CVL3034 NOMINATE CONTRACTS

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Nominate Contracts

Written by Harry Thake

Table of Contents:

Minor Contracts	7
The Law of Mandate	18
The Contract of Mutuum	124
The Contract of Commodatum	162
The Contract of Precarium	178
The Contract of Deposit	193
The Law of Sale	221
The Law of Lease	298
Letting and Hiring	303
Rights and Obligations of the Lessor	378
Rights and Obligations of the Lessee	387
Sub-Lease	405
Locatio Operis	420

Minor Contracts

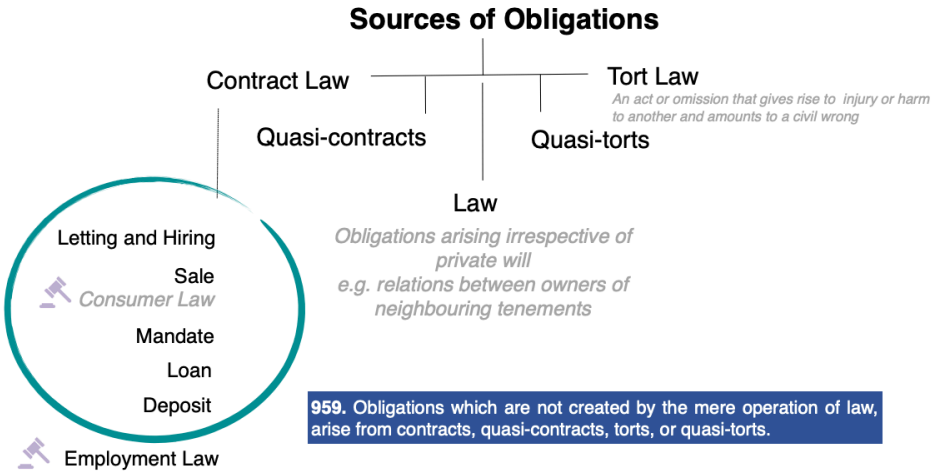
Nominate contracts is split into three main components; the **law of sale,** the **law of letting and hiring** (/ the law of lease), and **minor contracts**. Minor contracts are those not as major as sale and lease. We will be dealing with several minor contracts, including loans for use and consumption, mandate, and the contract of deposit.

These are all minor contracts contemplated in the Civil Code and which fall within the ambit of nominate contracts.

The exam is split as follows; Section A: Law of Lease, Section B; Law of Sale, and Section C; Minor Contracts. This subject goes hand in hand with the law of obligations, in which we will cover the notions of contracts and tort.

<u>Sources of obligations</u>

Contracts are important because they are vehicles through which obligations are created. Obligations do not, however, arise exclusively through contracts, as they may also arise through acts of tort or quasi-tort. In nominate contracts, we will not be delving into general contract law. Instead, we will delve into the specific rules governed by the law in relation to certain special contracts aforementioned.



959. Obligations which are not created by the mere operation of law, arise from contracts, quasi-contracts, torts, or quasi-torts.

Nominate Contracts are a special category of general contracts, defined by ***Torrente*** as *those contracts which, due to their greater importance or their greater frequency, have been specifically regulated by the legislator*.

Contract and Tort are the 2 main sources of obligations besides the law.

The written law creates obligations. However, another source through which we can create obligations is contract. A contract is a **manifestation of one's will, which meets the will of another.** Contract is a juridical act. An obligation may arise despite there not having been a contract. Contracts are relevant because they create obligations. If our wills meet and we express our consent on the same matter than we are creating obligations.

Article 965 of the Civil Code defines the general principle of contracts;

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

The final limb to this article discusses the special rules which we will be delving into. Such special rules exist owing to the frequency that these contracts are entered into.

Caruana Galizia: Nominate are those which have a **special denomination,** and which form the subject matter of a special title of the Code. Innominate are those which have no particular denomination, and which do not form the subject matter of a special title. **Both nominate and innominate contracts,** however, are subject to the rules of contracts in general. The former are also subject to certain rules of their own, which sometimes even modify the general rules; also innominate contracts may, by analogy, be subjected to the special rules of any one of the nominate contracts. Nominate contracts in short can be seen as

those contracts which due to their *greater importance* or their *greater frequency,* have been specifically regulated by the legislator.

Nominate contracts also have a specific name and are recognised by law such as sale or lease. In contrast an **innominate contract is a contract that lacks a specific legal name but is still enforceable if it adheres to general legal principles**, **the parties' specific stipulations** and **customs.**

In nominate contracts we will be dealing with lease, sale and minor contract for which the general rules of contract apply but with respect to which the code also stipulates specific rules. In a contract of sale is it regulated by the general law of obligations but also by the special rules in the civil code on the law of sale.

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

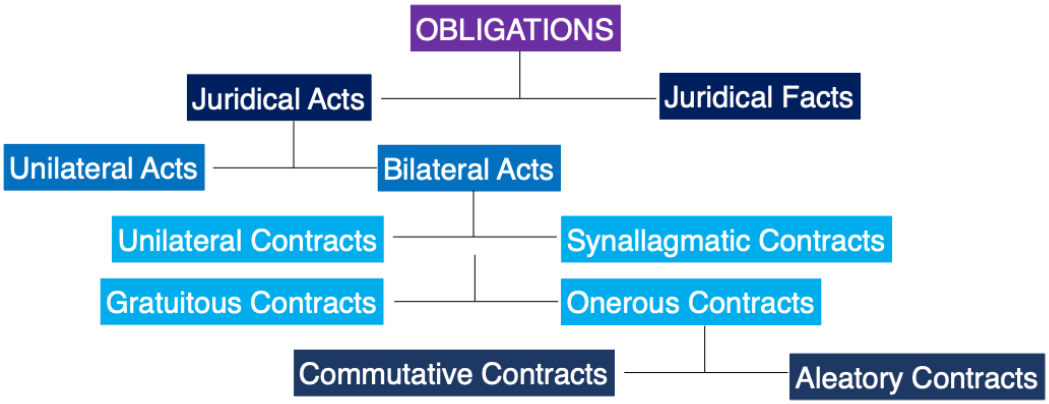
The first step in interpreting a contract is therefore to **'qualify'** or characterise it, i.e. to determine **whether it falls within the limits of one or other of the nominate contracts**. Of course, the parties to what the court concludes to be an innominate contract will often have left some or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

Article 960 of the Civil Code introduces the notion of contract by defining the term, stating;
960. *A contract is an agreement or an accord between two or more persons by which an obligation is created, regulated, or dissolved.*

This shows how important the notion of a contract is, being a vehicle of obligations.

Carbonnier states that *the clause is to the contract what the article is to the law*. A contract is important because they carry with them a binding nature. Except for instances where the law sets out and lays out specific obligations, we can only bind each other by drafting contracts. This is the purpose for which contracts serve.

Not all contracts are the same. Contracts may be **unilateral or bilateral** (vide art. 961), **onerous or gratuitous** (vide art. 962), **commutative or aleatory** (vide art. 963). Articles 961-964 qualifies several distinctions.



Arts 961-964 - the Qualification of Contracts

First Distinction – *Contract may be bilateral or unilateral*

Article 961 (1) - Bilateral / Synallagmatic Contracts

961. (1) A contract is synallagmatic or bilateral when the contracting parties bind themselves mutually the one towards the other.

You can have instances of reciprocal obligations, with the most typical example being the contract of sale (a price is set for a good or service to be delivered in exchange), or you can have a unilateral contract, whereby one person binds himself towards another, with the latter

not being bound to any obligation. A loan for use is the typical example of the unilateral contract. Let's say that my car broke down and my friend lends me his car for use. At this moment, a contract exists, stipulating that I must return the car to my friend eventually, with the friend not being bound by any other duty. A **bilateral contract** is sometimes referred to as a **synellagmatic** contract, meaning that there is a **reciprocal duty**, a situation where both parties are creditors and debtors of the other. This reciprocal duty leads to both parties having both rights and obligations, characterises the bilateral contract. The contract of sale and of letting and hiring are typical examples of this type of contract.

Article 961 (2) - Unilateral Contracts

961. (2) It is unilateral when one or more persons bind themselves towards one or more other persons without there being any obligation on the part of the latter.

On the other hand, in a **unilateral contract**, per **article 961 (2)**, obligations are only borne by one party, with the best example being the **contract of loan**.

A unilateral contract **creates obligations for one party only,** while the other party enjoys rights without being subject to any corresponding obligation.

Second distinction –*Contract may be onerous or gratuitous*

Article 962 (1) - Onerous Contracts

962. (1) When each of the parties undertakes an obligation, the contract is termed onerous.

In an **onerous contract**, a **party confers an advantage (i.e. a right) on the other party with the intention of obtaining a reciprocal advantage for himself.**

Article 962 (2) - Gratuitous Contracts

962. (2) When one of the parties gratuitously procures an advantage to the other, the contract is termed gratuitous.

Gratuitous contracts are those in which one party confers an advantage on another without receiving any consideration in return, while onerous contracts are those in which both parties receive an advantage.

Certain contracts, such as mandate, may be either onerous or gratuitous depending on whether remuneration is agreed. While there is often a coincidence between bilateral and onerous contracts, the two classifications are not identical, since a contract may be bilateral yet gratuitous. Conversely, an obligation may be onerous without being bilateral, as in the case of a loan at interest. Thus, the distinction between onerous and gratuitous contracts concerns the **advantage conferred**, whereas the distinction between bilateral and unilateral contracts concerns the **distribution of obligations**.

Let us consider a loan without interest. A person needs to borrow some money to purchase a book. A friend lends this money to purchase the book. This is a loan for consumption, and is unilateral, since I am bound to return the 100 euros back to my friend, with the latter not having to perform any other duty. It is also gratuitous since my friend is procuring an advantage to me without expecting any further consideration in return. It would be onerous if the money is lent to me only if I agree to pay interest on the money lent. This does not transform the contract into a bilateral contract, since it is still one party which is bound to perform obligation.

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

Third Distinction – *Contract may be commutative or aleatory*

Article 963 - Commutative Contracts

963. A contract is commutative, when each party binds himself to give or to do a thing which is considered as the equivalent of that which is given to or done for him.

Article 964 - Aleatory Contracts

964. When the advantage or loss, whether to both parties or one of them, depends on an uncertain event, the contract is aleatory.

A contract is **aleatory** when the events of one party is contingent on some future event, such as life insurance.

It is a sub-division of onerous contracts. Onerous contracts are, in general, commutative; but some are aleatory, because the performance to which one of the parties is bound depends, in its existence or in its extent, on an uncertain event or the occurrence of chance. The eponym is a betting agreement, but it is hardly a contract. The best example is ultimately the life insurance contract.

Classification of nominate contracts (contratti tipici) suggested by **Torrente & Schlesinger** according to their structural characteristics:

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

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

Real & Consensual Contracts

Fourth Distinction – ***Contract may be real or consensual***

Derived from doctrine; Roman law distinction between consensual and real Contracts
[not derived from the civil code]

There were four **consensual contracts** at Roman law - sale (emptio-venditio), hire (locatio conductio), partnership (societas), and mandate (mandatum) - so called because they were **enforceable by the mere consent of the parties without any other formality.**

There were four distinct **real contracts**. They were *mutuum* (loan for consumption), *commodatum* (loan for use), *depositum* (deposit), and *pignus* (pledge). In contrast to consensual contracts, the commonality of these contracts was that **no contract existed until delivery of the thing loaned, deposited or pledged. Once delivery occurred, an enforceable contract arose.**

Qualification of certain contract types

1) **The Contract of Sale**

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

A contract of sale is a **bilateral / synallagmatic, onerous,** and **consensual contract**. The advantage is procured not gratuitously but onerously because it is so procured with intent of an advantage returned in exchange. It is consensual because the contract of sale is formed upon agreement, and not delivery.

Completion of sale

Article 1347 states that:

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

2) **The Contract of Letting & Hiring**

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

A contract of **letting and hiring** is a **bilateral / synallagmatic, onerous,** and **consensual contract**.

3) **Commodatum (loan for use)**

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

A **commodatum** contract is a **unilateral, gratuitous,** and **real contract**. It is unilateral since only one party is bound by the contract. Commodatum contracts are always gratuitous, as defined by the law. It is real because the obligation of restoration arises only when the thing is lent to me.

4) **Mutuum (loan for consumption)**

Definition of mutuum.

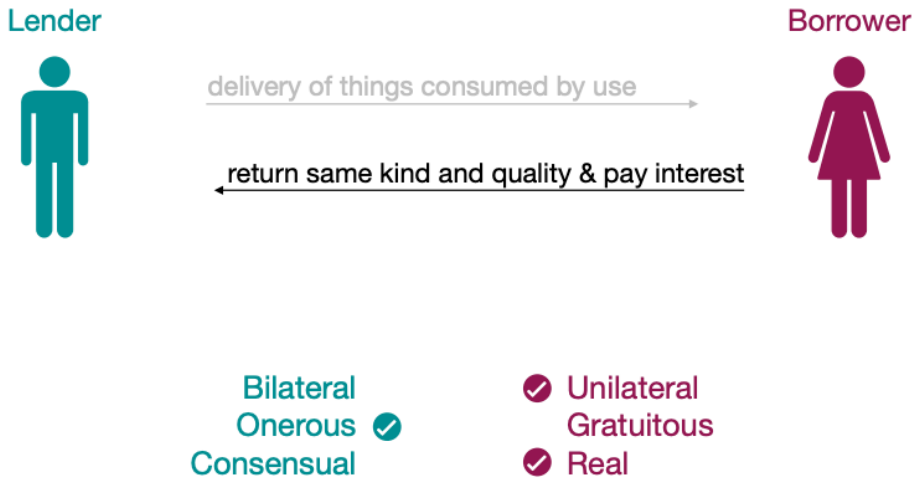
Article 1842. *Mutuum or loan for consumption is a contract whereby one of the parties delivers to the other a certain quantity of things which are consumed by use subject to the obligation of the borrower to return to the lender as much of the same kind of quality.*

Mutuum; Talking about a typical loan – giving me something which in order to be used needs to be consumed.

- Unilateral contract; only obligation mentioned is that of the borrower to return to the lender the property (money) which would have been delivered to him. the lender doesn't have any obligation, he simply delivered the property to the other party, money in this case.

- It is gratuitous because the law tells us that a mutuum is presumed to be gratuitous. If it were an interest bearing mutuum, it would be an onerous contract
- Real contract; because of the delivery

… if loan at interest is agreed



Definition of Deposit

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

Nature of deposit properly so called.

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

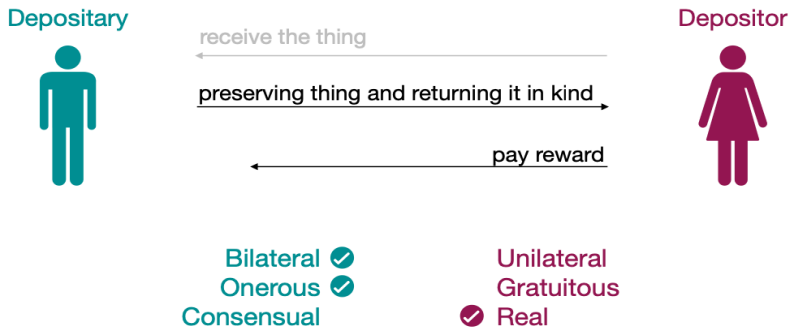
How deposit is perfected.

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

A unilerateral contract can, exceptionally, become synallagmatic by the addition of a clause:e.g. a remunerated deposit.

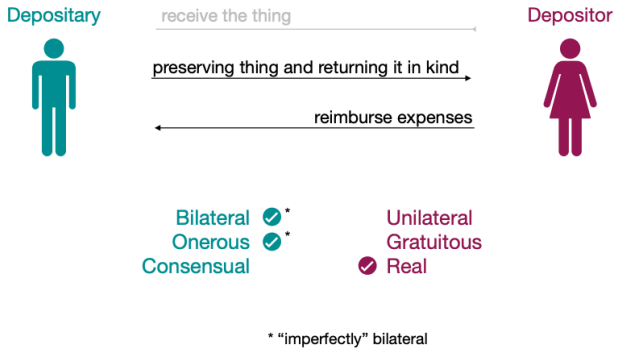
This case should not be confused with the case of **imperfect synallagmatic contracts**. Deposit and commodatum, in themselves, only imply an obligation for the party who, having been delivered the thing, is bound to return it. These are unilateral contracts, but if, during the contract, the debtor has to incur expenses to maintain the thing, he will, in turn, become a creditor. In this case, the indemnity claim by the depositary or the borrower is accidental in that it **arises from a fact subsequent to and external to the contract**.

An originally unilateral contract may become synallagmatic when the other party becomes liable during the life of the contract. This occurs when a gratuitous depositary expends money to preserve the property for which reimbursement will be due. This is found in article 1918.



… if depositor is bound to reimburse depositary for certain expenses

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



* "imperfectly" bilateral

The Law of Mandate

Manum Dare / To give a Helping Hand

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

A mandate is a **unilateral contract** whereby the mandatary is obliged to perform certain things as bound and instructed by his mandator. The mandate, however, transforms into a **bilateral contract** when the mandator promises payment towards the **mandatary**. This type of contract is also qualified as a **consensual contract**, since there is no delivery required prior to the existence of the contract. If the contract is onerous, it becomes bilateral, whereas it remains unilateral if the mandate is accepted gratuitously. In either case, however, it remains consensual.

The original civil code, based on Roman law it presumes a mandate to be a contract between people who have an intimate relationship However, this has developed significantly. Its importance is primarily in the area commerce and trade. The symbolic handshake (manum dare) served to highlight the strong element of trust, which is a characteristic of this contractual relationship. It is a contract characterised by a **fiduciary** nature and may be considered an ***intuiti personae contract***, referring to a transaction in which **the personal qualities of the parties are relevant**. Thus if one cannot appear to sign a contract on a certain day, one may sign a ***prokura***, which refers to the contract of mandate. There is an emphasis on trust. The mandate is an ***intuiti personae contract*** because the person entrusting the mandatary to sign on behalf of the mandator is being trusted.

Once a mandatary is appointed, then that mandatary is not able to appoint another mandatary to act on his behalf, owing to the principle of ***delegatus non potest delegare.*** The legal effects of a mandate are that the mandatary has commenced a legal and juridical relationship which

exists between the mandator and the third party. In the eyes of the law, **whatever the mandatary does represents a direct action between the mandator and the third party**.

In the contract of mandate, two transactions are highlighted, being the **prokura** (the procuration of the **power of attorney**) and the **execution of the mandate**, the latter being when the mandatary signs and the mandator becomes the owner of the property. If it is gratuitous, then all the mandatary requires to do is to execute the obligation. However, if the contract is onerous, then the mandatary and the mandator must agree on the price. However, the **third party is not concerned on the relationship between the mandate and the mandator**.

The legal effects between the mandatory and the mandator are different from those between the mandator and the 3rd party. There is a debate as to whether we have 2 contracts, one of **mandate,** which binds the mandator and the mandatory and then the contract of sale between the mandatory and the third party.

In the case of a contract of sale, the mandatary has disclosed that he is acting on someone else's behalf, but who is the 3rd party bound to, the mandator or the mandatary?

The answer is the mandator. **As long as the mandatary discloses the fact that he is acting on behalf of someone else, then the contractual contract of sale binds the 3rd party and the mandator.**

Article 1861 of the Maltese Civil Code stipulates that a mandate is gratuitous, unless there is an agreement to the contrary.

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

Thus, a **gratuitous mandate** takes the form of a unilateral and consensual contract, whereas a mandate done with a stipulation and agreement of remuneration takes the form of a bilateral or synallagmatic, onerous, and consensual contract. One must note that the commercial law

notion of mercantile agency, which is heavily based on the contract of mandate, is **always onerous**, and can never be **gratuitous.** This is enshrined in **article 49** of the Commercial Code.

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

Powers of the mandatory

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

The instructions determine the object of the mandate. The mandator is bound towards the third party, with one important qualification insofar that the **transaction is within the limits of the instructions that he gave to the mandatory.**

Mandate vs Prokura

Under Maltese law, no distinction seems to be made between the **mandate** and the **prokura**. Under Italian Law, this distinction is recognised.

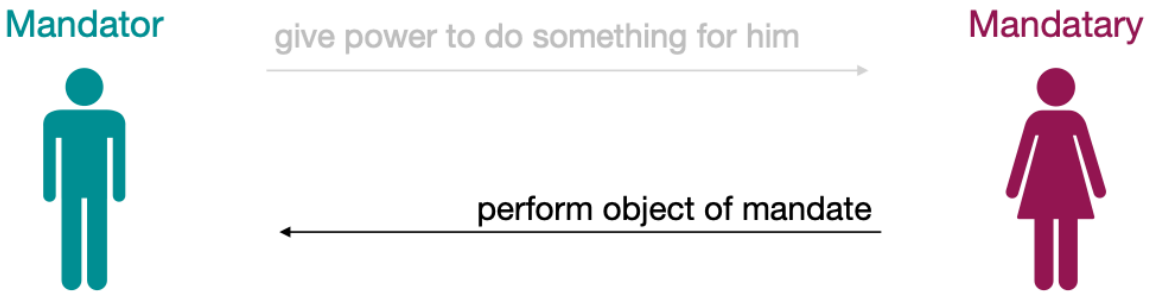
Art. 1703 Italian Civil Code: *il mandato e' il contratto col quale una parte* (mandatary) *si obbliga a compiere uno o piu' atti giuridici pero contro dell' altra* (mandator)

There is a clear difference between a power of attorney [prokura] (a unilateral act by which the dominus confers the power to someone else to represent him externally with respect to

third parties) and a mandate [mandato] (contract by which the principal and agent regulate their internal relations and the consequent rights and obligations).

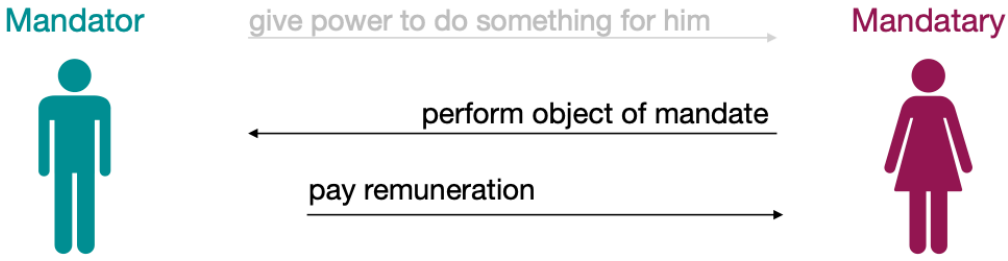
Evolution of the contract of mandate through time

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



Bilateral
Onerous
Consensual

Unilateral
Gratuitous
Real



Bilateral
Onerous
Consensual

Unilateral
Gratuitous
Real

Thus, a **gratuitous mandate** takes the form of a consensual, unilateral, and gratuitous contract, whereas a mandate done with a stipulation and agreement of remuneration takes the form of a bilateral or synallagmatic, onerous, and consensual contract.

The historical evolution of the contract of mandate is founded on the friendly relationship and trust which founded the development of social life. Mandate was a **bona fide *negotium,*** wherein **both parties were expected to act in good faith**. The mandatory, gaining no benefit from the contract, was expected to display ***omnis diligentia,*** meaning *all diligence*. In time, the economic importance of this contract increased exponentially, eventually finding its way into a major form of commercial life.

Mandate and the Locatio Operis

Mandate can be present in much more complex arrangements. It is crucial to understand and distinguish that in a contract of mandate one is engaging someone to perform acts on my behalf (juridical acts). When I engage a developer to build a house but that would be a *locatio operis (letting of work).* **Article 1623 of the Civil Code** defines the contract of letting of work and industry;

> **1623.** A contract of letting of work and industry is a contract whereby one of the contracting parties binds himself to do some thing for the other, for a reward which the latter binds himself to pay to the former.

The courts interpret the relationship between a lawyer and a client as a mandate. However, if I ask the lawyer to write me a letter, he is using his intellect and thus is a letting of work (*locatio operis).* This distinction was brought out by **Prof Caruana Galizia**;

> A letting of skill and labour is a contract whereby a person places his activity at the disposal of another in return for remuneration. Human labour may form the object of a contract in two ways. Where the emphasis is on the labour itself — that is, on how the work is carried out, including diligence and skill — and the result is of secondary importance, the contract is

a *locatio operarum*, or contract of services. Where, on the other hand, the emphasis is on the result to be achieved by the labour, such as the completion of a specific work, the contract is a *locatio operis*, or task-work.

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

The mandate falls into the broad category of locatio operi, **but is characterised by the nature of the activity that forms the object of the agent's obligation, which consists in the carrying out of legal acts** (e.g. purchasing or selling an asset): **this element distinguishes the mandate from the work contract and the employment contract**, which have as their object an activity of a **non- legal nature**, but manual or intellectual.

- **A. Torrente & P. Schlesinger, Manuale di Diritto Privato**,

Where do we find mandate most frequently in practice?

***Victor Tonna pro et noe v. Avukat Dottor Joseph Brincat** - mandate vis-a-vis lawyers*
Court of Appeal, 31 January 1994

"Ir-relazzjoni bejn avukat jew prokuratur legali u l-klient hija essenzjalment ibbazata fuq il-mandat."

***A.I.C. Joseph Barbara v. Director of Public Works** - architects and locatio operis*
Court of Appeal (Civil) 4 November 1987

"Il-kuntratt li bih Perit Arkitett u l-klijent tieghu jiftiehmu li l-Perit ghandu jirrendi s-servigi professjonali tieghu huwa kuntratt ta' kiri ta' xoghol u industrija." Illi huwa stabilit li l-kuntratt li bih perit arkitett u klijent tieghu jiftehmu li tal-ewwel jaghti s-servizzi professjonali tieghu **huwa kuntratt ta' kiri ta' xogħol u ta' industrija,** liema kuntratt huwa suggett ghall-kundizzjoni riżoluttiva tacita bhal kull kuntratt bilaterali iehor.

***Periti Alexander Bezzina et v. Joseph Mizzi noe -** controversial - professionals as mandators*

First Hall, Civil Court, 3 October 2003

The relationship between a client and a professional is closer to a **mandate** than to a contract for work. Maltese courts have consistently regarded, for example, the **lawyer as the client's mandatary**, not as a contractor. Professionals such as architects, doctors, and lawyers provide **services rather than results**: they are not obliged to achieve the client's desired outcome, but only to exercise their **best skill and diligence**. Accordingly, a lawyer who loses a case or a doctor whose patient dies is not liable, provided they acted in accordance with professional standards. By contrast, a contractor engaged to build a house must successfully complete the work or be liable for damages. An architect's role is one of advice and supervision, not execution of the work, which remains the contractor's responsibility; therefore, the contract of **locatio operis** does not apply to professionals.

If I engage an architect to draft a specific design I am tasking him with an intellectual task, so it is likely to be classified as a contract of work. But if the duties of the architect are merely supervisory I'm just tasking the architect to supervisors the workers on my behalf, and so it is likely to be classified as a contract of mandate

Joseph Borg v. Nobbli Maria Testaferrata Bonnici - *architects can be rendered as mandators*

Court of Appeal, 26 May 1958

In general, there is controversy in legal doctrine regarding the nature of the juridical relationship between an architect and the client or owner who commissions them with the technical direction of works — that is, whether it constitutes a *mandate*, a *contract for work and services (locatio operis)*, or a *sui generis* relationship.

In the present case, the circumstances show that the defendant engaged Architect Agius in connection with the works she wished to carry out, to find her a contractor and to do whatever was necessary. In what he did, Architect Agius — with the knowledge of the defendant — showed that he was acting in her interest and on her behalf. In this case, therefore, this amounted to a *mandate*.

Thus, in order to ascertain whether a professional who carries out the services of their client falls under the realm of mandate or of locatio operis, **one must consider each case as separate and within the context of their particular facts and circumstances**, for the judicial opinion varies inconsistently.

Mandate vs Brokerage

Chapter 615, the **Real Estate Agents, Property Brokers and Property Consultants Act**, in its article 3, states;

> **3. (1)** The activity of a property broker or real estate agent **means the acting as an intermediary in the process of negotiating and arranging transactions involving the acquiring or disposing or leasing of land,** including when the said activity is carried out through the engagement or the employment of a branch manager or a property consultant or both.

Parliamentary Secretariat for Competitiveness and Economic Growth, *Malta's Property Code and Regulations*, 2016 (White Paper)

"Real estate agency work" or **"Agency work"**:
(a) means any work done or services provided, in trade, **on behalf of another person** for the purpose of bringing about a transaction

The fundamental character of mediation is **the intervention of a person unrelated to the parties** (the "mediator"), who, without being linked to any of them, by relationships of collaboration or dependence, puts them in relation to each other to bring about or facilitate the conclusion of a deal. Connoting character of the mediator, therefore, and his independence from the parties. This does not exclude the possibility that he may act on a specific assignment from one of them, which has required him to take action to procure a deal (e.g.: finding a buyer for a property), but this does not diminish the third party with respect to the relationship between the parties , and in any case places him in a different position from an agent, an attorney or a clerk. **Thus, while classified as a broker, an estate agent could be remunerated as a mandatary** in the case of **breakdown of negotiations at a very advanced stage**.

In ***Emmanuele Borg v. Emmanuele Bartoli et*** (Court of Appeal, 2 March 1953), the broker in question had effectively led parties to sign a promise of sale. However, the relationship between the prospective buyer and prospective seller had broken down, and the final deed of sale was not signed. **The Broker claimed compensation for the services rendered**.

… [However] it is now well established in jurisprudence that in the civil sphere, if a broker has reconciled the parties regarding both the essential and accidental elements of the transaction, **in such a way that the juridical transaction is concluded, then he is always entitled to payment** — not, however, for full commission, but for compensation on the basis of *mandate* or *contract for work and services (locatio operis)*, to be determined at the Court's discretion."

The commercial code also makes reference to the rules of mandate which is article 1856-1890. We have several instances in the commercial code in which reference is made to the rules of mandate under the civil code. EX: Articles 49 and 50.

Melchiore Demajo vs Giuseppe Micallef

Court of Appeal, 10 May 1922

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

Nicholas John Dunkley vs Joe Cardona

Court of Appeal (Inferior), 9 January 2008

In fact, as this Court has always viewed it, the *sales negotiator — or commission agent*, as depicted in the circumstances of this case — is **a type of *mandatary* whose activity is aimed at concluding a transaction, both in his own interest and in that of his principal, concerning the sale and purchase of immovable property**. In relation to third-party

contracting parties, he is thus configured as the holder of the right (in this case, the right to commission), which reverts to the principal by virtue of an internal relationship.

Carmelo Pace vs Josephine Tabone Valletta

First Hall (Civil Court), 4th March 1952

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

S.G. South Limited v. Scicluna

First Hall (Civil Court)2 April 2004

"When it is not the broker's fault that an agreement is not concluded, or that it falls through, **he nevertheless always has a right to compensation based on a contract of mandate or a contract for work and services (*locatio operis*), the amount of which is to be determined at the Court's discretion according to all the circumstances of the case.**

…As stated, the principal may revoke the mandate whenever he wishes; however, he cannot seek to avoid compensating the mandatary by claiming that what the mandatary had begun was completed by him after the termination of the mandate…

In ***Morris vs Grech*** (Civil Court (First Hall), 5 October 1970), A foreign plaintiff had given a power of attorney with specific instructions to an estate agent in order to purchase some properties. However, the estate agent did not follow these instructions and plaintiff suffered damages. Plaintiff brought an action against the estate agent as his mandator under the institute of mandate. The estate agent pleaded that was he was not a mandatary, but merely a broker. The Court held that **the defendant did not assume the role of a broker, since he acted in the name and on behalf another person**. When defining a brokerage contract, a broker is one who does not conclude any contracts himself and restricts his role to negotiations. Therefore, **if an intermediary acts in a direct or indirect representative capacity, he may not be considered a broker, because an intermediary having the capacity of a power of attorney to conclude a contract himself would indicate going beyond his role of acting as a negotiator.**

Mercantile Agency & Mandate

As previously stated, per **article 49 of the Commercial Code**, mercantile agency is governed by the laws of mandate unless any agreement or law to the contrary states otherwise, apart from article 1861 of the Civil Code, which states that mandate is gratuitous unless there is a stipulation to the contrary.

49. In the absence of any agreement, law or custom to the contrary, mercantile agency is governed by the provisions contained in Title XVIII of Part II of Book Second of the Civil Code so far as applicable, with the exception of article 1861:

Provided that where a mercantile agency involves also the obligation on the part of the agent of performing particular services, then it shall also be governed by the provisions of the Employment and Industrial Relations Act, so far as applicable.

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

Mercantile **agency is the sphere of law which serves to overlap between commercial law and the law of mandate**. Agency is a contract whereby one person, the principal, authorises another, the agent, to act in his name and on his behalf, in a legal relationship between the principal and a third party.

Due to the development of trade, businesses increasingly require not only employees but also persons who can **represent them legally before third parties** and exercise **delegated decision-making power**. This need gives rise to **agency**, defined as a contract whereby an agent is authorised to **act, decide, and conclude transactions in the name and on behalf of the principal**. The scope of authority may be general or limited; what matters is that the agent retains **a margin of personal initiative**. Persons who merely promote business or transmit orders, such as brokers or commission agents, are therefore **not agents** in this sense.

While jurists traditionally consider agency to presuppose a **mandate**, Cremona argues that the two should not be equated: **a mandate may exist without agency, and agency without mandate**. Nevertheless, as noted by Muscat, agency is legally treated as **a species of mandate**, producing legal effects both between principal and agent and between the principal and third parties.

Directors vis-a-vis the law of mandate

Directors have traditionally been regarded as **mandatories and agents**. Prof. Cremona distinguished between directors acting as **mandatories** in their internal relationship with the company and as **agents** in their dealings with third parties, while modern law also recognises directors as **fiduciaries** following the introduction of fiduciary obligations in the Civil Code. However, this distinction has been criticised as unnecessary, since agency and mandate are closely linked. The preferable view is that a director should be regarded as a **mandatary**, whose position is governed primarily by the **Companies Act** and related company legislation, and subsidiarily by the **Civil Code rules on mandate** where company law is silent.

A.Muscat, Principles of Maltese Company Law, (Malta University Press: 2019)

Michael J. Falla v. John H. Sorotos,

Court of Appeal, 12 March 1976

In his internal relations with the company, a director is its mandatary and **in cases of a breach of his duties qua director he would be responsible towards the company.**

Dr Ian Refalo noe et v. Albert David Boweck et

First Hall (Civil Court), 18 March 1983

"id-diretturi ghandhom jitqiesu bhala agenti jew mandatarji tal-kumpaniji li tgawdi personalita'guridika u indipendenti mill-membri li jikkomponuha".

Managers vis-a-vis the law of mandate

The **manager is a mercantile agent** due to his right to manage and conclude his principal's business affairs … but besides transacting business in the name and on behalf of his principal, administers the principal's affairs at least in respect of the business or branch of business with which he is charged, and performs particular services in connection therewith for his principal. **All this implies that the contract which exists between the manager and**

the principal is "sui generis"; in fact, it partakes at the same time of the contract of agency, of mandate and of letting or work and industry.

F. Cremona, Notes on Commercial Law, 1970

Joseph C. Degiorgo noe v. Margherita Rossi et,

Court of Appeal, 14 January 1938

The mandate of a manager is considered by law to be a general mandate, unless the contrary is proved.

With regards to the role of managers, one must refer to **articles 59 and 60 of the Commercial** Code.

59. (1) The authority to act as manager may be express or implied.

(3) … 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.

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

What about contractual representation?

If a representation clause vests contractual authority only in **directors** (e.g. "any director" or "any two directors"), a **manager has no authority** to bind the company, regardless of the importance of the transaction. However, if the clause allows representation by a director **or any person authorised by the board**, a manager is generally deemed authorised to bind the company **within the scope of the business entrusted to him**. Such authorisation may be **implied**, unless the clause expressly requires it to be given in writing.

A.**Muscat**, Principles of Maltese Company Law, (Malta University Press: 2007)

Effects of the Contract of Mandate

1870. (1) **The mandator can, for the execution of a contract, act directly against the person with whom the mandatary in his capacity as such has contracted**.

(2) The powers of the mandator in relation to the subject matter of the irrevocable mandate by way of security may be suspended by express agreement for the duration of the mandate.

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

(a) Where the subject matter of the mandate is a ship or rights related or connected therewith, the Register of Maltese Ships and by means of an annotation;
(b) Where the subject matter of the mandate is an aircraft or an aircraft engine or rights related or connected therewith, the National Aircraft Register and by means of an annotation; and
(c) In all other cases, the Public Registry by means of a note, and in such case it shall have effect in relation to third parties and any exercise of any such powers by the mandatary as are suspended shall not have any effect except when done with the written consent of the mandatary.

The essential characteristic of this contract lies in the fact that the **acts done by the agent in the name and on behalf of his principal are considered at law to be acts of the principal,** and consequently, all profits or losses deriving therefrom are to go in favour of or are to be borne by the principal, while the agent and his estate remain extraneous to anything deriving from the acts. **After the mandatary has executed the acts, he remains a third party to the acts in question**. If the agreement was onerous and not gratuitous, the only thing which the mandatary would be entitled to is the payment.

In the case ***Andrea Spiteri vs Architect Edward Vassallo et***, the Architect engaged with supervision of a house reconstruction. Architect had, in virtue of the task entrusted to him, engaged plaintiff as a mason.

The tasks entrusted to an architect in his professional quality to supervise the reconstruction of a tenement is a mandate, and consequently the relationship between the architect, and his client is governed by the rules on mandate. For the execution of the contract, the mandator may act directly against the person with whom the mandatary, in his capacity as such, has contracted. This is a corollary of the principle that **a mandatary does not contract but offers his services in the name of the mandator, who, in turn, is to be considered as the contracting party.**

The only condition is that the mandatary had contracted as a mandatary and not in his name. Consequently, if an architect who has been engaged by an owner of a house to reconstruct his house, has in turn engaged a mason, such mason can act directly against the person engaging the architect for payment for his work.

Once the architect had not dealt with plaintiff in his personal capacity but in the name of the owner and as the owner's mandatary, **the relationship existed directly between plaintiff and the owner who could not plead that he had no relationship with plaintiff**.

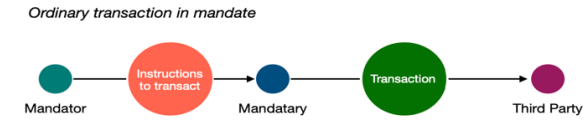
Andrea Spiteri vs Architect Edward Vassallo et

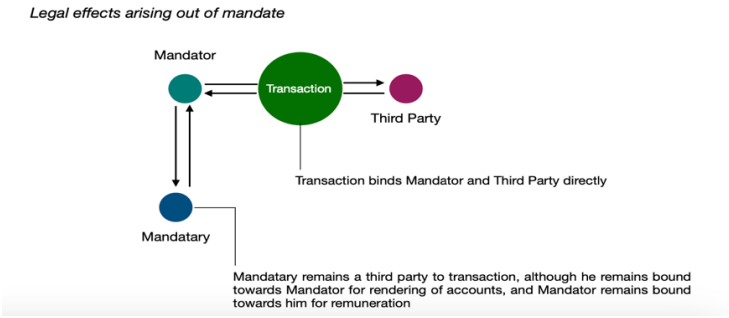
First Hall (Civil Court), 21 January 1954

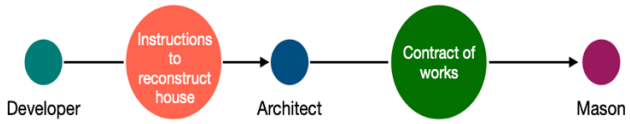
That since the defendant Vassallo did not act with the plaintiff in his own name but in the name of the defendant Jacono, and as his agent, direct relations were established between the plaintiff and Jacono, who therefore cannot claim to be released [from liability].

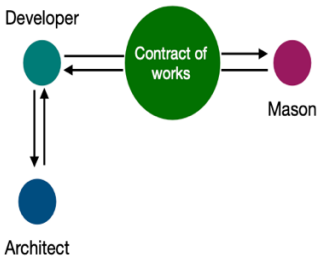
…That neither can Jacono himself claim that Architect Vassallo exceeded his mandate, because **the plaintiff in this transaction is a third party and therefore is not affected by the consequences of such an excess**, unless Jacono proves that the plaintiff was aware of that excess. …

Apart from this, there is also the consideration that the defendant Jacono accepted the advantages deriving from the alleged excess of the mandate and is enjoying them.









The Object of Mandate

Every contract of mandate must have a **lawful objective,** per article 1857.

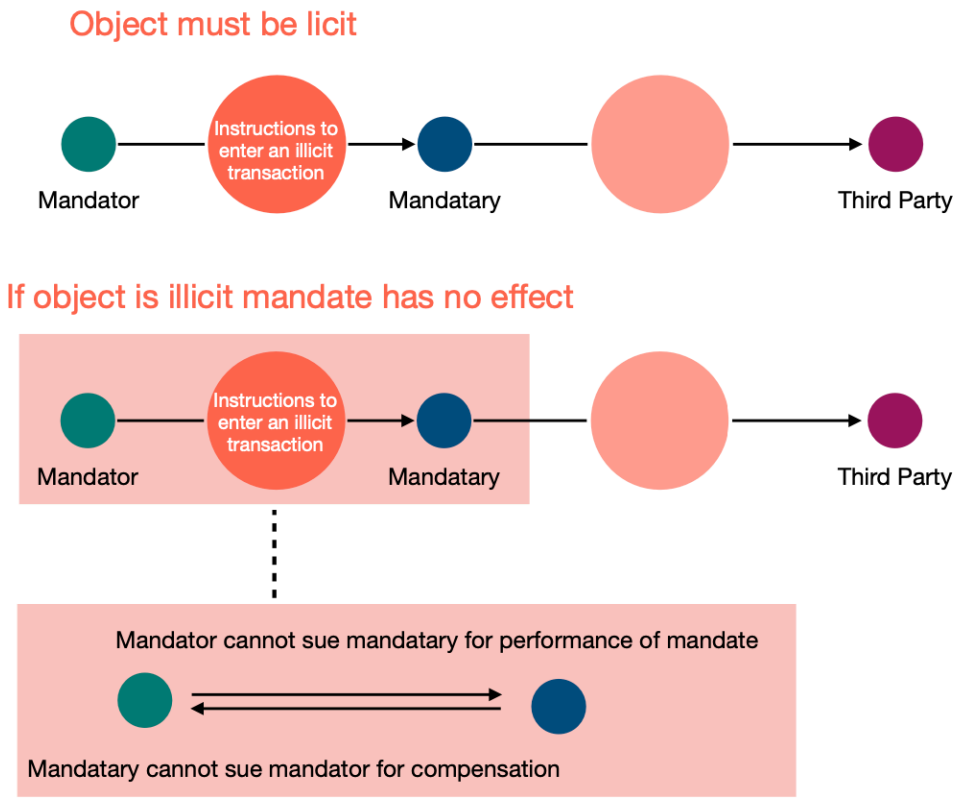
1857. (1) Every mandate must **have for its object something lawful** which the mandator might have done himself.

(2) Subject to any other special pro

vision of the law, a mandate can be **granted by a public deed, by a private writing, by letter, or verbally, or even tacitly**.

(3) An irrevocable mandate granted by way of security as specified in article 1887(1) shall be granted in writing on pain of nullity

The mandate cannot be used to circumvent the law. A minor cannot appoint a mandatary to perform an act in his name which he himself cannot perform. 1857 prohibits the **delegation of a power which does not exist**. When an object is illicit, the mandate is not enforceable.



Rev. Vincenzo Borg v. Giuseppe Caruana et -

First Hall (Civil Court), 5 October 1950

In this case, the plaintiff, who was travelling back to Malta by sea, was tipped that he was going to be searched by the port authorities upon his arrival. He wanted to do away with the money that he was carrying in order to avoid having to declare it. He, therefore, tasked

another person to deliver the money to someone who could, in turn, hold them in deposit for him.

The court refers to several jurists in ascertaining the characteristics of the object of mandate, including **Laurent, Duranton,** and **Troplong**.

Laurent: When the act is unlawful, the law does not recognise any effect of the agreement.
Duranton: The task which has been assigned must be lawful.
Troplong: The mandator cannot demand account from the mandatary who in turn cannot demand aremuneration or compensation from the mandator.

Illi huwa evidenti li l-iskop precipwu ta' l-attur, met huwa kkonsenja l-flus lill-konvenut biex dan jgħaddilhom lil dak ir-ragel, **kien dak li jevadi l-ligijiet fiskali**. ... [Il-mandatarju] rriferixxa kollox lill-attur, u dan immedjatament avvicina lill-konvenut biex dan jaghmel dak "li huwa nnifsu ma setax jaghmel", jigifieri biex inizzillu l-flus l-art hu, u hekk jevadi l-ligi u jehles flusu mill- konfiska, apparti xi piena ohra. … L-oggett ta' mandat kien ghalhekk illecitu

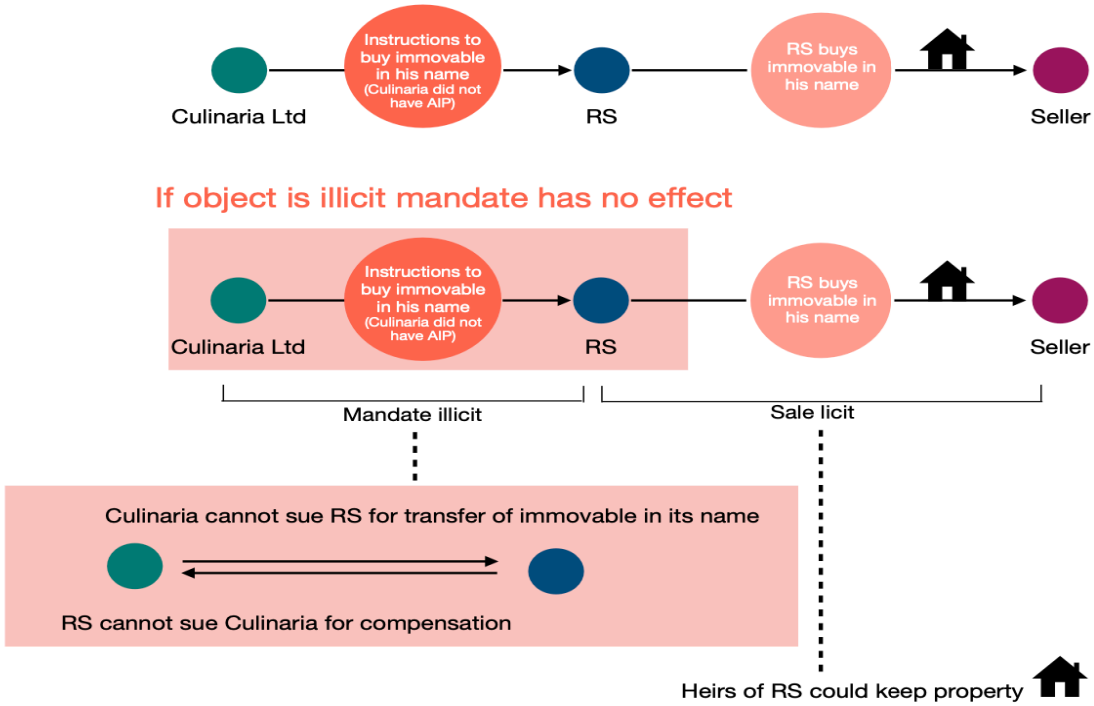
... Illi fuq l-iskorta tal-principji fuq zvolti, jidher car ghalhekk li, **ladarba l-mandat fuq imsemmi kien illecitu, lill-attur ma tikkompeti ebda azzjoni ghar-restituzzjoni ta' flusu kontra l- konvenut.**

This case importantly referred to the principle reiterated by **Ulpiano**, in that ***non habebis mandati actionem*** - no right to action, which applies owing to the fact that the unlawful object negates any and all effects produced by the mandate at law.

Judith Lucchesi noe v. Rita Sultana et - *mandate must have lawful objective*
Court of Appeal, 3 December 2004

Article 1857 of the Civil Code requires that a mandate concern a **lawful act** which the mandator could perform himself. Since the appellant company could not acquire the property

without the **Minister of Finance's permission** under Chapter 246, it was **legally incapable** of performing the act. Consequently, it could not lawfully grant a mandate to an agent to do what it was itself prohibited from doing. The agreement was therefore based on an **unlawful cause** and was unenforceable.



Form of mandate

Article 1857 also refers to the **form of the mandate**. 1857 (2) states that a mandate must be granted by **a public deed, a private writing, by letter, verbally, or tacitly**. The Civil Code in this regard is very liberal vis-a-vis the form of the mandate. Contrary to common belief, the Civil Code is not very concerned with the *form* of this contract, but rather **the substance thereof**. Except where the Civil Code states otherwise, a contract may be entered into quite loosely. In the case of Mandate, the Civil Code expressly declares that the contract may be entered into verbally or tacitly.

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

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

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

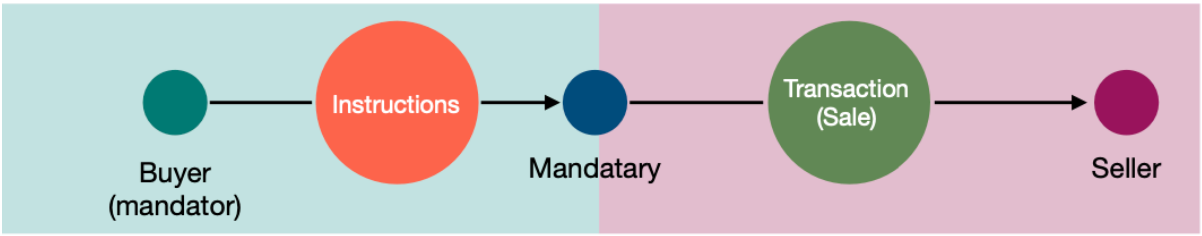
Form of agent's authority.
52. Where the law requires that an act be expressed in writing, the authority given to an agent to do such act must be conferred in writing.

Here, we find the first classification of the contract of mandate. A Mandate may be **general** or **special**. In relation to form, the power to make alienations to property, or to hypothecate property, must be conducted through a **special mandate,** which per 1863 (2), must be **expressed.** When we say that the mandate must be **expressed**, we refer to an agreement which is **not tacit**, as per jurisprudence. This **does not necessarily mean** that a special mandate, which power must be expressed, has to be done in writing. On the other hand, **a general mandate** may only be utilised to perform **acts of administration**.

The question arises as to **whether the form of the mandate requires the same formalities as that of the act entrusted to the mandatary**. Thus, if one appoints a mandatary to purchase immovable property, which act must be done via public deed and hence in writing, does the mandate also have to be done in writing?

In **Richard Rizzo Bamber noe v Giuseppina Rizzo noe et**, the Court held that a **mandate to purchase immovable property does not require a specific formality or written instrument**. Although the sale of immovables must be effected by public deed, this requirement **does not apply to the mandate** between mandator and mandatary. The phrase "must be expressed" in Article 1863(2) does not mean "in writing", but merely excludes a tacit mandate in certain cases and may be proved by **any lawful means, including testimonial evidence**.

Where a mandatary acquires immovable property in the interest of the mandator, ownership passes **ex tunc** to the mandator, who has a **direct action** against the mandatary or his heirs for transfer of the property. Such transfer cannot be refused on the ground that the mandator should instead sue for damages. Even where an expressed power is required (such as to hypothecate property), it **need not be in writing**, and a tacit mandate may arise from the surrounding circumstances showing authorisation.



Saverio Galea et v. Paolo Gauci noe, *- mandate vis-a-vis immovables need not be in writing*
Court of Appeal, 24 April 1931

"the mandate to buy immovable property is not subject to the need for a private writing; and, therefore, witness evidence is admissible to prove it"

Elizabeth Elkhiate et v. Emanuel Attard, *- immovables, mandate need not be in writing*
First Hall (Civil Court), 28 February 2001

Couple applied for a government plot and agreed with their children that the land would go in favour of one of their daughters.

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

…Minn naha l-ohra l-atturi qed jissottomettu li kien hemm ftehim espress bejn il-partijiet li gie accettat mill-konvenut. …

L-akkwist ta' immobbli fl-interess ta' haddiehor jiswa, avvolja l-ftehim dwar dan l-akkwist bejn lakkwirent u l-persuna l-ohra ma jkunx bil-miktub. **Il-mandat jista' jinghata mhux biss bil-miktub, imma anke bil-fomm u anki tacitament."**

On the basis of the evidence presented, the Court agreed that the plot had been acquired and developed by the parents on behalf of their daughter.

Romeo Fleri v. Notary Francis Xavier Dingli, *- element of tacit mandate is knowledge*
Court of Appeal, 17 May 1963,

A mandate may also be tacit, but an essential element of a tacit mandate is the knowledge and awareness in the alleged mandator that the matter in which he had an interest has been undertaken by another person.

The lawyer is to be considered a mandatary of his client for the acts in a proceeding. However, the lawyer cannot agree or bind himself to a compromise on behalf of his client, unless he has an express and special authorisation from his client.

Dr Paolo Borg Grech v. Dr Giuseppe Attard Montalto, *- knowledge of preparation of work*
Court of Appeal, 29 October 1956

Plaintiff, a lawyer, had drafted a contract of partition to which defendant and his brother were parties. Defendant refused to pay any part of the legal fees. **Defendant pleaded that he had never engaged plaintiff as his lawyer, however, Court found that defendant knew that plaintiff was preparing the draft, and that he had also retrieved certain documents from the notary for this reason.** Defendant had not protested against plaintiff's drafting of the contract. Court resorted to doctrine:

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

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

Defendant was deemed to have granted a tacit mandate to plaintiff and was bound to pay for his services.

S.G. South Limited v. Joseph Scicluna et *- 'tkun darb'ohra' = expressed appointment*
First Hall (Civil Court), 2 April 2004

From the foregoing, it follows that there existed a contractual relationship between the parties by virtue of which the plaintiff company had been requested by the defendants to try to find a buyer for the property they owned in Marsascala, including the premises in question. Although there may be some doubt as to whether this mandate was given in writing or not, the law does not require any written form for the validity of a mandate, and **a verbal agreement, as certainly occurred in this case, is sufficient for the contract to be concluded**. The mandate was clear and precise, namely, that the plaintiff company was to assist the defendants in attempting to sell the property they owned in Marsascala.

Now, although a mandate is one of those contracts which, by way of exception, may be terminated unilaterally through the revocation of the power of attorney (Article 1886(1) of the Civil Code), the mandate nonetheless remains a bilateral contract, and in order for it to be dissolved, **the decision to revoke the mandate must be communicated to the mandatary**. A mandatary who, in good faith, continues to execute the mandate because he was not informed by the mandator that the power of attorney had been revoked, retains the right to be paid whatever is due to him according to the terms of the agency agreement.

Furthermore, the defendant Franco Scicluna admits that shortly before signing the preliminary agreement which is the subject of this case, he had been contacted by the plaintiff company, and although he stated that communications had started to diminish, he agreed to discuss the matter brought to him by the plaintiff company. When he was informed that that

particular transaction had been cancelled, he replied that "nothing had happened, and if it didn't work out this time, **there would be another opportunity**." All this indicates that the same defendant, on behalf of his partners, accepted to continue negotiating with the plaintiff company, and this shows that, at least **tacitly**, he was confirming the mandate which had previously been granted (see Article 1857(2) of the Civil Code).

The mandator knew that the mandatary was looking for other people to sell the property to, but he didn't stop him - this was interpreted as a **tacit mandate**.

A lawyer **cannot enter any compromise without having a mandate which is not only express, but also special**. Thus, the relative party would not be bound by such compromise if it was entered into by his counsel, without any special mandate.

1860. If a mandate is granted by a private writing, the name of the mandatary may be left in blank; in which case, so long as the name is not written, the bearer of the writing or of the instrument or procuration shall be deemed to be the mandatary.

Fortunata Maggi v. Rosina Coleiro - *when PoA is unnamed, assumption of discretion is created. Court of Appeal, 14 December 1949*

A power of attorney which does not contain the name of the mandatary **indicates that whoever has signed this document has left the choice of the mandatary completely in the hands of the person to whom such document is delivered.**

The person bearing the document and purporting to be the mandatary, had filled in the missing fields herself, indicating her own name as the attorney.

"There existed no abuse, since it was to be presumed that the mandator had left the choice of the mandatary to the person to whom he had delivered the power of attorney."

Proof of Mandate

In ***Alfred Borg v. Raymond Portelli*** (FHCC, 24 November 1981), the Court asserted that ***the existence of a mandate must be proven by he who alleges the existence thereof***.

In ***Air Malta Company Limited v. Richard Muscat et*** (FHCC, 28 February 2001), the Court held:

As a general rule, a person is presumed to contract **in his own name**, unless he indicates that he is acting **on behalf of another**, or this is reasonably apparent to the other contracting party. The **burden of proof** that a person contracted in the name of another lies on the party making that allegation. In the absence of proof, or even in cases of doubt, a **mandate cannot be presumed** and must instead be **excluded**.

Acceptance of the Mandate

1856 (2). The contract is not perfected until the mandatary has accepted the mandate

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

Alessandro Mattei noe v. Not. G.D. Page noe,
Commercial Court, 2 October 1884,
Mandatary made purchase on behalf of mandator, but power of attorney was dated some days later than the sale.

Mandatary was considered to have accepted the mandate **since this could be inferred from the fact that he appeared on the deed of sale.**

Maria Dolores sive Doris Mallia et vs David Bondin et - acceptance
CoA, 23 May 2024

Il-mandat huwa kuntratt li bih persuna tagħti lil persuna oħra s-setgħa li tagħmel xi ħaġa għaliha u li dan il-kuntratt mhux perfett sakemm il-mandatarju ma jaċċettax (Artikolu 1856 tal-Kodiċi Ċivili). Filwaqt li mandat jista' jingħata b'att pubbliku, b'kitba privata, b'ittra jew bil-fomm, jew ukoll taċitament (Artikolu 1857 tal-Kodiċi Ċivili), il-liġi tipprovdi wkoll li l-aċċettazzjoni tal-mandatarju tista' wkoll tkun taċita u tista' tidher mill-fatt (Artikolu 1858 tal-Kodiċi Ċivili).

Thus, a **mandate is incomplete if it is not accepted by the mandatary**. The acceptance need not be done expressly, for **article 1858** allows the mandatary to accept **tacitly**. This acceptance **must be proven and inferred from the surrounding circumstances** and acts, on the **basis of a balance of probabilities.**

We know that a mandate can be either **general** or **special**. It is general when the mandate is done for all the affairs of the mandator, and it is special when the mandate is to perform one or certain affairs. **When the mandate is in relation to that specified in article 1863(2) then the mandate must be expressly granted.**

General & Special Mandate

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

1863. (1) A mandate made out in general terms applies only to acts of administration.

(2) The power to make alienations of property, except such alienations as fall within the limits of the administration, or to hypothecate property or to perform other acts of ownership, must be expressed.

John La Rosa noe v. Carmelo Galea - *determinate acts mandates to be restrictively interpreted*

Court of Appeal, 30 May 1958

A mandatary negotiated a sale on behalf of his mandator. The broker of the deal wanted to maintain an action for brokerage against the mandatary. The mandatary was extraneous to the

sale. **Mandator's instructions had been to find a buyer rather than to engage a bro**ker. In this case mandatary exceeded the limits of the mandate and the mandator would not be responsible**. One cannot assume that a mandate to sell includes a mandate to engage a broker since one can sell without the involvement of a broker.**

Baudry Lacantinerie: A mandate to perform certain determinate acts must be interpreted restrictively.

"Hija dottrina komuni illi f'certi cirkostanzi anke s-semplici silenzju tal-mandant jista' jinduci r- ratifika tal-operat tal-mandatarju, in bazi ghall-principju *"**qui tacet cum loqui potuit et debuit consentire videtur***."

On **the acceptance of mandate**, this case refers to the principle ***qui tacet cum loqui potuit et debuit consentire videtur -*** *who is silent when he could and ought to speak seems to agree.* Thus, provided that the circumstances of the case suggest as such, it is possible for silence to infer agreement of the mandate.

Eduardo Vassallo noe et v. Edward Lewis Galea et *- a general PoA may be expressed, but this does not automatically render it a special mandate*
First Hall (Civil Court), 7 October 1950

An **express mandate** must not be confused with a **special mandate**. A mandate may be express without being special and special wihthout being expressed. A mandate is **special** when it specifies the particular acts the mandatary is authorised to perform, whereas the **express** element refers to the clear manifestation of the mandator's will allowing the mandatary to perform acts **beyond ordinary administration**.
Accordingly, a **general power of attorney**, even if express, does **not** confer special authority for specific acts such as submitting a dispute to arbitration. Thus, although the mandatary may have an express mandate to manage, alienate, or even compromise, without a **special mandate** he lacks authority to appoint an arbitrator or conclude that particular settlement.

Mandate of ordinary / general tasks

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

In ***Spiridione Zammit v. Dr Antonio Caruana*** *(CoA, 4 December 1957)*, a lawyer was entrusted to act as counsel for his client. This was interpreted to be of a ***sui generis*** nature, similar to the contracts of letting and hiring and of mandate. Whatever the mandatary had done in the performance of his mandate, even if erroneous, but provided that no fraud, gross negligence, or carelessness had subsisted, the lawyer was not responsible for any damage suffered by the plaintiff.

Summary on form of mandate

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

Administration of the Community of Acquests

The law lays out that the ordinary administration of the community of acquests shall vest in either spouse.

1322. (1) The ordinary administration of the acquests and the right to sue or to be sued in respect of such ordinary administration, shall vest **in either spouse.**

(2) The right to exercise acts of **extraordinary administration**, and the right to sue or be sued in respect of such acts or to enter into any compromise in respect of any act whatsoever, shall vest in the **two spouses jointly.**

(3) Acts of extraordinary administration are the following:

(*a*) acts whereby real rights over immovable property are acquired, constituted or alienated;

(*b*) acts constituting or affecting hypothecation of property;

(*c*) acts whereby immovable property is partitioned;

(*d*) acts granting rights of use and, or, enjoyment over immovable property;

(*e*) donations other than those referred to in article 1753(2)(*a*);

(*f*) borrowing or lending of money, other than the deposit of money in an account with a bank;

. . . .

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

However, acts of extraordinary administration of the community of acquests shall vest in both spouses **jointly**. 1322 (6) holds that one spouse may, by means of a public deed, appoint the other to perform acts of extraordinary administration, but this is never really put into practice. This sub- article thus serves to merge the regime of the community of acquests with the

notion of mandate. **The question arises as to whether an agreement involving an act of extraordinary administration is valid in the case that the other spouse did not consent to such agreement.** In such case, what are the consequences on the creditor? We shall see, in the case of ***Demarco vs Demarco***, what such consequences entail.

First, we must look at an exception to the rule stipulated in **article 1322 (2)**, being that of **article 1324**;

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

Therefore, where the act pertains to the management of a trade, business or profession being exercised by one spouse, **article 1322 (2)** does not apply, and thus the spouse need not seek consent from the other spouse prior to performing such act. This applies, per **article 1324,** even where the act would have normally constituted an act of extraordinary administration.

Consequences to breach of 1322 (2)

> **1326.** (1) Acts which require the consent of both spouses but which are performed by one spouse without the consent of the other spouse **may be annulled at the request of the latter spouse where such acts** **relate to the alienation or constitution of a real or personal right over immovable property;** and where such acts relate to **movable property** they may only be annulled where the rights over them have been conferred by gratuitous title.
>
> (2) An action for annulment may only be instituted by the spouse whose consent was required and within the **peremptory term of three years** from –

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

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

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

…….

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

(5) Saving the preceding provisions of this article, where in any act which requires the consent of the other spouse and which relates to movables, a spouse has acted unilaterally, there shall be no right competent to the other spouse to demand the annulment of the act; where however, the other spouse has not ratified such act, whether expressly or tacitly, such spouse shall have an action to compel the spouse who has acted unilaterally to reintegrate the community of acquests, or where this is not possible, to make good the loss suffered.

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

Cohabitation Act. Chapter 571

If one spouse enters an act of extraordinary administration without the consent of the other spouse, then **the agreement may be annulled**. This action is barred by 3 years, peremptorily. There is a remedy, that of **reintegration**, whereby the injured spouse may file an action against the other spouse by reintegration.

In the **Demarco vs Demarco** case, the spouse constituted himself as a personal surety in favour of a company, of which he was also the financial controller. His wife sought to annul

the contract through which her husband had offered himself as a surety, thereby binding property falling within community of acquests.

Angela Demarco v. David Demarco et
First Hall (Civil Court), 9 October 2003

The Court held that an act must first be **connected to the administration of the community of acquests** before it can be classified as ordinary or extraordinary; otherwise, **Article 1326 of the Civil Code does not apply**. The guarantee signed by David Demarco, an accountant with no involvement in commercial management, was therefore **not an act of administration of the community**.

While the guarantee could **not bind the community of acquests** due to the lack of the wife's consent, it remained **valid and binding on the husband personally**. Spousal consent is required **only to bind the community**, not for the **validity of the contract itself**. Accordingly, the absence of consent may justify a declaration that the act does not affect the community, but **cannot annul the obligation entirely**.

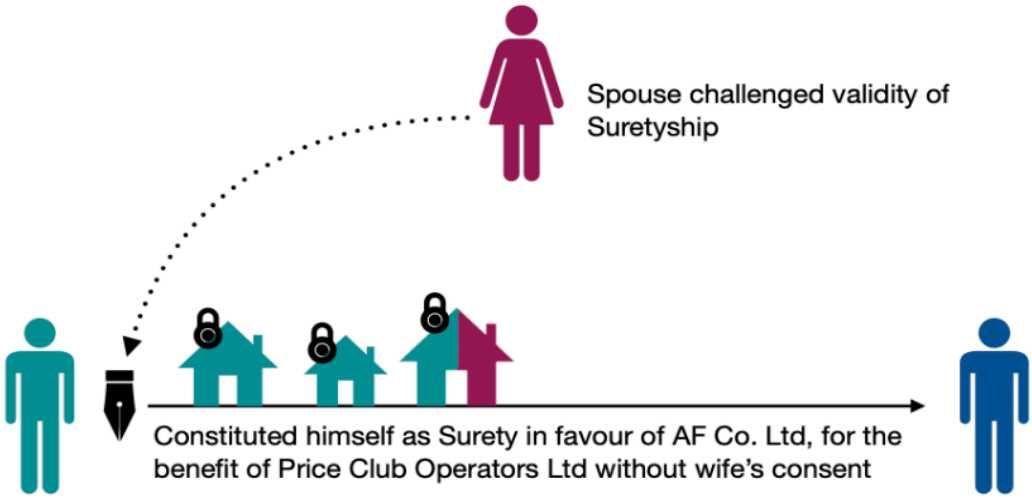
A creditor contracting with one spouse alone obtains a **valid obligation** binding that spouse's **paraphernal property**. The non-signing spouse's interest is limited to obtaining a declaration that the obligation does not burden the community, after which she has no further legal interest. Consequently, the obligation arising from the guarantee was **paraphernal to David Demarco** and did not burden the community of acquests, subject to Article 1329 of the Civil Code.

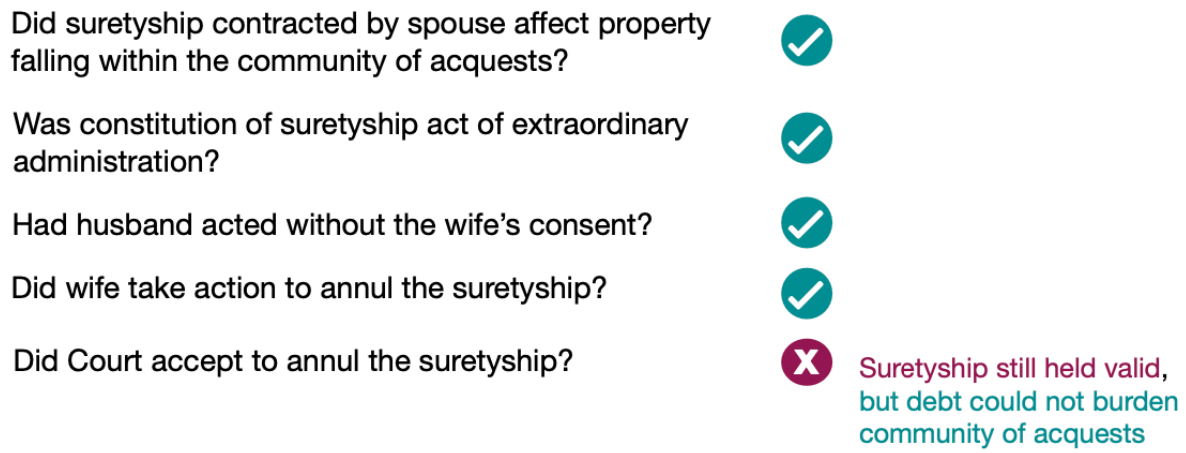
This case discusses the legal consequences of a spouse performing an act of extraordinary administration without the other spouse's consent. Demarco vs Demarco presented a very important evolution of what the law states.

Therefore, per **article 1326** and as interpreted in ***Demarco vs Demarco***, where one spouse performs an act of extraordinary administration without the consent of the other spouse, then

there lies grounds to annul that agreement. However, as described by jurisprudence, the plaintiff must be able to prove that the act of extraordinary administration in question pertains and relates to the **community of acquests then the lack of consent only allows annulment vis-à-vis the community.** Thus, if the act does not share a connection with the community of acquests, there lies no grounds to annul that agreement.

Thus, in ***Demarco vs Demarco***, the remedy available to the wife was to annul the agreement **only insofar as it affects the community of acquests**. Her interest would be for the property to remain within the Community of Acquests.



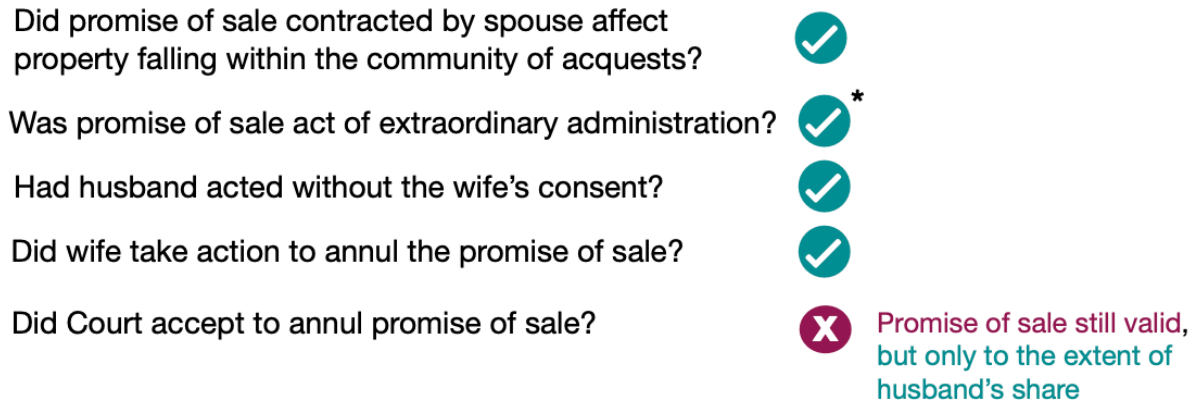


Charles Muscat et v. Roy Lancelot et - *wife did not consent to husband's PoS for an immovable First Hall (Civil Court),22 February 2016*

The plaintiffs sued the spouses **Lancelot Sharples** for the enforcement of a **promise of sale**. The wife objected on the basis that she had **not consented** to her husband entering into a promise of sale concerning an **immovable forming part of the community of acquests**, which she argued was an act of **extraordinary administration**.

By way of counterclaim, **Giovanna Sharples** sought a declaration that the promise of sale was **null and void** due to the lack of her consent. Relying extensively on **Demarco v Demarco**, the Court held that the promise of sale dated **13 October 2010** was **not null**, but was **valid only in respect of the husband's share**, namely **one half**, since the property belonged to the community of acquests.

Accordingly, the plaintiffs were entitled, if they so wished, to demand the **final deed of sale only for an undivided half** of the property.



The wife thus sought out to annul the promise of sale agreement. The question arises as to whether her remedy was to annul the entire promise of sale or to annul only part of the promise of sale. The Court ruled that the wife was permitted to annul **only her share** of the property vis-a-vis the promise of sale, on the basis of the ***Demarco vs Demarco*** judgement. **This decision and interpretation may be argued and criticised as being impractical and transactional, combatting the spirit encompassed within the notion of the Community of Acquests**

David James Sammut et v. Advocate Tonio Azzopardi noe et - *Promise of sale not listed*
Court of Appeal, 5 December 2014

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

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

Anthony Bugeja v. Publius Micallef et *- taking out a loan vis-a-vis consent of the spouse*
Court of Appeal, 27 June 2003

The defendant defaulted on a loan granted by the plaintiff and argued that, since his wife had not given her consent, the debt could not be enforced against the **community of acquests**. On appeal, the plaintiff contended that even if consent had not been given initially, the wife had **tacitly ratified** the loan.

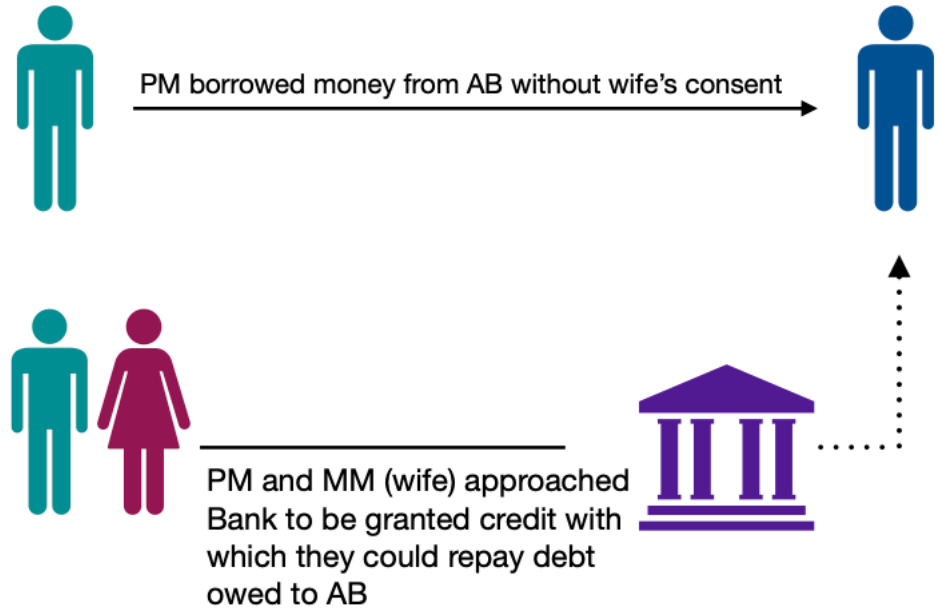
The Court accepted that there was no proof that the wife was unaware of the loan, particularly since she had accompanied her husband to the bank to request the loan facility. In the absence of proof that the non-consenting spouse expressly or tacitly ratified the act, her remedy would be limited to **internal recourse** against the other spouse under **Article 1326(5)**, namely to seek reintegration of the community or damages. Such internal remedies do **not affect third parties**.

Moreover, the wife's attendance at the bank to arrange further borrowing in order to repay the debt was held to be indicative of **express or tacit ratification**. Consequently, an act of extraordinary administration performed by one spouse alone **binds the community of**

acquests unless and until the court declares it null, and ratification — even tacit — validates the act against the community.

The fact that MM accompanied PM in seeking money from a bank, was deemed a circumstance through which one may derive **tacit consent** to the act of extraordinary administration.

Did loan taken out without wife's consent bind community of acquests or spouse's paraphernal property?



Did loan contracted by spouse affect property falling within the community of acquests? ✓

Was loan act of extraordinary administration? ✓

Had husband acted without the wife's consent? ✓

Had wife taken action to annul the loan? ✗

Had she expressly or tacitly ratified that act? ✓

Does debt burden community of acquests or husband's paraphernal property? Community of Acquests

Did wife have action of reintegration against husband? ✗

Has spouse sought **annulment** of act extraordinary administration entered into without consent in time?

- If yes ✓
- If no … Has spouse **tacitly or expressly ratified the act**?
  - If no ✓
  - If yes ✗

✓ **Debt must be fulfilled solely by the signatory through his/her paraphernal property**

✗ **Act cannot be challenged and binding on community**

✓ **Debt may be fulfilled by community of acquests but spouse may compel the other spouse to reintegrate the community of acquests or make good loss suffered**

Does the act concern **the acquests**?

If yes …

Is it an **act of extraordinary administration**?

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

If no ✗

If yes … Is it **a normal act of management of a trade, business or profession**?

If no … has it been **done without consent of spouse**?

If yes ✗

If no ✗

If yes ✓*

✓ **spouse may seek annulment** (or declaration that the debt must be fulfilled solely by the signatory through his/her paraphernal property)

*** (see following slide)**

✗ **Act cannot be challenged and binding on community**

Has spouse sought **annulment** of act extraordinary administration entered into without consent in time?

If yes ✓

If no … Has spouse **tacitly or expressly ratified the act**?

If no ✓

If yes ✗

✓ **Debt must be fulfilled solely by the signatory through his/her paraphernal property**

✗ **Act cannot be challenged and binding on community**

✓ **Debt may be fulfilled by community of acquests but spouse may compel the other spouse to reintegrate the community of acquests or make good loss suffered**

Therefore, **unless the wife challenges the act of extraordinary administration in time, the third-party creditor is not affected or threatened by the pain of annulment of the contract.**

Lombard Bank Malta v. Eurimpex Ltd et *- hypothecs over immovables in the community of a. FHCC, 27 February 2004*

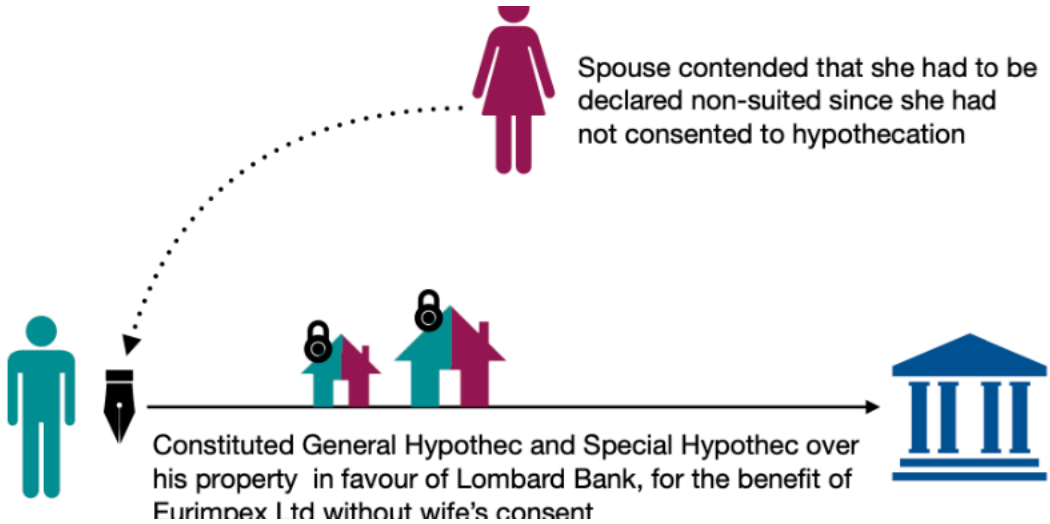
In this case, the spouse constituted a general hypothec and a special hypothec over property falling within the community of acquests, in favour of plaintiff (bank), for the benefit of a company (Eurimpex Limited). Wife claimed that she was not aware of the hypothecation and that the hypothecs were not effective over the community of acquests.

It is true that the defendant, **Zaffarese**, succeeded in proving that the signature appearing on the *consent form* (at fol. 71) and that on the *general power of attorney* (at fol. 79) were **not hers**, and therefore she cannot be considered to have participated in the **extraordinary act of administration** carried out by her husband when he mortgaged the property belonging to the **community of acquests** in favour of the plaintiff company by means of a special hypothec.

…

However, the defendant **Zaffarese** did **not institute any proceedings** intended to annul the extraordinary act of administration made by her husband, in the manner and within the time limits established by **Article 1326 of Chapter 16**(of the Civil Code), and therefore this act of administration **binds the community**.

From this it appears that an **extraordinary act of administration** carried out by one of the spouses alone **binds the assets of the community of acquests**, provided that there has been **no court declaration** of the nullity of that act. [The internal relations between the spouses, relating to reimbursement or damages as mentioned above, do not affect third parties



Did hypothecation by spouse affect property falling within the community of acquests?	✓
Was hypothecation act of extraordinary administration?	✓
Had husband acted without the wife's consent?	✓
Had wife taken action to annul the loan?	✗
Does debt burden community of acquests or husband's paraphernal property?	Community of Acquests
Did wife have action of reintegration against husband?	✓

Nazzareno Cardona v. Massimo Zahra et *- the exception to the rule - art. 1324 Court of Appeal, 16 December 2019*

This Court is convinced that the loan taken out for the purpose of the air-conditioning business managed by the respondent falls within the parameters of a <u>normal act of commercial management,</u> as required by law. However, there is no evidence that the same can be said for the entire amount borrowed. The burden of proof in this regard rested on the applicant, since he pursued the case even against the debtor's wife, who had neither signed the deed in question nor consented to the loan.

Where an extraordinary act of administration is carried out by one of the spouses alone and without the knowledge — even tacit — of the other spouse, such an act nevertheless remains valid. In light of the above considerations, the question arises as to whether an extraordinary act carried out by or with the knowledge of only one of the spouses, and which is not challenged through an annulment action, still burdens the community of acquests as if it had been carried out by both spouses, or whether it burdens only the paraphernal property of the spouse who alone carried it out. **In light of these considerations, this Court is of the opinion that the first court was correct in finding that the portion of the settled debt which was not intended to finance the air-conditioning equipment did not burden the community of acquests existing between the appellants, but was to be repaid by the appellant Massimo Żahra**, without prejudice to the appellant creditor's rights in the event that the particular assets of the debtor appellant were insufficient to satisfy the said payment.

Presta Nome Mandate

We will first compare the powers of an ordinary mandator (**article 1870**) with the powers of a ***presta nome mandator*** (**article 1871**);

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

In this article "public register"means:

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

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

(*c*) in all other cases, the Public Registry by means of a note,

and in such case it shall have effect in relation to third parties and any exercise of any such powers by the mandatary as are suspended shall not have any effect except when done with the written consent of the mandatary.

1871. (1) When the mandatary has acted in his own name, **the mandator cannot maintain an action against those with whom the mandatary has contracted,** nor the latter against the mandator.

(2) In any such case, however, the mandatary is directly bound towards the person with whom he has contracted as if the matter were his own.

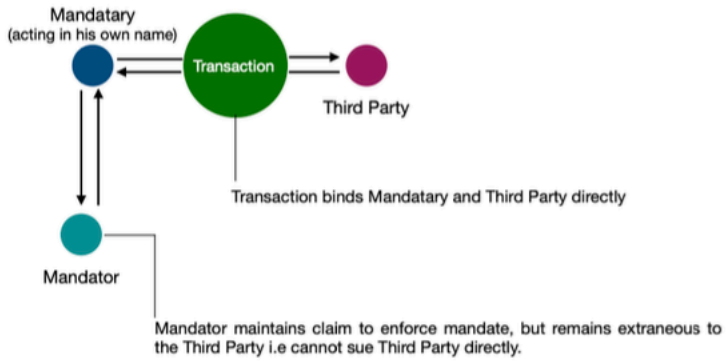
In the case of a ***presta nome*** mandate, the third party (the person with whom the mandatary is contracting) has no idea that he is actually contracting with someone else. In this case, there is still a **legal mandate**, with the difference that the mandatary is acting in his own name. Let us imagine a scenario where a mandatary goes to purchase property, acting in his own name, apart from the fact that he is acting on behalf of a mandator. When acting in one's own name as a mandatary, there is **no relationship between the mandator and the third party**. This is totally different to the case of an **ordinary mandate**, in which case the **third party is legally recognised to contract with the mandator directly**, notwithstanding that he is contracting through the means of a mandatary.

In the presta nome mandate, there is only a relationship between a **mandatary and the third party**. The question that arises is - what happens if the mandatary decides to keep the property for himself?

Ordinary transaction in prestanome mandate



Legal effects arising out of prestanome mandate



The mandator can **directly sue the mandatary** for **failure to fulfil his obligations** as agreed upon. While no relationship exists between the mandator and the third party, a **contract of mandate was still entered into between the mandator and the mandatary, and thus the mandatary is bound to all agreements and obligations which he subjected himself to upon entering into the contract of mandate with the mandator**. In the ordinary mandate there is a direct juridical link whereas in the prestanome this link is nowhere to be found.

In this case it is also worth noting that if a third party seeks to sue, he should seek the mandatory in this case and not the mandator.

The action filed by the mandator against the mandatary is referred to the ***actio mandati directa***, in which he can demand the mandatary to fulfil his obligations.

Richard Rizzo Bamber noe vs Giuseppina Rizzo noe et - *mandator action against mandatary* **In the acquisition of an immovable in the interest of another person, the mandator has a direct action against the mandatary, or against his successors, for the transfer of such**

immovable in his favour.

RRB authorised JR to purchase one undivided share of a house on his behalf. JR bought it in his name and started occupying it but kept paying rent to RRB. JR had also often requested plaintiff to sell him his share. JR died, but his widow and heirs refused to transfer property to him.

What remedy for mandator?

JR's heirs argued that the **mandator could only demand damages from the mandataries or his heirs**, rather than the transfer of the property in his favour.
RRB argued that mandator could exercise the ***actio mandati directa*** even if the mandatary has passed away.

Court argued that when JR had purchased in his name but as mandatary of RRB, RRB acquired no real right over the property purchased which entitled him to demand back such property.

However, RRB enjoyed a personal action - *actio mandati directa* - against the successors of the JR to demand the return of the share which JR had purchased in his own name. **The Court, therefore, acknowledged RRB as owner of one-half share of the house and ordered JR's heirs to transfer this share to plaintiff by means of a public deed.**

Emanuel Frendo v. Carmelo Azzopardi et - *proving Mandate*
First Hall (Civil Court), 28 January 2004

During a long period of cohabitation with the defendants' wife and mother, plaintiff had instructed the latter to acquire a property in his name. The cohabitee proceeded to purchase the property in her name. Following her death, her heirs at law attempted to evict the plaintiff from the property on the basis that he had no valid title to occupy that property.

It is undeniable from the evidence — which, as stated, remained uncontested — that the deceased **Carmen Azzopardi** did **not possess her own funds**, and that the **money for the acquisition and purchase of the property** was provided from other sources through the **intervention of the plaintiff**, who subsequently **reimbursed** those amounts.

… It is also **undisputed** that when the said **Carmen Azzopardi** assumed the obligation to appear on the **contract of purchase of the property**, she did so **in the name of the plaintiff**. This therefore means that when she accepted that obligation, it was her **duty to acquire the property in the name of her mandator**.

When this is not done, and in the execution of the mandate the **mandatary exceeds the powers conferred upon her**, she **does not bind the mandator**, unless he **expressly or tacitly ratifies** her actions — in accordance with **Article 1880(2) of the Civil Code**. In such a case, the mandator is **not legally bound** to recognize the contract as binding upon him, and thus has the **right of action** against the mandatary — or, as in this case, against **her heirs** — for the **restitution to him of the object** which the mandatary acquired **on his behalf and in his interest**.

The Court therefore decides the case by, after rejecting the defendants' principal plea (which was not maintained), **upholding the plaintiff's claims**, and declares, first and foremost, that the property **11B Nazzarenu Street, Marsa**, shall be deemed to be the **absolute property of the plaintiff**.

Moment of the Transfer of Ownership

Another question asked in this judgement related to ***the moment in which the mandator become the owner of the thing forming the object of the mandate***. Is the ownership transferred upon the transaction being contracted by the mandatary, or is it transferred upon the transfer of the property from the mandatary to the mandator?

One must note that here we are speaking strictly about **presta nome** mandates, since in the case of an ordinary mandate, the property is transferred immediately upon the contract being signed by the mandatary, since the relationship between the third party and the mandator is **direct**.

In the case of **presta nome** mandates, the mandator becomes the owner of the property **when the mandatary transfers the property to the mandator**. This is because to the public, this mandate does not exist, since the mandator chose to keep his identity hidden. There are thus two transactions in this case. Interestingly the government also expects that the stamp duty would be paid both with respect to the initial transfer as well as the successive one in which the mandatory transfers the property to the mandator.

This Case also referred to the principle subscribed to by ***Pothier***, in that if one instructs another to buy a certain thing, the agent that is in charge of my mandate, and who is now the owner of that thing, the mandatary, must return the thing to the mandator, even if the purchase was not done in the name of the mandator. This principle has been accepted and adopted by the Maltese Courts in the context of ***presta nome mandates and*** has been subscribed to by jurists such as ***Baudry-Lacantinerie*** and ***Laurent***.

Nicola Farrugia pro et noe v. Francesco Farrugia et, First Hall (Civil Court),
10 December 1954, Vol. XXXVIII.II.606

When a mandatary acquires a tenement in his name but in the interest of his mandator, **the mandator becomes the owner thereof *ex tunc* (from the outset)**. This, however, applies in the internal relationship between the mandatary who has so acquired, and the mandator. Thus for the acquisition to be valid in favour of the mandator, in relation to third parties, **the juridical act of the acquisition in the mandator's interest is to be perfected by the transfer of the property from the mandatary to the mandator by means of a public deed**.

The *mandatary prestanome* is one who **apparently exercises the rights of an owner**, while in reality he is merely an agent (*mandatary*). When, in this capacity as a *mandatary prestanome*, he acquires ownership of immovable property, there is a **public deed** through which the property is transferred to him, and a **secret agreement** stating that he, the apparent purchaser, is in truth only an agent.

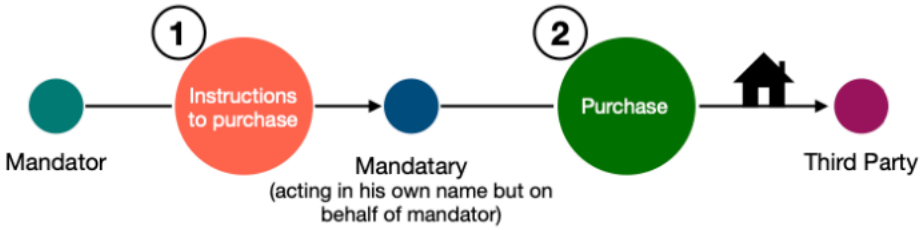
With regard to third parties, however, the principle remains that — in relation to them — **secret agreements that derogate from the apparent agreement produce no effect**.

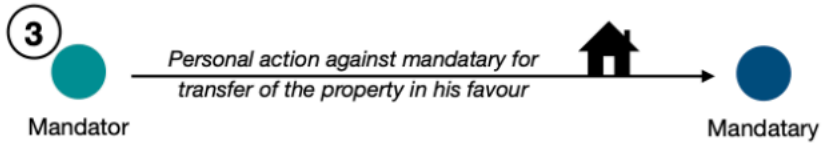
Prof Anthony J. Mamo noe v. Charles Sant Fournier - *secret agreements no effect VaV 3rd Parties Court of Appeal, 2 May 1957*

Between a **mandator and a mandatary prestanome**, the **true (internal) agreement prevails** over the apparent one, and the relationship is governed by the **law of mandate**. Property acquired by the prestanome in his own name is, in reality, owned by the mandator.
Where a person acquires immovable property **in his own name**, and a subsequent agreement declares that he had acted **in the interest of another**, that second agreement does **not effect a transfer** between the parties, since ownership had already passed internally by virtue of the mandate. However, **vis-à-vis third parties**, the second agreement constitutes an **assignment of ownership**, as it removes the appearance that the prestanome is the owner and attributes title to the true owner.

Accordingly, such a second agreement is not a mere declaration but a **true juridical mutation** affecting third parties, and therefore constitutes an **assignment subject to ad valorem stamp duty**. By means of this act, the prestanome ceases to be even the apparent owner, and the property becomes owned by the mandator both **in reality and in appearance**.

When did stamp duty have to be paid?





Government claimed that stamp duty had to be paid at both (2) *and* (3)

Defendant claimed that stamp duty had to be paid one at (2)

There is a secret agreement wherein the alleged acquirer is merely a mandatary, but **with regard to third parties, this secret agreement does not have any effect**. However, between the mandator and the nominee mandatary, the real agreement (the secret one) prevails over the apparent one (the public one); the things acquired by the mandatary therefore belong to the mandator.

Facts

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

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

The nominee mandatary (mandatario prestanome) is that mandatary who exercises the right of an owner but who, in reality, is merely a mandatary. There is a secret agreement wherein the alleged acquirer is merely a mandatary, but with regard to third parties, this secret agreement does not have any effect. However, between the mandator and the nominee mandatary, the real agreement (the secret one) prevails over the apparent one (the public one); the things acquired by the mandatary therefore belong to the mandator.

Baudry-Lacantinerie and Wahl comment that the presta nome mandate is not different to the ordinary mandate, to the extent that the net result is the same - the property acquired by the mandatary in either case must be transferred to the mandatory. A difference exists only in the moment of transfer, since in the case of the ordinary mandate, the property is transferred immediately and upon the contract entered into between the mandatary and the third party.

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

In the case ***Emily Davis v. Liberata Martinelli*** the Court stated that mandatary must indicate the name of the mandator to third parties to establish his position as mandatary. If he fails to do so he would be bound personally and the mandator would have no right to act directly against the third party. If mandatary acts in his own name the relationship would be constituted solely between the mandatary and the other party.

The plaintiff(mandator) sued the defendant for payment of a loan. Although the plaintiff provided the money, the creditor who appeared on the agreement was the mandatary, whom the plaintiff (mandator) alleged to have tasked with the granting of the loan in favour of the defendant. Agreement did not in any way mention plaintiff's name. If the name of the

mandator would not be revealed, the mandator would have no right of action against third parties, and vice versa. The mere fact that plaintiff (mandator) had supplied the money did not entitle her to sue defendant when the former's name had not even been revealed to defendant. The defendant had not contracted with plaintiff, neither directly nor indirectly.

The defendant was released from plaintiff's demands.

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

Valerio Caruana v Antonio Mercieca (Court of Appeal, 1920)

A mandatary who **contracts in his own name** has the right to sue and be sued **personally**, even if he is not the true owner. Merely stating that one is not the owner, without **identifying the mandator**, does not create a legal relationship between the mandator and the third party. Since the plaintiff failed to disclose the identity of his mandator, no direct relationship arose between the true owner and the defendant, and the plaintiff retained **locus standi** to demand restitution of the watch.

A mandatary must **clearly identify the mandator** to avoid personal liability or to bind the mandator vis-à-vis third parties.

Salvatore Coleiro v John Ellis (Court of Appeal, 1914)

A mandatary binds the mandator and avoids personal liability **only if** he clearly acts **in that capacity**. Where the mandatary fails to disclose his representative capacity or does not make it clear that he does not intend to bind himself personally, he is **personally liable**. The defendant, who claimed to have purchased furniture on behalf of a religious association, was held personally liable because he **failed to inform the seller** of this fact; mere knowledge that the furniture was to be used in the association's premises was insufficient.

Failure to disclose agency results in **personal liability** of the mandatary.

The Actio Mandati Directa

The action arising in favour of a mandator is that of forcing the mandatary to perform the task which the latter had accepted. **Only if such performance is impossible can the mandator sue for damages and interest.** The mandator may, if such thing is still in the mandatary's hands, demand the

restitution of such thing. The mandator would, however, lose the right of restitution if the thing has been transferred by the mandatary to a third party. Whilst in the latter case the mandatary would be responsible for damages, in the former case he would be subjected to the action of restitution.

In ***Carmela Farrugia v. Giuseppe Farrugia,*** the Plaintiff was the original purchaser even though defendant had appeared in his own name. The said mandatary can only be forced for the specific execution of his obligation to transfer the property to the mandator. One cannot argue that since the mandatary had not performed the mandate, he is therefore only subject to a claim for damages, but not to a forced specific execution. The mandator who judicially demands the specific execution need not impugn the act of acquisition.

It suffices if he proves that the acquirer (mandatary) had appeared on the deed and contracted in the interest of the mandator, in spite of the fact that he had acquired in his personal name.

Mandatary argued that he had exceeded his powers and appeared on the deed in his own name, his juridical position was not that of a nominee but was only responsible for payment of damages and hence could not be forced into a specific execution. Though the mandator has no real right over the property acquired by the mandatary in virtue of the mandate, the mandator still enjoys a personal action - actio mandati directa i.e. an action for specific performance against the mandatary as long as, and until, the property remains in the hands of the mandatary. The mandator in such cases has a right to demand the assignment of the property to him.

All the rules on presta nome mandate were previously created by **jurisprudence**. Today, all the rules and elements confirmed by jurisprudence are articulated in **article 1871A**.

1871A. (1) Any person holding property for another holds property subject to fiduciary obligations to the person engaging him for such purpose and shall be regulated by the provisions of this title and by the provisions of this Code relating to fiduciary obligations.

(2) **Where such person acquires property in his own name but on behalf of a mandator, the mandator shall at all times be entitled to demand the immediate and unconditional transfer thereof from the mandatory**. The mandatory shall on such demand or, in any case, on the expiration of the time during which the mandate was to continue, immediately render account of his mandate in terms of article 1875 and transfer the property to the mandator by such means as may be appropriate, saving any special terms of the mandate relating to fees and expenses and rights of any third party in good faith.

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

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

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

(4) A term of the mandate purporting to bind a mandatory as referred to above to transfer the property held by him to a third party after the death of the mandator shall not be valid unless such bequest be made by means of a will in accordance with the formalities required by law.

(5) In the event of the death of the mandatory, the heirs at law or the executor, if any, of the will of the mandatory shall be bound by the same obligations to preserve the property held for the mandator and to immediately transfer it to him or as he may instruct, saving such rights to the payment of outstanding dues and expenses according to law.

(6) Notwithstanding the provisions of article 1871(1), in cases where a mandatory, as referred to above, brings, by any means, to the attention of any third party the fact that he is acting in such capacity, the mandatory shall not be personally liable for the obligations entered into other than with and to the extent of the property held by him.

A **nominee (prestanome)** is a fiduciary who holds property **in his own name but for the benefit of another**. Where the relationship is one of **mandate**, the nominee merely lends his name and **does not acquire ownership** of the assets. He is bound by the **law of mandate** to follow the mandator's instructions at all times.

This relationship is regulated by **Article 1871A of the Civil Code**, introduced alongside the fiduciary obligations provisions and the Trusts and Trustees Act, in order to clearly distinguish **nomineeship/mandate** from **trusts**. Article 1871A confirms principles already recognised by Maltese courts, namely that the **mandator is always entitled to demand the**

immediate and unconditional transfer of the property, and that refusal to do so constitutes a **serious breach of fiduciary duty**.

Although nominees generally do not intend to acquire ownership, **fiduciary obligations are broader than mandate**. Unlike a prestanome, a fiduciary may **intend to acquire ownership** of assets to hold them for the benefit of another, as in the case of **trusts** or certain financial service arrangements. In sectors such as securities lending and prime brokerage, service providers may acquire ownership of clients' assets and even use or re-hypothecate them, while remaining bound by **fiduciary obligations** under contract.

-Max Ganado

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

2. "beneficial owner" means any natural person or persons who ultimately own or control the customer and, or the natural person or persons on whose behalf a transaction or activity is being conducted

"relevant activity" means the activity of the following legal or natural persons when acting in the exercise of their professional activities:

…

(c) **notaries** and **other independent legal professionals** when they participate, **whether by acting on behalf of and for their client** in any **financial or real estate transaction** or by assisting in the planning or carrying out of transactions for their clients concerning the –

(i) buying and selling of real property or business entities;

(ii) managing of client money, securities or other assets …

(iii) opening or management of bank, savings or securities accounts; …

(v) creation, operation or management of companies, trusts, foundations or similar structures, or when acting as a trust or company service provider;

"subject person" means any legal or natural person carrying out either relevant financial business or relevant activity;

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

Powers of the Mandatary

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

Caterina Schembri et vs Gaudenzia Cachia et - *exceeding mandatary powers*
Court of Appeal, 30 May 1975

When a mandatary acts as such — that is, **in the name of the mandant** — and, in the execution of the mandate, **exceeds the powers conferred upon him**, he does **not bind the mandant**, **unless** the latter **expressly or tacitly ratifies** the acts of the mandatary.

In such a case, the mandant is **not bound to recognize the contract as binding upon him**, because, as **Tartufari** states in *Della Rappresentanza nella Conclusione dei Contratti*, p. 377, paragraph 326:
"The acts or contracts which the representative concludes **beyond the limits of his authority** are, as far as the person represented is concerned, **legally null and ineffective**, since the absence of the most essential element of representation — the power to act on behalf of another — **by itself removes and excludes** the possibility of any legal bond or connection between him and third parties."

If the mandatary exceeds his powers, **he does not bind his mandator**. Acts performed in excess of the mandate are **judicially null and without effect.**

The above regulates the relationship between mandatary and a third party, not that existing between a third party and the mandator. Thus, the following rules must be borne in mind:

1. A mandatary who acts within his mandate binds his mandator. The relationship arises between the mandator and the third party.

2. A mandatary who acts beyond his mandate does not bind his mandator. The relationship exists between the mandatary and the third party in so far as the excess of mandate is concerned.

3. If a mandatary gives the third party enough information as to his powers, the third party is aware of the mandatary's limits and hence any contract entered into beyond such limits would be contracted at the third party's risk. He enjoys no action against the mandator nor the mandatary, unless the mandator ratifies the mandatary's actions.

In ***Alfredo Micallef vs Marietta Borg pro et noe*** *(FHCC, 5 November 1932)*, the Court held that since contracts are only binding between the parties and cannot benefit nor prejudice against other parties, one has to consider the agreements entered into by a mandatary in **excess** of his mandate **as having no effect whatsoever against the mandator**, who in such case is extraneous to the

agreement. Such agreements, when in excess of the mandate, are inexistent and ineffective against the mandator.

In **Dr Enrico C. Vassallo noe v Giuseppe Ebejer et** (Commercial Court, 17 March 1936), the plaintiff (mandator) instructed a mandatary to purchase engines subject to specific conditions regarding horsepower and valuation. The engines purchased were defective and did not meet the agreed specifications, despite being sold *tale quale*. The plaintiff sued both the mandatary and the seller seeking nullity and damages.

The Court held that a **mandator is not bound by acts performed by the mandatary in excess of his authority**. Such acts are **absolutely null and legally inexistent**, allowing the mandator to repudiate them **without needing to bring an action for annulment**. This nullity also operates **against the other contracting party**, even if that party acted in good faith (*quod nullum est, nullum producit effectum*).

Where the mandatary acts in **bad faith**, he is liable in damages to the mandator; where the third party also acts in bad faith, both are liable **in solidum**. Accordingly, the sale was declared **absolutely null**, the seller was ordered to take back the engines, and both the mandatary and the seller were condemned **jointly** to refund the price and pay damages.

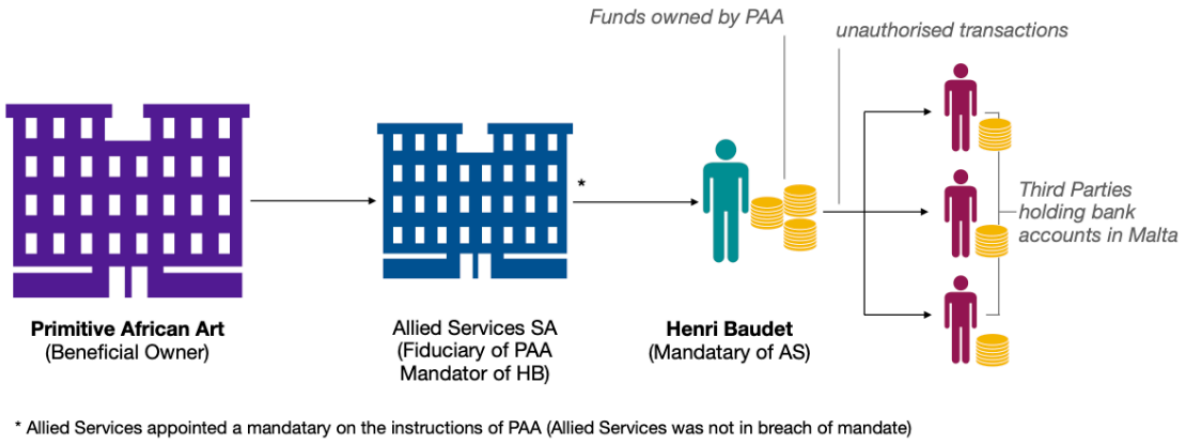
Primitive African Art Limited vs Henri Baudet - *exceeded powers*

FHCC, 27 February 2018

The plaintiff company had appointed a fiduciary, **Allied Services SA**, which in turn appointed **Henri Baudet** to act **in the name, interest, and according to the instructions of the plaintiff company**. As a mandatary and director, Baudet was obliged to act **in good faith and exclusively in the interest of the company**.

Evidence showed that over several years Baudet carried out **unauthorised transfers of funds** from the plaintiff company's Swiss bank account to accounts in Malta, **without the consent or knowledge of the beneficial owner**. Baudet admitted in related criminal proceedings in Geneva that he had transferred the funds without authorisation, and there was **no proof of express or tacit ratification** by the plaintiff company.

The Court held that Baudet had acted **beyond the limits of his authority**, breached the trust placed in him, and was therefore **personally liable**. He was ordered to **repay EUR 520,000** to the plaintiff company, together with **damages in the form of lost interest** on that amount.



Is dealing with a different supplier an excess of mandate?

In **Alessandro Gauci v Costantino Fenech** (Court of Appeal, 28 April 1920), the Court held that a **mandate to purchase goods from a specific supplier** may include the **implied authority to purchase the same goods from another supplier**if the original supplier cannot provide them. The decisive factor is the **mandator's interest**, which is presumed to be the acquisition of the specified goods at the agreed price and quality, rather than the identity of the seller.

Although a **special mandate** is in principle to be interpreted restrictively, this does not preclude the court from examining the **true intention of the mandator**, in the same manner as in the interpretation of contracts.

***Giovanni Anastasi noe vs Kaptan Serafino Xuereb et*,** Commercial Court, 14 June 1951:

There is no doubt that this decision was **not that of the shareholders**, but rather **that of the Board of Directors**.

There is also no doubt that the **Directors** are merely the **administrators (agents)** of the company.
Now, according to the **Civil Code**, unless there is an agreement to the contrary, the **rights, powers, and obligations** of these administrators are regulated **as in the case of a mandatary**, and according to the Civil Code, **a mandate includes only acts of administration**. A **decision to dissolve the company** goes **entirely beyond the limits** of mere administration. Such a decision **did not concern the directors**, but evidently **concerned the shareholders** in a **general meeting**.

Who is liable in case of damages?

In the second claim, the plaintiff requested a **general declaration of liability for damages**.
Since the defendants' actions were **unlawful**, this **general declaration** should be made in the sense already stated. As regards the defendant whose mandatary was **Degiorgio**, the latter **exceeded his powers** when he

represented him as a director in that meeting, as has been said above; therefore, **that defendant cannot be held responsible** for what was done **in excess of the mandatary's authority**.

The Court therefore **declares the defendants Captain Xuereb and Commander Bell responsible for the damages** suffered by the plaintiff **as a consequence of what was illegally executed.**

If the mandatary spends money entrusted to him by the mandator for a purpose different to that stipulated by the mandator, it is the **mandator who is liable**, since the mandator is liable for the negligence of the mandatary. Nonetheless, the mandator may sue the mandatary by way of his negligence by **article 1874**. In this case, the mandator is not dissolved of his obligation - he is still liable to the third party.

Article 1879

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

Geraldo Rosso Frendo v. Rev. Amabile Fenech, Court of Appeal,
10 June 1927, Vol. XXVI.I.i.847

Ricci *"*… when the **third party** knows the limit of the powers granted to the agent and, nevertheless, **gives his consent to an operation that is beyond these limits, he himself is at fault**, and, therefore, cannot impose the consequences of this on the agent. ; ...

For the agent to be covered from any liability towards the third party, where he has acted in excess of his power, it is not enough that he has given knowledge of the mandate received**, but it is necessary to have made him know the content**, because the law speaks of sufficient information of the faculty received, and this sufficient information is not obtained for the certainty of a mandate in general, but is then acquired when the limits of this are known."

Obligations of the Mandatary

There are 4 main duties enumerated in the civil code.

1.Bound to carry out mandate

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

(2) He is also bound to conclude any matter, which he may have commenced before the death of the mandator, if delay might be prejudicial.

The mandatary is bound to **carry out the mandate** so long as he is vested with such mandate. It is not up to the mandatory in deciding whether he has to execute the tasks. If he doesn't execute then the mandatory is answerable. This is very much in line with **1133 of the civil code** which lays down that the debtor is competent for the non-performance or the delay.

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

2.Liability of the mandatary

1874. (1) A mandatary is answerable not only for fraud, but also for negligence in carrying out the mandate.

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

3.Duty of the mandatory to render account

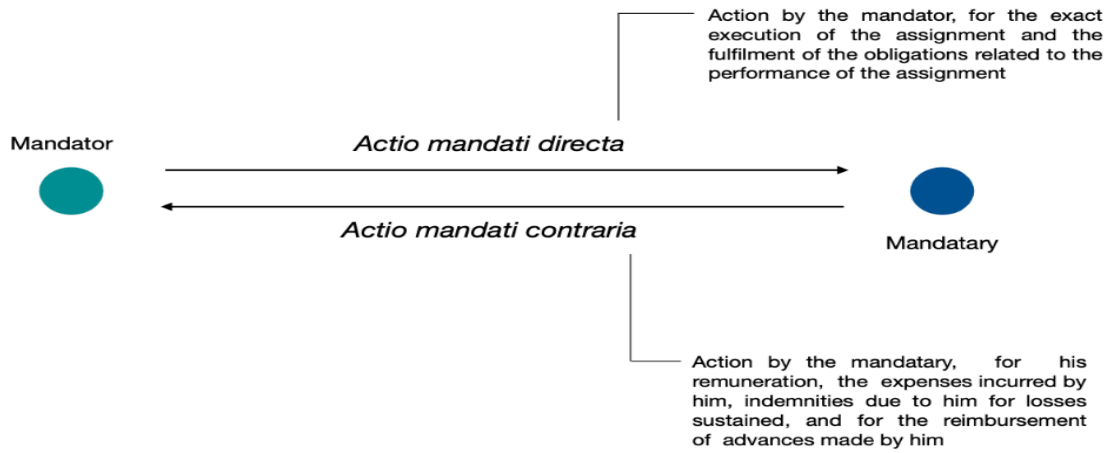
1875. The mandatary, unless expressly exempted by the mandator, is bound to render to the latter an account of his management and of everything he has received by virtue of the mandate, even if what he has received was not due to the mandator.

4.Delegatus non potest delegare

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

(2) If such power has been conferred upon him but without naming the person to be substituted, the mandatary is answerable for the person he has substituted if he has selected a person notoriously incompetent or insolvent or whom he otherwise knew to be such.

(3) In all cases, the mandator may act directly against the person whom the mandatary has substituted.



The **actio mandati directa** is the action by which a **mandator** may act against the **mandatary**, in order to exact the execution of the mandate and to fulfil all obligations entered into by the mandatary. On the other hand, the **actio mandati contraria** is the **action by the mandatary** to obtain any promised **remuneration**, expenses incurred, indemnities due, or for losses incurred.

In ***Ernesto Gulia noe vs Paolo Ellul*** *(FHCC, 18 January 1911),* the Court referred to the obligations of an administrator as being those of a mandatary, and hence, the **administrator is responsible for all damages and interest occasioned by non-performance of obligations**, just as in any other negligence committed by a mandatary in the fulfilment of his mandate. A mandatary who is entrusted with the administration of property is **responsible for any loss occasioned by prescription of rents or other incomes which he failed to receive or demand**. In this particular case, a mandatary (defendant) was appointed to administer the property of the mandator (plaintiff). The defendant failed to collect rent from certain tenants, as a result of which the claim had become prescribed. The mandator sued the mandatary for the rental arrears that had been lost as a result of his failure to collect them.

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

Article 1874 holds that a mandatary is answerable not only for **fraud** but also for **negligence** in the carrying out of the mandate. To this extent, one must examine the **degree of diligence required in the performance of an obligation**, which is stipulated in **article 1132 of the Civil Code.**

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

In ***Dr Carlo Moore noe vs Architect Carmelo Falzon et*** *(FHCC, 4 November 1957),* an architect

had been engaged in the supervision of construction works. The architect had not checked on the material being utilised by the workers. As a mandatary architect was **bound to perform the mandate,** he was **bound by the diligence and ability demanded by the execution of the task undertaken by him**. If the architect fails to examine properly the materials used in the construction which is carried out under his supervision, he is responsible for the damage which is caused by the defective material.

***Zejt Marine Services vs BNF Bank plc*,** Court of Appeal, 18 November 2020:

The plaintiff company notified **BNF Bank** to **stop and recall a payment** of **USD 15,154.19** that had been fraudulently transferred. Although the bank confirmed that there was **sufficient time to stop the payment**, it **failed to act with due diligence**, resulting in the loss of the funds.

The bank argued that it had merely executed two mandates: the original transfer and a later recall request, stressing that a recall is not guaranteed. However, the Court held that this did **not absolve the bank of its duty of care**. Beyond sending SWIFT messages, the bank should have taken **additional urgent steps**, such as direct contact with the correspondent bank.

The First Court established that the bank **delayed** in sending recall instructions until after banking hours, despite having received **multiple urgent notifications** earlier that day. Evidence showed that recalls are **frequently successful**, and the delay significantly reduced the chances of recovery.
The Court concluded that the bank acted **negligently**, failed to treat the matter with the required urgency, and was therefore **liable for the loss**. The plaintiff company was found to have acted promptly once it discovered the fraud.

Good Faith in the Contract of Mandate

In ***Yolanda Carabott vs Pauline Calamatta et*** *(CoA, 25 February 2011),* the Court examined the element of good faith in the contract of mandate. To understand this case, we must observe the timeline followed;

24 August 1993 General Power of Attorney by mandator (plaintiff) in favour of mandatary (defendant) authorising latter "to administer [her] property movable and immovable in the most ample and unlimited manner".

26 March 1998 Mandator found that locks to her former residence had been changed.

2 April 1998 Deed of transfer where mandatary appeared on behalf of mandator to transfer in the mandatary's own favour the former residence of the mandator. It was declared that this was done in full

and final settlement of the mandatary's claim against the mandator for the services rendered by the former to the latter during the previous thirteen years.

6 April 1998 Mandator formally requested that the keys to her former residence be returned to her by her mandatary.

16 April 1998 Mandator sent judicial letter to mandatary in order to formally inform her that she wished to terminate and revoke any engagement with which she had been entrusted by virtue of the general power of attorney.

Elements of Good Faith as posited in the Carabott vs Calamatta case:

The **absence of good faith** on the part of the defendant clearly results:
(i) both from the fact that **she transferred Yolanda's property to herself without the plaintiff's knowledge**,
(ii) as well as from the fact that **the contract contains false declarations**, since it stipulates that the parties had "agreed" that the property in question was to be transferred **in settlement of a debt of Lm16,900**, when in fact, from the evidence produced, it results that **there was absolutely no such agreement** between the parties.

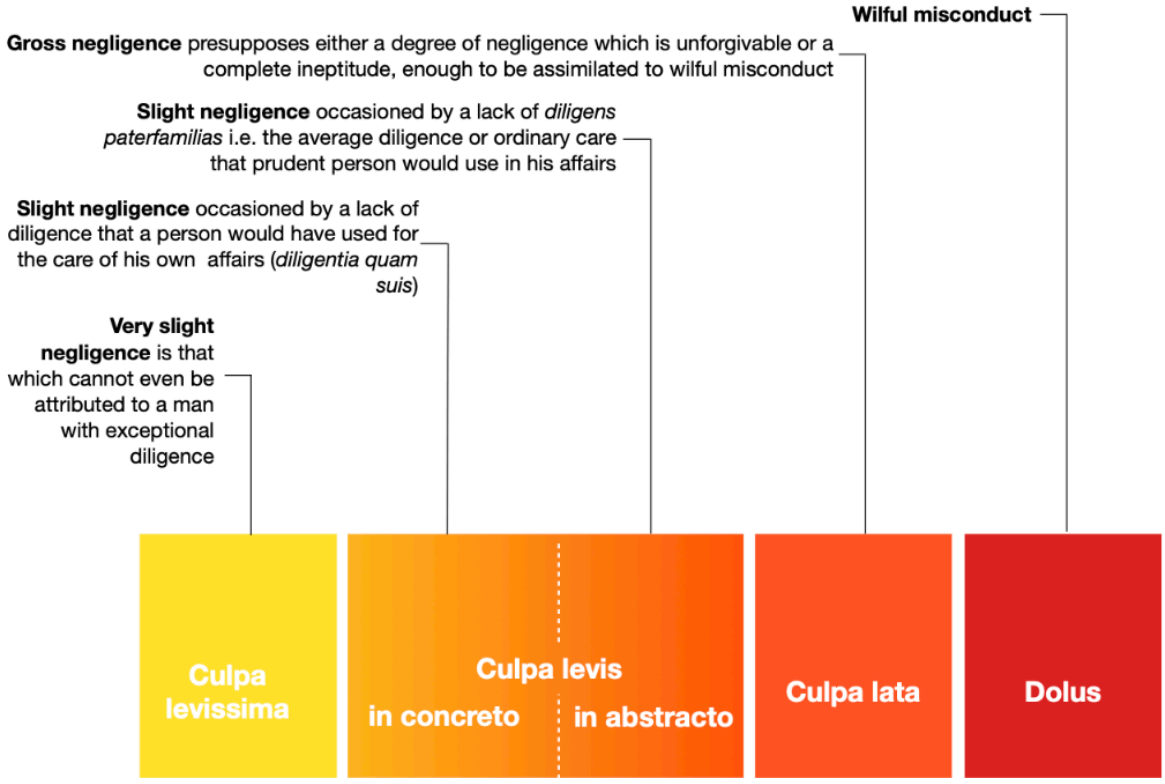
Certainly, **such an agreement cannot bind the plaintiff** in relation to **Pauline and her husband Carmelo Calamatta**, when it is clear that **good faith on their part was lacking**.

… It may also be said that the **defendant abused the general power of attorney** that she held in her hands, and therefore **her actions amount to fraudulent conduct** (*dolus*) on her part as **mandatary**. In this regard, reference is made to **Article 1874(1) of the Civil Code**, which stipulates that **the mandatary is responsible for any fraudulent act committed in the execution of the mandate**.

… The Court therefore **orders that the contract be rescinded for all intents and purposes of the law**.

Degree of responsibility where Mandate is gratuitous

Article 1874 (2) states that **where the mandate is gratuitous, then the liability for negligence is enforced less vigorously than that which is onerous.**



Dolus: Wilful misconduct

Culpa lata:gross negligence: Enough to be assimilated with wilful misconduct

Culpa levis in abstracto: Slight negligemce occasioned by a lack of diligence of the BPF

Culpa levis in concreto: Lack of diligence that a person woul have used for the care of his own affairs.

Culpa levisisima: Very slight negligence and rarely punishable unless the law says so

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

Izzo's defence was that he was doing it gratuitously and said that this mandate is gratuitous and had it been my camera then he would have accepted this cheque. His argument was that the standard of diligence to be assessed is not the culpa levis in abstracto but the culpa levis in concreto.

When the mandate is accepted **gratuitously**, the **mandatary is still bound to apply the diligence of a bonus paterfamilias**. He is responsible even for slight negligence independently of whether this mandate is gratuitous or otherwise. The mandatary cannot release himself from liability by claiming that he applied diligence as if the affairs were his own, since the due diligence must be of at least the **bonus paterfamilias**.

Degree of responsibility where Mandate is remunerated

Valhmor Borg noe vs Major Alfred Calascione noe *- liability where mandate is remunerated*
Commercial Court, 25 May 1961

BPM (*culpa levis in abstracto*)] is also the level of fault for which a **mandatary is liable when the mandate is for remuneration**, since his liability for negligence is assessed less strictly only where the mandate is **gratuitous**.
Accordingly, in the case of a **mandate for consideration**, the mandatary is required to observe **culpa levis in abstracto**, that is, the fault arising from a **lack of the prudence, diligence, and care of a good father of a family**.

Article 1875 speaks of the mandatary's duty to render account. In ***Marie Louise Micallef et vs Joseph Said (FHCC, 25 March 2015)***, the plaintiff claimed that the mandatary had abused of his position and misappropriated funds belonging to their mother's estate.

Marie Louise Micallef et vs Joseph Said - *1875, the duty to render account*
FHCC, 25 March 2015
It is evident that the plaintiffs are seeking the liquidation of a sum of money to be returned by the defendants to the estate of **Filomena Vella** on the basis that certain funds

remain **unaccounted for**. The Court held that the **first and necessary step** is for the defendant to **render an account in accordance with the law**.

Such an account must contain **detailed information** on income and expenditure during the period in which the defendant acted as **mandatary**, and must be supported by documentation (**Article 390, Civil Code**). The defendant has failed to do so and merely alleged that an account had been given to Filomena Vella, an allegation which was **not proven**.

The purpose of the proceedings was **not** to immediately order payment, but to require the **rendering of accounts**. Merely producing documents is insufficient. Where an account is not rendered, the law provides remedies (**Article 394**), and where an account is rendered but disputed, it may be **challenged** (**Article 392**).

Delegatus non potest delegare

Once the mandator has delegated his power to the mandatary, the mandatary **cannot further delegate such power to any other third party,** per **article 1876** and per the principle ***delegatus non potest delegare***. To this extent, we refer to ***Edward Borg Olivier et noe vs. Hon. Dr Giorgio Borg Olivier*** *(FHCC, 12 September 1957),* wherein the Court stated that **a mandatary cannot substitute another person in his stead unless he has been empowered to do so by the mandator.** This authorisation, to allow for a further delegation, need not be expressed - it may also be tacit in the same manner as mandate may be tacitly invoked;

Edward Borg Olivier et noe vs. Hon. Dr Giorgio Borg Olivier

FHCC, 12 September 1957

"l-artikolu fuq citat [section 1876 Civil Code] ma jeżigix li din is-segtha ta' delegazzjoni ghandha

tkun tabilfors espressa; l**-ghaliex l-istess tista' tkun tacita; multo magis meta l-mandat jista' jigi**

mogħti tacitament.")

"din il-prezunzjoni, bazata fuq il-mandat tacitu, giet konfermata fil-kors tal-kawza l-ghaliex il-

mandanti tieghu kkonfermaw id-delega li huwa kien per necessita ghamel fil-persuna ta' Edward
Borg Olivier, kif jidher mid-dokument ezibit."

Defendant had requested plaintiff to purchase some items for him. Instead of purchasing them himself, plaintiff sub-delegated a third party to find such items, whilst adding that such third party should purchase irrespective of the price. After plaintiff handed the items to defendant, the latter found the price exorbitant and refused to pay the requested price.

The Court held that the power to substitute had not been granted by defendant. Plaintiff had acted beyond his mandate when he had authorised the third party to purchase irrespective of the price. Such behaviour encouraged a degree of overcharging and was considered negligent. The mandator's acceptance of the plaintiff's claim would have been equivalent to protecting the negligent acts of a mandatary. The Court therefore allowed plaintiff's request limited to the real value of the items purchased.

If the mandatary substitutes his power to another **without having been authorised to do so by the mandatory, then the mandatary is responsible for all acts of the person substituted in his instead.**

Where the principle captured by s 1876 (delegatus non potest delegare) is violated, damages may arise against the mandatary.

In **Cavallo v Said**, the mandator authorised the mandatary to sell goods, but themandatary **unauthorisedly sub-delegated** the task. The mandator claimed that a better price would have been obtained had the mandatary acted personally. The Court rejected this claim for lack of proof. The Court held that **unauthorised substitution does not automatically give rise to damages**. Damages are recoverable **only if it is proven** that the mandatary would have achieved a **better result** had he executed the mandate himself. The consequence of unauthorised substitution is that the mandatary **cannot seek recourse against the mandator** for liabilities incurred by the substitute.

There can be no doubt that as long as they are duly authorised by the memorandum and articles of association, the directors of a company may appoint a mandatary to act on such company's behalf. The need for authorisation by the memorandum or articles of association stems from two principles that, in the case of a company, operate side by side:

(i) that the directors are themselves regarded as mandatories of the company and

(ii) that a mandatary is not entitled to appoint another person for himself unless he has been empowered to do so by the mandator - delegatus non potest delegare. …

Most companies' articles of association empower directors to **appoint mandataries/ attorneys** with such powers and conditions as they deem fit, within the limits of their own authority. Such appointments **need not be in writing** and may be made **orally or tacitly**, with acceptance by the mandatary likewise capable of being **implied from conduct**. Nevertheless, it is generally **prudent for third parties** dealing with a company to require **written proof of the board's authorisation**.."

- Andrew Muscat, Principles of Company Law.

Giovanni Anastasi noe v. Capt. A. Xuereb et - *damages and s 1876*

Commercial Court, 14 June 1951

In fact, in this matter the maxim *delegatus non potest delegare* applies. ... It is clear that the directors are the mandatories (agents) of the shareholders or partners, and without the permission of the mandator (principal), the mandatory cannot delegate his authority. **This is in accordance with our general law. As stated, the director of the company is equated with a mandatory, and the mandatory, by law, cannot—without the authority of the mandator—substitute someone else in his place.**

Fiduciary Obligations

Fiduciary obligations, though initially introduced for **financial services**, have a **broader application**. They impose a **heightened standard of good faith**, requiring honesty, loyalty,

and the **elimination of conflicts of interest**, and aim to protect situations of **trust, reliance, and vulnerability** from abuse.

Such obligations impose **duties of care, honesty, accountability, and loyalty** on persons who control or possess **property belonging to others** or held for the benefit of third parties. These principles form a **common foundation** underlying fiduciary civil law contracts, including **mandate and deposit**.

- Max Ganado, "Fiduciary Obligations under Maltese Law"

A fiduciary obligation arises where a person **holds or controls property for the benefit of another**, including attorneys acting under a power of attorney or agents dealing with a principal's property. Such obligations commonly stem from contracts like **mandate**, **deposit**, or **professional engagement**, where one person is entrusted to deal with another's property or interests, thereby giving rise to duties of **loyalty, care, and good faith**.

- Max Ganado (ed.), Introduction to Maltese Financial Services Law, 2009

To this extent, we must refer to **Article 1124J;**

1124J. In the application of the provisions of this Title the following principles shall apply: (a)when a fiduciary relationship is governed by particular rules, whether because of the source and type of the obligations or because of any special law, such particular rules shall apply to the context and these provisions shall apply as necessary to support the interpretation of the said rules; (*b*) it shall be presumed that these provisions operate consistently with particular rules applicable to any particular fiduciary relationship or obligation but, in case of inconsistency, the particular rules shall prevail over the provisions of this Title;

Fiduciary obligations were introduced on the condition that they support the interpretation of mandate, where there are diversions then the particular law applies over the law governing fiduciary obligations.

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

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

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

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

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

..

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

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

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

(c) not **to receive undisclosed or unauthorised profit from his position or functions** nor permit any other person to do so, nor enter into any transaction related to the property, directly or indirectly, unless authorised to do so by the instrument creating the fiduciary

obligation or permitted by a person or authority empowered to approve such dealings under the instrument or applicable law or as otherwise authorised by the Court:

Provided that any references to "the Court" shall be construed as references to the Civil Court (Voluntary Jurisdiction Section) unless otherwise indicated or unless the context refers to any court seized of any matter in which case it is the court where the matter arises;

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

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

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

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

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

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

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

Sub article 1 what is of relevance. The law states that fiduciary obligations **arise in the case of contract**, in our case, a contract of mandate. How do we confirm that it applies to us? It applies to contracts where a person owes a **duty to protect the interest of another person, including when he is vested with the ownership for such purpose,** thus including the presta nome mandate. Both normal and presta nome mandate are captured by this definition.

In this article, we note that there are several principles which have been established by jurisprudence covering the law of mandate. For instance, **article 1124A (4)(h)** is akin to the **action mandati directa** in which the mandator demands the property to be transferred to the mandatary.

Dealings with third parties aware of fiduciary obligations.

1124B. (1) Where a third party is aware that a fiduciary is vested with ownership, has registered in
his name, holds, exercises control or powers of disposition over property subject to fiduciary obligations, third parties may, in good faith, **act in relation to the fiduciary as though he were the**
absolute owner thereof. …

(2A) Where a third party acquires property under gratuitous title as provided for in sub-article (1) from a fiduciary who acts in breach of the fiduciary obligation or where the third party has acquired property under gratuitous title to the detriment of a beneficiary, the third party shall be subject to the same fiduciary obligations which the fiduciary was subject to …

(3A) Any third party dealing with a fiduciary in a transaction shall be entitled to enquire about the purposes of the fiduciary obligation, including the obligation of not exceeding the value raised by
the transaction or otherwise relating to the propriety subject to the transaction or the applicability of the funds in question. …

(6) Where a fiduciary is vested with ownership, has registered in his name, holds, exercises control or powers of disposition over property informs a third party with whom he is dealing that he is acting as a fiduciary, the third party is otherwise aware or should reasonably be aware, the fiduciary shall not be personally liable for the obligations entered into with such third party, other than those entered into in the exercise of his obligations. Where the third party is unaware of the fiduciary obligations, the fiduciary shall, subject to any terms which may have been stipulated or which otherwise apply under the applicable law, be personally liable to such third party in respect of any obligation entered into.

(7) The fiduciary shall have a right of recourse against the beneficiary where contemplated in the provisions of this Code or in any special law, by way of indemnity against such liability unless he has acted in breach of his duties, in which case he shall not be entitled to be indemnified. …

Here, again, we see certain rules which are merely being reproduced. **1124B (6)** reflects the principle of prestanome mandate, in that where the mandatary states that he is a mandatary, it is the mandator who is liable to the third party, whereas where he does not disclose his mandate, it is the mandatary who is liable

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

When the third party is aware of the breach of fiduciary obligations, such party becomes liable per. Article 1124A (3);

1124A. (3) Fiduciary obligations arise from behaviour when a person - ... *(a) Without being entitled, appropriates or makes use of property or information belonging to another, whether for his benefit or otherwise; or* *(b)* ***being a third party, acts, being aware, or where he reasonably ought to be aware from the circumstances, of the breach of fiduciary obligations by a fiduciary, and receives or otherwise acquires property or makes other gains from or through the acts of the fiduciary****.*

We are underlying this provision because this is one of the instances whereby the mandator is being afforded a larger protection - even where the mandatary is in breach of his fiduciary obligations, the mandator is still protected. A **third party cannot hide behind privity** if they knowingly profit from the breach.

Proprietary Remedy introduced in 2004

1124A(5) is of decisive importance especially when you have fraudulent transactions.

There exists a **proprietary remedy** in the case of breach of fiduciary obligations, per **article 1124A (5);**

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

One must compare the judgements deliberating on the issue before 2004 and after 2004. This is because Article 1124A (5) was introduced in 2004, and therefore the remedies offered by the court had changed overtime. To this end, we will compare the judgement **Dhalia Real Estate Services Limited vs Gordon Attard** (decided in 2020) with the judgement **Caterina Schembri vs Gaudenzio**

Cachia (decided in 1975).

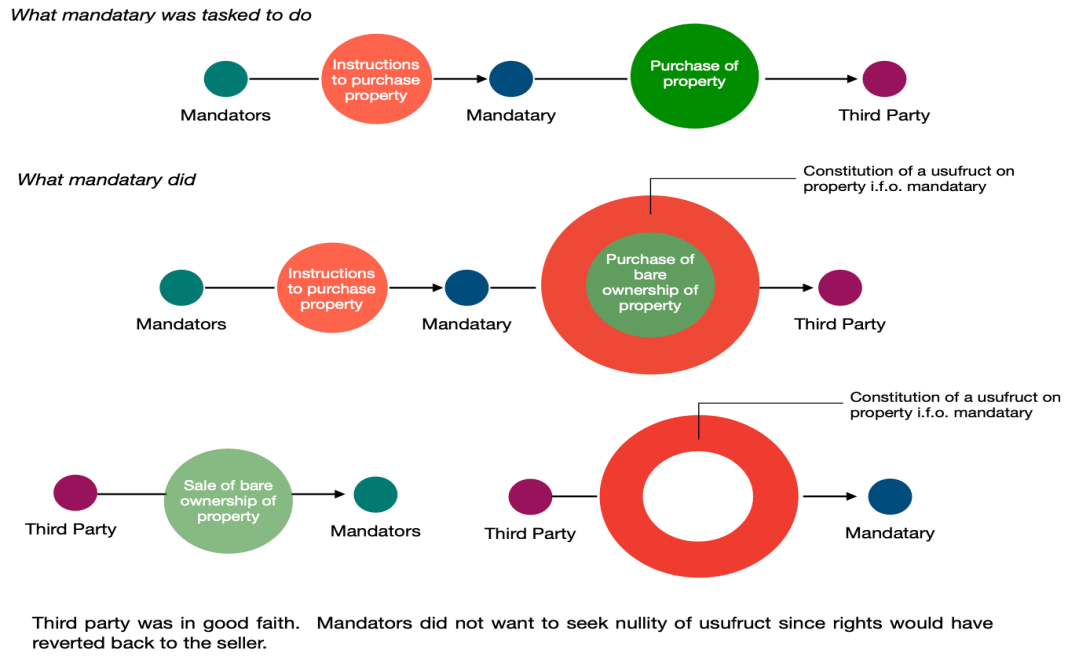
Dhalia Real Estate Services Limited vs Gordon Attard – fiduciary obligations and liability
FHCC, 15 December 2020

The respondent, while acting as manager, allegedly **diverted clients** of the applicant company to a company affiliated with him, thereby acting **against the interests of his principal**. Although a manager may not be responsible for policy-making, he is nonetheless a **fiduciary** and must act **in good faith and with loyalty**.

In **Vascas Enterprises Ltd v Adrian Ellul** (13 November 2014), the Court held that a manager, as an **agent and mandatary**, is bound to act with the **diligence of a bonus pater familias**. With the introduction of **Article 1124A of the Civil Code**, Maltese law formally recognised that certain relationships, including **employment**, give rise to **fiduciary obligations** beyond mere contractual duties.
The Court emphasised that the **higher the position held**, the stronger the duties of **loyalty, honesty, good faith, and diligence** owed to the principal. In simple terms, an employee — especially in a managerial or executive role — must **not harm, prejudice, or act against the interests of the employer**. These fiduciary duties apply **in addition to** contractual obligations, and the defendant, as manager, was therefore bound by **Article 1124A et seq.**

In ***Caterina Schembri vs Gaudenzia Cachia*** (1975)**,** the plaintiff mandator appointed her mother as a mandatary for the purchase of a house. Prior to purchasing the property in the name of her children, the mandatary proceeded to constitute a lifetime usufruct in her favour. The Mandator challenged the usufruct, claiming that its constitution was null and void due to excess of mandate.

There is a clear breach of the mandate, owing to the bad faith of the mandatary. The remedy available should be to annul the usufruct and to transfer ownership to the mandator. **However, at the time, there was no proprietary remedy, and thus the mandators sought out damages.** This case was ultimately resolved by allowing the mandator to bear the usufruct alongside the payment of damages by the mandatary.



Could mandators revoke contract of usufruct?

Third party was in good faith; therefore, the usufruct could not be rescinded since the consequence would have been that the usufruct would have had reverted back to the seller who would be bound to return the price thereof. Seller in good faith could not be bound to disburse money and retain the usufruct of a place which he never intended to retain (contradicting ***Vassallo v. Ebejer*** on nullity resulting from excess of mandate by mandatary).

Remedy prior to 2004

"Contracts must be performed in good faith and according to their nature … and although the terms of the power of attorney give a certain latitude to the mandatory (agent), that latitude must be understood as having been granted within the scope and limits of purchasing the property *as full ownership*, and not for a diminished property — that is, a partial right of ownership."

"When a mandatory acts as such, that is, in the name of the mandator (principal), and in the execution of the mandate exceeds the powers conferred upon him, he does not bind the mandator unless the latter expressly or tacitly ratifies the acts of the mandatory."

Thus, the plaintiff could enjoy the action for damages against the mandatary for not carrying out the mandate, per **article 1873 of the Civil Code**. After 2004, the position changed, and article 1124A(5) was introduced.

Saviour Cremona et vs Anthony Cassar et – incorrect remedy awarded
Court of Magistrates (Gozo), 30 March 2007

VB and SC granted the defendant a **mandat à prête-nom**, authorising him to appear **in his own name** in the preliminary agreement while secretly contracting **on their behalf**. A further mandate was later given for him to act, again without the sellers' knowledge, on behalf of a company wholly owned by VB and SC in the final share acquisition, for which he received **LM1,000,000** to cover expenses.

When the final contract was concluded, the plaintiffs were unaware that the defendant had concluded the villa contract himself and that **less land than intended** had been acquired. By secretly appropriating **8,000 square metres of land** for his own benefit, the defendant **breached the mandate**, failed to inform his mandators, and **betrayed the trust** placed in him, thereby incurring liability for damages.

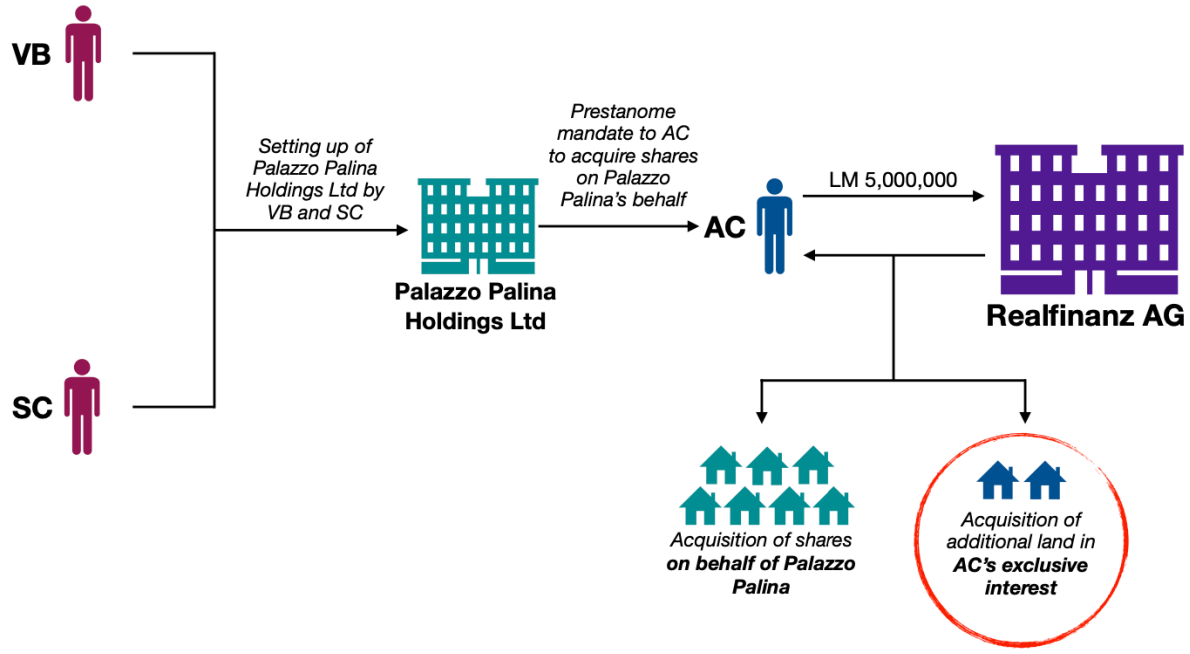
As regards damages, the Court found that the breach concerned **only part of the transaction**, since the defendant otherwise carried out the mandate correctly. Taking into account the land appropriated, market value, and development limitations, the Court awarded **LM50,000** in damages to the plaintiffs.

What happened in this case is that Anthony Cassar was allowed to retain the land which he had kept for himself, paying solely the payment of damages, perhaps because of an error in the filing of the application or else because the Court was not yet familiar with the proprietary remedy introduced in 2004. To this end, **Ganado** comments and criticises the remedy offered by the Court;

"there were cases where the Courts ... missed a valuable opportunity and awarded the **wrong**

remedy … in the Ta' Cenc Case, Court of Magistrates (Gozo), 30th March 2007, the judge awarded damages for breach of fiduciary duty rather than a proprietary remedy which the law caters for in breaches of fiduciary duties"

- **M. Ganado -** criticism on Court for not applying the correct remedy



Joann Cordina v. Charles Cordina

Court of Magistrates (Gozo) Superior Jurisdiction, 26 September 2007

The defendant held the plaintiff's inherited funds **as mandatary** on behalf of his wife, with the plaintiff's consent to deposit them in a fixed-term account in the defendant's name. Following the introduction of **Article 1124A of the Civil Code** by Act XIII of 2004, fiduciary duties and **mandate à prête-nom** were expressly regulated, together with enhanced remedies.

When the defendant **withdrew the funds without consent**, refused to return them, and **appropriated them for himself**, the Court held that this constituted a **breach of fiduciary obligations and misappropriation**. Under Article 1124A(5), a fiduciary who breaches his duties must **return the property and any benefit derived**.

Accordingly, the defendant was **condemned to pay Lm 6,461.05** to the plaintiff.

Spouses had inherited two equivalent sums of money, respectively, from a third party. Both sums were deposited in an account held in the husband's sole name. Husband refused to transfer the amount inherited by his wife back to her.

Maria Dolores sive Doris Mallia et vs David Bondin et – similarity between mandate and fiduciary obligations
Court of Appeal, 23 May 2024

In **Maria Dolores v David Bondin** (CoA, 23 May 2024), siblings granted one sibling a **mandate (power of attorney)** to purchase property on their behalf. Instead, he acquired the property **in his sole name**. The Court held that the relationship created **fiduciary obligations** under **Article 1124A**, and ordered the defendant to **transfer the property shares** to the plaintiffs. The case confirms that **once a fiduciary obligation is proven, proprietary remedies are available**.

Professor **Andrew Muscat** explains that fiduciaries are bound by **utmost good faith and honesty**, duties which cannot be excluded. Fiduciary duties include **loyalty** (avoiding conflicts and unauthorised profits), **care** (acting as a *bonus pater familias*), and **administrative duties** (segregation of property, record-keeping, and rendering of accounts). A fiduciary who breaches these duties must **return the property and any benefits derived**, including substituted property.

The Court highlighted the **close similarity between mandate and fiduciary obligations**, as both require performance in **good faith, honesty, and diligence**. Acting as an intermediary in the transaction placed the defendant in a **fiduciary position**, and his failure to comply obliged him to **make good the breach** by restoring the property to those entitled.

Finally, in this case, the remedy was applied correctly. Comparing this to the cases aforementioned, we notice a material change in the remedy awarded to the plaintiff. There were 6 siblings who entrusted one of the siblings to appear on the promise of sale on their behalf. It resulted that the mandatary decided to acquire the property in his exclusive favour. One of the siblings decided to challenge this promise of sale. The plaintiff thus requested for

the application of the proprietary remedy, asking not only for damages, but also for the share of ownership over the property. The Court stated, on the basis of **article 1124A**, that the siblings have the right to claim their share over the ownership of that property. Court decided that there was breach of fiduciary obligations and declared that sale of property had been made [as to one sixth of the property (i.e. sister's share)] in the name and on behalf of his sister.

Obligations of the Mandator

Articles 1880 - 1885 of the Civil Code speak of the **obligations of the mandator**.

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

Article 1880(2) allows for the **tacit ratification of mandate**. Thus, if a mandatary has exerted powers beyond those conferred to him by the mandatory, then the mandator is not responsible or liable for those actions, as per **article 1864**. However, if the mandatary may prove that the mandator has ratified and given consent to such acts which manifest powers beyond the scope of the mandate, whether expressly or tacitly, then the mandatary is no longer liable. If the mandatary has acted within the powers of his mandate, it is the mandator who is bound by any obligations contracted by the mandatary with a third party. If the powers are exceeded, however, it is the mandatary who is bound, unless the mandator has expressly or tacitly ratified it.

This was demonstrated in ***John La Rose noe vs Carmelo Galea*** *(CoA, 30 May 1958)*, in which the Mandator had entrusted a mandatary to find someone to carry out some marble works in his shop. The mandatary contacted a worker (plaintiff) who agreed to do the job. The worker sent a quotation to the mandatory (defendant). The mandator instructed the mandatary to confirm such worker to be tasked with this particular job.

The mandator, however, had no disposable funds to pay the worker, and thus he claimed that he told the mandatary to find a person who could perform the work at the rates paid by the War Damage Commission, and who agreed to be paid after the Commission had paid the defendant. The mandator further argued that if the mandatary had failed to inform the worker (plaintiff) of these conditions, the mandatary would have exceeded the limits of his mandate, and was therefore bound to pay the worker.

However, the Court held that the mandator's **silence and inaction** to the worker selected by the mandatary represents a **tacit ratification of the mandatary's behaviour**. It is an accepted doctrine that in certain circumstances, silence can infer ratification for one's actions, and thus, the mandator was liable to pay the worker per **article 1880 (2)**.

Zachariae states that Tacit ratification is generally accepted as arising from the mere silence of one who, whilst knowing that a matter has been commenced in excess of the limit of the mandate given to him, suffers his mandatary to complete it.

Once the mandator had received the worker's quotation, he was bound to inform the worker that he wanted to impose certain conditions. Thus, the mandator's inaction inferred an acceptance of the agreement - especially when considering that the defendant accepted the plaintiff's work and admitted the debt.

1881. (1) The mandator must repay to the mandatary the advances and expenses made or incurred by him in carrying out the mandate; and he must pay him the remuneration if promised to him, or if it is presumed to have been tacitly agreed upon, regard being had to the profession of the mandatary and to other circumstances.

(2) If no negligence be imputable to the mandatary, the mandator cannot refuse to make such reimbursement and payment, **even though the matter has not been successful**; nor can he have the amount of such expenses and advances *bona fide* incurred or made, reduced, on the ground that they might have been less.

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

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

1884. Where the mandatary has been appointed by several persons for a common business, each of them is jointly and severally liable towards him for all the consequences resulting from the mandate.

From these provisions, it is clear that the **mandator** is responsible and liable towards any third parties who contracted business with the mandatary, provided the mandatary did **not act negligently**. The mandator must repay the mandatary for all expenses and losses suffered in the fulfilling of the mandate, and the mandator cannot object to such repayment - **unless negligence is imputable to the mandatary**. The mandator must pay the mandatary **even if the mandatary was unsuccessful** - per **article 1881 (2)**. Thus, if a lawyer loses his case, the client is still bound to pay, unless the lawyer acted **negligently**.

In ***Carmelo Ellul vs Giuseppe Imbroll et*** *(FHCC, 21 May 1921),* the Court explained that a mandator is bound to carry out the obligations contracted by the mandatary in accordance with the powers vested in such mandatary. The mandator is **also responsible towards third parties if, while remaining within the object of the mandate, the mandatary would have been guilty of fraud or negligence towards the mandator**.

Example: A mandator who owes money to a third party, appoints a mandatary to transfer the payment to said third party. Mandatary proceeds to retain such sum and fails to forward it to the third party. The mandator still remains responsible towards the third party for the payment of the sum.

In ***Vincenzo Vella vs Marianna Curmi*** *(FHCC, 15 January 1902).* The Court held that when a mandator authorises the mandatary to take a sum of money on loan for a determinate

purpose, the **lender is not prejudiced if the mandatary misuses the money borrowed** and uses it for a different purpose. In such case, **the mandatary is not to be considered as having exceeded the limits of the mandate.** Had, for instance, the mandatary borrowed a larger sum than that authorised or had he performed an action which differed from that included in the procuration, then he would have exceeded the limits of his mandate. However, this particular case involves only the **obligation of the mandatary to use the money borrowed solely for the purposes authorised by his mandator**. This consequences of such misuse are thus to be borne by the mandator, without prejudice to the lender.

One must note that as per ***article 1881(2)***, and as confirmed in ***Giovanni Antonio Vassallo vs Giovanni Griscti*** *(CoA, 11 March 1919),* the **mandator may not refuse to reimburse the mandatary** (where no negligence is imputable to such mandatary), **not even on the grounds that the expenses suffered could have been less or was avoidable in the exercise of the mandate**.

The third party must not be in bad faith for mandator to be responsible to third parties:

With regards to the obligations of the mandator, we may refer to article 1124H, which speaks of then obligations of the beneficiary towards the fiduciary, which suggests and demonstrates a great similarity to the provisions aforementioned;

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

Article 1885 allows for the mandatary's right of retention. If the mandatary is not paid what he is due, he is allowed to retain any fruits or assets obtained by reason of the mandate until the mandator has fulfilled his obligations. The right of retention applies e**ven if the mandate is gratuitous.**

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

Termination of Mandate

1886. (1) Mandate is terminated -

(a) by the revocation of the procuration;

(b) by the death, the interdiction or the incapacitation, whether general or special, from entering into contracts, the declaration of bankruptcy, or the *cessio bonorum* either of the mandator or of the mandatary;

(c) by the termination of the powers of the mandator;

(d) by the expiration of the time during which the mandate was to continue;

(e) by the renunciation on the part of the mandatary;

Provided that:

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

(ii) the Minister shall have the power to issue regulations to establish an electronic register where the registration of mandates and their termination may be made and to establish such

formalities, fees and applicable procedures for registration in the said electronic register and to regulate access to the said register.

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

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

The law attempts to **balance** the respective positions of the mandator and the mandatary; the former may terminate through **revocation**, and the latter may terminate through **renunciation**. Thus, the law demonstrates a **balance** between the rights of the mandator and the mandatary.

S 1887 - Revocation by the Mandator

1887. (1) The mandator may revoke the mandate **whenever he chooses**, unless the mandate is expressly stated to be granted by way of security in favour of the mandatary or of any other person, and that it is irrevocable, in which case it may only be revoked with the consent of the person whose interest is secured thereby. The mandatary under such an irrevocable mandate granted by way of security, shall be bound to act in a fair and reasonable manner when exercising the powers granted thereunder, provided that a mandate by way of security which is irrevocable may only be granted when the object to which it relates is property which is movable, by nature or by operation of law, and it shall not be permissible for such a mandate to be issued with reference to immovable property or rights therein.
(2) Where powers are exercised under an irrevocable mandate granted as stated above and form part of or are granted pursuant to or in the context of a written agreement governing a

broader relationship, the mandatary shall furthermore be bound to exercise such powers in accordance with the terms and subject to the conditions of such agreement.

(3) Except as provided in the preceding sub-article, the appointment of a new mandatary for the same business is equivalent to a revocation of the mandate given to the previous one, even though the new mandatary does not accept the mandate.

(4) A general mandate does not produce the revocation of a special mandate previously given, unless the business contemplated in the special mandate is expressly included in the general mandate.

Per **article 1886 (1)(a)**, the mandatory may terminate the mandate by way of revocation, the process of which is explained in **article 1887**. An argument which is often brought up in this regard is whether the mandator must prove some just cause as to the termination of the mandate. In ***Giuseppe Vella Zarb vs Antonio Caruana et noe*** *(CoA, 7 March 1932)*, the Court **endorsed the absolute right of the mandator to revoke the mandate at will, irrespective of whether such mandate was gratuitous or onerous**. The argument utilised by the Court was that **mandate is a contract founded on trust which the mandator places in the mandatary** - thus, the Court argues that the mandator must be allowed to withdraw the authorisation when the necessary trust ceases to exist, **unless the mandator is bound by some reciprocal obligation which he fails to honour**.

S 1889 - Renunciation by the Mandatary

1889. (1) A mandatary may renounce the mandate by **giving notice** of his renunciation to the mandator.

(2) Nevertheless, if the renunciation is prejudicial to the mandator, he must be **compensated** by the mandatary, unless it is impossible for the latter to continue to carry out the mandate without suffering himself considerable prejudice.

When comparing **article 1887** with **article 1889**, we notice that while the mandator can revoke the mandate at any time, with no consequence, the mandatary must **give notice** and **pay compensation.**

The law, at least in terms of termination, clearly favours the mandator over the mandatary. Thus in 1887 and 1889 there is no perfect symmetry. The law does this because it presumes the mandate is gratuitous and thus believes that the mandatory won't suffer damages if the mandator decides to revoke.

Under Italian Law, article 1725, the Law clearly tries to address the imbalance between the mandator's position and the mandatary's position. What was happening was that onerous mandates would result in the mandator's revocation prior to the completion of the mandate, with the mandatary left without a remedy or compensation for his work. This was addressed by our jurisprudence.

Revoca del mandato oneroso: Articolo 1725

La revoca del mandato oneroso, conferito per un tempo determinato o per un determinato affare, obbliga il mandante a risarcire i danni, se è fatta prima della scadenza del termine o del compimento dell'affare, salvo che ricorra una giusta causa.

Se il mandato è a tempo indeterminato, la revoca obbliga il mandante al risarcimento, qualora non sia dato un congruo preavviso, salvo che ricorra una giusta causa.

The Question of Compensation

Laurent states that "*the code presumes that the mandate is a very secondary thing for the mandatary - it is merely incidental in his life.* ***This presumption is not always exact*** *- there are mandatories who base their living off of mandates or tasks entrusted to them. Certainly, a revocation of a mandate granted to a salesman would cause him damage. Would it therefore not be just to grant him compensation? Since the law does not grant such a right, he could only enjoy such right in virtue of an express or tacit agreement.*"

The Maltese Civil Code only burdens the mandatary with the obligation of compensation when such mandatary renounces the mandate - but the Civil Code is silent as to the compensation by the mandator to the mandatory in the case of revocation.

This was enunciated in ***Vella Zarb vs Caruana:***

Commercial agent (mandatary) of foreign principal (mandator) claimed compensation for services rendered since he had introduced various goods supplied by the foreign firm in Malta. The mandate had been revoked without notice.

Can the mandator revoke the mandate at will?

The Court endorsed the absolute right of the mandator to revoke the mandate, whether this be gratuitous or against remuneration.

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

The Court inferred from circumstances that **the mandatary would not have made the utmost to introduce principal's goods in Malta had he not expected to work longer-term** with the principal. Court, therefore, assumed that the parties intended mandatary to do his utmost but to **remain in charge of his task for a period of time sufficient to compensate him for his efforts**.

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

In ***Victor Salomone vs Dr Giuseppe Mifsud Speranza noe*** (*Commercial Court, 12 November 1934)*, the Court examined a foreign firm which had appointed a local agent, who had been assured a permanent agency, as a result of which such agent began to carry out work for the

firm. The mandator firm had subsequently decide to terminate the agency and set up a branch in Malta. The mandatary sued the mandatory for compensation of his services. The Court decided that ***a mandate could, in terms of law, be revoked at any time. However, if such procuration is granted for an established time, the mandator is responsible for damages if he chooses to revoke the mandate earlier than the stipulated time period, since the mandator in such case will be in breach of contract and would have caused unjustified damage to the mandatary***. Such damages are qualified as damages ***ex contractu***. Furthermore, there existed cases where even though the parties had not established a fixed time frame, the circumstances had indicated **an inferred time frame**, and that the representation should subsist for a certain time to enable the representative to reap the fruit of his work. This principle is strongly applied when an agent is appointed to introduce a new product in a market. In this case, the revocation had taken place after five years, yet the mandatary proved that he had attracted other firms which were operated in the mandator's name, and that he would not have carried out his works had he been aware that the agency would have been terminated after a few years.

S 1888 - Termination & Third Party Knowledge

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

Article 1888 *(1) states that the termination of a mandate* ***has no effect on third parties who have no knowledge of such termination****.*

In ***Luigi Caruana et vs Elia Farrugia et*** *(CoA, 12 July 1976), a sale was made by a mandatary notwithstanding the revocation of the mandate. Thus, the mandator sought to annul the sale. The Court stated that this action for annulment may only succeed* ***if the***

***mandator could prove that the third party was aware of the termination of the mandate**. In this case, the contract of sale was annulled since evidence was brought to indicate awareness of such termination.*

Termination of Mandate of Transfer of Immovable Property

1886. Provided that;

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

Under a proviso to **article 1886**, we find that when a mandate instructing a **mandatary who is a physical person** to **transfer an immovable** on behalf of the mandator, **or** when the mandate is **one of a general nature given between physical persons**, such termination may be **notified by the mandatory** or by any other person having an interest in the mandate to the **Chief Notary to the Government**, who will register the termination in order for **the public** to be aware of such termination.

Se ndaħħlu proċedura ġdida fejn tidħol … l-irtirar ta' prokuri. … Pereżempju jekk għamilt prokura lil ħija u kelli xi ngħid miegħu jew inkella ħija ma jridx jibqa' prokuratur tiegħi, jekk irrid nimxi mas-sewwa, irrid nagħmel ittra uffiċjali u ninnotifika lin-nutara kollha biex nirtira dik il-prokura. Meta ċempilt [lir Registratur tal-Qorti] u staqsejtu kemm tiġi din il-proċedura qalli li **biex tirtira prokura tiġik xi €2,150**. Affarijiet tal-meravilja! … Ħafna nies jirtiraw il-prokura u ma jibagħtux l- ittra uffiċjali *at their own risk*. Suppost tibgħat ittra uffiċjali.

- **Hon Owen Bonnici**, 3 November 2015

L-ewwel prijorità tagħna kienet li nirrevokaw il-prokuri, però mbagħad tkellimna man-nutara. *At an initial stage* ridna li nirreġistraw il-prokuri kollha. Tlaqna minn dak il-punt ukoll fuq suġġeriment tagħhom. Però mbagħad, meta għamilna iktar studji, bdew joħorġu ċerti *issues* problematiċi, fosthom jekk prokura għandhiex tkun *available* lil kulħadd. Jekk se nirreġistrawhom kollha mar- Reġistru Pubbliku jidħlu *data protection issues,* pereżempju.

… L-idea hija li għalissa se nirrevokaw **prokuri rigward *physical property***, jiġifieri dwar *immovable property*, jiġifieri rigward persuni wkoll. Ejja ninsew il-kumpaniji u l-affarijiet kollha, inkunu tlaqna mill-ewwel pass. Jekk se jkollna sistema ta' ċertezza – għax fl-aħħar mill-aħħar anke n-nutara qed inbatu meta lanqas inkunu nafu jekk prokuri tħassrux jew le - jekk se jkollna sistema *online* li se nibdewha jekk Alla jrid ... Aħna għamilna studji. Kemm jista' jkun hemm revoki f'sena? Bħalissa, skont l-istatistika, forsi jkun hemm 200 prokura f'sena.

… Għalissa nitilqu mir-**reġistru li se nieħdu f'idejja jien bħala Nutar tal-Gvern**.
… Kemm **idaħħal nota mad-Dipartiment**, fejn ikun irid jehmeż il-prokura li se jirrevoka.

- **Dr Keith German** (Nutar Prinċipali tal-Gvern)

Thus, a register was created in order to allow public access to all **terminated mandates**, which register is maintained by the Principal Notary for Government. Notaries now have the comfort of checking whether these special or general powers of attorney have been revoked or not.

Duty of the Mandator to Inform about revocation

In ***S.G South Limited vs Joseph Scicluna et*** *(FHCC, 2 April 2004*), estate agents had claimed compensation for their role in the sale of a property. The mandator claimed that if any mandate had been given to the property agent, it had been revoked. It resulted that the revocation was not made known to the agents.
"Issa ghalkemm il-mandat huwa wiehed minn dawk il-kuntratti **li ecezzjonalment jista' jigi terminat unilateralment bit-tnehhija tal-prokura (artikolu 1886 (1) tal-Kodici Civili), il-**

mandat jibqa' kuntratt bilaterali, u biex jinhall hemm bzonn li d-decizjoni ghat-tnehhija tal-mandat tigi kkomunikata lill- mandatarju. Il-**mandatarju** li, **in *buona fede***, jibqa' jesegwixxi il-mandat li kellu ghax ma jkunx gie mgharraf mill-mandant li l-prokura giet irtirata, **jibqa' xorta wahda bid-dritt li jithallas dak li** hu dovut lilu skond il-ftehim ta' agenzija. Kwindi l-Qorti tikkonkludi li kien hemm relazzjoni kontrattwali bejn il-partijet li bih is-socjeta' attrici giet imqabbda mill-konvenuti tipprova takkwista l-bejgh tal-proprjeta' li l-istess konvenuti kellhom gewwa Marsaskala."

S 1886 (1)(f) - Termination by Death, Interdiction, or Incapacitation

1886. (1) Mandate is terminated -
(f) by the death, the interdiction or the incapacitation, whether general or special, from entering into contracts, the declaration of bankruptcy, or the *cessio bonorum* either of the mandator or of the mandatary;

In ***Joseph Aquilina et vs Jean Paul Mifsud et*** *(CoA, 5 October 2001),* the Court established that the death of the mandator includes and implies the dissolution of a legal person.

Joseph Aquilina et vs Jean Paul Mifsud et *- death includes dissolution of Legal Person*
CoA, 5 October 2001

It is a **basic principle of law** that a **mandate terminates upon the death** of either the mandator or the mandatary. In the present case, the **legal death of the mandator** occurred through the **dissolution of the company WSSA**.

As a result, once the mandate was extinguished due to the mandator's "death", the former mandataries **lost any right to continue administering** assets that no longer belonged to their mandator. It is therefore incorrect to argue that the dissolution of WSSA did not automatically extinguish the **powers and authority** arising from the mandate.

S 1890 - Duty of Heirs of Deceased Mandatary

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

In the case of the death of the mandatary, the heirs of the mandatary are to inform the mandator of the mandatary's passing and attend to what is required per the circumstances of the case. **Strictly speaking, however, the heirs are not bound by the mandate**. Here, in particular, is where the element of good faith emerges in relation to the law of mandate. Heirs of the mandator, however, are not bound by the mandate.

Charles Michael Gauci vs Alfred Vella pro et noe
Court of Appeal, 14 January 2002

The juridical relationship between the mandator and the mandatory **was a personal one, based on reciprocal trust, which could never be extended to the heirs of either the mandator or the mandatory**. Therefore, the fact that the mandator, Paul David Gauci, bound himself that the appointment of general administrator made by him would be irrevocable could bind only him during his lifetime. **It could not bind his successors in title.** This is for the obvious reason that the property of the business remained that of the mandator, and upon his death it passed to his successors, who then had every right to ensure the administration of their property in whatever manner they deemed appropriate.

There is no need to emphasise that, in this regard, the position of general administrator — even if appointed irrevocably — was more vulnerable than that of an ordinary employee who would be protected in his employment by specific legislation. This Court is therefore convinced that the respondent was in no way obliged "to respect the rights which Paul David Gauci" (his father) had allegedly given to the appellant. In fact, Paul David Gauci had given the appellant no rights at all. He had merely given him a mandate that was to end upon the death of the person who had conferred it.

This, however, **does not apply in the case of prestanome mandates**. In the case of prestanome mandates, the obligations are inherited.

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

(n) where a fiduciary dies in the course of performing his fiduciary obligation:
(i) his universal heir who has reached majority and is capable at law, or if more than one, each one of such heirs severally, shall be deemed to be executors *ex lege* of the property and shall immediately transfer or deliver the property to a successor fiduciary or the beneficiary;

Thus, if my father held property in the name of another via a prestanome mandate, and if my father passed away, I am bound by the same fiduciary obligations which my father was bound by towards the mandator.

This is repeated in various instances, among them **article 1871A (3)**;

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

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

This shows how the law tries to protect the interests of the mandator at all times even after their passing.

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

"It is often the case that the heirs ask the professional to continue handling the property and then one has a
new mandate, but if they want the property back to engage someone else then the professional must comply.”

“A very important point to note is that the kind of agreement cannot designate what the professional should do with the property after the mandator, his client, dies. That kind of agreement would be invalid as it should be done in a will before a Notary. Mandates cannot be used as a will substitute.”

-Max Ganado

Mandate in Anticipation of Incapacity

This is an atypical type of mandate, differentiated from the ordinary mandate. This type of mandate is a mandate which serves to appoint another to take decisions instead of the mandator when the mandator becomes incapable to take such decisions himself. We know that when a person becomes interdicted or incapacitated, a curator is appointed by the court to represent the interests of that party. In this type of mandate, **the curator, so to speak, is appointed *a priori* by the mandator in order to take decisions when the mandator inevitably becomes incapable to enter civil acts**. This type of mandate is used for persons who suffer from certain conditions such as Alzheimers, in order for the person suffering from such disease to appoint another to take his decisions in his interest when the condition renders him incapable to contract. Some have argued this mandate to be a **conditional mandate,** since it will only become effective when a condition (incapacity) is fulfilled. This was explored by **J. Attard**, in her dissertation on the Enduring Power of Attorney under Maltese Law;

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

In ***X&Y vs Croatia*** *(ECtHR, 3 Nov 2011)*, the Court held that divesting someone of legal capacity entails serious consequences. The person concerned is not able to take any legal action and is thus deprived of his or her independence in all legal spheres. Such persons are put in a situation where **they depend on others to take decisions concerning various aspects of their private life**, such as where to live or how to dispose of assets and income, for example. Interdiction or incapacitation are contemplated in **article 520** of the COCP;

520. (1) A **demand for the interdiction or incapacitation of persons who have a mental disorder or other condition, which renders them incapable of managing their own affairs, or who are insane or prodigal**, is made by an application to the Court of voluntary jurisdiction.

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

A major who is a person with a mental disorder or other condition, which renders him incapable of managing his own affairs, or who is insane or prodigal, may be interdicted or incapacitated from doing certain acts.

Interdiction is the **preclusion of all civil acts**, including those of ordinary administration; the will of the subject is *substituted* by that of the curator.

Incapacitation is the **preclusion of performing extraordinary acts of administration** (borrowing any money, receiving any capital, transferring or hypothecating his property); the will of the subject is *not substituted* by the curator whose duty is to *assist* him.

In order to understand the **spirit** of **article 1864A**, which provides for the mandate in anticipation of incapacity, we must refer to the **parliamentary debates** which preceded the introduction of this provision;

*The aim of this legal reform is to protect people who are **abandoned or unable to make decisions for themselves**, and who often end up being represented by persons they **would not have chosen** had they retained full capacity. Traditionally, when individuals lose decision-making capacity, a **court-appointed curator** is assigned, often **without the person's input**. The core principle of the reform is therefore that **decisions should be taken by the person in advance**, while they are still capable.*

*Abuse is not limited to physical abuse; it also includes **financial and economic abuse**. The law is intended to cover persons who have been advised to undergo treatment or who are diagnosed at an **early stage of a condition**—such as dementia—that may lead to temporary or permanent loss of capacity. A person diagnosed with **early-stage dementia**, while still capable, should be able to decide **in advance** who will act for them once they are no longer able to do so.*

-Hon J Caruana

*The purpose of the law is to **empower individuals** who foresee that they will need others to make decisions on their behalf in the future, by introducing what is internationally known as **"advance directives" or "supervisory directives."**The legislation is particularly aimed at persons suffering from **pre-senile dementia (including Alzheimer's)**, as well as individuals undergoing **high-risk medical procedures**, where future incapacity is a real possibility.*

-Hon G Farrugia

Michela Pace holds that this form of mandate was introduced in order to **protect**, with such need for protection emanating from Malta's **ageing population**

"The need for protection in this regard is greatly amplified by Malta's ageing population and the increasing potential of a cognitive impairment with old age."

"Advance planning tools for incapacity ... ***mental incapacity must occur for the mandate to have validity*** *... This provides the protection, as it is ineffectual until the cause of incapacity is proven and accepted by the Court, which may also establish other conditions in the mandate. The wording of the law indicates that this type of new mandate under our law is not a continuing mandate as it cannot be used before incapacity, and it is thus a* ***conditional mandate."***

Another motive behind the promulgation of this form of mandate pertains to the **Convention on the Rights of Persons with Disabilities**, to which Malta is a signatory. In this Convention, Article 12 holds as follows;

ARTICLE 12

(5). Subject to the provisions of this article, **States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans**, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

1864A. (1) A mandate given by a person of full age in anticipation of his incapacity to a mandatary, for the latter to take care of the mandator or to administer his property shall be drawn, under pain of nullity by a notary public in the presence of two witnesses in accordance with the requirements of article 655(1) of this Code, **after having obtained a medical declaration that circumstances so require in the best interests of that person.** This mandate shall be registered in the same manner as any one of the acts mentioned in article 50 of the Notarial Profession and Notarial Archives Act.

(2) In the case of a person of full age, **performance of the mandate shall be conditional upon the occurrence of the incapacity and after obtaining the necessary approval from**

the court of voluntary jurisdiction upon application by the mandatary designated in the act. **The court of voluntary jurisdiction may impose those conditions that it may deem necessary.**

(3) (*a*) For the purpose of termination of the mandate, that termination has to be drawn by a notary public in the same manner as the mandate was constituted and the termination shall be accompanied by a sworn medical certificate which confirms that the incapacity has ceased and that termination has to be approved by the court of voluntary jurisdiction. That termination shall be registered in the same manner as any one act mentioned in article 50 of the Notarial Profession and Notarial Archives Act.

(*b*) Such termination shall be communicated or notified, as the case may be, to the mandatary who shall be bound to cease from representing the mandator with immediate effect. The registrar of the court of voluntary jurisdiction shall send a copy of the termination approved by the court of voluntary jurisdiction to the Chief Notary to Government who shall enter the particulars of such termination in a register held by him for the purpose and which shall be accessible to the public during office hours.

(*c*) If the mandatary continues to represent the mandator after the termination has been communicated or notified to him, the mandatary shall be held personally responsible for damages and shall be considered as acting in contravention of this article.

(4) The provisions of sub-title II of Title XVIII of Part II of Book Second of the Code shall, *mutatis mutandis*, apply to a mandatary appointed in terms of this article.

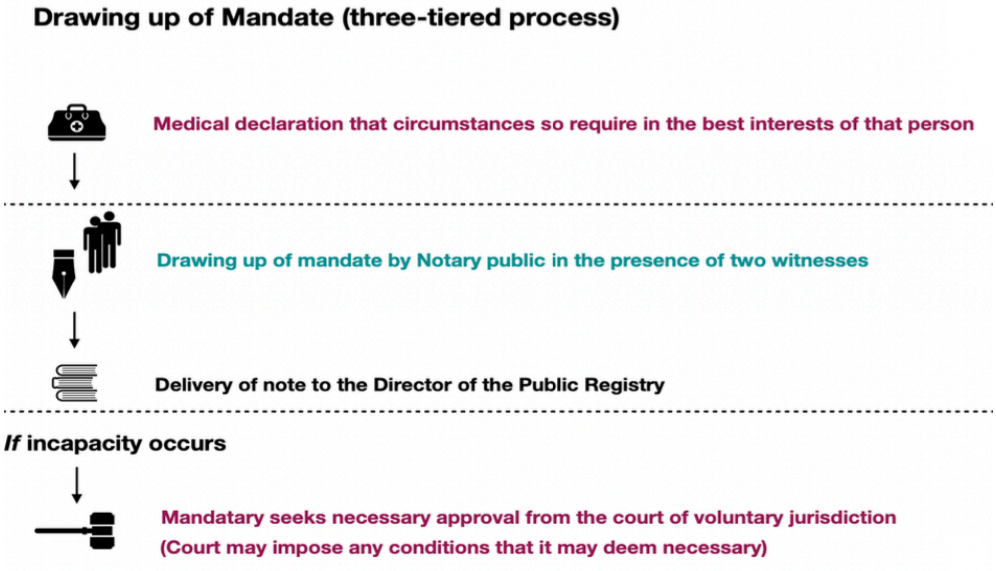
In order for this mandate to be drawn up, a 3 tiered process takes place;

1) A medical declaration that the circumstances point towards the necessity of a mandate;

2) The **drawing up of the mandate by Notary public in the presence of 2 witnesses**, followed by the delivery of the note to the Director of the Public Registry;

-----if incapacity occurs------

3) The mandatary must seek necessary *approval from the Court of Voluntary Jurisdiction*, which **may impose conditions** if it deems such conditions to be necessary.



The registry of this mandate is done per the ordinary procedure and per **article 50** of the **Notarial Profession and Notarial Archives Act**. Being a **public will**, the form of the will must be in line with that stipulated under **article 655 of the Civil Code**, which requires that **2 witnesses** be present in the receiving of the will by the Notary. If this mandate is drawn up, but the incapacity does not occur, then this mandate is **ineffective**. **If the incapacity occurs, then the mandatary must seek approval from the Court of Voluntary Jurisdiction in order for the mandate to become effective**.

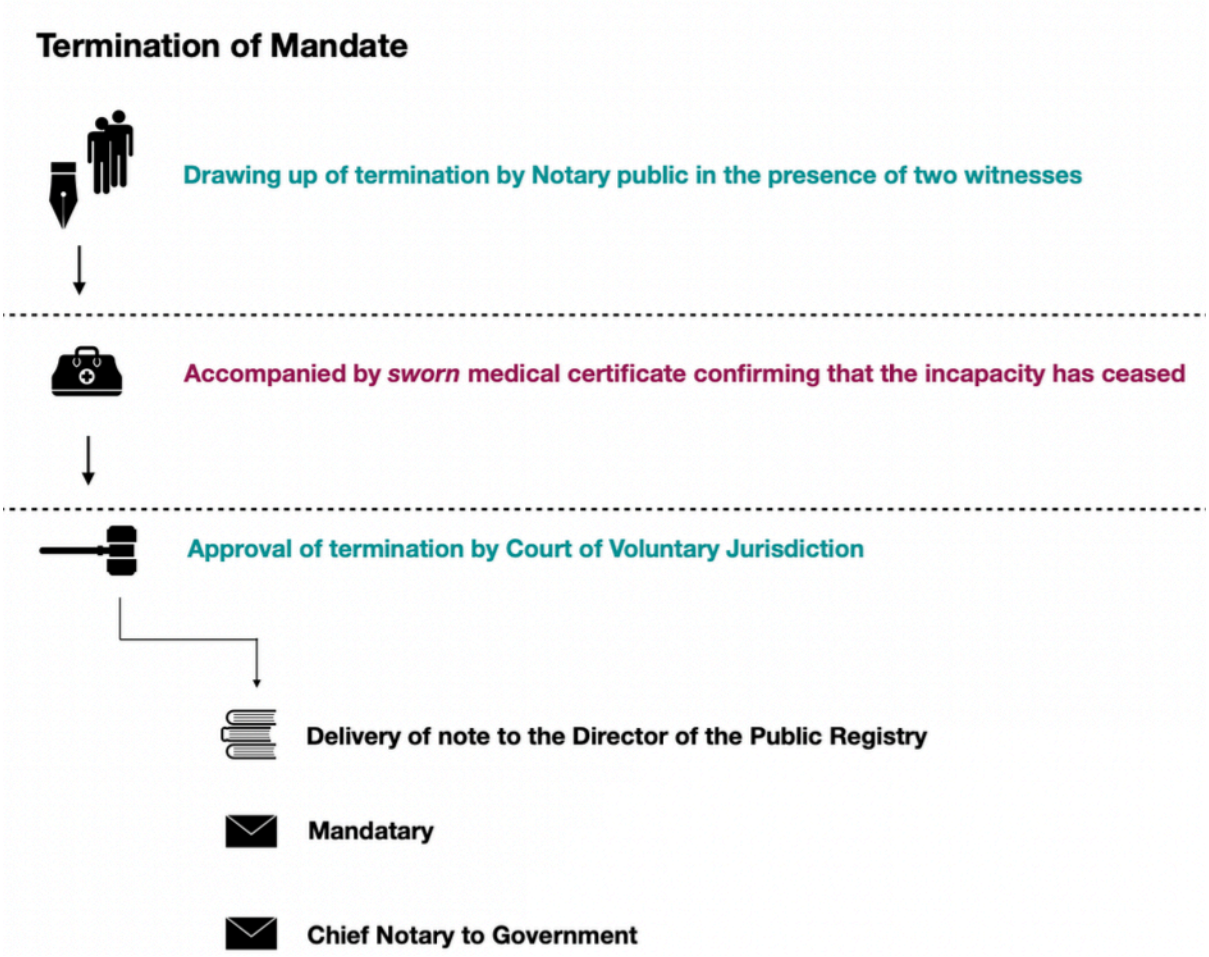
In order to **terminate** the mandate, say for instance where the chance of incapacitation has reduced significantly, the procedure is as follows;

1) The **Drawing up of the termination by Notary Public in the presence of 2 witnesses**;

2) Accompanied by a **sworn medical certificate confirming that the incapacity has ceased**;

3) The mandator must again seek approval from the Court of Voluntary Jurisdiction to terminate such mandate.

4) The termination must be made notified to the director of the public registry, and a letter must be sent to the mandatary and to the chief notary to government.



Article 1864A (1) holds that the mandate may be issued **either to take care of the mandator** or else to **administer his property**. These are the **objects** of the mandate. If we were to consider the first object, that of taking care of the mandator, the question arises as to the limitations of this mandate.

To this extent, **Michaela Pace** has referred to English Law, which distinguishes between **EPA** (enduring PoA) and **LPA** (Lasting PoA), a distinction which emerges in Common Law Jurisdictions. In the United Kingdom, LPAs were introduced by the Mental Capacity Act in 2005 after extensive consultation, and superseded EPAs which were introduced in 1986. An EPA was only valid for the administration of **financial affairs of another** and did not encompass health and welfare issues. In contrast, the LPA now introduced in UK legislation **includes the administration of financial matters, property matters and personal welfare**

issues. Under Maltese Law, the new provision empowers the mandatary to *take care of the mandator or to administer his property*, thus **it appears that the Maltese provision is more akin to the broader LPA than the narrower EPA.**

Joanna Attard, in her dissertation, stated that **EPAs** dealt solely with property and financial affairs. Indeed, according to the Court's interpretation in ***F. Vs West Berkshire HA***, EPAs were **restricted to merely refer to business matters, legal transactions, and other dealings of a similar kind**. Thus, **health and welfare** went beyond the scope of EPAs. LPAs were introduced to cater for both financial as well as personal welfare issues. LPAs now provide wider powers, and for the first time in England and Wales since 1959, the **personal welfare LPA now includes the right of attorney to consent to care and treatment decisions on behalf of the incapable adult**.

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

In the case of Maltese Law, although the two aforementioned authors do not reach a clear conclusion, it would seem that the Minister did **not intend** to also encompass **enhanced directives** (i.e - decisions of life or death).

Madanakollu inkwetajt li ***assoċja dan it-tentattiv li nipproteġu lill-persuna vulnerabbli ma' xi tentattiv li b'xi mod nimpinġu fuq id-drittijiet tal-persuna jew saħansitra fuq il-ħajja tagħha.*** *Il- focus prinċipali ta' dan l-Abbozz ta' Liġi huwa* to *take care of the mandator, u bil-Malti li jieħu ħsieb. Jiġifieri hawnhekk qed nitkellmu fuq il-bżonn tal-persuna meta ma tkunx f'pożizzjoni li tieħu ħsieb tagħha nnifisha…*

Jiġifieri ***mhux se nkunu qed nagħmlu u nirregolaw l-Advanced Directives permezz ta' din il-liġi għaliex ovvjament dan huwa suġġett kumpless ħafna li jirrikjedi l-input tas-settur mediku wkoll****.*

- Hon J. Caruana (2015)

The law is also silent on whether this contract is onerous or whether it is gratuitous. If the mandate was to be classified as being onerous, then some serious ethical problems may arise. Nevertheless, the law does not qualify the gratuity or non-gratuity of the contract.

Mandate is a **contractual relationship** entered into between two persons. Traditionally, difficulties arose when the **mandator died** and the mandatary continued acting under the mandate.

In the **medical field**, there is a recognised need for instruments allowing decisions to be made when a person can no longer decide for himself, such as **advance directives** or a carefully controlled **power of attorney**. These are intended to regulate **medical treatment decisions**, not property matters, and are usually **ring-fenced** to healthcare.

The concern expressed is that while such mechanisms are appropriate in the **medical context**, introducing them into the **Civil Code** as general mandates risks **blurring concepts** and extending a medical decision-making tool into areas (such as patrimonial matters) for which it was not originally designed.

- Hon C. Mifsud Bonnici (2015)

Irrevocable Mandate

The irrevocable mandate is a form of mandate which is used for a different purpose. It is a power of attorney entitling the creditor to a **self-help remedy** in the event of a default under the financing arrangement. the creditor has not been paid so he uses this mandate to take the aircraft and use it. Here, we are using mandate as a **security** or a **guarantee**. What is particularly controversial about this type of mandate is that while an ordinary mandate is based on trust, **this mandate is based on distrust**, because there is the existence of a guarantee which suggests that the mandatory does not fully trust the mandatary. While certain elements are common, its fundamental nature is very different.

We needed the irrevocable mandate to use it as a **security** - a form of a self-help remedy. The easiest example is the aviation industry - as a guarantee, you would want the aircraft. Here, a PoA entitles the creditor to a remedy in the event of a default under the financing arrangement. It is only the person whose interest is secured (the creditor mandatary), who can revoke the mandate. The mandator may only revoke it with the consent of the person whose interest is secured thereby.

This is a distinction between the ordinary mandate, which can be revoked by the mandator at will. A declaration of bankruptcy does not terminate an irrevocable mandate as would be the case of a revocable mandate. Such a mandate may only be granted when the object to which it relates is **movable property**, whether by nature or by operation of the law. The irrevocable mandate cannot be issued in relation to a guarantee over an immovable property. This form of termination is an exception to the rule stipulated by **article 1886(1)**. An underlying element in the law of mandate is **trust.** However, by making a mandate irrevocable, one is altering the dynamic of the mandate, because while an ordinary mandate may be revoked at will if the trust is broken, the same is not true in the case of an irrevocable mandate. Irrevocable Mandate is provided for under **article 1887**;

1887. (1) The mandator may revoke the mandate whenever he chooses, **unless the mandate is expressly stated to be granted by way of security in favour of the mandatary or of any other person, and that it is irrevocable, in which case it may only be revoked with the consent of the person whose interest is secured thereby**. The mandatary under such an irrevocable mandate granted by way of security, shall be bound to act in a fair and reasonable manner when exercising the powers granted thereunder, provided that a mandate by way of security which is irrevocable **may only be granted when the object to which it relates is property which is movable, by nature or by operation of law, and it shall not be permissible for such a mandate to be issued with reference to immovable property or rights therein.**

(2) Where powers are exercised under an irrevocable mandate granted as stated above and form part of or are granted pursuant to or in the context of a written agreement governing a broader relationship, the mandatary shall furthermore be bound to exercise such powers in accordance with the terms and subject to the conditions of such agreement.

(3) Except as provided in the preceding sub-article, the appointment of a new mandatary for the same business is equivalent to a revocation of the mandate given to the previous one, even though the new mandatary does not accept the mandate.

(4) A general mandate does not produce the revocation of a special mandate previously given, unless the business contemplated in the special mandate is expressly included in the general mandate.

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

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

Does absolute irrevocability preserve the true nature of mandate or would it render it more akin to an atypical contract? … revocability due to loss of trust constitutes an essential and typifying element of the mandate.

M. Xerri explains that, although **mandate under Maltese law is traditionally revocable** and may terminate upon bankruptcy of either party, the Civil Code was amended to introduce the concept of an **irrevocable mandate granted by way of security**. This allows security documents to include a clause giving the creditor an **irrevocable mandate**, such as an **Irrevocable De-registration and Export Request Authorisation (IDERA)**. An IDERA enables a creditor, upon default, to **de-register and export an aircraft without the debtor's consent**. Its registration in the National Aircraft Register provides **certainty and protection** to financiers or lessors by ensuring effective repossession in the event of default.

*M. Falzon explains that a **power of attorney or IDERA** may be registered in either the **National Aircraft Register** or the **International Registry**. Where a mandate or power of attorney (whether revocable or irrevocable) is granted for a **fixed period**, the expiry date must be recorded, and themandate **automatically ceases** upon that date.*

*A **de-registration or export request** made by an authorised person under a **registered IDERA or power of attorney** must be complied with, provided the authorised person certifies that **all prior-ranking registered interests have been discharged or consented**. An **IDERA may only be revoked with the written consent of the authorised person**.*

*Crucially, an **irrevocable mandate granted by way of security survives insolvency** and remains binding on, or enforceable by, the **heirs or liquidator** of either the debtor or the creditor, in accordance with its terms.*

Article 1857 (3) provides for the **form** of an irrevocable mandate;

1857 (3) An irrevocable mandate granted by way of security as specified in article 1887(1) shall be granted in writing on pain of nullity.

Thus, an **irrevocable mandate** may only be validly construed if it is made **in writing**, and thus it cannot be verbally generated.

Article 1870 (2) provides for the **power of the mandator** in an irrevocable mandate;

1870 (2) The powers of the mandator in relation to the subject matter of the irrevocable mandate by way of security may be suspended by express agreement for the duration of the mandate.

Article 1870 (3) provides that the irrevocable mandate must be **registered in the Public Registry**;

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

(*a*) where the subject matter of the mandate is a ship or rights related or connected therewith, the Register of Maltese Ships and by means of an annotation;
(*b*) where the subject matter of the mandate is an aircraft or an aircraft engine or rights related or connected therewith, the National Aircraft Register and by means of an annotation; and
(*c*) in all other cases, the Public Registry by means of a note and in such case it shall have effect in relation to third parties and any exercise of any such powers by the mandatary as are suspended shall not have any effect except when done with the written consent of the mandatary.

Article 1886 (2) provides for the **termination of** an irrevocable mandate.

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

Article 1887 provides for the **revocation of mandate,** and makes the distinction between revocable
and irrevocable mandates, while **article 1887 (2)** provides for the situation in which an irrevocable
mandate forms part of a written agreement which governs a broader relationship.

This is **contrasts with Italian Law,** which holds that an irrevocable mandate may be revoked if there is **just cause**, which is not referred to under Maltese Law.

The Contract of Mutuum

With this type of contract, we are moving into the realm of **loans**. There are **3 types of loans**, being the **commodatum,** the **precarium**, and the **mutuum**, the latter of which is the most practical and utilised loan in today's world.

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

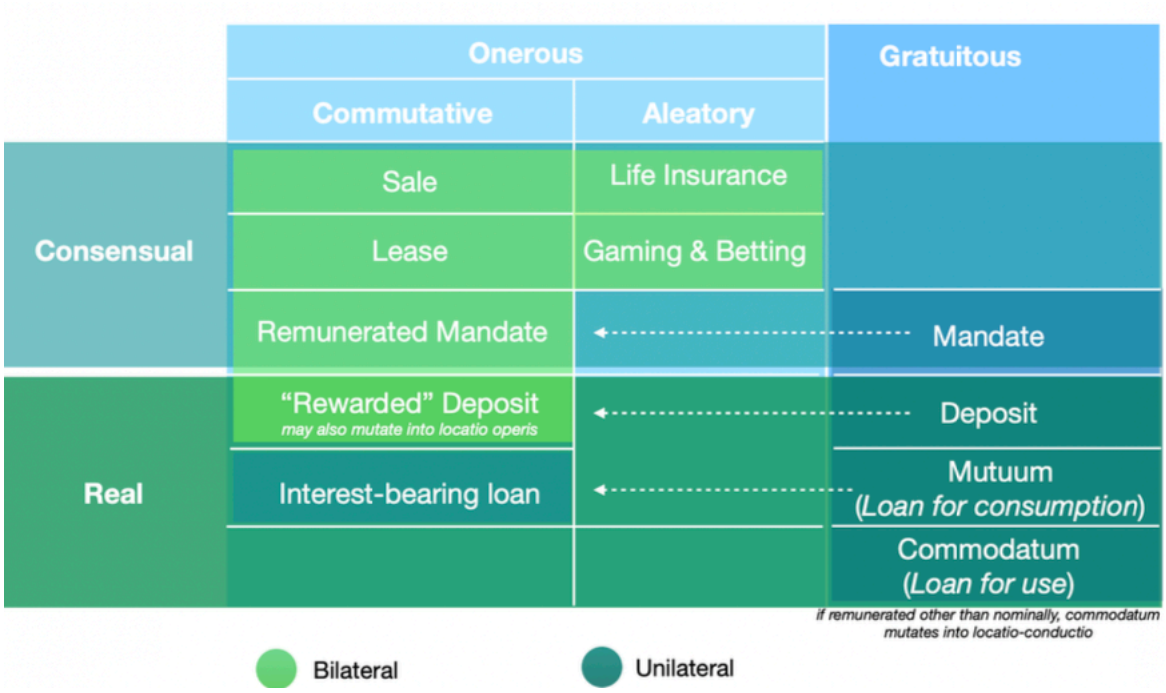
1839. Precarious loan or *precarium* is the same contract of loan for use defined in article 1824 with the only difference that the lender has the power to take back the thing when he pleases.

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

From these 3 different definitions pertaining to three different contracts of lease, one may extract 2 primary common factors, being that;

1) They are all **gratuitous contracts**; however, not in the same manner, in that while the contracts of **commodatum and precarium are essentially gratuitous**, the contract of **mutuum is naturally gratuitous** (in that it is possible to the lender to stipulate interest in his favour, rendering the contract onerous);

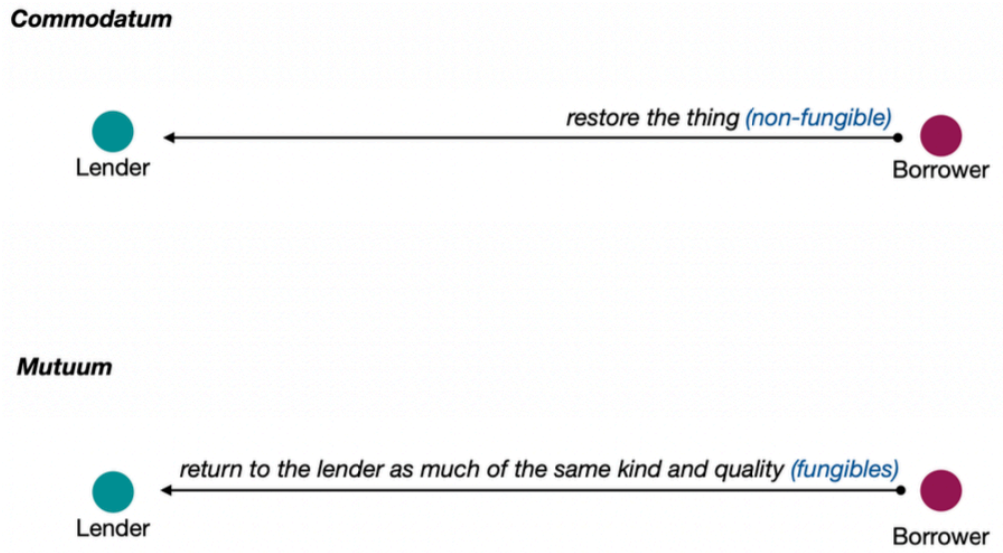
2) All contracts of loans are **real contracts**, because they are perfected upon the **delivery of the object**. One must note, however, that the fact that such contracts are real does not invalidate the **promise of loan**, which is binding on the promisor.



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

Mutuum is thus a **loan for consumption**. The object of this loan thus pertains to **fungibles**, i.e something which may be consumed, such as money. Fungibles can be borrowed, but they are **only borrowed for the purpose of being consumed.**

We must distinguish between the **loan for consumption**, and the **loan for use** (***commodatum***), as per **article 1824**. The use of the word ***delivers*** in **article 1842** (mutuum) signifies the nature of the contract, in that the contract of mutuum is a **real contract** (commences on delivery), as opposed to a **consensual contract** (commences on agreement). The borrower is obliged not to return the same fungibles which are borrowed, **but rather to return as much of the same kind and quality of such fungibles.** For instance, if I lend someone 5 x 1 EUR Coins, the obligation to return is fulfilled if he gives me a 5 EUR note instead of 5 x 1 EUR Coins. This is distinguished from the loan of ***commodatum***, which binds the borrower to return the same thing itself.



J Carbonnier holds that **fungible goods are characterised by interchangeability**, in that they are capable of replacement with each other. He then states that **non-fungible goods are those which are considered in their individuality and which therefore cannot be replaced by one another.**

Torrente states that **only inconsumable goods** can form the **object for the loan for use** (commodatum)**, and not consumable things**. The use of consumables destroys their substance.

The code presumes that the contracts of mutuum and commodatum are gratuitous and real contracts, because there is the obligation to deliver. **While commodatum is necessarily gratuitous, the contract of mutuum may be subject to a stipulation of interest**, which would turn the contract into an onerous one. Both of these contracts are **unilateral contracts**, since the law speaks solely of the obligation to return the thing to the lender (commodatum) or to return the same kind and quality of the thing (mutuum).

Another important distinction emerges as a result of the fact that **mutuum deals with fungibles while commodatum deals with non-fungibles**: If I borrow a car from my friend, I am the possessor but not the owner. If on the other hand my friend lends me a 5 euro note, I become the owner of the 5 euro note. This is a very important distinction between commodatum and mutuum - the borrower's relationship with the thing borrowed is different,

in that he is the possessor of the thing lent to him by way of commodatum, while he is the owner of the thing which is lent to him by way of mutuum.

In commodatum, there is thus a transfer of possession, while in mutuum, there is a transfer of ownership, both subject to the obligation to return either the thing itself or the equivalent of that thing, depending on the nature of the loan. In the case of mutuum, the risk of possession is transferred to the borrower, while in the case of commodatum, the risk of possession is retained within the lender. It is for this reason that **in commodatum, the periculum rei remains within the lender, while in mutuum, the periculum rei is transferred to the borrower.**

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

Elements of Mutuum

The **contract of mutuum** is perfected at the moment the thing is delivered to the borrower, with such delivery of the thing representing a **transfer in ownership (datio)** of the property given on loan, from the lender to the borrower. The *datio* effects the transfer in ownership to the borrower.

The **lender must be capable of alienating** in order for his transfer to be effective. Furthermore, the object of the loan must be *res fungibilis*, and thus they must be **corporeal** and **movable**, since only these things can be consumed by their use. The Borrower suffers any deterioration, as well as the loss of the thing lent, since the loan transfers the ***periculum rei*** (risk of possession) from the **lender to the borrower**.

This is all captured in **article 1843**;

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

John Muscat et vs Pacifico Bonnici et – elements of *mutuum*

FHCC, 19 January 2005

"... From the meaning that the law gives to a contract of this kind, it is obvious that the plaintiff who requests the restitution of the items loaned by him must prove the constitutive elements of the contract, namely the traditio rei, that is, in this case, ***the delivery of the money****, and furthermore, that this delivery was* ***made on a basis which imposes on the recipient the obligation to return the equivalent of the sum loaned.*** *It is only when these two elements of fact constituting the alleged claim are proven that it can be said that the plaintiff has fulfilled the evidentiary burden incumbent upon him."*

Antonio Xuereb v. Maria Leone, Civil Court (First Hall), 19 January 1864, Vol. XXX.15.

-mutuum is a real contract

Amount loaned as indicated in public deed was that of £10 with interest. The sum lent in reality was that of £8 (the other £2 consisted of hidden interest). Lender's demand was only allowed up to the **sum which was actually loaned** i.e. £8 along with interest.

Term for Repayment

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

Article 1072 holds that where a mutuum contains a stipulation as to the return of the items by a certain time, the things cannot be claimed before such specified time. In the case that there is no stipulation as to the period of time for repayment, **we refer to article 1073;**

1073. Time shall always be deemed to be stipulated in favour of the debtor, unless it appears from the stipulation or from the circumstances that it was also agreed upon in favour of the creditor.

If no time was stipulated for the fulfilment of the obligation, it shall be carried into effect **immediately upon request** (in favour of the debtor). The second limb to this article is not really utilised in practice, but is nonetheless possible, and holds that the parties may agree that the payment will come into effect upon request of the creditor (who is owed the money).

However, this article must be read alongside **article 1078;**

1078. Where the time for the performance of the obligation has been left to the will of the debtor, or where it has been agreed that the debtor shall discharge the obligation **when it will be possible for him to do so,** or **when he will have the means for so doing**, the following rules shall be observed:

(*a*) if the subject-matter of the obligation is the payment of a sum of money, such obligation shall be performed within two years, if the sum is due without interest, or, within six years if the sum is due with interest;
(*b*) if the subject-matter of the obligation is other than the payment of a sum of money, the time within which the obligation is to be performed shall be fixed by the court according to circumstances.

In the case that the time for performance is left to the will of the debtor, the law provides for **2 different time periods by when the obligation must be fulfilled**, depending on **whether there is interest**. If the sum is due without interest, the obligation must be fulfilled by 2 years if it is lent out without interest, and it must be fulfilled by 6 years if it is lent out with interest. If the mutuum is established for a fungible other than money, the time limit by when the fulfilment must occur is established by the Court.

1079. A debtor can no longer claim the benefit of time if he has become insolvent, or if his condition has so changed as to endanger the payment of the debt, or if by his own act he has

diminished the security which under the agreement he had given to the creditor, or if he has failed to give the security agreed upon.

Article 1079 holds that where the benefit of time is lost, the obligation becomes due immediately. The benefit of time may be lost upon insolvency of the debtor or if the debt becomes endangered, whether by his own act or otherwise.

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

Article 1077 holds that where no time is fixed for the performance of a duty, it shall become **effective immediately**, unless the nature thereof implies that the time is to be fixed by the Court. All of these aforementioned provisions pertain to obligations in general but nonetheless are applicable to the contract of mutuum.

It is important to distinguish between 1077 and 1078. If the debtor wants to plead the benefit of time, then is the debtor who must be able to prove that the money lent to him or to her was given to him or her on the condition that the repayment would be given out at his own will.

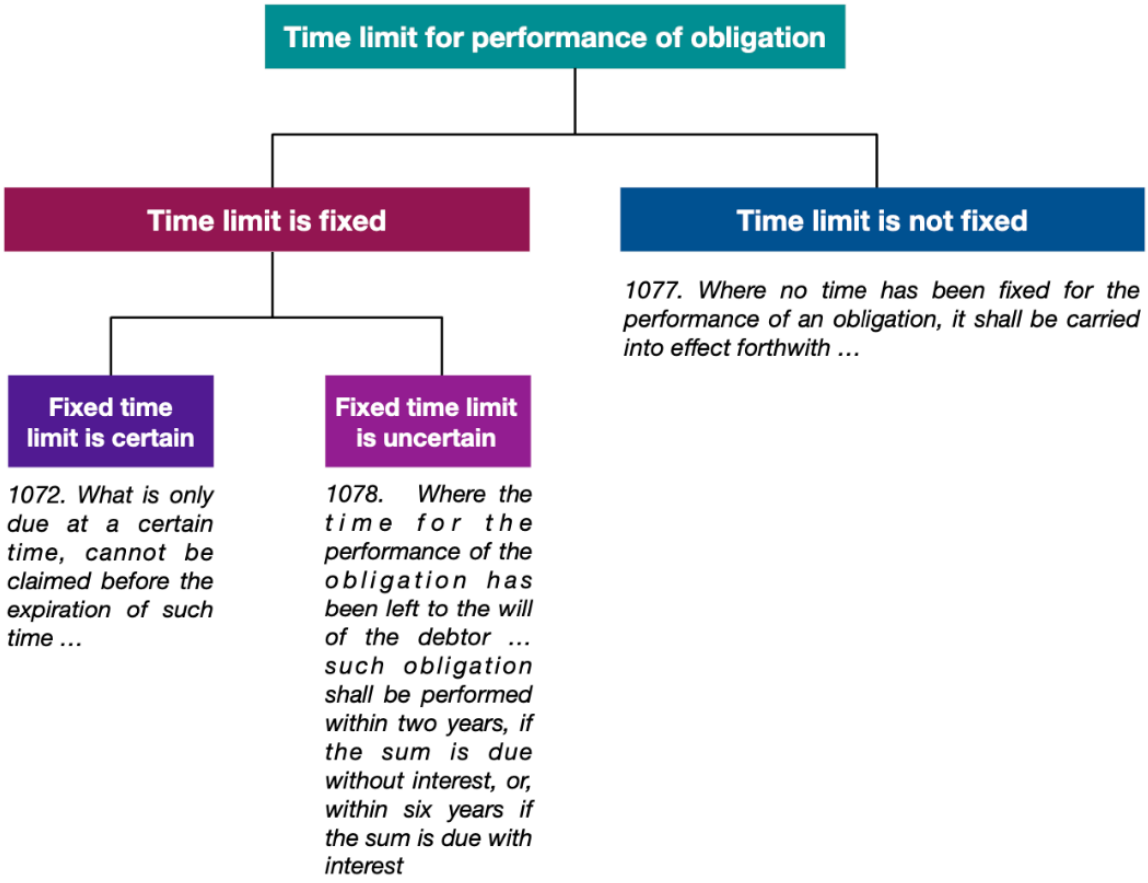
If the debtor fails to prove this, thus in the absence of the evidence, the court will consider the case to be ruled by Article 1077 thus that no time has been fixed for the obligation and will order the repayment of the amount forthwith – on demand of the creditor.

Giuseppe Barbieri vs Xuereb *FHCC, 1 December 1880*

In this case, the lender used the borrower for the repayment of a loan. The borrower claimed that the demand was premature, since two years had not been passed. The Court noted that the law distinguishes between obligations which are subject to a time limit and obligations which are not subject to a time limit. Since parties had not agreed to a time limit, the

obligation had to be **performed immediately**. The lender's demand was deemed admissible. In order to claim the 2 years per article 1078, **it was up to the borrower to prove that the amount of money was lent to him on condition that it be returned when he is possible to do so - thus the payment falls due immediately.**

This case is important because it established that when article 1078 becomes effective (i.e – when the benefit of time exists), it is **up to the borrower to prove that the amount was lent under the obligation to pay whenever possible** (i.e - no fixed time limit / uncertain time limit).



Spiridione Portelli et vs Dr Vincenzo Tabone M.D. et noe

FHCC, 18 Aug 1965

In this case, the lender sued the borrower for the balance of a loan. **No interest was agreed upon, nor any term fixed for payment**. The borrower claimed that the demand was premature, on the ground of article

1078. The Court concluded that the **3 instances foreseen under Article 1078** were to be interpreted restrictively;

1) When the time for the performance of the obligation is left to the will of the debtor;
2) When it has been agreed that the debtor shall discharge the obligation when it is possible for him;
3) When it has been agreed that the debtor shall discharge the obligation when he has the means to do so.

All 3 of these scenarios imply the manifestation of an intention through an **agreement**, whether verbal or written. The Court proceeded to examine whether the parties had intended a term for fulfilment or not. It found that the lender had assisted the borrower during times of financial difficulty, and he had awaited a number of months prior to instituting the suit, during which the lender had also accepted some part payments. **The Court thus concluded that the parties wanted to establish a term for payment, and thus the payment was deemed to be effective immediately.**

Carmelo Bonavia et vs Giuseppe Fenech
CoA, 1946

This case held that when a loan is repayable on demand, the lender is not bound by any term, and thus he may demand the repayment of the loan at any time, **provided that reasonable time is supplied.**

***Farrugia Randon* comments on how bank facilities (loans) are made repayable on demand;**
"... both before and after payment, banks invariably pass through a discussion and negotiating period with the customer, in the sense that banks invariably discuss the manner

how the defaulting customer could meet his commitments even by re-arranging the payment schedule or terms of repayments. Some time also elapses between the demand and the actual judicial procedures.

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

Kurt Xerri comments;

Banks generally exercise **restraint before enforcing eviction warrants**, allowing debtors time to regularise their position. Upon default, customers are first contacted by the **debt collection unit**, and regardless of the reason for default, are usually referred to a **rehabilitation unit** tasked with assisting distressed debtors. If rehabilitation succeeds, repayment terms may be resumed or restructured; if it fails, the case proceeds to **remediation and ultimately litigation**.

Only after these stages fail will the bank **call in the loan**, demand repayment within a short period, and issue a formal notice. Even after obtaining a **favourable judgment**, banks often allow the debtor a final opportunity to **sell the property privately**, since litigation and judicial auctions are costly and typically recover **significantly less than market value**. Where alternative security exists, the debtor's **primary residence is treated as a last resort**.

In ***Ganni Attard vs Josephine Cachia*** *(CoM, 8 January 2019),* the Court considered the scenario where the performance of the duty is left **to the will of the debtor** (i.e - article 1078);

In the present case, the deed dated **22 September 2010** did **not fix a specific repayment deadline** for the debt. Instead, it stated that the debtors were to **use their best efforts to**

repay the debt as soon as possible. The same deed also provided that **interest at 6%** was to accrue on the amount due **from 1 January 2010**.

In these circumstances, **Article 1078 of the Civil Code (Cap. 16)** applies, which provides that where no time for performance is stipulated, the obligation must be performed **within six years**. Accordingly, the debtors were required to repay the debt **within six years from 22 September 2010**, that is, **by 21 September 2016**.

In **Tommaso Azzopardi v Paolo Micallef** (FHCC, 13 February 1936), the Court clarified when a debtor **loses the benefit of time** under Article 1079 of the Civil Code. Mere **late payment due to temporary lack of funds** does **not** suffice. The creditor must prove a **real danger to repayment**, requiring **clear and conclusive evidence of insolvency**.

As regards **diminution of security**, the benefit of time is lost only if the creditor shows that he **would not have granted the term without that security**. The rationale is that the benefit of time is granted **on the condition that the agreed security remains intact**.

Fadda "The **non-performance owing to a temporary lack of money does not suffice to create the loss of the benefit of time**."

The question arises if **partial default by the borrower entitles the lender to recall the loan**. This was answered in ***Rev. Camilleri et vs Dr Fenech et***;

Rev. Camilleri et v. Dr. Fenech et, Civil Court (First Hall), 28 October 1895,
Vol. XV.258.

Plaintiff claimed that defendants (borrowers) had **failed to pay interest** on a loan within the agreed time (interest had been agreed on an annual 5% in arrears). A request was made to Court to declare that defendants had lost the benefit of time and that the **whole balance of the loan was immediately due and repayable**.

Defendants claimed that demand could not be allowed since the parties had not expressly stipulated that the **benefit of time would be lost with regard to the capital**, in case of **non-payment of interest**.

To this end, one must refer to **article 1068,** dealing with **resolutive conditions**;

1068. A resolutive condition is in all cases implied in bilateral agreements in the event of one of the contracting parties failing to fulfil his engagement:

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

In the case of bilateral contracts, the Law stipulates that either party may demand the dissolution of the agreement in the case of the other party's non-fulfilment of his duties. This dissolution is not ipso jure. This is referred to as the ***pactum commissorium tacitum***, which is a doctrine which stipulated that in a bilateral contract, any party may bring about the dissolution of an agreement in the case of delay in payment or the non-fulfilment of the obligations of the other party, provided that the obligation was to be fulfilled by a certain date. In such case, the **dissolution is not automatic - the Court has the discretion to grant relief per the circumstances of the case,** as held by ***Prof Caruana Galizia***.

To this end, one must contemplate whether the non-payment of interest is sufficient to give rise to the dissolution of the contract. The Court held that the **implied resolutive condition** did **not apply** to **unilateral contract**, and thus the Court concluded that since the contract of loan is a unilateral contract, then **article 1068** does not apply. Further, if the obligation is subject to a repayment in instalments, the delay in payment of the instalments was not sufficient to cause the loss of benefit of time. The loss of benefit of time is restricted solely to instances established by **article 1079** of the Civil Code. The lender could thus not prove that the borrower satisfied any of the conditions of 1079 and thus his demand was rejected.

This was reiterated in ***Michele Vella vs Pietro Grech*** *(FHCC, 28 February 1871),* wherein the Court held that the **contract of loan contains one principal obligation**, being the returning of the thing borrowed to the lender, and that **any other obligations** (such as interest) are **ancillary** to the principal obligations, and thus **the loss of benefit of time on the grounds of the non-payment of interest is not permitted.**

Interest in Mutuum

Interest may be stipulated, however up to a certain limit**, being 8%.** The law limits the percentage of interest to be claimed in order to prohibit abuse and to protect the debtor. This suggests a disfavour
by the legislator against the concept of interest.

1849. No interest is due in respect of *mutuum* unless agreed upon, saving the provisions of articles 1139 and 1140 where the borrower does not return the things borrowed at the time agreed upon, or at the time which, in the absence of an agreement, is fixed by the court.
1850. (1) It shall be lawful to stipulate for interest on a loan, whether of money or of goods or other movable things.
(2) It shall also be lawful to convert into a new capital at interest, the amount of interest due, provided such interest be not due for a time less than one year.
(3) Any other agreement for payment of interest on interest, is null.
1851. (1) The borrower who has paid interest which was not agreed upon, can neither claim it back nor deduct it from the capital, **except in so far as such interest exceeds the rate fixed in the next following article.**
(2) Nevertheless, the interest paid on any amount of interest due for a time less than one year, may be claimed back or deducted from the capital, even though the interest so paid does not exceed the said rate.

The default position, per article 1849, is that where otherwise stipulated, interest is not claimable on the contract of mutuum. However, per article 1850, it is lawful to stipulate interest. Interest is treated suspiciously because our code abhors the concept of usury, an

exploitative endeavour. 1851 states that when interest is paid when it is not agreed upon then you will have no claim for it being reimbursed.

1852. (1) The rate of interest cannot exceed eight per cent per *annum*.
(2) Any higher interest agreed upon shall be reduced to the said rate.
(3) If a higher interest than that fixed by law has been paid, the excess shall be deducted from the capital.
986. (1) Stipulations *quotae litis* are void.
(2) Saving the provisions of article 1852 and of any other provision of this Code or of any other law, any obligation to pay a rate of interest exceeding eight per cent *per annum* is also void in regard to the excess.

1852 states that the limit according to the law is of 8%, excess interest deducted from the capital.

The law could go as far as annulling any agreement vitiated by usuary. Does the law do so?

The consequence of charging interest is **not the nullity of the deed or the loan, not even of the interest, but it simply intervenes to reduce the illicit rate of that of 8%** and if anything has been paid already over 8% then it will be deducted from the capital.

Where a loan exists with a stipulation of interest, then per **article 986**, interest is valid only until the 8%, with any excess being inapplicable.

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

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

If one agrees to a loan at 20% interest, the loan is valid subject to an interest of 8%, with the other 12% being ineffective. When there is a usurious rate of interest, it is not the loan which is null, nor the interest, but rather the excess interest.

We have situations at times where private loan grants don't write 20% in front of a notary but then they circumvent the rule by inserting a clause saying for example if the interest is defaulted upon then the consequence will be that the debtor will transfer his car to me for example. That is where 1853 comes in.

Particular Stipulations of Interest

Compound Interest

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

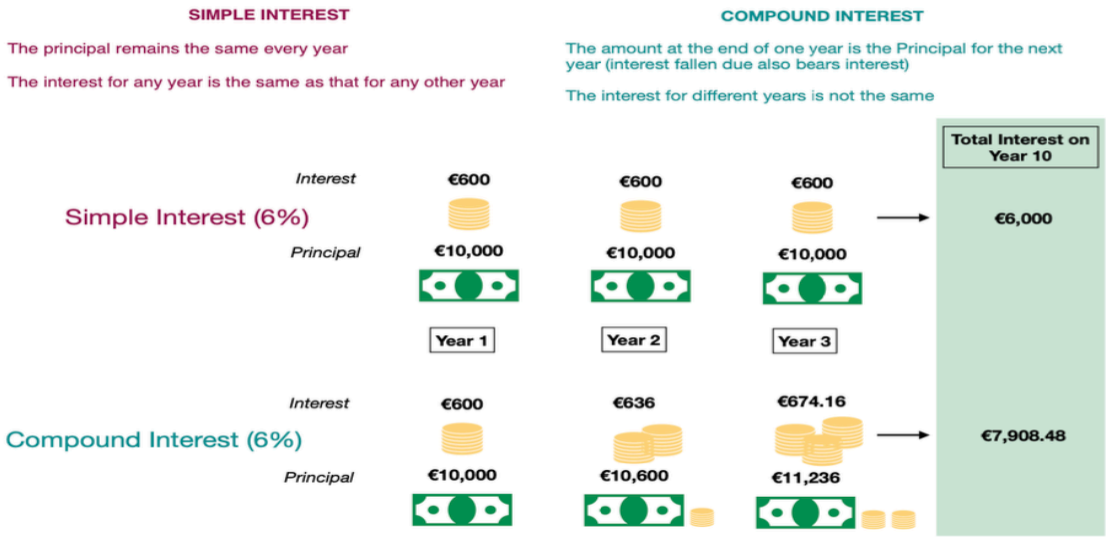
Article 1142 deals with stipulations of **compound interest**, while **article 1850** deals with the stipulation for interest in the contract of mutuum. Compound interest is an interest not on the same fixed amount but rather on an amount which includes the capitalisation of unpaid interest. **The interest is thus calculated on the original sum together with any interest which has not yet been paid.** The Civil Code has a difficulty with compound interest, in that article 1142 poses important limitations to compound interest, holding that it must be done **in virtue of an agreement entered into after the interest has fallen due,** and **must be due for a period of less than 1 year**. These conditions exist in order to **protect the borrower** and to **prevent abuse,** preventing situations of **usury** from arising. The law is telling us that it is allowed but has to follow what the law specifies.

1850. (1) It shall be lawful to stipulate for interest on a loan, whether of money or of goods or other movable things.

(2) It shall also be lawful to convert into a new capital at interest, the amount of interest due, **provided such interest be not due for a time less than one year.**

(3) Any other agreement for payment of interest on interest, is null.

Another limitation exists, holding that when compound interest is agreed upon, it must necessarily be compounded **annually**. If the interest is thus compounded to the capital *semi-annually*, there may arise a scenario where interest is compounded even faster and higher, albeit marginally and in smaller amounts (i.e - a compounding of interest every 3 months instead of every year) - thus the debt starts to grow very quickly.



One must pay particular attention to article 1855A;

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

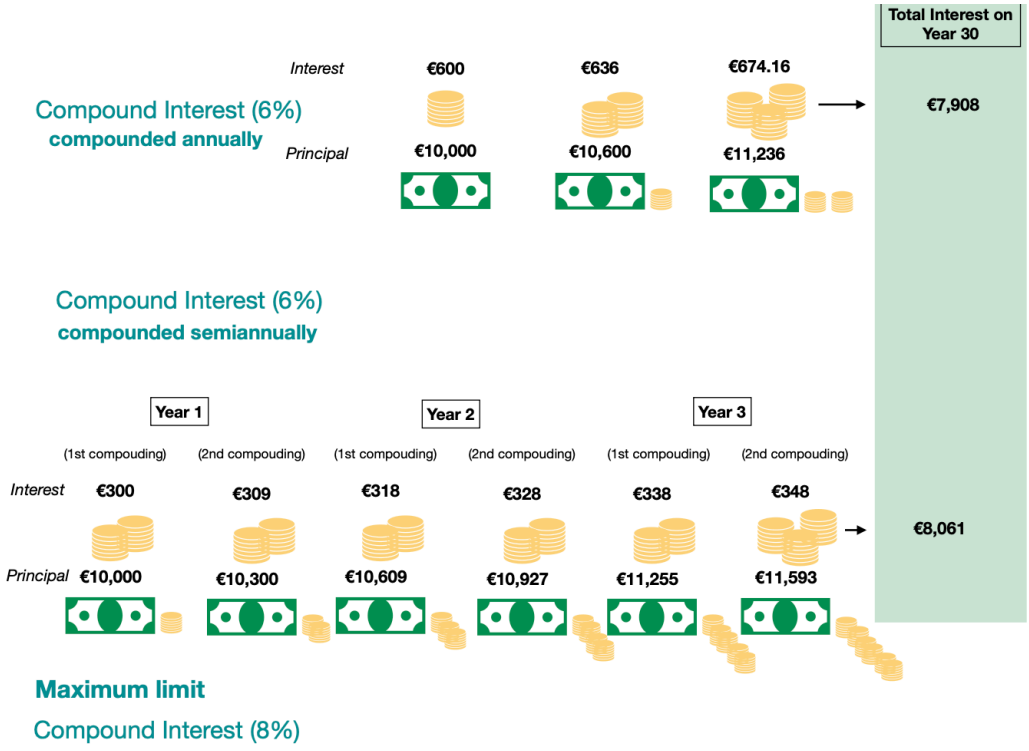
This article refers to **S.L. 16.06 - Interest Rate (Exemption Regulations)**. **Article 3** of this Subsidiary Legislation provides certain exemptions pertaining to the charging of interest rates.

L-Avukat Dottor Dominic A. Cassar noe vs Lawrence Farrugia noe et - *why law disfavours compound interest CoA, 6 December 2002*

The **social danger of anatocism** (compound interest) is closely linked to the concept of **usury**. Compound interest is objectionable mainly—if not exclusively—because it **directly or indirectly leads to usury**. The real harm lies in the **abuse of a debtor's vulnerable and desperate position**, where **excessive interest** is imposed far beyond what is justified, amounting to an **infamous and exploitative practice**.

Bank of Valletta Limited vs Anna's Trading Company Limited et
CoA, 6 December 2022

"In the view of the court, compound interest both in the special context of mutuum as well as in the general context, may serve as a means of evading the rule against usury, which is certainly a rule of public order. **When it serves such a purpose compound interest also prohibited by a rule of public order**. The law does not allow an interest rate higher than eight percent per year for civil and commercial obligations, **while, regarding banking operations, the Minister of Finance may permit higher interest rates**."



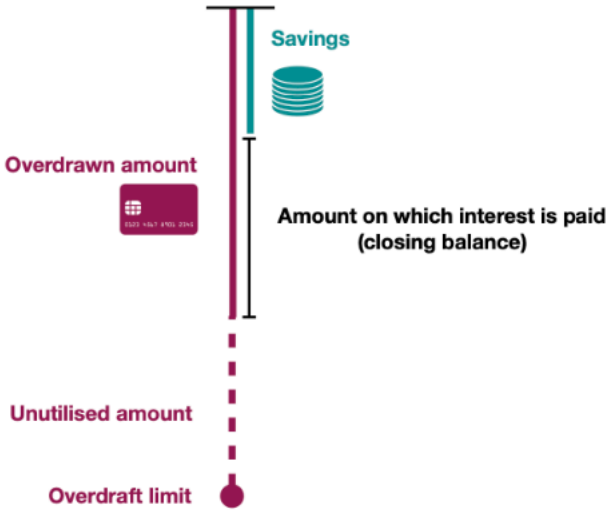
Bank Overdrafts vs Loans

An overdraft is a loan—it enables the borrower to borrow on a **designated account up to a specified amount**. An arranged or authorised overdraft is **a pre-agreed limit with your bank**, and you can spend up to that limit.

One must question whether the rules on compound interest apply also to **bank overdrafts**. While in a loan the amount of credit is issued immediately, in an overdraft, the bank is not giving you funds, but rather it is making funds available to the borrower, who has the choice to take them or not. The advantage of an overdraft is that when one seeks to start a business, he informs the bank that he might need a set amount of money without knowing if he actually requires that amount of money.

He will only pay interest on the sum of money which is borrowed, and not the sum of money which is made available by the bank to the borrower. Furthermore, one may set off the amount of which interest is charged to the amount of savings left in the overdraft account. Thus, interest will only be paid on the amount which was withdrawn. This comes with one

important characteristic, being that interest may be charged sometimes even daily. One ought to question whether this is in line with the rules of the civil code - to which the law holds that this is **not in line with the Code**. The Courts resolved this issue by stating that a **loan is not the same as an overdraft.** In overdraft the bank simply makes the credit available, and it is only transferred on the demand of the debtor.



Are the rules of mutuum applicable to overdrafts?

William Warrington noe vs Consiglio Sciberras *- overdraft not same as loan*

Commercial Court, 8 July 1985

Distinction by Ferri in Manuela di Diritto Commerciale who distinguished between "apertura di credito" from "mutuum". The former has as its object the "**enjoyment of an availability of a credit**", whilst the **latter has as its object a sum of money**. …

"Placing a sum at the disposal of another does not mean a transfer of ownership of **the sum**. This sum remains the bank's property and is merged with the other money of the bank. In default of a specific indication, the contract which has as its object a generic thing does not imply a transfer of ownership. **Juridically the 'placing of a sum at the disposal' of the**

other party implies solely that the accredited party may expect the payment of the sum demanded by him from the bank. Thus, only a right of credit is implied. … The Bank cannot transfer the sum lent to the accredited unless requested by the borrower"

Edwin Vassallo noe vs Salvatore Ballucci

FHCC, 30 April 1947

In this case, the lender sued for the payment of balance of an overdraft facility. The borrower pleaded that the lender was claiming compound and that interests exceeded the principal. The Court questioned whether the provisions governing mutuum applied also to overdrafts. The Court concluded that an **overdraft is not a contract of *mutuum,* even if it involved amounts lent out to a borrower**.

Overdraft is thus not to be construed as a contract of mutuum. Thus, the rules of mutuum **do not apply to the cases of overdrafts**. However, the question remains as to whether the rules on compound interest are applicable to overdrafts, namely whether **article 1142** applied to overdrafts. In ***Edwin Vassallo noe vs Salvatare Ballucci*** *(FHCC, 30 April 1947),* the Court referred to **Article 3 of the Commercial Code,** holding that *where no provision is made in such law, the usages of trade or, in the absence of such usages, the civil law shall apply.* Thus, since the notion of bank overdraft was characterised as a **usage of trade**, and is not catered for by the law, it is this commercial usage which **prevails over the Civil Code**.

An overdraft is an agreement which allows a customer a determinate ceiling up to which he can withdraw moneys from the bank. The amount allocated by the bank in an overdraft would result in a debit balance in the customer's account. The customer can utilise the overdraft to withdraw money up to the agreed limit, rather than from a previous amount he would have deposited with the bank

It is a contract by which the bank obliges itself to **leave at the disposal of the other party a** sum of money for an indeterminate period of time saving any agreement to the contrary … **it definitely cannot imply transfer of ownership, unlike in the case of *mutuum* where there necessarily must be the transfer of ownership from the lender to the borrower.**

Jurisprudence seems to be constant by holding that an overdraft is a separate and distinct contract from mutuum. The main argument being that **in the case of overdraft the bank** remains in possession of the funds until these are used and in this case one may not speak of a transfer of ownership like in mutuum.

"Banking practice has been accepted as derogating the general principles of Civil Law in connection with the matter of capitalisation of interests. **It has been acknowledged that a Bank may capitalise interests in a current account quarterly or half yearly.** The leading recent authority on the subject is the case Edwin Vassallo noe v. Salvatore Balucci (First Hall (Civil Court), 30 April 1947, Vol. XXXIII.ii.64). Could the Anglo-Maltese Bank charge in other words compound interest half yearly? And could the total amount of those interests exceed the capital amount "ultra alterum tantum"? An affirmative answer to these questions would run contrary to the general principles of Maltese Civil Law and of Roman Law on which our law on the subject of loans and interest is based.

The Civil Code expressly lays down in Section 1185 that interest may bear other interest provided that interest shall be due for a period not less than one year. The Court then considered whether it could accept the Bank's overdraft account which computed compound interests half-yearly**. Maltese case-law had accepted the view that account currents can be debited with interests periodically and to cover periods of less than one year**, since 1901 in a judgment delivered in the case Alfonso Ellul noe v. Giovanni Mifsud (Commercial Court, 12 November 1901, Vol. XVIII.iii.53).

The Court held that Maltese legal doctrine had adopted the French Legal Systems and quoted a number of French authors that recognised this usage in account current. The French Court de Cassation as far back as 1812 and acknowledged that interests were capitalised in account current "de plein droit".

On the score of these principles our Maltese Court decided that once interests were capitalised half yearly the other rule that interests could not exceed the capital based on Roman Legal principles did not apply in the case of Account Current. One could no

longer describe the item as interests after they have fallen due but were automatically converted into capital."

- **J.A. Micallef,** ***Banking Principles & Case-Law in Malta***

L-Avukat Dottor Dominic A. Cassar noe vs Lawrence Farrugia noe et- *elaboration of Vassallo vs Ballucci*
CoA, 6 December 2002

Where commercial law is silent, **commercial usage applies and prevails over the Civil Code**, but **no usage can legitimise ruinous practices** such as usury or uncontrolled compound interest.

Banks and financial institutions are treated differently because their interest practices are **regulated and controlled by law**, notably under the **Central Bank of Malta Act (Cap. 204)**. Overdraft facilities offer significant benefits to debtors, including flexible access to liquidity and the ability to reduce debt through deposits; this justifies a **limited derogation** from Civil Code rules, including the charging of **compound interest** during the life of the overdraft.

However, this exception is **strictly limited**. Once the overdraft or current account is **terminated or "called in" by the bank**, the relationship reverts to the rules of **mutuum**, and from that point onward the bank may charge **only simple annual interest**. Charging compound interest after termination is **unlawful**, and the exact termination date is a matter of evidence.

There are some exceptions to the rule(of the banks charging compound interest), particularly in cases where the Bank ***calls in*** (terminates) the overdraft. In such cases, the rules of interest per the Civil Code begin to apply. This is per the below cited judgements.

Avukat Reno Borg noe v. Joseph Borg et noe, *First Hall (Civil Court), 3 October 2002*

"This concession, however, continues to operate in a case where the overdraft facility remains in force, because **when the current account is terminated, the interest must be calculated according to the normal system established in the Civil Code.**

This occurs because once the facility is terminated, the amount due becomes determined, and as an obligation whose object is the payment of a determined sum, interest cannot be charged on interest except as contemplated in Article 1142 of the Civil Code."

"Bank of Valletta Limited v. 'Anna's Trading Company Limited' et,
Court of Appeal, 6 December 2002

From this evidence, however, it results that as from 15 November 1993 the Bank, through the official letter it sent, unilaterally terminated the running of the current account by calling in the amounts due to it; and therefore **from that time the relationship between the parties was no longer that of a current account but changed into one of a loan or *mutuum*, and from that moment the interest that could be claimed was only simple interest and not compound interest**. With regard to this interest, however, the maximum rate provided in Article 986(2) of the Civil Code did not apply, but rather the maximum rate as decided at that time by the Minister of Finance or by the Central Bank of Malta, as the case may be. …"

In the case of such exceptions, it is up to the designated entities (banks) who must prove that the rules on compound interest do not apply to the overdraft in question. This is because the derogations from the Civil Code laws on compound interest work in favour of the banks.

Exceptions to rules on compound interest must be proven by designated entities

H.S.B.C. Bank Malta p.l.c. v. Tal-Barrani Company Limited,
Court of Appeal, 28 January 2021,

… it is considered that in cases of [overdraft] the rules found in Articles 986(2), 1142 and 1850 of the Civil Code do not apply with regard to the operation of the highest applicable interest rates on loans, nor those relating to when and how interest on interest may be claimed. … It is also true that today the Civil Code itself, in relation to Obligations in General (Title IV of the Second Book) and the contract of Mutuum (Title XVII of the Second Book), appears to be loosening the binding force of the civil rules also with respect to the operation of interest."

Bank of Valletta Limited v. 'Anna's Trading Company Limited' et,

Court of Appeal, 6 December 2002

This Court must make it clear that since the derogations from the normal rules of law of our country are rules made in favour of banks and financial institutions, **it is they who must prove that these rules are indeed being scrupulously interpreted within the limits of the exceptions created in their favour**. This is precisely because, as was held in some of the judgments mentioned in this appeal, these derogations in favour of such institutions are derogations from provisions that are in a minimal way of public order, but from which, in certain cases, the Legislature considered it necessary to depart.

The Ultra Duplum rule

The ultra duplum rule is different because it is **not codified**. This means that no interest may be demanded by the creditor once the interest paid **equals the amount due.** If 10000 EUR was borrowed, according to this rule, no amount of interest which exceeds 10000 EUR may be demanded - if the interest exceeds the capital, the interest shall be reduced to the amount which is equivalent to the capital.

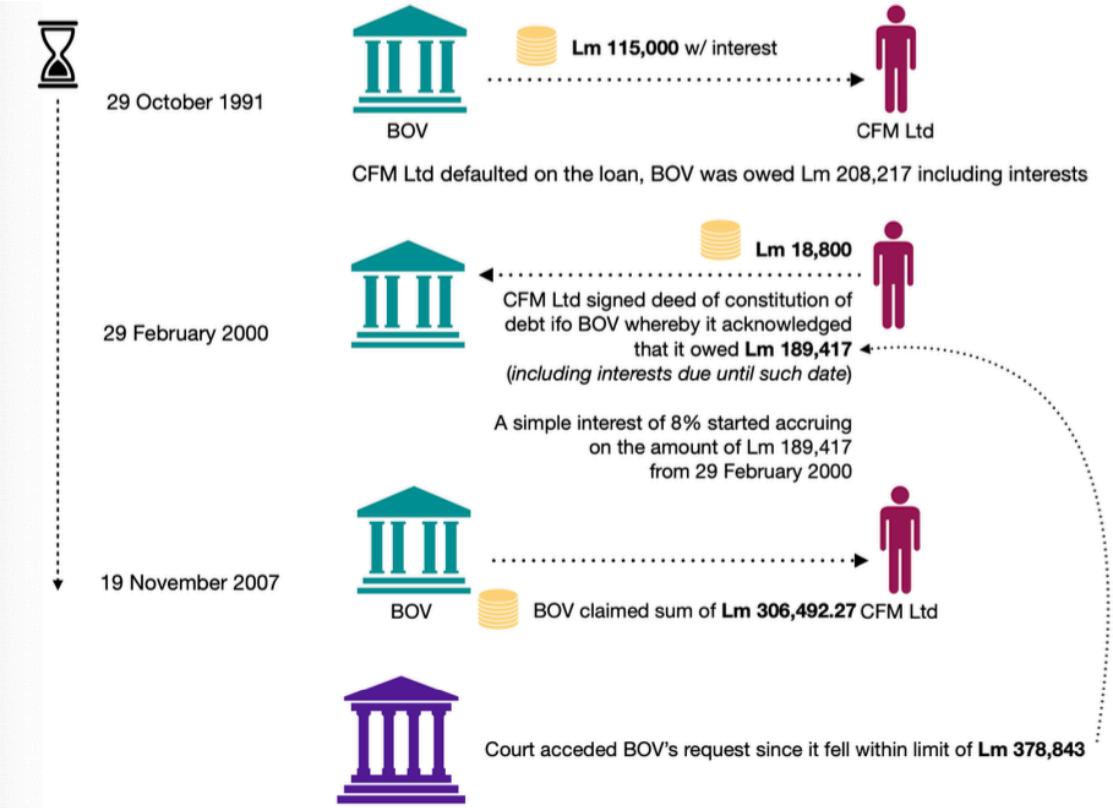
Bank of Valletta p.l.c. v. Carmelo Farrugia Melfar Ltd,

Court of Appeal, 30 October 2015

In this case, the bank granted a loan of **Lm115,000** to the appellant company. After default, the appellants acknowledged themselves as **joint and several debtors** for a **new, liquidated**

capital of **Lm189,417**, which already included accrued interest up to that date. The contract provided that **interest would continue to accrue**, subject to the legal maximum.

The Court held that the **ultra duplum rule** applies to this **new capital sum**. Accordingly, **unless there is a further lawful capitalisation under Article 1142 of the Civil Code**, interest accruing after the contract **cannot exceed the capital itself**. As a result, the total debt could not exceed **double the capital**, namely **Lm378,843 (€882,445.84)**, which remained within the limits recognised by the first court.



First exception to ultra duplum rule: overdrafts

However, one must note that the **rule of *ultra duplum* does not apply in the case of overdrafts. Jurisprudence holds that this is because overdrafts are regulated by Commercial Usage, and not by the Civil Code**.

In ***Edwin Vassallo noe v. Salvatare Ballucci,*** *(Civil Court (First Hall), 30 April 1947),* the Court questioned what would happen if, **following the capitalisation of interest**, it resulted

that the interests payable by the borrower **exceeded the principal**. The Court ruled that the borrower was not entitled to reduce the amount of interest payable. The reasoning was that since commercial usages allowed the capitalisation and compounding of interests without a judicial demand or express agreement, once the interest due is capitalised, th**e nature of the interest ceases and becomes capital,** and is deemed capital for the purposes of law until the obligation ceases.

Second exception to ultra duplum rule: accruing judicial interests

A second exception to the ultra duplum rule emerges in the case where the interest being accrued pertains to **accruing judicial interest**. Here, we are not speaking of a loan, but rather of a sum ordered to be paid by the Court, which was not paid by the debtor, in turn resulting in an accrual of judicial interests. Here, the Court concluded, in the below case, that it is possible for the interests to exceed the sum, since the interests pertains to a judgement, and not a loan.

"Bank of Valletta p.l.c. v. Francis Bezzina Wettinger,

First Hall (Civil Court), 10 December 2007

In this case, a **final judgment** of 9 March 1993 canonised the respondent as debtor in the sum of **Lm34,333.96**. Over time, the debt increased to **Lm83,864.14**, plus further interest.

The Court held that this situation **does not concern a loan contract**, but a **sum liquidated by judgment**. Accordingly, the **ultra duplum rule does not apply**. Once a sum is canonised by judgment, post-judgment interest constitutes **damages for delay in payment**, and interest may therefore **exceed the original capital**. To halt interest would unjustly encourage the debtor to delay payment without consequence.

Usury

986. (1) Stipulations *quotae litis* are void.

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

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

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

Usury refers to the situation whereby interest is charged at a rate which exceeds the limit permitted by law. **In such case, per the above-mentioned provisions of the Civil Code, the interest is not invalidated, but rather reduced to the rate of 8% per annum, the legal maximum.**

Consequences of usury:

Interest as an accessory obligation; does usury also lead to rescission of principal obligation?

"Guzeppi Axisa et v. Mark Belli et, First Hall (Civil Court), 24 April 2007 – usury vis-à-vis loans (*mutuum*)

The plaintiffs sought repayment of **Lm8,000** allegedly lent *brevi manu* (hand-to-hand). The defendant admitted borrowing only **Lm2,600**, arguing that the claim was inflated due to **usury**. No written contract existed; the case relied on testimony. The defendant described loans agreed at an excessive rate ("half a lira per lira"), with repayments structured monthly, and further sums added later under the same terms.
The Court reiterated that **interest is an accessory obligation** to the principal loan (*mutuum*).

Under **Article 1852 of the Civil Code**, interest may not exceed **8%**; any higher agreed rate is **reduced to the legal maximum**, not rendered void. Historically, usury affected the **interest obligation**, not the **principal**: even where usurious interest is annulled, the borrower must **restore the principal** (valued at the time of the loan). Accordingly, allegations of usury must be assessed to determine whether they challenge **only the interest** or (incorrectly) seek to extinguish the **principal obligation**.

1. Interest obligations in a loan contract are secondary to the principal obligation of repaying the borrowed amount.
2. Maltese law (Article 1852) caps loan interest rates at 8%. Any interest exceeding this limit is reduced to the legal maximum but does not invalidate the principal loan obligation.
3. If usury is proven, the obligation to repay excessive interest is void. However, the **principal loan amount must still be repaid**, based on its value at the time the loan was given.

When usury is paid, it is only the excess which is to be repaid, and not the entire sum paid in interest.

Would usury lead to the return of the entire sum paid in interest, or just the excess?

Maria Dolores Montebello et v. Saviour Chetcuti,
Court of Appeal, 27 January 2017
It results that in 1991 and 1992, the plaintiff borrowed the total sum of Lm7,000 from the defendant to purchase various plots in Mosta; the agreed interest was 10%. The plaintiff undertook that, when acquiring these plots, she would guarantee repayment of the loan with a

general mortgage over all her property and a special mortgage over the same plots. The acquisition contract by the plaintiff for the plots in Mosta was never executed, but the plaintiff began repaying the loan in instalments from time to time. The defendant, when he saw that the repayments did not cover what he was owed, approached a Notary who prepared a public deed signed only by the defendant, creating a mortgage in his favour, and subsequently requested the sale by auction of another plot belonging to the plaintiff. When the plaintiff learned of the auction, in 2007 she paid the defendant a further Lm7,500 to stop the auction proceedings, without prejudice to her position in this case. …

The First Court, after considering that the plaintiff had repaid the defendant the sum of Lm11,000 and that the loan deeds were null due to usurious interest, ordered the return of Lm4,000 to the plaintiff and also annulled the auction proceedings initiated by the defendant. …

This Court, however, does not agree that the defendant should return the difference between the Lm11,000 he received and the Lm7,000 he lent. The First Court stated this because it considered the loan deeds null as they were affected by usury.

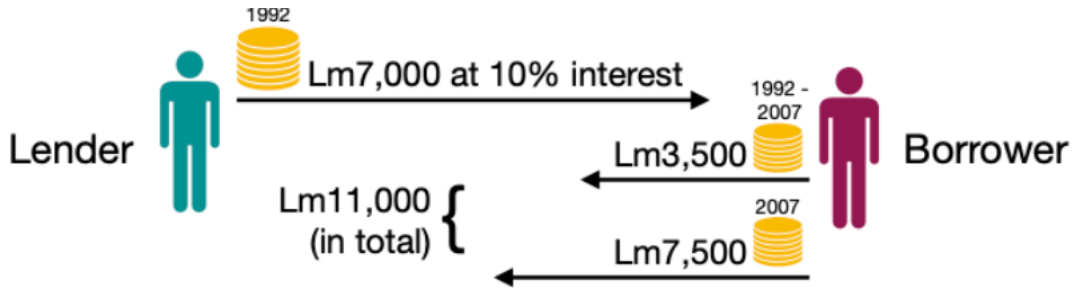
Usury, however, does not lead to the nullity of the deeds. Article 986 of the Civil Code provides that "any obligation to pay interest in excess of eight per cent per year is also null only for the excess." **Therefore, usury does not render the obligation null, but only the obligation to pay interest at a rate higher than 8% per year**. This is also clear from Article 1852 of the Civil Code, which, after stating that interest on a loan cannot exceed 8%, provides that "interest agreed at more than this amount shall be reduced to the limit" of 8%. …

The court had to determine whether the 8% was exceeded or not because the remedy was to recover the amount in excess. The court at first hall ordered the recovery of the full amount but this was overturned.

An obligation that stipulates the payment of usurious interest is not an obligation based on an illegal cause, because the obligation of the loan, as a cause, is independent from the

obligation to pay interest. **In this case, the obligation itself has a valid cause – a loan to purchase property – and the obligation linked to the interest is null only for the portion exceeding the 8% annual rate. The deeds in question therefore cannot be considered to have no legal effect**. This means that on the loan of Lm7,000 made by the defendant to the plaintiff, the defendant is entitled to interest at the rate of 8% per year. …

From 1992, when the last loan was made to the plaintiff, until 2002, ten years passed – for the years from 2002 to 2007, the defendant himself admits that he waived the further interest due from the plaintiff. For those ten years, the defendant is entitled to Lm5,600 interest, which means that if the defendant received the sum of Lm11,000 (Lm7,000 principal and Lm4,000 interest), **he received nothing in excess from the plaintiff and is not obliged to refund anything.**



Paul Pisani et v. Emmanuel Custo,

Court of Magistrates (Gozo), Superior Jurisdiction, 8 November 2002

That the defendants, by means of an application in the acts of the auction proceedings number 23/98 in the reversed names, while alleging that they are creditors of the plaintiff in the sum of **Lm16,667.88**, an amount claimed to be due according to a deed of constitution of debt, requested the judicial sale by auction of the property mentioned therein in order that the defendants' credit might be satisfied. …

That this credit claimed by the defendants is not truly due and contains a substantial amount of interest exceeding that permitted by law, because the amounts declared by the plaintiff as owed to the defendants in the said contract had been simulated. … Now,

the only amounts shown to have actually been lent were **Lm7,000**, with interest at **8%**, running with regard to the sum of **Lm2,000** from 12 May 1986, and with regard to the sum of **Lm5,000** from 22 February 1988. … That said, and on the strength of the schedule annexed hereto and forming an integral part of this judgment, it results to this Court that the amount due up to the date of the last payment was **Lm3,124**.

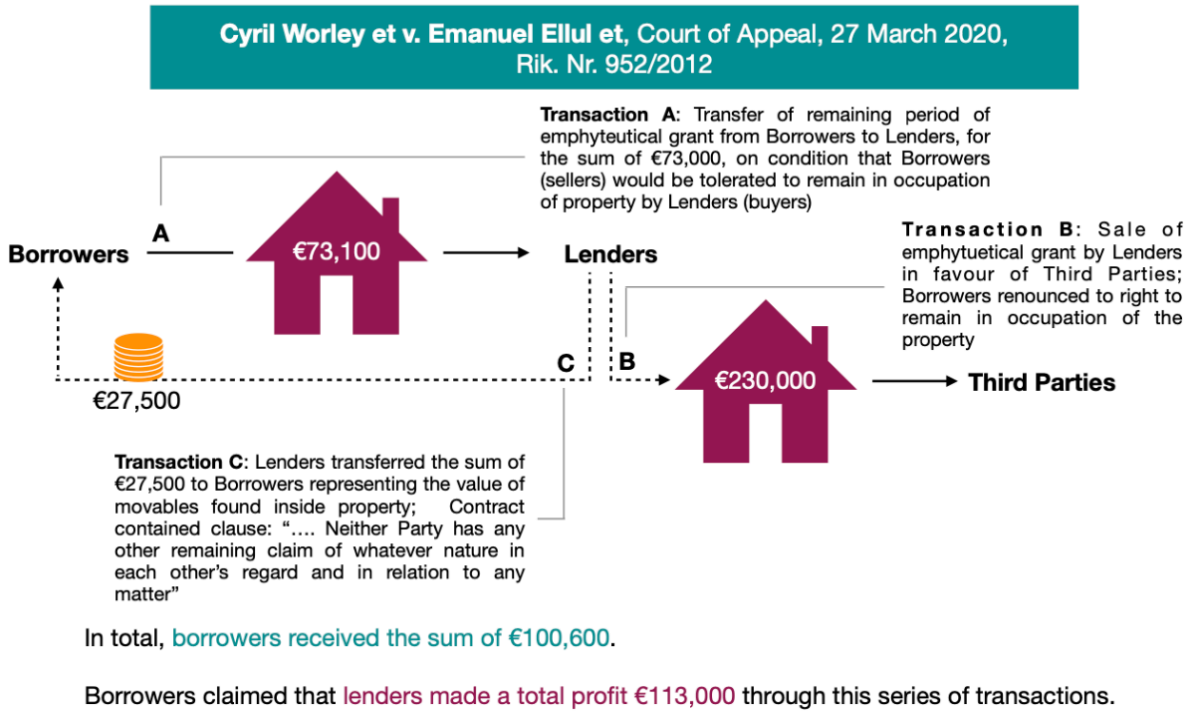
[The Court]:

1. Upholds the plaintiffs' first request;
2. Also upholds the second request and, for the purposes of this request, liquidates the amount actually due by him to the defendant in the amount of **Lm3,124**, saving additional interest from 14 May 1990 until the date of effective payment.
3. Upholds the third request, limited to the irregularity of the auction and insofar as the amount claimed is not entirely due, as decided above.

One must now pay attention to **article 1853,** providing for the remedy in cases of contracts containing usurious interest.

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

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



In total, borrowers received the sum of €100,600.

Borrowers claimed that lenders made a total profit €113,000 through this series of transactions.

Cyril Worley et v. Emanuel Ellul et,

Court of Appeal, 27 March 2020

The plaintiffs brought this action **because they contend that an excessive payment was made to the defendants, consisting of interest exceeding 8%,** and this in breach of the provisions of the law, as well as that the defendants unjustly enriched themselves at the plaintiffs' expense. Therefore, **they request a liquidation and condemnation of the payment of the amount so liquidated, representing the interest paid in excess of the rate permitted by law**.

It is evident that the defendant found the plaintiffs in a far from favourable situation and seized the opportunity to make a deal that yielded him considerable profit.

… However, since the contract of 16 February 2012 was not impugned, it cannot be considered as anything other than a contract of sale—this irrespective of what the true situation might have been. **Since the Court has before it a contract of sale which has not been challenged, it can never be said that the juridical transaction was a loan**. By virtue of the contract of 6 June 2012 the defendants became the owners of the property.

[The debtors:] *"At that time, that is what suited us to say… **At that time I repeat, that is what suited us to do. We needed them."***

But they maintain that the circumstances they were in—where they needed to borrow the further sum of €73,000—**led them to yield to the condition imposed by the defendant, namely that this transfer of property take place**. However, they contend that the agreement after the sale contract was that the house would be sold to third parties, and from the proceeds the defendant **would be paid the €73,000 together with certain expenses and interest according to law, while the remainder would go to the plaintiffs**. But after the sale to third parties took place, the defendant kept everything for himself, with the result that he made a profit of €113,000, consisting of interest exceeding the 8% rate.

This is the crux of the entire dispute. The plaintiffs–appellants contend that the contract of sale should in fact be understood as a loan agreement. But they made no attempt to challenge that contract on the ground of simulation, nor do they seek in any other way to invalidate that contract. **It is contradictory for the plaintiffs–appellants to seek a refund without attacking the contract of sale.** Since the plaintiffs, although unwillingly, accepted this condition, they cannot now withdraw the consent they gave to that same contract. It follows that the thesis of the plaintiffs–appellants under their first ground of appeal—namely that this was a loan contract secured by the house, on the basis that the accounts were to be settled after its sale—cannot stand, as this is not borne out by the evidence.

Thus, the argument of the plaintiffs–appellants is that the transaction between the parties was based on an illicit cause (usury), yet despite this they are not attacking the contract between the parties; they merely state that they are entitled to a refund of the excess interest paid.

As our Courts have held: *"Any agreement which the parties may devise to enable the creditor to obtain interest exceeding that permitted by law is null."* (See judgment in *Neg. Lewis Formosa v. Antonio Gatt*, decided by the Commercial Court on 20 November 1934). And also: *"The agreement tainted by usury is, with regard to the usury, absolutely null, that is, inexistent, because it is illicit as it is prohibited by law, and it is illicit with regard to the lender… Hence the sum paid as usury must be restituted to the person who paid it, and can never form the object of a natural*

obligation." (See *Carmelo Lia v. Emmanuele Genovese* (Collected Judgments, Vol. XXX.i.103) decided by this Court on 4 March 1938).

It may be that the defendant took advantage of the situation in which the plaintiffs found themselves, in the sense that he bought that property at a price far lower than its actual value on the open market, and that in different circumstances it would never have been sold at that price. However, as already stated, regarding the principle ***contra scriptum testimonium non scriptum non fertur*****,** the written document carries decisive weight, unless what is written is nullified or contradicted by unequivocal and conclusive evidence—evidence which in the present case ought to have been produced by the plaintiffs–appellants, but was not.

Since the plaintiffs–appellants accepted and chose to sign the deed of receipt (the *iskrittura ta' kwittanza*) of 28 February 2012, **they cannot claim a refund of money on the basis of unjust enrichment**, simply because after taking the money they needed, they had a change of heart! Matters cannot be conducted in this way, otherwise contracts become pointless and worthless.

The plaintiffs were in financial distress and required a loan of €73,000. To secure the loan, they transferred ownership of a property to the defendants under a sale agreement. The plaintiffs claim this was essentially a loan, with the understanding that the property would be sold, and the loan repaid from the proceeds. Any remaining funds were to be returned to the plaintiffs. However, the defendants retained the full proceeds from the property's sale, allegedly profiting by €113,000 due to excessive interest. For the plaintiffs to claim restitution, they would need to prove the existence of usury and challenge the sale agreement effectively. The court noted the plaintiffs voluntarily signed the contract and accepted its terms. After benefiting from the arrangement, they could not later claim unjust enrichment simply because they regretted the terms**.**

Contracts involving usurious interest are partially null for the excessive portion but remain valid otherwise. Restitution of overpaid interest can be sought if usury is proven, but the plaintiffs failed to provide sufficient evidence in this case. The court dismissed the plaintiffs' claims for reimbursement, emphasising that the signed sale agreement remains binding and that unjust enrichment cannot be claimed without evidence of

illegality or proof invalidating the contract. The plaintiffs' arguments were undermined by their failure to formally contest the sale agreement or provide conclusive evidence of usury.

Thus, while usury can serve to invalidate a contract, per article 1853, the recission of the contract must be formally raised by the parties. If the party alleging usury does not provide proof of usury, then the contract remains valid, especially if, as happened in this case, the parties voluntarily accepted the terms of the sale, knowing of all of its conditions.

Arthur Briffa et v. Carmelo Farrugia et, Court of Appeal,
8 January 2010, Civ. App. No. 632/2004/1

This case concerns a **promise of sale (konvenju)** and was heard together with another case between the same parties, decided on the same day, in which the Court held that the konvenju was **tainted by an illicit cause**.

The defendants, being in financial difficulty, sought to sell immovable property. Although brokers introduced them to the plaintiffs, no agreement on the price was reached. Instead, the plaintiffs **advanced a loan** to the defendants by notarial deed of 30 January 2003. The deed stated that a loan of **Lm33,000 was granted without interest**, secured by a hypothec, and repayable in monthly instalments. The defendants, however, claimed that only **Lm30,000** had been advanced and that the difference represented **hidden (usurious) interest**, and that they had been given a longer repayment period.

The deed further provided that, in default, the creditors could opt to accept the hypothecated property **by way of datio in solutum** instead of repayment. The konvenju sought to enforce this arrangement.

The Court held that since the **loan itself arose from an illicit cause**, namely **usury**, any subsequent agreement intended to settle that debt— including the konvenju — was likewise tainted by the same illicit cause. Consequently, the plaintiffs' claim to enforce the konvenju could not be upheld, without prejudice to their right to recover the **actual capital lent**.
Relying on **Articles 1852 and 1853 of the Civil Code**, which limit interest to 8% per annum and allow annulment of contracts made in fraud of that limit, the Court accepted the

defendants' plea of usury. On the evidence produced, the First Court was satisfied that the January 2003 loan contract involved **interest exceeding the statutory maximum**, rendering it unlawful.

Accordingly, the plaintiffs' claims were rejected on the basis of **illicit cause**.

Where Interest is not agreed upon

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

Guzeppi Axisa et v. Mark Belli et, First Hall

(Civil Court), 24 April 2007

Illi għall-finijiet tal-kwestjoni tal-imgħax fuq is-somma mislufa lill-imħarrek, ladarba **ma jirriżultax li kien sar xi ftehim partikolari dwar rata ta' mgħax bejn l-attur u l-imħarrek**, il-**Qorti qegħda tordna li l-imgħaxijiet legali mitluba fiċ-Ċitazzjoni jibdew jgħoddu minn dak inhar** tan-notifika tal-Att taċ-Ċitazzjoni, u **għandhom jitqiesu bir- rata tal-ħamsa fil-mija (5%) fis-sena**.

Francesco Mifsud v. Leone Agius,

First Hall (Civil Court), 7 March 1958

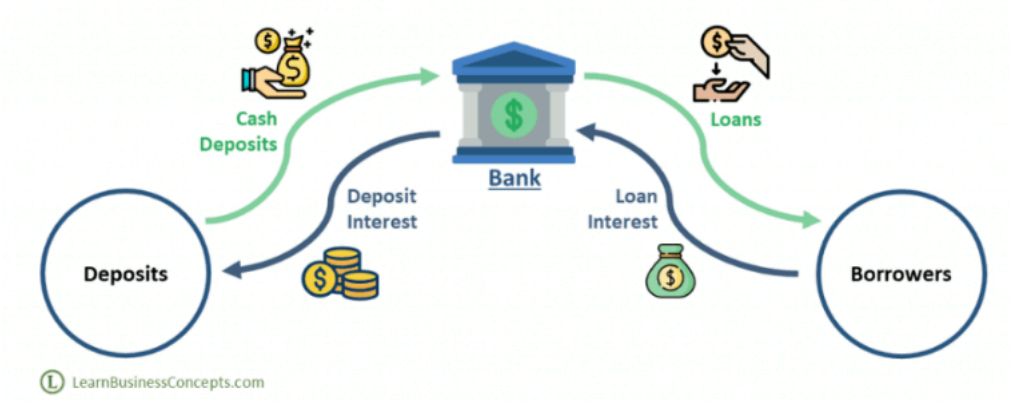
Illi, ladarba l-flus gew mill-attur "mislufa", ir-rapporti li nholqu bejn il-kontendenti huma soggetti ghar-regoli li jiggovernaw is-self, ghad li d-denominazzjoni moghtija lill-kuntratt kienet diversa; u ghalhekk, **f'kaz ta' self bl-imghax minghajr ftehim fuq ir-rata, l-imghax jitqies bil-hamsa fil-mija fis-sena ... Illi minn dan tinzel il-konsegwenza li l-ftehim fuq il-profitti ghandu jiftiehem bhala ftehim dwar l-imghax; u billi r-rata tal-imghax ma tirrizultax specifikatament mifthema, l-attur huwa ntitolat ghall-imghaxx tal-hamsa fil-mija (5%) fis-sena.**

Thus, where no stipulations of interest are agreed to, the law creates a 5% interest rate on any amounts borrowed with a generic stipulation of interest. This does not apply to loans which

do not have any stipulations of interest, but rather loans which have an agreed interest which is not fixed by the parties. This is thus a **fallback position and applies to resolve any uncertainties**.

Bank Deposits (irregular)

1894. A deposit of money or of other things which are consumed by use, is regulated by the laws relating to loan for consumption or *mutuum*, whenever power has been granted to the depositary to make use of the thing deposited on the sole condition of returning as much of the same kind and quality.



"It is more **difficult to distinguish between loan and irregular deposit**, given that, also as a result of this contract, the **property is transferred to the depositary**. The distinctive element can be identified in the function, which in the irregular deposit is similar to that of the deposit in general, i.e. custody: if I deposit a sum into a bank account, **the main purpose I would be after is the custody of the money, which I couldn't safely keep at home**. It would not matter whether the bank returned the same bank notes, with the same serial numbers, that I would have had deposited: I just require the equivalent value. **A loan, on the other hand, satisfies the borrower's need to temporarily dispose of a sum.** This does not change the fact that, given the undeniable similarity between the two institutions, the rules laid down for the loan are generally applied to the irregular deposit."

- A. Torrente

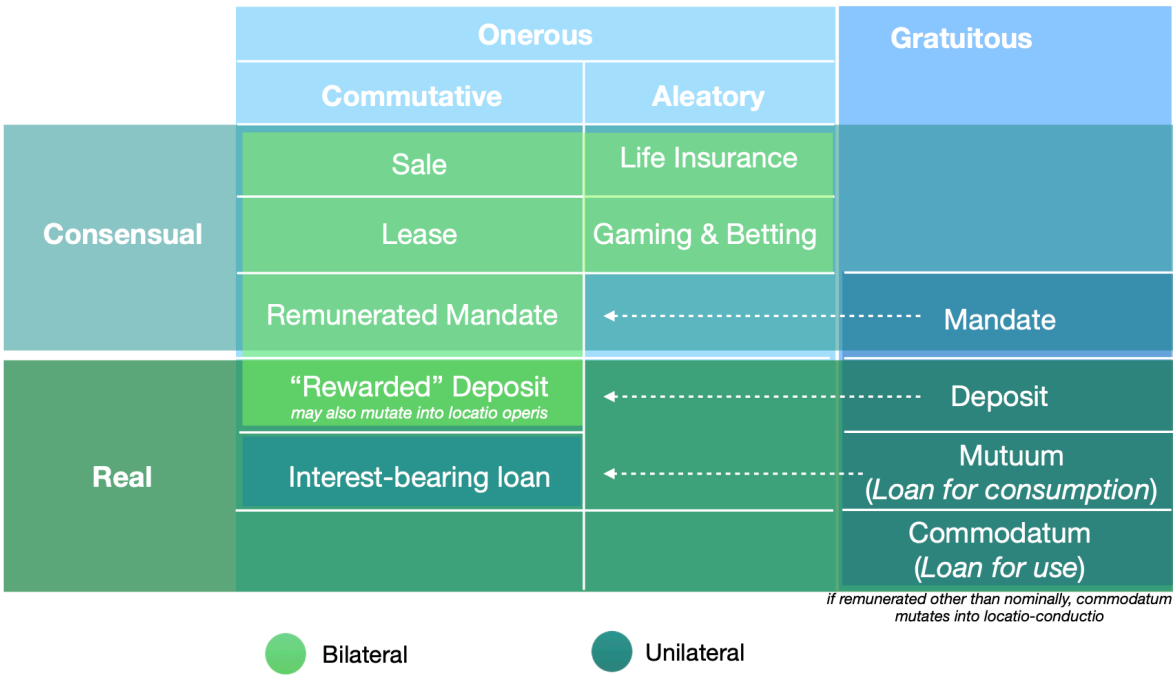
The Maltese Civil Code in Section 1996 [now 1894] states that **a deposit of money is to** be regulated by the laws relating to loan. But does it remain a contract of deposit? The answer is probably in the **affirmative**. Although the law compares it to the rules of the contract of loan, yet loan is considered juridically as being contracted in the interest of the debtor while in the contract of deposit **this is done in the interest of the party depositing the money. Betti** in his work "Teoria Generale delle obbligazioni" expresses the view that this is a **mixed contract**. The Italian Civil Code 1942 realising this juridical situation has provided a separate chapter in the code entitled "Of Banking Deposits" and while it has continued to classify it as a contract of deposit it has recognised that the ownership of the money passes into the Bank. **Under a normal contract of deposit, the person receiving the money only receives the custody of the object without a right to make use of the money. Scordino** in his work "I contratti Bancari" takes the view that this is not a contract of loan because in the Italian law it is expressly stated under section 1782 of the Civil Code that the rules of loan are to be followed only as far as they are applicable. It corresponds to section 1996 [now 1894] of the Maltese Civil Code. A model section does not appear in the Code Napoloen and was introduced in the Civil Code by the Maltese legislator.

-J Micallef

The Contract of Commodatum

Commodatum is the contract of loan for use, as opposed to the contract of mutuum which is a contract of loan for consumption. The difference is the subject matter of the contract (fungibles vs non fungibles).

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



This contract is unilateral, since the only obligation involved is that of the borrower to return. It is also a real contract since it is effective only upon the delivery of the thing, and not on the consent of the parties. **This contract is strictly gratuitous, since if an interest rate or a charge is attached to the contract of commodatum, then the contract is no longer that of commodatum but rather of letting and hiring.**

The term *commodatum* comes from the Latin Terms *"commodo datum"* - the lending of a thing subject to the borrower's duty to return after some time. This is thus a contract whereby a party (lender) delivers to the other (borrower) a movable or immovable thing so that the borrower can use it for a specific time or use, with the obligation to return the same thing received, **but with no obligation to pay any consideration.** This latter characteristic is the distinguishing feature of this contract and what separates commodatum from the contract of letting and hiring.

This is a bilateral transaction but in terms of obligations there is only one obligation by the borrower to restore the thing to the lender as soon as it is delivered to him. Delivery is a fundamental and constitutive element of the contract.

Prof. Caruana Galizia holds that the requisites for this contract is that the thing is granted for a determinate use and that it is perfected only when the thing is delivered. He furthers, stating that the **form of the contract is free** (i.e. - it may be effected in writing or else even verbally). He furthers, stating;

*"They lend me a book: I can read it, but I have an obligation to return it, and to return the same book, not another. The **simple possession of the thing passes on to me**: if I sold it, I would be guilty of misappropriation. There is no transfer of ownership like mutuum.*

*In fact, it is **not necessary that the object be the property of the lender**, because the function of "commodatum" is not that of transferring the ownership of the thing."*

Unlike mutuum, which can be either gratuitous or onerous, commodatum is **strictly gratuitous.** Any consideration agreed to changes the nature of the contract to one of letting and hiring. Another difference distinguishing commodatum from mutuum is that the former contract pertains to fungibles, **while the latter pertains to inconsumables**.

1825. All things which are not *extra commercium* and which are not consumed by use may form the subject of this contract.

A difference ought to be made between this contract and the contract of ***depositum***. In the latter contract, the **depositary cannot use the thing**. In commodatum, the borrower may use the thing provided it is used for the agreed purpose. If I leave a car in a friend's garage there is a deposit, and as a depositary, my friend cannot make any use of it. If, on the other hand, I give it to him for him to use, then as a borrower he would be able to use the car provided he return it after the agreed time.

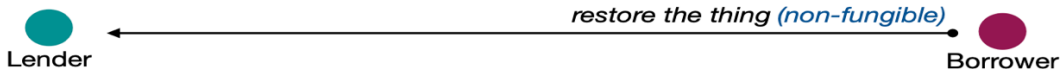
One must compare the contract of commodatum with the contract of precarium;

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

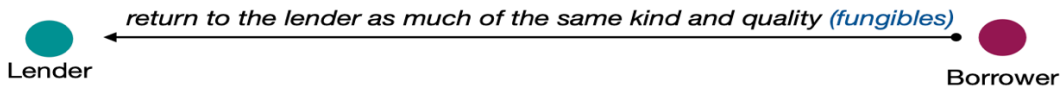
The law states that the contract of precarium is the same as the contract of commodatum. The only difference between these contracts is that in precarium, the lender may recall the thing when he pleases.

Thus, the law suggests that in commodatum, the lender cannot recall the returning of the thing. Contrary to the contract of precarium, here, the lender cannot recall the thing back at will, except for one of two scenarios - 1) when the agreed time period for loan elapses, or 2) the purpose of the commodatum has been fulfilled. This emerges from the definition under article 1824.

Commodatum



Mutuum



The nature of Commodatum

The contract of commodatum **does not confer upon the borrower any real rights**.

Annunziata Galea et vs Carmen Borg et

FHCC, 4 June 2019

That *commodatum* (from the Latin *commodo dato*) is a contract through which one party (the *commodant*) delivers to another party (the *commodatary*) a movable or immovable object, so that the latter may use it for a determined period or purpose, with the obligation to return it, without any payment;

That *commodatum* distinguishes itself from *usufruct* or *habitation* because it does not transfer ownership and does not create a real right. This is because the **object of the commodatum is only the temporary enjoyment of the thing by the commodatary as a personal relationship, and it is also different from *mutuum* since it is a "loan for use" and not a loan for consumption. …**

Furthermore, commodatum is always gratuitous, while a loan (*mutuum*) may be either gratuitous or onerous. Commodatum also differs from *deposit*, because in the latter, the depositary may not use the object for his own benefit. **Commodatum is also distinct from *precarium*, which is a loan of a thing without a fixed period, in which case the thing must be returned whenever its owner wishes to demand it back**.

Lorenzo Zahra pro et noe vs Mary Zahra

Court of Appeal, 6 October 2004

Now, the dominant orientation in legal doctrine and in jurisprudence is that **commodatum** is essentially a gratuitous real contract, perfected by the delivery of the thing, which delivery manifests the intention of the *commodant* to establish the juridical bond with the *commodatary*.

The question as to whether the contract is commodatum or locatio et conductio is answered in **article 1838**;

1838. (1) If any question shall arise as to whether the loan of a thing is by way of a loan for use, or by way of letting and hiring, **the person claiming a reward must prove his right thereto by express or tacit agreement.**
(2) A tacit agreement may be inferred from the condition of the parties, the quality of the thing, the prolonged use thereof and other circumstances.

It must be proven, therefore, that remuneration was promised in order for the contract to be classified as a contract of letting and hiring. Commodatum is **characterised by the gratuity of the agreement**.

Prof Caruana Galizia comments;
"Commodatum is very similar to lease with the difference that one is gratuitous and the other is onerous. In case of doubt whether the contract is commodatum or lease, ***the presumption is that it is commodatum*** *and therefore the grantee who alleges that it is a lease must show that the rent was expressly or tacitly agreed upon."*

Robert Borg vs Francesco Abela
CoA, 1949

Plaintiff allowed defendant to store various goods in his warehouse that he was renting. It later resulted that **a sum of £12 was fixed every three months as compensation**. This period was **automatically renewed unless plaintiff gave a seven day notice for the termination** of the agreement. The agreement also regulated the water and electricity consumption as well as whitewashing of the premises, and further **prohibited structural alterations**. The gratuitous nature is the principal element of 'commodatum'. Thus if one grants the use of a thing or a tenement to a person against a compensation for such use, the contract would not be 'commodatum' but a 'lease' if the compensation was given in money. If **the compensation consists of some other thing, the agreement between the parties would be an innominate contract.**

Baudry Lacantinerie: *"If the lender requests from the borrower some payment as compensation for the benefit granted to the latter by the agreement* ***such agreement shall not be null but shall no longer be a 'commodatum'****. It shall be a lease if the remuneration agreed upon consists in a sum of money."*

Ricci: *"In commodatum one makes a favour out of friendship or out of respect towards the person in whose favour the loan is made.* ***There exists no idea or intention of profit.****."*

The Court of Appeal further noted that the remuneration demanded by the plaintiff had by far exceeded the rent which the plaintiff himself paid to his landlord.

The court found that in reality, this contract was one of lease and not of commodatum, since the circumstances and agreement suggested a simulation of a contract of locatio et conductio. The Court referred to **Ricci**, who held that **in commodatum, there lacks an intention of profit.** Nominal compensation is thus an amount of money which **lacks an intention to make profit**. This must be characterised as slight and insignificant.

Joseph Calascione noe v. Carmelo Schembri,
Court of Appeal (Civil), 5 April 1954
Plaintiff claimed that he gave a tenement in Valletta to defendant on *commodatum*, against a nominal compensation of £12 per annum. Defendant refused to vacate property, claimed protection of special rent laws. The Court conceded that a **nominal compensation does not terminate the contract of 'commodatum'**, but added that the **compensation must be slight and insignificant**. The Court commented how in previous judgments (see Borg v. Abela) the law was excluding any type of compensation from 'commodatum'.

Court held that **once defendant was paying £12 per annum, the gratuitous element did not subsist**. Not being gratuitous, the contract was one of lease, hence, subject to the special rent laws.

Maria Sammut v. Lawrence Sammut

First Hall (Civil Court), 28 January 2004

The fact that the defendant pays the expenses for electricity and water does not exclude the nature of **commodatum**, because this fact cannot amount to a counter-performance for the benefit of the *commodant*.

Specified Time or Purpose for Commodatum

We know that the loan must be specified in terms of duration or in terms of purpose. The question arises - can the contract of commodatum be established "for the rest of the borrower's life"? This was answered in ***Galea vs Borg****;*

Annunziata Galea et v. Carmen Borg et*, - specified time or purpose*

First Hall (Civil Court), 4 June 2019,

Il-liġi titkellem dwar żmien jew użu **determinat**. **Ma tgħidx "żmien definit"**. Għalhekk, din il- Qorti tifhem li ikun hemm kommodat jekk id-dgawdija tingħata għal **tul ħajjet il-kommodatarju**; f'dan il-każ, iż-żmien, **għalkemm ma jkunx definit** (ngħidu aħna għal sena, sentejn, għaxar snin) b'danakollu **jkun determinat**.

Lorenzo Zahra pro et noe v. Mary Zahra – specified time or purpose

Court of Appeal (Inferior), 6 October 2004

From the above-mentioned provisions it is deducible that the contract may be for a determined period or for a determined use. In this regard, it is explained that *"the two possible modalities of the contract of commodatum,* ***both that relating to time and that relating to use, may exist independently of each other, and one is not necessarily tied to the other****. The parties may* ***therefore agree on a period during which the commodatum is to subsist, without agreeing on the specific use to be made of the thing delivered*** *by way of loan, and vice-versa." — "Fortunato Mercieca et v. Joseph Mercieca", Court of Appeal (Inferior), 1 November 2000.*

From the totality of circumstances in this case, it is the opinion of this Court that the agreement had the legal character of **commodatum**, in which case the judge cannot grant the lender's request for restitution as long as the utility of the thing lent has not been exhausted.

[The appellant's need to sell the property] is **not an urgent or unforeseeable need** that would legitimise the lender in demanding the return of the thing before the expiry of the time or the termination of the utility of the property. It does not appear that the law is satisfied with any pretext, whatever it may be. Certainly, and surely, not a capricious or deliberately engineered one.

Farstone Limited v. Anthony Farrugia et, *- specified time or purpose*
First Hall (Civil Court), 6 December 2019

The defendants had started occupying the property with the intention of eventually acquiring it. For some reason, the promise of sale agreement never took place. Plaintiffs filed for the defendant's eviction from the property. Defendants pleaded that they were occupying the property in virtue of a commodatum. It also resulted that defendants had spent up to €90,000 on improvements to the property.

"…Can it ever be doubted that a **commodatum** inherently possesses a **fiduciary character**? This is because it is essentially **gratuitous**. Indeed, the *causa* of the agreement qualifies the commodatum as a **contract of use based on the gratuitous nature of the enjoyment of the thing**. Naturally, this *causa* must be distinguished from the motives which may result from **affective or family ties or from gratitude**. Such motives, however, **have no legal relevance**."...

Having examined the evidence, the Court reached the conclusion that the agreement was that the defendants would occupy the property until the contract is executed, without payment. ...

It upholds [the counter-claim of the defendant and] declares and decides that the parties have an agreement that the defendants shall acquire from the plaintiff company the property [in question] and that they are to continue residing in it exclusively until the deed of sale is published.

Paraggi Holdings Limited v. RD et, *- specified time or purpose*
Court of Appeal, 20 July 2020

Plaintiff company requested Court to declare that the defendant and her son were occupying the property without a title. Defendants claimed that they were occupying the property by virtue of *commodatum*. It resulted that the defendant had started occupying the property after engaging into an extra-marital relationship with the plaintiff. The plaintiff eventually bought the property in the name of his company and started cohabiting with the defendant. After some years, the relationship broke down, and the plaintiff requested the defendant and her children to vacate the property.

The defendant continues to insist that the plaintiff had always promised her that the apartment would remain her home. … "**He swore to me that no one would ever throw me out of the house."** … Examining the facts of the case in light of what has been outlined above, this Court finds **that proof of a "specified use" exists**. The property that is the subject of these proceedings was rented and subsequently bought by the plaintiff company so that the defendant could live in it after she left the matrimonial home in which she had been living during her marriage. At the beginning of his relationship with the defendant, the plaintiff did not immediately go to live in this apartment. It was only some months later that he chose to move into the property in question as well. …

"The Court, having carefully examined all the abundant evidence regarding the relationship between the parties and the nature of that relationship, does not find credible the condition which the plaintiff now alleges existed, namely: **'as long as we stayed together.' …**

"The Court is convinced that Parraggi Holdings lent the apartment to the defendant for her to live in it and without any other condition. This Court reaches the same conclusion as the First Court. **It considers that between the parties there existed a relationship which lasted for several years, during which the partner took care of both the appellant and her children, and that to a certain extent the appellant became dependent on him**. It also considers the testimony of Yana Cassar, who was a close friend of both parties, and from which it also emerges that it was the partner who encouraged the appellant to leave her matrimonial home and go to reside in the Sliema apartment, and, after some time, they began living in it together. She states that he promised her that he would take care of her and that there even was an appointment for them to appear before a Notary so that the apartment would be written in her name, but due to family circumstances, the appellant did not attend the appointment.

It is to be said that **the fact that it does not appear that there was an agreement about a precise duration for such lending is not an obstacle for the rules of that type of contract to apply**, because under the law it is sufficient that the loan be made for a determined time or for a determined use. The law does not say "definite time"; **therefore, there is a commodatum even if the enjoyment is given for the lifetime of the borrower, and the law also recognises that the right created by that contract passes to the heirs of the parties, unless the lending was made solely for the benefit of the borrower himsel**f. On the other hand, it cannot be said that the lack of a predetermined period becomes a right for the lender to demand the return of the thing whenever he pleases, as required by the contract of precarium, **because the fact that the object is given for a specified use does not remove it from the sphere of the contract of commodatum so long as that use is in fact being exercised and continues to be exercise**d;

The contractual bond arises once delivery takes place. In the present case**, delivery occurred when the appellant's partner encouraged her and she accepted to enter the apartment and begin living in it as her residence**. Particularly for the appellant's grievance, it does not appear that any written instrument is necessary to substantiate the

validity of such a contract, because the delivery of the thing reflects the lender's intention to create a legal relationship with the person to whom the thing is lent (that is, the borrower).

The Court is of the view that the commodatum relationship was created when the partner encouraged and convinced the appellant to leave her home and move into the premises. As the learned counsel for the appellant rightly stated during submissions, the contract of commodatum came into being upon the delivery to her of the premises. **The circumstance of the relationship she had with her partner was the context in which that contractual bond arose, and not the (resolutive) condition binding the delivery to the appellant;**

… [the agreed use] was that the appellant was to live in the property as her residence. It repeats that Article **1824 of the Civil Code does not require that the loan be both for a determined time and for a determined use, because for legal purposes and for the validity of the contract of commodatum, either one of them is sufficient.**

In this case, the plaintiff company sought a declaration that the defendant and her son were occupying a property without legal title. The defendants claimed they were occupying the property under a commodatum (loan for use). The case revolved around the relationship between the parties, the conditions of the property's occupation, and the alleged promises made. The defendant began living in the property after entering into an extramarital relationship with the plaintiff, who later purchased the property through his company.

The plaintiff cohabited with the defendant in the property for several years. When the relationship ended, the plaintiff demanded that the defendant and her children vacate the property. The defendant argued that the plaintiff had promised her that the apartment would remain her home and that no one would evict her. **The court confirmed that a *commodatum* agreement existed, allowing the defendant to occupy the property as her residence without specific conditions**. The plaintiff had persuaded the defendant to leave her marital home and move into the apartment, promising it would remain her home, even attempting to transfer it to her name, though this was not completed. The court held that under Maltese law (*Article 1824 of the Civil Code*), ***commodatum* does not require a written agreement; the**

transfer of possession alone established a binding contract. The property was loaned for the specific use of serving as the defendant's residence, making her occupation lawful.
The court rejected the plaintiff's claims and affirmed the defendant's right to remain, based on the plaintiff's promises and the context of their relationship.

***AM v. AZ**, - specified time or purpose*
First Hall (Civil Court), 26 April 2019

The plaintiff and defendant were in a relationship during which the defendant lived **gratuitously** in properties owned by the plaintiff. After their separation, the defendant remained in occupation of one such property. The plaintiff sought her eviction, while the defendant claimed she was entitled to remain there by virtue of a **commodatum** agreement.

The Court focused on a written declaration by the plaintiff stating that, **for as long as the defendant lived in the property with their children**, he would continue paying the utility costs. From this document, it was clear that the plaintiff intended to allow the defendant to **continue residing in the apartment** while she cared for their children, even after the end of their relationship.

The Court found that the circumstances giving rise to the commodatum **had not changed**, since the (now adult) children were still residing in the property. Consequently, the plaintiff could not arbitrarily revoke the arrangement after having clearly assumed and repeatedly confirmed this obligation.

Accordingly, the plaintiff could not evict the defendant, as a valid **commodatum** subsisted.

Duties of the Borrower in Commodatum

1827. (1) The borrower is bound to take care of and preserve the thing borrowed as a

bonus paterfamilias.
(2) He cannot, **under pain of paying damages, apply the thing to any other use than that for which it is intended by its nature or by agreement.**

The borrower's sanction for this obligation is his responsibility even for fortuitous events, in case the use he makes of it **in a way which violates the agreement**. He is also bound to look after the safety and preservation of the thing ***uti bonus paterfamilias,*** and thus he is liable for ***culpa lata*** and ***levis, but*** not for ***culpa levissima***.

1828. If the thing perishes by a fortuitous event, without the fault of the borrower, the borrower is not liable for any indemnity.

By virtue of **article 1828**, the borrow **is not liable for the perishing of the thing by way of a fortuitous event**. There are, however, 3 exceptions to this rule.

1) Where there is **wrong use** or **delayed return**:

1829. If the borrower uses the thing for another purpose or for a longer time than he ought, he shall be answerable for the loss which may occur even by a fortuitous event, unless he proves that the thing would have equally perished if he had not used it for another purpose, or had restored it at the time fixed in the contract.

The presumption is that the thing would not have perished had the borrower not employed it for another use or had he restored it in due time. This presumption, however, is a *juris tantum* one, and is capable of being rebutted, in that the borrower may prove t**hat the thing would have perished anyways had he not used it for another purpose or had he returned it in the agreed time.**

2) Where the borrower **would have been able to safeguard it:**

1830. If the thing lent perishes by a fortuitous event from which the borrower could have preserved it by making use of his own thing instead of the thing borrowed, or if, being able to

save only one of the two things, he has preferred to save his own, he is answerable for the loss of the other.

The obligation of preserving the thing lent is based on the obligation of gratitude which the borrower is bound to perform towards the lender who has granted to him the use of the thing gratuitously.

3) If the borrower has **undertaken responsibility for all possible damages**

1831. A valuation of the thing, made at the time of the loan, shall have no other effect except that of determining its value at that time, in case the borrower should be answerable for any loss which may occur; and **the borrower shall not, merely because the thing was appraised at the time of delivery, be answerable for any loss resulting from a fortuitous even**t, unless it is otherwise shown that an agreement to the contrary was made.

The Maltese code does not infer a tacit assumption of the responsibility of risk on the part of the borrower from the mere fact of valuation. **This accepting of responsibility for all possible damage must be done expressly.**

1832. If the thing has deteriorated merely by the use for which it was lent, and without fault of the borrower, the borrower is not answerable for such deterioration.

If the thing deteriorates by the fact of use, the borrower is not liable for damages. He would be liable if he uses it for another purpose or for a longer duration, however.

1833. If in order to be able to make use of the thing lent, the borrower has incurred any expense, he cannot claim the reimbursement thereof.

Torrente holds that **the essential requirement of free loan (commodatum) is not lost if ancillary services are charged to the borrower**. For instance, if the borrower is obliged to pay charges related to the property granted on loan, the contract is still deemed gratuitous,

since the obligation is ancillary. This would apply also if, for instance, the agreement states that the borrower would have to pay transport costs to have the thing delivered to him.

Obligations of the Lender in Commodatum

1836. If, during the continuance of the loan, the borrower had to incur, f**or the preservation of the thing, any extraordinary and necessary expenses** of so urgent a nature that he was unable to give previous notice thereof to the lender, the latter shall be bound to reimburse such expenses to him.

1837. When the **thing lent has defects that may cause injury to the person making use of it**, the lender is answerable for damages, **if he knew of such defects** and did not warn the borrower.

Extraordinary expenses, for the purposes of s 1836, are those which do not refer to the enjoyment of the thing. Those charges spent on the enjoyment of the thing are to be incurred by the borrower. Any extraordinary and necessary expenses which are so urgent that the borrower could not have time to give notice to the lender are to be incurred by the lender. **If the extraordinary expenses are not so urgent, the lender must notify the borrower of the expense. If the lender then authorises this expense, it is also at his charge.**

Commodatum is said to be an **imperfect bilateral contract**, meaning that an obligation towards the borrower only arises in particular scenarios whereby the borrower would have to incur some undue expense owing to the thing borrowed. For instance, if someone lends a car to the borrower, knowing that the car is faulty, then he is liable to the borrower for damages. The same applies vis-à-vis extraordinary expenses, in that **the lender would normally not be obliged towards the borrower except where extraordinary expenses on the thing beyond the enjoyment thereof arise.**

If there is deterioration without use and with no fault of the borrower then the borrower not answerable.

Cessation of Commodatum

1835. (1) The lender cannot take back the thing until after the expiration of the time agreed upon, or, in the absence of an agreement, until it has served the purpose for which it was borrowed.

(2) Nevertheless, if during the time agreed upon, or before the borrower has ceased to need the thing, **the lender happens to be in pressing and unforeseen need of making use of the thing, the court may, according to circumstances, compel the borrower to restore it to him <u>subject to the obligation of the lender to reimburse to the borrower any expenses which the latter may have incurred to make use of the thing.</u>**

In the case the lender is in a pressing and unforeseen need of using the thing before the time for lending elapses, the Court has the discretion to compel the borrower to return the thing as long as the need for use on the part of the lender is required, provided that the use of the thing on the part of the lender is unforeseen at the time of the contract. In such a case, **the lender is bound to reimburse the borrower of any expense suffered in order for the lender to make use of the thing.**

Lucia Camilleri et vs Anthony Portelli

CoA, 24 October 1979

Plaintiff allowed defendant to fix a television aerial on his roof. No time for such use was agreed to, nor was any compensation fixed. Plaintiff eventually needed the full use of the roof to build thereon. Defendant refused to remove the aerial.

The Court classified the agreement as a 'precarium' and allowed the plaintiff's demand for the removal of the aerial.

("Though not specifically saying so, the Court [remarked that the plaintiff required to develop the roof], in order to indicate that even if the contract were to be considered a 'commodatum', plaintiff **could still demand back the full use of his roof owing to urgent circumstances."**

The Contract of Precarium

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

1840. The borrower of a thing by way of *precarium* **cannot delay the restitution thereo**f, when demanded, on the ground of any prejudice which he might sustain thereby:

Provided that if it appears that the restitution is demanded with intent to cause injury to the borrower, the court shall have power to grant him time for such restitution.

1841. Saving the provisions of the last two preceding articles, the rules laid down with regard to the contract of loan for use, shall apply to the contract of precarious loan.

The contract of precarium is characterised by the temporary nature of the loan. The law stipulates that it is nearly identical to the contract of commodatum except that the lender has the power to take back the thing when he pleases.

The term of a contract may come about either by the express agreement of the parties, or else **implicitly**, from the specific use for which the thing is loaned. **If a term is not established, then the borrower is bound to return the thing as soon as the lender requests it, i.e precarium.**

"*Precarium* differs from the *commodatum* in that the party who lends the thing has it in his power to take it back when he pleases. The rules of *commodatum*, therefore, apply with **the only difference that the borrower is bound to return the thing to the lender whenever the latter demands such restitution** and he may not delay restitution on any grounds whatsoever, not even on the ground of the prejudice which he might sustain thereby. It is only in case **where it appears that restitution has been demanded with intent to cause injury**

to the party who has received the thing, that the Court may grant him time, because "malitiis non est indulgendum" (indulgence is not to be shown towards those who are in bad faith).

- Prof Caruana Galizia

In ***Francesco Cassar v. Antonio Galea****, (First Hall (Civli Court), 24 March 1941),* the Court established that **where, in a contract of commodatum, no term is agreed upon, the contract is deemed precarium**.

Lorenzo Zahra pro et noe v. Mary Zahra*,*
Court of Appeal (Inferior), 6 October 2004

It follows from this that if it is not possible to establish the duration of the time, not even through the determination of the use, the agreement is considered a **commodatum without a determined time**, that is, **precarium (prekarju)**. The latter, although similar to commodatum, distinguishes itself from it by the fact that in such a hypothesis the person granting the thing has the right to demand its return **at any time**. In this regard, it has been decided that:

*"The existence of a time period is important for distinguishing between commodatum and precarium. **Because when there is a time period, the contract is one of commodatum and the lender cannot take back the object except in the case of urgent and unforeseen need until that time elapses; whereas if there is no time period, the contract is one of precarium and the owner of the object may take it back whenever he wishes** ..."*

This means, therefore, that **the lender may withdraw *ad nutum*** (at will) from the contract in every case where the time for restitution of the thing has not been established, or **where such time is not deducible from the use for which the thing is destined.**

There is, however, a difference between **precarium and mere tolerance**.

Connie Cacciattolo v. Silvio Bonnici et,

Court of Appeal (Inferior), 20 January 2003, App. Civ. Nr. 1264/2000/1

The plaintiff states that since she lived in St Julian's, **"I had no objection to this request and I allowed her, for some period, to use this room."** It is from this that the *precarium* arose. This is a title which, in modern law and legislation, presupposes an express contract or agreement, which therefore necessarily implies recognition of another person's right, as the defendant indeed acknowledges. In the view of this Court, therefore, **this title cannot be confused with *tolerance*, which presupposes merely tacit possession.**

Precarium vs Commodatum

Gaetano Sammut pro et noe v. Pauline Sammut et,

Court of Appeal, 8 June 2005, App. Civ. nr. 1192/1987/4

Plaintiff had allowed his son, who was also the defendant's former husband, to make use of one of his properties. After the marriage between the plaintiff's son and the defendant broke down, the latter remained in occupation of the property together with her daughter. The separation judgment had made no mention of the matrimonial home. Plaintiff claimed that the property had originally been delivered to his son by virtue of a *precarium*, specifically until the plaintiff needed it for himself, while the defendant maintained that the title by virtue of which she was in occupation of the property was that of *commodatum*.

Hu biss fejn mhux possibbli li jigi determinat iz-zmien, lanqas permezz ta' l-uzu, illi allura hu ritenut li jissussisti l-kommodat bla determinazzjoni ta' zmien, ossija **l-precarium li, ghalkemm affini mal-kommodat, jiddifferenza ruhu minnu ghall-fatt li l-kommondanti hu fakoltizzat bil- ligi li jitlob u jirrikjama r-restituzzjoni tal-haga f' kull zmien**;

Having clarified the above legal aspects relating to the institution of commodatum, the remaining question is whether such an agreement—*even if, for the sake of argument, it is accepted that this was a true and proper commodatum and not an improper commodatum or*

precarium—was made only between Gaetano Sammut and his son, or also with the defendant, or whether it was extended to her by virtue of the marriage.

On its assessment of the evidence, this Court is of the view that when the agreement was made—*assuming, without conceding, that it was a commodatum*—the defendant–appellant had not yet even come into the picture. The allegation by Gaetano Sammut and his son that the property was given to Carmelo Sammut when he was engaged to a certain Jane Zarb (and **not** to the defendant) is not contradicted by any evidence.

It is true that the presumed intention of the said Gaetano Sammut was that he was lending the use of the property to his son when the latter was contemplating marriage, but it is equally clear that, in terms of Article 1824 of the Civil Code, Gaetano Sammut delivered the property to his son **and not also to the defendant**, who, at the time of such delivery, did not even feature in the picture. The delivery of the **res** at that moment must therefore be interpreted as intended to eliminate any doubt regarding the true will of the lender, Gaetano Sammut, to establish a legally relevant relationship—even if conditional—with his son Carmelo Sammut as borrower, and **not** with any third party; much less, then, with the defendant–appellant.

In the considered view of the Court, all the circumstances taken together constitute sufficient proof that what we have here is the presence of a *commodatum–precarium*, that is, a true and proper **precarium** as provided for in Article 1839 of the Civil Code.

Cessation of Precarium

Mary Anderson v. Guza Jones et,

Court of Appeal (Inferior), 7 December 2005,

The defendants occupied the plaintiff's property with her **full consent**, so their occupation was neither abusive nor illegal. However, the Court found that the arrangement arose solely from **family goodwill (bona grazzja)** and did not constitute a **commodatum**. Instead, it was analogous to **precarium**, where occupation depends entirely on the owner's tolerance.

Unlike commodatum, occupation based on goodwill reflects the owner's **intention to retain full ownership rights**. While such tolerance justifies occupation for as long as it subsists, **once revoked**, the occupant is left **without title**.

Upon revocation of precarium, the right of enjoyment ceases immediately, and the occupant **cannot claim any continuing rights**, being obliged only to **return the property** to the owner.

Commodatum in Family Relations

Annunziata Galea et v. Carmen Borg et,
First Hall (Civil Court), 4 June 2019, Rik. Gur. Nr. 870/18

According to a pronouncement of the Court of Appeal (Civil):
"In general, in the normal relationships between a father and his adult children who continue living with him as one family in the same home, a contract of commodatum cannot be inferred" — **Antonio Vassallo v Edward Vassallo, 18.05.1964**.
And according to another pronouncement of the Court of Appeal (Inferior Jurisdiction), in the relationship between children and parents *"which begins from the birth of the children and continues beyond majority until the children's marriage,* ***there does not exist the factual situation of an agreement or contractual relationship which is necessary for commodatum, as is necessary for every contract"*** — **Maria Pace v Anthony Pace, 28.04.2004**; …

Maria Sammut v. Lawrence Sammut,
First Hall (Civil Court), 28 January 2004, Cit. Nr. 2268/1996
Having stated the issue which the parties are contesting, it should first be said that it is not uncommon for one or both parents to lend their children an object or property for the child's use, gratuitously.
…

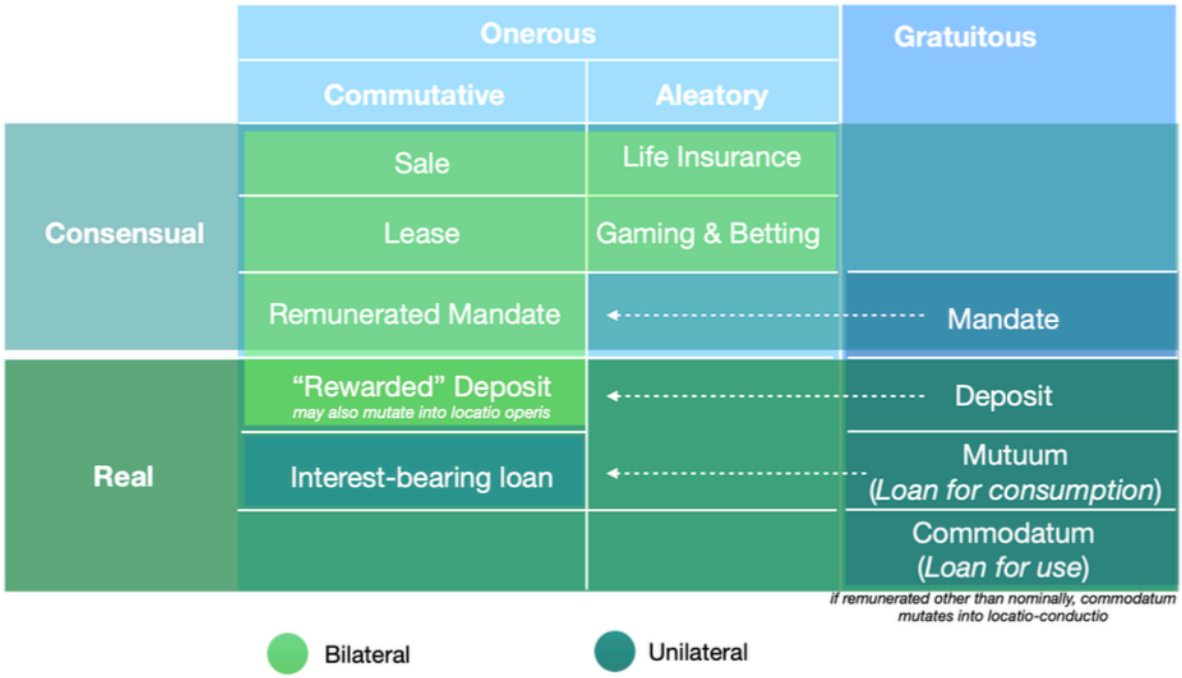
Applying the above-mentioned principles to the case under discussion, it is not contested that no fixed period was agreed between the parties. The same cannot be said with respect to a *determined use*, although even this term is properly circumscribed within the limits of the specific use, and therefore it may also be said that the element of time occurred tacitly and implicitly.

Insofar as the garage is concerned, from the substance of the evidence listed above, there can be no doubt, in the opinion of this Court, that **the father, by giving his keys to his children, truly intended to grant it to them without any payment, for the purpose of garaging their vehicles**. It is significant that the defendants have, for a considerable period of time, been making use of it.

The Contract of Deposit

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

The practical function of the contract (i.e the causa of the contract) consists in **ensuring the custody of a thing**, thereby guaranteeing the necessary vigilance for its conservation for the purposes of its restitution. The custodial duties **do not arise until the delivery of the thing**, rendering the contract a **real contract**. Upon the delivery, neither the ownership nor the possession of the thing is transferred to the depository. The depositary will only be holding the object in the interest of the depository, and **he cannot transfer nor use the property deposited with him**. In case the depositary transferred the property, he would be liable for misappropriation as held by **Torrente**.



In ***Gabriel Zammit vs Rabelink International Freight (Malta) Limited***, Small Claims Tribunal, 5 November 2020

It was held that there are **two obligations** incumbent upon the depositary:
one of a **principal nature**, which is the **return of the deposited item**, and another of an **accessory – yet nonetheless important – nature**, which is the **temporary custody** of the item.

Regarding the first obligation, it was stated that: **"This is the final obligation, both in the sense that the very obligation of custody is itself aimed at enabling the return, and in the temporal sense, in that the act of returning the item marks the termination of the relationship."** With respect to the second obligation, it is said that: **"Custody is nothing other than an accessory obligation of protection, an expression of the principle of good faith […] the depositary must carry out all those acts that are required in order to return the deposited item."** Additionally, custody of the item: **"manifests itself in the set of care and precautions suitable for the preservation of the thing, and includes every activity directed at safeguarding the physical integrity of the thing and also at**

preserving its exchange value and its economic destination." (GIOVANNA VISINTINI, *Trattato della Responsabilità Contrattuale*, CEDAM, 2009 ed., pp. 334–337)

In ***Paul Gauci et vs Joseph Mugliette***,

Court of Appeal, 9 February 2001, it was stated that:

"Deposit in general is a contract whereby one receives the property of another, with the **obligation to guard it and return it in kind** (Article 1891 of Chapter 16). When the deposit is voluntary, the contract necessarily has the nature of a mandate, because the depositary is obliged to carry out the will of the depositor and act according to the mandate given to him in the administration of the object entrusted to his care."

Nature of the Deposit Property so Called

Gratuity & Difference between locatio operis

1892. (1) Deposit properly so called is a gratuitous contract, saving any stipulation to the contrary.

(2) Only **movable things can be the subject of such deposit.**

"*Only corporeal movable things can form the subject-matter of deposit property so called; incorporeal objects are not susceptible of custody. And immovables, though corporeal things, may be preserved, without the necessity of a deposit or delivery. Deposit property so called is a gratuitous contract, saving any stipulation to the contrary. It* ***remains gratuitous notwithstanding that the depositary stipulated for a reward*** *- the reward, in fact, is not considered as* ***the equivalent of that which is done for the depositor but as something which is given in return for a favour*** *or even as the payment of the expenses necessary for the custody of the deposit. The contract, therefore, does not for this reason become one of letting of work and industry"* **- Prof. Caruana Galzia**

***Henry E. Zammit noe vs Anthony Camilleri noe*,**
First Hall, Civil Court, 10 October 1962, the Court stated:

"With regard to this institution, this Court inclines toward the most accredited doctrinal theory that, since voluntary deposit is essentially gratuitous, when compensation or remuneration is stipulated in favour of the depositary, **the contract *di quo* loses the character of a pure and simple deposit, and begins to take on elements of the contract of hire (locatio), and remains a deposit only in an improper sense.** This implies — as is also held in Roman Law — that such a remunerated depositary, in the sense explained above, assumes a greater degree of responsibility than that borne by a true and proper depositary. This responsibility is that of a diligent *pater familias*, a higher degree of diligence than the ordinary one; and in this matter neither the law nor doctrine makes any distinction as to who the depositary is, even if it is the Government. This responsibility, in light of what has been stated regarding the essence of the institution, extends also to acts carried out by the depositary's agents and employees."

Eucaristico Zammit vs Eustrachio Petrococchino noe
CoA, 25 February 1952
In this case, the plaintiff deposited a large consignment of fruit with the defendant for their cold storage. Service was given against payment. Fruit deteriorated and the plaintiff alleged that this happened through the fault of the defendant. The court held that the contract was not merely a deposit against a reward. **Baudry-Lacantinerie** holds that *the contract in virtue of which a trader or an industrialist, when exercising his profession, takes custody of certain things against payment is not a contract of deposit, but rather a contract of letting of work and industry.*
Thus, in this case, the contract, which concerned a commercial service given against payment, was deemed a locatio operis, and not deposit.

P Farrugia Randon, holds that:

"*The consequences are important. As mere depositary, the responsibility would have been regulated by law concerning a deposit against a reward. However,* ***when the contract is a*** *'locatio operis' it involves a person who is offering his technical services.*

Defendant was surely offering his technical services since the bananas were kept in order to delay their ripening. Once defendant had assumed the task to delay the ripening of the bananas against a payment, he was implicitly assuring that this obligation ***would be*** *performed according to standards of trade. He was, therefore, responsible for any shortcomings arising from lack of skill. The Court allowed plaintiff's demand. ...*

The ***Court of Appeal*** *agreed that, taking into consideration the circumstances of the case and the nature of the transaction, the Court held that such contract could not be termed a deposit but a 'locatio operis'."*

Eucaristico Zammit vs Eustrachio Petrococchino *noe*,
Court of Appeal, 25 February 1952, the Court stated:

"**When the deposit is remunerated, but the remuneration is equivalent to the service that the depositary is required to render, then the contract — from being a unilateral contract of deposit — becomes a synallagmatic contract of *locatio operis* (hire of work), in which the depositary undertakes to perform certain services in return for payment**. This distinction is important for the regulation of the depositary's responsibility.

For while the responsibility of a simple depositary is regulated by law as in the case of a remunerated deposit, in *locatio operis* the worker (locatur) offers his skill and undertakes the obligation to perform the work according to the standards of the trade; he is liable for anything that is done not according to those standards. And if, in performing the obligation he has assumed, he shows lack of skill, he is at fault and becomes responsible for the damages that arise from such lack of skill.

…

Now, since the defendant, as a worker under a contract of hire, assumed the technical obligation, the following consequences arise from these principles:

1. By the mere fact that the defendant undertook the obligation to delay the ripening of this fruit in return for compensation, he implicitly guaranteed that the obligation would be carried out properly and according to the standards of the trade;
2. The debtor in this case is therefore liable for anything done not in accordance with the standards of the trade.

…

The expert appointed by the Court concluded that the circumstances of the case indicate, as the probable cause of the deterioration which rendered the banana a total loss, the fact that the banana was exposed to a temperature that was not suitable for its condition."

Valhmor Borg noe vs Major Alfred Calascione noe

Commercial Court, 25 May 1961

In this case, the Plaintiff sued the defendant for payment of damages caused by improper storage of a large quantity of pears in the defendant's cold stores. Pears were to be stored at a particular temperature. However, the defendant stored the pears at a higher temperature, even inconsistently, and failed to ensure proper air circulation. The fruit went bad.

The defendant had entered into a commercial transaction against a payment of proportionate compensation. Because of this, the contract was deemed one not of deposit, but rather of the letting of work and industry, precisely because of the commercial nature of the service.

The Perfection of the Contract

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

(2) The delivery is effected by the consent alone, if the thing is already in the hands of the depositary by any other title and it is agreed that it is to remain in his hands as a deposit.

Prof Caruana Galizia comments, holding *The obligation of preserving and of returning the thing is impossible unless the thing be delivered to the person who is so bound. This contract is only perfected by the delivery of the thing to the depositary and is therefore* ***a real contract****. Delivery is effected brevi Manu, or by consent alone, if the thing is already in the hands of the depositary by any other title and it is agreed that it is to remain in his hands as a deposit*.

The question then arises as to what constitutes **delivery**.

Salvatore Desira pro et noe vs Brother Domenico Rosso
FHCC, 26 May 1953

The plaintiff's son attended De La Salle college, of which the defendant was the headmaster. The plaintiff's son, who went to school by bicycle, left it on school premises, and one day, the bicycle could not be found. The Plaintiff sued the defendant for its return.

The Court had to assess whether the defendant was a depositary or not. **The Court held that for the contract of deposit to exist, there must exist the delivery of the thing to the depositary who must, in turn, accept the thing and bind himself to take care of the thing gratuitously and to return it in kind on a simple demand of the depositor**. The deposit is perfected by the receipt of the thing deposited, thus by delivery.

In this case the facts did not point to an actual delivery of the thing, nor the placing of the thing in the defendant's custody. Still less had the defendant bound himself to return it to some person. The Defendant had merely permitted the child to leave the bicycle at the college. **The Plaintiff's son had left the bicycle where he deemed fit, from where he used to collect it after school without asking any permission. Thus, there was no contract of deposit.**

Types of Deposit

1894. A deposit of money or of other things which are consumed by use, is regulated by the laws relating to loan for consumption or *mutuum*, whenever power has been granted to the depositary to make use of the thing deposited on the sole condition of returning as much of the same kind and quality.

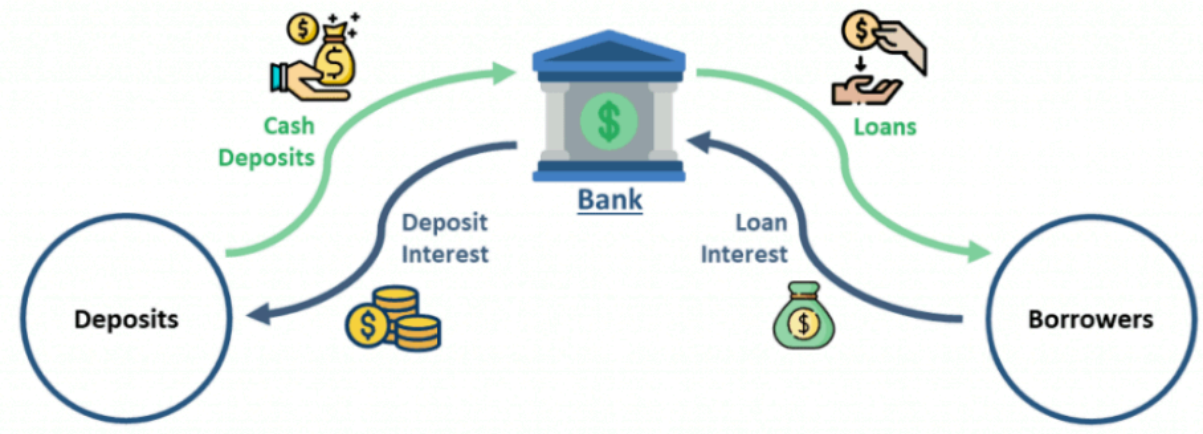
Distinction 1:

Regular vs Irregular Deposits

"If the deposit is regular, the expository cannot make use of the thing deposited; but nothing prevents the depositor from granting such a faculty, in which case the deposit is termed irregular since, of its nature, the contract of deposit should be made in the sole interest of the depositor. When such a faculty is granted ***the contract becomes very similar to loan for consumption or "mutuum"*** *but it retains its nature in view of* ***the depositary's*** *obligation of preserving the thing, which obligation is in the interest of the depositor. However,* ***an irregular deposit of money or other things which are consumed by use is regulated by the laws relating to loan for consumption****."*

- Prof Caruana Galizia

Thus, a regular deposit is one which prohibits the depositary from making use of the thing deposited. An irregular deposit may be made possible by the depositor, in which case the thing deposited may be made use of by the depositary. In this case, the law states that such contract is regulated by the laws of mutuum, in the case that the depositor gave the depositary the power to make use of the thing deposit. The depositary must then return as much of the same kind and quality as was deposited.



Torrente explains that the distinction between a **loan (mutuum)** and an **irregular deposit** lies primarily in their **function**. In an irregular deposit (such as a bank deposit), ownership of the money passes to the depositary, but the **purpose remains custody**: the depositor seeks safekeeping and expects only the return of an equivalent amount, not the same banknotes. By contrast, a loan serves the **borrower's need to dispose of money temporarily**. Despite their similarity, the rules of loan are generally applied to irregular deposits.

J.A. Micallef notes that under the Maltese Civil Code (now Article 1894), a **deposit of money is regulated by the rules of loan**, yet it **remains a contract of deposit**. This is because a loan is contracted in the **interest of the debtor**, whereas a deposit is in the **interest of the depositor**. Scholars such as **Betti** describe the irregular deposit as a **mixed contract**. The Italian Civil Code recognises this by classifying banking deposits as deposits while acknowledging that ownership passes to the bank. Unlike an ordinary deposit, where the depositary has custody only, an irregular deposit allows use of the money.

Scordino in his work "I contratti Bancari" takes the view that this is not a contract of loan because in the Italian law it is expressly stated under section 1782 of the Civil Code that the rules of loan are to be followed only as far as they are applicable. It corresponds to section 1996 [now 1894] of the Maltese Civil Code. A model section does not appear in the Code Napoloen and was introduced in the Civil Code by the Maltese legislator.

Distinction 2:

Voluntary vs Necessary Deposits

1895. Deposit is voluntary or necessary.

1896. A voluntary deposit takes place by the mutual consent of the person who makes the deposit and of the person who receives the thing on deposit.

1920. A necessary deposit is that which a person is compelled to make owing to some calamity, as, for instance, in case of a fire, destruction, pillage, shipwreck or other unforeseen emergency.

A necessary deposit takes place when a person is forced to entrust the custody of his property to the first person whom he happens to come across. The distinction between the two is merely technical, since the same provisions apply to both, by virtue of article 1921:

1921. All other provisions relating to voluntary deposit shall also apply to necessary deposit.

The Depositary

Deposit, as a rule, is generally a unilateral contract whereby only one party assumes obligations. These obligations are;

1) The Preservation of the thing deposited;

2) The prohibition of the use of the thing deposit, without the express or implied consent of the depositor to do so;

3) The prohibition to attempt to identify the things deposited and entrusted with him; and

4) The restoration of the thing deposited.

On the **degree of diligence**, we refer to **article 1899 and 1900;**

1899. A depositary must, for the custody of the thing deposited, use the same diligence which he uses for the custody of his own things.

1900. (1) The provisions of the last preceding article shall be applied more rigorously -

(*a*) if the depositary has himself offered to receive the deposit;

(*b*) if he has stipulated for a reward for the custody of the deposit;

(*c*) if the deposit has been made solely in the interest of the depositary;

(*d*) if it has been expressly agreed that the depositary shall be answerable for every kind of negligence.

(2) In each of the cases referred to in paragraphs (*a*), (*b*) and (*c*) of sub-article (1) of this article, the
provisions of sub-article (1) of article 1132 shall apply; and in the case referred to in paragraph (*d*)
of the same sub-article, the depositary shall be liable even for the slightest negligence.

1132. (1) Saving any other provision of this Code relating to deposits, the degree of diligence to be exercised in the performance of an obligation, whether the object thereof is the benefit of only one of the parties, or of both, is, in all cases, that of a *bonus paterfamilias* as provided in article 1032.

(2) This rule, however, is applied with a lesser or a higher degree of strictness in certain cases specified in this Code.

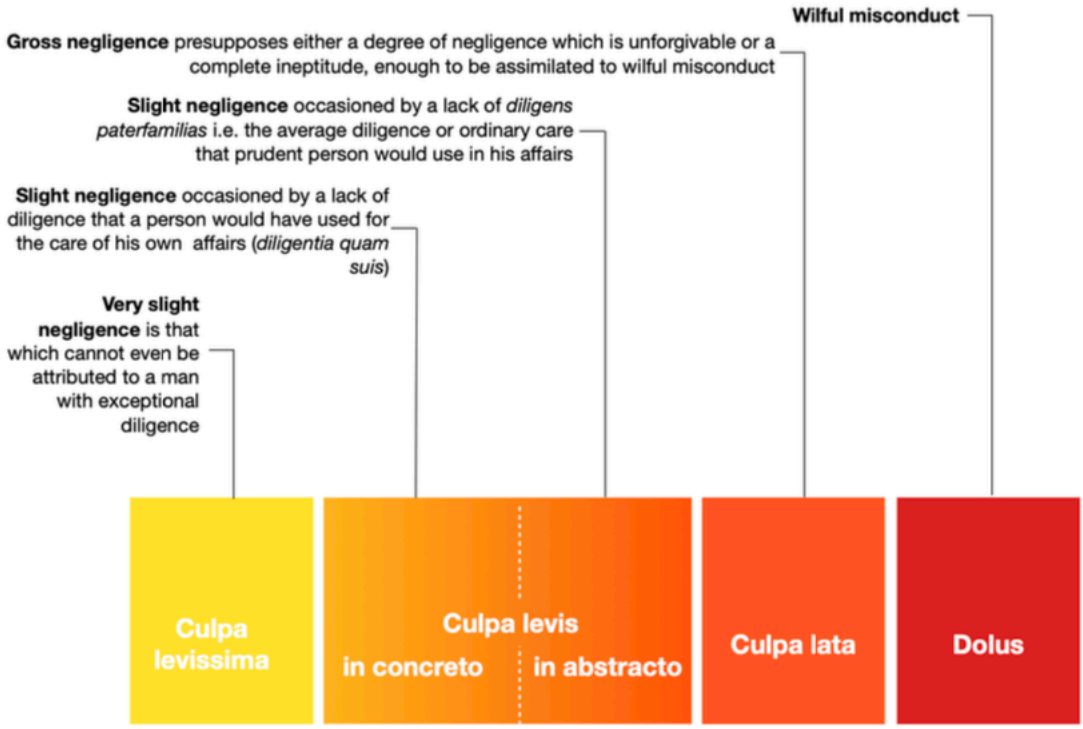
Prof Caruana Galizia comments, stating;

"The preservation of the thing deposited is the very purpose of the contract. As to the degree of diligence required, section 1899 ***departs from the general rule*** *that a person is only bound to use the same diligence as a "bonus paterfamilias" in the performance of his obligations and provides that a depositary must, for the custody of the thing deposited, use the same diligence which he uses for the custody of his own things (****"diligentia quad in suis rebus"****)."*

1901. A depositary is in no case answerable for accidents resulting from irresistible force, unless he has been put in default for delay in restoring the thing deposited; nor shall he be answerable, in the latter case, if the thing would have equally perished in the possession of the depositor.

One must note that the depositary is **not answerable for accidents resulting from irresistible force**, unless he has been put in default for delay in restoring the thing deposited. He will in any case avail of responsibility if he proves that the thing would have equally

perished in the possession of the depositor.



"It is to be noted, however, that if, for the custody of his own things, the depositary uses a very high degree of diligence, he is bound to do the same for the custody of the deposit. This provision, in fact, is meant to increase and not to diminish liability, or as the law itself says, to apply more rigorously the provisions of the preceding section. If it has been expressly agreed that the depositary shall be answerable for every kind of negligence, he shall be liable even for the slightest kind of negligence. However, a depositary from whom that thing has been taken away by irresistible force and who has received a sum of money or other thing in its place, must restore what he has received."

- Prof Caruana Galizia

1905. A depositary from whom the thing deposited has been taken away by irresistible force, and who has received a sum of money or some other thing in its place, must restore what he has received.

As in the gratuitous mandate, in gratuitous deposit the liability for fault is assessed with less rigour.

1902. The depositary cannot make use of the thing deposited without the express or implied consent of the depositor.

1903. He shall not attempt to discover what are the things which have been deposited with him, if they have been entrusted to him in a closed box or under a sealed cover.

1904. (1) The depositary must restore the identical thing which he has received, in the condition in which it may be at the time of its restitution.

(2) Any deterioration which occurs through no fault of the depositary, shall be borne by the depositor.

As shall be seen below, the **depositary can only make use of the thing deposited where expressly or implicitly permitted by the depositor**. He is also prohibited from trying to find out what things have been left in his deposit, in the case that such things were entrusted in a sealed cover of any sort.

The depositary must also restore the identical thing which was received. Any damage or deterioration attributable to the depositary's fault is to be charged to the depositary, yet any deterioration which occurs through no fault of the depositary is borne by the depositor.

We shall delve into the obligations of the depositary below. First, however, it is suitable to understand the relationship between fiduciary obligations and deposit, as well as the assessment of liability in relation to the expected due diligence.

Fiduciary Obligations & Deposit

The introduction of fiduciary obligations in our Code was mainly intended to cover financial services operations. However, the effect is more diffused.

Max Ganado holds that *fiduciary obligations impose a higher test or degree of good faith, and assume honesty and loyalty, so that conflicts of interest are totally eliminated. The notion of fiduciary obligations are very wide in scope and seeks to address the trust placed in one*

person by another and the reliance one generates through trust. This in turn creates dependence and vulnerability which is what cannot be allowed to be abused for any reason, let alone for personal gain. Fiduciary obligations are the type of obligations which impose on a person ***duties of care, honesty, accountability, and loyalty*** *in the handling of the property of another person. These obligations bind persons who are in control, directly or indirectly, through ownership or possession, of property belonging to another person or dedicated for the benefit of persons other than the fiduciary.*

Max Ganado describes fiduciary obligations as "*One set of rules which applies at the basis of all fiduciary civil law contracts, like* ***mandate*** *or* ***deposit****…"*

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

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

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

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

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

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

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

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

Liability in Deposit

Valhmor Borg noe vs Major Alfred Calascione noe

Commercial Court, 25 May 1961

Plaintiff sued defendant for payment of damages caused by improper storage of a large quantity of pears in defendant's cold stores. Pears were to be stored at a temperature of 38F, however, defendant stored the pears at a higher temperature, which was not even kept constant, and failed to ensure proper air circulation. The consignment of fruit went bad. As a general rule a depositary is bound to exercise a lesser degree of diligence than that applicable to normal cases i.e. **the *culpa levis in concreto***. However, there exist **circumstances** which increase the depositary's degree of diligence, for instance where the thing would be deposited against payment. **In such cases, the normal degree of diligence is applied, namely that of a bonus paterfamilias**.

In this case the distinction between deposit or *locatio operis* was of little practical importance since the degree of diligence which should have been used by the defendant was the same in either case. A mandatary who acts against payment, and a depositary who is compensated for his service are responsible for *culpa levis in abstracto* i.e. that deriving from lack of prudence, diligence or attention of a bonus paterfamilias. This was the degree of diligence which should have been exercised by the defendant in the transaction forming the contract of letting of work and industry i.e. in that commercial transaction for which he was adequately and proportionately compensated.

In the case of **gratuitous deposits**, the liability is assessed in the following case, in which the Plaintiff had left some items with the defendant, tasking the latter to deliver them to the plaintiff's daughter. The defendant lost these items.

Maria Camilleri vs Duminku Attard- Liability in case of a gratuitous deposit
First Hall, Civil Court, 2 April 1992

The defendant admits that he lost the items which he accepted in deposit. He alleges that they may have been stolen from his shop, but in this regard he produced no proof. It clearly results from the proven facts that the defendant did not exercise the due care required over the items entrusted to him; he did not take care to place them in a secure place and inaccessible to those entering his shop as soon as they were entrusted to him. …

Even if the defendant was not fully aware of the value of the items in the bag, he had sufficient prior warning such that he ought to have realised that he should not have left it within people's reach, where it could easily have been lost, taken or even stolen. **Had they been his own belongings, it is presumed that the defendant would not have acted with such carelessness**. **The fact that the defendant merely wished to do the plaintiff a favour is irrelevant to the case, even taking into account the element of gratuity of the contract of voluntary deposit, as indicated above. Once he accepted to do this favour, the law placed upon the defendant the burden of acting responsibly, as if he were taking care of his own property.**

As previously mentioned, by reason of article 1900 (1)(a), **where the depositary offers himself to receive the deposit, the assessment of diligence is taken more rigorously**. This is shown in the case;

Peter Said vs Joseph Gauci - Liability in case where the depositary offers himself to receive the deposit.

First Hall, Civil Court, 28 April 1987

In this case, the defendant **had offered to keep certain items** which were the subject matter of a court case. When the plaintiff demanded the return of the items, he found that their condition had significantly deteriorated.

"... The defendant, as a depositary who voluntarily offered himself to keep the items during the pendency of the case, **had the obligation of a *bonus pater familias* to take care of the items with a higher degree of diligence, though not to such an extent as to be liable for every form of negligence, however slight**, as contemplated by article 2002(1)(a). This is because, in this case, it does not result that it had been expressly agreed that the defendant, as depositary, would be liable for every instance of negligence; …

The defendant is responsible for the deterioration of some of the items in question, but not for all of the items."

The Court therefore ordered the restitution of those objects which had not deteriorated through the defendant's fault, and ordered him to compensate the plaintiff for those items which had been worn out as a result of his negligent custody.

In the case of a **remunerated deposit** (i.e non-gratuitous deposit which does not qualify as a contract of letting of work and industry, per the previously referred to judgements), we refer to the following cases vis-a-vis the assessment of liability;

Henry E. Zammit noe vs Anthony Camilleri noe- *Liability in case of remunerated deposit*
First Hall, Civil Court, 10 October 1962

The plaintiff firm purchased from another firm a consignment of whisky which had been deposited *in bond* with the defendant *nomine*.

In the case at hand, it does not result that the merchandise belonging to the plaintiffs, which had been deposited for consideration with the defendant *nomine*, still existed in deposit, or that it was stolen by means of a break-in or forced entry into the place where it was stored and kept, or through the breaking of any ordinary obstacle, such as doors and windows serving the store where it was "in deposit". … Rather, it is a fact that it disappeared from that warehouse, in respect of which no stock-taking had ever been carried out. …

Moreover, the fact is noted that every Customs employee in the department in question **had the facility to take the keys of the same merchandise stores without any entry being made in any office records, which was not in conformity with the diligence required of the defendant *nomine* and his employees, who were being paid for their service as depositaries.**

The Court therefore adjudges and decides by declaring the defendant *nomine* responsible for the deficiency complained of, and assesses the damages at the sum of **£90.10**.

C & B Autoparts Limited vs Emanuel Fenech
First Hall, Civil Court, 9 January 2004
Owner of a car was claiming damages after it was destroyed by fires while it was deposited at the defendant's panel beating garage. Burglars had broken into the garage and set fire to the vehicles that were deposit therein.
The relationship between the parties was that of a contract for work and industry in so far as the agreement was that the defendant would carry out work on the plaintiff company's vehicle, **and that of a deposit for consideration in so far as the agreement was that the defendant would keep the vehicle in his custody until the works were completed.** No

evidence was produced that the defendant kept the vehicle in his possession for longer than was necessary and that he was therefore in default (*in mora*).

In its note of observations, the plaintiff company stated that the defendant did not act with the prudence required by law because he left the vehicle in a garage which remained open and unattended for several hours. This is true, but it is not relevant for the purposes of the present case. The damage was not caused because someone entered the garage while it was left open; the damage occurred when the garage was closed and locked, to the extent that the person who caused the damage had to force the door open.

It was not due to any failure on the part of the defendant to take the necessary precautions that the damage occurred, but rather due to the fraudulent (*dolož*) acts of third parties. A break-in by force is always considered *force majeure*, for which the depositary is not liable**. In the opinion of the Court, therefore, since it was not shown that there was any fault on the part of the defendant, and since the damage occurred due to *force majeure*, the claims of the plaintiff company cannot be upheld.**

One must note that the **limitation of liability clause** does **not exclude dolus or culpa**.

Joseph Darmanin noe vs Joseph Schembri

CoA, 20 February 1953

Plaintiff had deposited machinery with defendant during the war. Defendant signed a declaration stating: **"I declare to conserve at Villa Rosa the machinery and furniture of Mr. Darmanin without any responsibility and without payment, until the end of the war."**

During the war, some of the machinery was damaged due to the bombings, other machines were delivered by defendant to third parties. Plaintiff sued for the return of the machinery transferred to the third parties. Court held that limitation of **liability clause did not exclude**

'dolus' or 'culpa lata' since this would mean that a depositary could relieve himself of his responsibility in case of fraudulent acts or serious negligence.

Since deposit was gratuitous the provisions of section 1899 applied. Court stated that the majority of writers agree that, in deposit, the law departs from the normal principle advocating diligence of a bonus paterfamilias. **In this case the diligence required is that which the depositary uses for the custody of his own things.** Writers also agree that the depositary is responsible for 'dolus' or 'culpa grave'. In terms of section 1901 **the defendant was not responsible for the machinery destroyed by the bombings, however, with respect to other items, the defendant was found to have merely abandoned them in Villa Rosa. This was equivalent to gross negligence**, since he had neglected the more basic duties of custody

In cases of **dolus or culpa**, the depositary is to assume any and all responsibility, provided that the loss or damage is attributed to him.

Michael Micallef et al. vs George Sammut et al.- ***Liability in case of dolus or culpa***
Court of Appeal, 7 July 1998

An employee of the plaintiff association was entrusted with depositing funds in a bank safe-deposit box. The funds went missing after the employee left the **key in an unlocked car overnight**.

The Court held that the employee, Frank Ciappara, acted with **gross negligence (culpa lata)** and possibly **dolus**. Leaving a safe key in an unsecured vehicle could not be justified as mere oversight. Even if third parties stole the funds after taking the key, Ciappara remained liable due to his serious lack of diligence.

The Court therefore found him **personally liable** and condemned him to pay **Lm 1,205** to the plaintiff association.

Degree of Diligence Required for Shore Handling

Carmel Bugeja noe vs Godwin Abela noe

Court of Appeal, 1 February 1988

In **Carmel Bugeja noe vs Godwin Abela noe (CoA, 1 February 1988)**, the plaintiffs' goods were mistakenly disembarked in Malta and temporarily stored, **for payment**, by the defendant shore-handling company in a Hazard Room. Some goods went missing and others were damaged.

The Court held that this arrangement constituted a **contract of deposit for consideration**, which imposes on the depositary two main obligations: **custody** and **restitution in kind**. Since the deposit was remunerated, the defendant was required to exercise a **higher standard of diligence**, namely that of a **bonus pater familias**, applied **more stringently**.

While a depositary is not liable for loss caused by **force majeure**, the **burden of proof** lies on the depositary to show that the loss occurred despite proper precautions. Theft may qualify as a fortuitous event **only if** the depositary proves adequate security measures.

In this case, the defendant failed to do so. The Court found **serious negligence**, noting excessive numbers of keys in circulation, poor control over access, and lax security in a facility storing valuable goods. The defendant also failed to take reasonable steps to recover goods later found by the police.
Accordingly, the defendant was held **liable for the loss and damage**, as the theft could not be attributed to force majeure due to the **lack of required diligence**..

Victor Azzopardi noe vs Godwin Abela noe

Court of Appeal, 7 May 1984

The plaintiff, a car importer, sued the defendant cargo-handling company after a car under the defendant's **custody and possession** was found **locked with the keys inside**. As a result, the

plaintiff had to force the car open by removing the windscreen, which broke and caused damage.

The Court held that the defendant, as **depositary**, was bound to exercise the diligence of a **bonus pater familias**. It was not enough for the defendant to merely instruct employees not to lock the car; the defendant had a **positive duty to ensure** that the car was not locked and to supervise its handling if necessary.

The Court found the defendant **negligent**, as the car was in fact locked with the keys inside. Moreover, the defendant accepted the method used to open the car and therefore also accepted responsibility for the resulting damage.Accordingly, the defendant was held **liable for damages**.

Defence of Force Majeure in Deposit

This defence, stating that the loss or damage of the thing was not attributable to the depositary, must be proven by **the defendant**.

1901. A depositary is in no case answerable for accidents resulting from irresistible force, unless he has been put in default for delay in restoring the thing deposited; nor shall he be answerable, in the latter case, if the thing would have equally perished in the possession of the depositor.

Mediterranean Trading Shipping Company Ltd et al. vs Tristar Freight Services Ltd
Court of Appeal, 26 January 2018

The Court reiterated that under a **contract of deposit**, the depositary's obligations are governed by **Articles 1899 et seq. of the Civil Code**, which require the exercise of the diligence of a **bonus pater familias**. Accordingly, the depositary must take **all reasonable precautions** to ensure that the deposited goods are kept in a **safe and suitable location**.

Although a depositary is generally **not liable for force majeure**, such a defence cannot be invoked where the damaging event is the **direct result of the depositary's failure to comply with a legal duty**. In this case, while the defendant company was not responsible for starting the warehouse fire, it failed to ensure that the equipment was stored safely and that it was dispatched within the agreed timeframe.

The Court noted prior lapses in custody and the unjustified delay in shipping the equipment, which remained in the warehouse even though it should already have been en route. This conduct fell **short of the standard of diligence of a bonus pater familias**, and therefore the defendant could not rely on force majeure to escape liability.

The Obligations of the Depositary

1902. The depositary cannot make use of the thing deposited without the express or implied consent of the depositor.

1903. He shall not attempt to discover what are the things which have been deposited with him, if they have been entrusted to him in a closed box or under a sealed cover.

1904. (1) The depositary must restore the identical thing which he has received, in the condition in which it may be at the time of its restitution.

(2) Any deterioration which occurs through no fault of the depositary, shall be borne by the depositor.

1905. A depositary from whom the thing deposited has been taken away by irresistible force, and who has received a sum of money or some other thing in its place, must restore what he has received.

1907. If the thing deposited has produced fruits which have been collected by the depositary, he is obliged to restore them.

Mary Hall vs Emmanuele Xuereb

FHCC, 27 March 1946

Plaintiff's property was destroyed during the war. She salvaged some articles (amongst which a coat) and a friend of hers deposited them with the defendant. The defendant eventually donated the coat to a friend's daughter.

Plaintiff recognised the coat and requested it from defendant; however, it was returned in a badly damaged state since the donee had proceeded to make certain alterations to it.

Laurent: "If, in spite of the prohibition stated by the law, the depositary uses the deposit he would
thus be **in breach of his obligations** and would consequently be responsible for damages and interest, if any."

The defendant had, without any due authorisation, donated the property to third parties, who had eventually caused the damages complained of. As to the other articles, which defendant claimed to have lost, the Court held that the depositary's conduct certainly fell below the standard of diligence required by the law.

The Court ordered defendant to pay a sum as damages.

Article 1908 elaborates on **to whom the restoration must be made**;

1908. The depositary must restore the thing deposited only to the person **who has entrusted it to him**, or to the person **in whose name the deposit has been made**, or to the **person who has been appointed to receive back the thing.**

Further, **Article 1909** holds that the **depositary may not require the depositor to prove ownership over the thing**;

1909. (1) The depositary cannot require the depositor to prove that he is the owner of the thing deposited.

(2) Nevertheless, if the depositary discovers that the thing has been lost or stolen, he must inform the person from whom it was stolen, or who lost it, of the deposit which has been made with him, allowing him a sufficient time to claim such deposit. If the person so informed fails to claim the deposit within the said time, the depositary is released by delivering the deposit to the person from whom he has received it.

Prof Caruana Galizia holds that:

*The **depositary cannot require the depositor to prove that he is the owner of the thing deposited even though he knows or has reasonable grounds for believing that the thing belongs to another person**. Nevertheless, if the depositary discovers that the thing has been lost or stolen, he must inform the person from whom it was stolen or who lost it, allowing him a sufficient term to claim such deposit. This obligation does not arise from the contract of deposit but is one imposed by law in the interests of the owner. If the person so informed fails to claim the deposit within the said time, the depositary is released by delivering the deposit to the person from whom he has received it."*

Torrente comments, "*The deposit can be effected by whoever has the possession or detention of the thing, **ownership is not material**. The obligation that arises from the contract is, therefore, that of returning the thing to the person who would have deposited the property with him: the depositary cannot expect the depositary to provide proof of ownership."*

Victor Mercieca vs Concetta Pisani et

FHCC

The Court referred to ***Carafa***, who held *the depositor's action for the return of the thing deposited is **not based on the right of ownership** but on the delivery made to the depositary and **on the latter's obligation** to return the thing to the person who has entrusted it to him.*

Saviour Attard vs Anthony Vella

First Hall, Civil Court, 20 October 2005

Once the car was entrusted to the defendant by **DM**, the defendant, as **depositary**, was legally obliged to return it **only to DM** and to no one else. Even though the car was registered in the plaintiff's name, this alone does **not entitle the plaintiff to demand delivery from the depositary**, since he was not the person who deposited the vehicle.

The depositary's obligation is strictly contractual and exists **solely with the depositor**. The plaintiff, if he claims ownership, must seek recovery of the vehicle **against DM**, not against the depositary, who cannot be compelled to act unlawfully by delivering the car to a third party.

The Court clarified that this ruling does **not operate erga omnes** and does not resolve the issue of ownership. The defendant is not claiming ownership but merely complying with his duty as depositary. Any dispute as to whether the car belongs to the plaintiff or to DM must be settled in **separate proceedings** between those parties.

Article 1910 contemplates the situation whereby the **depositor dies**, in which case the **thing is to be restored to the heir**.

1910. In case of death of the depositor, the thing deposited can only be restored to his heir.

1911. If there are several heirs, or if otherwise the thing deposited belongs to several persons the depositary may not restore the thing except with the concurrence of all of them, unless the share of each is determined.

The question then arises as to whether a **co-heir** would require the consent of the other to withdraw his share from the **decujus'** bank account.

Miggiani vs Galea noe

Commercial Court, 15 December 1900

The plaintiff's father held a Fixed Deposit account with defendant bank. Plaintiff attempted to withdraw one-fifth of the account but defendant bank refused part payment and requested the consent of all the other co-heirs. Plaintiff refused to obtain such consent. Court referred to article 1113(2) of the Civil Code:

1113.(1) An obligation, although susceptible of division, must be performed, as between the creditor
and the debtor, as if it were indivisible.

(2) The divisibility shall only be applicable in regard to their heirs, who can claim or are liable to pay the debt only to the extent of the shares competent to them, or for which they are liable as representing the creditor or the debtor.

Thus each co-heir can demand payment of the share due to him and could do so from the opening of the succession if the credit is due. The debtor who pays to a co-heir of the creditor such co-heir's share of the credit thus be paying validly and would therefore be releasing himself in relation to such heir.

Defendant pleaded article 1911 of the Civil Code. The Court observed that the said section of the law in fact clearly permits payment of a share when the shares can be determined. In this case such shares could be calculated by a mere mental exercise based on the share due to each heir by law. Court also noted that the contract in question was an *irregular deposit* and, therefore, regulated by the rules of mutuum.

P. Farrugia Randon comments;

Banks require the **consent of all heirs** because a bank account does **not necessarily reflect the entirety of the deceased's estate**. Issues such as **collation and other estate adjustments** may affect the true share due to each heir. As a **third party external to the estate**, a banker risks liability if he distributes funds without considering these factors. Since heirs hold **undivided rights** in the estate, the **partition of common property requires the consent of all co-owners**. A bank cannot substitute itself for the heirs by carrying out a

distribution based solely on a **prima facie mathematical calculation**, as it may be unaware of circumstances affecting each heir's actual entitlement.

1914. (1) The restitution of the deposit **must be made at the place where the thing deposited exists**. If another place has been specified in the contract, the depositary is bound to take the thing to such place. (2) The expenses of removal shall be borne by the depositor.

Prof Caruana Galizia holds that "*The restitution of the deposit must be made at the place where the thing deposited exists. If another place has been specified in the contract, the depositary is bound to take the thing to such place; by the expenses of removal are borne by the depositor. The action available to the depositor is the "**actio depositii directa**".*

Vis-a-vis the **time for restitution**, we refer to **article 1915**;

1915. The deposit must be restored to the depositor as soon as he demands it, even though the contract has fixed a time for the restitution, unless there is opposition to its restitution, by a garnishee order or a judicial demand.

Rights of the Depositary

As previously mentioned, the depositary may make use of the thing deposited if expressly or implicitly consented to by the depositor.

A particular right vested in the depositary is found under article **1916**, which contains a right to **compel the depositor to withdraw the thing deposited;**

1916. (1) The depositary may compel the depositor to withdraw the deposit. (2) He cannot, however, without just cause, compel him to withdraw the deposit before the time agreed upon.

Prof Caruana Galizia:

"*The deposit must be restored to the depositor as soon as he demands it, even though the contract has fixed a time for the restitution unless there is opposition to its restitution by a*

garnishee order or a judicial demand. On the other hand, the depositary may compel the depositor to withdraw the deposit since he is doing him a favour. ***He cannot, however, without just cause compel him to withdraw the deposit before the time agreed upon.*** *The contract of deposit is terminated by the restitution of the thing deposited. Since the deposit is concluded in the interest of the depositor, the depositary must return the thing as soon as the depositor requests it."*

The Plea of Ownership

1917. All the obligations of the depositary cease, if he discovers and proves that he himself is the owner of the thing deposited.

By virtue of **article 1917**, **all obligations on the part of the depositary cease *in toto* upon the proof that the depositary is in fact owner of the things deposited**.

Victor Mercieca vs Concetta Pisani et *FHCC, 21 April 1961* Plaintiff sued her daughter for the return of £500 deposited by the former with the latter. Defendant alleged that the money belonged to her. In the meantime, evidence was pointing towards a contract of deposit. ***Pothier***: "In order to allow the defence plea of ownership, the **depositary must be able to** immediately and summarily prove his rights of ownership. Otherwise, the presumption favours the depositor who is deemed to possess it through the depositary, who in turn is to be condemned to provisionally return the thing, saving his rights to claim restitution thereof." Defendant could not prove her claim of ownership, so plaintiff was still favoured by the presumption arising from the deposit. Plaintiff's right to file an action for the return of the money remained unprejudiced.

The Depositor's Duties

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

1919. The depositary may retain the deposit until full payment of what is due to him by reason of such deposit.

Strictly speaking, the depository should have no obligations, but he may contract obligations in favour of the depositor **"per accipiens**". Thus, the depositor is bound to reimburse to the depositary any expenses which the latter may have incurred for the preservation of the thing deposited and to make good to him all the losses which the deposit may have occasioned him. Furthermore, the depositary is granted the "jus retentionis" in guarantee of the rights i.e. he may retain the deposit until full payment of what is due to him by reason of such deposit."

Saviour Attard vs Anthony Vella
FHCC, 20 October 2005

Mechanic refused to return the car to its depositor since he had not yet been fully paid for his services.

Moreover, the defendant, as depositary, is invoking the *ius retentionis*, which is the right granted by law to retain an object on which he has carried out work until he is paid for that work.

As this Court stated in the case **Ellul vs Micallef**, decided on 24 February 1997, a right of *ius retentionis* exists whenever the person who possesses an object belonging to another "has incurred an expense for the thing possessed, for which he has the right to claim payment from the owner" (*abbia fatto per la cosa posseduta una spesa, della quale ha il diritto di reclamare il pagamento dal proprietario*) (**Zachariae,** Vol. II, p. 59).

The defendant carried out repair works on the vehicle, and for this work he was paid by the insurance company except for the sum of **Lm 50**, in respect of which he remains unpaid. Therefore, the defendant is likewise not obliged to release the vehicle from his custody before everything due to him has been paid.

Carriers by Land or Water

Liability of carriers,

1628. Carriers by land or water are, in respect of the custody and preservation of the things entrusted to them, subject to the same liabilities as depositaries.

for things delivered to them,

1629. They are responsible not only for the things which they have received in their vehicle or boat or other vessel, but also for the things delivered to them in any place to be put in the vehicle, or boat or other vessel, or to be carried in any other manner.

for loss.

1630. They are liable for the loss of or injury to the things entrusted to them, unless they prove that such loss or injury was caused by a fortuitous event or irresistible force and without any fault on their part.

Domenico Cassar v. Francesco Spiteri, Court of Appeal (Civil),
24 November 1911, Vol. XXI.I.367

Plaintiff sued defendant for payment of the value of the merchandise that was never delivered. The responsibility of anyone entrusted with **the transport of goods from one place to another** is that of **a proper "necessary depositary"**

Carriage by Air (International and Non-international Carriage) Order [Subsidiary Legislation 499.24 transposing the Convention for the Unification of Certain Rules Relating to International Carriage by Air known as the Montreal Convention]

Article 17 - Damage to Baggage

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier.

Article 18 - Damage to Cargo

1.The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:
-inherent defect, quality or vice of that cargo;
-defective packing of that cargo performed by a person other than the carrier or its servants or agents; …

International Carriage of Goods by Road Act [Cap. 486 transposing the Convention on the Contract for the International Carriage of Goods by Road (CMR)]

Chapter II - Persons for whom the Carrier is Responsible

Article 3

For the purposes of this Convention the carrier shall be responsible for the acts of omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his own.

Chapter IV - Liability of the Carrier

Article 17

1. The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.

2. The carrier shall, however, be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

Carriage of Goods by Sea Act [Cap. 140]

ARTICLE III

Responsibilities and Liabilities

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to -

(a) make the ship seaworthy;

(b) properly man, equip, and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. ...

ARTICLE IV

Rights and Immunities

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier ...

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from -

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

(b) fire, unless caused by the actual fault or privity of the carrier;

(c) perils, dangers and accidents of the sea or other navigable waters;
(d) act of God; …

Liability of a Shipper

Dr Simon Micallef Starface noe v. James Gollcher et, First Hall (Civil Court),
13 June 2002, Cit. Nr. 1317/93

The plaintiff imported batteries on a ship operated by the defendants' principals. Upon opening the container, some pallets were found **damaged** and others **missing**.

The **Bill of Lading was "clean"**, creating a presumption that the goods were loaded in **apparent good order and condition** and should have been delivered in the same state. Since the carrier provided **no explanation** for the damage or loss, responsibility was attributed to the ship.

As the losses occurred while the goods were in the **custody of the carrier**, the carrier, acting as **depositary**, was obliged to deliver the merchandise intact. Once damage and loss were proven, **liability followed**, and the ship was held responsible for the losses suffered.

Liability of a Carrier

Atlas Insurance PCC Ltd v. B.A.S. Limited, First Hall (Civil Court),
5 December 2019, Rik. Nr. 1175/08

The plaintiff insurance company, subrogated to the rights of Intercomp, sued B.A.S., which had been entrusted with transporting laptops from the Netherlands to Malta. Upon arrival, pallets were found damaged, with several boxes missing or empty, despite confirmation that the goods had left the Netherlands intact.

B.A.S. admitted its obligation to collect and deliver the goods but attempted to deny liability as depositary and to shift responsibility to third parties involved in the transport. The Court rejected this argument, holding that **B.A.S. remained fully responsible for the**

merchandise, even where it entrusted transport to others. As depositary, it had a duty to deliver the goods intact and to establish systems capable of excluding liability, which it failed to do. Consequently, B.A.S. could not shift blame to third parties it had itself appointed and was held liable for the loss.

Terms of CMR Convention complement the general Codal rules

"Moreover, nowhere does it appear that the defendant company has attempted to prove — as according to the agreement it is its burden to do — that even if the necessary attention and the reasonable care expected of a depositary or transporter of goods had been applied, such loss and theft would still have occurred."

Hotel keepers' Liability

Hotel keepers' liability is a special form of deposit regulated by Articles 1783 et seq. of the Civil Code and applies not only to hotels but also to similar establishments such as nursing homes, pensions, bathing establishments, entertainment venues, and sleeping cars. The law distinguishes between **items expressly entrusted to the hotelier for custody** (or wrongfully refused) and **items merely brought into the establishment** without being entrusted for safekeeping.

Where property is entrusted (or acceptance is unjustifiably refused), the hotelier is **fully and unlimitedly liable** for loss, theft, or damage, unless this results from force majeure or the guest's own fault (Article 1784). Where property is merely brought into the hotel, the hotelier's liability is **limited to a statutory cap of one hundred times the daily room rate**, unless the damage is caused by the hotelier or his employees, in which case **full liability applies**. Any agreement made in advance to exclude or limit the hotelier's liability is **null and void**.

Liability of hotel-keepers.

1039.(1) A hotel-keeper shall be liable up to an amount not exceeding €174.70 for any damage to or destruction or loss of property brought to the hotel by any guest.

(2) The liability of a hotel-keeper shall be unlimited -

(a) **if the property has been deposited with him**; or

(b) if he has refused to receive the deposit of property which he is bound under the provision of the next following sub-article to receive for safe custody; or

(c) in any case in which the damage to, or destruction or loss of, property has been caused, voluntarily or through negligence or lack of skill, even in a slight degree, by him or by a person in his employment or by any person for whose actions he is responsible.

(3) A hotel-keeper shall be bound to receive for safe custody securities, money and valuable articles except dangerous articles and such articles as having regard to the size or standard of the hotel are cumbersome or have an excessive value.

(4) A hotel-keeper shall have the right to require that any articles delivered to him for safe custody shall be in a fastened or sealed container.

(5) The provisions of sub-articles (1) and (2) of this article shall not apply if the guest, after discovering the damage, destruction or loss, does not inform the hotel-keeper without undue delay, or if the damage to, destruction or loss of, property is due -

(a) to a fortuitous event or to irresistible force; or

(b) to a reason inherent in the nature of the property damaged, destroyed or lost; or

(c) to an act or omission of the guest by whom it was brought into the hotel, or of any person, other than the hotel-keeper, to whom such guest may have entrusted the said property or of any person in the employment of such guest or accompanying him or visiting him.

(6) Any tacit or express agreement between a hotel-keeper and a guest entered into before any damage to, destruction or loss of, property has occurred and purporting to exclude, reduce or make less onerous the hotel-keeper's liability as established in this article shall be null and void:

Provided that, in the cases referred to in paragraphs (a) and (c) of sub-article (2) of this article where the damage to, or destruction or loss of, property has not been caused by a person mentioned in the said paragraph (c) voluntarily or through gross negligence, any agreement signed at any time by the guest whereby the hotel-keeper's liability is reduced to an amount being not less than one hundred and seventy-four euro and seventy cents (174.70) shall be valid.

Marco Vella et v. Dragonara Resort Ltd, Court of Appeal, 17 October 2008,
App. Civ. Nr. 772/2006/1

While the plaintiffs were staying at a hotel, they placed some valuable items inside a safe-deposit box located in their room. One evening, upon returning to the room, they found that the items had been stolen. The guests had left the key to the safety-deposit box unattended.

Was there a contract of deposit?

Article 1893(1) of the Civil Code provides that **"deposit is perfected only by the delivery of the thing to the depositary."**

In the present case, such a deposit is excluded because the items were **never transferred, through their physical delivery, into the possession of the defendant company**.

Was there an omission by the guest?

Alfred Schembri nomine v. Tigne Development Co Ltd proprio et nomine
(Court of Appeal, 6 October 2000):
… kienet in-**negligenza grossolana ta' l-attur** li rrendiet possibbli ... avut rigward tal-fatt illi b'mod mill-aktar traskurat **halla c-cavetta tas-safety box fil-kamra**

The Court, as presently constituted, **fully agrees with these reflections of the Superior Court and makes them, *mutatis mutandis*, applicable to the factual circumstances resulting from the evidence in this case**, and thus **rejects the plaintiffs' claim**.

The Law of Sale

Under Roman Law, obligations were defined in the Institutes as ***jurisdiction vinculum quo necessitate adstringimur alicujus solendae rei nostrae civitatis jura***, translating to ***a legal bond whereby people are constrained by a necessity of performing something according to the law's of one's country*** - a **duty of performance** or of **abstention**. The term *obligatio* connoted the binding of the wills of the parties. Where there is an obligation, there are two parties - a debtor and a creditor. The debtor is bound to a performance or non-performance to satisfy the right possessed by the creditor.. An obligation thus creates a ***jus in personam*** - a right vested in a person against another person, as opposed to ***jus in rem***, being a right available to all persons in general.

Under Roman Law, the following classifications of obligations existed;
a) Civil and Praetorian or honorary - those obligations arising out of Civil Law or from the praetor's Edict;
b) Ex contractu, quasi ex contractu, ex delicto, or **quasi ex delicto** - those obligations arising from agreement and delict respectively (out of contract or out of tort);
c) Civil / Natural - those obligations which are fully protected by law and enforceable by action and those which are not enforceable until contracted by the party.

Vis-a-vis obligations arising out of contract, we refer to obligations arising from agreement. **Under Roman Law, agreements were not actionable unless they could be classified under one of the aforementioned classifications**. Further, obligations **ex contractu** were subdivided into 4 categories;

1) Real - *commodatum, mutuum, pignus,* and *depositum* - key element for these contracts is the **delivery of the res from one party to another**;
2) Verbal;
3) Literal
4) Consensual - *law of sale, law of letting and hiring, mandate* - key element for these contracts is the **agreement which is reached by both parties.**

Sale Under Roman Law

Under Roman Law, sale was defined as ***a contract whereby one person promises to transfer to another a thing and to procure to him the undisturbed and permanent possession of it, and the other on his part, promises to pay a price***. There are two parties to such contract - the buyer and the seller, both of whom have **obligations in relation to each other**. Sale is thus a **bilateral / synallagmatic contract**.

There is a fundamental difference between the law of sale today and the law of sale under Roman Law - under Roman Law, sale was an obligation that consisted primarily in **granting to the buyer the peaceful possession of the thing sold**, whereas today, sale necessitates a **transfer of ownership of the thing**.

There are 3 essential conditions to the contract of sale;

1) **Consent** and **Agreement** - a contract of sale, being a **consensual contract** (and not a **real contract**), is **concluded upon the agreement of the wills of the parties, and not upon the delivery of a thing**. This is dependent on whether there was the intention to conclude such an agreement, whether in writing or verbally. In the case of verbal agreements, the contract is complete as soon as the price and the thing to be sold are agreed upon.

2) **The Thing being sold** - under Roman Law, the thing or *res* to be sold must be;

- In existence or **capable of existing**;
- In **Commercio** (capable of being owned); and
- Something in which **the buyer acquires an interest** (the buyer cannot already be the owner)

Under Roman Law, a thing which is described generally could not be the subject of a contract of sale, since the contract req**uired a certain level of specificity** as to what was being sold. This is not the case in today's contract of sale.

3) **The Price** (***pretium***) - Under Roman Law, the price must a) **consist in money**; b) **be certain or ascertainable**, c) **be genuine** (i.e - there must be an intention to pay said price), and d) **be reasonable as defined by law**.

Duties of the Seller under Roman Law

i) To deliver the thing and to give **vacant possession**. It was the responsibility of the seller to take the necessary steps to transfer to the buyer whatever rights he had in the thing sold. This did not equate solely to transfer of physical possession - **the seller must ensure that the buyer could maintain his possession freely and unconditionally** - his possession must be **exclusive**, and **not defeasible by interdict**. The buyer's possession must be free from burden and threats, except any which have been previously agreed upon.

Under Roman Law, it was not the transfer of ownership, but rather the transfer of peaceful possession, which fulfilled the obligations of the seller.

ii) To **take care of the thing until delivery**:

the seller must exercise diligence in the period of custody of the thing until it can be duly transferred to the buyer. During this period, the seller would be liable for damages to the thing ***in case of negligence and dolus***, but would not be liable should the thing perish by **accident** or by factors **outside the control of the seller**. It is important to note that in sale, the thing purchased is so purchased at the risk of the buyer - if the thing perished or was stolen from the seller, then the buyer will have to pay the price, provided that the perishing of the thing was done independently of the seller. This is precisely because the contract of sale is a **consensual contract**, concluded by the agreement of the parties, and not upon the delivery of the time. Under Roman Law, this theory of risk applied solely when the price and the thing are ascertained and unconditional (not subject to a suspensive condition).

iii) To **guarantee against eviction** and to **indemnify** in all cases of molestation or eviction which arise following the delivery.

This protection serves in favour of the buyer and against acts by third parties. This was considered to apply **until the buyer made good title by continued and acquisitive**

prescription. This duty to guarantee and the liability of the seller are subject to conditions such as the fact that the seller is **liable for cases of defect in title and** is responsible for indemnification. Such defect, however, cannot arise as a consequence of neglect by the buyer, in which case the seller is not responsible. This liability, however, is **excluded** when the buyer is **aware** of some defect or uncertainty as to the title of the thing before the contract of sale was entered into.

iv) To **guarantee against undisclosed defects**.
If the seller had guaranteed the existence of certain qualities or the absence of defects, or if he failed to disclose any defects of which he was aware, the seller is deemed liable for damages.

The seller, under Roman Law, need **not** have been the **owner of the thing**. This indicates that under Roman Law, a person was not precluded from selling a **res aliena.** The sale of such res aliena did not nullify the sale or void the effects of the agreement, but rather it meant that the seller had the duty to give warranty against eviction. This is not the case today - under modern law, the sale is **null and void** if the seller was not the owner of the thing to be sold. Today, one cannot sell a res aliena.

Duties of the Buyer under Roman Law

i) To **pay the price**, with interest if the payment is overdue. Here, the question of good faith arises, as the buyer is not bound to pay for the thing in question if the seller is unwilling to fulfil his duties as the vendor and to satisfy his reciprocal obligations in the contract of sale.

ii) To **take delivery** as soon as the seller tendered it, or at the time agreed. In such instance, any costs properly incurred to the seller between the date of the contract and the delivery were charged to the buyer.

The Law of Sale under Maltese Law

Under Maltese law, the law of sale is contained under **Title VI of Part 2 of Book Second** of the Civil Code. The Consumer Affairs Act (Chap 378) also plays an important role in the law of sale, since certain information pertaining to the sale of movables costing less than €5000 and the sale of dangerous goods is contained in this piece of legislation. This is indicative of the fact that both movables and immovables are subject to being sold, albeit via different procedures and formalities.

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

Article 1346 opens Title VI of the Civil Code by defining the **contract of sale**. In this particular contract type, the seller is binding himself to the transfer of ownership of the thing to the buyer. **Torrente** argues that ***sale is that contract which has, as its object, the transfer of ownership of the thing, or the transfer of any other right, in exchange for the price***.

Here, two parties emerge - the vendor (seller), and the buyer. The contract of sale is thus a **synallagmatic contract**, by which both parties are bound by each other to fulfil their reciprocal obligations. The contract of sale is thus also an **onerous contract**, by which both parties are procuring some advantage as a result of the contract. Moreover, the contract of sale is **consensual**, in that the contract is entered into upon the **agreement of the seller to transfer the ownership of the thing and of the buyer to pay the sum agreed upon**. The validity of the contract of sale is thus not contingent upon the delivery of the thing, or the payment of the sum, since **the contract begins to exist upon the agreement of the parties**. Once the parties agree to the terms of the sale, the contract is concluded and the obligations begin to exist.

As previously mentioned, the distinction between the Roman Law on sale and Maltese law on sale is that under the former, the seller was bound to ensure peaceful possession over the thing in favour of the buyer, **while in the latter, the seller's duty is to ensure the transfer of ownership of the thing.** To this extent, the Maltese position is founded on the French Tradition, which purports the same.

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

Article 1347 holds that the contract of sale is complete **upon the agreement** of the terms, even though the thing has not yet been delivered nor the price paid. From the moment of conclusion of the contract, the thing remains at the risk of and for the benefit of the buyer. Exceptions to this rule, however, can be seen in the case of agreements between parties to delay the transfer, for instance. This tends to occur in cases of hire purchase. In such instances, the purchaser agrees to pay for the thing in instalments or in percentages over a stipulated and agreed period of time. When hire purchase arises, the ownership of the thing is transferred **only when the final sum of money is paid to the seller**. The seller thus retains the ownership of the thing until the entire amount has been paid. This retention of ownership until such sum is completely effected is referred to as ***pactum de reservati dominii*** and remains to be classified as a contract of sale, effective by means of a **suspensive condition**.

Victor Soler nomine vs Josephine Pace et, decided on 6 October 1999.

The First Court had concluded that the defendant's obligation to transfer the vehicle only with the plaintiff's consent merely meant an obligation on the buyer not to sell the vehicle to third parties, and nothing more. However, the Court of Appeal did not agree with the First Court's interpretation because:

"... the ownership of the car was governed by the hire-purchase agreement through which it had been acquired by the defendant Chetcuti, and not by any declaration made by the contracting parties for the purpose of transferring its registration and licence. The terms and conditions of the sale are those resulting from the agreement of sale. There is no doubt, and this is expressly stated by the contracting parties, that this is a contract of hire purchase, that is, **location-vente**, or the pact of *riservato dominio* (retention of title)."

In that case, the contract contained an express condition that the vehicle would remain the property of the selling company until the full price, including interest and other expenses, was paid. In the case under examination, there is no such declaration.

Soler nomine vs Pace et case:

· It clarified that **registration certificates do not establish ownership**.

· It explained that **hire-purchase contracts must expressly state that title remains with the seller**; otherwise, they do not operate as "location-vente".

· It prevented parties from claiming ownership rights based on vague contractual clauses about consent or transfer.

· It distinguished **hire-purchase** from a **contract of sale** under Maltese law.

Theory of Risk

Within **article 1347,** we find the notion of the **theory of risk**. Once there is the conclusion of the contract of sale, the buyer bears the risk of the obligation in relation to the thing sold. If something were to happen to the thing independently of the seller's actions, the buyer is bound to pay the price notwithstanding that the thing has perished. The risk borne by the buyer for loss or damage suffered to the thing is referred to as ***periculum est emptoris***. Once the ownership is transferred from the seller to the buyer, the ***periculum est emptoris*** is also transferred. In the judgement ***Giuseppe Scicluna vs Andrea Fenech*** *(FHCC, 10 July 1888)*, the Court referred to **article 994** of the Civil Code to establish the theory of risk in relation to the law of sale. This article holds that where the basis for a contract is the alienation of the ownership of a thing, then the ownership is transferred upon the agreement of the parties, and the risk attached to the thing is borne by the party receiving such right;

994. Where the subject-matter of a contract is the alienation of the ownership, or of any other right over a certain and determinate thing, such ownership or other right is transferred and acquired in virtue of the consent of the parties, **and the thing remains at the risk of the alienee, even though the delivery thereof has not taken place.**

If, during the period of time between the conclusion of the contract and the time of delivery, the seller is burdened with certain expenses for the maintenance of the thing, **the seller is entitled to request reimbursement of such expenses**, since the seller is paying for the preservation of a thing the ownership of which is vested in the buyer. The buyer is the owner of the thing, and thus he bears all expenses related to the maintenance of the thing following the conclusion of the contract. This is **unless there is a suspensive condition**, such as an **agreed time of delivery**, or the **hire purchase** we have mentioned earlier.

We must also take note of the **sale in mora**, meaning that if the seller fails to deliver the thing due to his
own fault, then the thing is transferred back to him, even if it was previously in the hands of the buyer.
Furthermore, when a contract of sale is made with a **suspensive condition**, the agreement will have no effect if the thing perishes or deteriorates without the fault of the debtor. Although the law provides for this
default position vis-a-vis the theory of risk (vide arts 994 and 1347), **the law does not prohibit the seller and buyer from agreeing that the effects of ownership and risk are to operate differently** and at different moments. This is precisely because our law on contracts is founded on the **teorija della volonta'**, and thus the parties may agree to different terms, provided they bind themselves to such terms following the conclusion and **provided they were capable and gave their consent when entering into such contract.**

The Promise of Sale of Immovables

Many of the questions which have arisen in Court over the years pertain to the **konvenju** – the **promise of sale**. In order to have a public contract detailing the transfer of an immovable property, **there must be a promise of sale**.

1357. (1) A promise to sell a thing for a fixed price, or for a price to be fixed by one or more persons as stated in the foregoing articles, **shall not be equivalent to a sale; but, if**

accepted, it shall create an obligation on the part of the promisor to carry out the sale, or, if the sale can no longer be carried out, to make good the damages to the promisee.

(2) The effect of such promise shall cease on the lapse of the time agreed between the parties for the purpose or, failing any such agreement, **on the lapse of three months from the day on which the sale could be carried out**, unless the promisee calls upon the promisor, by means of a judicial intimation filed before the expiration of the period applicable as aforesaid, to carry out the same, and unless, in the event that the promisor fails to do so, the demand by sworn application for the carrying out of the promise is filed within thirty days from the expiration of the period aforesaid.

(3) A promise of sale or purchase, by whatever name called, of ships and aircraft, including an aircraft engine, shall be regulated by the provisions of any agreement between the vendor and the purchaser in accordance with its terms as well as by the international usages of trade applicable in the context. Sub-article (2) shall not apply in such cases and:

(*a*) the effect of such promise shall cease on the lapse of time or on the events agreed between the parties for the purpose; and
(*b*) any notices which may be required to be given by the parties may be given by notice in writing in any manner, including by electronic means.

Therefore, while in most scenarios, the agreement on the thing to be transferred and the determination of the price is enough to validate a contract of sale, the same is not true when discussing the sale of immovables. In order for a sale of an immovable to be valid, a **promise of sale** must be entered into by the parties.

There is some debate as to whether the promise of sale is to be deemed a **bilateral contract** or whether it is to be deemed **unilateral**. **Prof Caruana Galizia** agrees with **Troplong**, who argues that a promise of sale is a **unilateral contract**. The promise of sale is **only binding on the promisor,** as opposed to the sale itself, whereby both parties are offering and accepting mutually respective obligations. According to **Pothier**, the promise of sale is a contract by

which the promisor is **binding himself**, while the promisee is not bound in any manner whatsoever.

In ***Giovanni Fiott vs Avv. Dr Lorenzo Cauchi*** *(CoA, 15 December 1947),* ***the Court*** held that a unilateral promise of sale accepted without the promise to buy gives rise to a simple obligation of the promisor to give consent to the sale when the promise calls upon him to do so.

In ***Carmel Agius vs Pawlu Cilia*** *(CoA, 6 April 1993),* the Court **argued differently**. In this judgement, the Court referred to **article 1360**, which states;

> **1360.** The provisions relating to a promise to sell, shall apply to a promise to buy.

The Court therefore reasoned that a promise of sale incorporates both a promise to sell as well as a promise to buy simultaneously, and thus the contract ought not be classified as one which is unilateral, but rather one which is **bilateral**. This raises the question that once the first section gives rise to bilateral obligations, why should there be a second section, 1360.

Requirements for the Promise of Sale

Within the promise of sale agreement, anything relevant to the property must be listed and made known to the buyer, including any **easements, price to be paid, ground rent, emphyteutical associations, etc**. The PoS must also stipulate whether or not the buyer is obtaining a loan or not in order to finance the purchase. On such an agreement, the bank would enter into the shoes of the seller and enjoy a privilege over the thing being sold.

There are 2 primary reasons for which the parties must enter into a promise of sale prior to the sale itself, being;

1) That **the money to purchase such immovable will almost never be readily available**; and

2) The **requirement of research on transfers** and liabilities associated with the immovable, including the notary's research on whether the seller is the owner of the property, to ascertain whether the title of the owner is valid, to examine the root of the title, etc.

Through jurisprudence, several requirements for a valid promise of sale agreement have emerged;

1) It must be **done in writing**, per **article 1233 (1)(a)** of the Civil Code. This writing need not be drawn up by a lawyer or notary, as confirmed in ***Grech Cristal Bath vs Patiniott Grezzju*** *(FHCC, 13 May 2002)*
2) The Promise of Sale must reflect the **consent of the parties through signatures**;
3) The Promise of Sale must **contain the promise of transfer**, which effectively becomes the **object of the agreement**;
4) The Promise of Sale must clearly **state the title by which the object is to be transferred;**
5) The Promise of Sale must **clearly indicate the price**.

The preliminary agreement is a contract, and thus, the elements for the validity of a contract, per **article 966,** must be present during the entering of such contract. When the sale is complete, that contract is a **public contract**, contrary to the **preliminary agreement, which is a private writing**.

Another difference between the promise of sale and the contract of sale is that in the promise of sale**, no transfer of ownership is yet effected**, whereas in the contract of sale, the conclusion of the contract **equates to the transfer of ownership of the thing**.

Effects of the Preliminary Agreement

Article 1357 (1) holds that if a promise to sell **for a fixed price** is accepted, it shall create an **obligation on the part of the promisor to carry out the sale** or, if the sale can no longer be carried out, to make good the damages owing to the non-fulfilment of the promise. Such damages may only arise in cases where it is impossible for the promisor to execute his

promise - **otherwise, the Court will simply effect the completion of the sale, by substituting its consent for the consent of the seller**. The right of the purchaser is a **personal right**, and thus it is only he who can enforce the contract of sale. Because the right is personal, the buyer may only proceed against the seller for damages, even if the thing lies in the hands of third parties.

The law offers further protection to the promisee by means of **judicial sequestration**. The Court may direct the thing to be deposited with, or delivered to, a third party who will be entrusted with its safekeeping until the case is decided. However, the Court may not authorise such a measure unless the Creditor deposits a security for the future payment of damages and interests in the case that the claim is unfounded.

The damage referred to in **article 1357** relates to **actual loss, expenses incurred, loss of wages or earnings,** and **loss of future earnings**. The vendor is able to aggravate the promise of sale agreement if he sells the thing to a third party while the promise is still effective. The promisee could attempt to obtain a **warrant of prohibitory injunction** from the Court to prohibit the vendor from selling the property to third parties.

The promisee is able to exercise the ***actio pauliana*** only if the sale to third parties has occurred and he shows there was consiglium fraudus(a fraudulent conspiracy) between third party and the original promisor. In that case he can attack the contract between them when it's been done.

Jurisprudence suggests that damages in such a case may only arise when the sale is materially impossible to exercise. The causes are various. It could be that the promisor is not the owner, that the property does not correspond with its description or is otherwise burdened with hypothecs or servitudes that make the sale impossible.

Today, the *actio pauliana* can be instituted, provided that the promisee proves;
1) That the promisor entered into a new contract fraudulently(consiglium fraudus);

2) That the buyer knew of the preexisting promise of sale, indicating and demonstrating bad faith.

Per **article 1357**, the promisee is awarded 2 different remedies if the promisor fails to appear on the final deed;

1357. (1) A promise to sell a thing for a fixed price, or for a price to be fixed by one or more persons as stated in the foregoing articles, shall not be equivalent to a sale; but, if accepted, it **shall create an obligation on the part of the promisor to carry out the sale**, or, if the sale can no longer be carried out, to **make good the damages to the promisee.**

The remedies of 1357 are that of the **specific performance of the obligation** or of **damages**. Damages and interest are only awarded when it is impossible for the promisor to execute his promise. If the sale is still possible, then specific performance (the forced execution of the contract) is resorted to. In the cases of ***Mallia vs Portanier,*** the Courts held that the provisions of specific performance are exceptional and cannot be extended from one case to another.

If, during the promise of sale, the seller sells to a third party, then the promisee may make use of the Actio Pauliana. However, the sale can only be attacked if the promisee can prove that the **third party was aware of the promise of sale**. In such a case, the promise may only proceed against the promisor for damages. If the bad faith of the third party cannot be proved, the only legal remedy available is that of the warrant of prohibitory injunction.

Sum paid in Earnest vs a Deposit

When questioning whether a promise of sale materially binds the parties, one must refer to the wording in relation to the price. If the words ***on account of the final price*** are utilised, then the agreement is binding, because the money paid was a deposit of the final price. This is provided for in **1357 (1)**;

1357. (1) A promise to sell a thing for a fixed price, or for a price to be fixed by one or more persons as stated in the foregoing articles, shall not be equivalent to a sale; but, if accepted, it shall create an obligation on the part of the promisor to carry out the sale, or, if the sale can no longer be carried out, to make good the damages to the promisee.

(2) The effect of such promise shall cease on the lapse of the time agreed between the parties for the purpose or, failing any such agreement, on the lapse of three months from the day on which the sale could be carried out, unless the promisee calls upon the promisor, by means of a judicial intimation filed before the expiration of the period applicable as aforesaid, to carry out the same, and unless, in the event that the promisor fails to do so, the demand by sworn application for the carrying out of the promise is filed within thirty days from the expiration of the period aforesaid.

1359. Where in any promise to sell, **earnest has been given**, each of the parties shall be at liberty to recede from the contract: the party giving the earnest forfeiting such earnest, and the party receiving the earnest returning double the amount thereof, saving any other usage in regard to the particular contract in respect of which earnest has been given.

One must distinguish between a **penalty clause** and a **sum paid in earnest**. The judicial difference between the two is that while the former is a **promise of a future payment to which one submits to *sponta sua***, the latter consists in the effective and actual delivery of money delivered as a sign of good faith which is forfeited if one pulls out. An earnest payment is a specific form of security deposit made in some major transactions such a real estate dealings or required by some official procurement processes to demonstrate that the applicant is serious and willing to demonstrate an earnest of good faith about wanting to complete the transaction.

In relation to this, we must refer to ***Manche vs Farrugia***, wherein the parties had entered into a preliminary agreement of sale but who did not finalise the final contract of sale. The Plaintiff (buyer) had sued the seller for the amount of earnest (kappara) she had paid, claiming that the contract was not finalised because the preliminary agreement had lapsed

without the defendants having done anything so as to finalise the contract, such as sending a judicial intimation. The Court of Appeal has concluded that each of the parties has a duty, and if they wish to preserve the right to keep the earnest, they must file a judicial intimation addressed to the other party, informing them that if they do not initiate the final contract of sale, then the party submitting the judicial intimation will retain the earnest paid.

This judgement garnered criticism, as the Court is placing the wording per **article 1357 (2)** on the same level as the wording per **article 1359** (*'in earnest'*). This proves against the reasoning of the law, which held that per article 1359, one may exit the promise of sale against a penalty, being the earnest.

Earnest is the right to withdraw. If we don't appear, who has lost it and who has won it?

The judicial letter is used to define who the defaulting party is apart from preserving the validity of the promise. Earnest is retained and or paid by the non-defaulting party.

In the case of **deposit** (*on account of*), the sum paid is considered to be a guarantee of the final sum which must be paid upon the finalisation of the sale. In this case, both parties are obliged to appear on the final deed. If it is unclear whether the parties are paying a deposit or earnest, the Court will generally favour the idea that the sum was a **deposit,** as held in ***Cini vs Agius***.

This judgement also held that there are cases where a party may exit the promise of sale provided that valid reasons exist, without losing the earnest paid. In ***Hutchinson vs Cortis*** *(FHCC, 5 February 1992)*, the Court held that three requirements exist for one to exit the promise of sale agreement without losing earnest, being;

1) There is an **unjustified default** of the other party;
2) The availability of the party that is claiming the earnest to come to the definitive contract of sale;
3) The refusal of the other party to do so. This refusal can only be proven definitely by the party's
failure to come forward on the final contract of sale after an agreement was held to sell.

Hutchinson vs Cortis - *PoS with earnest given, when parties may exit*
FHCC, 5 February 1992

The party seeking to obtain the forfeiture of the earnest must first prove that the necessary elements triggering such forfeiture existed — namely, the other party's breach. This presupposes that the party claiming the earnest was **ready and willing to appear for the final contract**, and that the *other* party refused to do so. Such refusal can only be definitively proven by that party's **failure to appear for the contract after having been duly and formally summoned**, according to the circumstances of the case, to do so.

These requirements are in line with what ***Baudry-Lacantinerie*** believes, who argues that a preliminary agreement where earnest has been given denotes that **the consent of the parties has not been given definitely, and thus each party retains the right to exit the promise and withdraw their consent.**

Contrary to popular belief, there is no legal requirement for money to be paid at the signing of a "konvenju". However, there are legal consequences for both parties should such a sum be paid. This sum **can be part of the final price, known as a deposit – usually around 10% of the final price**. When a sum is paid in earnest, or as "kapparra", neither of the parties is legally bound to appear at the final contract of sale; both parties are however bound by a penalty clause.

Should the promisee withdraw from the agreement and fail to appear on the final contract of sale, he or she loses the sum paid in earnest to the promisor; conversely, should the promisor withdraw, they would then be liable to repay the promisee double the sum which he or she had deposited in earnest. If a preliminary agreement lapses without any of the parties having done anything about it, the Court noted that the preliminary agreement **loses its effect,** and if the money paid was a deposit of the final price, the parties must return the sum to the ***status quo ante contractum*** - the state of affairs prior to the contract. The restitution of the deposit paid was due irrespectively. This, however, does not apply in cases where the money paid was given in **earnest**, and not **on account of the final price**.

1357 (2) The effect of such promise shall cease on the lapse of the time agreed between the parties for the purpose or, failing any such agreement, on the lapse of three months from the day on which the sale could be carried out, **unless the promisee calls upon the promisor, by means of a judicial intimation filed before the expiration of the period applicable as aforesaid**, to carry out the same, and unless, in the event that the promisor fails to do so, the demand by sworn application for the carrying out of the promise is filed within thirty days from the expiration of the period aforesaid.

Article 1357 (2) states that the effects of the promise of sale cease upon the lapse of time as agreed to between the parties for the sale to initiate, or else on the lapse of 3 months from the day on which the sale could be carried out - **unless the promisee files a judicial intimation calling upon the promisor to fulfil his duties to contract the sale before such lapse of time**. Note that this is only in the case of a promise to sell **for a fixed price**. If the promisor fails to carry out the sale after having been called upon by the promisee, then the **promisee may demand by sworn application for the promise to be fulfilled by the promisor within 30 days from the expiration of the lapse of time**.

Thus, for the promisee to enforce the promise of sale, provided that such promise of sale is done for a fixed price, he must first **file a judicial letter in Court before the lapse of the agreed time limit** (3 months if no such agreement was made), and then he must **file a writ of summons within 30 days from the lapse of time aforementioned**, if the promisor does not appear to finalise the contract. In the lack of this procedure, the effects of the PoS are null and void.

Mangion Camilleri vs Farrugia et *- nullity of the effects of the PoS per 1357*
CoA, 28 December 2001

Therefore, according to Article 1357(2) of the Civil Code as cited, for the plaintiffs' claims to be upheld and for the defendants to be ordered to pay the amount requested in terms of the obligations they assumed in the promise of sale, the respondent plaintiff had to:

(a) **First**, summon the defendants by means of a judicial act to appear for the final transfer **before the expiry of the validity period** of the same promise of sale, that is, by 30 November; and

(b) **Subsequently**, if the defendants continued to fail to appear for the final transfer, the plaintiff then had to bring his claim by means of a further procedure, namely through the **specific judicial act of a citation**, to which the Legislator has given explicit and express reference.

From the above, it is beyond doubt that the clear intention of the Legislator is that whoever, under the terms of a promise of sale, wishes to validly and in accordance with the law compel the other party to fulfil their promise, is **obliged by law to follow a judicial procedure consisting of two distinct phases or stages**, which have been so precisely delineated by the Legislator himself and are **required for the validity** of the action.

Release from the Obligations of the PoS

There are 6 principal defences which may be raised in order to be released from the obligations of the Promise of Sale.

1) A lack of the **requisites of a contract**. Per Article 966 of the Civil Code, every contract is invalidated **ab initio** if there is a lack of **capacity, consent, object,** and **causa**. The absence of one may either invalidate the promise of sale ab initio or else it may allow one of the parties to withdraw from the agreement. In ***Cutajar vs Petroni***, the Court decided that the plaintiff had the right to withdraw from the PoS **since there was a mistake in the description of the immovable, and thus consent was vitiated.**

2) A lack of the **vendor's warrants**. As shall be seen below, the vendor is obliged to warrant the **peaceful possession** of the thing sold as well as the **warrant against latent defects of the object**. He must guarantee that the object is free from any burdens, such as servitudes or hypothecs. Alternatively, he must make the buyer aware of such burdens, in which case the PoS is valid if the buyer consented notwithstanding his knowledge of such burdens. In

Sciberras vs Scicluna, the civil Court held that no one is bound to buy the property of which he cannot have the peaceful possession due to causes imputable to the promisor of the sale. As for the issue of latent defects, the CoA held, in ***Cini vs Cassar***, that latent defects give the promisee the right to refuse the purchase.

3) The **total loss or destruction of the thing**. In the case of a promise of sale, the ***periculum rei**** **does not pass to the future buyer until the contract of sale is actually drawn up**. In ***Calleja vs Vella***, the Court held that the partial destruction of the thing gives the buyer the right to retract from the contract or the right to purchase at a reduced price.

- In contract and property law, it refers to **who bears the risk of loss or damage to the object of the contract** (the "thing") if something happens to it before the transaction is completed.

4) The **state of the immovable** must be such that it **cannot be burdened with any servitude or disadvantage not known by the buyer**. In ***Ellul vs Said***, the Court has suggested that the buyer has the right to retract from the sale **unless the seller is able to ensure that the property is free and unencumbered at the time of the sale**.

5) Where the **vendor's title is defective**. In the case of ***Vassallo vs Borg***, the plaintiff's withdrawal was justified because he could not be expected to take risks and expose himself to molestation and eviction from the property purchased.

6) Where there is a **defect in the private writing or in the public deed**. In ***Bonello vs Borg***, the Court laid down that if the promise of sale and purchase of an immovable is not put down in writing, none of the parties are obliged to honour the agreement.

Formalities Concerning the Contract of Sale

Persons Capable of entering into a Contract of Sale

1365. All persons may buy or sell, except those who are by law prohibited from so doing.

Article 1365 holds that all persons are capable of entering into a contract of sale, except those prohibited by law from doing so. Such persons prohibited from entering into a contract of sale include; **minors**, those **interdicted** and **incapacitated**, **spouses selling to each other**, through **intermediaries to tutors** or **curators** in relation to property belonging to persons under their tutorship or curatorship, etc.

1366. A contract of sale between spouses is null, except in the following cases:
(*a*) when the spouse assigns property to the other spouse in payment of a sum owed to that spouse in respect of a dowry;
(*b*) when the object of the sale or assignment which one of the spouses makes to the other is the payment of a debt due to the buyer or assignee, or the investment of money belonging to such buyer or assignee:

Provided that where in the cases aforesaid any indirect advantage results to either of the spouses, it shall be lawful for the heirs of the other spouse, or for any other person interested, to demand that the contract be rescinded *pro tanto.*

1367. The provisions of the last preceding article in so far as they prohibit either of the spouses from buying property from the other, shall not apply to cases where property is sold by auction on the demand of the creditors of the spouse to whom such property belongs.

Article 1366 states that **spouses** are unable to enter into a contract of sale with the other spouse, except in 2 cases;

1366 (a) - in the case of payment of a sum owed to that spouse in respect of a dowry, and
1366 (b) - in the case that the object of the sale is the payment of a debt due to the buyer.

Article 1367 states that the prohibition contained in article 1366 does not apply in the case that the property is sold by auction on the demand of the creditors of the spouse to whom such property
belongs. The invalidity of sale made vis-a-vis tutors and curators is covered by **article 1368**;

1368. The sale, however, made, either directly or through intermediaries, to tutors or curators in regard to property belonging to the persons under their tutorship or curatorship, or to agents in regard to property which they are authorized to sell is null, even though such sale was made by judicial auction.

Object of the Sale

In this regard, we shall consider 4 qualities which render the object of the sale valid in terms of the law, being that the object must be **in commercium, possible, belonging to the vendor**, and **lawful**.

Art 1370 - Things in Commercium

1370. All things which are not *extra commercium* may be sold, unless the alienation thereof is prohibited by any special law.

Article 1370 holds that all things which are **in commercium** are capable of being sold. This means that in order for a thing to be the object of a sale, it must be within commercial intercourse, in that it must be **capable of being owned**. One cannot therefore sell parts of the High Sea, or public spaces.

Art 1371 - Possible

1371. (1) The sale of future things is conditional; and **if the thing sold shall not exist at all, the sale shall have no effect.**

(2) Where, however, the subject-matter of the sale is an expectancy of a future thing, the sale is absolute and unconditional, and the buyer is bound to pay the price even though the thing shall not exist at all.

(3) In case of doubt, the sale is presumed to be conditional.

Article 1371 holds that the sale of future things is possible, provided that if the future thing fails to exist, the sale is invalid and has no effect. **This is unless the subject matter of the sale is the expectancy of a future thing,** in which case the sale is valid even if the thing fails

to exist at all. In cases of doubt, the presumption is that the sale of future things is conditional, and not absolute.

Article 1372 - it must belong to the Vendor

1372. Saving the provisions of article 559 and the provisions relating to Il-Monti in regard to pledges, the **sale of a thing belonging to another person is void**: Provided that such sale may give rise to an action for damages if the buyer was not aware that the thing belonged to another person: Provided also that the nullity of such sale may in no case be set up by the seller.

One is thus precluded from selling a **res aliena** (i.e - a thing belonging to another person). The contract, to this extent, is void. Per **article 1372 (3)**, the Seller **cannot set up the nullity of the sale of a thing which is not owned by him**. It is only the buyer who may nullify the contract in this regard. This is what is referred to as **relative nullity** (i.e - nullable solely by the victim to the injury).

The effect of nullity of the contract is that the parties return to their state of affairs prior to the entering into that contract. However, the **purchaser may still retain the right to institute an action for damages** if he was purchasing in good faith. This action may be considered as an anticipated action for warranty. However, if the buyer was in bad faith and aware of the fact that the thing was ***res aliena***, then he forfeits the right to claim for damages. This position is different to the position under Roman Law, wherein the selling of a *res aliena* was not deemed to be a ground to nullify a contract of sale.

The true owner of the property has the opportunity to institute an *actio rei vindicatoria* against the possessor to recover ownership, and an action for eviction against the purchaser if the sale already went through. The true owner, however, cannot prevent the sale *a priori*, considering his rights are sufficiently protected through the ARV, as discussed in ***John Mizzi***

v. Petty Officer John Crowther, wherein the Court based its argument on the teachings of **Ricci**.

John Mizzi v. Petty Officer John Crowther - *sale of a res aliena*
FHCC, 4 June 1955

The sale of another person's property is null. But this nullity may be invoked **only by the buyer**. The buyer has the right to demand **specific performance** of the sale, and the seller cannot escape performing the contract by alleging the nullity of the sale on the ground that the thing sold belongs to someone else.
Nor does it matter that the true owner objects to the property being transferred to the buyer. The rights of the true owner over that property are sufficiently protected by the **rei vindicatio** (action for recovery of ownership). A circumstance not foreseen by the contracting parties, and not dependent on their will, constitutes a case of **force majeure**, which does not exempt the debtor from observing the agreement.
However, the sale of another person's property gives rise to a claim for **damages** only if the buyer was **unaware**, at the time of the agreement, that the thing belonged to someone else. If the buyer **did know**, then although he can still demand performance of the contract, he **cannot** claim damages.

The seller's good faith is irrelevant when it is the buyer who is bringing the action. The buyer has the right to claim damages if he did not know, at the time of the agreement, that the property belonged to another.

Moreover, in ***Gerarda vs Zammit*** *(8 June 1904)*, the Court held that the principle of the nullity of a *res aliena* applies also to those instances where the thing had **already previously belonged to the buyer**, except in cases of *il-monti* pledges and where the thing was lost by the buyer and recovered by the vendor in good faith.
Thus, in order to sell something, the thing must belong to the seller - ***nemo dat quad habet*** (the purchase of a possession from someone not the owner subsequently denies the title of ownership to the purchaser).

Price in the Contract of Sale

1352. (1) The price must be in money.

(2) Nevertheless, the contract shall not cease to be a contract of sale if, in addition to the sum of money agreed upon, the buyer binds himself to give some thing in kind by way of a supplement to the price.

In the contract of sale, the price represents the **obligation of the buyer** in consideration of the thing sold by the seller. Article 1352 stipulates that the contract of sale cannot be one of exchange and cannot be made in consideration of a thing which is not money. However, per **1352 (2)**, the contract of sale is still valid if the buyer binds himself to give something in kind by way of a **supplement to the price**. In this scenario, there is still money which is being paid, and so the law is clear that a contract of sale is invalid if the buyer pays the seller in kind, with no monetary consideration.

In ***Joseph Fenech vs Salvatore Debono*** *(CoA, 24 October 1955)*, the Court stated that sale entails an *obbligazione di fare* in exchange for an *obbligazione di dare.*

1353. (1) The price must be fixed and stated by the parties.

(2) It may, however, be left to the decision of one or more persons specified by the parties; and in such case if such person or any of such persons is unwilling or unable to fix such price, the sale is void.

The price must be qualified as **true** or **serious**. It must also be **fixed and stated by the parties**, and thus the Court can never determine a price independently of the will of the parties. The Parties may agree that another person is to fix the price of the sale, per **article 1353** and **article 1354**;

1354. The price may **also be left to the decision of one or more experts not specified by the parties**; and, in such case, if the parties fail to agree as to the expert or experts to be appointed, the appointment shall be made by the court.

In this case, if either of the parties **refuses the price stipulated by the expert, then the contract of sale is invalid.** Further, if the parties do not agree on the expert to be appointed, then they may request the Court to appoint such other expert.

Form of Contract

1363. (1) The sale of immovable property shall be null if not made by a public deed. (2) It shall also be null if the purchase is made *pro persona nominanda.*

In ***Caruana vs Grech*** *(1917),* the Court held that the sale of an immovable is perfected and the right to ownership is transferred upon (1) the **agreement of the parties** on the object and price and (2) the **publication of the contract in the public registry**. After these 2 conditions are met, the contract is deemed ***erga omnes*** effective. As specified in sub article 2 the contract shall also be null if made pro persona nominanda.

Obligations of the Seller

1378. The seller has two principal obligations, **namely, to deliver,** and to **warrant the thing sold**.

Article 1378 denotes and classifies the **obligations of the seller** into **2 principal categories**, being the **delivery of the thing sold**, and the **warranty of the thing sold**.

The Obligations of Delivery

Delivery relates to the transfer of possession of the thing sold. As previously stated, the ownership is transferred upon the agreement of the price and the thing, in the case of moveables, and upon the publication of the contract with due formalities, in the case of immovables.

There is a distinction to be made between **delivery and carriage**. Delivery refers to the handing over of the object, with the expenses for such a process to be borne by the seller, per **article 1383**. Carriage, on the other hand, refers to the transport of the thing, with such expenses being borne by the buyer as per **article 1383 (4)**

1383. (1) The expenses of **delivery** are at the **charge** of the **seller**.

(2) Such expenses shall include those of weighing, counting or measuring the thing, where the sale is made by weight, number or measure.

(3) The expenses of weighing, counting or measuring are at the charge of the buyer where the sale is made in bulk and the weighing, counting or measuring is required by the buyer in order to ascertain whether the thing sold is according to the quantity stated or promised to him.

(4) The expenses of **carriage** are at the **charge** of **the buyer**.

Effecting Delivery

The process of delivery is contingent on the nature of the thing sold. In the case of immovables, we refer to **article 1379;**

1379. The delivery of immovable property takes place *ipso jure* on the publication of the contract of sale, saving, as regards the delivery of possession of property sold by judicial auction, the provisions of the Code of Organization and Civil Procedure.

This provision argues that the delivery is to take place ***ipso jure*** on the publication of the contract of sale, saving as regards the delivery of possession of property sold by judicial auction.

In the case of movables, we refer to **article 1380**;

1380. The delivery of movable property takes place either by **handing the property to the buyer**, or by **handing to him the key of the place in which the property is lying**, or by **handing to him the documents of title the delivery of which operates**, according to law, the transfer of the property to which such documents refer, or by **causing the buyer to be acknowledged by the persons in whose possession the property exists**.

This provision provides for a number of manners through which the delivery can take place, such as;

- The handing of the property or the key to the place where the property is lying to the buyer;
- The handing of the documents of title to the buyer;
- The causing of the buyer to be acknowledged by the person in whose possession the property lies.

1381. The delivery of movable property takes place also by the mere consent of the parties -

(*a*) when the thing sold is already in the possession of the buyer; or
(*b*) when the seller who has reserved to himself the enjoyment of the thing sold acknowledges that he holds the thing on behalf of the buyer; or
(*c*) when the transfer of the thing sold cannot be effected at the time of the sale:

Provided that in the cases mentioned in paragraphs (*b*) and (*c*), such delivery shall not operate to the prejudice of third parties.

Movable property can also be delivered by mere consent as per **article 1381** in 3 distinct cases, being when the thing is already possessed by the buyer, when the seller acknowledges that he holds the thing on behalf of the buyer, or when the transfer of the thing sold cannot be effected at the time of the sale.

Except for these cases of mere consent, when the object of the sale is a **corporeal moveable**, there must be the **physical delivery of a thing**. In cases where the object of the sale is **incorporeal**, we refer to **article 1382**;

1382. The delivery of incorporeal things **takes place either by the use** which the buyer makes of such things with the consent of the seller, or by **handing over the documents of title** in the case of any right the title to which is transferable by endorsement or delivery.

This provision argues that delivery takes place either by the use which the buyer makes of such things with consent of the seller or by handing over the documents of title in the case of any right which is transferable by delivery.

Article 1384 holds that the **delivery must be made** at the **place where the thing was at the time of sale**.

1384. Delivery must be made at the place where the thing was at the time of the sale.

There is a presumption that the delivery must take place at the premises of the seller and this is why the expenses of delivery are to be borne by the seller, while expenses for carriage are to be borne by the buyer.

1385. If the seller fails to make delivery at the time agreed upon, **the buyer may elect either to demand the dissolution of the contract or to demand that he be placed in possession of the thing sold**, provided the delay has been caused solely by the seller.

The buyer may either demand the dissolution of the contract and claim damages, or he may demand that he be placed in possession of the thing sold and claim damages. This is subject to the proviso that the delay has been caused solely by the seller.

Quality

A situation may arise whereby the quality of the thing delivered does not match that which was promised during the finalisation of the contract of sale.

1390. If the thing which the seller offers to deliver is not of the quality promised, or is not according to the sample on which the sale was made, **the buyer may elect either to reject the thing and demand damages, or to accept the thing with a diminution of the price upon a valuation by experts.**

Article 1390 provides that the buyer may either **reject the thing and demand damages**, or else he may **accept the thing with a diminution of the price**, upon a valuation made by experts. The situation of something of different quality being delivered must be distinguished from a situation where an object is delivered with a **latent defect**. In the case of **article 1390**, there is no latent defect, since we are not speaking of a defect which was not disclosed, but

rather of a **discrepancy in the quality of the thing** delivered. This distinction is pivotal for purposes of **prescription** as well as **remedy**. In ***Pace vs Castle Management Ltd***, the Court held that if a defect can be fixed, it means that the **product was defective,** and not that it **lacked the stipulated quality**.

In terms of remedies available for the two different situations, the Court argued in ***Philip Degiorgio vs Kenneth Cole pro et noe H.P. Cole Ltd*** *(16 October 1996),* that in the case of latent defects, the action available is the ***actio rehibitoria or actio aestimatoria***, whereas in the case of the delivery of a thing of a different quality, the action is that contemplated under Article 1390.

In order for a successful action for damages, the buyer must refuse to accept the object and then ask for damages. He could only keep the object if he intends to institute the action for the diminution of price.

Quantity

1399. The seller is **bound to deliver the full quantity of the thing as stipulated in the contract**, subject to the modifications contained in the following articles.

Article 1399 specifies the **general rule,** which is subject to modification.

1400. (1) Where the sale of immovable property has been made with an indication of the quantity at so much per measure, the seller shall be bound to deliver to the buyer the quantity stated in the contract if the latter requires it.
(2) If this cannot be done, or if the buyer does not require it, the seller is obliged to accept a proportionate reduction of the price.

Article 1400 deals with the ***sale ad mensuram***, in which the sale of immovable property has been made with an indication of the quantity, in which case the seller is bound to deliver the quantity stated in the contract. If this delivery cannot be done, or if the buyer does not require it, the seller is obliged to accept a proportionate reduction of the price.

1401. If, on the contrary, in the case mentioned in the last preceding article, t**he quantity is found to be greater than that stated in the contract, the buyer shall be bound to pay a supplement:**

Provided that where the overplus exceeds the twentieth part of the quantity stated in the contract, the buyer shall be at liberty to repudiate the sale.

Article 1401 deals with a situation when the quantity is found to be **greater** than that stated in the contract, in which case the **buyer is bound to pay a supplement**. If, however, the surplus exceeds 5%, the buyer is at liberty to repudiate the sale.

1402. In all other cases, whether the sale is in respect of a specified and limited *corpus*, or whether it is in respect of distinct and separate tenements, or whether, in the sale, the measure is first stated, or the *corpus* is first mentioned followed by an indication of the measure, **the indication of the measure will not entitle the seller to any increase of price in respect of any excess in such measure, nor the buyer to any diminution of price in respect of any deficiency in such measure, unless the difference between the actual measure and that stated in the contract is more than one- twentieth whether in excess of or below the value of all the things sold:**

Provided that no claim may be enforced for an increase or a diminution of the price, notwithstanding that the difference is more than one-twentieth, whether in excess of or below the aforesaid value, if the thing was sold by judicial auction or if it was expressly stipulated that there should be no warranty as to quantity or if the thing was sold *tale quale*, saving, where the sale was not made by judicial auction, any remedy allowed in law in case of lesion.

All other cases of sale, not being sale ***ad mensuram***(sale according to size), are governed by **article 1402**.

This provision holds that in any such cases where the sale is not ***ad mensuram***, the sale will **not entitle the seller to increase the price in respect of excess,** and it will **not entitle the buyer to pay any diminution of price in respect of any deficiency in such measure**. In this case, the sale is still subject to the 5% rule - if the difference is more than 5%, the buyer may choose either to pay the difference, or to rescind the sale, as per **article 1403**;

1403. Where in accordance with the provisions of the last preceding **article an increase of the price is to be paid on account of an excess in the measure, the buyer may elect either to repudiate the contract or, if he retains the tenement, to pay the overplus, together with interes**t.

In cases where the buyer decides to repudiate the sale, the seller must return to the buyer not only the price of the sale, but **also the expenses of the contract and any other lawful expenses incurred**, as per **article 1404;**

1404. In all cases in which the buyer is entitled to repudiate the contract, the seller is bound to return to him, in addition to the price if received by him, the expenses of the contract and any other lawful expense incurred in connection with the sale.

Where an increase or diminution of price is due, the price shall be increased or diminished only to the extent by which the excess or deficiency of the quantity is greater than that allowed by law, as per **article 1406**;

1406. In all cases where an increase or a diminution of price is due, the price shall be increased or diminished only to the extent by which the excess or deficiency of the quantity is greater than that allowed by law.

Article 1405 provides for a legal set-off in cases where two tenements are sold in the same contract, and one is smaller and the other is larger than that which is specified;

1405. Where two tenements have been sold by one and the same contract, and for one and the same price, the measure of each tenement being specified in the contract, and it is found that one of the tenements is smaller and the other larger than the measure specified, **set-off takes**

place to the extent of the difference; and an action for an increase or diminution of price is only maintainable in accordance with the rules set forth in the foregoing articles.

The cessation of the Obligation to Deliver

There are certain cases where the vendor is **not bound to deliver the thing**, as outlined through **article 1392**;

1392. (1) Nor shall the seller be bound to make delivery of the thing, even though he has allowed the buyer time for the payment of the price, **if, since the sale, the buyer has by his own act diminished the security which by the contract he had given to the seller.**

(2) Nor shall he be bound to make delivery if, since the sale, **the buyer has become a bankrupt, or insolvent, or his condition has been so altered that the seller is in danger of losing the price**.

(3) The same rule shall apply where, although the buyer was in a state of bankruptcy or insolvency at the time of the sale, **such state did not reveal itself except after the sale and it was not known to the seller at the time of the sale.**

(4) In the aforesaid cases, however, **the seller is bound to deliver the thing if the buyer gives him security for the payment of the price** at the time agreed upon.

The obligation of the vendor to deliver is thus absolved;

- When the buyer does not pay the price, except those situations where the seller has allowed the buyer a time for payment;
- When the buyer has by his own act diminished security which by the contract he had given to the seller since the sale;
- When the buyer has become bankrupt or insolvent or his condition has been so altered that the seller is in danger of losing the price since the sale;
- When the buyer was in a state of bankruptcy or insolvency at the time of the sale but such state did not reveal itself except after the sale and it was not known to the seller at the time.

In the **latter 3 situations**, if the **buyer gives him security for the payment of the price, then he is still bound to deliver.**

The State of Delivery

1393. The thing must be delivered in the same state in which it was at the time of the sale.

Article 1393 notes that the thing must be delivered in the same state in which it was at the time of sale.

One must also consider the **fruits** which are due or which have been collected following the concurrence of the wills of the parties and prior to the delivery of the thing. These fruits are referred to as ***fructus pendentes***. To this end, we refer to **article 1394 and 1395;**

1394. (1) From the day of the sale, all fruits shall belong to the buyer. (2) In the case of a sale made under a suspensive condition, all fruits which fall due or are collected before the fulfilment of the condition shall belong to the seller. **1395.** The fruits which are uncut or unplucked at the time of the sale, or, where the sale is made under a suspensive condition, at the time of the fulfilment of the condition, shall belong to the buyer although they had been sown by the seller.

Therefore, **from the day of the sale**, all fruits shall belong to the buyer. This is unless a **suspensive condition** is imposed, in which case it is only the fruits which are generated **after this condition is satisfied** which belong to the buyer - any fruits which fall due or are collected before the fulfilment of the condition **belong to the seller**.

Furthermore, **fruits which are uncut or unplucked at the time of the sale** shall belong to the **buyer**, even though they had been sown by the seller.

Prescription

The actions aforementioned, namely:

1. The action of the **seller for an increase in price**
2. The action of the **buyer for a diminution of the price**, or
3. The action of the **buyer for the repudiation of the contract** are all subject to a prescriptive period of **2 years from the day of the contract**. This period of limitation runs

against absentees, persons interdicted, and minors, if they claim under a seller or buyer against whom the running of the said period of limitation is not suspended.

The Obligations of Warranty

1408. The warranty which the seller owes to the buyer is in respect of the quiet possession of the thing sold and of any latent defect therein.

Article 1408 splits these obligations into 2 categories, being the **warranty of peaceful possession**, and the **warranty against latent defects**.

Warranty of Peaceful Possession

One of the most fundamental functions of the seller in a contract of sale is of guaranteeing the peaceful possession by the buyer of the thing sold. The sale of a thing enables the buyer to acquire the ownership and free disposability of the thing sold. Thus, the property **cannot belong to others**, **nor can it be burdened by any real or personal right which have not been made known to the buyer at the time of purchasing.** When a buyer is disturbed from the free enjoyment of the thing acquired, there exists an ***ex lege*** remedy referred to as the **Warranty of Peaceful Possession**, regulated from **articles 1409 - 1423** of the Civil Code. In ***Francis Portelli et vs Stanislaw Pisani et*** *(FHCC, 30 October 2008),* the Court noted that the purpose of the warranty is to protect the purchaser from any molestation by the vendor himself and by third parties. It is a warranty **against eviction** which deprives the buyer of the thing sold, either in whole or in part, **or any easement or burden claimed by others** on the thing sold which was not stated in the contract.

Article 1408 is based on the Roman Law point of view which was not based on the transfer of ownership but rather on the transfer and security of **peaceful possession**, which was what signified the conclusion of the contract of sale. Today, the institution of sale has changed, and the **transfer of ownership has replaced the granting of peaceful possession**. Notwithstanding this, the peaceful possession is still pertinent, so much so that **Prof Caruana Galizia** holds that **article 1408** *does not impose on the seller the warrant of ownership, but rather that of peaceful possession*.

Quiet possession does not mean that the seller is warranting that the property is vacant. They are warranting the fact that **no one has a right over the thing being sold.**

1409. Although no stipulation of warranty has been made in the contract of sale, the seller is in law bound to warrant the buyer against any eviction which deprives him, in whole or in part, of the thing sold, and against any easement or burden on the same, claimed by others, and not stated in the contract.

Article 1409 states that this warranty **is not one which need be expressly included within a contract of sale, since it exists and is provided for within the law.** Nonetheless, the *seller is in law bound to warrant the buyer against any eviction which deprives him, in whole or in part, of the thing sold, and against any easement or burden on the same, claimed by others, and not stated in the contract*. This refers to the notion of **implied warranty** - the law creates a situation where the warranty is deemed to have been given even tacitly upon the conclusion of a contract of sale. Thus, the warranty of peaceful possession is a right pertaining to the buyer deriving from the very nature of the contract of sale, **mirroring the position taken under French Law**.

1410. It shall be lawful for the parties, by special agreement, to add to, or diminish the effects of such implied warranty, or to stipulate that the seller shall not be liable to any warranty.

Article 1410 also notes that it is possible to specifically opt out of the warranty by **special agreement**. This provision also allows the parties to **add or diminish** the effects of such a warranty. These amendments must be stipulated in the **preliminary agreement as well as in the final contract**.

1411. Although it is agreed that the seller should not be subject to any warranty, nevertheless he shall be liable to that warranty which arises from his own act; and any agreement to the contrary is void.

Even if the buyer and seller agree **"no warranty applies"**, the **seller cannot escape responsibility for defects or problems that arise because of *his own actions***.
In other words, the law says:

- A seller *may* exclude warranties in general,
- **but** the seller **cannot** exclude liability for defects or damages that **he personally caused**.
- Any contract clause trying to remove this responsibility is **void** (legally invalid).

This article will continue to make the seller liable and stands to ensure good faith. If an eviction results from the vendor's own act, then the warranty applies notwithstanding that the parties may have opted out of such warranty.

Article 1412 holds that the seller is bound to return the price paid in the case that this warranty is not fulfilled, and in the case that the buyer is subsequently evicted, even in the case that the warranty was specifically opted out of.

1412. Even in case of a stipulation of no warranty, the seller, in case of eviction shall, in the absence of an express agreement to the contrary, be bound to return the price.

Baudry-Lacantinerie hold that this warranty against eviction is also excluded when the seller reveals the damages at the moment of sale to the buyer or if the buyer knew beforehand. We note that this warranty entitles the buyer to ask for the restitution of the price, the return of the fruits, and the payment of damages (including judicial costs), per **article 1413**;

1413. Where there is a promise of warranty or where no stipulation has been made in regard thereto, the buyer shall upon eviction be entitled to claim from the seller - (*a*) the return of the price; (*b*) the return of the fruits, if the buyer has been obliged to return them to the owner who has recovered the thing; (*c*) all judicial costs, including those for giving notice of the suit to the person from whom he derives his title;

(*d*) damages, including the lawful expenses of the contract and any other lawful expense incurred in connection with the sale.

When speaking of the warranty for peaceful possession, we are speaking of a protection of molestation, which includes the protection from **eviction, easements**, and **burdens**. Eviction is defined by **Toullier** as ***the deprivation which the buyer suffers in whole or in part of the right of ownership which the sale was supposed to have transferred to him***.

Under Maltese Law, there are two requisites which constitute an eviction, being;
1) The **molestation must be the consequence of a right which is justifiably claimed by a third party,** be it an action justifiably directed against the buyer or be it an exception going against the buyer when he wishes to exercise the actions which derive from purchase. According to authors, eviction can take place even if the buyer does not have possession.
2) The right which is justifiably claimed **must owe its origin to a fact which precedes the sale**. This requisite arises from the very nature of the warranty.

The molested buyer has the right to expect the seller to stop the molestation.

Total Eviction

In cases of total eviction, the seller is bound to **return the price**, as per **article 1413**. This conforms to the general rule governing the effects of the warranty - once there is eviction, the price becomes an *indebitum* which has been paid. Thus, **the restitution of the price takes place independently of any notion of reimbursement of damages or non-performance on the part of the seller**. This covers two underlying principles, being that the buyer is the full owner of the thing, and the theory of risk previously referred to.

1414. (1) Where, at the time of eviction, the thing sold has decreased in value or has considerably deteriorated, either through the negligence of the buyer or by irresistible force, **the seller is still bound to return the full price.**

(2) Where, however, **the buyer has derived a benefit from the deterioration occasioned by him**, the seller shall be entitled to deduct from the price a sum corresponding to such benefit.

Even if the thing sold has deteriorated or lost value by the time eviction occurs, whether due to the buyer's negligence or an unavoidable event, the seller must still return the **full price**. The law protects the buyer in eviction cases by ensuring that any decrease in value does not reduce the seller's obligation to refund what was paid.

However, if the deterioration was caused by the buyer **and** the buyer personally gained a benefit from it, the seller may deduct from the refund an amount equal to that benefit. In this situation, the buyer should not profit from harm he caused to the item before eviction.

Ultimately, the obligation of returning the price ought not to be confused with the obligation of warranty.

Further, as per **article 1413,** in the case of total eviction, the seller is also bound to **return the fruits to the buyer.** This obligation arises when the purchaser himself is bound to return the fruits to the person who is the cause of the eviction. This right exists on the condition that the buyer was invested with good faith on the day when the sale was transacted. **If the buyer was not acting in good faith, he has no right to the fruits and to the damages which arise**. A buyer would be in good faith at the moment of the sale when he genuinely thinks that the thing sold belongs to the vendor. This would make him entitled to damages, interests and fruits until the eviction.

In the case that the thing sold did not yield any fruits and did not procure any pecuniary advantage, the purchaser in good faith has the right to demand from the seller the interests of the price, as held in ***Luigi Cassar vs Giulia Ciantar noe et*** *(FHCC, 26 February 1935)*.

Another obligation of the seller emanating from **article 1413** is the obligation to reimburse the buyer for any **judicial costs** that have been incurred for giving notice of the suit to the

seller. The buyer's duty is to immediately inform his vendor should he be sued through a judicial act.

The final obligation due by the seller to the buyer in the case of eviction is that of **damages**. The vendor is bound to return any damages, including the lawful expenses of the contract and any other lawful expenses incurred in connection with the sale.

In the case of eviction, in summation, the buyer has the right to claim the following from the seller;

(a) - The **Full Price**

(b) - The **Fruits Gained, provided that the buyer was bound to return these fruits to the owner**

(c) - The **Judicial Costs**

(d) - The **Damages incurred**.

1415. If, at the time of eviction, **the thing sold has increased in value**, even irrespective of the act of the buyer, **the seller shall be obliged to pay to the buyer the amount exceeding the price of the sale**.

Article 1415 holds that if the thing sold has increased in value at the time of eviction, the **seller is bound to pay the buyer the amount exceeding the price of the sale**.

1416. (1) The seller is bound to repay to the buyer or to cause to be repaid to him by the person who has recovered the tenement all expenses incurred by him in connection with **any repairs or useful improvements made on the tenement.**

(2) Where the seller has sold the tenement of another person in bad faith, he shall be bound to pay to the buyer all expenses, even decorative expenses, which the latter may have made on the tenement.

Articles 1416 (1) and **(2)** discuss the situation whereby works have been made by the buyer on the thing sold. The law distinguishes between the seller in good faith and the seller in bad faith in this regard.

Under Article 1416 (1), contemplating this situation wherein the seller was in good faith, and holds that the buyer has the right to claim all **necessary expenses** relating to **repairs** or **useful improvements** made to the thing sold from the seller.

Under Article 1416(2), the law permits the buyer to reclaim **even decorative expenses**, provided that the seller has sold the thing in **bad faith,** knowing that he was not the true owner of the thing.

Partial Eviction

Partial eviction exists in one of three situations;

1) The Eviction of a **material part of the thing - 1417;**

2) The **Loss of an active servitude**; or

3) The **Existence of a passive servitude - 1419**

1417. (1) Where the eviction is **only of part of the thing**, and such part is of such importance in relation to the whole that without it the buyer would not have bought the thing, **he may within a year from the day** on which the judgment as to the eviction has become final and absolute, **demand the dissolution of the sale.** (2) The said time shall run as provided in sub-article (2) of article 1407.

Article 1417 provides for the eviction of a material part of the thing. The law qualifies this partial eviction as existing solely when the **loss of the material part of the thing is such that the buyer would not have bought the thing had such part been removed from the thing** prior to the sale. The buyer may institute this action within **1 year from the judgement which declared eviction** and may demand for the **dissolution of the sale**.

In order to qualify the **importance of the material loss of the thing**, and which loss is sufficient to ground dissolution and which loss is not sufficient to ground dissolution, we must refer to jurisprudence;

Giuseppe Farrugia vs Nicolina Cachia *(CoA, 12 February 1937)* -
Partial eviction occurs *when the buyer is deprived of the right to the advantage of certain qualities or natural fruits of the find that are* ***indispensable for the destination that the parties have expressly or tacitly fixed between them*** *on the occasion of the sale and purchase*.

One must contrast **article 1415** with **article 1417**;

1415. If, at the time of eviction, the thing sold has increased in value, even irrespective of the act of the buyer, the seller shall be obliged to pay to the buyer the amount exceeding the price of the sale.

1417. (1) Where the eviction is only of part of the thing, and such part is of such importance in relation to the whole that without it the buyer would not have bought the thing, he may within a year from the day on which the judgment as to the eviction has become final and absolute, demand the dissolution of the sale.

(2) The said time shall run as provided in sub-article (2) of article 1407.

1419. (1) Where the tenement sold is subject to non-apparent easements whereof no declaration was made and such easements are of such importance that it may be presumed that the buyer would not have bought the tenement if he had been given notice of them, he **may demand either the dissolution of the sale or compensation.**

(2) The provisions of this article shall not apply in the case of a judicial sale by auction

Article 1419 contemplates the situation of the **existence of a passive servitude**, which is a form of **partial eviction**. This article provides that if the property is subject to non-apparent

easements, the seller is bound to inform the buyer of their existence because they lessen the value of the immovable. If the buyer would not have bought the tenement, had he been given notice of such non- apparent easement, the buyer may demand the **dissolution of the sale** or **compensation**.

Remedies for breaches of the warranty of peaceful possession

The buyer may be molested in his possession either **by actions of the seller** or else **by the actions of third parties**. Usually, the warranty against acts of third parties **arises when a third-party claims ownership, but this may also be the case where there are burdens such as easements claimed by others**. In the case of breaches by way of actions of the seller, these are quite rare, and occur when the seller exercises a right belonging to him, as a result of which the buyer is evicted.

In the cases of actions of third parties which result in the buyer's eviction, **the seller must firstly defend the title of the buyer when he is challenged in Court by a third party**. In such a situation;

- The seller may apply to become a party to the suit in ***status et termini*** when the buyer persuades him to intervene on his behalf; or
- If the seller is reluctant to intervene, the buyer may file an application ***a chiamata in causa***, forcing the seller to become a party to the suit.

In ***Calleja vs Gatt***, the Court held that **hypothec burdens** are not **latent defects**, but fall under **warranty of peaceful possession**.

Cessation of the Warranty of peaceful possession - 3 instances

1: By the will of the parties

1410. It shall be lawful for the parties, by special agreement, to add to, or diminish the effects of such implied warranty, or to stipulate that the seller shall not be liable to any warranty.

1411. Although it is agreed that the seller should not be subject to any warranty, nevertheless he shall be liable to that warranty which arises from his own act; and any agreement to the contrary is void.

2: By the seller's refunding to the buyer who paid a sum of money to prevent eviction

1421. Where the buyer has prevented eviction of the tenement by paying a sum of money, the seller may free himself of all the consequences of the warranty by refunding to him the sum paid together with interest, and all expenses.

3. By prescription - 1 year for partial eviction, 2 years for total eviction (per 1423)

1417. (1) Where the eviction is only of part of the thing, and such part is of such importance in relation to the whole that without it the buyer would not have bought the thing, he may within **a year from the day on which the judgment as to the eviction has become final and absolute, demand the dissolution of the sale.**
(2) The said time shall run as provided in sub-article (2) of article 1407.

4: By the seller's possibility to raise a defence to an action for warranty

1422. The warranty against eviction **ceases if the buyer has suffered a final and absolute judgment to be given against him without making the seller a party to the suit**, if the latter proves that he could have set up a good defence, not set up by the buyer, whereby the action would have been dismissed.

Article 1422 provides that the warranty against eviction ceases if the buyer suffers a final and absolute judgement against him, **without having summoned the seller to be a party to the suit**. For this condition to hold, the seller must prove that, had he been summoned, he would have set up a better defence than that of the buyer, so much so, that the action of third parties would have been dismissed.

Warranty against Latent Defects

This warranty has its origins embedded in Roman Law, which established that the sellers of slaves and animals were bound to declare the defects of such slaves and animals in public - the failure to do so would be tantamount to fraud.

1424. The seller is bound to warrant the thing sold against any latent defects which render it unfit for the use for which it is intended, or which diminish its value to such an extent that the buyer would not have bought it or would have tendered a smaller price, if he had been aware of them.

The seller is bound to warrant the thing sold against any latent defects which;
- Render the thing unfit for the use for which it is intended, or
- Diminish its value to such an extent that the buyer would not have bought it or would have tendered a smaller price, had he been aware of such defects.

The warranty is justified by **Windscheid's Theory of Presumption**, which holds that when a person buys a thing, there is a presumption that such person bought the thing in a determinate state. As the buyer is unaware of the latent defects, he presumes that the thing is in a determinate state.

Latent defects refer to those **defects which are hidden**. There is, however, a question as to the extent of the visibility or noticeability of such defects, which question is answered in Article 1425;

1425. The seller is not answerable for any apparent defects which the buyer might have discovered for himself.

The seller is **not responsible** for defects that are **apparent**—that is, defects that the buyer **could have noticed by ordinary inspection** at the time of the sale. If the defect is visible, obvious, or easily detectable, the buyer cannot later complain or demand compensation, because the law expects buyers to examine what they are purchasing.

On this point, one must distinguish between the warranty against latent defects and between the obligation for the seller to deliver the thing at the same quality as it was promised, or according to the same sample on which the sale was made, per article 1390;

1390. If the thing which the seller offers to deliver is not of the quality promised or is not according to the sample on which the sale was made, **the buyer may elect either to reject the thing and demand damages, or to accept the thing with a diminution of the price upon a valuation by experts**.

Article 1390 holds that the seller is obliged to deliver things according to the quality promised or according to the sample on which the sale was made - thus, this section provides for those instances where the seller delivers a thing of less quality than was agreed to.

The distinction between this and between the warranty against latent defects is founded on the difference between **a quality and a defect**. **Pacifici Mazzoni** held that an object has its own determinate feature, which renders the object fit for the particular use for which it is destined, and which aid the object to produce all the advantages which it could possibly give. Thus;

If the object is deficient in its determinate feature, it is said to be defective, whereas **if the determinate feature is different, but not deficient, it is said to be of a different quality**.

Ricci distinguished between the sale of a thing of a different quality and the sale of a different thing altogether. In both scenarios, we are not speaking of things with latent defects. He held that the sale of a thing having a different quality occurred when the thing had different and **distinguishable qualities.** When such qualities cannot be separated from the thing, the sale is of a totally different thing. Both these examples fell under article 1390's protection **but are distinguished from the warranty against latent defects.**

In ***Saliba vs Galea*** *(1968),* the CoA held that the failure to supply certain components of an engine did not warrant the ***actio redhibitoria***, as this particular sale fell under the obligation per article 1390 of the Civil Code, being the delivery of a thing of a different quality. A situation of latent defects would have arisen had all components been delivered and had such components had **deficiencies in their qualities** (not different qualities but rather defects in the qualities).

In ***Falzon vs Aquilina*** *(1951),* the Court distinguished between actions which can be exercised in the case of latent defects and the actions available to remedy breaches of article 1390. If article 1390 is violated, the buyer may either (i) Reject the thing and demand damages or (ii) Accept the thing with a reduction of the price based upon expert evaluation.

Such rejection / acceptance must be **made upon delivery, as upheld in *Bezzina vs Borda*** *(1990)*

In the case of latent defects, the buyer may either;
(1) Institute the **actio redhibitoria** - an action to restore the thing to the seller in consideration of a refund; or
(2) Institute the **actio aestimatoria** - an action to demand a reduction to the price, determined by the court, with the thing being kept by the buyer.

The prescriptive periods for the institution of all 4 aforementioned actions (2 for 1390, 2 for breach of warranty against Latent Defects) are also different.

1407. (1) The action of the seller for an increase of the price, and the action of the buyer for a diminution of the price or for repudiation of the contract shall be **barred by the lapse of two years from the day of the contract.**

(2) The said period of limitation shall run against absentees, persons interdicted, married women and minors, if they claim under a seller or a buyer against whom the running of the said period of limitation is not suspended.

According to **article 1407**, the action of the buyer to demand a **diminution in price** or to demand for the **repudiation of the contract** is barred by the lapse of **2 years** from the date of the contract.

On the other hand, in the case of the actio redhibitoria and the actio aestimatoria (available to the buyer in cases of breach of warranty against latent defects), we refer to **article 1431**;

1431. (1) The *actio redhibitoria* and the *actio aestimatoria* shall, in regard to **immovables**, be barred by the **lapse of one year as from the day of the contract**, and, in regard to **movables,** by the **lapse of six months as from the day of the delivery of the thing sold**.

(2) Where, however, it was not possible for the buyer to discover the latent defect of the thing, the said periods of limitation shall run **only from the day on which it was possible for him to discover such defect**.

(3) The said periods of limitation shall run as provided in sub- article (2) of article 1407.

The law carefully distinguishes between those latent defects which could have been discovered as at the time of delivery and those defects which could not have been discovered at the time of delivery. The distinction vis-a-vis prescription is not in the amount of time until which the actions are extinct, but rather the distinction is *when* such lapse of time begins to run (at time of deliver vs at time of discovery).

The actio redhibitoria and the actio aestimatoria are defined under **article 1427**;

1427. In the cases referred to in articles 1424 and 1426, the buyer may elect either, by instituting the *actio redhibitoria*, to restore the thing and have the price repaid to him, or, by instituting the *actio aestimatoria*, to retain the thing and have a part of the price repaid to him which shall be determined by the court.

Doreen Baldacchino vs Auto Sales Limited - *comparative perspective*
FHCC 7th December 2021

Article 1641 of the French Civil Code currently in force is identical to the Maltese provision. On the other hand, Article 1490 of the Italian Civil Code in force (from 1940) is similar to the Maltese provision but removes the reference to the subjective element.

The Italian Court of Cassation has established that the circumstance of a decrease in value is independent from that of the malfunctioning of the thing. **In other words, you may have a thing that functions well but still has some other defect that reduces its value. In the view of that Court, this teaching also applies to the Maltese provision.**

Irene Causin vs No Deposit Cars Malta Ltd
COA 3rd September 2024

Now, as is well known, even in the case of a sale, for the buyer to have the right to rescind the contract, the defect found must be of a certain seriousness and gravity, **"the extent of which is determined by the law through two criteria: one objective, consisting in the absolute unfitness of the thing for its intended use, or in the reduction of such use; the other subjective, consisting in the intention of the buyer who, had he known of that defect, would not have purchased the goods or would at least have bought them at a lower price"**

32.Alongside this, the return to the seller of the defective item purchased is a **crucial requirement** for the success of the redhibitory action, and it is the element that distinguishes this action from the estimatory action (*actio quanti minoris*), where the buyer is only seeking a reduction in price and not the cancellation of the contract. This is clearly shown by the wording of **Article 1427 of the Civil Code**. On this point, our Courts have stated that:

"Fundamental … is the principle that the *actio redhibitoria* imposed on the buyer the obligation 'to give back the thing', that is, to return the purchased object to the seller and simultaneously to 'demand the refund of the price'. The law therefore allows no alternative for the buyer who chooses to proceed by way of the redhibitory action. In truth, the buyer had no right to keep the object in his possession and release it to the seller only when the seller

refunds the price. He had the obligation to immediately, as soon as he rejects the object because he has discovered the latent defect, return the thing to the seller."

The Defect

The defect discovered must be qualified by 3 principal characteristics, being that the defect must be **serious, latent,** and **existent at the time of sale**.

I. Serious

The defect must be serious, and not merely a marginal defect. The serious defect must be such as to make the thing **unfit for the use for which it was intended,** or else such as to **diminish the value to such an extent that the buyer would not have bought it or would have tendered a smaller price**. Maltese law, article 1424, has adopted both an **objective test** as well as a **subjective test** to determine the gravity of the defect. This test was established in ***Lucia vs Chevalier*** (1920).

A: The objective test - "**unfit for the use for which it was intended"**
B: The subjective test - "**the buyer would not have bought it or would have tendered a smaller price"**

Moreover, in ***Pisani vs UCIM Co. LTD*** *(2001),* the Court held that in order for the action to succeed, the **defect must be of sufficient relevance**. The court must investigate the nature and extent of the defect complained of which investigation must be carried out on a case-by-case basis.

Doreen Baldacchino vs Auto Sales Limited
FHCC 7th December 2021

According to **Laurent:**
The decision as to whether a defect renders the thing unfit for the use for which it is intended, or whether it hampers such use to the extent that the buyer would not have bought it, or

would have offered a lower price had they known of it, **falls within the discretion of the judge.**

Not every reduction in utility amounts to a vice; the reduction must have an effect on the **contract.**

There was a Court that stated that there is no hidden defect if the **defect merely annoys the buyer**. However, this pronouncement should not be regarded as a rule of law, because if the inconvenience is of a certain magnitude, the buyer certainly would not have bought the thing or would have paid a lower price.

Another Court—the Court of Montpellier—held that the defect must be **irremediable**. This, however, amounts to adding a qualification not found in the law. Tradition contradicts that Court, because according to it even a horse that was temporarily ill was still considered affected by a hidden defect, since the buyer expects to be able to use the item immediately.

II. Latent

The defect must be **hidden from the buyer**. It must not have been disclosed to the buyer by the seller at the time of the sale. As previously mentioned, **article 1425** holds that if the defect was apparent and could have been noticed by the buyer at the time of delivery, then the buyer loses the right to file an action against the seller.

1425. The seller is not answerable for any apparent defects which the buyer might have discovered for himself.

One must note, however, that the test adopted to ascertain whether the buyer could have noticed such defect is not that of extra or expert diligence, but rather that of the ***bonus paterfamilias*** – the standard experience of the ordinary man, as held in ***Borg vs Petroni***.

This implies that **if the seller knew of the defect, and failed to inform the buyer, then the seller cannot claim that the buyer did not properly examine the thing**, that is unless the

defect is readily apparent. In ***Gerada vs Attard***, the Court held that the prospective buyer who does not examine the thing prior to the sale **forfeits his right to action**. At least a superficial examination of the thing is required. **Baudry-Lacanterie** and **Tartufari** held that the buyer had an obligation to refer to an expert if he considers himself as being unable to notice of any possible defects. On the other hand, in ***Florian vs Desira***, the Court held that technological products which carry defects require expert examination, and not examination by an ordinary man.

Doreen Baldacchino vs Auto Sales Limited - *technological products & latent defects*
FHCC 7th December 2021

This Court agrees with the Commercial Court of Appeal that:
"The words *'from the day on which he could have discovered the defect'* must be interpreted to **mean that the *dies scientiae* is not the day on which an irregularity in functioning is noticed or detected, but the day on which the defect is actually ascertained**. This is particularly the case in the sale of machinery or devices of delicate and technically complicated construction, such as washing machines, refrigerators, etc., which today have become common household items. It **is not logical to assume that as soon as the buyer notices some irregularity in functioning, they should immediately conclude that this irregularity is a defect… and promptly institute legal action**. Rather, it appears more reasonable to say that, in similar cases, given the possibility that the issue is not a real defect but simply an irregularity that is easily repairable, the buyer should first turn to the seller—who, even under the warranty normally issued with the sale of such equipment—should provide for the repair."

The cited judgment dates from 1963. The technology of that time is primitive compared to that of today, and therefore, all the more so, today's consumer is not in a position to fully understand what exactly has gone wrong with the product they have purchased.

Borg vs Petroni
Commercial Court, 1953

The fundamental technical notion of what is to be understood as a *vice* or *defect* of the thing sold is not something that can be easily determined. The criterion outlined by Tartufari is to consider the **state and objective condition of the thing individually**, without comparison to other items, even of the same type. For every item, whatever its kind or quality, there is a certain way that the thing ought to be—representing its normal state and condition—on which depends its suitability for the use for which, according to its nature, it is destined, or which the parties had in mind when concluding the contract. **Any deviation found in the thing from this ordinary and normal state of being renders it defective**; and thus, by *vice* or *defect* one must understand **any abnormality or imperfection, and every breakdown or malfunction that is found in the thing** and that, to a greater or lesser extent, removes its suitability for use or its quality and integrity.

On this point **Vivante** agrees, stating: *"Vices are inherent in the imperfect way in which the goods were manufactured; the vice is a breakdown or deterioration of the goods from their normal condition."*

III. The Defect must Exist at the Time of Sale

In ***Vella vs Deguara*** *(1953),* the Court held that the latent defect must exist at the time of the sale. The buyer must prove that the defect **originated prior to the sale**, not based on assumption but on certainty. Where the defects become apparent on delivery, but were not so when the thing was bought, the warranty in respect of latent defects would **still be valid**.

In ***Falzon vs Aquilina,*** the court referred to **Vivante**, who stated that if the purchaser did not have the chance to examine the thing prior to delivery, the defects should be treated as latent until the thing is properly examined.

Effects of the Warranty: The Actions Available

As previously mentioned, **article 1427** establishes the 2 actions available for the buyer in the case of a breach of the warranty against latent defects.

1427. In the cases referred to in articles 1424 and 1426, the buyer may elect either, by instituting the *actio redhibitoria*, to restore the thing and have the price repaid to him, or, by instituting the *actio aestimatoria*, to retain the thing and have a part of the price repaid to him which shall be determined by the court.

Geoffrey Ciantar vs Muscat Motors Limited

Court of Magistrates, 8th July 2024

The action brought by the applicant, the *estimatoria* action, is one of two actions available to a buyer (the other being the *redhibitory action*) who believes that the object purchased from the seller is affected by a defect that was not visible at the time of sale. The seller is obliged under Article 1424 of Chapter 16 to:

"1424. … make good the latent defects of the thing sold which render it unfit for the use for which it is intended, or which so diminish its value that the buyer would not have bought it, or would have offered a lower price, had he known of them."

The subsequent articles then specify that:

"1425. The seller is not answerable for apparent defects which the buyer could have discovered by himself."

"1426. However, he is answerable for latent defects, even if he was unaware of them, unless it was agreed that in such a case he shall not be bound by any warranty."

3. If the buyer believes that the seller has breached this warranty, the remedies available to him under the Civil Code are therefore one of the following two:

- The remedy of the **a*estimatoria action*, where he keeps the item and requests the return of that part of the price which the court determines,** or
- The remedy of the ***redhibitory action*, where he returns the item and requests the refund of the price.**

When the *actio redhibitoria* is successfully instituted, while the buyer is required to return the thing, the seller is bound to return the full price. The sale would thus be dissolved, and the state of affairs would return to their ***status quo ante***.

In ***Aquilina vs Muscat***, the Court held that the price is to be returned **only upon the dissolution of the sale**. Although not expressly stated by law, the application of the status quo ante principle dictates;

- That the buyer return the thing together with any accessories or fruits derived; and
- That the seller return any interest gained.

Some authors such as **Ricci** holds that the buyer must also make good any deterioration which can be attributed to him. Expenses incurred in connection with the sale must be paid by the seller in good faith.

1429. (1) If the defects of the thing sold were known to the seller, he is not only bound to repay the price received by him but he is also liable in damages towards the buyer. (2) If the defects were not known to the seller, he is only bound to repay the price and to refund to the buyer the expenses incurred in connection with the sale

Article 1429 contemplates the difference between when the **seller knew of the defects** and when he **did not know of such defects**. In the former case, the seller is bound to repay the price and to pay any damages suffered by the buyer. In the latter case, the seller is only bound to repay the price and to refund the expenses incurred in connection with the sale.

The Actio Aestimatoria

If the ***actio aestimatoria*** is successfully instituted, the buyer may **retain the thing** and have a part of the price reduced, with such reduction taking the form of a sum repaid to him, which sum is determined by the Court. It is generally held that the reduction must be such that it reduces the price to an amount which the buyer would have paid for the thing at the time of sale had he known of the defect.

Busietta vs Borg Cardona *(CoA, 2000)* held that the choice between the actio redhibitoria and the actio aestimatoria is left entirely to the buyer. Further, the Court held that **the seller**

cannot interfere with the buyer's choice, and that the **buyer cannot institute both actions at the same time**.

Ronnie Camilleri et vs Belleview Supermarkets Company Limited - *elements to the A.A.*
CoA, 31st May 2023

It must be stated that this Court recognises that **not every defect qualifies** under the a*estimatory action*, since the defect must be **serious** and **not visible at the time the sale took place**.
As was said in the judgment ***Giuseppe Gerada v. Salvu Attard*** (Commercial Appeal) decided on 6 November 1959 (Kollez. Vol. XLIII.i.545):

"Therefore, the warranty which the seller must give the buyer is for serious, hidden, and pre-existing defects."One of the seller's obligations is to guarantee the thing sold, including for defects that do not appear, while the law provides that apparent defects are those that the buyer could have noticed on his own (Article 1425 of the Civil Code). It follows that, **except in those cases where the buyer could have immediately noticed the defect, it is for the seller to ensure that the object of the sale is fit for its intended use.**

Thus, for example, the First Hall of the Civil Court stated in the case ***Carmelo Barbara v. Joseph Camenzuli***, decided on 20 October 2005:

"In the case of a building, it is the duty of the seller, even if he was not the builder, to ensure that the building is 'fit' for the purpose for which it is being sold—in this case, as a residence. ***The obligation to ensure that everything is in order rests on the seller and not on the buyer who, except for circumstances that are visible ictu oculi, has the right to rely on the seller regarding the viability of the object."***

Geoffrey Ciantar vs Muscat Motors Limited - *defences to the actio aestimatoria*
Court of Magistrates, 8th July 2024
A seller who is faced with an action of this kind has several possible defences, including:

• that the **item is not affected by any defect**, whether apparent or not; or
• that although a defect exists, **it was not hidden** because it should have been apparent to the buyer at the moment of sale, meaning the buyer could have discovered it on his own; or
• that although a defect exists, it developed **after** the sale and was not present at the moment of sale; or
• that the item is **indeed affected by a hidden defect that existed at the moment of sale, but the seller had agreed with the buye**r, at the time of sale **and under Article 1426 of Chapter 16 as part of the sale conditions, to exclude the warranty against hidden defects**; or
• that the action brought by the buyer has lapsed due to the expiration of six months from the delivery of the item, in terms of Article 1431

Restrictions to the Actions

1) Agreement to the contrary

1426. Nevertheless, he is answerable for latent defects, even though they were not known to him, unless he has stipulated that he shall not in any such case be bound to any warranty.

Article 1426 states that the seller is able to relieve himself from liability for latent defects if he has stipulated that he will not be bound to any such warranty. This is sometimes referred to as a sale ***tale quale*** (as is). Some judgements, such as ***Pace vs Garcia***, have held that the inclusion of the phrase *tale quale* in the contract relieves the seller from any liability for latent defects. However, in cases such as ***Grixti vs Simler***, the Court has ruled otherwise, holding that the seller needs to expressly state that he is not bound to liability for latent defects. A more elaborate interpretation was given in ***Bajada vs Demajo***, in which the Court held that in order for the vender to be released from the warranty per article 1426, the agreement by which the seller is so released must be **certain and unequivocal**. While the simple insertion of the phrase *tale quale* is not per se sufficient to release the seller from this obligation, the effect of this phrase must be contextualised by the manner in which it is used, and thus a case-by-case basis is adopted. In ***Debono vs Portelli*** *(1988),* the phrase *tale quale*

was not included in the contract, yet the Court stated that even had this phrase been included, the seller was still liable.

2) Forfeiture of the actions

1431. (1) The *actio redhibitoria* and the *actio aestimatoria* shall, in regard to immovables, be barred by the lapse of one year as from the day of the contract, and, in regard to movables, by the lapse of six months as from the day of the delivery of the thing sold.
(2) Where, however, it was not possible for the buyer to discover the latent defect of the thing, the said periods of limitation shall run only from the day on which it was possible for him to discover such defect.
(3) The said periods of limitation shall run as provided in sub- article (2) of article 1407.

As previously stated, the law holds that the actions are barred by the lapse of 1 year in the case of immovables, and 6 months in the case of movables, from the date of the contract (or else from the date of discovery where it was not possible for the buyer to discover at the day of delivery). One must note that this period is a **period of forfeiture, and not a prescriptive period**. The term cannot be interrupted or extended by judicial acts. This was confirmed in ***Camilleri vs Calascione.***

Paul Borg et vs Spiteri Joseph
CoA, 21 November 2024

In the first grievance, the defendant–appellant begins by referring to Article 1431 of the Civil Code and emphasises that in its second sub-article, the law does not refer to the moment when the buyer **actually** discovers the defect, but rather to the moment when the buyer **"could"** have discovered that defect.

As must be done by any defendant who raises the plea of prescription, in a case of this nature the burden always lies on the party raising the plea of *decadenza* (lapse of the action) to present clear evidence showing from which point the one-year time-limit mentioned in

Article 1431 of the Civil Code began to run (see *Domenic Micallef et v. Mizzi Brothers Limited*, delivered by the First Hall of the Civil Court on 29 September 2011).

It must first be stated that, as far as **Article 1431(2)** of the Civil Code is concerned, the phrase *"could have discovered the defect"* **should not be understood to mean that the one-year period begins to run from the moment the buyer notices some irregularity in the purchased item** (see *Sergio Sciberras v. Burmarrad Commercials Limited*, judgement of the Court of Appeal of 28 April 2017).

It is also accepted that in cases involving complaints about hidden defects in the construction of immovable property, the one-year period mentioned in **Article 1431** of the Civil Code begins to run from the moment the defects or damages start to reveal themselves in such a way as to trigger, in the mind of a reasonable person, a serious doubt about the quality of the item purchased—or, in other words**, a well-founded suspicion that the building is affected by a defect of sufficient gravity to give rise to the rescission of the contract of sale or to a reduction in the price paid**

Geoffrey Ciantar vs Muscat Motors Limited *- forfeiture and not prescription per 1531*
Court of Magistrates, 8th July 2024

Because the six-month period is one of **forfeiture (decadenza)** and not **prescription**, it **cannot be interrupted or extended** by the buyer. Unlike prescriptive periods, the buyer cannot preserve the action simply by notifying the seller or by initiating negotiations. **Exceptionally**, however, jurisprudence has recognised that when the seller **acknowledges the existence of the defect** and implicitly or explicitly undertakes to remedy it, the forfeiture period **starts running anew**. As stated in ***Carmelo Buttigieg v. Eucharist Zammit*** (1997), it is **not** a true interruption of time, but rather the seller's acknowledgment that **preserves** the buyer's action: the new period begins from the day of that acknowledgment.

For this to apply, the seller's acknowledgment must be **clear, formal, explicit, and unconditional** (*Fenech vs Spiteri*, 1990). Mere notification of the defect, or negotiations between the parties, is **not sufficient**, unless during those discussions the seller actually **admits the defect and accepts responsibility**, for example by agreeing to take back the item or repair it. Finally, case law holds that where a seller confesses to the pre-existing defect, such confession must occur **within the original time-limit** available to the buyer (*Camilleri vs Calascione*, 1954).

3) Where the thing perishes by an independent event

In the case where the subject matter is destroyed or perished by some fortuitous event, the seller is not liable. This is unless the perishing of the thing is a cause of a latent defect, in which case the seller is answerable.

Obligations of the Buyer

The buyer is subject to 4 principal obligations, being 1) to pay the price, 2) to pay the interest on the price, when required, 3) to receive and accept the thing bought, and 4) to pay the expenses of the sale.

1: To pay the price

1433. If the time and place for the payment of the price are not stated in the contract, the buyer must pay at the time and place of the delivery of the thing.

Prof Caruana Galizia holds that since there has to be an identity (the handing over of the thing at the same time and place) in the time between the delivery and payment, it must follow that the payment and delivery should be affected at the same place. The reason for this identity of time is to protect the interest of the parties, because if the delivery precedes payment, the buyer may decide to delay the payment. Similarly, if the payment precedes the delivery, the seller may delay the delivery.

In ***Zahra vs Misrahi,*** the Court held that if the time and place of the payment have not been stipulated, the payment must occur at the time and place of delivery. **The vendor is not**

obliged to deliver the thing if the buyer does not pay the price, unless a delay has been granted for payment.

The rule that payment and delivery should occur at the same time and place **does not apply in the case of sale on credit**, or **when the price must be paid by a third party**.

1437. (**1) If the buyer is disturbed in the possession of the thing or has reasonable cause to fear that he will be so disturbed, by any action hypothecary or for the recovery of the thing *rei vindicatio*, he may suspend the payment of the price until the seller shall have caused the molestation to cease or shall have removed the cause for which such molestation is feared,** unless the seller elects to give security, or unless it was agreed that the buyer was to pay notwithstanding any molestation.

(2) Nevertheless, even in the case mentioned in this article, in the event of any of the circumstances referred to in article 1434, the buyer, if he suspends payment of the price, shall owe interest thereon, unless he elects to pay the price into court.

Article 1437 holds that if a buyer is **disturbed in the possession of a thing** or if he **has reasonable cause to fear that he will be disturbed by any action hypothecary or by an action to recover the thing** (rei vindicatoria), then the buyer may **suspend the payment of the price until the seller has terminated the molestation or removed the cause generating fear**.

The right to suspend payment may be denied when the seller elects to give security to secure the re-payment of the price in case of eviction or if it was agreed that the buyer is to pay notwithstanding molestation or if the warranty against eviction is excluded completely.

Ricci claims that the buyer may only reclaim the thing which he has not paid, and not the thing which is already in his possession. Thus, protection here, **under Article 1437 only applies to the price not yet paid**, not to undoing the sale or returning the thing already delivered. He further states that the molestation cannot be of any kind, but that it **must pertain to the actio rei vindicatoria** or to the **actio hypothecaria.** However, since the law

did not specify whether the actio rei vindicatoria pertains to the totality or not (i.e partially) of the thing, then it is to be presumed that the law caters for both possibilities.

2: To Pay Interest when required

1434. The buyer, even though there be no agreement to that effect, **is bound to pay interest on the price up to the day of payment at the rate of five per cent *per annum***, indiscriminately in the following cases:

(*a*) if the thing sold and delivered yields fruits or other profits;
(*b*) if, even though the thing yields no fruits or other profits, he has been called upon by means of a judicial intimation to pay the price;
(*c*) if the delivery of the thing, being movable, has not taken place through the fault of the buyer, and the seller has called upon him, by means of a judicial intimation, to take delivery of the thing:

The second obligation of the buyer is to pay, in certain cases, the interest on the price. Such interest could either be a result of;
- Conventional Interests (i.e. - an agreement by the parties); or
- The circumstances per **article 1434,** in which case the buyer is to pay an interest rate of **5% per annum** until the day of payment.

Article 1434(a): Where the thing bought yields fruits

Article 1434(a) holds that where the thing sold and delivers yields fruits or other profits, then the buyer is subject to pay the 5% interest rate. Interests start running from the date of delivery. According to **Laurent** and **Pacifici Mazzoni**, delivery is considered to be the moment at which the enjoyment of the thing belongs to the buyer.

1436. If the thing is capable of yielding fruits or other profits, the buyer shall still be bound to pay interest on the price, even though owing to a fortuitous event or for any other cause the thing shall have yielded no fruits or other profits during the time when the price was still owing.

Article 1436 holds that if the thing is capable of yielding fruits, the buyer is bound to pay interest **even though no fruits have been produced**, during the time when the price was still pending. Thus, the law looks at **potentiality** to produce, and not actual production.

Article 1434(b): Where the buyer has been called upon to pay the price

Where the buyer has been called **upon by a judicial intimation** to pay the price by means of a judicial intimation, interests begin to accrue.

Article 1434(c): Where the buyer has caused the non-delivery of the thing

Where the delivery of a thing being movable has not taken place through the fault of the buyer and the buyer has been called upon by the seller by means of a judicial intimation to effect the delivery of the thing, then he becomes liable to pay interests.

1437 (2) Nevertheless, even in the case mentioned in this article, **in the event of any of the circumstances referred to in article 1434, the buyer, if he suspends payment of the price, shall owe interest thereon**, unless he elects to pay the price into court.

Article 1437 (2) holds that if interest is payable by the buyer by reason of **article 1434**, the buyer **continues to owe interests even if he has suspended the payment by way of article 1437 (1)**.

1435. (1) **The buyer is not bound to pay interest during the time allowed to him in the contract for the payment of the price.** (2) Nevertheless, any time allowed by the seller after the contract of sale shall not operate as a waiver of the interest on the price, unless such time be allowed under a will.

Article 1435 holds that the buyer is not bound to pay any interest for the time allowed to him for the payment of the price. Any time exceeding the permitted duration for payment shall be considered for the purposes of interest. Furthermore, any time allowed by the seller for the buyer's payment following the term stipulated in the contract for payment **shall not serve to relieve the buyer of the obligation for interest**

3: To Receive the Thing Bought

The third obligation of the buyer is to receive the thing bought. This does not apply **where the sale was made on credit**. In any cases where the sale is not made on credit, the buyer must present himself at the time and place where the sale is to be carried out, and he must pay the price at that time and place. Failing to do so would expose the buyer to an action of non-performance, which could lead to the dissolution of the sale.

In ***Nicosia vs Cuschieri***, the Court held that if a thing is delivered after the stipulated time, the buyer is bound to accept it unless he has sent the seller a judicial letter declaring his default.

4: To Pay the Expenses of the Sale

Any expenses relating to the sale of the thing is imputed to the buyer. This rule applies differently when dealing with the payment of brokerage and when the payment of experts entrusted with the determination of the price are due. Further, the parties are free to derogate from this rule, should they so agree.

Remedies Available to the Seller

1) The Actio Venditi

The first remedy available to the seller when the buyer fails to perform is the **actio venditi**, through which the seller may compel the buyer to pay the price and accept the thing. If the buyer refuses delivery, the seller may deposit the item in court at the buyer's risk. This action allows the seller to enforce any specific obligation owed by the buyer under the contract of sale.

2) Judicial Authorisation

A second remedy available is that the seller may seek the Court's authorisation, following his deposit of the thing in Court, either to;

- **Delay** the delivery until the payment of the price (except in cases of sale on credit); or
- Take necessary steps to **sell the thing by judicial auction**.

The law permits the seller to delay the delivery of the thing via **article 1391** and **1392**;

1391. The seller is not bound to deliver the thing, if the buyer does not pay the price thereof, unless the seller has allowed the buyer time for payment.

1392. (1) Nor shall the seller be bound to make delivery of the thing, even though he has allowed the buyer time for the payment of the price, if, since the sale, the buyer has by his own act diminished the security which by the contract he had given to the seller.

(2) Nor shall he be bound to make delivery if, since the sale, the buyer has become a bankrupt, or insolvent, or his condition has been so altered that the seller is in danger of losing the price.

(3) The same rule shall apply where, although the buyer was in a state of bankruptcy or insolvency at the time of the sale, such state did not reveal itself except after the sale and it was not known to the seller at the time of the sale.

(4) In the aforesaid cases, however, the seller is bound to deliver the thing if the buyer gives him security for the payment of the price at the time agreed upon.

In ***Darmanin vs Sammut***, the Court held that if the buyer does not pay the price, the seller has the **right of retention over the thing**, as a guarantee of his rights. If the vendor does not deposit the thing in Court, he must retain the thing exercising g the diligence of the **bonus paterfamilias**. The ***periculum rei*** is still left within the buyer.

3) Pactum Commissorium Tacitum

The third remedy deals with ***pactum commissorium tacitum***, which is a **tacit resolutive condition** whereby if one of the parties in a bilateral contract does not perform his obligation, then **the other party is not bound to perform his obligations**.

1438. (1) **The seller of an immovable cannot demand the dissolution of the sale on the ground that the price has not been paid to him.**

(2) In the case, however, of goods or other movables, the dissolution of the sale, even though no express resolutive condition is attached to the contract, shall take place *ipso jure* in favour of the seller, if the buyer previously to the expiration of the time fixed for the delivery of the thing, has not presented himself to take delivery thereof or if on presenting himself to take delivery of the thing he has not concurrently tendered the price, unless a term of credit has been agreed upon for the payment thereof.

Article 1438 protects third parties who might have acquired rights over the immovable following a sale, notwithstanding that the buyer has not yet paid the price. The seller is not permitted to dissolve a contract of sale for immovables on the grounds of non-payment. **Sir Adriano Dingli** has followed this view based on the work of **Troplong**, who disagreed with the French System which did not protect the rights of third parties.

However, **per article 1438 (2)**, the law applies the notion of ***pactum commissorium tacitum*** in relation to **movables**, provided that this works in favour of the seller, and not the buyer.

In ***Farrugia vs Dunbar Vella***, the Court stated that the law allowed the tacit resolutive condition to apply *ipso jure* in the case of movables to protect the seller. **The Court held that movables fluctuate in value much more rapidly when compared to immovables, and thus the seller may be prejudiced by the buyer's delay.** In this judgement, the Court implied that in the case of immovables, owing to the static nature of their price, there was no need to impose the tacit resolutive condition ipso jure, following what was held by **Mazzoni, Ricci,** and **Laurent**.

Thus, if the buyer of a movable has not presented himself to accept the delivery of the thing, unless a term of credit was agreed to, the contract is deemed to dissolve ipso jure. **Ricci** held that the reasoning behind this provision was based on the **difficulty to exercise the actio rei**

vindicatoria in the case of movables, as the transfer of possession of movables is exercised quickly and easily.

In ***Demajo vs Grech***, the Court held that the ipso jure tacit resolutive condition in sale applies only in favour of the seller. The buyer is protected by way of **article 1226;**

1226. (1) The plea of nullity may at any time be set up by the party sued for the performance of the contract in all cases in which such party could have brought an action for rescission. (2) Such plea is not subject to the prescription established in articles 1222 and 1224.

The **automatic** cancellation of a sale due to non-payment protects **only the seller**. The **buyer**, however, can still protect himself by raising a **plea of nullity** under Article 1226 **at any time**, even if the prescriptive period has expired.

The right of the buyer to rescind the sale can be found in **article 1385**;

1385. If the seller fails to make delivery at the time agreed upon, **the buyer may elect either to demand the dissolution of the contract or to demand that he be placed in possession of the thing sold**, provided the delay has been caused solely by the seller.

In ***Vassallo vs Agius***, the Court held that the tacit resolutive condition in civil obligations does not generally apply *ipso jure*, but instead is to be declared ex officio by the Court. The Court, however, declared **article 1438 (2)** as being an exception to this rule. The Court also held that **where no term by when the payment must be effected was established, the provision under Article 1438 (2) could not apply**.

This sub article reads as follows:

(2) In the case, however, of goods or other movables, the dissolution of the sale, even though no express resolutive condition is attached to the contract, shall take place *ipso jure* in favour of the seller, if the buyer previously to the expiration of the time fixed for the delivery of the thing, has not presented himself to take delivery thereof or if on presenting himself to take delivery of the thing he has not concurrently tendered the price, unless a term of credit has been agreed upon for the payment thereof

4) The reclamation of the thing or the prevention of the re-sale

The fourth and final remedy available to the seller in the case of the buyer's non-performance of his duties is found under **article 1439**;

1439. If the sale of a movable was made without any stipulation as to credit, the seller may, in default of payment, take back the thing sold, if it is still in the actual possession of the buyer, or restrain the buyer from reselling the thing, provided the demand for the recovery of the thing be made within fifteen days of the delivery and the thing be in the same condition in which it was at the time of the delivery.

This remedy applies **solely to movables**. The seller thus has the remedy either **to take back the thing sold,** provided that the thing is in the possession of the buyer, or else to **prohibit the buyer from selling it to a third party**. The seller may only demand the reclamation of the possession of the thing **within 15 days of the delivery**, and the thing must be in the same condition in which it was at the time of delivery.

The requisites to this remedy are that;

- The thing must be a **movable**;
- There was **no agreed delay for payment**;
- The thing must be in the **possession of the buyer**;
- The thing must be in the **same condition** as it was at delivery; and
- The demand must be made **within 15 days** of delivery.

The Theory of Risk in Sale

The doctrine of risk has been defined by **Bianca** as *the danger of prejudices that the subject supports as a holder of a legal possession*.

The two essential components of this doctrine are **the periculum rei** (the risk which the owner bears in relation to the possible destruction or deterioration of the thing he owns, bearing also the losses attributed to such risk), and the **commodum rei** (the benefits attributed to the thing).

Under Roman Law, a sale was complete once the thing had been delivered. Upon delivery, ownership transferred along with the periculum rei. Today, under Maltese, French, and Italian Law, **the ownership and the risk is transferred upon the conclusion of the contract of sale,** i.e. - when the price and the thing are agreed to, being a consensual contract.

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

This is enshrined in **article 1347**, which states that the sale is complete (ergo, the ownership is transferred) when the thing and price have been agreed upon, notwithstanding that the thing has not yet been delivered nor the price paid. At the point of completion, **the risk and benefit of the thing becomes of the buyer**.

In ***Scicluna vs Fenech***, the Court held that this theory of risk is based upon **article 994** of the Civil Code;

994. Where the subject-matter of a contract is the alienation of the ownership, or of any other right over a certain and determinate thing, such ownership or other right **is transferred and acquired in virtue of the consent of the parties, and the thing remains at the risk of the alienee, even though the delivery thereof has not taken place.**

This article states that the contractual risk is at the charge of the alienee (buyer), even though the thing had not been delivered.

This is different when the movables are not sold in bulk but by **weight, number or measure**, per **article 1348**;

1348. (1) Nevertheless, where movables are **not sold in bulk but by weight, number or measure**, **the sale is not complete in that the property does not pass to the buyer** and the things sold remain at the seller's risk, **until they are weighed, counted or measured.**

(2) The buyer, however, may demand that the things be weighed, counted or measured and delivered to him, or, in case of non-performance of the obligation, payment of damages.
(3) The seller may also compel the buyer to perform his obligation or, in default, to pay damages.
(4) The provisions of this article shall also apply where the thing sold is an immovable and cannot exactly be determined before it is measured.

In such case, the risk remains at the **seller,** until such movables are weighted, counted, or measured.

This is founded on **article 995(2)**;

995. (1) Where the subject-matter of the contract is an uncertain or indeterminate thing, the creditor does not become the owner of such thing until it has become certain, or the debtor has specified it, and has given notice to the creditor that he has specified it.
(2) Until the thing has become certain or has been specified, it remains at the risk of the debtor.

When the Seller is in mora

When the seller is in mora (in default / in error), the **periculum rei is transferred back to him**, even though the thing may have been in the hands of the buyer. This is established in **Article 1126 (2);**

1126. (1) The obligation to give a thing carries with it the obligation to deliver the thing, and to preserve it until the delivery.
(2) **If the debtor is in default for delay in making the delivery, the thing shall be at his risk and peril, even though before such default it was at the risk and peril of the creditor.**

Thus, the buyer may have become the owner and risk-bearer of the thing upon the completion of the contract of sale, yet when the seller enters into default, whether in relation to delivery or otherwise, then the **periculum rei is transferred back to him**.

When the sale is subject to a suspensive condition, we refer to **article 1064**;

1064. Where an obligation is contracted under a suspensive condition, and the thing forming the subject-matter of the agreement perishes or deteriorates before the condition is fulfilled, the following rules shall be observed: (a) if the thing perishes entirely, without any fault of the debtor, the agreement shall be ineffectual; (b) if the thing perishes entirely, through the fault of the debtor, such debtor shall be liable to the creditor for damages; (c) if the thing perishes in part only, or deteriorates, without any fault of the debtor, the loss shall be borne by the creditor, who shall be bound to receive the thing in the state in which it is without any abatement of the price thereof; (d) if the thing perishes in part, or deteriorates, through the fault of the debtor, the creditor may elect either to demand the dissolution of the agreement, or to claim the thing in the state in which it is, with damages.

Notwithstanding the aforementioned rules, **the law does not prohibit the buyer and the seller from derogating from such rules, establishing different moments at which the ownership or risks are transferred from one party to another**.

The Dissolution and Recession of Sale: Redemption & Lesion

1440. Independently of the causes of rescission or dissolution already mentioned in this Title, and of those which apply to all agreements, a contract of sale may be, in whole or in part, dissolved by the exercise of the right of redemption and may be rescinded on the ground of lesion.

Article 1440 holds that a sale may be dissolved or rescinded, other than those causes which were previously referred to, in whole or in part, on the **grounds of redemption** and **of lesion** respectively.

By redemption— if the seller reserved the right to re-purchase the thing sold within a fixed time.

By lesion— if the price is so low that the seller suffered a substantial legal disadvantage (received less than half the real value).

Redemption

Redemption is a right reserved in the seller's favour to **repurchase** by returning the price and other expenses. In this manner, the vendor redeems the property which he has sold to the purchaser. This right is of a patrimonial character, and may be assigned to others by universal or by particular title.

The action for redemption is defined under **article 1441** and established by **article 1442**;

1441. The right of redemption is **created by agreement.** **1442.** The action for the recovery of an immovable, in pursuance of a right of redemption, may be instituted not only against the buyer, but **also against any other possessor of the immovable**; and upon the re-sale, the immovable passes to the party exercising the right of redemption, free from any hypothec, easement or other burden with which the buyer or other possessor may have charged it; saving, in regard to any contract of lease, the provisions contained in articles 1530 and 1531.

Per article 1441, the agreement must be **expressed** and specifically outlined in the Contract of Sale. It cannot take place naturally, in that if it is not included in the contract of sale, then it is automatically excluded. When a redemption is executed, the contract of sale is dissolved and the state of affairs returns to the *status quo ante*.

The right of redemption must contain a duration after when the right is forfeited. Per **article 1459**, this **duration cannot exceed 5 years**;

1459. (1) The right of redemption cannot be reserved for a period exceeding five years to be reckoned from the day of the sale. (2) Where the right of redemption has been reserved without any limitation of time, or for a period exceeding five years, the agreement is null in regard to any time exceeding five years.

(3) The period fixed by the contract or reduced as aforesaid, is peremptory; and it runs also against minors and persons interdicted or absent.

Duties attributed to the right of redemption

The seller must return **only those costs incurred as expenses to the sale**, as well as the **price itself**, and nothing more. **Articles 1443** and **1444** establish those duties binding the party instituting the right of redemption;

1443. The party exercising the right of redemption is bound to return to the party against whom such right is exercised **the price of the sale giving rise to the exercise of such right, and any other lawful expense incurred by the buyer in connection with such sale**, as well as all **necessary and useful expenses made on the thing either by the buyer or by any other possessor**, even though for any cause whatsoever for which neither the party against whom the said right is exercised nor any other former possessor is responsible, the effect of such expenses no longer exists.

1444. The party against whom the said right is exercised **is entitled to interest from the day of the respective disbursements which according to the last preceding article are to be refunded to him**, subject, however, to the deduction of the value of the fruits which, as from the day of the sale giving rise to the exercise of the right of redemption he or any other former possessor has collected or by the use of the diligence of a *bonus paterfamilias* could have collected:

Provided that he may retain the fruits aforesaid and waive his right to interest.

The buyer is entitled to **interest** on the refunds he will get (price + certain expenses)but in doing so he must **deduct fruits** from that interest. Conversely, he may also choose to **keep the fruits** and **give up all interest**.

The obligations of the **seller** emerging from the right of retention are;

1) The seller must return to the buyer the **price and expenses of sale**. Since the sale is dissolved, a reciprocal restitution must take place.
2) The obligation of the seller to **reimburse the buyer for any necessary and useful expenses**. Decorative expenses are not included.
3) The obligation of **reimbursing the interest on the sum paid**, per **article 1444**.

The obligations of the **buyer** emerging from the right of retention are;
1) The obligation of **relinquishing the thing** - one must note that here **we speak of a transfer of possession**, since ownership is restored to the seller automatically, since the sale is dissolved. One must also note that owing to this, the buyer has the right of retention (jus retentionis) over the thing, if the seller does not fulfil his reciprocal duties.

2) The obligation of **returning the fruits,** per **article 1446**, which begins when the buyer's right to interest stops.

The right of redemption ceases in 3 cases, being:
(1) **by the expiration of the time agreed upon**
(2) **by the transfer of the movable thing to a third party** (note - in the case of immovables, the right of redemption dissolves all relations between the re-seller and third parties), or
(3) **by renunciation of the right**.

Assignment of Debts & Other Rights

Assignment refers to the **sale or transfer of an incorporeal thing**, specifically the transfer of a **credit under an onerous title** for a price or any other consideration. Essentially, it involves the **sale of something intangible**.

In an assignment, the creditor, referred to as the assignor, transfers their credit to another party, known as the assignee, in exchange for a price. This transaction occurs directly between the assignor and the assignee, with the debtor remaining uninvolved in the assignment process. Similar to a sale, the assignment is considered complete once the debt (or the right or cause of action) and the price have been agreed upon. However, there is a

crucial additional requirement: **the deed of assignment must be formally drawn up to complete the process.**

The Deed of Assignment

The requisites for an assignment are divided into internal and external categories. The internal requisites align with those required for a contract of sale, while the external requisite necessitates that the assignment be made in writing.

1470. (1) The assignment is not valid unless made in writing.

According to **1470 (1)**, having the assignment **documented in writing is essential** for its validity. Furthermore, specific types of assignments, such as those involving hereditary rights or debts arising from public deeds, must be formalised through the execution of a **public deed**.

EXAMPLE: A is the creditor, B is the debtor, and C is the third party. In this situation, A needs immediate funds and cannot wait for B to pay the owed amount. Consequently, A assigns the debt to C, likely for a lower price than the actual debt due, allowing C the opportunity to profit. By accepting the assignment, C becomes B's new creditor and is bound by the same conditions originally established by A.

It is **crucial that the debtor is informed of the assignment**, as stated in **§1471**, to safeguard the debtor's interests. The debtor must know to whom the debt has been assigned in order to make proper payment. Notification of the assignment must be conducted through a **judicial act**, which can be filed by either the assignee or the assignor. This requirement is significant because the law imposes sanctions in **1472** for failing to notify the debtor about the assignment, as detailed in.

Effects of Assignment

The **assignee acquires the credit through the assignment**, enabling them to claim the full sum or object associated with the debt, even if the price of the assignment is lower than the amount owed or the value of the item due.

In addition to the principal credit, the **assignee also inherits any security**, **privilege**, or **hypothec** linked to the debt, along with all **accessory rights**. This includes rights to interests and other benefits that have not yet become due. However, it is important to note that **interests and fruits that have already fallen due are not included in this transfer, as they constitute a separate debt**. They lose their status as accessories and must be explicitly mentioned in the assignment for the assignee to acquire them.

Obligations of the Assignor

1476 outlines the **assignor's obligation to guarantee the existence of the debt at the time of assignment**, **explicitly prohibiting the assignment of fictitious debts**. If no explicit warranty is included in the assignment, the **law automatically presumes one exists**. Should it be discovered that the debt does not exist, the assignor is required to return any price received for the assignment. Furthermore, if the assignor has promised to cover the debt in the event of the debtor's default, they assume a role akin to that of a surety. In this case, the assignor is liable for the full debt, irrespective of the assignment price.

This warranty regarding the debt's existence **ceases under specific conditions**:

1. If the assignor explicitly states that the assignment is made without warranty;

2. If the debt becomes irrecoverable due to the assignee's negligence.

However, if the assignor has guaranteed payment for the debtor, the assignee is not obligated to take preservation actions to maintain the debt, as it is the assignor's responsibility to perform such actions without jeopardising the warranty.

Moreover, the **assignor is not obligated to guarantee the debtor's solvency unless expressly stipulated in the assignment, indicating that the debt is good and collectible**. If the assignor warrants the debtor's solvency without specifying a duration, this warranty is limited to one year from the assignment date if the debt is due or from the debt's due date if it has not yet matured. In the case of an annuity, the warranty does not extend beyond ten years from the assignment date.

Before the assignee can seek recourse against the assignor, they must first sue the debtor and prove his insolvency. An **exception** arises **when the assignor has promised to pay for the debtor upon the assignee's request**; in such cases, the assignee can immediately sue the assignor after making the request for payment.

Assignment of Hereditary Rights

The **alienation of an inheritance by the heir to a third party** in exchange for a price must be executed through a **public deed**, as outlined in **1481**. This article establishes several principles governing such assignments of rights.

First, if an individual **assigns their right to an inheritance without specifying the items included**, they must guarantee their status as an heir to that inheritance.

Second, if someone **sells an inheritance that does not exist** because the succession has not yet opened, or one that exists but to which the seller has no rightful claim, they are obligated to return the price to the buyer and may also be liable for damages.

Third, when a **person sells only their claim to a succession**, the assignor is not required to provide a warranty and is not bound to return the price, as their status as an heir is not guaranteed and involves inherent risks for the assignee.

1482 addresses the **scenario in which the seller is either a debtor to or a creditor of the inheritance**.

Article 1482 says that when someone sells their share in an inheritance, both seller and buyer must settle any gains or burdens related to that inheritance. If the seller owes anything to the estate or has taken estate property, he must repay or compensate the buyer. Conversely, if the seller has paid any debts or expenses of the estate, or if the deceased owed the seller money, then the buyer (who now takes the seller’s place as heir) must reimburse the seller. Unless the parties agree otherwise, each must restore what properly belongs to the other so that the buyer receives the inheritance share exactly as it should be.

Assignment of Litigious Rights

A **right is considered litigious when it can only be exercised after undergoing litigation**. Such rights may be contested either in whole or in part, regardless of whether an action has already been initiated or if there is a reasonable apprehension of one arising.

To counteract the potential abuses associated with the assignment of litigious rights, the law grants the debtor the option to discharge their obligation by paying the assignee the price of the assignment, along with any associated expenses and interests from the date of payment. However, the law does permit certain exceptions to the prohibition on assigning litigious rights.

If the assignment is made by a **co-heir** or **co-owner to another co-heir** or **co- owner of the right being assigned**, it is **allowed**. This exception is based on the premise that reducing the number of litigants in a lawsuit is beneficial.

Secondly, the **assignment is permitted if it is made to a creditor in satisfaction of their claim**, which helps avoid potential lawsuits should the debtor default on payment. Additionally, assignments made to the possessor of the property subject to the litigious right are also allowed. Assignments made under a purely gratuitous title are permissible as well.

The law does not specify the timeframe within which this right, created by assignment, can be exercised. However, **legal scholars agree that it can only be exercised until the lawsuit is definitively resolved**. Once a judgment has been rendered, the right either gets denied or confirmed, thus ceasing to be considered litigious.

The Law of Lease

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

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

The 1868 Code had as its basis contractual liberty (parties were at liberty to agree), and corporeal things, and one of the key factors was that at the end of the lease **there was no right to renewal unless it was expressly agreed upon**. Later on in history there were

automatic rights or granted rights of renewal, but no such rights existed in the 1868 Code. Other positive factors included the liberalism it offered as well as a useful default position in the sense that the Civil Code, as originally drafted, provided default rules which made sense and respected, in the tradition of the time, the autonomy of the parties leaving them fully at liberty. This Code worked well until the turn of the century when we started to find the typical situations of the time, such as the fact that there was a difficulty and a scarcity of residential accommodation, and that there was also the situation that rents were unaffordable. Furthermore, young couples could not easily find independent accommodation. Such that in 1931 we had what is today known as Cap. 69 of the Laws of Malta, the Reletting of Urban Property (Regulation) Ordinance, the second landmark law on the issue. This regulation has been amended over the years with the last taking place last year. As the name implies it referred to urban property. The definition of property was perhaps arbitrary through today's lens.

It included residential accommodation, certain categories of commercial property, (wholesale, retail, cinemas, warehouses (it was unclear whether offices were considered to be commercial properties, garages were not included although it was debated whether or not they counted as warehouses)). **The lessee and tenants were very widely defined.**

The basis of Cap. 69 is that at the termination of the lease there was an automatic, given by law, right of indefinite renewal of the lease under the same terms and conditions such that the idea was that it was to be a temporary measure to ease the housing shortage (although it also applies to commercial premises). The conditions could be changed if one were a lessor in very particular qualified circumstances, but the law created a specialised court known as the **Rent Regulation Board** which is still in existence today. Therefore, if the lessor wanted to take back the premises leased, or felt that the rent was unfair, or decided to make improvements, **the remedy was going to the Board which then had parameters whether to allow or reject these requests.**

The key note to take from this law is the following key features: urban property as therein defined, the wide definitions of the term *"tenant",* and the indefinite renewal. This law came into operation when the Civil Code period ended. The way in which it was conceived was

that when the original term (all leases must have terms) under the Civil Code ended then Cap. 69 came into force. To that end, **Cap. 69 itself did not impose controls on the original rent.**

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

Next, although this law has since been abrogated, **the Housing Act was passed in 1949** and gave the Housing Secretary the right to requisition private, unoccupied property and force the landlord to rent it out on certain conditions. What would happen was that neighbours would often report houses they knew to be vacant to the Housing Secretary. Again, at the time there was a crisis of homeless as the nation rebuilt in the aftermath of the War. In 1961 **the Housing (Decontrol) Ordinance, Cap. 158** of the Laws of Malta, was passed. Although the current Cap. 158 has been significantly amended such that a lot of the original 1961 content has been removed and legislated, the concept of the control remains a reflection of the market reality which showed that in spite of the good intentions of Cap. 116, Cap. 69, and the Housing Act**, these laws had the opposite effect as owners were doing their utmost not to lease out property for fear of never seeing their property again.** The burdens of structural maintenance and repairs were entirely disproportionate to the frozen rent. On the one hand we find increasing costs and on the other we find low, fixed income.

The term *"decontrol"* means to take-away-from. As such, this Ordinance was intended to create a legal context whereby the effect of certain laws which were considered to be unfair or an economic disincentive to renting. **The thinking at the time was that there was the need to act to reactivate the rental market to bridge the gap between demand and supply of rental property**. Therefore, incentives were created to encourage landlords to place property on the market for property. The concept of decontrol was to take away from

the sphere of operation of these restrictive rent laws, those properties which were decontrolled, making it a legislative incentive for people to build or buy to rent, free of the issues of indefinitely frozen rents or the risk of requisition. Note that this referred only to residential accommodation, as the thinking was that businesses take care of themselves.

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

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

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

Finally, in **Act 24 of 2021**, **the Reform of Controlled Residential Leases Act** referred to dwelling houses with the background of mounting criticisms by the European Court in Strasbourg regarding the rights of the landlord. This Court has had occasion to think and reflect on what is a reasonable restriction to the right of enjoyment of property and it has always stressed the reasonable and proportional burden of the owner, such that it has consistently held that **there should be a proportion between the interests of the tenants**

and those of the landlord such that the right of peaceful enjoyment of possessions, Article 1 of the First Protocol, **is respected.** Therefore, the Court has taken a certain pro-landlord approach in commercial leases (*vide* the ongoing discussion of leases taken by band clubs), as can be noted in the language used, stating that in the case of residential eviction situations the owner must suffer a disproportionate burden.

Therefore, the yardstick in commercial situations is that the owner is in a stronger position than those in residential scenarios, in which case the stance is decidedly pro-tenant. Act XXIV of 2021 addressed specifically this situation, creating a means test for the tenant to fulfil based on income and capital in the previous five years. If the tenant is not over the threshold, then the rent is increased by 2% of the open market value of the property, but the difference is subsidised by the Housing Authority. If one is over the threshold, the tenant must vacate the premises in two years.

Thus, in summation;

- 1995 - Distinction between leases pre June 1995 and post June 1995, in that leases post June 1995 were liberalised (returning to the 1868 stance of complete freedom) and leases pre June 1995 continued being regulated by the law which governed them.

- **Act X of 2009** - introduced distinction between urban residential leases and commercial leases, from 1st January 2010 such contracts must be in writing;

- Act XXIX (29) **of 2019** - Introduction of Private Residential Leases Act, such must be in writing and registered starting from January 1, 2020.

Of Contracts of Letting and Hiring

We will be observing **articles 1525 - 1531B** of the Civil Code as a starting point. We will then delve into other special laws, such as **Chapter 69.** In the Civil Code, one will find the original provisions of the Civil Code with significant amendments which took place over time. The reason is generally historical in that the law of lease is far more of a structure with a lot of branches rather than a systematic statement. There are generally references to other special laws.

After the provisions governing the law of lease, there are 3 other short titles which cover other aspects of letting and hire.

The first is the **letting and hiring of carriers of land and sea** (which is typically of historical value, since this area is regulated by other modern special law).

The second is **the hiring of a person** (which has today resurfaced in a different manner, whereby a company provides people for employment for another company, i.e the hiring of **personnel**).

The third is the **contract of works** (***locatio operis***), known as *appalt,* which refers to the contract whereby a contractor is engaged to perform and carry out certain works, characterised by the **independence of the contractor from the employer**, which is what separates this type of contract from the contract of employment. In the latter, the employee is hardly independent from the employer, whereas in the locatio operis, the employee is independent from the employer.

Formalities of Lease Contracts

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

Article 1525 (1) is partly an original provision. Nonetheless, there are references to Chapter 69, 199, and other special laws. The original provision stated that lease could be done

verbally or in writing. However, by virtue of **Act 10 of 2009**, as of **1st January 2010**, a contract of lease must **be done in writing,** in the case of **urban property, residential tenements or commercial tenements**. Thus, theoretically, one may rent a vehicle verbally, but he may only rent urban, residential, or commercial tenements in writing, and not verbally. These contracts may also be done electronically, but not verbally. Generally, anything which is permanently stored and which may be retrieved would be deemed as being done in writing.

Locatio operis, or a contract of work and labour, differs from a contract of employment. *Locatio operarum* is today all but abrogated by the contract of employment (*vide* Cap. 425 of the Laws of Malta).

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

Adjudication of Lease disputes - the Rent Regulation Board

The provisos which ensue are later additions to the law. Such provisos refer to the **rent regulations** (Chapter 69). By virtue of these amendments, **the Rent Regulation Board** can decide on ***all matters affecting the leases of urban tenements including residential as well as commercial tenements including causes relating to the occupation of urban tenements where they have expired, and any damages resulting during such period of occupation***.

Thus, the Rent Board has sole competence to the exclusion of the ordinary Civil Courts and, where competent, the Agricultural Lease Board. **Thus the Rent Board, established by Chapter 69, hears all cases pertaining to urban tenements, residential tenements, and commercial tenements.** This was specifically tasked in wide terms because there were some doubts as to the competence of issues pertaining to damages left by the tenant following the

termination of the lease. The Courts have interpreted such issues as to fall under the competence of the **Rent Board**. The moment that there is a **lease relationship** pertaining to Urban, Residential, and Commercial tenements, then it is the **Rent Board** which has competence.

S.1525 (1) (provisos) The Rent Regulation Board (hereinafter referred to as the "Rent Board") established under the Reletting of Urban Property (Regulation) Ordinance shall decide all matters affecting the leases of urban tenements including residential as well as commercial tenements **including causes relating to the occupation of urban tenements where such leases have expired, and any damages resulting during such period of occupation**. Other leases fall under the competence of the courts of civil jurisdiction while matters relating to agricultural leases shall fall under the competence of the Rural Leases Control Board appointed according to the provisions of the Agricultural Leases (Reletting) Act:

Provided that matters relating to the **validity of a contract of lease, shall be examined by the courts of civil jurisdiction**, so however, that any other matter following the determination of such matters relating to validity shall fall under the competence of the Rent Board.

The Rent Board shall also have the competence to decide demands related to maintenance, repairs, defects and faults of the tenement including latent ones, damages or improvements, amounts due for water and electricity and any amount left by way of security deposit by the tenant, where such demands are included in other demands or pleas made before the Board, over which the Adjudicating Panel has no jurisdiction.

The Rent Board has the authority to request information and documentation from government entities, departments and authorities as well as from any other entity to meet its functions as established in this Code.

In the 3rd proviso, the law states that the **Adjudicating Panel** established by the **Agricultural Leases Act** is excluded from competence in relation to demands related to

maintenance, repairs, defects, and faults of the tenement, including latent damages, insofar as the claim relates to **urban property** or **residential or commercial tenements**. The **lease of movables** (i.e renting a boat) falls under the remit of the **ordinary Civil Courts**. Further, **agricultural leases** fall within the competence of the Agricultural Leases Control Board, as per Chapter 199, and not the Rent Board.

Therefore, the competence of the Rent Board is triggered by the existence of a lease contractual relationship. Without such contract, the Rent Board has no competence. However, **it is the Ordinary Civil Courts who have the competence to decide whether or not a lease exists.** If the Ordinary Civil Courts find that a lease exists, they will cease the proceedings and state that they have no competence over the dispute. If there is no lease agreement in question, then the Courts have competence to continue to hear the matter. Furthermore, a competence issue relating to for example aircrafts, ships do not fall under the ordinary competence of the board as the board only deals with urban, commercial and residential immovables and which do not fall within the net of chapter 604.

In the third proviso, the law makes a distinction between **competence** and **jurisdiction**. This is a clever distinction, because competence refers to *who can hear the case*, whereas jurisdiction refers to *the powers available for the body in deciding on the matter*.

The subsequent article (1525(2) holds that provisions of this title do not apply to agricultural leases.

(2) Unless otherwise specifically stated in this Title, the provisions of this Title shall **not apply** to **agricultural leases** which shall continue to be regulated by the provisions of the Agricultural Leases Reletting Act.

Important Definitions pertaining to s.1525

Article 1525 (3) provides several very important definitions, which serve to put to rest certain unclear terminology.

These definitions are a result of the anomalies which used to arise under Chapter 69.

For example, Chapter 69 referred to Commercial Premises, which would comprise of shops, pharmacies, bakeries, but not the offices of lawyers, architects, etc. The reason was that Chapter 69 had defined the term through the statement *a tenement used for any art*. The question was whether the exercise of legal work fell under this classification, a question which was answered by the courts in the negative. Thus, S.1525 (3) serves to clarify these definitions;

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

Provided that a tenement leased to a society or leased to a musical, philanthropic, social, sporting or political entity, that is used as a club, shall not be considered as a commercial tenement even if part of it is used for the purpose of generating profit;

"club" means any club which is registered as such with the Commissioner of Police in accordance with the appropriate provisions of the law;

"private residential lease" means any long or short private residential lease, including the letting of shared residential space, which is entered into after 1st January, 2020, and any leases for a residential purpose entered into before the 1st January, 2020, which would still be in its original or renewed period on the 1st January, 2021.

It has been clarified that a ***club*** will not fall under the definition of ***commercial tenement*** even if part of the club is used to generate profit.

The Letting and Hiring of Things

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

(2) Any kind of corporeal property, whether movable or immovable, may be the subject of a contract of letting and hiring.

Article 1526 (2) states that **only corporeal things may be subject to a lease**. One may have a lease of an intangible right, but this would often be called a **royalty** or a **license**, and not a lease. **Article 1526 (1)** provides for the definition of the contract of the letting of things as a contract ***whereby one of the contracting parties binds himself to grant to the other the enjoyment of a thing for a specified time and for a specified rent which the latter binds himself to pay to the former.***

This is thus the grant of a **corporeal** thing for an **agreed period of time**, for an **agreed use**, and at an **agreed rent**. The contract of lease **cannot be perpetual** - it may be renewed, but it cannot be perpetual. There was a need to regulate the letting of large movables, such as aircrafts and engines. This contract is to be distinguished from licensing agreements, whereby one rents out **incorporeal rights** in exchange for an agreed price. Recently, our jurisdiction has entered into the Cape Town Convention, which allows for the creation of security interests for aircrafts and aircraft spare parts and engines.

This convention is unrelated to the Civil Code, yet article **article 1526 (3)** was added recently (2016 - Aircraft Registration Amendments), by reason of this Convention.

3) The letting of ships and aircraft, including aircraft engines, shall be regulated by the provisions of any agreement between the lessor and the lessee in accordance with its terms as **well as by the international usages of trade applicable in the context.**

Notwithstanding any of the provisions of this sub-title, any agreement relating to the letting of ships or aircraft or aircraft engines, shall be governed by:

(*a*) **the terms and conditions agreed between the parties**, and in case of conflict with the provisions of this Code, such terms and conditions shall prevail; and

(*b*) **the special laws relating to merchant shipping and civil aviation**, as the case may be.

In other words, the lessor is entitled to cite legal and contractual grounds to terminate the charter of an aircraft or vessel, and the lessee is entitled to challenge the legality or justification of such termination in order to claim damages. This is linked to the term ***default***. The Aircraft Registration Act incorporates part of the Cape Town Convention, which allows the taking of financial security, lending, banks, etc, not only over aircrafts but also over **spare parts** (engines), owing to the value of spare parts, which may be utilised as security. The value of spare parts in aircrafts are so significant that an investor may invest solely in the parts of the aircraft. **Per s 1526(3)**, the letting and hiring of ships and aircrafts is governed **firstly** by **Merchant Shipping** & **Aviation Law**, **secondly** by any terms and conditions agreed to, and **thirdly** by the **Civil Code**.

(5) The lease of a ship or an aircraft, including aircraft engines, or rights thereunder, shall be immediately dissolved or terminated by the lessor (or mortgagee who shall be deemed to have such power unless expressly waived) **at any time in the event of a default and upon notice in writing to the lessee**, notwithstanding the opposition by the lessee, **and this without the need of any authorisation or confirmation by any court that an event of default has taken place.**

In such circumstances the lessor may, after notice to the lessee, take possession of the ship or aircraft, including an aircraft engine, in accordance with the agreement between the parties and may, by application, ask the Court for an order authorising or directing these acts, and the Court shall render full support to the lessor or the mortgagee as expeditiously as possible.

The Lessor, per **1526 (5),** has the right to terminate the lease of a ship or aircraft unilaterally without any requirement of judicial interference at any time in the event of a default. This is a very one-sided provision, in the sense that a capricious or unreasonable lessor may opt to unilaterally dissolve such lease without any valid cause, extrajudicially. What is reserved in favour of the lessee is the **right to claim damages** if it can be established that the dissolution was unfounded. With the unilateral right comes the responsibility of damages, with the *burden of proof lying on the lessee to show that the termination is unjustified.*

The analogy here we can speak about is locatio operis. In locatio operis you have the right to dissolve the contractor you have engaged and the right is given to terminate unilaterally. You don't have to show default. However, the contractor can sue back and say there were no grounds for termination, I suffered damages and thus have a right to compensation.

The lessor also has the right to take possession over such parts subject to the lease. The Court will provide full support in favour of the lessor, in this regard, notwithstanding that the letter of the law also refers to the **mortgagee**. The mortgage is a type of security which was originally created under the Merchant Shipping Act in line with British Practice and was extended to the Aircraft Registration Act. There are a number of rights associated with mortgages, one of which is the **preferential ranking of payment of debts** in the case that the aircraft is sold, whether judicially or otherwise. The Mortgage is also classified as an **executive title**, alongside court decisions.

Another important right of the mortgagee is the **right to repossess** - the right to take back the asset. One may ask for a public search to reveal all states of mortgages. The point here is **that the mortgagee and the lessor have the right not only to dissolve the lease but also the right to repossess**. This was done to try an allay foreign investors about Court delays. There is a useful definition of **default** under our law. All financial agreements will contain references to the procedure followed after **default**, which thus warrants further understanding of the term. This definition is found under **Article 1526 (7)(b);**

1526 (7) (*b*) the term "default" means: (i) the fulfilment of a condition under which the dissolution of the lease was expressly covenanted or a failure by a party to perform his obligations; (ii) or a change in the financial condition of the lessee as stated in article 1079; (iii) or a default which substantially deprives the mortgagee of what it is entitled to expect under the agreement between the mortgagor and the mortgagee;

There are generally 2 types of Charter - the **Bareboat Charter**, whereby the charter **is solely for the ship or aircraft,** and the **Charter by Demise**, which means that the administration

and responsibility of the vessel or aircraft are surrendered entirely to the charterer (lessee). The latter is referred to as Charter by Demise because it reflects the surrender of responsibility by the lessor to the lessee (charterer).

1526(7)(*d*) the term "mortgagee" shall include a mortgagee acting in its capacity as security trustee, bond trustee or by whatever name called;

The Lease of a Co-Owned Property

We are discussing this in the context of the **lease** of an undivided object. The first question is whether a co-owner may lease out an entire building, where he only owns 1/3 of that building. The law replies in the negative, holding that **you may not lease out an undivided share**. Since the articles were amended at several points in the past, sometimes an article may only be understood in the context of a subsequent article. Thus, when reading these articles, one ought to pay more attention to the substance rather than the order, owing to the various amendments which affected the meaning of these provisions. Here, we refer to **articles 1527 - 1531**.

1527. (1) The lease of an urban property, a residence or a commercial tenement that is co-possessed by more than one person shall always be made by all the co-possessors subject to the provisions of article 1530.

(2) Should one of the co-possessors also occupy the co- possessed property, if the parties agree that a contract of lease be made, such an agreement shall be made by a contract in writing between all co-possessors on the one hand and the occupier of the tenement on the other; and thereafter such person shall be considered to be a lessee, according to the terms and conditions of a contract of lease, without losing his rights as a co-possessor:

Provided that this sub-article shall be without prejudice to the provisions of Title V of the Second Book, Part I of this Code.

(3) Should a co-possessor of an urban tenement, a residence or a commercial tenement lease out such property without authorization by a judgment of the Rent Board, or in the case of a

movable without authorization of the competent court, or without the consent of the other co-possessors, such lease may at the request of any one of the other co-possessors be **declared** null, **unless** such request is made **within two months from the date when such other co-possessor would have obtained knowledge of such a lease**.

Obviously, the lease made to an undivided property is valid where all co-owners agree and sign the lease. While the law refers to co-possessor, text writers and jurisprudence make it evidently clear that the law, here, is speaking of **co-owners**. Per **Article 1527 (3)**, the co-owners have the right to declare that a contract of lease is null and void if it is issued without the consent of the other co- owners.

It is possible, however, for one of the co-owners to request petition to the Rent Board (in the case of immovables) or to the Ordinary Civil Court (in the case of movables) to approve the lease in favour of an external third party, binding therefore the other co-owners. If A and B and C are co-owners, A will have to file a request against B and C, and in some cases against the prospective lessee, in the Rent Board (or Civil Court, as the case may be), asking the Court to approve the terms and the fact of the lease. The Board / Court will be requested to thus approve the lease and all underlying terms and conditions. This is a remedy available for a co-owner, which remedy is debated amongst jurists. This is made possible by way of **article 1528**;

1528. (1) **The Rent Board may, at the request made by means of an application by one of the co-possessors of the urban tenement, residence or commercial tenement, authorise the lease of the urban tenement, residence or commercial tenement**, where it is shown that the tenement is suitable to be leased and that the proposed lease is advantageous, and that it is not shown that any of the other co-possessors has a just cause to oppose such lease:
Provided that in the lease of movables all the provisions of this sub-article shall apply, however the matter shall fall within the competence of the courts of civil jurisdiction.

(2) The provisions of sub-article (1) shall also apply when any one of the co-possessors is absent, and the Rent Board, in the case of the lease of an urban tenement, a residence or a

commercial tenement (or the court in the case of the letting or hiring of movables and other things, as the case may be), would not have received any notice whether the absentee is still living, or as to his whereabouts.

It is also possible for all the co-owners to agree to grant a lease in favour of **one co-owner**. If a co- owner / co-lessor has opposed the granting of a lease, it does not mean that it has renounced to or forfeited what is known as its **right of preference.** Where there is a renewal or a lease, the right of preference is suspended, since the sitting tenement always has a preference to the lease, even in the case where such co-owner does not favour the granting of that lease.

This is established in **article 1529**;

1529. The co-possessor who has, in general terms, given his consent for the lease of the thing, or who, in spite of his opposition the Rent Board or the court, as the case may be, has given, in general terms, his authorization for the lease of the thing, may, nevertheless, exercise the right of preference referred to in articles 1591, 1592 and 1593 unless he has in any manner waived such right.

Therefore, irrespective of whether the co-owner approved of or disapproved of the lease which was granted by reason of the Court's (/Board's) authorisation following an application by another co- owner, his **right of preference** remained unaffected.

<u>This right of preference is often given in 3 scenarios;</u>

1. To the sitting tenant if the lease expires
2. To co-owners, and
3. To persons living above the lower tenement where a lease has come to an end.

As already mentioned **1527(3)** holds that where there is the lease of an urban, residential, or commercial tenement, by one co-owner without either the authorisation of the competent court or the consent of all the other co-owners, then that lease is subject to annulment at the instance of any one of the other co-owners, provided the action is filed within **2 months of the date of knowledge.**

The lease by a person possessing under **temporary or dissoluble** title is covered by **article 1530**;

1530. (1) The letting made by a person possessing the thing under entail or in usufruct or under any other temporary or dissoluble title, s**hall be valid even in regard to his successors, if it is made on fair conditions and for a term not exceeding eight years, in the case of rural tenements, or four years,** in the case of urban tenements, or an ordinary period according to usage in the case of movable property, or for any period, shorter than the said periods respectively, in the case of property the letting of which for a period exceeding such shorter period is prohibited.

(2) The letting made for any longer period by a person possessing the thing as aforesaid shall, on the demand of his successors in the possession of the thing, be reduced to the reasonable period above-mentioned, to be reckoned from the date of the contract.

Here, the scenario often pertains to **usufruct**, which is a temporary right, or rather a right which dissolves upon consumption, or which dissolves upon the death of the usufructuary, rendering it temporary. In the 1980s, we have seen a complete turnaround as to what **fair conditions** entail. Prior to the 1980s, fair conditions was understood and interpreted as being fair in terms of the old rent laws, until the tide shifted and the meaning of fair conditions was translated to refer to ***open market conditions*** - **what would a willing lessee pay to a willing lessor dealing at arms length without any undue pressure of whatever nature, circumstances, etc**.

Furthermore, the lease made by a person possessing the thing by dissoluble or temporary title is valid only if it is made for a **term not exceeding 4 years** (urban tenements) or for a **term not exceeding 8 years** (rural tenements). Today, it is harder to ascertain whether a tenement is classified as a rural one or as an urban one, since today, several farmhouses which appear to be rural are actually urban in nature, owing to the activities which surround such tenement.

Article 1531A was enacted in 2009, and was touched again in 2019 with the Private Residential Leases Act, and essentially holds that any lease agreement after 1st January 2010 has to **be made in writing,** and must stipulate **a number of requirements**;

1531A. (1) With regard to the letting of an **urban property, a residence and a commercial tenement** made after the 1st January, 2010, the contract of lease shall be made in writing and shall stipulate:

(*a*) the property to be leased;

(*b*) the agreed use of the property let;

(*c*) the period for which that property will be let;

(*d*) whether such lease may be extended and in what manner;

(*e*) and also the amount of rent to be paid and the manner in which such payment is to be made.

(2) In the absence of one or more of these essential requirements, the contract shall be null.

(3) The lease of an urban property, a residence and a commercial tenement made after the 1st January, 2010 shall be regulated exclusively by the contract of lease and by the articles of this Code:

Provided that private residential leases shall be regulated by the Private Residential Leases Act

What is concerning is that **if a lease agreement fails to contain any of the essential requirements under Article 1531A,** then the lease is to be declared **null**. This is concerning as the question arises as to whether the contract signed between two parties of good intention and of clear desires is to be annulled solely on the grounds of a lack of one of the requisites per **1531A**.

Reletting of Urban Property (Regulation) Ordinance: Kap. 69

This Chapter of the Laws of Malta deals with **residential leases**. Our first comment is the definition of ***shop*** found under Article 2 of Chapter 69;

the expression "shop" means any premises principally leased for the sale of any wares or merchandise, whether by wholesale or retail, any market stall, warehouse and any premises

licensed for the sale of wine and spirits or refreshments, any cinema hall or any other premises principally leased for the exercise therein of any art or trade or for use as a club;

When we were discussing the definitions in the Civil Code, we noted that **the Civil Code has built upon the definitions found under Chapter 6**9. The Civil Code has made it clear that *shop* (commercial premises) includes any commercial premises and any office whose objective is generally to generate income or profit. This was introduced in the Civil Code in **Act 10 of 2009** to clarify the problems that arose with the definition in Chapter 69. There were several judgements which were difficult to rationalise because of the strange interpretation given to premises which were used for any art of trade within the context of the definition of Shop under Chapter 69. One of the problems which arises when studying the laws of lease is the **difficulty to reconcile** the fact that there are different laws operating in different periods of time. For instance, the Controlled Residential Leases Act overrides the provisions of the Civil Code, but this piece of legislation must be read alongside the Private Residential Leases Act, thus suggesting a form of fragmentation when dealing with these laws. We will also consider the term ***tenant*** under Chapter 69;

the expression "tenancy" includes sub-tenancy; the expression "tenant" means also:
(*a*) in the case of a dwelling-house:
(i) that person who has been recognised as a tenant in accordance with any law validly applicable before the 1st June 2021;
(ii) the widow or widower of a tenant:

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

(iii) the siblings of the tenant who have continued the lease *in solidum* together with him: Provided that the siblings shall not have the right to be considered as tenants if they did not inhabit the dwelling-house for four (4) out of the last five (5) years prior to the 1st June,

2008, and, in the case of this sub-paragraph did not continue living with the tenant until the date of his death:

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

The only explanation as to why there is the reference to 2008 (first proviso) is that this definition was a transposition of several articles in the Civil Code which were introduced in 2010 which were subsequently repealed and done away with. We are also told that **if one is not recognised as a tenant upon the promulgation of the Controlled Residential Leases Reform Act (in 2021), then such person loses the protection and applicability under Chapter 69 unless he qualifies as a tenant per article 2**, namely sub-paragraphs (ii) and (iii) quoted above. Thus, the law creates the requirement that the widow or widower of a tenant may only be classified as a tenant if he or she has resided in the tenement for at least 4 out of the last 5 years preceding the 1st June 2008, **significantly limiting the scope and definition of a tenant**. This also means that the lease terminates with the death of the surviving spouse who has inherited the lease.

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

Article 2(b) has not been changed notwithstanding the aforementioned pieces of legislation which were introduced recently. This article holds that in the case of a shop, it is **consanguinity** or **affinity** which renders one a tenant where a tenant passes away without a widow or widower, up to the degree of cousin (where it is the cousin, such cousin is deemed heir of the tenant, and not tenant).

This means that in 2021, **the old rule that leases were inherited indefinitely under Chap 69 was done away with,** and these amendments are an effort to bring the definition of *tenant* per Chapter 69 on the same par as the Civil Code. Here, we will note the difficult balance between respecting the right of property (i.e - peaceful possession) and the right to evict. Surviving spouses and children who have been living in the tenement have the right to continue, subject to the overriding provisions of Article 4A;

44. (1) For the purposes of this Ordinance the term "letting" shall be deemed to include -
(*a*) any emphyteutical grant for a period not exceeding sixteen years; and
(*b*) notwithstanding any stipulation to the contrary, any agreement in pursuance of which any person has been accommodated in consideration of payment periodically recurrent in any premises other than a hotel or lodging-house licensed as such by the Police; and
(*c*) any other agreement whereby any real or personal right on any premises, which right includes that of occupation of those premises, is granted under an onerous or commutative title for a period of time, whether such time is established by fixing a certain reference to a certain or to an uncertain future event.
(2) The provisions of this article shall not apply to accommodation provided by the Government in requisitioned premises.

46. (1) The foregoing provisions of this Ordinance shall not apply to the lease of any premises entered into on or after the 1st June, 1995:
Provided that articles 16 to 45 shall also apply to all leases made after the 1st June, 1995.
(2) For the purposes of this article -
(*a*) the term "lease" includes any letting as defined in article 44(*a*), (*b*) or (*c*) and includes a sub-lease;
(*b*) the renewal of a lease on or after the 1st June, 1995 (whether such renewal be conventional, legal, customary or otherwise) shall not be deemed to be a lease entered into on or after the 1st June, 1995.

Here, we are speaking of **urban premises**, and thus agricultural premises are excluded. Article 46(2)(b) makes the point that **renewal of the old leases** on or after 1st June 1995 shall

not be deemed to be a new lease. The political decision is clear - new leases are liberalised, with the Private Residential Leases Act serving as a measure of control. This contrasts with the previous situation and position before 1995. We also had Act 10 of 2009 - when we refer to the Civil Code, we shall see that the old commercial leases cease after 2028, giving 10 years chance to decide a way forward.

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

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

There is an old and unwritten tradition which is codified and nearly universally adopted in drafting practice, owing its origin to the old articles on usufruct, that **ordinary repairs** and **maintenance** are at the charge of the lessee, whereas **extraordinary repairs** are at the charge of the **lessor**.

What article 4 (a) is stating is that the Board shall allow an increase in rent if the lessor is bound to carry out extraordinary (often structural) repairs. The second ground for the Board to allow the increase in rent is stated in article 4(b), providing that the Board shall allow an increase in rent, or the refusal of the renewal of the lease, or the imposition of new conditions by the lessor, in the case that **the new lease is not more than 2% per annum of the freehold value of the tenement on the open market**. This article saw a major reform owing to the **2021 amendments**, particularly when considering **article 4(b)**, which allows that in the case of a pre-June 1st, 1995 Lease of a residential dwelling house, the lessor can ask for

the application of this law, and subject the tenant to a **means test**. In the past, where there was an increase in rent, the tenant had an opt-out clause to be exercised within 15 days. The tenant was deemed to accept this new rent unless opposed by judicial letter.

In **Article 4A**, we find the right to request the Rent Board to increase the rent, with discretion being vested in the Board, up to a maximum of 2% of the open market value of the premises.

4A. (1) When a person is in occupation of a dwelling-house on the basis of a lease which commenced before 1st June 1995 through the application of the provisions of this Ordinance, the following conditions shall, provided they are inconsistent with the provisions of the said articles of this Ordinance, apply in respect of such lease from 1st June 2021 notwithstanding the provisions of the said articles of this Ordinance or of any other law.

(2) **The lessor shall be entitled to file an application before the Board requesting that the rent be reviewed to an amount not exceeding two percent (2%) per annum of the free and open market value of the dwelling-house** on 1st January of the year in which the application is filed and in order to establish new conditions regarding the lease.

(3) (*a*) When the request is made by the lessor in accordance with sub-article (2) and the leased tenement is a dwelling-house, the Housing Authority shall be notified with the application and shall have the right to participate fully as intervenor in the proceedings;

(*b*) the tenant shall in any case be entitled to the benefit of legal aid provided by the Housing Authority in proceedings filed in terms of this article:

Provided that this shall not prejudice the rights of the lessor who shall be entitled to the benefit of legal aid provided by the Legal Aid Agency in proceedings filed in terms of this article if he is not in full-time gainful employment;

(*c*) **at the initial stages of the proceedings, the Board shall conduct a means test of the tenant**, which shall be based on the means test provided for in the Continuation of Tenancies (Means Testing Criteria) Regulations issued under article 1622A of the Civil Code and any regulations that may from time to time replace them. The means test shall be based on the income of the tenant between the 1st January and the 31s December of the year preceding the year in which the proceedings are commenced and the capital of the tenant on the 31st

December of the said year. The means test shall be conducted with particular reference, *inter alia,* to regulations 4 to 8 of the Continuation of Tenancies (Means Testing Criteria) Regulations which shall apply *mutatis mutandis*:

The Housing Authority grants a subsidy in certain circumstances of up to 10,000 EUR per annum rent when the application is filed and served, after which the Lessor has to prove title, based on **the Means Test** per S.L 16.11. If the tenant does not qualify as being in excess of the Means Test, thus if the Tenant is **under threshold**, then the subsidy will come into effect. Meanwhile, another process which occurs after the proof of title and the means test, being the appointment of architects to **value the property**.

Then, the board has the discretion to allow a rent increase of up to 2% of such valuation. There are some anti-avoidance provisions that serve to ensure that assets are not kept hidden, such as that spouses are to declare their joint assets. If there is a change in circumstance, the lessor may reapply again. If the tenant is above threshold, thus not qualifying for protection, then the tenant must vacate within 2 years, and the Board has a discretion to fix an interim rent during these 2 years, until the tenant evicts.

Proof of title + means test → valuation of property by architects → board has discretion to allow a rent increase up to 2% of valuation → if tenant above threshold, then he must vacate within 2 years

<u>What the "% threshold" means</u>

The **2% threshold** compares: **The annual rent payable** vs **2% of the open market value of the property**. This is used to decide whether the rent being paid is **disproportionately low**. The landlord **does not recover possession**. The **Rent Regulation Board / Housing Authority** may: Increase the rent to a **fair level**, and Ensure it does **not exceed legal limits.** Because the tenant is vulnerable:

- The **Housing Authority pays a subsidy**
- This compensates the landlord
- The subsidy can be **up to €10,000 per year.**

Grounds for Eviction

9. The Board shall grant the permission referred to in the last preceding article in the following cases:

(*a*) if the tenant has in the course of the previous lease failed to pay punctually the rent due by him, or has caused considerable damage to the premises, or otherwise failed to comply with the conditions of the lease, or has used the premises for any purpose other than that for which the premises were leased, or has sublet the premises or made over the lease without the express consent of the lessor. For the purposes of this paragraph:

(i) the tenant shall be deemed to have failed to pay punctually the rent due by him if in respect of each of two or more terms he has not paid the rent within fifteen days from the day on which the lessor has called upon him for payment;

(ii) any subtenancy of a portion only of the premises, made on or after the l3th day of July, 1945, for the use of the portion sublet otherwise than as a shop and the residue of the premises continuing to be occupied by the tenant or by any member of his family, shall not be deemed to be a subtenancy referred to in this paragraph;

(iii) any subtenancy or assignment of lease of any premises, including a shop, made at any time between the 10th day of June, 1940, and the l3th day of July, 1945, both days inclusive, shall not constitute a good reason for the grant of the permission referred to in article 8;

(*b*) if the lessor requires the dwelling-house for his own residence or for that of any of his ascendants or descendants, whether by consanguinity or affinity, and the Board is satisfied that the tenant has alternative accommodation, holding it in title of ownership, which is reasonably suitable to the means of the tenant and his family as regards size and state of repair and proximity to his place of work (if he is employed):

Provided that the Board shall also consider properties of the tenant which despite being in the possession or detention of third parties, may be recovered by the tenant within a short period of time:

Provided further that the Board shall also consider properties, the use of which would have been granted to third parties under any other title including lease for the malicious purpose of evading the effects of this article:

Provided further that this article shall not be applicable where the tenant is sixty-five (65) years of age or older:

Provided further that this article shall be without prejudice to the lessor's right to obtain the termination of the lease in the case that the tenant does not meet the income and capital criteria of the means test mentioned under article 4A.

Article 9(a) establishes that the lessor may request the Board to terminate or to not renew in the following circumstances;

1) Where the lessee has caused considerable damage to the premises;

2) Where the lessee has changed the use/destination of the premises;

3) Where the lessee has not paid two or more instalments of rent and remains in default for 15 days following a request in writing of each default in instalments.

Thus, if there are 3 defaults, 3 letters must be written. There must be a separate request in writing for each default in instalments;

4) Where the lessee has, without consent of the lessor, either assigned or sub-let the premises.

The exhaustiveness of this list is an overall murky question.

Note that in the case of **sub-lease**, there exists a situation whereby **B subleases to C**, in which case the relationship between B and C is different and independent to that between A and B, but B remains responsible to A if the sub-lessee causes any damage. The title between B and C (sub-lease) depends on the continuous existence of the lease. If the lease terminates, the sub-lease terminates with it. An assignment is simply a transfer of the lease. A leases to B and A transfers the lease to C, in which case A exits the contractual relationship and C enters instead and in the shoes of A.

Moreover, there was an old article which allowed the lessor to act to take back the property. On this, there is also Article 13 of Chapter 69 which seems to have been forgotten with it being touched for the last time in 1942. It is unclear whether these prohibitions were meant to exist simultaneously or Article 9 supersedes Article 13.

Article 10 is relevant because towards the final provisions on lease in the Civil Code, there are some provisions to consider with respect to the right of preference. During the period of operation of and insofar as Chapter 69 operates, the provisions of the civil code relative to the right of preference are in abeyance.

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

Article 12 refers to the resuming of the possession of shops;

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

In the case of a shop, the presumption of possession can only be granted in the case contemplated under **article 9(a),** which was previously discussed.

Rent regulation board

This article deals with the constitution of the rent regulation board.

16. (1) There shall be a Board to be known as the Rent Regulation Board. (2) The Board shall consist of a Chairman who shall be appointed by the President of Malta from among the judges and magistrates. (3) The President of Malta may appoint several judges or magistrates to sit on the Board, but only one judge or magistrate shall sit in any one case. (4) Without prejudice to any other law the Board shall also decide all matters affecting the leases of urban property including residential as well as commercial property in terms of Title IX of Part II of Book Second of the Civil Code, Of Contracts of Letting and Hiring, including causes relating to the occupation of urban property where such leases have expired after the termination of the rent, and any damages resulting during such period of occupation:

Provided that matters relating to the validity of a contract of lease, shall be examined by the courts of civil jurisdiction, so however, that any other matter following the determination of such matters relating to validity shall fall under the competence of the Rent Board.

The Rent Board shall also have the competence to decide demands related to maintenance, repairs, defects and faults of the tenement including latent ones, damages or improvements, amounts due for water and electricity and any amount left by way of security deposit by the tenant, where such demands are included in other demands or pleas made before the Board, over which the Adjudicating Panel has no jurisdiction.

When a lease expires and the tenant remains in occupation, **the landlord's claim is no longer for rent but for compensation arising from unlawful occupatio**n. In such situations, the Rent Regulation Board has wide and exclusive competence to determine the dispute. This includes claims relating to compensation after the expiry of a lease, as well as matters concerning water and electricity charges, security deposits, breaches of lease conditions, and even the dissolution of a lease where a contractual obligation has not been honoured.

In all these cases, jurisdiction lies with the Board to the exclusion of the adjudicating panel under the Private Residential Leases Act. The only matters that fall outside the Board's competence are issues concerning the validity(and issues intrinsically related to the existence of the lease). Article 16(4) confirms that this broad competence of the Board reflects and reproduces the powers granted to it under the Civil Code.

The composition of the RRB is fairly simple, there is a Chairman appointed from amongst the Judges and Magistrates and two other members. Questions of law are decided by the Chairman alone. In the case of questions of fact, where the two architects of the Board file a joint report, this binds the Chairman. In these cases of unanimity, the Chairman cannot substitute its own position.

Article 16A discusses the **powers of the Board**;

16A.(1)(*a*) In actions before the Rent Board, where the demand is solely for the eviction of any person from the lease or sub-lease of any urban, residential or commercial tenement, with or without a claim for rent or any other consideration due or by way of damages for any compensation, up to the date of the surrender of the tenement, it shall be lawful for the applicant to demand in the sworn application that the Board gives judgment allowing his demand, without proceeding to trial:

Provided that when the demand for eviction is made with a claim for rent or any other consideration due or damages for any compensation, the Rent Board shall decide the demand for eviction at the first hearing before deciding any other demands made by the applicant:

Provided that the applicant shall, in his sworn application state that the respondent has no defence to the action:

Provided further that the applicant shall also file together with the application a sworn affidavit containing facts relative to the claim, and confirming that such facts are within his knowledge. The applicant may also file together with his application an affidavit of any other third party confirming facts relative to the claim.

(*b*) In the cases provided for in this article, the sworn application shall be in writing according to the prescribed form and shall contain an order to the respondent to appear before the Board, on an appointed day and at a stated time.

(*c*) In the cases provided for in this article, the sworn application shall also indicate clearly that the procedures conducted are special summary procedures where judgement shall be given at the first hearing of the case should the respondent fail to appear at that sitting or should he fail at that sitting to show that he has a valid defence to put forth to rebut the applicant's claims.

(2) A copy of the sworn application shall be served upon the respondent.

(3) In the cases referred to in sub-article (1), the sworn application shall be served on the respondent without delay; and he shall be ordered to appear not earlier than fifteen days and not later than thirty days from the date of service:

Provided that in the case of non-observance of the provisions of this article the Board shall not stop proceedings by special summary proceedings but shall give such orders as it may consider appropriate so that the rights of the parties be not prejudiced.

(4) The sworn application, and the affidavit produced therewith, and any order referred to in sub-articles (2) and (3) shall be served by means of any executive officer of the courts after judicial hours.

Article 16A is a copy and paste of Article 167 of the COCP. This article refers to special summary proceedings, known as *giljottina* proceedings. The idea that was **introduced was to provide a remedy for uncontested debt.** A judicial letter is sent, and if unchallenged it would be equivalent to that of a judgement. **Article 167 of the COCP,** is where it may be used both to get an executive title on unpaid rent and also eviction. The two demands may be proposed simultaneously. A judgement condemning a lessee to pay unexpired rent, or illegal occupation and also a judgement to evict. The applicant has to state that there are amounts that are due and to confirm on oath that there are no grounds for defence. It is not easy to state that in the sworn application, the defendant has no defence to the action.

Whereas ordinarily proceedings before the RRB are by *rikors*/application, in the case of proceedings under **Article 16A,** it has to be **a sworn application**. The seriousness of the giljottina, or special summary proceedings, is that there is a demand with the Court to proceed with a dispensation of hearing. This could be very dangerous and in fact Chief Justice Emeritus Giuseppe Mifsud Bonnici came hard on those who abused this procedure. In practice, the Court is cautious and only uses this procedure in case of squatters. On his part, the respondent has to convince the Court it has prima facie ground and the Court, at its discretion, may either evict or grant respondents leave to defend.

Article 23 is very important for valuations. Architects' valuations are important. The board will rely 2 members of the panel to exercise the premises in question. These are in practice very important questions because they relate to the values which are quite relevant.

On Article 23, where there has been previous litigation involving the same premises and there has been a report by the architect, jointly accepted by both parties. This report is judicially

confirmed and then imposed on the RRB. These are provisions of the RRB which were well-meant to expedite proceedings

23. (1) Whenever a question arises before the Board requiring the valuation of any premises or any other technical opinion in connection with any case before the Board, t**he Chairman shall assign two of the members of the Panel to examine the premises in question,** or to take cognizance of the record of the case relative to the matter in which the technical opinion is requested; and such two members shall present their report to the Chairman during the sitting or file the said report in the registry of the Board as the Chairman may direct:

Provided that where the valuation of any premises or any other technical opinion in respect of premises is required before the board and where:

(i) it results that the valuation or other technical opinion in respect of the same premises was given before a court by an Architect or Civil Engineer appointed by such court with the agreement of the lessor and the tenant who were parties to the said case before the court and who are also parties to the case before the board; and
(ii) the said valuation or other technical opinion was confirmed in a final judgment of a court, **the chairman may, after hearing the parties, decide to rely on the said valuation or technical opinion to such an extent as he deems fit instead of assigning two (2) members of the Panel to examine the premises in accordance with this article:**

46.* (1) The foregoing provisions of this Ordinance shall not apply to the lease of any premises entered into on or after the 1st June, 1995:

Provided that articles 16 to 45 shall also apply to all leases made after the 1st June, 1995.

(2) For the purposes of this article -
(*a*) the term "lease" includes any letting as defined in article 44(*a*), (*b*) or (*c*) and includes a sub-lease;

(*b*) the renewal of a lease on or after the 1st June, 1995 (whether such renewal be conventional, legal, customary or otherwise) shall not be deemed to be a lease entered into on or after the 1st June, 1995.

NOTE THAT THE RENEWAL OF PRE 1995 LEASES WERE NOT CONSIDERED TO BE NEW LEASES AND CONTINUED UNDER THIS ORDINANCE.

Per **article 46**, **articles 1-15 of this Ordinance shall not apply to leases issued after 1st June 1995, while articles 16 et seq shall apply to all leases**.

Housing (Decontrol) Ordinance: Kap 158

The current state of this ordinance is barely recognisable from its original state. The aim of this ordinance was to decontrol the shackles placed on lease under the previous laws, by allowing for a free and open market. The renewal for decontrolled houses, provided for under this Law, did not apply in the case of **leases entered into after 1st June 1995**. This is the first point which we must make. This ordinance aimed to boost home ownership and to strengthen the rental market after WWII's aftermath, in turn combatting homelessness. Chapter 116, the Rent Restriction (Dwelling House) Ordinance, set maximum rents and lease conditions, and thus, Chapter 158 was introduced in 1959 to create a new classification of dwellings, referred to as **decontrolled houses**, allowing landlords to set market prices, **repealing the obligation to renew leases and exempted decontrolled dwelling from requisition**. This less stringent ordinance aimed to adjust rents for improved controlled dwellings with tenant consent.

We must consider several important definitions under this Act;

Article 2: '**letting**" or "**lease**" includes -

(*a*) any emphyteutical or sub-emphyteutical grant for a period not exceeding sixteen years;

(*b*) notwithstanding any stipulation to the contrary, any agreement in pursuance of which any person has been accommodated in consideration of payment periodically recurrent in any dwelling-house; and

(*c*) any other agreement whereby any real or personal right on any dwelling-house, which right includes that of occupation of that dwelling-house, is granted under an onerous or commutative title for a period of time, whether such time is established by fixing a certain specified day or whether it can be established by reference to a certain or to an uncertain future event;

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

One must also refer to the original article, being **article 3**, which was intended to encourage people to build dwelling houses and then rent them out. This encouragement became the policy behind the original 1995 ordinance. All the different types of tenements listed under **article 3** shall classify as **decontrolled dwelling houses**. All of those tenements which qualified as decontrolled dwelling houses were not subject to rent laws.

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

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

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

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

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

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

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

In the relevant time there were grounds in article 3 of the law where the owner, which means here owner, emphyteuta and usufructuary, **could apply for a decontrol certificate**. If for example you could show that you had built a house which was not ready, if you had to do alterations etc for use on 1st April 1959 then you could apply for a dwelling house.

Article 5 states that decontrolled dwelling houses which are registered according to article 3 **are not subject to the Rent Ordinances**. This article was amended in 1979 to protect certain tenants

5. (1) Subject to the following provisions of this article and of article 6, the provisions of the Rent Ordinances shall not apply to any decontrolled dwelling-house from the day on which the house is registered in accordance with the provisions of article 3.

(2) Where on the expiration of the lease of a decontrolled dwelling-house (whether such period be conventional, legal, customary or otherwise) **the tenant is a citizen of Malta and occupies the house as his ordinary residence**, the provisions of sub- article (3) shall have effect and the provisions of the Reletting of Urban Property (Regulation) Ordinance shall also apply but only in so far as they are not inconsistent with the said provisions of this article.

Article 5 subarticle 1: The provisions of the rent ordinances, that is to say chapter 69 and 116, will not apply to decontrolled dwelling houses. The idea od the law was to take away from the clause of chapter 69 and chapter 116, the rent restriction dwelling ordinance.

Article 5(2) was introduced in 1979, in order to protect certain tenants, since the effect of decontrol was that there was no longer protection for tenants of decontrolled dwelling-houses. Note that the protection is restricted to **Maltese Citizens**. This article has been held

to be unconstitutional. Nonetheless, the provision remains. Prior to this 1979 amendment, the tenant of a decontrolled dwelling house had **no remedy to remain in the premises**, thus the 1979 amendments allowed the tenant to continue in the lease with an increase on the first continuation thereof, with subsequent increases arising after 15 years of continuation.

The criteria for the increase in lease was a cost-of-living index which is published and updated every year as an annex to this law. **Article 5 (3)** establishes the rules on renewing the lease, or imposing new conditions thereof, or increasing the price thereof, with such rules having effect provided that the conditions under article 5(2) are satisfied (i.e - the tenant is a citizen of Malta and occupies the house as his ordinary residence);

Article 5 grants ex lege the right to continue indefinitely on the same terms and conditions of the former lease with the exception of a debated doubling of the rent on the conversion of the lease and then every 15 years according to the index of inflation in chapter 158.

(3) The provisions referred to in sub-article (2) are:

(*a*) It shall not be lawful for the lessor of the dwelling- house to refuse to renew the lease except in any of the circumstances set out in paragraph (*b*), nor shall it be lawful for him to raise the rent, or to impose new conditions for the renewal of the lease, except as provided in paragraphs (*c*) and (*d*).

(*b*) The lessor may only refuse to renew the lease, and may only resume possession of the house, at the termination of the lease, if he shows to the satisfaction of the Board, on an application to resume possession, **that in the course of the lease, the tenant has failed to pay the rent due by him in respect of two or more terms within fifteen days from the day on which the lessor called upon him for payment,** or has caused **considerable damage to the house,** or otherwise failed to comply with the conditions of the lease or his obligations thereunder, or has used the premises for a purpose other than mainly as his ordinary residence.

(*c*) The rent payable under the same lease after the date of the first renewal of the lease made by virtue of this sub-article may be increased by the lessor, upon such renewal and after the

lapse of every fifteenth year thereafter during the continuance of the lease in favour of the same tenant, by so much of the rent payable immediately before such renewal or before the commencement of each subsequent fifteen year period, being an amount not exceeding the said rent, as represents in proportion to such rent the increase in inflation since the year the rent to be increased was last established.

(*d*) Where, on or before the date of any renewal of the lease of the dwelling-house, the lessor files in the Registry of the Board, a certificate, signed by a qualified architect and civil engineer and which is either accepted as correct by the tenant or has been so declared by the Board on an application by the lessor requesting such a declaration, showing that the house is in good state of maintenance and repair, all repairs and all maintenance of the dwelling-house shall thereafter, and throughout the continuance of the lease in favour of the same tenant, be at the charge of the tenant.

- **5(3)(a)** refers to the general rule, in that the lessor may not refuse the lease to the tenant
- **5(3(b))** provides the exception (i.e - when such lease may be refused), and
- **5(3)(c) and 5(3)(d)** refers to the situations in which **the rent may be raised or new impositions may be set for the renewal of the lease**.

- 5(3)(b) - lease may be refused if the lessor shows to the board that in the course of the lease, **the tenant has failed to pay the rent due in respect of 2 or more terms within 15 days from the date of payment, or has caused significant damage to the house, or otherwise didn't honour the conditions of the lease, or is not using the premises as his ordinary residence**.

5(3)(c) - rent may be increased after 15 years after the continuance of the lease in favour of the same tenant by an amount not exceeding the rent, representing in proportion to the rent the increase in inflation since the last increase in rent.

5(3)(d) - where the lessor, prior to the date of renewal of the lease of the dwelling-house, obtains a certificate signed duly by a qualified architect and civil engineer and which is accepted as correct by the tenant / declared as correct by the Board, showing that the house is

in a good state of maintenance, **then all expenses pertaining to repairs and maintenance shall thereafter be at the charge of the tenant.**

Article 5(3)(d) refers to a situation whereby the lessor is permitted to transfer the cost of ordinary repairs to the tenant, burdening the latter with both the cost of extraordinary repairs as well as the cost of ordinary repairs, provided that the conditions required by law are met**.**

5. (1) Subject to the following provisions of this article and of article 6, the provisions of the Rent Ordinances shall not apply to any decontrolled dwelling-house from the day on which the house is registered in accordance with the provisions of article 3.

Prior to the 1979 amendments, tenants had considerable power, preventing landlords from **refusing lease renewals**, **increasing rent**, or **imposing new conditions**. This led to difficulties for landlords in reclaiming their property or receiving market value rent. Legal challenges citing property deprivation without compensation were raised.

Article 5 has been amended to reflect Article 1 of the First Protocol of the ECHR, protecting the right to peaceful enjoyment of property. The thinking to understand these 1979 amendments was that 20 years prior to such amendments, there had been the Housing Decontrol Ordinance, and the effect of a decontrolled premises, as we know, is to free such premises from the control of the Rent Ordinances. Therefore, at the time there was a social reality whereby tenants of decontrolled dwelling houses, at the expiration of the lease, were out on the street, because there was no protection. **Thus, the purpose of this amendment was to give a security of tenure to the owner.**

We are thus told that where there is the expiration of a lease of a decontrolled dwelling house, held by a citizen of Malta as its ordinary residence (meaning principal residence and excluding holiday homes), there was the right to continue in occupation.

Article 5(2) holds that the provisions of Chapter 69 will continue to apply insofar as they do not conflict with the provisions under Article 5(2). We are also told that *it shall not be lawful for the lessor to refuse to extend the lease nor to impose new conditions except where provided thereunder*. We are told that refusal may only happen on non-payment of 2 instalments consecutively after notice, or where there is considerable damage, etc, with such wording being copy pasted from Chapter 69. There is a new provision in this Chapter, which holds that when there is a decontrolled dwelling house which continued by virtue of this chapter which is no longer an ordinary residence, then there is the right not to renew and to evict.

At the end of Chapter 158, there is an index of inflation. This is one of the indexes which exist. This index is arithmetical and provides for the proportion of the increase in rent when such increase is permitted by law (i.e - the first increase and the subsequent 15-year increases).

Article 9 of Chapter 158 is a historical provision which holds that the **Housing Act does not apply**. The gist of it is that the tenant of a decontrolled dwelling house had a right to continue on the lease under the same terms and conditions with the difference that there was a debated right of the owner to double the rent.

9. The Housing Act shall not apply to any house which is registered as a decontrolled dwelling-house in accordance with the provisions of this Ordinance.

Articles 12 and 12A provide the same narrative as article 5, and have been struck down by Constitutional Courts, notwithstanding that they remain in the Statute. The context is not the lease of a decontrolled dwelling house which has expired, but r**ather the situation of the expiration of a temporary emphyteusis of a dwelling house**. Here, we are moving from a lease to emphyteusis.

12. (1) Notwithstanding anything contained in the civil code or in any other enactment the following provisions of this article and of articles 12A and 12B shall have effect with respect to all contracts of temporary emphyteusis made at any time.

(2) Where a dwelling-house has been granted on temporary emphyteusis -

(*a*) for a period not exceeding thirty years, if the contract was made before 2lst June, 1979, or

(*b*) for any period, if the contract is made on or after the date aforesaid,

and on the expiration of any such emphyteusis the emphyteuta is a citizen of Malta and occupies the house as his ordinary residence, **the emphyteuta shall be entitled to continue in occupation of the house under a lease from the *directus dominus*** -

(i) at a rent equal to the ground-rent payable immediately before the expiration of the emphyteusis increased, at the beginning of the lease of the house by virtue of this article, and after the lapse of every fifteenth year thereafter during the continuance of the lease in favour of the same tenant, by so much of the ground-rent payable immediately before such commence- ment or the commencement of each subsequent fifteen year period, being an amount not exceeding such ground-rent, as represents in proportion to such ground-rent the increase in inflation since the time the ground-rent to be increased was last established; and

(ia) subject to the conditions laid down in subarticle 5(3)(*b*); and

(ii) under such other conditions as may be agreed between them, or failing agreement, as the Board may deem appropriate.

Article 12 provides for the context of a temporary emphyteusis of a dwelling house occupied by a Citizen of Malta. If the emphyteusis was done before the 21st June 1979, then it falls under the protection of this Act, if it **does not exceed 30 years**. If it was done after the 21st June 1979, the duration is irrelevant and it also falls under the protection of this Act. When we say that the tenant falls under the protection of this act, we mean that the emphyteuta may continue to occupy the house under a lease, subject to an increase in ground rent.

When the temporary emphyteusis is converted into a lease, then every 15 years, this rent is increased according to the COLI, as per **article 12(2)**.

Article 12 refers to the **temporary emphyteusis of dwelling-houses**. Prior to the 1979 amendments, if a dwelling-house was granted on temporary emphyteusis, it was up to the emphyteuta to vacate at the end of the term. There was no protection for such emphyteuta. One must note that in the case of pre-1979 temporary emphyteusis of a dwelling house entered into **either before 21/06/1979** (not exceeding 30 years), or **on or after 21/06/1979**, there emerged the **entitlement of the emphyteuta to convert the temporary emphyteusis into an indefinitely renewable lease under these conditions**.

"Under these conditions" refers to the statutory requirements of **Article 12(2),** namely that the temporary emphyteusis concerns a dwelling-house occupied as an ordinary residence by a Maltese citizen, falls within the relevant time limits, and **converts into an indefinitely renewable lease at a rent equal to the former ground rent subject to COLI-based increases every fifteen years and such other conditions as may be agreed or fixed by the Rent Regulation Board**.

This provision pertains to **temporary emphyteusis**, and **overrides any provision found within the Civil Code**. This provision in reality has nothing to do with decontrolled dwelling-houses, but it is nonetheless found within this Act of Parliament. The initial rent could not exceed twice the formerly payable ground rent, and then was revised every 15 years according to the COLI. There was also the right of the emphyteuta, in certain circumstances, to convert a temporary emphyteusis into a **perpetual emphyteusis**, done by multiplying by 6 the ground rent payable every month.

12 (3) Where on the expiration of an emphyteusis as is mentioned in sub-article (2)(*a*) or (*b*) the dwelling-house is subject to a lease, the provisions of the Reletting of Urban Property (Regulation) Ordinance, shall not apply in respect of such lease:
Provided that where the tenant under the said lease is a citizen of Malta and occupies the house as his ordinary residence he shall, on the termination of the lease, be entitled to

continue in occupation of the house under a new lease from the *directus dominus* at the same rent and under the same conditions as are mentioned in sub-article (2)(i) and (ii) in respect of the emphyteuta.

Thus, if there is a temporary emphyteusis which satisfies the conditions under **article 12(2),** then there is the right to convert into a lease, and if it is a temporary emphyteusis which is given out on lease, and the temporary emphyteuta does nothing, then this right passes onto the tenant.

Therefore, if B (emphyteuta) has purchased a house from A (dominus), and if B has rented out the house to C (tenant), then if B does not exercise the right to transform the emphyteusis into a lease as per **article 12(2)**, then the right to convert into a lease falls onto C, the tenant.

A (owner) grants a temporary emphyteusis to **B, B** leases the dwelling-house to **C.** The emphyteusis expires
B does nothing

In that case:

- **C steps into the protected position**
- **C obtains a new lease directly from A**
- On the **same statutory terms** that B would have enjoyed

If the temporary emphyteusis does not satisfy the conditions under article 12(2), then as per **article 12 (4)**, then the emphyteuta is entitled to convert the temporary emphyteusis into a **perpetual emphyteusis,** at a ground rent x6, revised every 15 years.

12 (4) On the expiration of a temporary emphyteusis of a dwelling house occupied by a citizen of Malta as his ordinary residence at the time of such expiration, not being an emphyteusis mentioned in sub-article (2)(*a*) or (*b*), **the emphyteuta shall be entitled to convert the emphyteusis into a perpetual one under the same conditions of the temporary emphyteusis with the exception of those relating to the duration and the**

ground-rent. The ground-rent payable with effect from the conversion of the emphyteusis into a perpetual one and until fifteen years from that date shall be equal to six times the ground-rent payable immediately before such conversion, and shall thereafter be increased every fifteen years by so much of the then current ground-rent, being an amount not exceeding such rent, as represents in proportion thereto the increase in inflation since the time the said ground-rent was last established.

People would then redeem x20 the ground rent. Thus let us imagine a ground rent of 250 EUR, then for around 50,000 EUR you would have the ownership of that property.

Briefly, **article 12A** contemplates a scenario where there is a number of sub-emphyteusis;

12A. (1) This article shall apply:
(*a*) on the expiration of a temporary emphyteusis of sub- emphyteusis (hereinafter in this article referred to as "the most recent emphyteusis or sub-emphyteusis") which is not one the effects of the termination of which are regulated by article 12(2)(*a*) or (*b*) or by article 12(4) or 12(5);
(*b*) of a dwelling house which at the time of the expiration of the most recent emphyteusis or sub-emphyteusis:
(i) is occupied by a citizen of Malta as his ordinary residence; and
(ii) is subject to another emphyteusis or sub- emphyteusis (hereinafter in this article referred to as "the preceding emphyteusis or subemphyteusis") whether perpetual or temporary.

We must also refer to **Article 12B,** which was introduced by 2018 Act XXVII, to provide a remedy for Article 12, mirroring article 4A of Chapter 69

12B. (1) When a person is in occupation of a dwelling-house on the basis of a title of lease, which may have also been established on the basis of a preceding title of emphytheusis or sub-emphyteusis, which commenced before 1st June 1995 through the application of the provisions of this Ordinance, the following conditions shall, provided they are inconsistent with the provisions of the said articles of this Ordinance, apply in respect of such lease from

1st June 2021 notwithstanding the provisions of the said articles of this Ordinance or of any other law.

We have a lease established on the basis of an emphyteusis or sub-emphyteusis established before the **1st June 1995**. It is not the lease established before such date, but the emphyteusis or sub- emphyteusis.

In ***Cauchi vs Malta*** *(2021),* the ECtHR expressed concern, despite these amendments, arguing that the 2018 Act, and thus Article 12B, lacked effective procedural safeguards and offered another cumbersome legal hurdle. The Court concluded that Article 12B's approach might still lead to low rents, failing to meaningfully address the disproportionate interference caused by the existing rent laws.

Article 16 specifies that the conversion right from a temporary emphyteusis to a lease does not apply to new leases after 1st June 1995. However, it does not invalidate previous instances of conversions. New leases followed the new rules, and existing leases remained valid and continuous.

***16.** (1) The provisions of article 5(2) to (5), article 7, article 10 and article 11, shall not apply to the lease of any dwelling house entered into on or after the 1st June, 1995.

(2) For the purposes of sub-article (1) -

(*a*) the renewal of a lease on or after the 1st June, 1995 (whether such renewal be conventional, legal, customary or otherwise) shall not be deemed to be a lease entered into on or after the 1st June, 1995;

(*b*) the continued occupation of a dwelling house under a lease from the directus dominus at the expiration of a temporary emphyteutical concession expiring on or after the 1st June, 1995 in terms of article 12 shall not be deemed to be a lease entered into on or after the 1st June, 1995.

(3) The provisions of article 12 shall not apply to any contract of temporary emphyteusis entered into on or after the 1st June, 1995.

One must note that **the 2021 amendments to this Ordinance** aimed to rectify the pre-1995 leases that were controlled or restricted - a situation recognised as violating fundamental human rights. These reforms shifted the burden to taxpayers due to the subsidies provided by the Housing Authority.

Continuation of Tenancies (Means Testing Criteria) Regulations: SL16.11

This SL establishes the **means test** referred to in Chapters 69 and 158. Here, there is specific reference to **article 4A of Chapter 69** and **article 12B of Chapter 158**. **Regulation 4 establishes and confirms that it is the Rent Board** who determines and hears proceedings related to the means test;

4. (1) Means test proceedings shall be heard by the Rent Board behind closed doors and the record of the proceedings shall only be accessible to the parties subject to an obligation on the landlord to maintain the information contained in the said record as secret information. Any person who divulges information in breach of the provisions of this regulation shall be guilty of contempt of the Rent Board without prejudice to any other civil or criminal liability to which the said fact may give rise under any other law.

The **means test** is divided into 2; the part dealing with **income** and the part dealing with **capital**, as per **Regulation 2 - the applicant is to pass both parts of the test;**

2. (1) These regulations establish the criteria of the means test to be satisfied in terms of article 4A of the Reletting of Urban Property (Regulation) Ordinance and article 12B of the Housing (Decontrol) Ordinance by a person with a claim to the continuation of the tenancy under the said articles. (2) In order to satisfy the means test criteria established by these regulations a person shall be required to have **both an income and capital** within the limits established by these regulations.

Both the income part and the capital part are ascertained **within a specific period of time established by Regulation 3;**

3. Without prejudice to the provisions of regulation 8, the only relevant period, hereinafter in these regulations referred to as the "relevant period", for the calculation of means for the purposes of these regulations shall be:

(*a*) with regard to the income criterion, the income between the 1st January and the 31st December during the year immediately preceding the year in which the application is filed in terms of article 4A of the Reletting of Urban Property (Regulation) Ordinance and, or, article 12B of the Housing (Decontrol) Ordinance;

(*b*) with regard to the capital criterion, the capital as of the 1 January 2021, or five (5) years prior the filing of the application before the Rent Regulation Board in terms of article 4A of the Reletting of Urban Property (Regulation) Ordinance and, or, article 12B of the Housing (Decontrol) Ordinance, whichever date comes earlier.

The **income test** is contingent on the applicant's **age**, in that **Regulation 5**, concerning the income test, holds that the applicant is first to check his or her respective age group, and then the Board will assess whether the applicant's income exceeds the threshold pertaining to that age group;

5. (2) For a person who is younger than thirty-six (36) years old to meet the income criteria of the means test, the income of the said person during the relevant period shall not exceed twenty-eight thousand and five hundred euro (€28,500).
(3) For a person who is between thirty-six (36) years old to forty-five (45) years old to meet the income criteria of the means test, the income of the said person during the relevant period shall not exceed thirty-eight thousand euro (€38,000).
(4) For a person who is between forty-six (46) years old to fifty- five (55) years old to meet the income criteria of the means test, the income of the said person during the relevant period shall not exceed forty two thousand euro (€42,000).

Regulation 6 establishes the capital test, and again carries a maximum capital possession depending on the age of the applicant;

6. (1) (1) For a person who is younger than thirty-six (36) years old to meet the capital criteria of the means test, the capital of the said person shall not exceed sixty thousand euro (€60,000). (2) For a person who is between thirty-six (36) years old to forty-five (45) years old to meet the capital criteria of the means test, the capital of the said person shall not exceed ninety thousand euro (€90,000). (3) For a person who is between forty-six (46) years old to fifty- five (55) years old to meet the capital criteria of the means test, the capital of the said person shall not exceed one-hundred and eighty-five thousand euro (€185,000). …

Here, the income is evaluated according to **the Income Tax Act**, with the sources of income being contained therein. On the other hand, **capital is evaluated according to the criteria established by Regulation 7 of the SL;**

7. In calculating the capital criteria of the means test, account shall be taken of: (*a*) the value of any immoveable property belonging fully to the person with a claim to the tenancy only if the said person holds vacant possession of the said property; (*b*) money deposited in a bank which can be withdrawn at less than three months' notice; (*c*) cash in hand; (*d*) time deposits; (*e*) bonds; (*f*) stocks; (*g*) securities; (*h*) any other financial instrument or financial product:

Private Residential Leases Act: Kap 604

This law came into force on the 1st January, 2020, and has faced significant amendment in the past few years, especially in the years 2021 and 2024. This is an act which serves to develop the private rented sector, by ensuring standards of fairness, clarity, and predictability,

vis-a-vis contractual relations between lessors and lessees. **Article 2** of Chapter 604 provides for the **definition of Private Residential Lease,** which per definition must be entered into **after 1st January 2020,** or else if entered before such date, any such lease which would still be in its original or renewed period on the 1st January 2021. Post-1995 leases which are still in force in 2021 are registrable. By the fact that they are registrable, they are not automatically applicable to these provisions, meaning they would be subject to the increases contemplated in the Civil Code.

As we will find out, in 2009, there were important increases. In 1995 there was first a liberalisation of the future and most importantly there was no right of renewal. The question is how much Chapter 604 will hinge on post 1995 leases.

One argument holds that it is a subsequent and specific law which should prevail over general law, and on the other hand there is the argument which holds that the post 1995 lease should run its course within its terms on the basis of the law in force at the time it was contracted.

2. "private residential lease" means any long or short private residential lease, including the letting of shared residential space, which is entered into after 1st January, 2020, and any lease for a residential purpose entered into before the 1st January, 2020, which would still be in its original or renewed period on the 1st January, 2021;

3. (1) The provisions of the Act shall apply to private residential leases that are entered into or renewed after the entry into force of the Act:

Provided that leases which were granted after the 1st June, 1995, and which are still in force on the day of the entry into force of the Act shall continue to be regulated exclusively by the provisions of the Civil Code, except for the cases specified under article 5.

(2) The provisions of the Act **shall not apply** to:

(a) **tenements belonging to the Government of Malta:**

Provided that tenements owned by **private foundations** set up for the purpose of providing affordable housing shall not be considered as tenements belonging to the Government;

(b) tenements let to any tourist, exclusively for tourism purposes:

Provided that if a property is registered as a holiday furnished premises in accordance with the Malta Travel and Tourism Services Act, the Act shall still apply if the applicant does not qualify as tourist;

(c) tenements which are not let for a primary residential purpose;

(d) tenements let or granted on emphyteusis before the 1st June, 1995:

Provided that the provisions of this Act shall not apply to leases which were entered into after the 1st June 1995, but which originate from a controlled private residential lease in accordance with the Reletting of Urban Property (Regulation) Ordinance or the Housing (Decontrol) Ordinance.

This act thus provides for 2 types of residential leases, being **long term** or **short term** private residential leases. These distinctions are made in **article 2**;

"long private residential lease" means any lease, negotiated for a primary residential purpose in accordance with article 8 and which is not a short private residential lease;

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

requirements the contract shall be deemed to be a private residential lease in accordance with article 8:

Provided further that any short private residential lease negotiated for a period exceeding six (6) months shall also be deemed to be a private residential lease in accordance with article 8:

Provided further that short private residential leases may not be extended;

When it comes to short term Private Residential Leases, such lease must be 6 months and designed for persons who only need to rent for a short time and the applicant must be one of the following:

1. Non-resident workers who are employed for a period of less than 6 months or are employed to complete a specific task within the same time period.
2. Non-resident students who are enrolled in courses of less than 6 months.
3. Residents who need to rent an alternative primary residence for a period of less than 6 months.
4. Non-residents who need to rent a tenement for a period of less than 6 months, provided that they would not be seeking to establish their long-term residence in Malta.

When it comes to long term private residential leases, they are effectively a private residential lease which is not a short private residential lease, henceforth one which is not 6 months (thus it is longer). Additionally, there is some different criteria. This Act, shall not apply to Government property, tourism letting and all those properties which are not rented for a primary residential purpose.

In order for this law to be applicable, we must be dealing with a primary residence. **Additionally, pre-1st June 1995 leases do not fall under the ambit of this law. These are regulated under Chapter 69.** Chapter 604 shall not apply to the letting of urban tenements when an emphyteusis is converted into a lease. This act shall apply to leases entered into after 1st January 2021. Therefore, this applies to private residential leases, long or short, entered into after the 1st June 2021 and which fall within the purview of the law so much so that these contracts require registration.

Article 8 provides for the **minimum contractual duration of long term private residential leases**;

8. A long private residential lease cannot have a duration of less than one (1) year. Any agreement stipulating a shorter duration shall be deemed to have been agreed for a period of at least one (1) year.

Article 5 sub article 1 imposes an obligation of registration of post 1995 leases which are still enforced when this law came into force. This is basically a consumer-oriented law and therefore in line with consumer legislation, Chapter 604 provides that any benefit granted in the law cannot be derogated from contractually.

Formalities of Private Residential Leases

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

Provided further that the inventory shall also be presented in the case where the tenement is let unfurnished.

Thus, per **article 6 (1), all private residential lease contracts must be done in writing**. The Law provides for the requirements as to the contents of such contracts, being (1) **the tenement to be leased**, (2) **the agreed use thereof**, (3) the **period for which such lease shall last**, (4) **whether such lease may be extended and in what manner**, (5) **the amount of rent and manner of payment**, (6) **any amount deposited by the lessee by way of security**, and (7) **an inventory attesting to the condition of the tenement** and the state of condition of the furniture and appliances found therein, supplemented with proof. **Per sub-article (2)** of article 6, the lack of one of these aforementioned formalities result in the nullity of the contract.

(2**) In the absence of one (1) or more of the said essential requisites stipulated in sub-article (1), the agreement shall be null and void**:

Provided that the failure by the lessor to comply with any of the said requisites may not be held as a valid reason for the lessor to be exempted from the obligation to register the agreement in accordance with article 4.

(3) The Authority may publish on its website a model private residential lease agreement which may be used as a basis by any person entering into a private residential lease agreement:

Provided that the Authority may also publish on its website a standards form containing the clauses referred to in sub-article (1) and which may be made compulsory for any person entering into a private residential lease agreement which is not in accordance with the model agreement

Article 7 refers to **clauses which are forbidden** from being implemented in such contracts. This article essentially prohibits the lessor from **premature termination of the lease**, except

in cases of default by the lessee. The landlord may terminate the lease in the case of default, per the Civil Code. This act explicitly states that, besides its own provisions, **there can be no case of early termination as provided by the Civil Code, and** thus the only case of early termination permitted by this Act is the case of default from the fulfilment of the lessee's obligations as stipulated by **articles 1554, 1555, 155A, and 1614** of the Civil Code. Any other form of early termination per the civil code is prohibited and ineffective in relation to Private Residential Leases.

7. (1) Any of the following clauses which are inserted in a private residential lease contract, shall be deemed to be without effect:
(a) clauses which provide for the automatic termination of the contract other than the non-fulfilment of the lessee's obligations under articles 1554, 1555, 1555A and 1614 of the Civil Code or the non-observance of any one (1) of the conditions of the lease for which termination had been expressly foreseen:

Provided that where the lessee fails to pay punctually the rent due, the lessor shall always call upon the lessee in accordance with article 1570 of the Civil Code;

There is the rule that a long private residential lease is automatically renewed unless terminated by notice in advance by the lessor. This is a major d**erogation from the civil code in that the civil code provides that on the expiration of the agreed period of lease, the lease terminat**es. Here the lease will be renewed unless the lessor gives advance notice of its termination.

To the contrary, this does not apply to the short private residential leases.
In summation.
Article 1554 - obligation to use the tenement as a *bonus paterfamilias* and to pay the agreed rent;
Article 1555 - obligation to use the tenement as agreed upon;
Article 1555A - non-use of the tenement;
Article 1614 - prohibition to sub-let except where agreed upon.

These are the only clauses which may be entered into a contract establishing a private residential lease which may result in the early or automatic termination of the lease, per Chapter 604.

Other forbidden clauses include those which permit the lessor to reduce any benefit stipulated in the contract without also reducing the rent payable, or clauses which relieve the lessor of his obligations per the Civil Code except the obligations contained in **articles 1545 and 1546** of the Civil Code.

Article 13 of the Act provides for the **rent** agreement between the parties, holding that such rent is subject to the will of the parties;

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

Article 14 then contemplates **when rent may be increased.** Essentially, this article holds that a **rent increase** may only take place once a year. On the first year of the lease, the rent must be fixed at the same amount. Further, such increases may not exceed annual variations recorded the PPI (Property Price Index) published by the national statistics office.

The Law, in article 14(2) holds that a rent may only be increased **up to 5% more than the rent of the previous year**. Any rent increase beyond 5% is thus invalid.

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

One may argue that most of the provisions are non-derogable (they cannot be done away with by the parties to the lease). Thus, the rent may only be increased once a year and according to the provisions under Article 14. This is non-negotiable by the parties, yet a proviso following this rule holds that the parties may agree for the rent to be revised during the term of the lease. Any increase in the rent is limited by Article 14(3) in the sense that there is a limit, notwithstanding what was agreed, that such increase cannot exceed 5% per annum, and likewise yearly increases may not exceed the annual variation in the Property Price Index.

Article 9 refers to **long Private Residential Leases**, and contemplates the **notice of termination by the lessor**;

9. (1) A private residential lease shall cease to have effect upon the expiration of its term, whether such term is conventional, legal or judicial, provided that the lessor **gives notice to the lessee at least three (3) months before by registered letter:** Provided that for the purpose of proving the fulfilment of his obligation under sub-article (1), it shall be sufficient for the lessor to provide evidence that the registered letter has been sent within the stipulated time, and to the correct address.

(2) If the lessor does not serve the lessee with a notice of termination within the specified time, the private residential lease shall be deemed to have been renewed for a further period of one (1) year:

Provided that in the absence of a notice of termination by the lessor, the lease shall continue to be
renewed.

(3) This article shall not be applicable for short private residential leases.

Thus if the lessor does not issue the notice of termination at least 3 months prior, the lease is deemed to be automatically renewed for another one year period. A question which may arise in this Chapter is to determine which provisions are mandatary and which are consensual.

9C. (1**) Every party to a private residential lease agreement may request the addition of a lessee to that** agreement:
Provided that the said addition may **only be effected with the express consent of the lessor and the existing lessee or lessees.**
(2) The addition of a lessee shall not create a new lease or interrupt the periods stipulated in this Act, particularly those contained in articles 8, 9, 11, 12 and 16.
(3) The incoming lessee shall be held responsible for any debts that would have been incurred before his addition to the agreement.
(4) An incoming lessee shall be granted access to the original lease agreement and all the relevant details of the registration.
(5) All the parties to the original agreement shall be granted access to any agreement for the addition of a lessee and all the relevant details of the registration.
(6) The Authority may publish on its website a model agreement for the addition of a lessee which may be used as a basis by any person effecting such an addition:
Provided that the Authority may also publish on its website a standard form which may be made compulsory for any person entering an agreement for the addition of a lessee which is not in accordance with the model agreement.

Per article 17, the **lessor is bound** to supply adequate water and electricity supply to the lessee, when the lease concerns a private residential tenement. The lessor is also bound to consider the amount of persons residing in the tenement for the purposes of calculating the amount due to the lessee, the latter of whom has the right to the account drawn up by the lessor in his calculations of the tariffs due.

Article 18 then contemplates the situation of an over holding of rent premises by the tenant;

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

Article 23 establishes an **adjudicating body** established to hear issues on **private residential leases**;

23. (1) There shall be an Adjudicating Panel for private residential leases, hereinafter referred to as the "Adjudicating Panel". (2) The Adjudicating Panel shall have the exclusive jurisdiction to decide any disputes relating to private residential leases to which the Act applies, provided that any monetary claims shall not exceed five thousand euro (€5,000), and which involve (a) matters referred to in articles 1540, 1541, 1542, 1543, 1545, 1546, 1548, 1556, 1559, 1561, 1562, 1563 u 1564 of the Civil Code provided that these claims do not involve the termination of the lease; and (b) any dispute relating to: (i) the retention or reimbursement of any amount which is left by means of a security deposit as stipulated in article 6(f); (ii) rental and utility arrears, including those related to water and electricity consumption; (iii) compensation for the occupation by the lessee of the dwelling house let beyond the date of expiry

of the agreement, provided that these claims do not involve a claim for the termination of the lease;

(iv) compensation for the loss of earnings borne by the lessor due to the dwelling house not being occupied in the period stipulated in article 11(1);

(v) matters referred to in article 17, provided that the dispute is exclusively between the lessor and the lessee, including claims made to the lessor to recognise the number of persons living in a dwelling house and providing access to the details of the account to the lessee;

(vi) expenses relating to the ordinary maintenance of the common parts of the condominium, and;

(vii) damages deriving from any other breach of the provisions of this Act;

(c) disputes relating to any amount which is left by means of a security deposit, in the case of occupation without title in accordance with article 19, if the person who would have permitted such occupation without title and who would have retained such amount, would have admitted his guilt to the offence according to article 20 or would have been found guilty of an offence by the courts of criminal judicature according to article 22:

Provided that a demand made in accordance with paragraphs (a) and (b) may also be included in other claims or pleas made before the Board, in any action affecting private residential leases, over which the Adjudicating Panel has no jurisdiction, including where the claim is made for the termination of the lease or the eviction of any person from the lease:

Provided further that the Adjudicating Panel shall only hear claims relative to registered agreements.

There is also a right of appeal to the Court of Appeal on a point of law.

Agricultural Leases (Reletting) Act: Kap 199

This act reflects different policies in different times. It was originally conceived with the intention to protect farmers but not at the expense of land developers. There is a clear policy choice that there is a right to terminate an agricultural lease which is not irrigable if there are development permits. This was a major concession to developers, so that if the land is not

irrigable then there is the right to terminate an agricultural lease if there are development permits.

Recently, a Constitutional Court judgement held that Agricultural Leases which impose unfair conditions on the owner of the land constituted a violation of the peaceful enjoyment of property, which is why several amendments have been done on this Act in 2022.

Article 2 defines agricultural land as;

"agricultural land" means any land which is mainly let for the growing of crops, flowers, fruit-trees or vines and for cognate agricultural purposes, including the erection of glasshouses, cloches or cold frames, but does not include grazing grounds;

What are known as metier/mezzadria leases are agreements where there is no rent payable by the farmer but rather a payment via consideration in crop sharing in kind are not included in the ambit of this definition. For the purposes of Chapter 199, lease is defined as;

"lease" means a lease for **an agreed total period not exceeding sixteen years for a rent in money or other consideration payable yearly in one or more instalments and includes a lease tacitly renewed from year to year or renewed by a decision of the Board under this Act**, but does not include either an emphyteusis or an agreement of lease in virtue of which the produce is to be apportioned between the lessor and the tenant; it also includes "sub-lease" in relation to sub-lessor and sub-tenant;

There is a Board called the **Rural Leases Control Board** (RLCB) which is akin to the Rent Board and which is competent on matters of agricultural leases to decide on changes in condition or on terminations. Like in Chapter 69, the Lessor is **not** empowered to refuse to renew on the same terms and conditions an agricultural lease, or to change the conditions. However, 2022 amendments (article 3(2A)) empowered the Lessor to ask for an increase in rent and a change in conditions, and in establishing the rent, the increase in rent will not exceed 1.5% of the rent of Agricultural Land on the Open Market and 2% of the rent of a Residential Farmhouse.

3(2A) When the change of the conditions of lease under this article consists in an increase in the rent the following provisions shall apply:

(*a*) the owner in his application shall indicate by how much the rent shall increase;

(*b*) the tenant on his part shall indicate in his reply how much the fair rent should be in his opinion;

(*c*) in its final judgment the Board shall determine the fair rent taking into account the value of the agricultural land when valued as agricultural land for agricultural use obtainable on the open market, the means of the tenant, the circumstances and the condition of the agricultural land and any burden that is disproportionate to the lessor;

(*d*) the Board may establish that any increase in rent shall be gradual;

(*e*) the rent revised by the Board shall not exceed one point five per cent (1.5%) per annum of the value of the land free and unencumbered made in accordance with paragraph (c);

(*f*) when the agricultural land includes a farmhouse used by the tenant as his sole place of residence, the rent in respect of that farmhouse alone shall not exceed two percent (2%) per annum of the free and unencumbered on the open market value of the farmhouse:

Provided that the Board shall grant the tenant the option to discontinue the lease of the farmhouse and to continue only the lease of the agricultural land at such rent as revised by the Board in accordance with this sub-article.

(*g*) the revised rent shall apply for a period of eight (8) years;

(*h*) the rent shall remain the same after the expiration of eight (8) years, unless otherwise agreed between the tenant and the lessor, or unless the lessor requests again the increase in rent according to this article.

Today, it has been established that independently of the issue of building permits, agricultural land has a value in itself, also because it is becoming rarer, and thus the lessor has the right to demand an increase in rent which does not exceed 1.5% of the open market value of the agricultural land and which does not exceed 2% of the open market value of a residential farmhouse.

Article 4 allows the lessor to file an action against the lessee to regain possession of his land.

4. (1) Subject to the provisions of this Act, where a lessor desires to resume possession of any agricultural land, unless the tenant has agreed in writing both as regards the termination and as regards the compensation due, he shall apply to the Board by means of an application containing -

(*a*) detailed grounds for such termination, and

(*b*) a demand for the liquidation of any compensation payable under the provisions of this article,

and filed not later than three months before the date on which the current lease terminates:

Provided that, where any such lease does not terminate on the 15th day of August of any year, no decision approving such resumption of possession shall be carried into effect before the 15th day of August following the date of the termination of the lease then current.

Article 4(2) reproduced the old provisions in the sense that it **indicates the grounds on which a lessor could apply to the Court to take back the land**. The grounds on which this claim could succeed are as follows;

(2) The Board shall allow the lessor's application if the lessor proves that -

(*a*) he requires the agricultural land to be used for agricultural purposes by himself personally or by any member of the family personally for a period of not less than four consecutive years starting immediately following the date of termination; or

(*b*) he requires the agricultural land, provided it is not irrigable land, for the construction thereon of buildings for dwelling, business or industrial purposes; or

(*c*) the agricultural land was sublet or the lease thereof transferred without the consent of the lessor to any person other than a co-tenant thereof or a member of the family; or

(*d*) during the two years immediately preceding the date of termination, the field was allowed to lie fallow for at least twelve consecutive calendar months; or

(*e*) during the two years immediately preceding the date of termination, the tenant has failed, in respect of two or more terms, to pay the rent, on each occasion, within fifteen days from the day on which the lessor has called upon him in writing for payment; or

(*f*) during the two years immediately preceding the date of termination, the tenant, being bound to repair and maintain the walls of the agricultural land, failed to fulfil such obligation or habitually disregarded any other conditions of the lease or deliberately or through negligence caused or allowed to be caused damage, other than damage of small importance, to any fruit- trees in the agricultural land:

There are a number of provisos here, 4 in total, to article 4 sub article 2. The first proviso says that where the tenant proves that he needs the land to sustain his and his family's livelihood. There is a relative hardship test in the sense that the board will weigh the hardship to be suffered by the sitting famers as against the need of the prospective applicant who claims that he wants to cultivate it. There are 2 further relevant provisos.

2nd and 3rd proviso to 4 subarticle 2 -The first is that where there is a farmhouse which is used and occupied by the tenant/ farmer as his own residence.

Sub article 3 contemplates a situation where termination is only of a part of agricultural lease. Where the unaffected remaining part is at least 1124 square metres, more or less a tumolu, the farmer is entitled to request to continue the lease under new provisions.

There is the rural board from which there is a right of appeal on grounds on eviction under **article 4** and on points of law, as per **article 10**;

10. (1) There shall only lie appeal from a decision of the Board -
(*a*) in all cases where the decision is given on an application made under article 4 or under article 25;
(*b*) in all other cases, on a point of law only.

We need to know that there is a law that regulates agricultural leases, and these have their own definition which excludes mezzadria and were brought as a reaction against the low rent of agricultural land.

The Law of Lease pre & post 1995: The Civil Code Provisions

1531A. (1) With regard to the letting of an urban property, a residence and a commercial tenement made a**fter the 1st January, 2010,** the contract of lease shall be made in writing and shall stipulate:

(*a*) the property to be leased;

(*b*) the agreed use of the property let;

(*c*) the period for which that property will be let;

(*d*) whether such lease may be extended and in what manner;

(*e*) and also the amount of rent to be paid and the manner in which such payment is to be made.

(2) In the absence of one or more of these essential requirements, the contract shall be null.

(3) The lease of an urban property, a residence and a commercial tenement made after the 1st January, 2010 **shall be regulated exclusively by the contract of lease and by the articles of this Code:**

Provided that **private residential leases shall be regulated by the Private Residential Leases Act**

Article 1531A provides for the letting of an urban property, a residence, and a commercial tenement made after the 1st January 2010.

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

Article 1531B holds that the **old law continues to regulate lease agreements made before the 1st June 1995.** However, the provisions of **Act X of 2009 apply and override the old laws in the areas concerned and dealt with by this Act**. Thus, **Articles 1531C, D, E, H, I, J,** and **K** apply even to old leases.

We must be aware of the **temporal application of these laws** - after 1st June 1995, leases were liberalised. **Act X of 2009 represented and introduced a liberalisation of the market of all leases entered into after 1st June 1995**. However, the Act had no effect on those leases entered prior to 1st June 1995. The situation prior to Act X of 2009 was that leases prior to 1995 were still subject to obscure rent laws. **The 2009 amendments thus served to gently phase out the old lease laws, moving away from the abusive situation** whereby one would go to live with his grandparents and continue the lease upon their passing.

In 1531AA there is no such statement of nullity, but there is an extended list to include security deposit.

When it comes to **leases which were entered into post 1st June 1995,** we refer to **article 1531L**;

1531L. With regard to leases which came into **force on or after the 1st June, 1995** such leases, both of a **residential** and of a **commercial** tenement, and of **urban property**, shall continue to be regulated by the same terms and conditions agreed upon between the parties and by law as in force at the time.

This should also be read in conjunction with **article 1531M:**

1531M. With regard to **leases made before the 1st June, 1995** of tenements which are not residences or commercial tenements, subject to the provisions of article 1531J relating to clubs, and subject to the provisions of article 1531H with regard to garages and summer residences, **the law and all definitions as were in force before the 1st June, 1995 shall continue to apply:**

Provided that the Minister responsible for accommodation may from time to time make regulations to regulate such leases so that a fair balance may be reached between the rights of the lessor, of the tenant and the public interest.

These two provisions establish that leases entered into **post 1st June 1995** shall be regulated by the terms and conditions entered into by the parties and the law in force at the time of

agreement. On the other hand, leases entered into prior to 1st June 1995 will continue to be regulated by the law in force at the time of agreement, except where any provision introduced by **Act X of 2009** is concerned. One must note that this does not apply to **residential or commercial tenements** and is **not admissible in relation to clubs, garages, and summer residences**.

These 2 provisions were written only to be superseded by the Private Residential Leases Act. Nonetheless, these provisions hold that leases entered into force prior to **1995 which are not residential or commercial tenements, are to be regulated by the law and terms at the time**. Leases post 1995 are to be regulated by their terms and by the Civil Code, together with any effects produced by Act X of 2009.

The pre-1995 leases which are not residential or commercial, subject to the rules on garages, clubs, and summer houses shall continue to be regulated by the law in force at the time. Therefore, for example, in the case of quarries, the thinking is that it is not the lease of an immovable but rather a lease of the right to excavate, in which case the law in force at the time continue to apply.

Generally, through Act X of 2009, the pre-1995 leases remained as they **were except where the 2009 amendments regulated such lease.** Other than these amendments, it was the old laws which applied. Under both chapter 69 and chapter 158 we have the 2019 amendments. It is very important to bear in mind 2 considerations - the first being **which law applies** (pre-1995 alone, post-1995 alone, post-1995 together with any relevant provisions under Act X of 2009), and the second being whether the lease pertains to specific tenements such as **band clubs**. In 1995, there was a cross-party agreement which sought to eliminate political clubs from the new law, but instead of removing only political clubs from the new law, the removal was extended also to all band clubs, musical societies, etc. This was a 1995 exclusion.

Article 1531C - The Rent of a Residence

1531C. (1) Without prejudice to the rights of the lessor in accordance to article 4A of the Reletting of Urban Property (Regulation) Ordinance and article 12B of the Housing (Decontrol) Ordinance, the rent of a residence which has been in force before the 1st June, 1995 shall be subject to the law as in force prior to the 1st June, 1995 sohowever that **unless otherwise agreed upon in writing after the 1st January, 2010, the rate of the rent as from the first payment of rent due after the 1st January, 2010, shall, when this was less than one hundred and eighty-five euro (€185) per year, increase to such amount**:

Provided that where the rate of the lease was more than one hundred eighty-five euro (€185) per year, this shall remain at such higher rate as established.

(2) In any case the rate of the **rent** as stated in sub-article (1) **shall increase every three years by a proportion equal to the increase in the index of inflation according to article 13 of the Housing (Decontrol) Ordinance;** the first increase shall be made on the date of the first payment of rent due after the 1st January, 2013:

Provided that where the lease on the 1st January, 2010 will be more than one hundred eighty-five euro (€185) per year, **and by a contract in writing prior to 1st June, 1995 the parties would have agreed upon a method of increase in rent, after 1st January, 2010 the increases in rent shall continue to be regulated in terms of that agreement until such agreement remains in force.**

Article 4A of Chapter 69 and Article 12B of Chapter 158 refer to the 2% increase in rent. One must note that **the pre-1995 laws in the case of residential leases have not been abrogated, but rather the rent has been reviewed.** Unless parties have agreed in writing after 1st January 2010, it is common that parties do acknowledge that current rates are unreasonable and thus they do not accept to increase the rent. The intention behind this was to grant a small remedy and phase out these old leases with time. This was done by limiting the circumstances where the lease could be inherited.

Today, regarding residential leases, there are 3 possible scenarios;

- Scenario 1 - residential lease which came into force pre-1995.
- Scenario 2 - If the rent does not exceed 185, the rent will automatically increase on 1st January 2010 to 185 euros per annum If the rent was more than 185, the higher rent applied and every three years there was an increase according to the index of inflation.
- Scenario 3 - There is a situation where the policy was to respect prior agreements relating to increases. This is the proviso of Article 1531C. Where there was a pre-1995 lease and the rent as of 1st January 2010 was more than 185 and parties had agreed to an increase prior to 1995 in writing, that method of increase will be applicable and prevail.

Before 1995, there were outrageous rent amounts, varying from 20-80 Maltese Lira per year, because such rents did not reflect the value of property. As of January 2010, the rent was changed to €185 in the case of pre-1995 residential houses. The law allows for agreement between parties in writing entered into before 1st January 2010. If there was a pre-1995 contract, and one agreed in writing after 1st January 2010, this is valid, the tenant will not be able to provoke the €185 per annum criteria. This is because 185 lira is a **fallback position not a mandatory cap**.

As of the 1st January 2013, there has been an increase in rent every 3 years, per the COLI, according to the Housing Decontrol Ordinance.

Article 1531D - The Rent of a Commercial Tenement

1531D.(1) The rent of a commercial tenement, unless otherwise agreed upon after 1st January, 2010 or agreed upon in writing prior to the 1st June, 1995 with regards to a lease which would still be in its original period on the 1st January, 2010, shall as from the date of the first payment of rent due after the 1st January, 2010, be increased be increased by a fixed rate of fifteen per cent over the actual rent and **shall continue to increase as from the date of the first payment of rent due after the 1st January of each year by fifteen per cent over the last rent between the 1st January, 2010 and the 31st December, 2013**.

(2) The rent as **from the first payment of rent due after the 1st January, 2014, is to be established by agreement between the parties**. In the event that such agreement is not

reached, the Property Market Value Index shall be considered as a guide to the rent as may be established by regulations made by the Minister responsible for accommodation and in the absence of such regulations, the rent shall from the first payment of rent due after the 1st January, 2014, **increase by five per cent per year until the coming into force of the said regulations.**

(3) In **the case of a commercial tenement, if there was an agreement between the parties for periodic rent increases, then such agreement shall continue to apply without the increases contemplated in this article**:

Provided that except in such cases where the increase in rent has been effected following an agreement, where the increase as proposed herebefore for commercial tenements is applied, the tenant may by means of a judicial letter served on the lessor or on one of the lessors, terminate the lease by giving him advance notice of three months and this shall also apply if the lease is for a definite period.

In the past, **commercial premises** in localities such as Sliema and Valletta had very expensive rent rates. Following the 2009 amendments, commercial leases are to **terminate by 2028**. Businesses were given from 2010 to 2028 to decide how to relocate or to reach a new agreement. The general rule is that in the case of commercial premises, the rent increases with effect from the 1st June 2010 by 15% on the preceding rent every year. This continues for 3 years, thus till 2013. As from 1st January 2014, an index of commercial increase was meant to be published - but it was not. Thus a 5% increase per annum continued to apply until the regulations were published and provided that no agreement was reached.

One of the difficulties which was addressed in Act X of 2009 pertains to the situations of automatic renewal (where no agreement was reached). The rule is that where there is an agreement for periodic rent increases which is still in force on 1st January 2010, these automatic rent increases continue to apply.

Article 1531D had many commercial leases with low rents for 2 reasons

1) The rent freeze of Chapter 69 and

2) The protection given to shops by chapter 69 because the thinking was that it was a means of livelihood so it had to be protected.

Per **Article 1531I**, where there was a lease entered prior to 1995, if the tenement was commercial, then by 2028 the lease will cease (20 years from 1st June 2008 - 2028 could be there by accident or by reason of a carryover from the original draft until later drafts);

1531I. In the case of commercial premises leased prior to 1st June, 1995, the tenant shall be considered to be the person who occupies the tenement under a valid title of lease on the 1st June, 2008, as well as the spouse of such tenant, provided they are living together and are not legally separated, and also in the event of the death of the tenant, his heirs who are related by consanguinity or by affinity up to the grade of cousins inclusively:

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

Thus, commercial tenement leases terminate in 2028.

This is subject to 3 important exceptions, being;

1. Where the parties have agreed after the 1st of January 2010. **Here there would be no requirement of writing, as in the case of residential tenants**. Here there is a measure of contractual liberty which grants parties the space to validly agree on a rent after the 1st of January 2010, and which is not subject, therefore, to the increase spoken about above.

However, this is **not consistent with the general trends of the amendments**, whereby new rents after January 2010 require writing.

2. **Where there is a lease agreement, which is pre-1995 and is still in its original period**. We previously outlined the distinction that under the old-rent law there was the original period regulated solely by the Civil Code, and then there was the renewal period, where the Rent Board and Chapter 69 take effect. These contracts are not frequently used, but aren't unusual. The increases contemplated in the original period, continue to be regulated by what is contemplated in the original period, and not by the increases contemplated above, at 15% and 5% respectively.

3. **Where there is an agreement between parties for periodic increases**. This last exception is the one most open to debate. The problem with this article is that we are given no clarity to which bracket category of leases it applies. The presumption is that it applies to pre-1995 leases.

Beyond that, however, we are given no indication whether the contract has to have been enforced in 2010, or not enforced in 2010, or simply if one had many situations in limbo. The parties had an understanding between them, they were probably aware that the arrangements could be challenged, but not to cause trouble, to give effect to it, arguing that it was a new contract every time. **Dr. Galea holds that the spirit of the provision is to not disturb these arrangements.** There are certain leases, such as hotels, restaurants, etc. where a significant investment is required and where a tenant would tell the landlord that he is going to make a substantial investment (e.g. refurbishment) and requires an extended lease. Hence it is not uncommon that commercial leases are 25 or 30 years as envisaged in the second exclusion.

Article 1531E - External Ordinary Maintenance of Lease

1531E. The external ordinary maintenance of a tenement leased prior to 1st January, 2010, save unless otherwise agreed upon in writing between the parties, shall be at the expense of the tenant and not of the lessor.

This is partly based on the Civil Law tradition and also the contractual practice of parties. The lines between ordinary repairs and maintenance has always been blurred, for the former

may (and often) include replacements and the fixing of things, while the latter could also imply similar repairs. The problem is that since Article 1531E speaks only of ordinary maintenance, the question is raised as to whether there exists extraordinary maintenance. It is difficult to think what the latter could refer to, since maintenance is something which is recurrent and must happen periodically. There is nothing extraordinary about maintenance. If it is a major repair or extraordinary, would it still be considered maintenance?

There is thus a problem with the meaning of *external ordinary maintenance*. This article codified the judgements which held that external maintenance is to be charged to the tenant and not the lessor.

Article 1531H - Pre-1995 Lease of Garages

1531H.(1) In the case of garages leased before the 1st June, 1995 that d**o not form part of a residence leased to a tenant as an ordinary residence** and which are not considered as a commercial tenement, in the absence of an agreement to the contrary there shall not be any right of renewal of the lease after 1st June, 2010.

(2) In the case of a tenement leased before the 1st June, 1995 **and used as a summer residence** which is not the ordinary residence of the tenant, in the absence of an agreement to the contrary there shall not be any right of renewal to the lease after 1st June, 2010:

Provided that for the purposes of this Title no tenant shall be deemed to hold more than one ordinary residence.

By act 10 of 2009 as of 1st January 2010 the automatic indefinite renewal of garages was abolished with the following exceptions:

- If a **garage formed part of a residential lease** used as an ordinary residence, then this rule of non-renewal will not apply.
- To be excluded from the non-renewal lease it is not sufficient for this garage to be part of a residential lease **but the tenant has to live there as its ordinary residence**.

In Chapter 69, there was a more significant degree of protection to commercial premises – the thinking at the time was that they would serve as means of subsistence. Thus, people used to store goods in garages, claiming them to be commercial premises so they would engage the protection afforded under chapter 69. The same reasoning applies in the case of **summer houses** - in the past there was this concept of people having a summer house, which was also protected by the law. Now, tenements leased and used as a summerhouse pre 1995, after 1st June 2010 were not afforded any protection.

Article 1531J - Lease of Band Clubs

1531J. (1) In the case of a tenement leased to an entity and used as a club before the 1st June, 1995 including but not limited to a musical, philanthropic, social, sport or political entity, when its lease is for a specific period and on the 1st January, 2010 **the original period "di fermo" or "di rispetto" is still running and the lease has not yet been automatically extended by law, then in that case the period of lease established in the contract shall apply**. In all other instances where the contract of lease was made prior to the 1st June, 1995 the law and all definitions as in force on the 1st June, 1995 shall continue to apply:

Provided that notwithstanding the provisions of the law as in force before the 1st June, 1995, the Minister responsible for accommodation may from time to time make regulations to regulate the conditions of lease of clubs so that a fair balance may be reached between the rights of the lessor, of the tenant and the public interest.

Period di fermo- the lessee is bound to stay for the di fermo period.
Period di rispetto-the lessee can dissolve the agreement and terminate after giving the agreed period of notice and this can happen at any time.

Example: if the lessor leases the property to a lessee for a period of 10 years of which, the first.2 years are di fermo, and the following 8 years are di rispetto, the di fermo period binds both parties such that neither party, including the lessee may terminate the lease unilaterally whilst the following 8 years if di rispetto bind only the lessor who cannot terminate the

contract except for just case, whilst the lessee may terminate at any time provided he gives the notice agreed in the contract of lease.

The owner is always bound for the entire period on the other hand.

If, in a Pre-1995 cases of clubs (which include musical, philanthropic, social, sport, or political entities), if, as of 1st January 2010, there is the original period di fermo or di rispetto still running, then the agreement as to the period of lease continues to apply, per the contractual will of the parties. If there were no such agreements di fermo or di rispetto, the pre 1995 scenario (indefinite renewal terms) continue to apply.

In the wake of the human rights arguments on clubs came regulation **S.L. 16.13**. This holds that in the case of pre-1995 leases of clubs, if in 2014 the lease was in its original di fermo or di rispetto period, then the terms per these regulations were to apply. There was an increase of 10% until 2016 and of 5% until 2023.

1531J(2) The provisions of this sub-article and of the following sub- articles shall, notwithstanding any other law, apply in respect of the occupation of premises under title of lease by a club where all the following conditions are satisfied:

(i) where the club consists of a band club which on the 1st March, 2018 has **been in existence for at least thirty (30) years;**

(ii) where the said band club has on the 1st March, 2018 **occupied the same premises as its principal quarters under a title of lease or emphyteusis or under a combination of both for a period of at least thirty (30) years;**

(iii) where the **band club is still in occupation of the premises and the premises are the only premises of the band club,** except for stores and similar premises or premises which are small and are not used as a club, on the 1st March, 2018; and

(iv) where the **eviction of the band club has been ordered by a final judgement of the Rent Board or of a Court for a reason other than the failure to pay rent due**.

(3) **Where all the conditions listed in sub-article (2) are satisfied, the club shall be entitled to continue occupying the premises under a title of lease under the following conditions:**

(i) for a rent which shall amount to ten (10) times the amount of rent payable for the occupation of the said premises prior to the final judgement of the Rent Board or of the Court ordering eviction;

(ii) the rent referred to in sub-paragraph (i) shall not be further increased in terms of regulation 2 of the Conditions Regulating the Leases of Clubs Regulations but the amount due to the owner in terms of regulation 3 of the said regulations shall still be due in addition to the rent;

(iii) the rent due in terms of sub-paragraph (i) shall not be less than five thousand euro (€5,000) *per annum* or amount to more than one (1) per cent of the value of the premises on the 1st January 2018.

This sub-article was introduced by way of 2018 amendments which were heavily criticised for going against peaceful enjoyment of possession and the right for a fair hearing. S.L 16.13 will not apply to such case and the rent shall not be less than €5,000.

There is a jurisprudence Constance that holds if there is an express prohibition in the contract then violation thereof will lead to the dissolution of the contract. Depending on the drafting, whether it is a resolutive condition or not, the court will then decide to grant cure time.

It is an express resolutive condition then it is suggested then the court would not be able to.

Absent an express prohibition to carry out structural alterations, it is within the power of the lessee to carry out structural alterations provided that three conditions concur:

1) The lessee must be able to **demonstrate that it is beneficial**
2) That it is **not structurally dangerous**
3) It is **possible for the structural alterations to be undone at the end of the lease a**t the option of the owner.

Where there is eviction for a prohibition to carry out structural alterations, this is no longer considered to be a valid ground for eviction if the band club can bring a guarantee (mainly financial) to show that any damages done can be remedied and that it can be reverted back to its original state. Here, again, in the case of a band club, this article was heavily criticised in the below cited judgements. Nonetheless, the effect of this amendment was to limit the operation of the clauses which used to prohibit structural alterations. **This amendment thus serves to bypass those lease agreements which prohibited structural alterations, provided that such financial guarantee and ability to revert back to original state was permissible, to the extent that in such cases eviction could not be granted.**

Carmen Mary Lanzon et vs Joseph Boffa et

CoA, 23rd April 2018

There was a contract between the family owners and the band club. The lease agreement contained a prohibition to carry out structural alterations without the consent of the lessor. The band club went ahead and carried out such works. The band club was evicted. This judgement was heavily criticised, on grounds that the eviction constituted a violation of the right to possession.

This issue is what the 2018 amendments have attempted to resolve; **prohibiting the eviction on grounds of structural alterations. However, these amendments were criticised owing to their retroacive effect;**

Peter Paul Lanzon et vs State Advocate et

Constitutional Court, 26 March 2021

The Court notes that the defendants are correct in their argument that, in the context of civil laws, the State is not completely precluded from introducing legislation with retroactive effect. It is, however, clear that this power has its limits, because even in the civil sphere there exists the right to legal certainty.

Furthermore, their complaint that the First Court based its decision solely on the writings of one author and reached an erroneous conclusion partly because this is manifestly unfounded.

The writings of the author to whom the First Court refers follow, without any deviation, the principles established in the jurisprudence of the European Court. From a study of the jurisprudence of the European Court it clearly results that**, for the introduction of legislation with retroactive effect to be compatible with the right to a fair hearing, it is not sufficient that it be enacted in the general interest.** As correctly considered by the First Court, it must be established conclusively that there exist "compelling reasons of public interest" which justify such an introduction.

"… in the context of civil disputes, it has repeatedly ruled that although, in principle, the legislature is not prevented from regulating, through new retrospective provisions, rights derived from the laws in force, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude, except for compelling public-interest reasons, interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute."

Issues concerning rent increases mentioned by the defendants in their grounds of appeal may at most be relevant for the purposes of the applicants' complaint based on Article 1 of the First Protocol to the European Convention, but they in no way detract from the anti-conventional nature of the impugned law with regard to the right to a fair hearing. Nor are the legal remedies introduced by Article 1531J(4) of the Civil Code, to which the State Advocate refers, relevant in this context. **These "remedies" do not detract from the fact that the applicants had in their favour an eviction order against the defendant company which suddenly became unenforceable as a result of State intervention**. According to law, judgments of the Court of Appeal are final and not subject to appeal. The "remedy" introduced runs directly counter to this principle, inasmuch as it forces the applicants to institute further legal proceedings in order to establish whether they can enforce the eviction order of the Court of Appeal which is supposed to be non-appealable. Therefore, in these circumstances, **Article 1531J(4) cannot even be considered a remedy, given that it not only obliges the applicants to institute further legal proceedings after having obtained a final eviction order, but also because, as a result, this so-called remedy runs counter to the rule of finality of judgments (*res judicata*) established by law itself**.

There was also a **finding of a violation of Article 1 of the first protocol** and there are interesting revelations that retroactive legislation may violate the right of peaceful possession and legitimate expectations. Whilst retroactive application is not prohibited it is only exceptionally so.

Bradshaw Judgements of the Kings Own Band Club of the European Court – the court made a clear policy statement on the argument of who is to carry the burden. In the case of residences, the private sector is to carry a part of the burden because it is the policy of the European Court to protect housing and not see people on the streets.

Presumption of Duration

The rule is that where a lease is established, the presumption is that unless otherwise agreed, is that the letting of a thing is made for the period in respect of which the rent has been calculated.

1532. (1) In the absence of an express agreement or of circumstances tending to show the intention of the contracting parties as to the duration of the lease, the following rules shall be observed:

(*a*) **the letting of an urban tenement or of a movable shall be deemed to be made for the period in respect of which the rent has been calculated**, that is, for one year, if the rent has been agreed upon at so much a year; for one month, if the rent has been agreed upon at so much a month; for one day, if the rent has been agreed upon at so much a day:

Provided that if it is not made to appear that the rent has been agreed upon by the year, the month or the day, it shall be deemed to have been agreed upon according to usage;

(*b*) the **letting of a rural tenement shall be deemed to be made: if the tenement is capable of producing fruits, for the period which is necessary for the gathering of the**

produce of four years; if the tenement is not capable of producing fruits, for the period in respect of which the rent is calculated, as is provided in the case of urban tenements;

(*c*) if any particular **usage is proved in regard to the duration of the letting of certain things, such things shall be deemed to be let out for the period fixed by such usage**.

(2) The provisions of sub-article (1) do not apply with regard to the lease of urban, residential and commercial property made after 1st January, 2010:

Provided that any private residential leases entered into after the 1st January, 2020, shall be presumed to have been entered into for a period of one (1) year, unless the parties agree to a short private residential lease or the letting of shared residential space in accordance with the Private Residential Leases Act.

As from 1st January 2010, since as from that date the agreement must contain the duration of the lease as well as the duration covered by the payment of rent. In the past, the law catered for a presumptive duration of a lease where the agreement does not provide for such duration. In 2010, the legislator wanted to have clarity and uniformity across all leasing, and thus **the law was amended to provide that every lease is to contain the duration of the lease as well as the period of time covered by the rent**. Per article 1352(2), therefore, any lease made after 1st January 2010 in relation to urban, residential, and commercial property are not subject to these presumptions.

Prior to the amendment, the law was as follows: In the case of rural tenements, the law holds that the lease is presumed to last for the period which is necessary for gathering the produce of 4 years, in the absence of an agreement to the contrary. For urban tenements and for rural tenements which do not produce fruits, the law holds that the lease lasts for a duration according to the rent payment agreement. And if any particular usage is produced in regard to the duration of the letting of certain things, such things shall be deemed to be let out for the period fixed by usage.

Rent

1533. (1) The rent may be either in money or in kind, or even in a portion of the fruits produced by the thing.
(2) Where it is not shown that the rent has been agreed upon as payable in kind or in a portion of the fruits, it shall be deemed to have been agreed upon as payable in money.
(3) The provisions of sub-article (2) do not apply with regard to the lease of urban, residential and commercial property made after the 1st January, 2010.

Article 1533 holds that rent must be either in money, in kind, or in a portion of the fruits produced by the thing. Again, the law creates a presumption for those agreements which were made prior to 2010 which did not stipulate the form of rent, in which case the law presumed it to be payable in money. After 2010, the lease agreement must contain the form and amount of payment due, as well as the period covered by this rent and the frequency of payment.

1534. (1) Where the **contract has already commenced to be carried into effect**, **the rent,** in the absence of an express agreement, or of any law fixing the amount thereof**, shall be fixed at the current price, if any, or, in the absence of a current price, by means of a valuation by experts:**

Provided that in case of occupation without title under the Private Residential Leases Act, the rent shall be fixed in accordance with the provisions contained in the said Act.

(2) The provisions of sub-article (1) do not apply with regard to the lease of urban, residential and commercial property made after the 1st January, 2010:

Provided that in the case of occupation without title which are in existence after 1st January, 2020, the rent shall be determined in accordance with the Private Residential Leases Act.

Article 1534 holds that where the contract has come into effect prior to 2010, and where no agreement has been made to this regard, the rent is to be valued at the **current market value.**

1535. (1) Every payment in advance in respect of rent of rural tenements is null, if any prejudice is caused thereby to the hypothecary creditors of the lessor or to the persons succeeding to the property under an entail, or to whom, in consequence of any dissolution of his right, the property passes.

(2) Every payment in advance in respect of rent of an urban tenement for more than six months is also null, if any prejudice as aforesaid is caused thereby.

Article 1535 then holds that rent for rural tenements **cannot be paid in advance if it prejudices the lessor**. Further, for urban tenements, prepaid rent may only apply for up to 6 months of the rent. Any rent exceeding 6 months for urban tenements will be null if there is prejudice against the lessor.

1536. (1) If, at the expiration of the lease, the **lessee continues and is suffered to continue in the enjoyment of the thing let to him, the lease shall be deemed to be renewed on the same conditions and with the same rights and duties, for a period to be regulated in accordance with the provisions of article 1532,** except as regards rural tenements with respect to which the lease shall be deemed to be renewed for the period which is necessary for the gathering of the produce of one year:

Provided that where the rent is payable in termly payments, the lease, except as regards rural tenements, shall be deemed to be renewed for a time corresponding to the period of one term only:

Provided further that in case of private residential leases under the Private Residential Leases Act, the lease shall be deemed to be renewed in accordance with the said Act.

(2) The provisions of sub-article (1) do not apply with regard to lease of urban, residential and commercial property entered into after the 1st January 2010:

Provided that private residential leases under the Private Residential Leases Act shall be regulated in accordance with the said Act.

Article 1536 provides for the **tacit renewal of the lease**. This provision holds that where the lessee, after having concluded the duration of the lease, continues to enjoy the thing, then the lease is deemed to be renewed on the same conditions for a period to be regulated in

accordance with **article 1532** (i.e. the presumptions of duration), except where the lease concerns **rural tenements**.

Where the lease concerns rural tenements, the renewal is valid up to the period necessary for gathering fruits of one year. This is subject to **article 1537**;

1537. When the lessor has given notice to the lessee to surrender the thing at the expiration of the lease, the lessee may not set up the tacit renewal as provided in the last preceding article, even though he has continued in the enjoyment of the thing.

The notion of Congedo / Kongedo

This term is found in older judgements. In urban leases it was necessary to send a notice in writing, informing the lessee that the lease was not going to be extended. Failing to send this notice would imply that there would be an extension. This notion has been abolished. The payment must be kept distinguished from the duration of the lease. The latter may be for a year, but payable every 4 months, for instance.

The Private Residential Leases Act reintroduced the requirement of the kongedo, in certain instances.

Rights and Obligations of the Lessor

1539. The lessor is bound, by the nature of the contract, and without the necessity of any special agreement-

(*a*) to **deliver** to the lessee the thing let;

(*b*) to **maintain** the thing in a fit condition for the **use** for which it has been let;

(*c*) to **secure** the lessee in the quiet enjoyment of the thing during the continuance of the lease.

We know that the lessee does not have technical possession, since the possessor is possessing through the lessee. The *causa detentionis* is not that of possessing to own, but rather to make use (e.g. habitation) of the property, for instance. The lessee is said to be the detentor, not the possessor, of the thing.

The Lessor's Duty to Deliver

1540. (1) The lessor is bound to **deliver** the thing in a **good** state of repair in every respect.

(2) During the continuance of the lease, the lessor is **bound to make all repairs which may become necessary**, excluding, in the case of buildings, the repairs mentioned in article 1556, if he has not expressly bound himself to this effect.

(3) For the purposes of this Title with regard to an urban, residential and commercial tenement, "structural repairs" shall be deemed to be those relating to the structure of the building itself, including the ceilings.

(4) When the lessor in the case of a **residence leased prior to the 1st June, 1995 carries out structural repairs which have become necessary not due to his own fault, then the rent shall be increased by six per cent of the costs incurred:**

Provided that where the structural repairs have not become necessary due to a fault of the lessee, then the said lessee has the right to terminate the lease even though the period of the lease has not yet lapsed:
Provided that in the cases **where the lessor is willing to carry out these repairs, the lessee may choose to carry out such repairs at his expense, and in such an event the rent shall remain unchanged**; however **the lessee shall in such case have no right for any full or partial compensation for such structural repairs at the termination of the lease**.

This implies that all the repairs which become necessary, as well as the expenses of delivery, are charged to the lessor.

In the pre-1995 leases, where structural repairs become necessary without the fault of the lessor, the lessor is entitled to a 6% increase in rent. The lessee has a knockout clause. In other words, they may not accept the 6% increase and terminate the lease. In the cases where the lessor is willing to carry out these repairs, the lessee may choose to carry out such repairs at his expense, and in such an event the rent shall remain unchanged; however the lessee shall in such case have no right for any full or partial compensation for such structural repairs at the termination of the lease.

The Lessor's Duty to Maintain the thing in a condition fit for the use for which it was leased:

There is an error in the law. Per 1540 (2), the lessor is bound to make all repairs which are necessary excluding for repairs mentioned in article 1556. However, article 1556 holds;

1556. The lessee of an urban tenement is responsible for all repairs other than structural repairs:

Provided that if such repairs are not carried out appropriately and according to good workmanship the lessor shall have the right to request the Rent Board to authorise him to carry out such repairs at the expense of the lessee:

Provided further that in those instances where new repair obligations have been imposed on the lessee which were not incumbent upon him before the 1st June, 2008 the failure by the lessee to undertake such repairs before the 1st January, 2009 shall not in any way expose the lessee to damages or any other form of punitive measures such as an action for the termination of the lease.

Article 1556 tells us that the lessee is responsible for all repairs other than structural repairs. However, article 1540 (2) tells us that the lessor is bound for all repairs except such repairs mentioned in 1556. **Thus, the law does not tell us who is responsible for structural repairs.** Traditionally, the consensus is that ordinary repairs are left to the charge of the lessee, while extraordinary repairs (including those structural) are charged to the lessor.

Article 1540 (4) and the two provisos which follow tell us that in a pre-1995 lease, **if structural repairs become necessary for causes not attributable to the fault of the lessor, then the lessor is entitled to increase the rent by 6% of the amount expended.** An exit route of the lessee is provided for in the second proviso.

1541. (1) If the lessor, on being required so to do by means of a judicial act, fail**s to carry out the repairs to which he is bound, it shall be competent to the lessee to request, by application, authorization to carry out such repairs at the expense of the lesso**r, under such conditions as the Adjudicating Panel for Private Residential Leases, the Rent Board, or the Court or the Rural Leases Control Board, as the case may be, may deem proper in the circumstances.

(2) The lessee shall have the right to keep the rent due or the rent which is still due to be paid, so that he will be paid back for such expenses, subject to his rights for any greater amount, if the amount of those expenses is more than such rent; in this case the lessor has no right to increase the rent as mentioned in article 1540(4).

1542. The lessor is bound to make good to the lessee the damage which the latter has sustained in consequence of the delay on the part of the lessor in carrying out, on the intimation mentioned in the last preceding article, the repairs to which he is bound.

1543. It **shall be lawful for the lessee, without the necessity of any proceedings, to carry out at the expense of the lessor the urgent repairs;** and, the omission or delay of which might cause to him serious prejudice: and, in any such case, he may, for the purpose of reimbursement, retain the rent as provided in article 1541:

Provided that the lessee shall be bound to inform as soon as possible the lessor about these circumstances and to deliver to him a report by an expert as to the urgency of such repairs and their estimated value and the prejudice which might result from such delay:

Provided also that the lessor shall be entitled to assume the continuation of the repairs commenced under the provisions of this article.

These provisions state that where the repairs are not urgent (i.e where the lessor does not carry out the repairs), the lessee has the right to apply to the competent board to carry out the repairs itself. The lessee may then retain the rent to set off against the cost of repairs. If the **repairs are urgent, the lessee is not obliged to ask for permission.** The first proviso to article 1543 says that prior to carrying out the urgent repairs, the lessee must, however, **formally notify the lessor of a report by an expert**, indicating the urgency of such repairs. The lessor is responsible in damages towards the lessee for any damages suffered by reason of the non-repairing of urgent repairs.

1548. (1) If, during the continuance of the lease, the tenement let requires urgent repairs which cannot be delayed until the expiration of the lease, the lessee is bound to suffer the execution of such repairs, whatever the inconvenience caused to him thereby, even though, during such execution, he may be deprived of a part of the tenement.
(2) Nevertheless, if the execution of such repairs takes more than forty days, the rent shall be abated in proportion to the time and to the part of the tenement of which the lessee is deprived.

The lessee thus has two options where repairs are concerned,

1. To **carry out the repairs himself at the expense of the lessor**.

Per Article 1541, for **non-urgent repairs**, the lessee must seek authorisation from the Court to order the lessor to perform such repairs, at the charge of the lessor. The lessee then has the right to retain rent in order to set-off these expenses. Where the lessor delays the exercise of the repairs, the lessee may claim damages from him.

Per Article 1543, for **urgent repairs**, the lessee may carry out such repairs without seeking authorisation, at the expense of the lessor. The lessee may again retain rent in order to set off the costs involved in the repairs.

2. To **dissolve the lease**.

Article 1544 holds that where the repairs are significant, and where the lessor fails to effect the repairs even after being authorised by the competent body, the lessee may demand dissolution.

1544. If the repairs which the lessor is bound to carry out are such that the omission thereof will prevent or considerably lessen the enjoyment of the thing let, and the lessor fails to carry them out within a time fixed by the Rent Board (or the court or the Rural Leases Control Board as the case may be), **the lessee may also demand the dissolution of the contract, together with damages.**

The Lessor's Duty to Warrant: enjoyment, defects, & title

The next obligation is that the lessor, similarly to the law of sale, is **to warrant against non-disclosed non-apparent defects which could not be discovered by the lessee at the time of the** lease, per articles 1545 and 1546;

1545. (1) The lessor is bound to warrant the thing let against the **faults** or **defects** which **prevent** or **diminish the use thereof**; and, where the existence of such faults or defects is

proved, the lessee may demand at his option **either** the **dissolution** of **the contract** or an **abatement of the rent.**

(2) The same rule shall apply even though such faults or defects shall have arisen after the stipulation of the contract.

(3) The lessor, however, shall not be bound in respect of apparent faults or defects which the lessee could have discovered for himself at the time of the contract.

1546. If, in consequence of **latent faults** or **defects** existing in the thing let at the time of the contract, the lessee suffers any damage, the lessor, if he knew of such faults or defects, or had a reasonable suspicion thereof, **shall be liable in damages** unless **he shall have made known to the lessee the existence, or his suspicion of the existence, of such faults or defects.**

Thus, for faults or defects which prevent or diminish the use of things - lessee may demand either the **dissolution** or an **abatement of rent**. This applies even where the fault arises after the stipulation of the contract. This is **except where the lessee knew of the faults at the time of the contract or where he could have discovered of them upon the time of contract**.

Where the fault is **latent** existing at the time of contract, the **lessor is liable also for damages where the lessee suffers damages,** unless the lessee knew of such defects at the time of contract.

Like the law of sale, there is also an additional responsibility of damages of the lessor if it is shown that the lessor knew of the defects and did not disclose them. Article 1547 holds that the lessor is bound to respect the structure and the manner in which the object was rented out.

1547. The lessor cannot, during the continuance of the lease, change the form of the thing let, without the consent of the lessee.

The landlord is thus prohibited from interfering with the form of the thing.

Another obligation of the lessor is to **warrant title**, similar to the case of sale. Here, there is a distinction between a **molestation of fact** (i.e. - trespassing but not challenging title) and a **molestation of law** (challenging title).

1550. The lessor is not bound to warrant the lessee against the molestations which third parties may, by mere acts, cause to him in the enjoyment of the thing let, where such third parties do not claim any right thereon, saving the right of the lessee to proceed against them in his own name.

This provision holds that the lessor is not bound to warrant against the lessee for **molestations of fact** (i.e acts by third parties which disturb the enjoyment but which do not hinge on a right). Instead, the lessor must warrant the lessee against **molestations of law.**

1551. (1) **Where, on the contrary, the lessee is disturbed in the enjoyment of the thing in consequence of an action touching a right on the thing let, he may maintain an action for damages against the lessor**, if he is entirely deprived of the thing, or for a proportionate abatement of the rent, if he is deprived of only a part of the thing, or if a diminution of the enjoyment of the thing or an inconvenience is caused to him.

(2) It shall, however, be competent to the lessee, even in the latter case, to sue for the dissolution of the contract and for damages, if the part of the thing which is left to him does not serve the purpose for which he had taken the whole thing on lease.

1552. The provisions of the last preceding article in respect of the liability for damages shall not apply -

(*a*) if the lessee fails to give notice to the lessor, without delay, of the molestation, and the lessor is prejudiced by such omission;
(*b*) if the cause of the action referred to in the last preceding article, has only arisen after the stipulation of the contract, and is not due to an act of the lessor;
(*c*) if, at the time of the contract, the lessee knew of the right of the third party.

1553. If the third parties who have caused molestation by mere acts claim any right on the thing let, or if an action is brought against the lessee himself to compel him to surrender the thing, in whole or in part, or to suffer the exercise of any easement, **he is bound to call upon the lessor to defend him**, and he shall, if he so demands, have the proceedings against him discontinued, upon declaring the name of the lessor under whom he holds the thing.

If there is a legal molestation where the title of the lessee is challenged, **then there is responsibility of the lessor to defend the lessee** - in which case the lessor is responsible for damages towards the lessee if the latter is evicted.

The lessee must immediately notify the lessor of the molestation of law, in which case the lessor is called upon to defend it - so much so that **this warranty ceases if the lessee does not notify the lessor**. In fact, article 1552 puts those conditions and situations where the warranty given by the lessor ceases, with the first cessation being that of a failure to give notice of the molestation of title. **Another possibility of cessation happens where the legal cause of action of the third party challenging the title of the lessor arose after the lease without any fault of the lessor**. For instance, if the title of the lessor was somehow annulled. Here, the question of whether the lessor was negligent must be asked. The third cessation pertains to when the lessee knew of the risk and right of the third party - if the lessee entered into the lease knowing that the title is not protected, then the lessor is not liable per the warrant of title.

Finally, there is the right of the lessee to opt out of proceedings (having proceedings against him terminated) **by naming the lessor, demanding that the proceedings be continued against the lessor**. Let us consider that there was a molestation of law whereby the third party files the action against the lessee. In this case, the lessee has the right to discontinue proceedings, on naming the lessor, having such proceedings continue against the lessor.

The last point to be made is that of article 1548A, which gives a right to the lessor to inspect, at reasonable time, the premises with its own experts. If the lessee does not cooperate, he may be ordered to cooperate by the competent Board.

1548A. During the running of the lease of an urban, residential or commercial tenement, t**he lessor has right of access to the tenement in such times and in such manner agreed upon with the tenant** in order that the lessor may fulfil his duties or to verify whether the tenant is performing his obligations, as well as to show the tenement to prospective buyers:

Provided that in the absence of an agreement between the parties, the Rent Regulation Board may, if need be, after hearing the parties summarily, fix days, times and conditions, after an application filed by the lessor for that purpose. The Board may give a decree during the sitting or in the chambers without hearing the parties. The decree shall be given within five working days from the date when the tenant is served with a notice. The Rent Board may order the inspection to be done under the supervision and in the presence of a court marshal. In this function, the Rent Regulation Board shall also take into account the

tenant's right to privacy and shall verify that no abuse is made of the lessor's right as provided in this sub-article. In such case, no appeal may be made from the said decree.

Rights and Obligations of the Lessee

1554. The lessee is bound -
(*a*) to make use of the thing let to him as a *bonus paterfamilias*, and for the purpose stated in the contract, or, in the absence of any agreement to that effect, for such purpose as may be presumed according to circumstances;
(*b*) to pay the rent agreed upon, or fixed in accordance with the provisions established by law.

The obligations of the lessee are principally to use and enjoy the thing as a *bonus paterfamilias*, and for the purpose as agreed upon. Where no agreement was made as to the purpose, the purpose may be presumed per the circumstances. Here, *use* is agreed or presumed according to the destination of the thing. The obligation to use the thing as intended may be classified as its own obligation. The final obligation is to pay the rent agreed upon. Most of the lessee's rights and duties are codified jurisprudence. It is jurisprudentially acknowledged that non-use means abandoned, meaning renunciation. If the lessee does not live in the tenement, it is presumed that he has abandoned the lease. Nonetheless, this may be qualified in the case of working abroad, for example.

In ***Joseph Brincat vs Josephine Casolani***, the Court held that it is the lessee's duty to use the let thing as per the *bonus paterfamilias*. This obligation of use as a bonus paterfamilias has far reaching consequences, to the extent that other obligations are deemed to be tied to this principal duty to use. **This good use must be evaluated according to the agreed purpose for which the lease is established.** In certain circumstances, according to both the agreed purpose for lease as well as the nature of the thing, the circumstances may even show that a degree of positive action is required.

1555. If the lessee uses the thing leased for any purpose other than that agreed upon by the parties, or as presumed in the previous article, or in a manner which may prejudice the lessor, the lessor may, according to circumstances, demand the dissolution of the contract.

Article 1555A (2) was introduced because originally, Act X of 2009 attempted to give some balance to the situation where a person is permanently living in a care institution. In this case, it does not mean that the lease is abandoned and the lessor may take the thing back. There was a provision which was introduced stating that if there is evidence of total dependence on a care institution, then the lease passes on to the next in line. In 2009, where there were grounds not to continue the lease, there was a transitionary period.

1555A.(1) In the case of a residential tenement, failure to use the tenement for a period exceeding twelve months shall be deemed to be bad use of the thing leased in terms of article 1555:
Provided that when a person has failed to use the leased tenement due to being temporarily absent from the tenement due to work, study or health care, then such failure shall not be deemed to be bad use.

(2) When the lessee of a lease which started before the 1st June, 1995 is recovering in hospital or in an old people's home, and where such institution certifies or where it conclusively results that the same tenant is permanently dependent on the institution, for the purposes of the continuation of a lease according to the Reletting of Urban Property (Regulation) Ordinance and the Housing (Decontrol) Ordinance, the said permanent dependence shall have the same effects as the death of the lessee.

(3) In the case of commercial premises, failure to use the said tenement for a commercial purpose in accordance with the provisions of a contract of lease shall be deemed to be bad use of the thing leased in accordance with the provisions of article 1555.

(4) The provisions of article 1555 shall also apply in the case of rural tenements, if the lessee abandons the cultivation thereof, or does not cultivate the said tenement as a bonus paterfamilias, and the lessor may thereby suffer prejudice in respect of which no security was given to him.
(5) In any of the aforesaid cases, apart from those cases where the lessee forfeits the lease due to his recovery in an institution, the lessee shall also be liable to pay damages.

In the case of a commercial tenement, non-use is deemed to be an abandonment of the lease, per article 1555A (3). The reason behind this pertains to goodwill: if a shop was kept closed, there is loss of goodwill (clientele) to the owner. Thus, the non-use is deemed to be abandonment. Sub article 3 codifies a situation which has been recognised jurisprudentially and refers to non-use of a commercial tenement. There were elaborate judgements of the board saying if you open for a few hours of the week, you have not abandoned the lease.

In the case of rural tenements, non-cultivation or lack of care is also deemed to be abandonment, giving rise to dissolution.

This article refers to those scenarios whereby the lessee would not make use of the thing, or if the lessee would make **bad use** of the thing.

The lessee also has the obligation to **pay the rent**, per **article 1554 (b).** Rent is the consideration for which the enjoyment is granted. **Article 1533**, as previously stated, holds that rent may be payable either in money, in kind, or in a portion of the fruits generated. In the absence of proof to the contrary, the law holds that rent is deemed payable in money, in the case that the contract was entered into prior to 2010. Every lease relating to urban, residential, or commercial premises entered into after 2010 must stipulate the form of payment in order for the lease to be valid. This is by way of **article 1531A**;

1531A.(1) With regard to the letting of an **urban property, a residence and a commercial tenement** made after the 1st January, 2010, the contract of lease shall be made in writing and shall stipulate:

(a) the property to be leased

(b) the agreed use of the property let;

(*c*) the period for which that property will be let;

(*d*) whether such lease may be extended and in what manner;

(*e*) and also **the amount of rent to be paid and the manner in which such payment is to be made**.

(2) In the absence of one or more of these essential requirements, the contract shall be null.

(3) The lease of an urban property, a residence and a commercial tenement made after the 1st January, 2010 shall be regulated exclusively by the contract of lease and by the articles of this Code:

Provided that private residential leases shall be regulated by the Private Residential Leases Act

The code does not clearly state what happens to deterioration through *normal and fair use and fair wear and tear*. Instead, the Code holds that the lessee is also bound to pay **damages caused by his own fault or by his negligence, or by the fault of persons for whom he is answerable**.

1557. The lessee shall in no case be responsible for the repair of damages caused by *force majeure* and without any fault of his own.

1561. The lessee is liable for any **deterioration or damage** which occurs during his enjoyment, unless he proves that such deterioration or damage has occurred without any fault on his part.

1562. The lessee shall be liable for any damage caused by fire, unless he proves that it occurred **without any fault on his part**, or on the **part of any of the persons mentioned in the next following article,** or through a **fortuitous event**, or an **irresistible force**, or through a **faulty construction**, or that the fire was communicated from a **neighbouring tenement**.

1563. The lessee is liable for any deterioration or damage caused by any act or default of the members of his family, or of his servants, guests, or sub-lessees.

These articles attempt to address the question of what happens as to deterioration or change in condition between the moment of commencement of the lease and the termination of the lease. We know the principle of ***deterioration per vetusta*** – the sense of the article is that there is no liability for normal use (fair wear and tear), even if there is natural deterioration.

The burden of proof is on the lessee to prove that the damage was caused either by *force majeure* or else by some act external to his will and fault. **If the damage was caused by**

force majeure **or by some external act, then the lessee is not liable to any damages.** The force majeure must also occur in such a way not attributable to the lessee's fault. For instance, if the lessee knows that some natural disaster will occur, and he does not take the ordinary precautions, then he would be liable for damages. Per these provisions, the lessee is not liable for any damage except where committed through his fault (culpa).

Laurent holds that normal legitimate use and fair wear and tear is not a use where the lessee is at fault. Consequently, if there is deterioration through age or through fair wear and tear, absent negligence or malice, then the lessee is not responsible. The boundaries between the bonus paterfamilias obligations and the fair wear and tear and normal use are not always easy to define.

Articles 1562 and 1563 are two well-known articles. 1563 extends, on the same defence and basis, responsibility of the lessee to family members, guests, sub-lessees and servants. Article 1562 holds that any damage caused by fire is charged to the lessee unless the lessee proves that the fire happened without his fault or if the fire happened through force majeure or through a faulty construction. There is a presumption that the lessee is responsible for a fire which occurred in its premises, which may be rebutted if it happened through a fortuitous event or through force majeure, or that the fire was communicated from a neighbouring tenement.

Alterations

The lessee is also **prohibited** by the law from making alterations to the thing without the lessor's consent.

1564. (1) The lessee may not, during the continuance of the lease, make any alteration in the thing let without the consent of the lessor, and he is not entitled to claim the value, whatever it may be, of any improvement made without such consent.

(2) The lessee may, however, remove such improvements, restoring the thing to the condition in which it was before they were made, provided as regards improvements existing at the termination of the lease, he shows that he can obtain some profit by taking them away, and

provided the lessor does not elect to keep them and pay to the lessee a sum equal to the profit which, by taking them away, the latter would obtain.

Per **article 1564,** the lessee is not permitted to make any alterations without seeking the lessor's consent. He is also prohibited from claiming the value of any improvements so made without the lessor's consent. Furthermore, the lessee **is entitled to remove improvements made without consent, restoring the thing to how it was before the improvements were made, provided that he may obtain some advantage by taking them away and provided that the lessor does not want to retain the improvements, paying the lessee for the amount of profit he would have made**. What is interesting to note is that while the article holds one thing, jurisprudence seems to hold a contrary approach. This article suggests that one cannot perform structural alterations.

Judgements, however, say that where the lease agreement prohibits structural alterations, then any alterations made without the consent of the lessor are prohibited and the lessor may demand the dissolution. Further, where the lease agreement is silent, structural alterations are permitted on the conditions laid out below;

1. The lessee has to be able to show that it derives real benefit
2. There are no structural risks
3. The works can be restored to the original situation

On the basis of this, nowadays the structural alterations are permitted but if there is a prohibition, this will lead to a dissolution.

In ***Micallef vs Ebejer***, the Court held that the tenant may only affect alterations to the tenement if;

- The works are **partial** and **not of great importance,** and do not pose any **threat** to the structure of the property;
- The works **do not change the destination** (intended use) of the tenement;
- The works do not **prejudice** the right of ownership;
- The works can be **reversed** at the end of the lease;

- The works are **useful** or **necessary** for the enjoyment of the premises.

These principles are upheld by the Rent Regulation Board in several decisions, including this and ***Bonnici vs Galea*** *(1986).*

The lessee is also obliged to **report any damage** or **encroachments** made by third parties, whether of fact or of law.

1565. The lessee is bound, under pain of paying damages, to give notice to the lessor without delay of any encroachment or damage affecting the thing let.

The lessee must **return the thing in the same state which he has received it**, as per **article 1559**;

1559. Where the lessor and lessee have made a description of the condition of the thing let, the lessee is bound to restore the thing in the same condition in which he received it, according to the description, except as regards that which may have perished or deteriorated through age or irresistible force.

This is subject to the conditions that **a state of description of the thing** was made by the lessor and the lessee. This description may be referred to as a **condition report**. In this event, the lessee is bound to return the thing in the condition in which it was received. It is interesting to note that **article 1557** refers to *force majeure*, while article 1559 refers to *irresistible force.* The exception pertains only through deterioration through age or to irresistible force. This means natural deterioration. Where no description has been made, we refer to **article 1560**;

1560. Where no description of the condition of the thing let has been made, it shall, in the absence of any proof to the contrary, be presumed that the lessee received the thing in good condition.

The law thus presumes that the condition of the thing is in a good state at the time of receiving it, in the absence of any description of the condition to the contrary.

Classification of the right of the Lessee

Prior to contemplating the rights of the lessee, we must first ascertain whether the right of enjoyment of the lessee is a **real right** or a **personal right.** This classification is not as easy and straightforward as it may seem. For a long time, our courts have adopted **Troplong's perspective**, who holds that the right of the lessee to enjoy the use of the tenement is a **real right**.

However, it has became clear, both jurisprudentially and doctrinally, that the right of the lessee to enjoy the tenement is **personal**.

- **Article 1526(1)**, which states;

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

-it is a personal relationship between parties which gives one party rights in relation to a property inter se between the parties, it does not create rights in and over the property erga omnes

- Had it been a real real right, the law would have required the registration of the lease in the public registry, in order for third parties to be aware of this right. This is a consequence of it being a personal right. The law tells us that when we perform a public deed conferring real rights, those rights only rake effect with regards to third parties upon registration meaning they are already real rights but they must be registered in order to bind third parties.

- A lease is a personal right, but the requirement is that there has to be a specified time for a specified rent. This naturally precludes an indefinite lease.

Dissolution of Lease

We must remember that there are 3 different regimes of law which apply to lease, which provide for different forms of dissolution. Thus, we must first ascertain which law is applicable to the lease at hand;

- Pre-1995 leases
- Post-1995 leases
- Act X of 2009 Amendments

Insofar as pre-1995 leases are concerned, **articles 1536 and 1537 require the notice of termination**. If this notice was not given, there was a right for the extension of another instalment as provided for in the lease.

1536. (1) If, at the expiration of the lease, the lessee continues and is suffered to continue in the enjoyment of the thing let to him, the lease shall be deemed to be renewed on the same conditions and with the same rights and duties, for a period to be regulated in accordance with the provisions of article 1532, except as regards rural tenements with respect to which the lease shall be deemed to be renewed for the period which is necessary for the gathering of the produce of one year:

Provided that where the rent is payable in termly payments, the lease, except as regards rural tenements, shall be deemed to be renewed for a time corresponding to the period of one term only:

Provided further that in case of private residential leases under the Private Residential Leases Act, the lease shall be deemed to be renewed in accordance with the said Act.

(2) The provisions of sub-article (1) do not apply with regard to lease of urban, residential and commercial property entered into after the 1st January 2010:

Provided that private residential leases under the Private Residential Leases Act shall be regulated in accordance with the said Act.

1537. When the lessor has given notice to the lessee to surrender the thing at the expiration of the lease, the lessee may not set up the tacit renewal as provided in the last preceding article, even though he has continued in the enjoyment of the thing.

This does not apply for post-2010 leases of urban, residential, or commercial premises.

Insofar as post-1995 leases are concerned, such are terminated **at the end of the term**, strictly and without the requirement of any other formality. For residential leases, chapter 604 applies for post-1995 leases. Post-1995 leases, subject to chapter 604, the rule is that the lease dissolves upon the expiration of the duration.

Where the Contract of Lease is Terminated:

Per the Civil Code, a contract of lease may be terminated in 1 of 5 ways;

1. The **expiration** of the stipulated times;
2. The occurrence of a **resolutive condition**;
3. The **non-performance of obligations**;
4. The **destruction of the thing**;

1. **The Expiration of Time**

1566. Without prejudice to the provisions of articles 1531A to 1531M, a contract of letting and hiring ceases *ipso jure* on the expiration of the term expressly agreed upon, and it shall not be necessary for either of the contracting parties to give notice to the other:

Provided that private residential leases under the Private Residential Leases Act, shall be regulated in accordance with the said Act.

This provision holds that if a duration of agreed lease expires, the lease is dissolved *ipso jure*, and there is no requirement to notify the other party. This is subject to any provisions found in the Private Residential Leases Act which applies to the lease of residential tenements.

1567. With regard to rural tenements or movables, the contract shall also cease *ipso jure* on the expiration of the term, even though such term is presumed as provided in article 1532.

Vis-a-vis movables or rural tenements, **article 1567** states that the contract shall cease upon the lapse of the agreed time, even though such term is presumed as per article 1532.

1568. With regard, however, to urban tenements, when the duration of the lease is presumed as provided in article 1532, the contract shall not cease on the expiration of the term unless either of the parties gives notice to the other at least one month before, if the presumed duration of the lease is for one year, or fifteen days before, if such duration is for less than one year.

With regards to **urban tenements**, **article 1568** holds that **when the duration of the lease is presumed per article 1532**, the contract shall **not cease** upon this lapse of the presumed duration **unless either of the parties** gives notice to the other **at least a month before** (in the case of a presumed one year duration), or **at least 15 days before** (in the case of a presumed duration of less than one year)

For the purposes of the interpretation of the above articles, article 1532 is being replicated;

1532. (1) In the absence of an express agreement or of circumstances tending to show the intention of the contracting parties as to the duration of the lease, the following rules shall be observed:

(a) the letting of an urban tenement or of a movable shall be deemed to be made for the period in respect of which the rent has been calculated, that is, for one year, if the rent has been agreed upon at so much a year; for one month, if the rent has been agreed upon at so much a month; for one day, if the rent has been agreed upon at so much a day:

Provided that if it is not made to appear that the rent has been agreed upon by the year, the month or the day, it shall be deemed to have been agreed upon according to usage;

(*b*) the letting of a rural tenement shall be deemed to be made: if the tenement is capable of producing fruits, for the period which is necessary for the gathering of the produce of four years; if the tenement is not capable of producing fruits, for the period in respect of which the rent is calculated, as is provided in the case of urban tenements;

(*c*) if any particular usage is proved in regard to the duration of the letting of certain things, such things shall be deemed to be let out for the period fixed by such usage.

(2) The provisions under sub-article (1) do not apply with regard to the lease of urban, residential and commercial property made after 1st January, 2010:

Provided that any private residential leases entered into after the 1st January, 2020, shall be presumed to have been entered into for a period of one (1) year, unless the parties agree to a short private residential lease or the letting of shared residential space in accordance with the Private Residential Leases Act.

The issue of tacit re-letting requires analysis in this context. Tacit re-letting is a fresh lease of the former thing let, which takes place upon the expiration of the previous lease and is based on the tacit consent of the parties. It will not therefore take place if the lessee is requested to return the thing on the expiration of the lease. In the case of rural tenements, the renewed duration is the time necessary for the gathering of the produce of 4 years. In the case of urban tenements, the renewed duration is that of 1 term only. Therefore, if the original lease was that of €1000 a year payable at €250 every 3 months, the lease shall be deemed to be renewed for a period of 3 months.

2. The Occurrence of a Resolutive Condition

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

1068. A resolutive condition is in all cases implied in bilateral agreements in the event of one of the contracting parties failing to fulfil his engagement:

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

When a contract fails to refer to the dissolution of the contract in the case of the non-performance of the other party, **article 1068 holds that the Court is allowed to apply its discretion to determine whether the non-performance of an obligation would be tantamount to dissolution, provided the contract is bilateral in nature.** In the case of an expressed resolutive condition in the contract of lease, the Court has no discretion to extend, and must dissolve, in the case of its fulfilment, per article 1569(3). In the case of an implied resolutive condition, which exists in all bilateral contracts, the Court may dissolve, but it may also extend. Thus, in all bilateral contracts there is an implied resolutive condition to the effect that if one party does not deliver, the other party does not have to deliver. Running through all this is the subtle concept of the implied resolutive condition which is often formulated in the language '***inadimplendum non est inadimplendi'***. If a party does not perform their side of the agreement then the other party is not bound to perform.

Thus, if in a lease agreement (bilateral), one of the parties does not honour its obligations, then the Court may dissolve the contract, if it deems fit according to the circumstances. It may also provide a duration of time for the issue to be remedied. In the case of non-performance, the other party thus has the right to dissolve the lease, on the grounds of article 1068.

1569. (1) A contract of letting and hiring **shall also be dissolved *ipso jure* upon the fulfilment of a condition under which the dissolution of the contract was expressly covenanted**, saving any action for damages which may be competent to the covenantee according to law.

(2) If the dissolution of the contract is covenanted in the event of either of the parties failing to perform that which he has promised, the dissolution shall take effect only from the day on

which the covenantee shall have, **by means of a judicial act**, given notice to the covenantor of his intention to avail himself of the covenant.

(3) In the cases referred to in this article, no time for clearing the delay can be granted to the party in default.

This article specifically refers to an express resolutive condition. Article 1569 then holds that a contract of lease shall also be dissolved *ipso jure* **if the parties expressly provide for its dissolution after a condition has been met.** Per 1569(3), the Court cannot extend the duration if the express resolutive condition is fulfilled, as opposed to implied resolutive conditions. Even though the law says that the contract will be void ipso jure, the parties will still naturally need to prove that condition was fulfilled or not fulfilled. Furthermore, as catered for by article 1569(2**) the other party will need to submit a judicial act, giving notice to the other party stipulating the intention to avail himself of the covenant.**

Article 117 states that in all commercial contracts there is an implied resolutive condition. What is material is that there was a proviso added stating that in the case of contracts of lease and emphytheusis, the special rules of lease and emphytheusis apply, in other words even though probably it is a commercial lease, still the civil code applies and not the commercial code.

3. The Non-performance of Obligations

1570. A contract of letting and hiring may also be dissolved, even in the absence of a resolutive condition, where either of the parties fails to perform his obligation; and in any such case the party aggrieved by the non-performance **may elect either to compel the other party to perform the obligation if this is possible, or to demand the dissolution of the contract together with damages for non-performance:**

Provided that in the case of urban, residential and commercial tenements **where the lessee fails to pay punctually the rent due, the contract may be terminated only after that the lessor would have called upon the lessee by means of a judicial letter, and the lessee**

notwithstanding such notification, fails to pay the said rent within fifteen days from notification.

Article 1570 stipulates that a contract of lease may still be dissolved if, in the absence of a resolutive condition, when either party fails to perform his obligations. In any such case, the aggrieved party may **either compel the other party to perform the obligation,** or he may **demand the dissolution of the contract along with damages**.

Here, the remedies are interesting, because normally, the action is to dissolve and claim damages. However, here we are even granted to possibility of a specific performance. The party aggrieved by non-performance may either act to compel the other party to perform, or to dissolve and claim damages.

Here, the Court has the discretion to grant time to cure the default and to assure compliance. Normally, the Court exercises this discretion, giving opportunity to comply. **The 2009 amendments also brought a change to this provision, in that there is now a pre-requisite of a judicial act demanding payment, in the case where the failure to perform takes the form of the tenant's failure to pay rent.**

4. The Destruction of the Thing

1571. (1) If, during the continuance of the lease, the thing let is totally destroyed by a fortuitous event, the lease is *ipso jur*e dissolved; if it is destroyed only in part, the lessee may, according to circumstances, demand either an abatement of the rent or the dissolution of the contract.

(2) The lessee may also, according to circumstances, demand an abatement of the rent or the dissolution of the contract, if owing to a fortuitous event, t**he thing let has become unserviceable.**

(3) **No compensation** may be claimed in any of the cases mentioned in this article.

Where there is total destruction due to a fortuitous event, the lease is dissolved ipso jure. Where there is a partial destruction by the same reason, the lessee may demand a deduction in the price of rent or the dissolution of the contract, if the thing let has become unusable by a fortuitous event. No compensation may be claimed by the lessee.

When the Contract of Lease cannot be Dissolved

In the past, the lessor reserved the right to dissolve if the lessor required the habitation for his own use. This was only valid if it was expressly reserved in the contract.

1572. Without prejudice to the provisions of articles 1531A to 1531M a contract of letting and hiring of a thing **is not dissolved by the death of the lessor or of the lessee.**

Article 1572 tells us that without prejudice to articles 1531A - M, a contract of lease is not dissolved by death of any party. Both the rights and duties are inherited, and the lease continues in its original terms. The first part to this provision, holding that this applies without prejudice to articles 1531-M is today **irrelevant,** owing to amendments to the provisions referred to.

The 1868 civil code granted to the heirs of the lessee the right to inherit and continue the lease but within the terms of the lease. Then we had chapter 69 which gave an extensive meaning to tenant because it included the heirs. Therefore the inheritance of a lease due to the death of a lessee is linked to 2 factors;

1. The express provisions of a special law; how far can a lease be inherited?
2. The definition of a lessee.

1573. It shall not be lawful for the lessor to dissolve the contract on the ground that he desires the house let for his own habitation, unless the right to do so has been expressly stipulated, in which case the lessor shall be bound to give notice to the lessee one month before, if the remaining period of the lease is not less than one year, or fifteen days before, if the remaining period of the lease is less than one year:

Provided that in the case of private residential leases in accordance with the Private Residential Leases Act, the lessor shall be bound to give notice to the lessee at least three (3) months before by registered letter.

1574. If the lessor sells the thing let, or alienates it in any other manner, **the alienee cannot dissolve the lease, unless the lessor has reserved to himself such power in the contract of lease**.

1575. (1) The alienee of the thing let desiring to avail himself of the power reserved in the contract respecting the dissolution of the lease in case of sale or other alienation**, is bound, unless otherwise agreed upon in the contract, to give notice to the lessee,** one year before, in the case of rural tenements, and one month or fifteen days before in accordance with the provisions of article 1573 in the case of urban tenements:

Provided that in the case of private residential leases under the Private Residential Leases Act, the lessor shall be bound to give notice to the lessee at least three (3) months before by registered letter.

(2) In the case of movables, the notice to the lessee must be given eight days before, or at least so many days before as correspond to half of the remaining period of the lease.

On another note, it is also possible for a lessor to reserve the right to take back the premises if they need it. there are similar provisions in chapter 69 and chapter 158 whereby a lessor may take back a lease for its own need. If this happens there has to be notice.

As a rule, the transfer of the property or object leased does not, in itself, terminate the lease, unless such power is specifically written in the contract, in which case it is competent to the acquirer (transferee) to dissolve the lease, subject to one year's notice.

1576. The buyer of a tenement subject to the right of redemption cannot avail himself of the power to eject the lessee, until he shall become irrevocably the owner of such tenement.

Thus, a buyer who purchases a leased property subject to a right of redemption cannot evict the tenant until the redemption period expires and the buyer becomes the final, irrevocable owner of the property.

Sub-Lease

Sub-lease contemplates the scenario where A lets to B, who subsequently lets to C. We know that as a rule, that there is no relationship between the original lessor and the sub-lessee.

In 2009 there were 2 parallel amendments. The first was that the old pre 1995 commercial leases are to terminate by the 1st June 2028. The second is that the commercial sub-leases under the old pre-1995 law were to terminate by May 2018.

Another consideration to make is that **most lease agreements have a prohibition of the right to assign and the right to sub-lease.** One must note that the way contracts are drafted tends to allow the lessee to sub-let without the consent of the lessor. To bypass these prohibitions, lessees used to form shell companies doing nothing but holding a lease, and instead of assigning or sub-letting they would transfer the shares in this company. This thus serves to affect an assignment without any formalities.

Around February - March of 2018, a strong lobby had formed to push for a change in the law. This evidently resulted in the introduction of the provisos found under article 1613:

1613. (1) In the absence of other special provisions, the contract of subletting is regulated by the same provisions which regulate the contract of letting and hiring:

Provided that in the case of the sub-letting of commercial tenements before the 1st June, 1995, these shall be terminated on the 31st May, 2018 subject to the provisions of this article **unless done by agreement with the lessor, in which case such sub-lettings shall be regulated by such agreemen**t:

Provided further that the lease shall be established according to that laid down in article 1513D.

(2) In the absence of an agreement between the lessee and the person who is the sub- lessee before the 31st May, 2018 who has an interest in remaining in the tenement in case of a sub-lease that expires on the 31st May, 2018, where the sub-leased tenement consists of commercial premises **which in the year preceding the 31st May, 2018 is managed by the sub-lessee, the person who before the 31st May, 2018 was the sub-lessee shall have the right to continue managing his business from the tenement, under those conditions as may be determined by the Rent Regulation Board,** for such period as may be established by the Board which shall not be longer than the period of the lease or be more than ten years, whichever is the shorter.

The rushed amendments of 2018 on commercial sub-leases introduced the right to the operator of a business to apply and extend the lease on those conditions to be determined by the Rent Board, provided that such are in line with the termination of the commercial leases in 2028. This was an attempt in a sense to save the position of commercial sublessees. The maximum is May 2028, since the expiration of the Commercial Leases (not sub-leases) is June 2028. Thus, the sub-lessee of a sub-lease entered into prior to 1995 has the right to demand that his lease remain valid and may demand to continue managing the business for which he is a sub-lease. **All conditions and duration of extensions are determined by the board, and no commercial sub-lease can be extended for a period going beyond June 2028 in this regard.**

The board has a discretion to accept or decline and the board also has a wide discretion to establish the conditions(here the risk of not pleasing anyone comes in) however the term of extension of the commercial sublease cannot exceed the period of the 'top lease' or 10 years from 31st may 2018, whichever is the earliest.

The problem is that these articles tried to please everyone, but in fact they may please no one. Theynare very difficult to reconcile, because in reality the discretion was thrown back entirely to the board, as seen in sub-article 3:

(3) A request for the sub-lessee to continue managing his business from the leased tenement shall be made by means of an application filed before the Rent Regulation Board by not later than the 31st May, 2018 and that application shall contain the reasons for which it is made. The Board shall not accede to the request **unless the applicant satisfies the Board that he will suffer serious prejudice if he does not continue to manage his business from the tenement.**

(4) The application made by the sub-lessee in accordance with sub-article (3) **shall be notified to the owner and the lessee who shall have the right to oppose the request**.

There is also the right for the board to establish interim measures. Pendente lite, during proceedings, the Board may establish interim rent payable during proceedings, of which the owner may receive a cut. This interim rent is not appealable, per sub-article 5.

(5) The hearing of the application referred to in sub-articles (3) and (4) shall be regulated by the rules of procedure applicable to applications filed before the Rent Regulation Board, without prejudice to the Board's right, at any stage of the proceedings, to establish or change the amount of compensation which the person who was the sub-lessee before the 31st May, 2018 **is obliged to pay to the owner or to the lessee or both while the proceedings are pending. There will be no right of appeal from the decree establishing the said compensation.**

(6) If the Board accedes to the request for the applicant to continue managing his business from the premises, as previously laid down in this article, **the Board shall establish the rent for the period after the 31st May, 2018 at an amount which is in accordance with the value that the tenement could fetch if this were to be leased on the market by its owner for the use that was being made thereof during the year immediately preceding** the 31st May, 2018. The Board shall also have the power to order the payment of rent below the said market value if it is proven to the satisfaction of the Board that the payment of the said market value would impose harsh consequences on the person managing his business from the tenement, in a way that would prejudice that person's living or that of persons working in the tenement.

If the Board decides that the payment of rent shall be below the said market value, the Board shall also order in its decision that the rent should be increased every year until it reaches the said market value by not later than the first expiry of rent due in the year 2027.

(7) **When the Board establishes a new rent in accordance with this article, it shall have the power to establish that such rent shall be divided among the persons having a right over the tenement** and particularly between the owner of the tenement and the person having another title of tenancy over the premises and the manner in which such lease is to be divided.

New Relationship established?

There are a number of provisions which may appear to be contrary such as article 1613(4) which says that the owner or the lessee is given the right to decline the sublessee. In turn the RRB also has the power to decline the sublease. The RRB has a right under 1613(5) during the course of proceedings to charge compensation which the sub-lessee is obliged to pay the owner or lessee or to both. The question arises that if the board has the power to decide such things, **then has a new relationship been created**. The board has the power to order an increase in rent both payable to the sublessor and also to A, the lessor.

(8) When the rent that must be paid by the person who was the sub-lessee before the 31st May, 2018 is established in a final manner, that rent must be paid as from the 1st June, 2018 **in a way that any compensation paid according to sub-article (5) shall be deducted from the amount of arrears due.**

Under article **1613(8)**, where the sub rent is established, any compensation is deemed to have been paid on account it will be deducted from the final equation.

1614. (1) **The lessee is not entitled to sub-let a thing or to assign its lease, unless such right was agreed upon in the contract.**

(2) For the purposes of this Sub-title, a management agreement or any other form of agreement, by means of which a lessee transfers to third parties the possession of the

tenement or of the business operated from the commercial tenement shall be considered as sub-letting.

(3) Where the lessee is a limited liability company or any other form of company, **the cumulative *inter vivos* transfer of fifty per cent of the shareholding, even if carried out by means of more than one transfer and, or the transfer of the actual controlling power of the administration of such company or of the control of the business conducted from the tenement shall be considered as a sub- lease**:

Provided that such a transfer shall not be considered as a sublease if the transfer was made to any one of the spouses who are not legally separated and, or to the children of the shareholder.

In the past, there was an entitlement to sub-let or assign unless this was prohibited. Today, there is no entitlement to sub-let or assign unless expressly provided for in the Lease Agreement.

Furthermore, in the past, a party used to grant to another what was termed a *management agreement*, which allowed for the lessee to grant another party the right to manage the place. Today, this shall be considered subletting by **reason of article 1614 (2)** and thus if the lessee is not entitled to sublet then a management agreement can also not take place. Here, there is a very wide, almost blanket, prohibition whereby any form of transfer of the business is considered as a sub-lease.

Sub-article 3 is something which we have spoken about briefly, which considers the lease when the lessee is a limited liability company. Any cumulative **inter vivos** transfer which amounts to 50% of the shareholding, even where carried out by more than 1 share transfer, then the business is said to have been sub-let to another, and thus the lease will be deemed dissolved.

The difference between a sub-lease and an assignment is that in the former, a new relationship is created without extinguishing the relationship between the original lessor and

original lessee, **while in the case of assignment, the lessee is replaced by the assignee, the latter of which steps into the shoes of the original lessee.** Another distinction is that in the case of sub-letting, the sub-lessee must bind himself to periodically pay rent in a method similar to that found in the principal lease. In the case of assignment, on the other hand, any consideration agreed upon is to be paid only once, unless divided into instalments. Commercially, a sub-lease is more effective. This is because while the lessor may or may not acknowledge the sub-lease relationship, the lessee is bound to deal with the sub-lease - the original lessor has no involvement in the relationship between lessee and sub-lessee. Further, one must note that the relationship between lessee and sub-lessee is contingent on the original lease relationship, in that if the original lease is dissolved, the consequence is carried onto the sub-lease.

1615. (1) The lessee may house third parties in parts of the residential property against payment unless this is expressly forbidden in the contract and subject to the provisions of article 1555.

(2) The lessee shall also be entitled to accept other persons to dwell with him against payment of part of the rent, or against any other consideration, unless such right has not been expressly forbidden by the contract.

This article holds that unless expressly prohibited, the lessee may **house others without entering into a sub-lease agreement.** The lessee will be responsible for such persons. The lessee shall also be entitled to accept other persons to dwell with him against payment of part of the rent, or against any other consideration, unless such right has been expressly prohibited by the contract. Furthermore, this housing of third parties must be subject to article 1555, which holds;

1555. If the lessee uses the thing leased for any purpose other than that agreed upon by the parties, or as presumed in the previous article, or in a manner which may prejudice the lessor, the lessor may, according to circumstances, demand the dissolution of the contract.

Articles 1616 and 1617 respectively provide that a tenant cultivating land under the agreement of sharing the produce with the lessor as well as an occupier of a part of an urban tenement, which is not separated from other parts of the building or may be only accessed by the same entrance of other parts, cannot sub-let or assign the lease, unless such power has been expressly granted to them by the landlord.

1616. A lessee who cultivates land under a covenant of sharing the produce with the lessor, cannot sub-let or assign the lease, unless such power has been expressly granted to him by the lessor.
1617. Nor may the occupier of a part of an urban tenement, not separated from other parts of the same tenement, or having access by the same entrance as other parts of the same tenement, sub-let or assign the lease, without the consent of the lessor.

Jurists and case law accept the distinction between a prohibition conceived in absolute terms and a prohibition qualified by the terms *without the consent of the lessor*. The latter suggests that the lessor has no right to refuse his consent unless a just cause is given, while the former holds that the lessor may veto any subletting or assignment at his total discretion.

1618. Notwithstanding that the power to sub-let or to assign the lease has not been excluded and also where it has been agreed upon, the lessor shall have the right to recover possession of the premises, if such premises are sub-let or the lease thereof is assigned to any person using, causing or suffering the same to be used for purposes of prostitution or for other immoral purposes.

Article 1618 holds that the lessor has the right to recover the possession of a tenement if the premises are sub-let or the lease is assigned for the purposes of **prostitution** or any other **immoral purposes**.

1619. The lessor may enforce his rights for rent, compensation for non-repairs, or in connection with any other covenant of the lease, on the fruits and on the value of all things which serve for the furnishing or stocking, or for the cultivation of the tenement, even though

such fruits or other things belong to the sub-lessee, and the latter has discharged his liabilities towards his sub-lessor:

Provided that such rights shall not be available to the lessor in respect of the said things if the same belong to or are held by or on behalf of any department of the Government of Malta in any case in which such department is not itself directly liable for the payment of the debt.

Article 1619 contemplates the **right of the lessor to enforce his rights for rent or compensation for non-repairs on the fruits and on the value of all things which serve for furnishing and stocking**, even though such fruits or other things belong to the sub-lessee and such sub-lessee has discharged his liabilities towards his sub-lessor. Such privilege is not possible if the said things belong to or are held on behalf of any Governmental department.

Further, **article 1620** refers to the rights of the sub-lessee;

1620. The sub-lessee may not claim against the lessor any of the rights competent to the lessee.

With regards to the applicability of articles 1619 and 1620, we refer to article 1621;

1621. The provisions of the last two preceding articles shall also apply in cases where the lessee has not been restrained from sub- letting or from assigning the lease, or has been expressly allowed to do so, unless the lessor has expressly released the lessee from his obligations or has expressly acknowledged the sub-lessee instead of the lessee.

Until the lessor acknowledges the sub-lessee or assignee, or until the lessee is discharged from his obligations:

- The sub-lessee or assignee has no direct relation with the lessor and has no action against him.
- The lessor only has a direct action against the lessee and never against the sub-lessee or assignee.

In such a situation, however, it must be noted that the lessor may institute a real action over the fruits of the thing let, and invecta et illata, which are things carried in and brought into by the hirer or tenant, and which became, or which were pledged to the lessor as security for the rent.

The Right of Preference

Article 1590 reads, "The right of preference or of tenancy in respect of the lease of things shall not be available, even with regard to property of the Government of Malta, except in the cases laid down in any of the articles following."

The right of preference existed in the past but was significantly re-written in the 1960s and has the effect of granting in certain situations an acknowledged preference. In other words, on the same conditions a particular person is preferred. The opposing view to the right of preference is that it goes against the rules of the free market in the sense that having people who are preferred means that it's not out there on the market. Of course, one can say that this right operates on the same conditions as the open market. In other words, you are preferred on the same conditions.

Where a lease is terminated, a right of preference exists in relation to the entitlement to be granted a lease over the tenement.

A right of preference means that a person on exhaustive grounds is entitled to be preferred over other prospective lessees.

This was suspended during the period of operativity of chapter 69 and chapter 158. Also, the right to be preferred does not necessarily mean the right to be preferred under the terms of the old lease. The ROP comes into effect where a new lease is going to take place, and it is here in respect of this new lease that the ROP becomes effective. It does not mean that this means the right to continue under the terms of the old lease

There are three categories of preferred persons. To this end, Article 1622, relating to sub-lease speaks on this right of preference.

1622. (1) The right of preference referred to in article 1591, shall also apply in the case of the sub-letting of a thing held in common by several lessees.

(2) The right of preference granted under paragraph (*a*) of article 1594 is also competent to the sub-lessee in respect of the new sub-lease of the premises; but the right of preference granted under paragraph (*b*) of the said article is competent to the sub- lessee only in cases where the lower part of the building is sub-let by the person who had sub-let the upper part to the said sub-lessee.

(3) The provisions of articles 1596 to 1610, inclusively, shall apply in all the cases referred to in this article.

Generally, the right of preference exists in favour of:

1) A co-possessor of a property where the tenement exists, per art 1591

2) The sitting tenants, per art 1594 (a), and

3) The tenant of the upper stories over the lower stories, per art 1594 (b) and 1610.

A Co-Possessor of a Property.

1591. Where two or more persons possess a thing in common, each of them has a right of preference over strangers in respect of the lease of such thing, on the same conditions offered by others.

1592. The said right cannot be exercised except by the co- possessor himself, and it cannot be exercised by him after the thing has been validly let to any other person.

1593. In the event of concurrent claims by two or more persons having such right, it shall be lawful for any of them to demand that the thing be let, upon an auction, to the highest bidder, and that strangers be not admitted to bid.

By virtue of article 1622 (1), the right under article 1591 applies also in the case of sub-lease. Each co-possessor has a right of preference over other persons. Possession is an exclusive right, and one can co-own, but it is difficult to imagine the scenario of co possession without

being a co-owner. This right in favour of the co possessors may not be exercised if the object has been validly let to third parties. The term co possessor is misleading here, since it refers to the kind of possession typically exercised by the co-owner.

The Sitting Tenant

> **1594.** If there are no claims on the part of persons having a right of preference on the ground mentioned in article 1591, a right of preference, in regard to tenements, is granted
> (*a*) to the lessee in the last preceding lease of an urban tenement, in respect of the new lease of the same tenement;

In the absence of a co-owner as referred to under articles 1591, then the right of preference is vested in the sitting tenant. **Article 1622** renders this provision applicable to sub-lessees, to different extents, however;

> **1622.** (2) The right of preference granted under paragraph (*a*) of article 1594 is also competent to the sub-lessee in respect of the new sub-lease of the premises; but the right of preference granted under paragraph (*b*) of the said article is competent to the sub- lessee only in cases where the lower part of the building is sub-let by the person who had sub-let the upper part to the said sub-lessee.

The Tenant of Upper Storeys over Lower Storeys

If the right of preference is not exercised in the above-mentioned situations, the right is vested in the tenants of upper storeys of the building. This expressly excludes apartments and maisonettes. It was designed to cater for those situations where there was one entrance of a house, with different families living on different levels. Per article 1622 (3), these provisions apply.

> **1594.** (*b*) to the possessor or occupier of the upper part of a building, in respect of the new lease of the lower part of the same building, whether such lower part belongs to the lessor of the upper part or to any other person, and whether it has or has not access from the street:

Provided that the right of preference granted under this paragraph shall not apply in the case of any building constructed or used as a common tenement house or of any building consisting of flats which, though having in common other parts of the building, are constructed, leased, or occupied for use separately.

1610. The right of preference granted under paragraph (*b*) of article 1594 to the possessor or occupier of the upper part of a building in respect of the new lease of the lower part of the same building shall not be competent -

(*a*) if the possessor or occupier of the upper part does not make use thereof for his own habitation or that of his family;

(*b*) if the new lease of the lower part is claimed by the lessee himself who enjoyed the last preceding lease, in virtue of the right of preference granted under paragraph (*a*) of article 1594.

How the Right of Preference is Exercised

The lessor has to inform, by judicial letter, the party preferred, who has 15 days to declare whether or not the right of preference will be exercised. If he fails to respond, the right is lost. To this end, **a lacuna exists, since the law does not state what will happen if this judicial letter intended to inform the preferred party is not sent**. There are instances where the right of preference is particularly excluded, such as where the preferred party was either a non-resident, or did not reside in the premises above that in question, or it can somehow be shown that the party otherwise entitled to be a preference was a defaulter.

Articles 1595 and 1596 et seq elaborate on the nature of the right of preference and the exercise thereof, respectively.

1595. (1) In the cases mentioned in the last preceding article, the right of preference can be exercised in the manner and within the times hereinafter stated, even after the new lease has been agreed upon with others.

(2) Such right, however, is merely personal, and it may not be transferred to other persons, nor shall it transmit to the heirs or other successors of the person entitled thereto.

1596. A person vested with the right of preference for any of the causes mentioned in article 1594 must, in order validly to exercise such right, **within fifteen days from the day on which he shall have been notified** by the lessor of the conditions offered by or agreed upon with others, accept such conditions, and give, if simultaneously with the aforesaid notification he is so required, sufficient security for the performance of the said conditions where such security is included in such conditions.

1597. (1) The notification of the conditions offered or agreed upon, shall be made by the lessor by means of a judicial act calling upon the person to be served therewith to declare, within the time mentioned in the last preceding article, whether he intends to accept such conditions, **and warning him that, in default of acceptance within the aforesaid time, his right of preference shall lapse.**

(2) Where the new lease is in writing, the lessor may, in the aforesaid judicial act, state the conditions of such lease by a mere reference to the writing, but in such case he must, if the writing is a private writing, annex a copy thereof, or if the writing is a notarial deed or a draft thereof, state in the said act the name, surname and place of residence of the notary having such deed or draft.

Chapter 69 suspends the right of preference, **so these provisions apply only to post 1995 leases**. The right of preference is exercised in that the lessor is to inform, by means of a judicial act, of the terms and conditions of the fresh lease. The lessor is to inform this to those who have the right of preference. The party having the right of preference has to declare by judicial act whether or not they accept the new terms and conditions, and if requested, provide security. Failure to do so would be equal to a waive of the right of preference. If the lessor does not ask for security, then there is no need to pay security. There exists a right of a party entitled to a right of preference to challenge a lease in violation of the right of preference. This happens where the procedure of advanced notification has not been carried out.

1608. The lessee may not set up his right of preference against the demand for the surrender of the tenement, where such demand is admissible, **if he refuses to accept the new lease on the conditions proposed to him and by the Rent Board deemed reasonable**, even though

it is proved that the plaintiff intends to let out the tenement to others on less onerous conditions.

1609. Nor may he set up his right of preference against the aforesaid demand, where such demand is admissible, **if the plaintiff declares on oath that he does not intend to let out the tenement before the lapse of one year to be reckoned from the day of the demand, or that he does not intend to let out the tenement within the said time on conditions less onerous than those which the defendant shall have refused to accept**, whatever such conditions may be, and irrespective of any opinion of the Rent Board in regard to such conditions:

Provided that if the declarant shall, in violation of the terms of any such declaration, let out the tenement, within the time aforesaid, to persons other than those mentioned in article 1606, the party who has surrendered the tenement in consequence of such declaration, may maintain against the declarant an action for damages, exercisable within one year from the day on which the tenement shall have been so let out.

The statement that the right of preference may be exercised even where there has been a new lease agreement tends to lead us to the conclusion that a party entitled to the right of preference may challenge. The law is surprisingly very silent on the time limits on which the challenge can take place. Acquiescence and renunciation as a consequence thereof then comes in.

Reading the 2 instances of 1594(sitting tenement and occupier of tenant above) it is useful to be aware of the fact that this does not apply if the proposed lease does not exceed one year and is to family as per **article 1606.** In turn this gives a right of preference to family.

Article 1594A holds that the right of the sitting tenant is excluded in a number of circumstances mentioned in **1607.**

Going back to **1613 (1),** we note;

1613. (1) In the absence of other special provisions, the contract of subletting is regulated by the same provisions which regulate the contract of letting and hiring:

Provided that in the case of the sub-letting of commercial tenements before the 1st June, 1995, these shall be terminated on the 31st May, 2018 subject to the provisions of this article unless done by agreement with the lessor, in which case such sub-lettings shall be regulated by such agreement:

Provided further that the lease shall be established according to that laid down in article 1513D.

This means that the rules of lease apply to sub-lease unless there is a specific provision relating to sublease. The point being made is that 1622 refers us to 1591 (right of preference of co-possessors).

This also applies where there are *several lessees* letting out one thing. So if the sub-lease finishes, any one of the co-lessees is entitled to preference in respect of a future fresh sub-lease. 1622 also sends us to 1594 (a). This applies also to an existing sub-lease. In other words, the sitting sub-lessee has a preference on a fresh sub-lease. However, in respect of 1594 (b) (the preference of the tenement above), this applies only where the lower part was sub-let by the same person of the upper part.

Locatio Operis

This is not defined in the law, but we know that it refers to the letting of work and industry.

1633. In a contract to execute a certain work it can be agreed that the person undertaking the work shall bestow only his **labour or skill**, or that he shall also supply the materials.

There is thus a party who is contracted to carry out a particular job. Here, most of the provisions have been untouched and are out of date. The contractor may supply material, work, or both. Sometimes, the question arises as to whether there is a contract of work or a contract of employment. The response typically agreed to is that it depends on the degree of autonomy and independence enjoyed by the contractor. **In the case of the employer-employee relationship, there is a greater degree of control by the employer, while the contractor generally retains its legal autonomy and independence**. We are not told how a contract of works comes into effect, but naturally it is effected in writing.

Furthermore, we must note that a difficulty may arise as to how to distinguish the contract of sale from the contract of the letting of work. The distinction is material because the duties and rights in sale are different to those which emerge from the letting of work and industry. The remedies and criteria are not the same.

We do not have, unlike under the Italian Code, the letting of *intellectual skill*. If one commissions an artist to draw an artwork, it is unclear as to whether such would be a letting of work or not.

It is unclear as to why architects are trusted with the drafting of construction contracts. Such typically include what is referred to as *Fidic Criteria*, which are not captured by our law. This has 2 consequences - unfortunately, lawyers are not involved in the drafting, and thus have to work with a contract which does not have legal input, and second, these *Fidic* rules have rendered the provisions of this sub-title (1633 - 1643), except in 2 instances, irrelevant.

1638. (1) If a building or other considerable stone work erected under a building contract shall, in the **course of fifteen years from the day on which the construction of the same was completed, perish, wholly or in part, or be in manifest danger of falling to ruin, owing to a defect in the construction, or even owing to some defect in the ground, the architect and the contractor shall be responsible therefor**.

(2) The relative action for damages must be brought within two years from the day on which any of the said cases shall have occurred.

This provision holds within its parameters imposes responsibility onto the contractor when, within 15 years of the completion of the building, when such building perishes, wholly or in part, or is in danger of falling to ruin, owing to a defect in the construction. This is an article of public order and cannot be derogated from. The architect is also liable for the same.

The conditions for such liability to arise is that first, there is a building contract. Within 15 years, if the building either perishes or is in manifest danger of falling as a consequence of defect of either the construction or of the ground, then liability arises. The FIDIC document is very clear in establishing that the contractor must ensure that the ground is suitable for construction. The relative action for damages must be instituted within 2 years of the moment when the building perishes or is found to be in manifest danger of perishing.

1640. (1) It shall be lawful for the employer to dissolve the contract, even though the work has been commenced.

(2) If the employer **has no valid reason for the dissolution**, he is to compensate the contractor for all his expenses and work and to pay him a sum to be fixed by the court, according to circumstances, but not exceeding the profits which the contractor could have made by the contract.

(3) If the employer **has valid reason for the dissolution**, he is to pay the contractor only such sum which shall not exceed the expenses and work of the contractor, after taking into consideration the usefulness of such expenses and work to the employer as well as any damages which he may have suffered.

(4) Any advance made to the contractor before the dissolution of the contract shall be applied to the sums due in terms of sub- article (2) or (3) of this article and the contractor shall return any resulting excess to the employer.
(5) The contract shall be immediately dissolved when the employer informs the contractor, by any means whatsoever, of his decision to dissolve the contract, and this **without the need of any authorisation or confirmation by any court.**

Today the employer may unilaterally dissolve the contract, even after the works have commenced. This was amended in 1995 so as to produce this effect. Prior to 1995, the employer could not unilaterally dissolve without judicial intervention. This right, today, of the employer to dismiss the contractor need not have a valid reason. Sub-articles (2) and (3) elaborate on the difference in claims which may be brought by the contractor in the cases when the employer had a valid reason and when he did not have a valid reason, with the **difference being the claimable damages.**

1633. In a contract to execute a certain work it can be agreed that the person undertaking the work shall bestow only his labour or skill, or that he shall also supply the materials.

A contract of works is to be distinguished from a contract of service or employment, which is a contract whereby one of the contracting parties binds himself to do something for the other, for a reward which the latter binds himself to pay to the former. The International Federation of Consulting Engineers (FIDIC) has the important task of producing standard contracts of work and defining important aspects, such as the various functions of the parties, safety standards and methods of dispute resolution as international standards.

The Effects

1. The ownership of the work

With regard to ownership, when the materials are furnished by the artificer, whilst the work is being executed, the work belongs to the artificer. However, if the materials are furnished by the employer,

the work is his from the very beginning. If the employer has furnished the artificer not with the materials but with money to acquire such materials, the materials belong to the artificer. The artificer must execute the work by means of the materials furnished by the employer, and the latter is not bound to accept the work if it is executed with different materials, except in case of fungible materials which are handed over to the artificer in such a way that he may make use of those same materials or others of the same kind. When the materials are furnished by the artificer, the work which must result by effect of labour is destined for the employer and **the contract is therefore meant to produce the transfer of ownership from the artificer to the employer just as if it were a sale or other contract which transfers ownership.**

The transfer of ownership does not take place until it is inspected and approved by the employer. When the materials are furnished by the artificer, until the work is approved by the employer, the ownership of the thing remains of the artificer. Therefore, he may keep it for himself, transfer it to others or dispose of it.

With regard to the construction of a building, even though the employer has only supplied the ground, and the materials are to be supplied by the artificer, **the building belongs to the employer from the beginning by right of accession.**

2. The periculum et commodum rei

When the materials are furnished by the employer, the work is at the employer's risk from the beginning. On the other hand, the labour of the artificer is at the artificer's risk and therefore he is not entitled to the price if the thing is destroyed by accident or force majeure. If the thing is lost through the fault of the artificer, he is bound to make good the damages, and sometimes even in a specific form, by executing the work with his own materials.

If the cause of destruction is imputable to the employer, the artificer does not sustain the loss of labour and in turn has a right to the price. When the materials are furnished by the artificer, the work is at the artificer's risk until it is inspected and approved by the employer, not only with regard to the labour but also the materials.

3. Reciprocal obligations

The Obligations of the Artificer are:

The artificer is bound to **execute the promised work properly**, **in accordance with the agreement** and **the rules of the art** and **must act in good faith**. If the employer requests alterations or additions to the original plan before or during execution, the artificer may not refuse unless these are burdensome or increase the price. As a rule, the artificer is not required to perform the work personally and may subcontract it, unless it was expressly or tacitly agreed that the work be carried out by him personally. Subcontracting does not release the artificer from his obligations towards the employer, unless the employer expressly accepts the subcontractor. Where the **artificer provides the materials, he must supply good-quality materials**; where the employer provides them, the artificer **must make proper use of them.**

Article 1642 of the Civil Code discuss the liability of contractor and reads, *"The contractor is responsible for the acts of the persons employed by him."*

The Artificer is bound;

- To deliver the work at the time agreed upon.
- To warrant buildings or other stonework. In case of buildings and other considerable stonework, certain defects may escape the notice of the employer, and therefore his approval at the time of the delivery is not sufficient.

The conditions for this responsibility are:

- That the building or other stonework has been totally or partially destroyed or that there is an evident manifestation that it is in danger of falling to ruin, as held in ***Grixti Vs. Gatt***.
- That this be due to a defect in the construction or in the ground, as held in **Borg Vs. Mifsud**.
- That these facts take place within fifteen years from the day of the completion of the work.

Article 1638 reads, "(1) If a building or other considerable stonework erected under a building contract shall, in the course of fifteen years from the day on which the construction of the same was completed, perish, wholly or in part, or be in manifest danger of falling to ruin, owing to a defect in the construction, or even owing to some defect in the ground, **the architect and the contractor** shall be responsible therefor.

(2) The relative action for damages must be brought within two years from the day on which any of the said cases shall have occurred."

If a building or other considerable stonework erected under a building contract shall, in the course of fifteen years from the day on which the construction of the same was completed, perish, wholly or in part, or be in manifest danger of falling to ruin, owing to a defect in the construction, or even owing to some defect in the ground, **the architect and the contractor shall be responsible therefor**. The relative action for damages must be brought within two years from the day on which any of the said cases has occurred. The party instituting an action **must prove that there has been an omission or lack of professionalism by the architect, artificer, or both**, who may only be held liable if his course of action lacks the current standards of his profession.

This article shall come into force, if and only if a building is:
1. In manifest danger of falling to ruin,
2. Actually collapses, wholly or in part.

These are the **only scenarios which give rise to joint and several liability of the contractor and architect.** Moreover, this must be proven. "*or even owing to some defect in the ground*" this is important and even referred to in FIDIC contracts. Keep in mind that in these contracts, the moment of taking control over a site is important. The moment that there is the delivery of a site, there is in the FIDIC and implied in the Civil Code, a rule which presumes that the conditions of the ground have been viewed and examined. The prescriptive period for the liability of the contractor and the architect is 15 years and the action has to brought up to 2 years after the action has happened. That is to say if a building is erected in 2010 and

collapses entirely in 2021, the 16 years have not elapsed and the architect + contractor shall still be liable, however the action for damages must be brought before the end of 2023, because the prescriptive period is the same for any action in tort (2 years).

Architects complain that this burden is too heavy, and they are forced to pay professional insurance well into their retirement. This is an article of public policy, and the liability of the architect is not only towards the original buyers of the property but also towards subsequent ones.

Obligations of the employer

1. **To inspect the work and approve of it, if it is in conformity with the agreement**. The inspection of the work is that act by which the employer sees whether the works are in accordance with the agreement. The approval is that act by which the employer acknowledges that the work has been done well and is in conformity with the agreement. In practice, inspection and approval become one and the same thing upon delivery of the work. In inspecting and approving the work, the employer cannot proceed arbitrarily. His decision that the work is not in accordance with the agreement is not definitive, **thus if the contractor deems this decision to be unjust, he may demand from the court that the work be judged by experts**. The inspection and approval of the work discharge the artificer from his obligations because it is presumed that he has executed the work promised according to the agreement.

2. To pay the price - the employer is **obliged to pay the agreed price, which is unalterable** because it forms part of the contract.

Article 1639 reads, "A contractor who has undertaken the construction of a building or other considerable work, according to a plan determined and agreed upon between him and the employer, cannot claim any increase in the price, on the ground of an increase in the rate of wages or the cost of the materials, or on the ground of deviations from or additions to the plan, which are not onerous to the contractor.

Article 1643 of the Civil Code reads, "Masons, carpenters and other artificers employed in the construction of a building or other work undertaken in pursuance of a contract of works, **have no action against the person for whose benefit the work has been performed, except to the extent of such amount as may be due by such person** to the contractor at the time their action is instituted."

This is a special favour granted by law to those who live on their work in order to assure payment of their wages. This section was interpreted in **Briffa vs Tabone (1949),** in which it was held that such an action can only be instituted by artificers and may not be instituted by sub- contractors.

3. To **make good any defects in case he supplies the materials -** When the employer furnishes the materials, he must supply good materials, which must be adequate for the work to which they are destined. In case, the work is partially or totally destroyed on account of defects in the materials supplied by the employer, **the destruction is borne by the employer, not only with regard to the materials but also to the wages of the workmen.**

1640. (1) It shall be lawful for the employer to dissolve the contract, even though the work has been commenced.

(2) If the employer has no valid reason for the dissolution, he is to compensate the contractor for all his expenses and work and to pay him a sum to be fixed by the court, according to circumstances, but not exceeding the profits which the contractor could have made by the contract.

(3) If the employer has valid reason for the dissolution, he is to pay the contractor only such sum which shall not exceed the expenses and work of the contractor, after taking into consideration the usefulness of such expenses and work to the employer as well as any damages which he may have suffered.

(4) Any advance made to the contractor before the dissolution of the contract shall be applied to the sums due in terms of sub- article (2) or (3) of this article and the contractor shall return any resulting excess to the employer.

(5) The contract shall be immediately dissolved when the employer informs the contractor, by any means whatsoever, of his decision to dissolve the contract, and this without the need of any authorisation or confirmation by any court.

A **1995 amendment** gave the unilateral right of the employer to dissolve the contract. Prior to this, there was no right of the employer to unilaterally dissolve the contract, and one had to go to Court to go ahead with the dissolution of the locatio operis. This was unfair and prejudicial and time costly, so the law amended it. Additionally, under the old law, the contractor could sue back for damages.
Note that the contractor still has certain rights and remedies, as the contractor may still challenge the existence of good ground of dismissal. Cioe', if the contractor proves that he was not at fault and worked well and carried out his duties as per the contract, then he is entitled to compensation for his expenses and work and also loss of profit.

It shall be lawful for the employer to dissolve the contract, even though the work has already commenced. The contract shall be immediately dissolved when the employer informs the contractor, by any means whatsoever, of his decision to dissolve the contract. Following the 1995 amendments, there is the possibility of the employer of unilaterally dissolving the contract without the need of any authorisation or confirmation by any court. However, such a unilateral decision is at the risk of the employer because if he has **no valid reason for the dissolution**, he is to compensate the contractor for all his expenses and work and to pay him a sum to be fixed by the court, according to circumstances, but **not exceeding the profits which the contractor could have made by the contract.** On the other hand, if **the employer has valid reason for the dissolution, he is to pay the contractor only such sum which does not exceed the expenses and work of the contractor**, after taking into consideration the usefulness of such expenses and work to the employer as well as any damages which he may have suffered.

1641. (1) A contract of works or *locatio operis* is dissolved by the death of the artificer, the architect or the contractor.

(2) The employer, however, is bound to pay to the heirs of the artificer, architect or contractor, in proportion to the price agreed upon, the value of the work done and of the materials prepared, **but only if such work and materials may be useful to him.**

A contract of works is **dissolved by the death of the artificer or the architect or the contractor**. The employer, however, is bound to pay to the heirs of the artificer, architect or contractor, in proportion to the price agreed upon, the value of the work done and of the materials prepared, but only if such work and materials may be useful to him. In addition to these special causes of dissolution, the contract of works is also dissolved by the ordinary causes of dissolution of all contracts, such as in **the absence of any one of the requisites of contracts.**