CML2010
DUTIES OF TRADERS & COMMERCIAL INTERMEDIARIES

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Duties of Traders and Commercial Intermediaries

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Unfair Competition

Competition is one of the essential elements of a Free Market Economy (an economy in which everyone is entitled to establish an enterprise and compete with one another (law permitting). The freedom to carry out economic activity very often means that economic entities will be competing against each other in the 'market'. Competition means striving to gain something by establishing superiority over others. In a FME this means striving for custom in the market to acquire a greater market share than your competitors. This may give rise to potential conflicts with others in the same market. It is generally (though not universally) acknowledged that competition is beneficial to society in general and particularly to consumers. However, competition may be abused in one of two ways:

1. Economic entities may act unfairly in relation to the legitimate interests of their rivals, i.e., use 'dishonest practices' to gain an advantage over their rivals. Take, for example, an enterprise that attempts to enter the soft-drinks market by modelling its own products and practices very closely to an established IP which may create confusion amongst consumers; or
2. Economic entities may act in such a way as to eliminate or weaken competition in the market.

These two potential abuses give rise to two separate fields of law:

1. **The Law of Unfair Competition (First Abuse):** Which determines the proper limits of competition between traders. It is concerned with acts whereby one trader through 'dishonest practices' takes unfair advantage over another trader, e.g., using a trademark which is similar: denigrating his rival's products.
2. **Competition Law (Second Abuse):** Which seeks to ensure the maintenance of workable competition and thus:
   a. (Section V of the Competition Act) Prohibits agreements or any form of collusion that distorts competition (e.g., price-fixing, collusion); and
   b. (Article 9 of the Competition Act, Article 102 TFEU) Prohibits abuses by dominant firms (e.g., excessive pricing or refusal to supply in order to eliminate competition).

Particular focus shall be given to the Law of Unfair Competition (henceforth referred to as 'UC') which is dealt with in Sub-Title III of Title II of Part I of the Commercial Code, entitled *'Of Limits of Competition',* Articles 32-37. Consumer law frequently overlaps with Unfair Competition law because the 'dishonest practices' in question very often are also harmful to consumer interests.

Position Prior to Act XXX of 1927

Acts 32-37 were introduced into the Commercial Code by virtue of Act XXX of 1927 but the notion of Unfair Competition had long been recognized by our Courts. The Court had already dealt with and evolved the concept of UC prior to 1927 with most of the cases dealing with 'trade *indicia'* (i.e., trademarks, trade names, and trade signs, with all three protected in equal measure). In this case the unfair advantage is gained by a firm misrepresenting its goods or business or shop as someone else's or as connected to someone else's business.

Prominent jurisprudence:

1. ***Smith noe v Galea* (IV.i.66 – 10/04/1867):** This case concerned the trade sign of a shop in Valletta called *London and Palace House* and the Court argued that as soon as a trader uses a trade sign on the market it becomes his property, and he alone has the right to use it.
2. ***Turnbull Jr. & Somerville v Schembri* (XI.i.259 – 05/03/1887 – a Privy Council decision) [see also Commercial Court decision (X.iii.80 – 18/11/1884):** The Privy Council decision is actually referred to in the Maltese collection of judgements. The case concerned the market for cigarettes: the Plaintiff marketed a brand of cigarettes (Kaiser – I – Hind) whilst the Defendant started marketing a brand of cigarettes with an imitating name. the Commercial Court decided in favour of the Plaintiff, but the Court of Appeal reversed the decision with the Privy Council overturning the latter decision. In its decision the Privy Council reasoned as follows: *"As soon, therefore, as a trade mark has been employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm it becomes, to that extent, the exclusive property of the firm, and no one else has a right to copy it or even appropriate any part of it if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the trade mark belongs".* Once a trader establishes himself as the first user of a trademark, he then owns it exclusively, meaning he has the right to exclude others from its use.
3. ***Huber v Agius* (XII.iii.579 – 18/11/1884):** Relates to a restaurant in Strait Street, Valletta called Victoria Restaurant.
4. ***Attard noe et v Pace noe et* (XIII.iii.453 – 28/03/1893):** Relates to bottled mineral water.
5. ***Condachi noe vs Zikalaki* (XIII.iii.503 – 08/06/1893):** Relates to cigarettes.
6. ***Atkinson noe vs Attard noe* (XVIII.iii.36 – 30/05/1901):** Relates to bottled mineral water.
7. ***Bonello noe vs Cauchi et* (XX.i.233 – 30/06/1909):** Relates to Crown-brand butter and margarine. Ordinance XI of 1899 (known as the *Industrial Property Protection Ordinance*) protected trademarks which were registered (as well as facilitating their registration) as well as patents. In this case the trademark had been registered. Suit was brought against the Defendant for using an imitating name with one of their defences being that the registration of the trademark in question under the ordinance was irregular. However, the court reasoned that irrespective of the regularity of the registration, the Plaintiff still enjoyed the protections awarded to them under the law as found in the Law of Property. As soon as a trader uses a mark in such a way that the public associates that mark with a particular product the owner of such a trademark is automatically given its exclusive ownership, irrespective of its registration or lack thereof. Therefore, the Plaintiff's case was based on both the rights offered to him by the IPPO and by the Law of Property.

In all of the above-mentioned cases the court concluded that the trademark becomes the property of the person who first uses it, and that the owner shall be given all the rights and protections awarded by the Law of Property. All these cases are based on the principle that prior use of a mark, name, or sign in trade gives you property rights and, therefore, exclusive use of that mark, name, or sign. The Courts used the ordinary law and remedies (property and tort law) to control these 'unfair' commercial practices.

Two basic elements had to exist for an action of UC (see *Curmi v Mizzi* – 18/10/1957):

1. Plaintiff suffered damage as a result of defendant's act; and
2. The damage was the result of unlawful means used by defendant.

Two problems arise from these two requisites:

Problem I - *"Any person who makes use within the proper limits of a right competent to him shall not be liable for the damage which occurs through his fault"* (Art. 1030, Civil Code): What are the proper limits? When does the use of a right to carry out an economic activity become an abuse of that right (other than for the use of someone else's trade *indicia*)?

If a trader loses business as the result of competition said competitor should not be held liable. Therefore, when is the use of a right the *use* of a right and when is it the *abuse* of a right. Articles 32-36 of the Commercial Code identify those dishonest practices which are beyond the proper limits of competition and are as such unlawful.

Problem II – Difficulty in establishing damages suffered as a result of an act of UC. How does one prove loss of clientele, loss of sales, and the quantum of such loss?

In order to bring a civil suit against a competitor the Plaintiff must actually prove that he has suffered damages. In many cases finding such proof and quantifying the damage is near-impossible. Act XXX of 1927 addressed this in article 37 by allowing the 'injured trader' the choice of either suing for damages (which must be proven) or suing for a penalty established by the Court in lieu of damages (where actual damages need not be proven). Because of this difficulty in proving damages the Plaintiff is afforded a choice.

Therefore Act XXX of 1927 defined the limits of competition by laying down provisions which prohibit particular acts of unlawful competition (articles 32-36) whilst offering injured traders a means of recovering compensation where proving actual damages is difficult (article 37).

Unfair Competition – General Observations

Rules of unfair competition are known as business-to-business rules as they involve dishonest practices where one business attempts to gain an advantage over his competitors through dishonest means.

The following are three general observations relating to all acts of unfair competition.

Firstly, Acts of UC are exhaustively listed. These are considered as *delitti commerciali* and the Court cannot add any other act to the ones listed. To that end, no new acts of UC can be created unless by the legislator. Moreover, these are sometimes referred to as quasi-offences in Maltese jurisprudence. Furthermore, they should not be extensively interpreted: *"illi li kazijiet ta' konkorrenza sleali … huma tassativi u ghalhekk ma tapplikax ir-regola estensiva* *tal-ejusdem generis"* (Darmanin vs Cachia noe). Parallel trading is a situation where a supplier appoints in Malta an exclusive distributor, however a situation may arise where a trader manages to option said product not from the supplier, but from an alternative source. From the point of view of contractual law, the contract is between the manufacturer and the chosen trader, meaning it is only binding between those two parties. If one were to look at articles 32-36 none of them prohibit parallel trading as an act of UC, meaning there is no possible remedy for this situation. The following are pertinent cases on the issue with many involving parallel trading:

- *Camilleri pro et noe vs Bonnici* (XXVIII.iii.1330 – 07/05/1934): This case involved parallel trading where plaintiff was meant to be the exclusive distributor of bicycles whilst the respondent acted as a parallel distributor.
- *Gauci noe vs Scerri* (XXXIX.iii.849 – 29/04/1955)
- *La Rosa vs Borg* (XL.i.508 – 05/03/1956)
- *Manduca noe vs Bezzina Wettinger* (477/2002 – 16/12/2004)
- *La Rosa de Cristofaro vs Farrugia* (XXVIII.iii.1159 – 09/05/1933): Plaintiff, by virtue of an agreement signed with the defendant, granted the operation of his business (an operation agreement) to the defendant. Therefore, the plaintiff did not sell his business to the defendant as a going concern, but in a sense leased it to him. As per the agreement the defendant would run the business, earn the profits, and pay a fee to the plaintiff. Six months later the agreement was terminated. The defendant, having knowledge of the business' inner-workings and trade secrets, poached some suppliers by virtue of the inside knowledge that he had of the business. The plaintiff sued for unfair competition. The judgement is quoted as saying *"the cases that are specified in the law are, as in any other law of a criminal nature, exhaustive and the judge cannot without committing an injustice condemn the trader for a penalty that is not contemplated".* The second paragraph leans towards a discussion as to whether the law is unfair by saying *"although the conduct of the defendant is reprehensible and certainly not inspired by principles of good faith, this case is not contemplated by the legislator and therefore one cannot award a penalty and the plaintiff does not have the action as contemplated in the writ of summons".*
- *Darmanin vs Cachia noe* (XXXIV.iii.806 – 04/05/1950): Plaintiff was the proprietor of a shoe shop which contacted a manufacturer to design and produce a lady's shoe, and that's what they did. The shoe was designed and manufactured exclusively for plaintiff who began selling it in its retail outlets. One of the defendants made contact with another manufacturer in Catania which sent a few pairs of the shoe in question for it to be copied and produced for sale in the defendant's retail outlets. The defendant also approached other retailers with the aim of supplying them with said shoe. Plaintiff sued on the basis of unfair competition and lost on that count for the same reason as the above-mentioned case. However, in the writ of summons the plaintiff also alleged that this amounted to *dolus,* that is to say a dishonest practice. The court, in a sense, latched onto those words and said that *"there is no doubt that according to the general principles of law everyone is responsible for the damages caused either negligently or through* dolus *and likewise there is no doubt that the defendant acted in bad faith, that is to say with* dolus".

Should the law prohibit acts of unlawful competition generally? A comparative approach.

- Paris Convention, Art. 10(*2*) *bis.*: *"any act of competition contrary to honest practices in industrial or commercial matters".*
- German Act against Unfair Competition (2004) prohibits acts of unfair competition generally (*"unfair commercial practices are prohibited, if they are likely to significantly affect the interests of competitors, consumers or other market participants"*) but also provides a non-exhaustive list of acts deemed 'unfair'.
- Italian Civil Code, Art. 2598, lists a number of acts which are deemed unfair but also covers any act that *"directly or indirectly uses means that are not in conformity with professional correctness and which can damage the business of another person".* Meaning the courts have the right to use its discretion when determining whether an act is one of unfair competition or not.

One would note the lack of a general provision in the Maltese rules against unfair competition. In England, there exists the tort of passing off but no general tort of 'unfair competition'. In the case of *L'Oreal v Bellure* the Supreme Court ruled that *"the rejected complaint shows just how anti-competitive a law of unfair competition would or might be. What one man calls 'unfair' another calls 'fair' … so I think there are real difficulties in formulating a clear and rational line between that which is fair and that which is not, once one goes outside the requirement of no deception".*

The **second general observation** is that the plaintiff and defendant in an action for unfair competition must both be traders:

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

Article 37 of the Commercial Code reads as follows:

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

paid to the injured trader in settlement of all his claims for damages and interest.

However, there is an issue: Articles 32A and 32B of the Commercial Code were added as acts of unfair competition to transpose Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising but the definition of 'trader' in the Directive is different to that contained in the Commercial Code. The Directive in article 2(d) defines a 'trader' as *"any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader"* while the Code (art. 4 of the Commercial Code) defines a 'trader" as *"any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership"* (acts of trade are those listed in article 5 of the Code).

To that end, if the courts adopt the Directive definition found in the Commercial Code it would mean that Malta has not correctly implemented the Directive. This begs the question as to whether the Court can adopt the Directive definition for the purposes of Articles 32A and 32B, with the European Union Act (Cap. 460 of the Laws of Malta) providing that *"any provision of any law which from the said date is incompatible with Malta's obligations under the Treaty or which derogates from any right given to any person by or under the Treaty shall to the extent that such law is incompatible with such obligations or to the extent that it derogates from such rights be without effect and unenforceable".*

The **third** and final observation is that there is no need to prove *dolus* or any unlawful intent. Article 37(3) indicates that intention (*"the malice of the offending party"*) is only relevant as a factor to determine the amount of the penalty and not as a requisite to found an action for unfair competition. The following is pertinent jurisprudence on the issue:

- *Thiellay v Sammut* (V.iii.631 – 11/11/1971)
- *Somerville v Schembri* (Commercial Court decision: X.iii.80 – 18/11/1884)
- *Barbara v Barbara* (XXVIII.iii.952 – 31/05/1932)
- *Marpierre Estates Ltd vs Grech et* (App 3463/1996 – 16/02/2004): Here, plaintiff had a pizzeria called *Cottonere Pizzeria and Take-Away* in Fgura. He had opened this establishment and 1995 and operated since that date. The defendant opened another catering establishment close to the plaintiff in Fgura and called it *Cottonere Bar and Restaurant.* Plaintiff filed an action for UC and the defendant changed the name immediately after. The Civil Court did find the defendant in breach of article 32 but did not grant any damages to the Plaintiff who appealed, arguing that there was a breach of UC and the fact that he changed the name (indicating a lack of malice) is irrelevant for the purposes of proving article 32. The Court ruled that *"our courts have always maintained that as soon as you establish an act of unfair competition the court's inquiry stops there … the intentional element is only material in the case of determining the penalty".* The Court still rejected the appeal on the basis that the plaintiff had sued for damages and not penalties.
- *Spiteri v Cachia* (Civil: 491/2002 – 10/06/2004)

Unfair Competition – Prior Use

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

Article 32 mentions two acts as evidenced from the use of the word 'nor' with these two acts covering (see *Sammut v Cuscieri* – XLII.i.714 – 31/10/1958):

- Obtaining clients from competitors by using confusingly similar names or marks.
- Obtaining 'credit' under false pretences (take, for example, a firm name that gives the impression of multiple partners when the individual is a sole trader, or when an individual mentions a person notable for being trustworthy in the firm name despite their lack of involvement).

The similarity between these acts is that they both attempt to increase goodwill by misrepresentation. Names and marks play a fundamental role in a free market economy, hence, the importance of protection. Here we shall focus on the first and most commonly used limb. Essential requisites to ground an action under the 'first limb' of article 32:

1. The existence of a *"name, mark, or distinctive device lawfully used by [plaintiff]",* and
2. The making use by the defendant of a *"name, mark, or distinctive device capable of creating confusion" with that* 'lawfully used' by plaintiff.

The words *"lawfully used by others"* [i.e., by the plaintiff] in the second requirement indicates prior use, wherein the plaintiff has been using the name/mark/device before or prior to the defendant. The plaintiff must prove he has prior use of the name, mark, or device, as per the Latin maxim *prior in tempore, potior in iure".* Priority of use confers ownership of a mark, name, or device and, consequently, its exclusive use – the right to exclude others from using that name or mark. This principle was established before Act XXX of 1927: *"as soon as a trademark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the property of the firm"* (Somerville v Schembri – XI.i.259, Privy Council 05/03/1887). See *ITC Limited et v LBM Breweries Ltd* (976/2005, PA 30/04/2013) for the point made in *obiter.*

Article 32 protects names, marks, and devices against unlawful use *"even though such other name, mark or distinctive device be not registered in terms of the Trademarks Act".* The protection enjoyed by a mark on the basis of prior use (ownership) exists independently of registration of that mark/name under the TM Act. To that end a registered TM enjoys protection both under article 32 and under the TM Act. A mark may be not recognisable under the TM Act and still be entitled to protection under article 32. The following are pertinent cases on the issue:

- *Bonello noe v Cauchi et* (XX.i.233 – 30/06/1909): Plaintiffs were the owners of the TM *Crown* brand for butter and margarine.
- *Benjacar noe v La Rosa de Cristofaro* (XXVII.iii.758 – 15/10/1931): Plaintiff was representing a firm that produced scotch whiskey and they registered a mark with the letters OVH as well as another mark Griers OVH. The defendant was using a mark with the label Yellow Cap OVH and the plaintiffs filed an action against the defendants both on the basis of their registered TM OVH and on the basis of unfair competition. One of the pleas raised by the defendants was that the mark was irregularly registered with

the Court agreeing that an acronym cannot be registered as a TM per se. However, the plaintiffs still enjoyed prior use.

- *Farrugia noe v Benjacar noe* (XXXIII.i.721 – 21/03/1949)
- *Spiteri v Cachia* (Civ 491/2002 – 10/06/2004): Here, plaintiff operated a mechanic's business with the trade name and trademark *Car Clinic.* Defendant was using a similar TM, *Leli Car Clinic.* Plaintiff sued both under article 32 as well as under the TM Acts 2000. While the case was ongoing the defendant obtained registration of *his* mark. Meaning plaintiff was suing on the basis of having prior use and registration whilst defendant registered his own TM. The Court first looked at the registration issue and stated that plaintiff's action cannot succeed on the basis of the TM Act 2000 as defendant's TM is also registered. However, the Court was satisfied with the action under the doctrine of prior use and noted that he has the right to file an action for UC under the Commercial Code.
- See also for a different view: *Messina noe et v Mizzi pro et noe* (XVIII.iii.106 – 31/05/1902).

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

1. *Micallef v Bonello* (XXIII.i.200 – 10/07/1916): Plaintiffs had registered a TM consisting of a picture of a sheep with a ribbon in December 1914. In April 1915 they sent a judicial letter to the defendant alleging that he was using a confusingly similar mark. The defendant rebutted this allegation and argued that although the plaintiff had registered the mark, defendant enjoyed prior use. The court had to determine whether it was the registered TM or the prior user who had the better right and there were a number of problems because under the procedure under the IPPO the defendant did not object to plaintiff's TM application. The Court decided that registration is there to confirm ownership rights and not to create them (which is wrong in the sense that registration creates ownership rights of marks with no prior use). The court sided in favour of the prior user, quoting English jurists and stating that the fact that the defendant did not oppose the application did not mean that he lost his rights of ownership.
2. *Mamo noe v KPI et* (Comm. 03/12/1986): Plaintiffs were the Italian clothing brand *Stefanel* and the Maltese franchisee of said brand. Sometime before, the second defendant had registered as a TM *Stefanel.* This case was an action to cancel the registration of *Stefanel* from the register and again the Court, using *Micallef v Bonello,* sided in favour of plaintiff as the prior user, meaning registration is no guarantee of the exclusive rights of ownership.

The provisions of the TM Act confirm that the principle has not changed post-2000 (Note: The TM Act 2000 – Cap. 416 – was replaced by the TM Act 2019 – Cap. 597). Under article 6(4) *"a trademark is not to be registered or, if registered, is liable to be declared invalid where, and to the extent that:* (a) *rights to a non-registered trademark or to another sign used in the course of trade, were acquired prior to the date of application for registration of the subsequent trademark, or the date of the priority claimed for the application for registration of the subsequent trademark, and that non-registered trademark or other sign confers on its proprietor the right to prohibit the use of the subsequent trademark;* (b) *the use of the trademark may be prohibited by virtue of an earlier right, other than the rights referred to in sub-articles* (2) *and* (4)(a)*, and protected by means of:* (i) *copyright;* (ii) *registered designs;* (iii) *other rights which the Minister may prescribe by regulation".* A right to a non-registered trademark is acquired by prior use and Article 32 of the Commercial Code gives the non-registered trademark holder – if a prior user – the right to prohibit the use of the subsequent trademark. Article 16 (3) of the TM Act 2019 reads as follows:

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

Under the principle of abandonment/non-use, the right to exclusive use may be lost as a result of non-use when circumstances show that the right owner had the intention to abandon the mark/name. But *"biex ikun hemm l-abbandun bic-cessazjoni tal-uzu, hemm bzonn illi l-intenzjoni tal-abbandun tigi pruvata"* (*Sammut noe v Salamone noe* – XXXVII.iii.820, 03/03/1953). See the following cases:

- *Sclivagnotis noe v Farrugia* (XXVIII.iii.811 – 14/01/1932)
- *Caruana v Portanier noe* (XXIX.i.1185 – 07/01/1935)
- *Sammut noe v Salamone noe* (XXXVII.iii.820 – 03/03/1953)
- *Sammut noe v Trapani noe* (XXXVII.iii.916 – 20/10/1953): Both this and the above-mentioned case relate to the non-use of German trademarks during the Second World War. In the meantime, it would appear that English and Maltese companies began using these trademarks and the issue of non-use arose. Defendant pleaded that plaintiff did not use the trademark for six years and so they abandoned their rights. However, the court stated that there was no intention to abandon the trademark and so the German companies had not renounced their rights.
- *Staines noe v La Rosa noe* (XXXIV.i.396 – 13/12/1950)
- *Lucia noe v Salamone noe* (XLIV.i.308 – 22/01/1960)

The prior user loses his right to apply for the invalidity of a later registered trademark where *"[she] has acquiesced for a period of five successive years, in the use of a later trademark registered in Malta"* (Article 11(1) and (2) of the TM Act).

Unfair Competition – Article 32: Well-Known Names/Marks
A problem arises where a name or mark has a reputation in Malta but the trader who owns the well-known name or mark has no place of business in Malta and does not trade in Malta. This begs the question: *Is reputation alone, without actual trade within the jurisdiction,*

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

The Soft-Line Approach: For a number of years, the view was that reputation in Malta was sufficient for an action under article 32. In *Frendo Randon noe v Gatt noe* (App Kum 21/06/1968), *The Club Med Case,* plaintiff was the French company *Club Mediterranée* ("Club Med"), a company well-known all-over Europe in the tourism industry. It had no place of business in Malta and did not trade there. Their only activity in Malta had been two brief visits by foreign tourists booked through them. The defendant company, after trying unsuccessfully to be appointed as plaintiff's agents for Malta, then registered a company in Malta with the same name, i.e., *Club Mediterranée Ltd.* Both the Commercial Court and the Court of Appeal held for plaintiff French Company. The defendant's plea was that since Club Med did not carry-on business in Malta, it was not in competition with the defendant Maltese company and therefore article 32 was not applicable. The Court rejected this argument. It said that the name of the French plaintiff company had an international reputation and was well-known in Malta. A trademark or a trade name could have goodwill in Malta even though no business was carried on in Malta. Furthermore, since both plaintiff and defendant companies were in the tourist business they were potentially competing in the same international market. The court held that *"l-iskop u l-attivatijiet proposti mis-socjetà appellant kienu f'kompetizzjoni ma' dawk tas-socjetà appellate u diretti potenzjalment ghall-istess suq internazzjonali … Fil-kamp ta' dawk l-attivatijiet, l-isem tas-socjetà appellate jidher li kien akkwista avvjament internazzjonali … Is-sid ta' isem kummercjali* (business name) *jista' jkollu avvjament f'pajjizi anke jekk ma jkollux f'dak il-pajjiz sede kummercjali".* This approach was adopted in subsequent cases. Take, for example, *Grech noe v Mangion* (Kumm 16/11/1987), *The Body Shop Case,* wherein defendant had a shop named 'Body Shop'. At the time The Body Shop International PLC (plaintiff) was not operating in Malta. The Court held that the name 'Body Shop' was well known internationally, including in Malta, and defendant's act was in breach of article 32.

The Hard-Line Approach: Our courts shifted to the 'hard-line' approach in the Court of Appeal decision in the Tanti McDonald's case. In *Valletta noe v Tanti* (App Kum 11/03/1992), plaintiff was the US company McDonald's corporation, a company well known in the fast-food business but that the time they did not carry-on business in Malta. The defendant tanti was a Maltese trader who was using the McDonald's name and the so-called *Golden Arches* 'M' sign in his business in Malta which consisted principally in selling snacks and ice-creams from mobile kiosks and vans. The Commercial Court decided the case primarily on the same lines as the Club med case. It also held, however, that the use of the name McDonald's amounted to the use of a firm name *"capable of misleading others as to the importance of the firm"* in breach of the second limb of section 32. The Court of Appeal reversed the decision on the basis that since this was an action for unfair competition, if the plaintiff was not in competition with the defendant, because it was not trading in Malta at the time, then the action under article 32 was inapplicable. The court is quoted as saying *"il-konkorrenza necessarjament tfisser kompetizzjoni bejn tnejn fl-istess sfera ta' attivita, fl-istess contest ta' zmien u spazju.*

Jekk l-attrici mhux qed tinnegozja f'Malta kif jista' l-konvenut jikkonkorri maghha lealment jew slealment". This approach was adopted in subsequent cases. Take, for example, *Valletta noe v Muscat pro et noe* (Kumm – 22/10/1992), *The McBennies Case.* Here, plaintiff was also the US coporation McDonald's but in this case the defendant was operating a snack bar with the name *McBennies* and was using the words *'Big Mac'.* The Commercial Court decision in *The Tanti McDonald's Case* held that Tanti was also in breach of the second limb of article 32 in that by using the name *'McDonald's'* he was using a *"firm name capable of misleading others as to the real importance of the firm".* Unfortunately, this point was not discussed in the Court of Appeal judgement. In a subsequent case which concerned the use of the name *'Tesco'* on a shop in Sliema, the UK company Tesco successfully brought an action for unfair competition which the Commercial Court decided on the second limb of article 32. What has complicated the issue is the dawn of e-commerce which allows a corporation to sell its products to Maltese consumers without explicitly having a foothold in the Maltese marketplace.

With regards to registered trademarks, one ought to contrast the position taken by our courts in connection with the registration of trademarks under the Industrial Property Protection Ordinance (replaced by the Trademarks Act). The registration of a trademark, which is identical or similar to a trademark which is well-known in Malta, is invalid even though the proprietor of the well-known trademark has no trade or business in Malta. In *Mamo noe v Kontrollur Proprieta Industrijali* (App Kumm – 16/11/1992), *The Stefanel Case,* which relates to the cancellation of the registration of the well-known mark *'Stefanel',* which a Maltese trader had managed to register in his name without the knowledge of the Italian company. The Court said that the principles underpinning trademark registration were different from those which applied to article 32 sections. The fact was that the Maltese trader was not the owner of the name and registration of trademarks should not be reduced to a race in which the first person to register acquired the rights of the trademark. In *Valletta noe v Muscat Scerri noe* (App Kum 15/02/1995 – 697/87), *The Muppets Case,* the Court of Appeal upheld the opposition filed by Henson Associates, creators of the well-known TV puppets *'The Muppets',* which also owned trademark rights in the name in several countries around the world against an application by a Maltese trader to register *'Muppets'* as a trademark for its food products. The Court reaffirmed the distinction between article 32 actions for unfair competition and the right to register a trademark and recognized the international reputation of a well-known brand and its commercial value.
Until the year 2000 then, it seems that well-known marks had no protection in Malta unless they were registered. The position changed in the year 2000 with the coming into force of the Trademarks Act (Cap. 416 of the Laws of Malta), replaced in 2019 by the Trademarks Act (Cap. 597 of the Laws of Malta). Although the Trademarks Act deals principally with the registration of trademarks and the protection of registered trademarks, it does contain provisions which provide some protection to well-known marks, even though they are not registered.

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

Furthermore, under article 6(1) a trademark shall not be registered or, if registered, shall be liable to be declared invalid where it is identical or similar to an earlier trademark and, under article 6(2) *'earlier trademarks'* includes *"*(d) *trademarks which, on the date of application for registration of the trademark or, where appropriate, of the priority claimed in respect of the application for registration of the trademark, are well known in Malta, in the sense in which the words "well-known" are used in Article 6bis of the Paris Convention"*. Article 126(2) of that same Act states that *"subject to the provisions of article 11, the proprietor of a trademark which is entitled to protection under the Paris Convention as a well-known trademark is entitled to restrain by injunction the use in Malta of a trademark which, or the essential part of which, is identical or similar to his mark, in relation to identical or similar goods or services, where the use is likely to cause confusion".* Furthermore, article 126(3) goes on to state that *"nothing in sub-article* (2) *shall affect the continuation of any* bona fide *use of a trademark begun before the coming into force of the Trademarks Act".*

Unfair Competition – Article 32: Distinctiveness, Unofficial Mark, Get-up, and Use of Own Name

Distinctiveness is an essential function of a name/mark as it is a *badge of origin* that enables the consumer to distinguish goods or services of a particular trader from those of others. Distinctiveness is acquired by use in the market but there is no specified time period with the Court, in *Chircop v Galea,* saying *"ma hemmx zmien specjali preskritt mill-ligi biex ikun hemm il-protezzjoni … jiggifieri wara kemm zmien l-uzu taghha jaghti esklusività".* Certain names or marks may not easily acquire distinctiveness. Names/marks that are descriptive generally lack distinctiveness (take, for example, words in common use, words that describe the goods, and geographically descriptive words). With regards to a secondary meaning, *prima facie* non-distinctive names/marks (e.g., descriptive ones) can acquire a secondary signification whereby they acquire the essential function i.e., a badge of origin that distinguishes those products/services from others. See:

- *Colombos v Lee* (XXVIII.iii.1057 – 14/02/1933)
- *Chircop et v Galea noe* (XXXIX.i.401 – 27/06/1955): *"Xejn ma jfisser li l-kliem* 'Florentine Art' *huma, kif jinghad* 'geographically descriptive' *ghaliex anki isem geografiku jista' jakkwista* 'distinctiveness' *billi jakkwista* 'secondary meaning' *fis-sens li kif gara f'dan il-kaz parti sostanzjali tal-pubbliku, fl-idea taghha, tassocja l-isem geografiku man-negozju ta' negozjant partikolari."*
- *Spiteri v Cachia* (Civ 491/2002 – 10/06/2004)

Article 32 protects a name by which a product/service is popularly identified by the public even though that popular name is not the actual trademark. See:

- *Mifsud noe v Nicosia noe* (XXV.i.592 – 11/06/1923), *The 'Tal-Mara' Case*: *"la ditta attrice ha acquistato nel commercio locale del suo prodotto, oltreche la proprieta esclusiva del marchio da esso usato … anche la proprietà esclusiva del nome commerciale col quale il suo prodotto e' richiesto dai commerciante ed e' offerto dai rivenditori".*
- *Mizzi noe v Frendo noe* (XXVIII.i.726 – 30/10/1933), *The 'Tal-Baby' Case.*

Article 32 also protects *'get-up'* or *'trade dress'* e.g., Shape or colour or design of package or product can acquire distinctiveness and act as a badge of origin (essential function):

- *Hammer v Gatt* (XXIV.iii.245 – 07/10/1920): Here, plaintiff was the proprietor of a well-known tea producer which had a distinctive wrapping with a red seal with the words G.I.P. on it. The defendants applied to register a trademark with similar packaging and the Court on this basis referred to the notion of unfair competition when saying *"it would also be a case of unfair competition, the placing on the market of products with packages in a shape or colour that could be easily confused with packaging of a similar product marketed by a different firm"*.
- *Lee v Galea* (XXVIII.iii.1197 – 20/07/1933)
- *Portelli v Axisa* (XXVIII.iii.1318 – 19/04/1934)
- *Sammut noe v Mizzi pro et noe* (XLIV.iii.750 – 28/01/1960)
- *Darmanin v Busuttil* (App 22/10/1973)
- *Agius Vadala v Mizzi* (Comm 08/08/1990)
- *Macpherson Mediterranean Limited v Conquest Limited* (Civ 3298/1996 – 11/01/2020)

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

- *Cachia v Azzopardi* (V.iii.629 – 4/11/1971)
- *Fenech v Formosa* (XXIV.iii.750 – 25/06/1919)
- *Dimech v Chretien* (Privy Council 16/10/1930; App XXVII.i.696 – 07/05/1928)
- *Grech noe v Galea* (Comm 05/06/1980): Here plaintiff was a company called *Ed T. Agius & Co. Ltd.* The defendants also represented a company, called E. Agius & Co. Ltd. The plaintiff company initially was a firm with the name of E.T. Agius & Co. In 1907 it became E.T. Agius & Co. Malta Ltd, and 1939 it applied for a commission agent's license. The defendants' business was also an old one and, although the name was similar, there did not appear to be a problem. In 1972 Emmanuel Agius, owner of the defendant's firm E. Agius, passed away and his spouse, who did not want to run the business, sold it as a going concern to her granddaughters' husbands. As soon as they acquired the business, they set up a company with the name E. Agius & Co. Ltd and traded in the same business with this new company. Plaintiffs sued for unfair competition, and they lost on two grounds: firstly, they weren't in the same line of business, and secondly the Court also argued that even though the defendants were not using their own name, nonetheless because they were successors in title to Emmanuel Agius then they inherited the right to use that name and the same principle applies to the successor in title to the business.

Unfair Competition – Article 32: Capacity to Create Confusion

Article 32 states that *"traders shall not make use of any name, mark, or distinctive device capable of creating confusion with any other name, mark, or distinctive device lawfully used by others, even though such other name, mark, or distinctive device be not registered in terms of the Trademarks Act, nor may they make use of any firm name or fictitious name capable of misleading others as to the real importance of the firm".* In the second requisite of the first limb the defendant makes use of a *"name, mark, or distinctive device capable of creating confusion"* with that *"lawfully used"* by plaintiff. The capacity to create confusion involves the following issues:

- Comparison of names/marks,

- Is proof of actual confusion necessary?
- Is it necessary for the goods/business of plaintiff and defendant to be identical or at least similar? (Common field of activity).

Confusion – Comparison of Marks

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

1. **The assessment is to be made from the point of view of the average customer:** Who the 'average consumer' is depends on the type of product or service. For instance, a bottle of lemonade could be purchased by anyone while a large photocopier would be normally purchased by a business firm or professional office. The average consumer carries out a normal examination of the product – neither very careful nor very careless. An average consumer is neither unusually intelligent nor unusually stupid. In *Cutajar v Caruana* (App 1998) the Court held that the mark COUNTY CASUALS was not capable of creating confusion with the mark COUNTY LEATHER, the Court referred to the *"average man in the street ta' intelligenza ordinarja li jara, jifhem, u kapaci jiddistingwi bejn kelma u ohra, bejn disinn u iehor, bejn hoss u iehor"* and said that *"il-protezzjoni kontra l-konkorrenza sleali ma tkoprix la kazijiet ta' injoranza akuta u lanqas ta' disattenzjoni jew negligenza grassa".* The following are pertinent Maltese judgements:
   a. *Hammer v Gatt* (1920) refers to *"acquirenti di media intelligenza",*
   b. *Said v Ellul* (1954) says that the average consumer has *"intelligenza u diligenza ordinarja",*
   c. *Agius Vadala v Mizzi* (1990) refers to the *"xerrej komuni",*
   d. *Portanier v Abela* (1950) states that the law is not there to protect *"ignorant or careless people",*
   e. *Vassallo v Caruana* (1950), quoting an English case, states that the law is not intended to protect *"unusually stupid people, fools, or idiots".*

   EU law judgements state that an average consumer *"is deemed to be reasonably well informed and reasonably observant and circumspect"*. See:
   a. *Sabel v Puma* (1997)
   b. *Canon v MGM* (1998)
   c. *Lloyd Schuhfabrik v Klijsen* (1999)
   d. *Marca Mode v Adidas* (2000).

2. **The 'idea' of the mark is to be registered:** *"Two marks when placed side by side may exhibit many and various differences yet the main idea left on the mind by both may be the same"* (Kerly). In *Sansone v Cassar Torreggiani* (App 2005) the Court decided the case on the basis of *'l-idea dominanti li tibqa' f'mohh il-konsumatur ordinarju'.* In this case, the Court held that the word *"CHOCOTELLA"* was not confusingly similar to the mark *"NUTELLA",* but the confusing similarity arose in the fact that the *"idea dominant"* conveyed by the objects depicted in the Chocotella label was similar to that conveyed by the Nutella label. In *Valletta noe v Busuttil et* (App 2001), the Court referred to *'l-idea dominanti taz-zewg marki indipendentement mid-dettalji li jkunu jakkumpanjaw dik l-idea dominanti'.* On the basis of this principle the Court held that the mark NUTINA was confusingly similar to the mark NUTELLA. In *Page v Tanti Bellotti* (1905) this principle was applied to a label of candles which depicted a sailing vessel. See the following cases:
    a. *Pulis noe v Tabone et* (XXV.i.287 – 27/12/1922)
    b. *Mifsud noe v Nicosia noe* (XXV.i.592 – 11/06/1923) – *'Tal-Mara' Case*
    c. *Salamone noe v Borg noe* (XXXVI.iii.616 – 05/02/1952)

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

3. **The mark must be seen as a whole:** *"The trademark is a whole – the whole picture on each has to be considered"* (Kerly). This principle is particularly relevant where the similarity is in get-up (i.e., the way the product is "dressed") rather than a word mark. Examples are the cases relating to the packaging of Knorr and Lombardi products:
    a. *Sammut noe v Mizzi noe* (Comm 1960)
    b. *Agius Vadala v Mizzi* (Comm 1990)
    c. *Vella Zarb noe v Portelli pro et noe* (XXIX.iii.288 – 30/06/1936)
    d. *Micallef et noe vs Camilleri et noe* (778/90DS – 23/02/2001)

    When considering the mark as a whole, it is also important to take into account not only visual but also aural similarity – *"the ear as well as the eye".* See:
    a. *Valletta noe v Busuttil et* (App 2001) where the Court held that the mark NUTINA was confusingly similar to the mark NUTELLA,
    b. *Farrugia v Bonaci* (Comm) where the Court held that the mark CHIN – 8 was confusingly similar to KINNIE since CHIN-8 could be pronounced as 'kin-ejt',
    c. *Vassallo v Caruana* (Comm 1950) where the Court held that the mark LOLA COLA was confusingly similar to COCO COLA,
    d. *Miceli Farrugia noe v Vassallo noe* (L.ii.654 – 05/12/1966).

    EU Law judgements state that *"the average consumer normally perceieves the mark as a whole and does not proceed to analyse its various details".* See:
    a. *Sabel v Puma* (1997)
    b. *Lloyd Schuhfabrik v Klijsen* (1999)

4. **The average consumer has imperfect recollection:** *"Marks are remembered rather by general impressions or by some significant detail than by any photographic recollection of the whole"* (Kerly). In *Sansone v Cassar Torreggiani* (App 2005) the Court held that the word CHOCOTELLA was not confusingly similar to the mark NUTELLA, but the confusing similarity arose from the similarity of the labels. EU Law judgements states that the average consumer *"has to place his trust in the imperfect image of them he has retained in his mind".* See:
    a. *Sabel v Puma* (1997)
    b. *Canon v MGM* (1998)
    c. *Lloyd Schuhfabrik v Klijsen* (1999)
    d. *Marca Mode v Adidas* (2000).

5. **Marks are to be compared as they would be in actual use.**

6. **All circumstances of the trade to be considered:** E.g., Nature of market, other similar marks, usages, etc. See:
    a. *Vassallo v Caruana* (XXXIV.iii.813 – 07/06/1950)
    b. *Sammut v Mizzi* (XLIV.iii.750 – 28/01/1960)

Proof of actual confusion is not necessary for an action to be successful. In *Vadala v Mizzi* (Comm 09/08/199) the Commercial Court stated that *"l-azzjoni kontra l-konkorrenza sleali hija bazata fuq il-potenzjalità u mhux l-attwalità tad-dannu. Hija essenzjalment azzjoni preventive ghalkemm ghandha wkoll aspett punittiv".* See *Lee v Galea* (XXVIII.iii.1197 – 20/07/1933). However, in borderline cases, proof of actual confusion might tip the scales. See:

- *Montanaro Gauci noe v Cassar* (XLVIII.i.544 – 20/01/1964)
- *Tanti Palmier v Caruana Curran noe et* (XLIX.iii.1096 – 14/01/1965).

It is often considered a requisite for the goods/business of the two businesses with confusingly similar names to be in an identical or similar common field of activity, as noted in:

a. *Frendo Randon v Gatt et*
b. *Valletta noe v Tanti*
c. *Grech noe v Galea* (Comm 05/06/1980)
d. *Muscat Xerri noe v Bonnici* (App 08/07/1980).

However, this is criticisied as it fails to take into account marks with widespread reputations and the notion of mark-dilution.

Unfair Competition – Articles 33, 34(2), 35, and 36
The False Indication of Origin
Article 33 states that *"traders shall not make use of any false indication of origin of the goods provided that a designation which according to commercial usage is considered as a common designation, shall not be deemed to be a false indication".* For case-law on the false indication that goods were made in a country which enjoys a reputation for particular goods see *Barbara v Barbara* (XVIII.i.758 – 30/06/1933) and *Vella Zarb v Portelli* (XXIX.iii.288 – 30/06/1936). The false indication of origin convers geographical indications and the designations of origin.

Council Regulation (EU) No. 1151/2012 of 21st November 2012 on quality schemes for agricultural products and foodstuff speaks of:

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

The English *Erven Warninck B.V. V.J. Townsends & Sons (Hull) Ltd* (1979 – FSR396) case the Court considered where the false indication of origin covers products of a particular character or composition, but which are not linked to a particular locality (such as Advocaat).

Article 34(2) states that *"moreover, they shall not make us of honours, patents, medals, prizes, or other distinctions to which they have no claim or which have been obtained for some other branch of business or trade".* The use of deceitful means gives an unfair advantage over competitors who trade honestly and does not prohibit exaggerated praise of one's own goods or business.

Article 35 deals with the subornation of employees and states that: *"traders shall not suborn persons employed in the trade or business carried on by a competitor for the object of knowing or exploiting his customers".* Employees, especially key employees, over time acquire confidential commercial information, e.g., about know-how, consumers, and suppliers. 'Suborn' implies bribery or corruption but the law does not specify the means. It could be by the promise of anything of value – need not be money but could be the offer of employment.

Article 36 deals with certificates of honesty and competency and states that *"a trader shall not, in the exercise of his trade or business, issue certificates of honesty or competency contrary to the facts as known to him and capable of imposing upon the good faith of others".* Although the trader's intention may not be reprehensible, his certificates are capable of misleading others. No trader is forced to issue a certificate.

Unfair Competition – Articles 34(1)
Spreading of News Prejudicial to Traders

Article 34(1) states that *"traders shall not, for the purpose of competition, spread news capable of prejudicing the business or trade carried on by other persons".* Article 16(1) (Trade Libel) of the Media and Defamation Act (Cap. 579 of the Laws of Malta), states that: "(1) *Whosoever shall publish any statement which he knows or with due diligence could have known to be false and which is likely to damage any business concern or any other property shall be liable to pay to the injured party, in addition to the damages which may be due under any law for the time being in force in respect of any actual loss or injury, an amount not exceeding eleven thousand, six hundred and forty euro (€11,640) to be fixed by the Court.* (2) *A company, a foundation, a co-operative and any other moral person may sue and be sued for defamation".* That same act defines *publication* as *"any act whereby any written media is or may be communicated to or brought to the knowledge of any person or whereby words or* *visual images are disseminated"* and *written media* as *"any writing or print made by any device and includes any written media content distributed by any means both if distributed through electronic online platforms and if distributed by any means offline without the use of electronic platforms and any other means whereby words or visual images may be heard or perceived or reproduced".*

Article 34(1) contains some essential requisites to ground an action under said article:
- Spreading of news
  - The spreading of the news need not by widespread, but a simple comment made in conversation, or a single letter may count.
  - The news need not be false.
- Capable of prejudicing the trade or business of another trader.
- For the purpose of competition (intentional element) (see *Alfred Gera & Sons Limited v Casingena et* (287/2003; PA 08/10/2004) for an overview of the elements).

'News' covers a varierty of means: word of mouth, circulars, letters, adverts, etc. 'Spreading' need not be widespread'. One letter to one person can be enough if it is capable of causing prejudice. See:
- *Distefano v Gauci* (XXVIII.iii.712 – 16/04/1931),
- *Falzon v Nani* (XXXVII.iii.844 – 27/03/1953) *"in-numru zghir ta' persuni li maghhom tigi mxerrda n-notizja ma jnehhix li n-notizja giet mxerrda…",*
- *Mizzi v Vella*: Here the defendants were a group of companies, now known as the Mizzi Group. At the time they were the distrubutors of an English company called Roots which sold a number of English car brands. The Hillman brand had begun producing a popular car called the Minx. When the defendants began selling this vehicle, they fixed a sticker to the windscreen which read as follows: *"As recommended, the engine of this car has been designed and tuned to run on Shell Super. Should a lower grade fuel be used, re-tuning of the engine would be essential".* This case was filed by the agent of the Esso motor fuel company. All petrol distributors sold fuel in grades at the time, and they filed this case in court arguing that this practice was in breach of article 34(1). A number of issues arose and at one point in time the question of damages arose where the Court argued that *"hija bizzejjed skond il-ligi l-possibilità ta' din il-hsara ghall-konkorrenza illecita"*.

Denigration is the most common form, but the article is not limited to denigration. See:
- *Nani v Arrigo* (XXXIV.iii.841 – 20/07/1950)
- *Vella v Guillaumier* (Civ 14/94 – 27/02/1997)
- *Gauci Maistre v Mizzi* (Civ 1480/1991 – 30/01/2003)
- *Anthony Caruana & Sons Limited v Caruana* (App 573/2005 – 28/02/2014)

The truth or falsity of the news is irrelevant except for penalty under article 37. See:
- *Grech v Micallef* (XXIX.i.1487 – 26/10/1937)
- *Curmi v Mizzi* (XLI.iii.1244 – 18/10/1957)
- *Vincenti Kind v Manche* (XLI.iii.1259 – 10/12/1957)

Capacity to create prejudice not the creation of actual prejudice. See:
- *Distefano v Gauci*

- *Nani v Arrigo*
- *Falzon v Nani*
- *Curmi v Mizzi* (*"hija bizzejjed skond il-ligi l-possibilità ta' din il-hsara ghall-konkorrenza illecita"*)
- *Scicluna noe v Cachia noe* (Comm – 11/03/1987): Both companies sold windsurfers and were already established in the market. The defendant was already marketing in Malta two brands of windsurfers. The Maltese importer of another brand shut down and his brand was available. The owners of both companies wrote to the Tornado brand of windsurfers, competing for the distributorship. Plaintiff, when giving information to the owner of this brand only told the owner that he marketed one brand which was not a popular one, hiding the fact that he also supplied to other popular ones, whilst the defendant was truthful. When the defendant found this out he informed the foreign supplier that the former supplier was untruthful. Plaintiff alleged that this was the selling of news capable of causing prejudice and that this was done for the purpose of getting an advantage. The court ruled that neither had the brand but were instead competing for it, and so his informing of the supplier was to correct the misinformation being supplied, thus it could not cause damage.

The capacity to create prejudice might arise even if plaintiff is not actually named in the 'news'. See:

- *Grech v Micallef* (XXIX.i.1487 – 26/10/1937)
- *Distefano v Gauci*

The news must be spread for the purposes of competition and not any other purpose e.g., out of vindictiveness. It is not necessary to prove intention/purpose of causing damage. However, the proving of actual damage caused is necessary if plaintiff were to sue for he recovery of damages caused, as opposed to suing for the imposition of a penalty. The question of fact deduced from the circumstances. An act done for the purpose of competition is any act which is done for the purpose of promoting a trader's interests in the market. It is not limited to acts done for the purpose of undermining clientele or goodwill of others (see *Mizzi v Vella*). Furthermore, see:

- *Conti v Borg* (XXXIII.i.636 – 15/03/1948)
- *Grech v Micallef*
- *Curmi v Mizzi*
- *Vincenti Kind v Manche*
- *Mizzi v Vella*: This case concerned the sale of household appliances, a number of brands of which the Mizzi Group imported. Vella, representative of the defendant company had been, a short while before this case started, a manager of the household goods division of the Mizzi Group before leaving to approach dealers to sell a particular brand of appliances himself. Mizzi retaliated by sending a circular to resellers stating that if they stocked those goods sold by Vella, they would stop supplying them with Hoover brand vacuum cleaners and Kenwood brand food mixers. These resellers did not want to lose the possibility of selling Kenwood and Hoover products and this was affecting the defendant who, in retaliation, wrote two letters to Kenwood and Hoover themselves alleging, *inter alia,* that one of the directors of the Mizzi Group was acting childishly and vindictively. Therefore, Mizzi sued for unfair competition under this provision because of these two letters that the defendant had

sent. The first court decided in favour of the defendant on the grounds that the acts prohibited under law are those with the purpose of reducing or negatively effecting the goodwill of a competitor, or to poach their clients. The Commercial Court seems to be interpreting in this restrictive manner. The Court of Appeal disagreed and stated that *"an act done for the purpose of competition is any act which is done for the purpose of promoting a trader's interests in the market. It is not limited to acts done for the purpose of undermining clientele or goodwill of others".*

Self-defence involves acts done to prevent damage. See:

- *Grech v Micallef*
- *Mizzi v Vella*: One of the pleas raised by Vella was that the letters were written in self-defence to protect his business interests.

Unfair Competition – Articles 32A and 32B (Misleading and Comparative Advertising

Article 32B(1) states that *"traders shall not engage in any form of misleading advertising"* whilst article 32A states that *"traders shall not engage in any comparative advertising"*, with the latter allowing comparative advertising provided it meets the conditions set out in article 32A(2). These provisions originate in the Misleading and Comparative Advertising Directive (European Parliament and of the Council - December 2006); codified version Directive 2006/114/EC of the of as amended particularly by of 12 Directive 84/450/EEC Directive 97/55/EC which added the provisions on comparative advertising to those on misleading advertising. Article 1 of the Misleading and Comparative Advertising Directive expressly states its intention as *"to protect traders".* Directive 84/450/EEC as amended by Directive 97/55/EC also protected consumers and the general public but the purpose was changed to cover only business-to-business (B2B) relations when the Unfair Commercial Practices Directive – Directive 2005/29/EC – was implemented, concerned business-to-consumer (B2C) relations.

Originally, these provisions were contained in articles 48, 49, and 50 of the Consumer Affairs Act (see *World Marketing Services v Crosscrafts* – Decree 415/01 – 11/04/2001). They were moved to the Commercial Code as part of the unfair competition sections by virtue of Act II of 2008 which also transposed the provisions of the Unfair Commercial Practices Directive in the Consumer Affairs Act (see *Green Dot Malta Limited v Green.Mt Limited* – PA 903/2008 – 27/05/2010).

Interpretation

The terms 'misleading advertising' and 'comparative advertising' were both interpreted in the CJEU cases of *Pippig v. Hartlauer* (C-44/01 – 08/04/2003) and *Carrefour v. ITM* (C-562 – 08/02/2017):

- Misleading advertising: the Directive carried out *"a minimal harmonisation of national rules [and, therefore] … allows Member States to apply stricter national provisions in that area …"*
- Comparative advertising: the Directive *"carried out an exhaustive harmonisation of the conditions under which comparative advertising in Member States might be lawful. Such a harmonisation implies by its nature that the lawfulness of comparative advertising throughout the Community is to be assessed solely in the light of the criteria laid down by the Community legislature. Therefore, stricter national provisions on protection against misleading advertising cannot be applied to comparative advertising as regards the form and content of the comparison".*

However, a problem arose with regard to the definition of a trader, with conflicting definitions being found in the Commercial Code and the Directive. The former defines a trader in article 4 as *“any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership”,* whilst the Directive in article 2 defined the trader as *“any natural or legal person who is acting for purposes relating to his trade, craft, business, or profession and anyone in the name of or on behalf of a trader”.*

Defining ‘Advertising’

Article 36A of the Commercial Code reads as follows: *“for the purposes of this subtitle, "advertising" means any form of representation, including a catalogue, a circular and a price list, about a trade, business, craft or profession in order to promote the supply or transfer of goods or services, immovable property, rights or obligations and "advertisement" shall be construed accordingly”.*

This definition contains the following elements:

- The making of a representation in any form (covers all kinds of communication not only visual or graphic, but also oral representation).
- That the advertising be done in connection with a trade, business, craft, or profession.
- That the advertising be done to promote the supply or transfer of goods or services, immovable property, rights, or obligations.

Misleading Advertising

Article 32B of the Commercial Code states that:

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

or intellectual property rights or any awards and distinctions made to him.

The elements of this offence are twofold:

I. It deceives or is likely to deceive [the average consumer]: See:
   a. *Estée Lauder v. Lancaster Group* (C220/98) (16/09/1999): *"It is necessary to take into account the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect".*
   b. *Kram Trading v. Oleg Barkov* (PA 390/2014) (28/05/2015)
II. By reason of its deceptive nature, it is ether likely to affect the economic behaviour of the average consumer, or injurers or is likely to injure a competitor.

Article 32B(3) describes those factors to be taken into account when determining whether an advertisement is misleading or not. See the following judgements:

- Malta:
  - *Green Dot Malta Limited v Green.Mt Limited* (PA 903/2008 – 27/05/2010)
  - *Beer House Limited v. Max Diner Limited* (PA 1038/2011) (27/01/2014)
  - *Kram Trading v. Oleg Barkov* (PA 390/2014) (28/05/2015)
- EU:
  - *Estée Lauder v. Lancaster Group* (C220/98) (16/09/1999)
  - *Lidl v. Vierzon* (C-159/09) (18/11/2010)

Article 33 (the false indication of origin) has not been rendered superfluous as can be noted by article 32B(3)(a) which states that *"in determining whether an advertisement is misleading account shall be taken of all its features, and in particular of any information it may have about the characteristics of goods or services, including their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services".*

Article 34(2) (the use of honours) has not been rendered superfluous as can be noted by article 32B(3)(c) which states that *"in determining whether an advertisement is misleading account shall be taken of all its features, and in particular of any information it may have about the nature, attributes and rights of the advertiser, including his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or any awards and distinctions made to him".*

Comparative Advertising

Article 32A reads as follows:

> **32A.** (1) Traders shall not engage in any comparative advertising.
>
> (2) Notwithstanding the preceding sub-article, comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:
>
> (a) it is not misleading within the meaning of article 32B or within the meaning of articles 51C and 51D of the Consumer Affairs Act;

(b) it compares goods or services meeting the same needs or intended for the same purpose;
(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
(d) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;
(e) for products with designation of origin, it relates in each case to products with the same designation;
(f) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
(g) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;
(h) it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor.

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

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

Comparative advertising was defined by the CJEU when deciding the case of *Toshiba Europe v. Katun Germany* (C112/99) (25/10/2001) which stated that *"in order for there to be comparative advertising within the meaning of [the Directive], it is therefore sufficient for a representation to be made in any form which refers, even by implication, to a competitor or to the goods or services which he offers. It does not matter that there is a comparison between the goods and services offered by the advertiser and those of a competitor".*

The test is whether the advert *"identifies explicitly or by implication a competitor or goods or services offered by a competitor".* A catalogue with a list of spare parts and consumable compatible with Toshiba photocopiers listed according to particular model with columns indicating Toshiba's OEM number and Katun product number amounted to comparative advertising.

The general principle of comparative advertising, as established by the CJEU in the case of *Carrefour v. ITM* (C-562/15) (08/02/2017), is as follows: *"since comparative advertising* *contributes to demonstrating, in an objective manner, the advantages of various comparable goods and thus to stimulating competition between suppliers of goods and services to the consumer's advantage, the conditions to be met for such advertising must be interpreted in the sense most favourable to that advertising, while ensuring at the same time that comparative advertising is not used anticompetitively and unfairly or in a manner which affects adversely the interests of consumers".*

Note that the spreading of news provision under article 34(1) does not require the news to be false. However, if the comparative advertising is lawful because it complies with the requirements of article 32A(2), it would not be an act of unfair competition despite article 34(1). See the supremacy of EU Law under the European Union Act (Cap. 460) and the notion of *lex posterioris.*

Maltese Case-Law
See:

- *World Marketing Services v. Crosscrafts* (Decree 415/01) (11/04/2011),
- *Kram Trading v. Oleg Barkov* (PA 390/2014) (28/05/2015): *"An objective test is taken … by reference to the reasonable reader of the advertisement"*; *"the general public is taken to know the ways of advertisers and to expect hyperbole"*; *"they will judge the advertisement as a whole. As a result, dishonesty will only be found when there is a significant misleading in the advertisement".*

CJEU Case-Law
In the *Lidl v. Vierzon* case (C-159/09) (18/11/2010) the matter concerned price comparison of a list of products (mainly foodstuffs) from a Vierzon and Lidl store respectively. The Court considered three conditions for the legality of comparative advertising, i.e., articles 4(b), (a), and (c) of the Directive:

- Article 4(b) (comparison of goods or services meetings the same needs or intended for the same purpose): The test is whether there is a sufficient degree of interchangeability. Food products are not excluded simply by virtue of the fact that they differ with respect to the preferences of consumers based on place of production, ingredients, etc.
- Article 4(a) (not misleading): The Court must take into account:
  - Perception of the average consumer,
  - All relevant factors including any omission that could deceive. In this case:
    - If a significant number of average consumers would mistakenly believe that the selection of goods is representative of general level of prices.
    - If products selected were objectively different in a way that could affect buyer's choices e.g., omission of brand name or other features if omitted could be misleading.
- Article 4(c) (objective comparison of one or more features): The Court considered the requirement that the features compared must be verifiable, stating that *"for the prices of the goods comprising two selections of products to be verifiable, it is a necessary precondition that the goods whose prices have been thus compared must be capable of being individually and specifically identified on the basis of information contained in the advertisement"* (para. 60).

In the case of *Carrefour v. ITM* (C-562/15) (08/02/2017) the Court stated that *"Article 4(a) and (c) of Directive 2006/114, read in conjunction with Article 7(1) to (3) of Directive 2005/29, must be interpreted as meaning that advertising, such as that at issue in the main proceedings, which compares the prices of products sold in shops having different sizes or formats, where those shops are part of retail chains each of which includes a range of shops having different sizes or formats and where the advertiser compares the prices charged in shops having larger sizes or formats in its retail chain with those displayed in shops with smaller sizes or formats in the retail chains of competitors, is liable to be unlawful, within the meaning of Article 4(a) and (c) of Directive 2006/114, unless consumers are informed clearly and in the advertisement itself that the comparison was made between the prices charged in shops in the advertiser's retail chain having larger sizes or formats and those indicated in the shops of competing retail chains having smaller sizes or formats".*

Title II *Of the Duties of Traders*
Sub-title I *Of Trade Books*
There are three main duties of traders: to keep within the limits of fair competition, to keep trade books, and to publish marriage contracts (when the trader exercises act of trade, he is given credit and although to trade with debt on the basis of their trust. If the trader wants to cheat those that trusted him, he might do a marriage contract between him and his wife, place the assets under his wife's name and in the event of his business failing would have no assets to his name that may be recovered by injured creditors. Meaning if the spouse's position is guarded by a marriage contract potential creditors have the right to know that such a contract is in place). Bear in mind that a trader can be both the physical trader as well as a commercial partnership.

Trade books are those where the trader keeps a written account of transactions, and it is important they be kept for three main reasons:

1. Trade books constitute evidence of their content in terms of the law, and they are admissible as evidence in court proceedings, and their content, unless rebutted, constitutes *prima facie* evidence.
2. Trade books must also be kept in the interest of third parties, those people who deal with the trader and extend said trader credit for his business to flourish. To that end, they have the right to know how the money they entrust to the debtor is being utilised, to ensure that the trader is not siphoning off funds from the business.
3. Trade books must be kept in the interests of society at large. If the trader is no longer in a position to pay his debts and he suspends their payment, the trader has to file an application in court and declare himself bankrupt and if he does so society at large has an interest to know whether that bankruptcy is a genuine one or a fraudulent one and it would know whether there has been any wrongdoing on the part of the trader by looking at his trade books.

Article 13 states that every trader has to keep five type of trade books with no exception (except for companies):

(a) a waste-book;
(b) a journal;
(c) a cash-book;
(d) an inventory-book;

(e) a ledger.

Article 14 notes the purpose of the waste-book and states that *"every trader shall immediately enter in the waste-book every commercial transaction which he makes, showing all the conditions or terms to which it is subject",* meaning it is essentially a rough notebook for brief notetaking of transactions. It is important because the doctrine of *a tempo vergine* notes that evidence considered immediately following the event is considered to be closer to the true version of events than evidence taken at a later point.

Article 15 notes the purpose of the journal and states that *"the journal must show day by day all the transactions concluded by the trader, his debts and credits, his negotiations, acceptances and endorsements of bills, and, generally, all that he receives or pays for any cause whatsoever; and must show month by month the sums disbursed for household expenses".* The term journal comes from the Italian word *giorne,* meaning it includes a daily record of events. on a daily basis the trader has to take note of those things included in article 15. Acceptances and endorsements of bills refers to bills of exchange and when one is issued to a trader said trader must formally accept to bind himself to the payment thereof. The bill of exchange is a document of title meaning anyone who holds it has the right to claim payment from he who accepts it. In order for the right to collect payment be transferred it must be formally endorsed first. Article 15 also notes that once a month the trader must also render an account of what monies he has taken for his personal disbursement. This shows to creditors a division between those monies used by the business and those taken for the trader's personal disbursement.

Article 16 notes the purpose of the cash book and states that *"the cash-book must show in detail, day by day, all the sums received and those paid out by the trader, compared with the journal; it must be balanced at least once a month."*

Article 17 notes the purpose of the inventory book and states that *"the trader shall make every year an inventory containing a description and valuation of his whole estate, assets and liabilities, whatever may be their nature and origin. The annual inventory shall be closed with a balance and with a statement showing the profits and losses and shall be copied out year by year in the aforesaid inventory-book."* This is what is known in the accounting world as the profit and loss account.

Article 18 notes the purpose of the ledger and states that *"the ledger shall show an accurate and up-to-date record of all transactions classified as personal and impersonal accounts and so kept as to render possible the drawing up of a true and correct picture of the state of affairs of the business or trade at any given time*." This is important for a number of reasons:

- It introduces the notion of a clear delineation between a trader's personal and impersonal accounts.
- This allows one to extract a true and fair view of the financial situation of the trader. The moment that the trade books do not give such a view they fall afoul of the law.

Article 19 caters for optional trade books that any trader can keep by stating that *"besides the books mentioned in the foregoing articles of this sub-title, traders may keep other books* *and other papers wherefrom the extent and the progress of their business shall appear in a more detailed manner".*

Article 20 refers to the duty of the trader to keep letters or correspondence received or forwarded by him by stating that *"every trader shall keep, by order of date, the original of all letters, invoices and telegrams received by him, and a copy, whether hand-written or type-written, or a press-copy, of all letters, invoices and telegrams forwarded by him".* This provision was drafted in roughly 1927 and thus makes no mention of faxes or emails but does mention telegrams.

Article 21 lays down a formality required in the keeping of trade books by stating that *"*(1) *All books which traders are required to keep, with the exception of the waste-book, shall be numbered and kept, by order of date, without blanks or marginal notes.* (2) *Whenever it shall be necessary to make any cancellation, this shall be made in such a manner as to leave the cancelled words legible.* (3) *The provisions of this article shall not apply to such books as were already in use before the first day of January nineteen hundred and twenty-eight".* The same procedures regarding the deletion of words apply for any application before the Court and any public deed published by a Notary Public.

Article 22 states that "(1) *Trade books, whether obligatory or optional, shall constitute evidence in terms of the Code of Organization and Civil Procedure.* (2) *Nevertheless, it shall not be lawful to divide the contents of such books".* In the case of *Ramel u Zrar Ltd. v Schembri & Sons Ltd* plaintiff made a claim against the defendant that it was owed 30,000. Defendant argued, amongst other things, that all that was there was paid, and that it was the duty of the plaintiff to prove that it was owed that amount, whereas plaintiff argued that for defendant to argue that they paid in the full they must prove such payment. The Court took note of the fact that Schembri & Sons Ltd did not produce its trade books whilst plaintiffs submitted theirs. In view of that fact the court held in favour of plaintiff.

Article 23 notes that *"*(1) *In the course of an action, the court may, at the instance of one of the parties or of its own motion, order the production of all correspondence touching the question at issue, and of the trade books in order to abstract therefrom such portion only as relates to the controversy".* Take, for example, a case where one party claims payment from another. A judge would normally appoint a technical expert to examine the trade books of both sides. Naturally, either party without trade books would be at a disadvantage. FIX

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

Article 25 states that *"retail traders are not bound to enter in their books the sales made for ready cash: it will be sufficient for them to enter each day the total amount of the sales made on such day"*, exempting retailers from the need to fill in their trade books after each transaction.

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

Part III Of Bankruptcy
Title I Of the Declaration of Bankruptcy
Article 477 states that *"every trader who suspends payment of his debts is in a state of bankruptcy"*.

Article 478(1) states that *"the trader or his lawful representative can, on the suspension of payments, make a declaration thereof in the Civil Court, First Hall",* meaning once the trader is bankrupt he has the option of going before the First Hall of the Civil Court to formally declare bankruptcy wherein he has an obligation to file all trade books (**article** 480) which, according to **article 494**, *"shall be open to inspection by all the parties interested, and, by permission of the judge, they may be delivered, wholly or in part, to the curators"*. If the Court declares the trader to have suffered a *bona fide* bankruptcy his debts shall be forgiven and his slate wiped clean.

Article 539 states that:

> (1) *The benefits granted by law in favour of bankrupts shall not apply in the case of fraudulent bankruptcy.*
> (2) *A bankrupt shall be deemed to be a fraudulent bankrupt in each of the cases following:*
>
> > (a) *if he makes an untrue statement in respect of the debts owing to or from him, or in respect of his insolvency;*
> > (b) *if he has simulated any expenses or losses or if he fails to give a satisfactory explanation of the manner in which his receipts have been disposed of;*
> > (c) *if he has concealed or removed any sum of money, or any debt due to him, goods, merchandise or other movable effects;*
> > (d) *if he has made fictitious sales, transactions or donations;*
> > (e) *if he has simulated collusive debts between himself and fictitious creditors, by simulated writings or by declaring himself debtor, without consideration or cause, in any public or private act;*
> > (f) *if he has concealed or destroyed his books, documents or other papers relating to his accounts.*

In all of the above-mentioned cases the bankruptcy shall be deemed as fraudulent with all cases relating to the proper keeping of trade books.

Article 540 states that:

> *A bankrupt may in the cases following be adjudged a fraudulent bankrupt, unless he sufficiently proves that he had no intent to defraud -*
>
> > (a) *if he has not kept books or if his books do not show the true state of his assets and liabilities;*
> > (b) *if, on being lawfully summoned for examination, he fails to attend;*

(c) *if he has not aided in the making up of the inventory.*

In all three cases if the trader has proven a lack of intent to defraud the discretion is given to the court to decide whether it was in fact a fraudulent bankruptcy.

In the case of *Mamo v Barbara* the courts dealt with the issue of whether trade books could be subject to a warrant of seizure. **Article 493** explicitly states that *"if the property of the bankrupt, including his books and papers, have not already been secured upon the demand of some creditor, the curators, as soon as they have been sworn, shall apply to the judge of the Civil Court, First Hall, for the issue of a warrant of seizure. In the case of bankruptcy of a partnership en nom collectif, the warrant of seizure shall be executed not only at the principal offices of the partnership, but also at the residence of each partner".*

LLCs and Trade Books

LLCs are regulated by the Companies Act. The major obligation is that of keeping trade books and that of keeping proper accounting records. In this respect the duty imposed on LLCs emanates from two pieces of legislation: the Commercial Code itself and the Companies Act. In virtue of article 4 of the Commercial Code an LLC is *ipso jure* considered a trader and so those obligations found in the Companies Act apply to LLCs. The Companies Act has imposed even more onerous obligations on a LLC which have superseded certain, but not all, provisions found in the commercial code. The reasoning behind the more onerous obligations imposed on LLCs owes to the fact that the liability of shareholders is limited to the capital invested in the company. Article 20 of the CC imposes an obligation on all traders to *"keep, by order of date, the original of all letters, invoices and telegrams received by him, and a copy, whether hand-written or type-written, or a press-copy, of all letters, invoices and telegrams forwarded by him".* This obligation is still applicable to LLCs. Particularly of note is article 163 of the Companies Act:

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

(a) *all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;*
(b) *the assets and liabilities of the company;*
(c) *if the company's business involves dealing in goods:*
(i) *statements of stocks held by the company at the end of each accounting period of the company;*
(ii) *all statements of stocktakings from which any such statement of stocks as is mentioned in sub- paragraph* (i) *has been or is to be prepared; and*
(iii) *except in the case of goods sold by way of ordinary retail trade, statements of all goods sold and purchased, showing the goods and the buyers and sellers in sufficient detail to enable all these to be identified.*

(2) *For the purposes of sub-article* (1), *proper accounting records shall be deemed to have been kept with respect to the matters aforesaid if such records*

> *are sufficient to show and explain the company's transactions and are such as to -*
>
> (a) *disclose with reasonable accuracy, at any time, the financial position of the company at that time; and*
> (b) *enable the directors to ensure that any balance sheet and profit and loss account prepared under this Chapter complies with the requirements of this Act.*
>
> (3) *The accounting records shall be kept at the registered office of the company or at such other place as the directors think fit, and shall be at all times open to inspection by the officers of the company:*
>
> *Provided that if accounting records are kept at a place outside Malta there shall be sent to, and kept at a place in Malta and at all times be open to the inspection of the officers of the company such accounts and returns with respect to the business dealt with in the accounting records so kept as will disclose with reasonable accuracy the financial position of that business at intervals not exceeding six months and will enable to be prepared, in accordance with this Act, the company's balance sheet and its profit and loss account.*
>
> (4) *A parent company which has a subsidiary undertaking, in relation to which the above requirements do not apply, shall take reasonable steps to secure that the subsidiary undertaking keeps such accounting records as to enable the directors of the parent company to ensure that any balance sheet and profit and loss account prepared complies with the requirements of this Act.*
>
> (5) *Notwithstanding the provisions of article 26 of the Commercial Code, the accounting records of the company shall be kept for a period of ten years:*
>
> *Provided that where the accounting records are kept in a bound or unified form, the ten years shall commence to run from the date of the last entry made therein.*
>
> (6) *If a company fails to comply with any provision of sub- articles* (1) *to* (4)*, every officer of the company who is in default shall be guilty of an offence and liable on conviction to a fine* (multa) *of not more than eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87), unless he shows that he acted diligently and that, in the circumstances in which the company's business was carried on, the default was excusable.*
>
> (7) *If a company fails to comply with the provisions of sub-article* (5)*, every officer of the company who is in default shall be liable to a penalty.*

Besides the accounts and the accounting records that have to be kept by the company in terms of article 163, every company must also keep a register of members, a register of debentures, minutes of proceedings of general meetings (those meetings with shareholders), as well as minutes of proceedings of board meetings. These minutes keep an official record of what is said during the meetings, and of the positions taken either by the shareholders or directors at that meeting. If there is litigation in the future the only point of reference is checking the minutes of the meetings. The Company Secretary is bound to keep the minutes and before the following meeting he must circulate the draft minutes to be approved in the subsequent meeting. On the agenda at the next meeting the first thing to be discussed is the approval of the previous board meetings. It is at this point when one who does not approve of the minutes can ask for an amendment which must be voted upon apart from the minutes themselves.

Article 167(1) of the Companies Act states that *"the directors of every company shall prepare for each accounting period individual accounts comprising the balance sheet as at the last day of the accounting period to which they refer, the profit and loss account for that period, the notes to the accounts and any other financial statements and other information which may be required by generally accepted accounting principles and practice. These documents shall constitute a composite whole. The name, registration number, legal form and registered office address of the company and where appropriate, the fact that the company is being wound up shall be indicated in these accounts".* Article 167(3) brings out the importance of the accounts giving a true and fair view of the company's financial situation when saying *"the individual accounts shall give a true and fair view of the undertaking's assets, liabilities, financial position and profit or loss. Where the application of this Act would not be sufficient to give a true and fair view of the undertaking's assets, liabilities, financial position and profit or loss, such additional information as is necessary to comply with that requirement shall be given in the notes to the financial statements".* Article 167(4) builds on this point by stating that *"where the application of the provisions of this Act would not be sufficient to give a true and fair view within the meaning of sub-article* (3)*, additional information shall be given".* When referring to a true and fair view bear in mind the oath one takes before testifying to state *'the truth, the whole truth, and nothing but the truth'.*

Special undertakings have special rules that regulate them. Article 168 allows for such special undertakings to have their accounts drawn up in a different manner than that which is followed by the typical business.

Article 170: In the case of a group of companies, *"if at the end of an accounting period a company is a parent company the directors shall, as well as preparing the individual accounts for that company, also prepare consolidated accounts".*

Once the accounts are prepared, the directors have to approve of said accounts, in accordance with article 176(1). Said article stipulates that *"the balance sheet … be dated and signed on behalf of the board by two directors of the company".* This essentially hands the director of the company a veto over the company's affairs. Article 176(2) goes on to stipulate that *"every copy of the balance sheet which is laid before the company in general meeting, or which is otherwise circulated, published or issued, shall state the name of the directors who signed the balance sheet on behalf of the board".* Furthermore, there exists a duty to deliver a copy to the Registrar of Companies to be published to ensure the transparency of a limited liability company. If the directors approve accounts that are not in compliance with the provisions of the Companies Act those directors become liable to a penalty under law; and if one delivers a balance sheet or accounts which are not signed by directors that too is an infringement of the law.

Article 177 stipulates the need for a director's report which shall state:

> *"the names of the persons who, at any time during the accounting period, were directors of the company, the principal activities of the company and its subsidiaries in the course of the accounting period and any significant change in those activities during such period, and a fair review of the development of the business of the company and its subsidiaries during the accounting period, and of their position at the end of that period together with a description of the principal risks and uncertainties that they face.*
>
> *The review shall be a balanced and comprehensive analysis of the development and performance of the undertaking's business and of its position, consistent with the size and complexity of the business.*
>
> *To the extent necessary for an understanding of the undertaking's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters. In providing the analysis, the directors' report shall, where appropriate, include references to, and additional explanations of, amounts reported in the annual financial statements".*

Every copy of the directors' report is laid before the general meeting and a copy is also delivered to the Registrar of Companies for publication.

Besides the directors' report there is also an auditor's report, stipulated under article 179. Article 179(1) stipulates that *"a company's auditors shall make a report to the company's members on all annual accounts of the company of which copies are to be laid before the company in general meeting during their tenure of office".* Furthermore, according to article 179(2) *"the auditors' report shall be drawn up in accordance with generally accepted auditing standards and shall state whether in the auditors' opinion the annual accounts have been properly prepared in accordance with this Act, and in particular whether a true and fair view is given".* The auditor's report must be laid before the company in general meeting and also given to the Registrar of Companies for publication. If the auditor feels that there is something wrong with the company or that he is not in a position confirm that the account provides a true and fair view, the auditor must qualify those accounts by stating why he is not in a position to confirm that the audited accounts give a true and fair view of the company's financial position (article 179(10)). This gives a qualified auditor's report which is typically a red flag. In article 179A the legislator forces the auditor to take a position as to whether the accounts give a true and fair view of the company's financial position. According to article 161 if an auditor resigns, he must make a statement saying why he is resigning and he must bring any matter which he feels should be reported to the shareholders of the company, to the shareholders of the company. Furthermore, if he feels that no such matter exists, he must say so. Audited accounts must be delivered at least fourteen days before the general meeting.

Besides the Companies Act traders and companies have other obligations towards the keeping of trade books under provisions dealing with fiscal legislation: *The Income Tax Management Act, The Value Added Tax Act,* and *The Duty on Documents and Transfers Act.* Article 19(1) of the Income Tax Management Act states that *"every person carrying on a trade, business, profession or vocation shall keep proper and sufficient records of his income and expenditure to enable his income and allowable deductions to be readily ascertained".* Article 48(1) of the Value Added Tax Act states that *"every registered taxable person established in Malta shall keep full and proper records of all transactions carried out in the course or furtherance of his economic activity"*, whilst the 11th Schedule of that same act imposes what is required to be kept for the purposes of VAT. The Duty on Documents and Transfers Act regulates the charging of stamp duty, and article 7 of that same act states that *"every document mentioned in this Act shall be preserved by the owner thereof for at least four years after the day on which duty thereon has or ought to have been paid, and any person who destroys or mislays or fails to produce any such document before the lapse of the said period shall be liable to the same penalty as if the duty had not been paid"*. Section 2 of this act defines a document *"includes a policy of insurance, a bill of sale, a notarial deed, a schedule of redemption of ground rent filed in court, and a judgment, decree or order of any court or other lawful authority whereby any immovable or any real right over an immovable is transferred".*

The Duty to Publish Marriage Contracts

This is not a duty on the trader, but a duty on the notary. With the term marriage contract, we are not referring to the actual marriage certificate of the couple, but to a marriage settlement agreement (or a pre-nup) or an agreement done during the marriage whereby the couple will have separate estates. In the past most women did not work but instead contributed a dowry. The wife's family typically wanted a hypothec on the estate of the husband to secure her dowry if the husband ever went bankrupt. These sections of the Commercial Code were originally intended to cater for this. Every marriage that is celebrated in Malta and if a couple is married abroad and settles in Malta leads to a community of acquests from the date of celebration or settlement. Property which either spouse had prior to the marriage or was donated to him or was inherited by him or her is known as paraphernal property which would remain belonging to the spouse which owns it in the case of a marriage breakdown. This idea of community of acquests is not always appreciated or desired because there may be situations where the spouses would want to have a separation of estates which can be done for a number of reasons:

- The parties may not wish to share their property,
- There could be a large difference in the financial positions of the spouses,
- If the husband is performing a business in his own name, he might be scared that if the business failed his wife would also lose what is hers, meaning it might be in the interests of both parties that they shield some property by doing a separation of estates.

In the case of a trader the separation of estates is important for the purposes of creditors. For this reason, the legislator has specifically catered for an obligation that where the matrimonial regime has been treated in a particular way by the spouses this pact must be made public so that anyone looking to extend credit to the trader can know the full situation between husband and wife.

Articles 27 to 31 of the Commercial Code are obligations on the notary.

Article 27 reads as follows:

> **27.** (1) Every notary receiving a marriage contract or any deed varying such contract between persons any one of whom is described in the deed as a trader, shall, within fifteen days from the date of such contract or deed, file with the Registrar of Courts of Malta or with the Registrar of Courts of Gozo, according to the residence of the party described as a trader, a note containing the following particulars:
> (a) the date of the contract or deed and the name of the notary receiving such contract or deed;
> (b) the name of the party described as a trader;
> (c) the amount of the dowry and of the dower.
>
> (2) The registrar shall cause a copy of the note aforesaid to be posted up at the Exchange and published in the Government Gazette.

Article 28 speaks of an index with all the notes mentioned in article 27 which is open to the public, allowing anyone who checks to know whether such an agreement between spouses exists.

Article 30 states that:

> **30.** (1) Where any one of the spouses engages in trade after the marriage, or although already engaged in trade has not been so described in the marriage contract, the obligations mentioned in article 27 shall devolve upon such spouse.
>
> (2) If such spouse fails to carry out the said obligations, such spouse shall be liable to the penalty prescribed in the last preceding article and may, moreover, in the event of bankruptcy, be adjudged a fraudulent bankrupt.

Article 31 states that:

> **31.** (1) The registrar shall cause every demand for the separation of property between spouses any one of whom is described in the Index mentioned in article 28 as a trader, to be published in the Government Gazette.
>
> (2) The registrar shall likewise cause the judgment on the said demand to be published in the Government Gazette and shall enter a reference to such judgment in the said Index.

Persons Auxiliary to Trade

These are the other people who owe their existence to the fact that there is a trader, be they agents, managers, commercial agents, commercial managers, brokers, and commission agents. The idea behind this is that as the trader's activities grow the trader needs other people to help him with said activities. There are two classes of persons auxiliary to traders:

1) Those that have a limited function but whose actions have no legal support vis-à-vis third parties (e.g., an employee, skilled labourer, secretary, etc.).
2) Those whose actions create a legal relationship with third parties (e.g., agents, managers, etc.).

There is another subdivision which one ought to take into account:

1) Persons auxiliary to trade dependant on other persons (e.g., the agent who has a principle).
2) Persons auxiliary to trade who are independent of other persons (e.g., the broker).

Article 49 states that In the absence of any agreement, law or custom to the contrary, mercantile agency is governed by the provisions contained in Title XVIII of Part II of Book Second of the Civil Code so far as applicable, with the exception of article 1861: Provided that where a mercantile agency involves also the obligation on the part of the agent of performing particular services, then it shall also be governed by the provisions of the Employment and Industrial Relations Act, so far as applicable." Here there are two main observations to make:

1) The sources of mercantile agency are threefold:
    a. The law of agency itself,
    b. The law of mandate: The authorisation to do something on one's behalf,
    c. The provisions of the Employment and Industrial Relations Act.
2) Section 1861 of Title XVIII of Part II of Book Second of the Civil Code is not susceptible to mandate which states that the person who acts as the mandatory has no right to be paid under the mandate, meaning it is gratuitous. However, mercantile agency can never be as such because the legislator has purposefully excluded article 1861 from being a source of Commercial Law. Mercantile agency must always be against payment because of the maxim *finis mercatorum lucrum est,* meaning the mercantile agent takes on risks and responsibilities and as such should be compensated.

In an agency situation the agent has the power to negotiate and conclude business on behalf of the principle, while in the case of a mandate there is no power to negotiate, but the mandatory is given strict instructions. Professor J. Micallef defined *agency* as *"a contract whereby one person, the principle, authorises another, the agent, to act in his own name and on his behalf in a legal relationship between the principle and a third party".* Therefore, there are three characters at play: the principle, the agent, and third parties. There are three different relationships: that between the agent and the principle, that between the agent and the third parties, and that between the principle and the third parties. When dealing with an agent, the principle is bound by the agreement signed on his behalf by the agent to the extent that *"all acts done by the agent on behalf of the principal, within the scope of his authority, produce directly their effect whether in favour of or against the principal"* (article 50 of the Commercial Code). This provision has two main points: firstly, that the act must be done by the agent on behalf of the principal within the scope of his authority, and secondly, the act of the agent produced its effect directly. When the agent acts, he must be exercising some form of decision-making discretion as to the conclusion of the contract and the principal must have *a priori* authorised him to exercise this discretion in this manner. The agent must exercise some discretion because if he did not exercise it, he would simply be a mandatory and not an agent.

The decision-making which is done by the agent must have been delegated to the agent for it to be binding on the principle. The latter part of article 50 means that if a principle appoints an agent and said agent signs an agreement with a third party for and on behalf of the principle within the scope of his authority, that agreement is as though it was signed by the principal himself and he will be bound by it. It also means that any profits or losses made by that transaction will belong to the principal and not his agent. In the case of *Cool Operators Ltd v John Caruana,* the plaintiff was a company that sold air-conditioning equipment to commercial premises and the defendant was an auditor. There was a company that owned a hotel which was not in the best of shape and owed a lot in debt. The bank thought that if it were to sell te hotel in the state that it was in it would fetch one amount, but if they upgraded it, it would fetch a larger amount. The bank was reluctant to trust the owner of the hotel with the money for the upgrades so instead it placed an independent auditor on the company's board of directors to act as the signatory for and on behalf of the company. Cool Operators Ltd supplied a new air-conditioning system for the hotel which cost of £Lm130,000. For Cool Operators Ltd to be protected it asked the company to supply them with a bill of exchange (a document of title to money, considered to be an executive title under Maltese law). The signatory for this company was John Caruana who, as an auditor by profession, had no connection to the hotel apart from the role placed on him by the bank. At this stage he is acting as an agent. However, John Caruana did not disclose that he was acting for and on behalf the company, and signed under his own name, meaning article 50 did not apply. The company defaulted on the payment for the system and Cool Operators Ltd sued John Caruana directly for the amount owed. On the day of the case the case was filed with Special Summary Proceedings. John Caruana did not appear before the Court and did not reply to his summons and the case was decided against him *in absentia.* The debt was imposed on him personally because he did not indicate that he was acting for and on behalf of the company.

Article 51 states that *"for the purpose of establishing the validity and the effects of the act done by the agent, regard shall be had to the capacity of the principal and to the intention of the agent: Provided that where at the time of the conclusion of the transaction the principal is in bad faith, he cannot set up the good faith of the agent".* Article 51 tries to establish the validity and effects of those acts done by the agent for and on behalf of his principal. To see if an act is valid or not and that it produces an effect or not one must look at both the capacity of the principal and the intention of the agent. Once the agent is signing on behalf of the principal and it is the principal that is to be bound, the agent cannot sign a contract on behalf of the principal if the principal himself has no capacity under law to perform that act. A principal cannot avoid a legal incapability by appointing an agent without that legal incapability to sign on his behalf. The only intention to be considered with regards to the agent is his intention, not his capacity (meaning those interdicted can work as agents). To that end, an agent can even be a minor (article 1869). The intention of the agent means that the consent of the agent cannot be vitiated. Those acts done with the vitiated consent of the agent are not enforceable.

The form of the authority of the principle

Article 1857(2) of the Civil Code states that *"subject to any other special provision of the law, a mandate can be granted by a public deed, by a private writing, by letter, or verbally, or even tacitly"* and article 52 of the Commercial Code states that *"where the law requires that an act be expressed in writing, the authority given to an agent to do such act must be conferred in writing".* We know when an act must be done in writing because in various provisions of the law one will come across a requirement that a particular transaction be done in writing. Take, for example, the transfer of a car which is not valid unless stipulated in a private writing. Article 1233 of the Civil Code gives a list of transactions that must be done in writing, and amongst them one will find *"any agreement implying a promise to transfer or acquire, under whatsoever title, the ownership of immovable property, or any other right over such property"*, also known as the promise of sale. Article 1233 also refers in sub-article (b) *"any promise of a loan for consumption or mutuum".* If a bank fails to issue a sanction letter the verbal promise to extend credit is void.

In full, article 1233 reads as follows:

> 1233. (1) Saving the cases where the law expressly requires that the instrument be a public deed, the transactions hereunder mentioned shall on pain of nullity be expressed in a public deed or a private writing:
>
> (a) any agreement implying a promise to transfer or acquire, under whatsoever title, the ownership of immovable property, or any other right over such property;
> (b) any promise of a loan for consumption or mutuum;
> (c) any suretyship;
> (d) any compromise;
> (e) any lease for a period exceeding two years, in the case of urban tenements, or four years, in the case of rural
> (f) any civil partnership [any partnership which is not for those commercial purposes found in the Commercial Code]; 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.

The object of the mandate must be something lawful which the principal may do himself. This ties up with the notion of the capacity of the individual found in article 51. This arises in virtue of article 1857(1) of the Civil Code. The agency situation does not arise until the agent has accepted the mandate given in virtue of article 1856(2) of the Civil Code. According to article 1858 the agreement can be tacit if the mandatory begins the performance of his mandate. Article 1859 states that *"any person carrying on trade or exercising a profession who, without just cause, fails to give notice to the mandator, without delay, of his refusal to accept a mandate relating to commercial or to professional business, as the case may be, is answerable to the mandator for damages occasioned by the delay".*

The notion of the manager

The manager under Roman Law is referred to as the *instator* and article 57 states that *"a manager is a person who is placed, personally and permanently, in charge of the business or of a branch of the business of the principal in one or more fixed places".* Professor Micallef states that *"the function of the manager is to substitute the principal in the management of the business which has been entrusted to him and as such he is entitled to perform and conclude, in the name and on behalf of his principal, all acts pertaining and necessary to the exercise of the business or branch of business in respect of which he has been appointed, subject to any limitations imposed on him by the principal".* The definition of manager under article 57 speaks of permanence (meaning the manager does not work for one specific job) and one or more fixed places, meaning there is a geographical attachment. It also speaks of the manager being made in charge of the business or a branch thereof, meaning he is given wide powers within his remit. The legal characteristic of the manager partakes in the notions of agency, mandate, and employment. The manager is not a trader because he owes his existence to the fact that there is a trader who has delegated his authority to him. Even if the manager is given a share of the profits by way of remuneration it does not make him a trader. See *Michele Mariaci v Farrugia* (XIIX.iii.58) and *Zammit v Galea* (XX.iii.21). The principal who may appoint a manager must be a person who has the capacity to exercise acts of trade himself. Under article 58 *"any person, whatever his or her age, may be a manager".* Therefore, a minor could necessarily be a manager as well.

Under article 59(1) *"the authority to act as manager may be express or implied".* In the case of *Borg v Schembri* (App – 16/7/1968) the Court stated that for someone to be appointed manager there is no need for anything to be in writing and the law allows for tacit agreement. The law does not cater for a mechanism as to how the manager is going to make public his authority as a manager, but it merely caters for making public limitations to the manager's authority. If one has appointed a manager and one wants to make sure that the manager would not conclude transactions on one's behalf that goes beyond his remit there is a mechanism in article 59(2) which states that *"in the first case, where the principal desires to limit the authority conferred on the manager in such a way as to raise a presumption that the limitations imposed are known to third parties, he must file in the one or the other of the courts mentioned in article 55 a note showing in detail all such limitations, and cause such note to be affixed in the Exchange and published in the Government Gazette and in another newspaper, possibly a commercial newspaper".* If the principal does not use the procedure found in this article it is presumed that the authority given to the manager is a general authority. This presumption is in virtue of article 59(3) which states that *"in the second case, the authority to act as manager shall in regard to third parties be deemed to be general and to comprise all matters pertaining and necessary to the exercise of the business or branch of business in respect of which it has been conferred, unless the principal proves that such third parties knew of the aforesaid limitations at the time the transaction was concluded".* The general presumption is that the manager has a general authority to do anything pertaining and necessary to the exercise of the business or a branch thereof. The exceptions to this rule are either the principal uses the procedure found in article 59(2) or he might also notify a particular third party that that manager has certain limitations in the authority he has been given. if the principal adopts the procedure found in article 59(2) he is creating a presumption *juris et de jure* that third parties are presumed to know that there is a limitation. See *Emmanuele Micallef v Alfred Tonna* (XXXV.i.272 – App 30/4/1951), *C & L Calleja Trading v*

Victor Aquilina, and *Ray Pullicino v Ray Davidson* (FHCC). In article 59(3) not the use of the words *pertaining* and *necessary,* therefore a general authority of the manager includes all matters pertaining and necessary to the exercise of the business or the branch thereof in respect of which it has been conferred. Thus, the manager cannot do acts of a civil nature on behalf of the principal, or acts that favour his personal interests, or carry out the sale of the business, or anything that does not serve the business. See the following cases where the manager of a company had granted a pension to employees and the court held that these acts were not pertaining to the business: *Joseph Pace v Ferguson* and *Oreste Caruana Scicluna v Edward Finucane.*

There are some limitations in the Commercial Code with regard to acts that would not be binding on the principal. Article 61 states that *"a loan* (mutuum) *made to the manager is not binding on the principal except when the object for which it has been made has been stated, and such object actually relates to the business or branch of business in charge of which the manager has been placed".* See *Micallef v Farrugia* (XVI.iii.65). There is a particular rule of the law of procedure that states that if one is present in Malta then he cannot be represented by someone else to file proceedings on his behalf but instead must file them in his own name. article 64 is an exception to this rule and states that *"the manager may sue or be sued in the name of the principal for any obligations arising out of the acts done by him in the exercise of the business or branch of business with which he is charged, even if the principal is present in Malta"*. See *Borg noe v Schembri* (IIL.i.364) and *Portelli noe v Vella.* Also, see the Realto Theatre Case. In *Dennis Degiorgio as general manager of the National Bank v B. Tagliaferro & Sons* the plaintiff extended the defendant a loan with the condition that they be allowed to appoint a director to the defendant's board if need be. Their attempt to do so was refused and so they sued. The National Bank is a company registered under the Companies Act and, in their memorandum, they listed who has the right to represent the company in judicial proceedings and who has the right to conclude agreements on behalf of the company (legal representation). The National Bank, in its memorandum, had a legal representation clause establishing that it was vested in a number of the bank's directors. The issue arose that Dennis Degiorgio was not vested with such legal representation and thus, as a manager, he could not bring suit on the company's behalf. The plaintiff relied on article 64 and so a conflict arose between said article and the Companies Act. The Court decided that the Companies Act did not do away with the contents of article 64 and so the two can co-exist. The Court of Appeal ruled otherwise and said that the company had to be represented by its directors because the Companies Act is a specialised law and therefore *lex specialis derogat lex generalis.* Alternatively, the directors of the bank could, at a general meeting of the board, have passed a director's resolution authorising Dennis Degiorgio to represent the bank, thus allowing to sue and by sued in his name for an on behalf of the bank.

The Duties of the Manager

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

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

The first specific duty is that contained in article 65 which states that *"the manager is jointly and severally liable with the principal for the observance of the provisions contained in Title II of this Part of this Code in regard to all matters relating to the business or branch of business with which he is charged".* The duties in Title II are the duties to keep within the limits of fair competition, to keep trade books, and to publish marriage contracts. *"Jointly and severally"* means that if there are three debtors who between them borrowed 1,000, logic would dictate that they are each responsible for one-third of the amount. The creditor can claim the full amount from just one of the creditors who in turn will have to sue his co-debtors for their portions of the debt. Article 65 makes the manager jointly and severally liable with the manager.

Article 63(1) states that *"the manager shall not, either on his own behalf or on behalf of others, without the express consent of the principal, carry on or have any interest in any business of the same nature as that in charge of which he has been placed".* The manager is in a position of trust and therefore he cannot compete with the principal. Article 63 makes it clear that the manager cannot compete with the principal without the express consent of said principal. Article 56, dealing with the agent, was far more relaxed. Article 63(2) states that *"if the manager acts in contravention of this prohibition, the principal may, at his option, either take action for damages and interest or demand payment of any profits made by the manager in any transaction entered into in violation of his duty".*

The rights of the manager are like those of the agents with the right to be:
1. Reimbursed
2. Indemnified for losses
3. Remunerated for his services
4. The *jus retenciones.*

The authority of the manager is terminated in the same way as that of an agent, either by the revocation of authority on the part of the principle, or by interdiction, or if the manager is incapacitated, or if the manager renounces to the appointment, or if the appointment was made for a limited period of time, upon the expiry of that period of time. Very often, the manager is an employee so those rules dealing with employment law (Cap. 452 of the Laws of Malta) are applicable to the manager as well. There are two particular departures from this, dealing with the probation period (article 36 of Cap. 452) and reinstatement following an unjust termination (article 81 of Cap. 452). With regard to the former, when there is a contract of service in respect of employees holding managerial or administrative posts, or whose wages are more than double the minimum wage, the probationary period will be one year. With regard to the latter, if the person who was dismissed from employment was a manager or a higher level, then the industrial tribunal cannot order the reinstatement of that person because at that stage the trust has been lost. If an employer wants to terminate the authority given to the manager, he can publicise it under article 66 which states that *"the* *determination of the manager's authority shall be made public with the same formalities prescribed in sub-article* (2) *of article* 59*, even where the grant of the authority had not been so made known".*

The manager has a fiduciary duty towards his principal. In the cases of *Anthony Caruana Ltd & Sons Ltd v Christopher Caruana* and *Vascas Enterprises Ltd v Adrian Ellul* people who were employed as managers left their employer and began competing with them. In both cases they both utilised information that they had acquired during their employment as managers. Both cases bring out the fiduciary relationship of the manager.

The Commercial Traveller and the Salesman

The commercial traveller is a person entrusted by a trader with the authority to act and conclude business on behalf of the trader and in the trader's name either in the place where the trader exercises his business or elsewhere. Traditionally this was more common. There are two types of commercial travellers: those who are authorised to promote business and transmit orders for acceptance by the principal (not authorised to conclude business himself) and those who are pure agents with the power to sell and conclude transactions for and on behalf of the principal.

Article 67(1) states that *"commercial travellers shall produce to the customers with whom they deal in the name of the principal, the instrument creating their authority and defining its limitations".* Whilst article 67(2) deals with the absence of such authority stating, *"in the absence of an express authority, they cannot receive the price of goods, unless they personally deliver the same, nor can they grant time for payment or allow discount in respect of transactions concluded by them"*. The transaction is being performed by the principal, not the commercial traveller. Article 67(3) states that *"they may receive complaints addressed to the principal, and may sue or be sued in the name of the principal in respect of obligations arising out of transactions concluded by them in the name of the principal himself"*. Note that the commercial traveller is of a higher degree than a salesman and comes close to being an agent.

The salesman is dealt with in article 68 of the Commercial Code which states in sub-article (1) that *"salesmen entrusted with wholesale or retail sales, are empowered to receive within the warehouse or place of business, the price of goods sold by them, unless the receipt of payments is entrusted to some other person as cashier"*. Normally, the salesman is limited to being within a physically confined place, such as a warehouse or a place of business.

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

The Broker

The Commercial Code regulates the broker in a very detailed way and the provisions used are hardly utilised today. The idea was that the person who acts as the broker must be seriously regulated and duly licensed to ensure that no one acts unfairly but as time went by the profession of the broker has gone unregulated without any sanctions being meted out. Brokers are regulated in article 79 and onwards in the Commercial Code.

Article 79(1) states that *"any person desiring to act as a public broker shall notify the Council of the Chamber of Commerce, Enterprise and Industry, as the authority regulating this activity, requesting registration, within thirty days of starting such an activity".* Furthermore, there was disqualifications for becoming a broker, as found in article 80 which states that *"If a public broker is convicted of any of the crimes provided for in Sub-titles I, II and III of Title IX of Part II of Book First of the Criminal Code, he shall,* ipso facto*, forfeit his office, and his name shall be struck off the register".*

Furthermore, certain provisions of the keeping of trade-books applied to the broker (article 82), as found in article 83 which states that *"every public broker, on the conclusion of every transaction, shall forthwith note it down in his memorandum or day-book, and shall, day by day, enter every transaction in his book of brokerages. He shall state in both such books, the date, the name of the contracting parties, the nature of the transaction and, generally, every stipulation and condition agreed upon by the parties, and, in the case of merchandise, he shall particularly state the quality, the quantity, the price and the marks, if any, and the mode of payment".*

Unlike a trader, brokers are precluded from transacting business on their account under article 88 which states that *"no public broker shall transact any commercial business for his own account, or have any interest therein, either directly or indirectly, in his own name or through the medium of a third party, whether alone or in partnership with others; nor shall any public broker lend his name for any transaction whatsoever to any person not authorized to exercise the office of a public broker: Provided that two or more public brokers may form a partnership between them for the purpose of brokerage only".* Furthermore, article 89 states that *"a public broker is not the agent of the parties in concluding any transaction; and if in concluding any transaction he acts as agent of one of the parties, he shall not be entitled to the commission as broker"*.

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

Article 91 establishes a penalty for this stating that "(1) *A public broker who acts in contravention of any of the obligations mentioned in the foregoing articles shall, at the instance of any interested party or of the Attorney General, be liable to a penalty of not less than fifty euro* (*€50*) *and not exceeding five hundred euro* (*€500*) *on proceedings taken before the Civil Court, First Hall, or the Court of Magistrates* (*Gozo*) *in its superior commercial* *jurisdiction, as the case may be, saving any other action arising from this Code or any other law.* (2) *The court may, moreover, order the interdiction of the public broker for a period not exceeding two years, in which case the provisions of article 81 shall, during the time of interdiction, be applicable".*

The Commission Merchant
Widely considered a relic of the past, the commission merchant is a person who transacts business under his own name, or under a firm name, for and on behalf of a principal. Meaning he acts in his own name for and on behalf of a principal. It is debatable whether or not the commission merchant is a trader in his own right, but the legislator has chosen to denote him as a person auxiliary to trade. Article 97 states that *"a commission merchant is not bound to disclose the name of the principal for whom he acts. He is directly liable to the person with whom he deals, as if the transaction were his own".* There is therefore no legal relationship between the principal and third party.

The Commercial Agent
Regulated by article 70 onwards of the Commercial Code. This person was introduced in 2003 as part of the procedure taken by the Maltese government to include in Maltese Law the EU *acquis communautaire,* particularly to adhere to Directive 86/653. The distinction between an agent and a distributor is that agents receive commission on the sales performed whereas distributors purchase goods from the foreign supplier with the right to keep all profit. The foreign supplier will not feature in any sales made and the responsibilities of the seller fall squarely on the distributor.

Furthermore, there exists a distinction between the sole distributor and the exclusive distributor which is that for sole distributors the foreign supplier can compete with it in the domestic market whilst it cannot compete with its exclusive distributors.

Sub-title IV regulates *"relations between commercial agents and their principals and the activities of commercial agents in Malta".* This sub-title shall not apply to:
(a) *commercial agents whose activities are unpaid;*
(b) *commercial agents when they operate on commodity exchanges or in the commodity market; and*
(c) *persons whose activities as commercial agents are secondary.*

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

'Commission' is defined as *"any part of the remuneration of a commercial agent which varies with the number or value of business transactions".*

Furthermore, *"'regulatory authority' means the Council of the Chamber of Commerce, Enterprise and Industry'.*

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

Article 71(3) states that *"the regulatory authority shall not accept an application for registration to act as a commercial agent from any person who is in the employment of the Government of Malta or of any financial institution, or from any person holding a warrant to practise a profession in Malta and actually practising such profession, or from stockbrokers or from any person who, whether in Malta or abroad, has been found guilty of fraudulent bankruptcy".*

Article 71(4) states that *"notice of any registration under this article shall be published in the Gazette. In the month of January of each year, a complete list of registrations then in force shall likewise be published in the Gazette".*

Article 71(5) states that *"any registration carried out under this article may be withdrawn or suspended by the regulatory authority, if the person registered -*

(a) *is convicted of any crime against property;*
(b) *is adjudged bankrupt;*
(c) *accepts employment under the Government of Malta, or with any financial institution, or becomes the holder of a warrant to practise a profession and actually practises such profession or becomes a stockbroker;*
(d) *is proved, to the satisfaction of the court, not to be a fit and proper person to act as a commercial agent".*

If someone acts as a commercial agent without being so registered by the regulatory authority there are serious legal ramifications. Article 73 states that *"without prejudice to the provisions of article 71(1), any person who, without being registered, represents himself to be, or acts or undertakes to act as a commercial agent, shall be liable:*

(a) *on a first conviction to a fine (multa) not exceeding two thousand and five hundred euro (€2,500); and*
(b) *on a second or subsequent conviction, to imprisonment for a term not exceeding three months or to a fine (multa) not exceeding five thousand euro (€5,000)".*

Article 74 gives the duties of the commercial agent to his principal. The generic duty is states in article 74(1) which states that *"in performing his activities a commercial agent shall look after the interests of his principal and act dutifully and in good faith".* Article 74(2) offers the particular duties as: *"in particular, a commercial agent shall -*

(a) *make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;*
(b) *communicate to his principal all the necessary information available to him;*

(c) *comply with reasonable instructions given by his principal.*

Article 75 offers the duties of the principal towards his commercial agent. The generic duty listed in article 75(1) states that *"in his relations with his commercial agent a principal shall act dutifully and in good faith".* Article 75(2) offers the particular duties as: *"in particular, a principal shall –*

(a) *provide his commercial agent with the necessary documentation relating to the goods concerned;*

(b) *obtain for his commercial agent the information necessary for the performance of the agency contract, and in particular notify his commercial agent within a reasonable period where he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected".*

The principles listed in the two preceding articles cannot be contracted out or derogated under article 76.

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

Article 77A establishes when the right to a commission arises, stating that *"(1) A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract -*

(a) *where the transaction has been concluded as a result of his direct or indirect intervention; or*

(b) *where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.*

(2) *A commercial agent shall also be entitled to commission on transactions concluded during the period covered by the agency contract where he has an exclusive right to a specific geographical area or to a specific group of customers and where the transaction has been entered into with a customer in that area or group".*

Article 77B states that *"subject to article 77C, a commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has terminated if -*

(a) *the transaction is mainly attributable to his efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract terminated; or*
(b) *in accordance with the conditions mentioned in article 77A above, the order of the third party reached the principal or the commercial agent before the agency contract terminated".*

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

Article 77D reads as follows:

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

Article 78 states that "(1) *The commercial agent and principal shall each be entitled to receive from the other, on request, a signed written document setting out the terms of the agency contract including any terms subsequently agreed.* (2) *Any purported waiver of the right referred to in paragraph* (1) *above shall be void".*

Article 78A states that *"an agency contract for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency contract for an indefinite period".*

Article 78B states that:

> **78B.** (1) Where an agency contract is concluded for an indefinite period either party may terminate it by notice.
>
> (2) The period of notice shall be -
> (a) one month for in first year of the contract;
> (b) two months after the commencement of the second year but before the commencement of the third year;
> (c) three months after the commencement of the third year;
>
> and the parties may not agree on any shorter periods of notice.
>
> (3) The parties may agree on longer periods than those laid down in sub-article (2), provided that the period of notice to be given by the principal may not be shorter than that to be given by the commercial agent.
>
> (4) Unless otherwise agreed by the parties, the end of the period of notice must coincide with the end of a calendar month.
>
> (5) The provisions of this article shall also apply to an agency contract for a fixed period which in virtue of article 78A is converted into an agency contract for an indefinite period and for the purposes of calculating the period of notice the term of the fixed period contract shall be deemed to be part of the agency contract for an indefinite period.

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

Article 78D states that:

> **78D.** (1) *Subject to sub-article* (7) *and to article 78E, the commercial agent shall be entitled to an indemnity if and to the extent that -*
> (a) *he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and*
> (b) *the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.*
>
> (2) T*he amount of the indemnity shall not exceed a figure equivalent to indemnity for one year calculated from the commercial agent's average annual*

> *remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.*
>
> (3) *The grant of an indemnity as mentioned above shall not prevent the commercial agent from seeking damages.*
>
> (4) *Subject to sub-article* (7) *and to article 78E, the commercial agent shall be entitled to compensation for damage he suffers as a result of the termination of his relations with his principal.*
>
> (5) *For the purpose of this sub-title such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which -*
>
> (a) *deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or*
>
> (b) *have not enable the commercial agent to amortize the costs and expenses that he had incurred on the advice of his principal in the performance of the agency contract.*
>
> (6) *Entitlement to the indemnity or compensation for damage as provided for under sub-articles* (1) *to* (5) *shall also arise where the agency contract is terminated as a result of the death of the commercial agent.*
>
> (7) *The commercial agent shall lose his entitlement to the indemnity or compensation for damage in accordance with the provisions of the foregoing sub-articles if within one year following termination of his agency contract, he does not make a claim to his principal therefor.*

Article 78F states that *"the parties may before the expiration of the agency contract, not derogate from articles 78D and 78E to the detriment of the commercial agent".*

Article 78G states that:

> **78G.** (1) *A restraint of trade clause shall be valid only if and to the extent that -*
>
> (a) *it is concluded in writing; and*
>
> (b) *it relates to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract.*
>
> (2) *A restraint of trade clause shall be valid for not more than two years after termination of the agency contract.*

> (3) *Nothing in this article shall affect any enactment or rule of law which imposes other restrictions on the validity or enforceability of restraint of trade clauses or which enables a court to reduce the obligations on the parties resulting from such clauses.*

Article 78H states that *"nothing in this sub-title shall require information to be given where such disclosure would be contrary to public policy".*

Article 78I states that:

> **78I.** (1) *Any notice, statement or other document to be given or supplied to a commercial agent or to be given or supplied to the principal under this sub-title may be so given or supplied:*
>
> (a) *by delivering it to him;*
>
> (b) *by leaving it at his proper address addressed to him by name;*
>
> (c) *by sending it by post to him addressed either to his registered address or to the address of his registered or* principal office; or by any other means provided for in the agency contract.
>
> (2) *Any such notice, statement or document may -*
>
> (a) *in the case of a body corporate, be given or served on the secretary or clerk of that body;*
>
> (b) *in the case of a partnership, be given to or served on any partner or on any person having the control or management of the partnership business.*

Article 78J states that *"the provisions of this subtitle shall also apply to agency contracts concluded before the date of coming into force of this sub-title: Provided that noting therein shall effect any right or liability accrued before such date".*