**

permissible for the holder of the notes to be met with exceptions related to transactions in which he was not a party. Once endorsed, the third-party holder has the right to act based on what appears on the face of the bill of exchange; **an endorsed bill of exchange acquires an autonomous existence and is considered an obligation in itself, independent of the obligation that led to its issuance**."

Relative Autonomy - s.198

Article 198 holds that a plea which is personal to the holder of a bill **cannot delay the payment thereof, unless the pleas are such as can be conveniently and speedily disposed of in the pending action**. Thus while in article 197 the law speaks of a plea personal to the endorser, in article 198 we refer to a plea personal to **the holder**. Another contrasting element between the two articles is that **article 197 sets out a negative obligation** (i.e - the plea against an endorser **cannot be held** against the holder), while **article 198** establishes a **prohibition on delaying the payment** da parti of the drawee. Further, in article 198, the law holds that the plea may be raised, but if it is such that an investigation into the plea will cause delay to the payment, then the plea will not be accepted. Thus a personal plea against the holder **may be raised so long as the investigation does not delay the payment**.

Jurisprudence suggests that two distinct approaches exist in relation to article 198. Some courts tend to dispose of article 198 by applying the principle of strict autonomy (i.e - only pleas pertaining to BoE validity are heard and allowed), **while others apply article 198, opting for limited autonomy** (i.e - pleas which do not cause a delay in payment only are heard).

Jurisprudential Approach 1: Strict Autonomy

Charles Gatt noe vs Joseph Vassallo Gatt noe – *Strict Autonomy* (15th November 1993)

"The legislator intended that claims based on bills of exchange be conducted and decided with unusual speed and efficiency. It is precisely for this reason that the law limits the exceptions that can be raised against the holder of the bill of exchange.

As soon as a bill of exchange is admitted, an *ad hoc* obligation is created, entirely independent and separate from any obligation that may have preceded it.
Therefore, in a case like this, the admissible exceptions are **generally limited to the bill of exchange itself** (i.e., regarding formal requirements), and as a rule, exceptions concerning prior obligations should not be allowed."

George Zahra vs Alfred Borg – *Strict Autonomy* (28th April 1995)

"The Court rejected the defendant's request to contest the plaintiff's claim in a bill of exchange action brought through the special summary procedure.

The Court reaffirmed the established jurisprudence that in bill of exchange actions, **only exceptions that contest the formal validity of the note are permitted** — specifically where it is alleged that, on the face of it, the note is defective in one of its constituent elements as required by law."

Prof. Cremona Notes: *"the moment a person signs the bill of exchange..... the obligation arising from that signature is considered to be complete in itself;* ***it acquires a juridical existence which is considered separate, distinct and independent from the original and fundamental contract entered into between the parties concerned.*** *The law identifies the obligation created or evidenced by the bill with the signatures placed thereon. Accordingly, a party to a bill would be liable thereon, not because of any pre-existing obligations, but merely because he did actually sign the bill".* **Prof Cremona** goes on to state that **this does not preclude the plea from being raised regardless, but it does not mean the court will definitely accept to hear such pleas.**

Peter Azzopardi vs Raymond Camilleri – *Strict Autonomy*:

"This plea is unfounded because the obligation arising from the bill of exchange is independent of the *causa obligationis* (the underlying reason for the obligation) for which the bill of exchange was issued... **In fact, it is well established that among the special characteristics of bill of exchange is is that the obligation arising from the note is, by its very nature, an abstract obligation.** This does not mean that a bill of exchange can be validly issued without consideration or for an illicit consideration — because it is well known that *fraus omnia corrumpit* (fraud corrupts everything).What it does mean is that, as long as a bill of exchange is issued for a reason that is lawful and legal, the *causa obligationis*... remains outside the scope of the instrument itself."

These judgements thus assert a strict distinction between the obligation attached to the bill of exchange and the ***causa obbligationis*** - the underlying obligatory relationship which resulted in the creation of the bill of exchange. This distinction is what renders **autonomy** into the bill of exchange, to the extent that an issue in one obligation (i.e the underlying transaction) is interpreted to have **no effect whatsoever** on the obligation emanating from the bill of exchange. This is what the **principle of strict autonomy dictates**. The courts hold that in the case of an error or fault arising in the underlying transaction (the *causa obbligationis*), then the remedy is to institute a **separate action** to resolve this issue, without interfering with the payment of the bill of exchange. **The idea is that the signing of the bill of exchange creates a totally separate contractual relationship, which exists independent of whether the first and underlying obligation is fulfilled or not, to the extent where faults in the underlying transaction are to be tackled in a separate claim to that of the *actio camiaria,* as suggested by the courts.**

***John Giordimaina et vs Joseph Pace – Limited Autonomy* (16th January 2003)**:

"When a bill of exchange remains within the patrimony of the creditor of the obligation (i.e., it is not endorsed), it does not acquire an autonomous nature independent of the obligation that gave rise to it. In the opinion of this Court, it is only when the bill of exchange is endorsed that it acquires value 'on the face of it' and becomes dependent solely on what appears on the note itself. A bill of exchange, as is known, does not create novation, and when it remains in the hands of the contracting party, it cannot be detached from the original obligation.

Whoever acquires a bill of exchange is acquiring an autonomous credit instrument and knows that disputes arising from the obligation that led to that credit remain irrelevant to them, because they, as a third-party acquirer, may only seek payment on the note itself.However, between the original parties, the bill of exchange should not have this autonomous nature, because it merely serves as proof of the debt created between those parties; and therefore, the reciprocal obligations of those same parties are relevant in any action for payment. In other

words, an action on a bill of exchange between the parties who issued it cannot proceed independently without reference to the agreement that led to its issuance.

Personal exceptions against the holder (not just against the endorser) may be raised. In other words, if the bill of exchange has not been endorsed (and is therefore still in the contractual phase and not yet in the negotiable instrument phase), the drawer-defendant may raise personal exceptions against the payee-plaintiff."

The Court therefore, in this case, distinguishes between a bill which has **not been endorsed and a bill which has been endorsed**, to the extent that an endorsed bill is to be construed as totally autonomous, whereas a bill pertinent to the original parties is less autonomous, and an error in one obligation may give rise to a justification in the other.

This judgement referred to the works of **P.S. Atiyah**, who, in ***the Rise and Fall of Freedom of Contract***, stated that;

An assignment (of credit) was never wholly satisfactory as a method of creating credit. ***For the procedure of assignment did not sufficiently detach the debt from the underlying transaction****, the debtor was always entitled to raise 'equities' against the assignee, that is to say the assignee might, when he came to enforce his claim, find that he was met by counter claims arising out of the original transaction of which he had no knowledge. -* ***P.S. Atiyah***

Scicluna vs Vella – Limited Autonomy – Endorsement Creates Autonomy (18 March 1965)

The benefit of a *kambjala* (bill of exchange) is that it can be quickly endorsed, and once endorsed, it acquires an autonomous character. Without a *kambjala*, a creditor may enter into a contract for the assignment of a right under civil law. However, in relation to the third-party acquirer, the debtor may still raise exceptions related to the underlying transaction. Therefore, for the creditor, this right of assignment is not very effective because few people are willing to take on someone else's credit while remaining exposed to issues inherent to an obligation to which they were not a party. Hence, the *kambjala* was created.

Since anyone who buys a *kambjala* is acquiring an autonomous credit title, they know that issues arising from the original obligation which led to that credit remain irrelevant to them. As a third-party acquirer, they may claim only based on the *kambjala* itself.

However, between the original parties, the *kambjala* does not carry this autonomous nature, because it merely serves as proof of the debt created between those same parties. Therefore, the reciprocal obligations between those parties remain relevant in any legal action for payment. In other words, an action based on a *kambjala* between the parties who originally issued it cannot proceed independently of the agreement that led to its issuance

Article 198 may be described as the provision for **relative autonomy**. Under this scenario, **personal pleas against the holder** may be raised, provided that **the investigation thereof does not delay the payment and that the pleas may be easily disposed of in the actio cambiaria**.

Guillaumier Industries Ltd. vs Victor Vella et – 4 December 1998

"The scope of the law is very clear. A lawsuit based on a bill of exchange must be treated by the Court with the utmost urgency... The bill of exchange **is precisely a commercial**

instrument invented to ensure speed and efficiency in the circulation of credit and debt, and to respect and, as far as possible, guarantee that commercial processes are animated by the same needs. **To ensure this speed, the law restricts the exceptions that may be raised against the holder of a bill of exchange so that these do not delay the enforcement of the payment of a bill. It only allows exceptions that are easily resolvable."**

Prof. Carlo Mallia noe v. Mariano Accarino noe – 22 November 1997

"In fact, Article 181 of the Commercial Code establishes that personal exceptions against the holder of a bill of exchange cannot delay the payment of the sum if they are not liquid and 'of prompt resolution.' If, on the other hand, they involve lengthy investigations, those exceptions must be reserved for a separate case, and the judgment on the bill of exchange cannot be deferred—whether with a guarantee or without—according to the prudent discretion of the Court."

Carmelo Sammut et noe v. Armando Bugeja et – 28 March 2008

"In conclusion, the Court reiterates that the **bill of exchange has an autonomous and independent nature from the transaction from which it originates**. Moreover, by its very nature, it is a commercial instrument created to ensure speed and efficiency in credit and debt situations. Therefore, since the bills of exchange in question were signed and it was not satisfactorily proven that there was payment—even in part—on them, the plaintiffs' claims must be upheld."

Personal Pleas attacking the Validity of the BoE - General Pleas

Despite the idea that a real plea is one which attacks the bill of exchange's validity, the courts have often accepted **personal pleas** which attack such validity. These pleas succeed notwithstanding the fact that the plea is brought **against the holder**. In these particular cases, however, the bill of exchange is not attacked on the grounds of its **formality**, but rather owing to other circumstances which ought to render it null and void, such as the **procurement of consent via fraud or violence**. An underlying principle within the Civil Law tradition is that fraud nullifies any and all forms of consent - ***fraus omnia corrumpit***.

Joseph Cost Chretien vs Joseph Borda – 6 November 1961

"The exception is not of prompt resolution... therefore, prima facie, it may appear that in this case payment should be ordered... **however, in this case there is the special circumstance that the exception concerns the very existence of the bill of exchange itself... when that is the case, this principle no longer applies where the exception is to the effect that no obligation under the bill of exchange ever arose."**

Tabone vs Camilleri – 27 February 1939

"It is true that according to this article of the law [Article 198], when an exception cannot be resolved quickly, it is inadmissible if it would delay payment. However, there are exceptions—both absolute and relative—that may be raised and should be admitted. These exceptions are grounded in common law and in the law governing bills of exchange. **For**

example, incapacity, which is regulated by common law, constitutes one of the absolute exceptions, while payment is one of the relative or personal exceptions regulated by the law of bills of exchange. There are also exceptions arising from facts that occurred after the date of issuance of the bill."

Joseph Lia vs Alfred Dalli *- violently achieved acceptance / acceptance via dolo 26th January 1989*

"hemm eccezzjonijiet permessibbli meta din tolqot l-ezistenza tal-kambjala stess bhal meta l-kunsens tal-accettant tal-kambjala jkun vizzjat minhabba **vjolenza jew dolo**".

Antoine Vassallo pro et noe vs James Anthony Cefai – 16 March 2005

"Now, it is true that the Commercial Code provides for the case of certain exceptions; among others, that found in Article 198. However, properly interpreted, this legal provision **'implies that exceptions which were of a personal nature to the holder—and which therefore could have originated from the transaction giving rise to the issuance of the bill of exchange and could delay the determination of the action on the bill—had to be discarded'** (from *Adrian Busietta nomine vs Marco Attard nomine*).

However, there are other exceptions that may be admitted, and among these are cases where the acceptor's consent was vitiated by **fraud (dolo)** or **violence**. Therefore, as has been affirmed on other occasions, **'when the exception is one of fraud, the Court must examine the issue raised, because otherwise, it would be favoring someone who—if the exception is proven—acted fraudulently.'**

Thus, the evidence regarding the alleged fraud or violence is to be heard in the same proceedings where the payment of the bill of exchange is being claimed.

If the Court does not investigate this point—raised either as an exception or a counterclaim—as in this case, the Court would indirectly be helping someone who does not deserve such support due to their fraudulent behavior. In these situations, two legal principles are applicable: **'it is naturally fair that no one should become enriched to the detriment of another'** (*natura aequum est neminem cum alterius detrimento fieri locupletiorem*), and **'malice is not to be tolerated'** (*malitiis non est indulgendum*), which is a principle of morality and should have juridical application."

S 253 (e) COCP - Grave and Valid Reason

So, the Court had to apply the aforementioned principles. In terms of real pleas (formal validity) the Courts have always accepted them as a grave and valid reason – if you don't have a valid bill, you don't have a right to enforce that bill.

In determining whether an application to suspend the enforcement of a BoE for a 'grave and valid' reason is justified, the Courts have had to consider whether the application is

permissible in terms of Arts 197 and 198 and the principles of autonomy or relative autonomy established by the courts.
Also, in the context of BoEs which are being enforced by an endorsee (the bill has been endorsed), the endorsee has strict autonomy, an independent and valid right. So, as long as the bill is valid, anything relating to the underlying transaction which gave rise to the BoE will not be accepted as a grave and valid reason. The Court will respect the autonomy of the BoE. In other words, Where the enforcement is sought by an endorsee and the alleged grave and valid reason relates to the underlying relationship the Court will generally not suspend – Art 197 – absolute autonomy.

That leaves the situation where art.198 applies where the original parties to the bill and the person who is trying to stop the enforcement of the bill is referring to the underlying obligation. If the Court can easily decide that matter, and if that matter is justified, it can suspend. If, however, the Court sees that it is something that requires investigation and will therefore delay, then that shouldn't be accepted as a grave and valid reason because it would destroy the autonomous nature of the BoE. It would go against the principle in art. 198.

So, where the enforcement is sought by the payee and the drawer/acceptor's grave and valid reason relates to underlying contractual relationship between the parties, Court should only suspend if –

1) The facts are conveniently and speedily determinable by that court; or

2) The reason given attacks the validity of the issue of BoE itself, e.g., fraud or violence.

These two conditions ensure that **article 198 Commercial Code** and **article 253 COCP** are both respected in their entireties. In these cases, the court should be ready to suspend the facts of the case and to reserve the rights of the parties before resolving the accepted pleas.

Giovanni Briffa vs Ronald Azzopardi – Prima Facie Examination

"The law does not specify what constitutes serious reasons, and in the Court's view, this was not due to an omission by the legislator but was done intentionally, because the legislator wanted to leave it to the Court's discretion to decide in which cases it should grant the request or not. Certainly, a valid reason should not be a frivolous one, because as the law itself states—except in the case of signature—the reason must be serious and valid, which makes it clear that a person cannot arbitrarily oppose execution.

On the other hand, the legislator did not eliminate the inquiry that takes place in a case according to the provisions of the Commercial Code. Rather, Article 253(e) and its proviso were designed as a discretionary **prima facie procedure** in the hands of the Court, naturally based on serious and valid reasons. It is true that the words *prima facie* are not found anywhere in the law, but it would be senseless for the Court to go into the full details of the ordinary procedures when, one way or another, the legislator did not remove those procedures, such that a proper application of the law must be interpreted in that light."

Daniel Borg vs Mark Casha – 17 June 2015

"This is a **preliminary procedure** of examination and verification, where the Court may order the **suspension of the execution** of a bill of exchange or promissory note as an executive title, in cases where from this preliminary procedure it appears **prima facie** that:
(i) the signature on the bill of exchange or promissory note is not that of the person opposing its execution, or not of their representative; or
(ii) there exist other serious and valid reasons to oppose such execution."

Motor Inc. Limited vs Christ Scerri- *proof is often not accepted, since the plea must be merited prima facie* – 28 March 2022

"This Court adopts the wise reasoning of the First Hall of the Civil Court in the aforementioned case and considers that the reasons presented by the applicant to halt the execution of the bills in question can never be considered the type of 'serious and valid reasons' that the legislator had in mind when introducing Article 253(e) into the law. This is because they require an in-depth investigation that exceeds the level of a **prima facie** analysis.

The Court also notes that in order to respect the legislator's intent, this procedure allows for **little to no submission of evidence by the parties**. Any evidence that may be submitted is always at the **discretion of the Court**."

Usury

Usury refers to the stipulation for interest **in excess of that permitted by law**. There are certain pleas which attack the validity of the bill of exchange itself and which can always be raised. Our courts have held that when BoEs are used to cover the stipulations of interest in payments due up to 8%, these are not completely invalid. This is rendered a matter of public policy and given strict interpretation by the Courts.

986. (1) Stipulations *quotae litis* are void.

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

Civil Code

Article 986 of the Civil Code states that an obligation to pay a rate of interest exceeding 8% p.a is null and void beyond the 8% (thus permissible up to the 8%, and anything over and above is null). This article, however, is subject to the exceptions enlisted under the Interest Rate (Exemption) Regulations, which were introduced owing to international trade and because it is considered custom for such trade to charge more than 8% outside of Malta. The 8% limitation was pushing away trading opportunities with foreigners in Malta, and thus

these regulations were introduced. However, insofar as the parties to a contract or agreement are Maltese, 8% is the maximum possible charge for interest. **BoEs are often chargeable at an interest rate more than 8%**. The question is thus whether this excess warrants invalidation. As per article **986 (2) Civil Code,** a plea may be raised to combat this excess, however, the party suing may only serve to **invalidate the excess amount**, and not the bill in its entirety.

Catherine Farrugia vs Marcus Lauri et *- usury 31st January 2018*

"Illi minghajr pregudizzju ghas-suespost, jekk il-Qorti, jidhrilha li ghandha tidhol fil-mertu dwar jekk l-kampjala tkoprix element ta' uzura, l-unika konsegwenza li dan jista' jwassal ghaliha, hija n- nullita` ta' "dak li hu zejjed", u dan kif jipprovdi l-Artikolu 986(2) tal-Kap. 16, kif ukoll kif jipprovdi l-Artikolu 1852 tal-Kap. 16 tal-Ligijiet ta' Malta."

Prescription

Procedurally, it is worth noting the prescriptive periods applicable for the enforcement of a bill of exchange. This refers to the time frame in which the action must be brought. Every right for action will expire within a stipulated amount of time, with 30 year and 40 year prescription (the latter in the case of Churches and other Pious Institutions) being the time in which **all real, personal, or mixed actions** is barred completely, as per **articles 2143** and **2144**.

When referring to prescription, we must ascertain the difference between acquisitive prescription and extinctive prescription. For the purposes of bills of exchange we are primarily concerned with extinctive prescription, as governed by **s 2107 of the Civil Code;**

2107. (1) Prescription is a mode of acquiring a right by a continuous, uninterrupted, peaceable, open, and unequivocal possession for a time specified by law.

(2) Prescription is also a mode of releasing oneself from an action, when the creditor has failed to exercise his right for a time specified by law.

The law also provides for shorter prescriptive periods, which would take precedence over the 30 year extinctive prescriptive provision, owing to their specificity (*lex specialis derogat legi generali*).

We refer to **article 542 of the Commercial Code;**

542. Saving the provisions contained in articles 238, 239 and 263, actions arising from bills of exchange or from promissory notes shall be barred by prescription by the lapse of five years from the day of their maturity, and actions arising from drafts or cheques on bankers or cashiers shall be barred by prescription by the lapse of five years from their date.

As a general rule, **prescription may be interrupted.** However, the **Commercial Code** creates a rather exceptional rule, that holds that **all prescriptions enlisted and provided for by the Commercial Code are peremptory, and thus they can never be extended, interrupted, or suspended**.

541. All times fixed by any express provision of this Code for the exercise of any action or right of recourse arising from commercial acts, are peremptory; and the benefit of the *restitutio in integrum* by reason of any title, cause or privilege whatsoever shall not apply.

Thus, no interruption may be brought in relation to bills of exchange prescriptions. The lapse begins upon the **date of maturity**, in the case of a specified date, or else **upon sight,** or else upon the lapse of the 21 days (from usance). This was confirmed in ***Anthony Sammut vs Joseph Peters et.***

Promissory Notes

Promissory notes are **necessarily comprised of 2 parties**. They are regulated by **2 provisions of the Commercial Code,** being **articles 260 and 261**.

260. The provisions applicable to bills of exchange, and relating to endorsement, joint and several liability, *aval*, time of maturity, payment, payment for honour, protest, duties and rights of the holder, and re-exchange, shall apply to promissory notes.

261. (1) A promissory note shall state the date, the amount to be paid, the person in whose favour or to whose order such note is signed, the time when payment is due, and the value supplied in cash, goods, in account or in any other manner.

(2) It may also be drawn payable to bearer.

The law refers back to the rules on Bills of Exchange which consequently apply to promissory notes. The principles may be deemed to be similar, **but there are some differences.**

As with bills of exchange, the law **does not provide a definition for promissory notes**. Under English Law, the **Bills of Exchange Act** does provide a definition;

Promissory Note: "... an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of, a specified person or to bearer"

Under English Law, bills of exchange may be drawn *to bearer*, unlike under Maltese law. Conversely, under Maltese law, **a promissory note may be issued to bearer**.

A promissory note is often a short document. It is a unilateral contract, being **signed by only one party - the person who promises to pay**. These are often referred to as 'IOUs'. The document signifies an undertaking to pay. The party forming the document may include a stipulation to interest contained in the promissory note, but this is not popular. **Article 261** establishes the contents of the promissory note. The formalities required for a valid promissory note are;

1. The **date of issue**;
2. The **amount promised to be paid**;
3. The person **to whose order is signed** (the payee);
4. The **maturity date;**

5. The **value supplied in cash**;

Article 261 (2) states that a promissory note can be issued **to bearer**. Unlike bills of exchange, a promissory note cannot be drawn **at usance**. For promissory notes, unlike in bills of exchange, there is no acceptor. The presentment of the promissory note is sufficient for the document to be enforceable.

There are a number of additional formalities required in bills of exchange which **are not required for promissory notes**, such as the **place of issue, the name of the drawee, the place of payment, the signature of the drawee**, etc. Strangely, the law does not require the promissory to be signed by the issuer, unlike the case of the drawer in the bill of exchange.

Differences & similarities between BoEs and promissory notes

Upon a reading of **article 260**, one immediately notes that **a promissory note is a type of bill of exchange.** It is more akin to a **bilateral bill of exchange** than it is a trilateral one, but some difference emerge nonetheless.

Differences

1) A promissory note is a **promise** by one party to pay another. There is no order to pay. A bill of exchange is one party who **orders** another to pay the drawer or else another party.

2) Unlike a BoE, a promissory note **can be made to bearer** (261 (2)).

3) Unlike a BoE, a promissory note can only be presented for payment, and not for acceptance, since there is no drawee involved.

Similarities

1) Like a BoE, a promissory note may be **negotiated and endorsed**. The element of **transferability** is thus common between the two credit instruments. Further, a third party may step up and guarantee the payment.

2) Like a BoE, a third party can pay for honour and guarantee by aval.

Under English Law, the promissory note must contain the **signature of the maker**. Maltese law adopts the same position, leaving the note unenforceable without the signature of the drawer. The signature of the payee is **not required**.

However, **on endorsement, it must be signed by the endorser**. The BoE rules on endorsement apply if the promissory note is made payable **to the order of a specified person**. The endorser does not have to sign if the document is signed to bearer, in which case the holder has a right to payment.

One must note that **the presentment of a promissory note is necessarily required for payment**. This is a *sina qua non* for the enforceability of the note. The promissory note can only be presented for payment, and not for acceptance.

The question of autonomy

Article 260 states that the rules regulating the time of maturity and payment apply the same to BoEs as they do to promissory notes. **Articles 197 and 198**, regulating the rules of autonomy vis-a-vis the maturity and payment of a bill of exchange thus apply also to promissory notes, thus implying that **the same element of autonomy of rights exists to the case of promissory notes**.

Furthermore, the same rules and procedures for **enforcing the rights on a bill of exchange** (i.e real pleas, personal pleas, limited autonomy, etc) apply to the case of promissory notes. Thus, if there is an issue with the underlying transaction, the plea may be raised solely if it does **not delay payment**.

2004 amendments to the COCP vis-a-vis promissory notes

As previously mentioned, in 2004, BoEs and promissory notes were added to the list of documents which vest **executive title.** The grounds for suspension are the same in the cases of BoEs and promissory notes, being the ground of false signature and of grave and valid reason. The same rules and jurisprudence applies, including the rules governing the **protest procedure** and **right of recourse**.

Prescription

The same prescriptive period applies to both BoEs and promissory notes. Again, we refer to **articles 541 and 542** of the Commercial Code;

> **541.** All times fixed by any express provision of this Code for the exercise of any action or right of recourse arising from commercial acts, are peremptory; and the benefit of the *restitutio in integrum* by reason of any title, cause or privilege whatsoever shall not apply.
>
> **542.** Saving the provisions contained in articles 238, 239 and 263, actions arising from bills of exchange or from promissory notes shall be barred by prescription by the lapse of five years from the day of their maturity, and actions arising from drafts or cheques on bankers or cashiers shall be barred by prescription by the lapse of five years from their date.

The 5 year prescriptive period is deemed **peremptory** by the Commercial Code, thus prohibiting the rules of interruption of prescription as per the Civil Code.

Cheques

Within the realm of cheques, there seems to be a conflicting interpretation between the law and practice. The provisions on cheques fall under the same provisions governing credit instruments, yet **banking practice and directives issued from the Central Bank have shown a different interpretation**. The most recent CBM directive is Directive 20, on cross-boarder payments, with the preceding directive (19) elaborating on **the Use of Cheques and Bank Drafts.**

The most highlighted feature of cheques is their **convenience**. The use of cheques has been in decline in the EU consistently since 2000. While also declining in Malta, the use of cheques is still 10x higher than the EU average. Approximately 18% of payments in Malta are done via cheques.

Like promissory notes, cheques are governed by 2 provisions; **articles 262 and 263 of the Commercial Code;**

262. (1) Drafts or cheques on bankers or cashiers shall be dated, and shall specify the sum to be paid, and shall be made payable to a person therein named, or to his order, or to bearer.

(2) They shall be payable on presentment.

263. Where the holder of a cheque fails to cash it within three days from the date thereof, and, after such time, the banker or cashier refuses to pay, the holder who has received the cheque from a third party has no right of recourse against such party, nor against the maker of the cheque, if the latter proves that he had in the hands of the banker or cashier sufficient funds to meet the cheque, and that such funds did not cease to be available through his fault.

The U.K Bills of Exchange Act states that ***a cheque is a bill of exchange drawn on a banker payable on demand***. In this way, the U.K classifies the cheque as a **type of BoE**.

In a cheque, there are three parties, with the drawee being a registered bank. The holder of a chequebook is deemed to be the **drawer**, and the person being ordered to pay is the **drawee**. In the case of cheques, **the bank is the drawee**. The **drawee is ordered to pay a sum of money to the payee**. So long as there is money in the bank account, the law's presumption is that the issue of the cheque represents **the drawer has put the drawee in funds, because the drawee (bank) is the holder of the money**. Rules relating to BoEs payable on demand apply to cheques when presented to the bank for payment. This is not expressly stated in the law, because the law on cheques does not specify whether any provisions governing BoEs apply also to the case of cheques.

Formalities

Article 10 of Directive 19 of the CBM lays out the formalities required for a valid cheque;

10. (i) The drawer is obliged to provide all the following information on the paper-based instrument:

- The date of issue;
- The payee;
- The payable amount in words and figures which shall agree; and
- The signature of the drawer or the authentication as agreed between the drawee institution and the drawer.

(ii) A drawer can issue an instrument only for amounts exceeding twenty euro (€20).

1) The **Date of issue.**

this element is important since it serves to establish whether either of the parties were in a sufficient legal capacity to enter into the agreement or not. **Directive 19** also **prohibits the practice of issuing post-dated cheques,** holding that such cheques in circulation must be transferred to a bank, without the option to endorse them.

2) The **amount to be paid.**

3) The **name of the payee**.

The latter element is overridden with conflict. The law holds that **a cheque may be drawn to bearer or to the order of a person**. However, **directive 19 states and declares that cheques cannot be issued to the order of a person**. This directive thus hinges on the negotiability of the cheque. Our law does not state specifically whether there are any rules governing BoEs which also apply to Cheques. This has raised judicial debate, to the extent that it is unclear as to the **nature** of cheques. The main streams of thought contemplate whether a cheque is based on the law of mandate/agency, or if it is deemed to fall under the category of bills of exchange, similar to the U.K position and akin to the case of promissory notes. This distinction is important because under the law of mandate, **a cheque is revocable**. Should the cheque be classified as falling under mandate law, the drawer is able to call the drawee and order the revocation of the cheque, and thus the non-payment of the money. The *raison d'etre* behind classifying a cheque as a form of mandate is because a cheque represents an **order to pay**.

Anthony Grech Sant vs. Ronald Balani – 27 October 2017

"The Court understands that there are many similarities between cheques and bills of exchange, but they cannot be considered to operate in the same way... just because one says that a bill of exchange also means a cheque, that does not make it so. The true nature of a cheque is also different from that of a bill of exchange.

A cheque has the nature of a **mandate**, which does not apply to a bill of exchange. It is true that, over time, certain elements of the bill of exchange have begun to be accepted as applicable to cheques as well, but this not only created some confusion, it also did not lead to such assimilation being accepted as an established fact.

A cheque, therefore, is a **negotiable instrument**, like a bill of exchange, but the two are not the same, and as has been said, *"it is still not altogether clear"* how far and to what extent the principles of bills of exchange apply to cheques.

It is said, for example, that a bill of exchange has an **autonomous and independent existence** from the transaction that gave rise to its issuance, but the same cannot be said with certainty regarding cheques... One might, perhaps, argue that a cheque begins to resemble a bill of exchange when it is put into circulation through **endorsement**."

The court thus made a distinction between endorsed cheques and unendorsed cheques. Further, the Court recognised the legal discrepancies which exist within the remit of cheques, and appeals for amendment.

A running theme in judgements is that Courts tend to uphold the principle that **a cheque is only classified as a type of BoE once it is endorsed**. Until it is endorsed, it is simply an instruction to the bank to order payment held by the payee. Thus the courts, should they uphold this line of thought, are holding that a cheque is a mandate until it is endorsed, at which point it transforms into a bill of exchange.

Enrico Sammut vs Vincenzo Falzon – 15 October 1875

"...it is certain that cheques drawn on bankers or cashiers, when made to order and negotiated by means of endorsement, as in this case, the act of endorsement converts them into a **bill of exchange**."

This case thus recognises cheques as BoEs when they are endorsable (issued to the order of someone).

Anthony Grech Sant vs Ronald Balani – 5 October 2016

"From the jurisprudence, it is therefore evident that under the law, a cheque is equivalent to a bill of exchange, to the extent that the applicable law is the law governing bills of exchange. This is always the case when the cheque is **'to order'** and thus functions as a **credit instrument**, and **not** when the cheque is 'only' (i.e., non-endorsable), in which case it is considered solely as a method of payment and **not** as a credit instrument."

This judgement took a step further, asserting that the law of bills of exchange apply to cheques when the cheque is capable of being endorsed.

Anthony Borg et vs Anthony Willoughby et – 9 March 2005

"The cheque... is intrinsically nothing other than a **credit document**... In the hands of the holder, the cheque carries an advantage similar to that of someone holding a bill of exchange. As such, the relationship arising from the face of the cheque is therefore equated to the relationship between the drawer and the drawee as it appears on the face of a bill of exchange itself.It is this aspect that makes the action arising from the cheque an **autonomous action**, like that of a bill of exchange."

Prof Micallef asserts that; *"Cheques are very similar in legal form to bills of exchange... the juridical nature and character of a cheque or of a draft or cheque to bankers or cashiers, as our Code terms it, is very similar to that of a bill of exchange... in certain cases credit instruments are made to circulate as documents containing 'abstract' rights, that is a right which derives from the document itself independently of the causa obligationis or the original contract which had given rise to it. Consequently, the credit instrument is issued even though the original contract which gave rise to it is not mentioned in the body of the document consisting of the credit instrument... Not all credit instruments possess this quality of giving rise to abstract rights but only those which are recognised*

by the law, either expressly or impliedly and such an attribute is implied in bills of exchange, promissory notes and cheques"

Therefore, the current stream of jurisprudence establishes that **a cheque is a type of bill of exchange**, because it represents an order given to the drawer for the drawee (Bank) to pay the payee. Conversely, a cheque **cannot be drawn on the drawer himself** (i.e the drawer cannot also be the payee), unlike the case of the bill of exchange. Moreover, the **cheque is payable on demand**, at sight, and when presented to the bank, the presentment is only for payment (similar to bills of exchange drawn at sight).

Stop Payment (countermand)

The question arises as to whether the issuer/drawer of a cheque has the right to stop a payment. This is the practice of someone who issues a cheque and subsequently requests the cheque to be nullified, notwithstanding the bank being put in funds by the drawer. Under U.K. Law, Article 75 of the Bills of Exchange Act holds;

"the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (i) countermand of payment; and (ii) notice of customer's death."

Thus under U.K. Law, countermand is expressly permitted. Under Italian and French law, the doctrine also allows for countermand, subject to certain conditions and limitations (i.e - a cheque cannot be countermanded before the lapse of 8 days from issue).

Under Maltese Law, there is no specific regulation of countermanding cheques. But our courts have recognised that cheques, in producing the same effects of a BoE, warrant the same treatment of a BoE, to the extent that **it cannot be withdrawn, thus prohibiting countermanding of cheques**.

Daniel Cremona nomine vs Nazzareno Zammit et nominee

"In matters concerning cheques, with regard to stop payments under Maltese law, one must refer to the law on **bills of exchange**, since there is no specific **ad hoc** provision, and particularly in the case of a **cheque to order**, this must be considered as being subject to the law on bills of exchange.

As for the practice of stop payments, although certainly practiced, this Court does not consider it to amount to a **commercial usage**, also because it directly contradicts the provisions and nature of the domestic commercial law, which ought to prevail."

The Procedure of Article 253 (e) and its applicability for cheques

We have previously stated that the 2004 COCP amendments widened the scope of executive title to include bills of exchange and promissory notes. Cheques are thus not deemed to carry executive title. One may argue that if a cheque is a type of BoE, as per the aforementioned stream of judgements, then it should be treated the same way. The ultimate conclusion, however, as adopted by the courts, is that once the COCP's list of exhaustive titles are **exhaustive,** then this should not be arbitrarily widened to include cheques. This principle was upheld in ***Anthony Grech Sant vs Ronald Balani.***

Anthony Grech Sant vs Ronald Balani - *applicability of 253 in BoEs*

"Din il-Qorti, kwindi, ma tarax li l-kliem kambjala jew promissory note uzata fl-artikolu 253(e) jistghu jigu estizi biex jinkludu cheques li, kif intwera, ghandhom natura differenti u japplikaw ghalihom regoli differenti ....Il-ligi in kwistjoni ma titkellimx dwar titoli ta' kreditu in generali izda specifikatament dwar il-kambjala u promissory note. Cheque, f'xi aspetti tieghu, jixbha lil dawn izda mhuwiex wiehed minnhom".

Prescription

Articles 541 and 542 of the Commercial Code states that;

541. All times fixed by any express provision of this Code for the exercise of any action or right of recourse arising from commercial acts, are peremptory; and the benefit of the *restitutio in integrum* by reason of any title, cause or privilege whatsoever shall not apply.

542. Saving the provisions contained in articles 238, 239 and 263, actions arising from bills of exchange or from promissory notes shall be barred by prescription by the lapse of five years from the day of their maturity, and actions arising from drafts or cheques on bankers or cashiers shall be barred by prescription by the lapse of five years from their date.

We know that the prescriptive periods in the Commercial Code are Peremptory. The 5 year lapse, in the case of cheques, begins **from the date of issue**.