ADVANCED COMPANY LAW CML3010

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Corporate Governance

What entity is responsible for the government ? For the directors?
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Corporate governance consists of the system of rules, processes, controls, devices, mechanisms, organs and relationships whereby companies are directed and controlled. It refers to structures aimed at allowing a company to achieve its corporate objectives and promoting correct corporate behaviour.

Corporate governance requires proper distribution of responsibilities and correct, professional inter-play between the major players within a company: the chairman, directors, secretary, senior management, auditors, regulators.

In this context, the Board of Directors are the most important organ: plays a pivotal role in corporate governance. Directors should seek the company's well-being, not their own. The Board makes appointments, agrees contracts, determines policies and all other important decisions for the company.

It is important to have independent outside members in order to balance the presence of insider executive directors; helpful to receive their experience from different backgrounds.

There is a difference between private and public companies - There are more different types of public companies.

Corporate Governance Code - When it comes to certain bigger companies, they have additional duties that emanate from corporate governance and the MFSA has issued a **corporate governance code that** has to be followed by Company directors.

There is some resistance when it comes to smaller companies, since corporate governance will have a negative effect on certain companies.

Definition of Corporate Governance: Prof Muscat: (Considered as the basic requisites of corporate governance)

"*Although there is no strict definition of the term corporate governance, its wider spectrum has been said to engulf practically anything that concerns the manner in which companies listed or not are governed and includes inter alia, director's duties, minority's rights and creditor protection.*"

Origins of the Principle: Dates back to 1992, where a definition was provided by Lord Cadbury's report. It is widely recognised as the origin of this governance. This is defined as;

"Corporate governance is the system by which companies are directed and controlled."

Corporate governance is defined as: *"The manner in which companies are controlled, whilst corporate structure is the result of the cultural context in which companies exist and operate".* Hence in this definition, a reflection of the basic split, which is the board of directors who are the manager of the company and the shareholders who own it.

In a subsequent report, by the OECD, (MILLSTEIN Report), **2 possible definitions** were given to corporate governance:

1. The narrow version: Corporate governance is defined as the relationship between managers, directors and shareholders. This definition also encompasses the relationship between the incorporation, stakeholders, and the society, stakeholders and society at large. Hence, the limits of the directors are not limited - what are envisaged as being with the stakeholders and society at large

2. The wider version: MILLSTEIN states that corporate governance encompasses a range of laws, regulations, listing rules and voluntary private sector practices. It is also acknowledged that corporate governance primarily concerns the manner in which the — advisors are put to profitable use.

In a general way, this report provides the framework for corporate governance which has been in some form adopted across the globe.

What happens if we try to apply the general principle to the domestic reality? There is a debate as to whether this concept of corporate governance should be a self regulated process. The other extreme would be to consider whether all companies should be obliged to comply with their duties towards a regulated corporate governance regime.

A 3rd possibility would be to have a model which is based on a mix of both - a combination of self-regulation, and imposed obligations. The reason why there is a resistance to having these obligations being compulsory and as noted by Marlene Mizzi is that “The size of most maltese companies render the application of these mandatory principles impracticable, particularly where the number of directors on a small size regulated companies, is not more than 2 or 3, therefore it would be the same directors, occupying the audit committee, the remuneration committee, the nominations committee, the chairman and ceo as well as assess their performance”.

MFSA Regulations: The mere size of it renders its main objective ineffective.

A practical example of when things go spectacularly wrong is the Volkswagen emissions scandal (Dieselgate). In fact, this is referred to as the classic example of corporate misgovernance. David Fabri states that VW almost ended up like ENRON. Penalties and costs have tallied in the US to 25BILLION USD, as if something was misowned. There are serious consequences to coverup any breach.

Another observer **JOHN ARMOR FROM OXFORD** said that what was fascinating about Volkswagen was the scale and the manner of their deceit.

What was certain was that there were a number of breaches at different levels of the hierarchy at VW. Why was it that risk averse individuals amongst the management failed to investigate potential smoking alarms? How can a company with such an International reputation go with the idea of cheating, but this was allowed at all stages of governance. Hence, it manifests severe breaches when it comes to good governance.

What Did they do ? In order to enter the European and american markets, cars must pass an emissions tests. VOLKSWAGEN had programmed its diesel cars to defeat the emissions tests, so even if there were more emissions the alarms would not ring.

Hence in order to clean up the diesel, it was effecting their performance - whilst engineers had decided to introduce 2 distinct driving modes, the car’s system was smart enough to determine whether it was undergoing the test, hence it used to go to the minimum emissions tests, however the cars emitted up. To 4 times the nitrogen oxide compared to the usual circumstances.what was certain was that there was a number of breaches at different levels of hierarchy of VOLKSWAGEn.

If we had to dissect this example, you could identify 5 failures by VW.

1. Most notably customer abuse, since VW manifested failure of integrity and honesty in dealing with customers - as most people choose VW as it offers certain assurance of a certain quality, hence tampering with emissions it failed to do so

2. Deceptive advertising

3. Tricked the regulators and caused harm

4. Had incorrect whistle blowers procedures - if there were failures in corporate governance as there was bad composition, and group strategy.

Hence first we dealt with the examples, then identified the major failures - what interests us most is the examples of corporate mist governance which led us in the wrong direction. In fact it was shown that various changes in the management structure and in the composition of the board were introduced as it was recognised that in the volkswagen case there were too many directors of the same or similar background and experience, when there is lack of experience and diversity, you do not have the necessary checks and balances to ensure that there are no breaches in good governance.

The VW example, in order to regain its international reputation, the company introduced a **number of significant remedial measures**, that included the following, within the board composition of VW, a minimum number of female directors were introduced.

Secondly, a new ombudsman scheme was made part of the company's governance structure, furthermore, new internal and external whistleblowing mechanisms were introduced, additionally, a number of new mechanisms of oversight and supervision was made part of the technical department overseeing diesel engines, finally, to rather novel or new ideas within governance were also introduced, essentially, there was an appointment of a **new director whose main task was to oversee the ethical levels across the board and production and to ensure that integrity levels were preserved,** another important condition overlooked is that a new age limit was introduced, so that is a brief definition, and tracing back the origins of corporate misgovernance, there are different levels of corporate governance depending on the size of the companies.

Companies are governed by the Companies Act, and the statutes of the government but listed and regulated companies apart from requirement of the companies. Act and M AND A, there are a number of special laws, and more importantly a number of rules and principles issued by the MFSA.

Companies Act: Recognised as the principal source of corporate governance is the Companies Act, cap 386. In the Companies Act we have specific actions which deal with the division of authority between the board of directors on one hand and the general meeting of shareholders on the other. Furthermore, directors' duties and accountability also find their source in the Companies Act together with shareholder redress mechanisms and disclosure and transparency requirements. These requirements of transparency are manifested in annual repository duties and shareholder information rights. Linked to the companies act are the M&A, recognised as being an important source of corporate governance under maltese law. Whilst the memorandum and association describes the features of the company, targeted at the outside world, the articles of association deal with the internal relationship of a company with its members and its relationship between members themselves. In fact, it is recognised as being an important tool in order to supplement the provisions that are found under the companies act.

Along with these documents, the MFSA has issued a number of guidelines and in so doing, it has put as part and parcel of Maltese law, certain requirements that emanate from EU obligations, and we will see that the latest, compendium of rules dealing with corporate governance was issued last year, and is referred to as the **corporate governance code,** which if we look it up at the website, is applicable to **all entities authorised by the MFSA.**

A combination of self-assessment and mandatory obligations. The element of supervision, the idea of checks and balances, is for this reason that a number of levels of control and supervision are controlled and included. The elements that arise are the elements of internal and external checks and supervision of the companies' governance, ensuring that a company is governed in a correct manner.

MFSA Press release 25th Aug 2022: MFSA launched a corporate governance code to authorised entities, but previously the MFSA had issued guidelines. The corporate governance code, the definition taken from the CADBURY code, the financial aspects of corporate governance (1992). It is crucial to ensure that all entities operate transparently, efficiently, and effectively. Good corporate governance fosters mutual trust with stakeholders inc. customers, employees, intermediaries and the general public as well as with the jurisdiction as a whole.

Quoting from Preamble in the Corporate Governance Code; *Corporate governance: "the system by which all companies are directed and controlled", 1 or more widely "the social, legal, and economic process through which companies function and are held accountable". It is strategically crucial to ensure that all Authorised Entities operate transparently, efficiently and effectively, and achieve a judicious balance between their own interest and the various constituents in the environment in which they operate. Corporate governance ensures the Board of Directors and management are discharging their functions effectively when it comes to building and satisfying stakeholders' confidence. It is the responsibility of the Board to ensure there is good corporate governance, by setting culture, managing stakeholders, and ensuring that adequate systems for control and oversight of the business are in place, thus delivering satisfactory outcomes. Good corporate governance fosters mutual trust with stakeholders, including customers, employees, intermediaries, and the general public, as well as with the jurisdiction as a whole. It is conducive to value creation for all stakeholders, ensuring the financial soundness of firms, the protection of investors, as well as the integrity of the market. Conversely, governance shortcomings may lie at the heart of failure in financial services entities, whether that is a failure to treat customers fairly, a failure to ensure appropriate financial crime and other regulatory compliance/controls, or failure to abide with good business practices. This may in turn have repercussions on the business sector in which the entity operates and, consequently, on the economy in general and on the reputation of the jurisdiction. Furthermore, good governance is also considered a key enabler for entities to generate business benefits,*

On the other side of the coin, **governance shortcoming** may lie on the governance entities, whether a failure to treat customers fairly or failure to apply controls - good governance also is a key enabler for entities to generate business benefitting shareholder value and higher trust, enhancing their strategic advantage. Hence, in launching this corporate governance Code, the MFSA puts a lot of focus **on ensuring that the boards of authorised entities adopt a governance system that delivers satisfactory and high quality outcomes**. Then there is a particular section that makes it clear to what entities the corporate governance code applies to.

The code provides a set of principles complemented by supporting provisions which are to be applied on a best effort basis. These are organised into 4 main sections as follows:

1. The effective board

2. Internal controls

3. Stakeholder engagement

4. Corporate culture, CSR AND ESG

ESG - Environmental social and government activities - this idea of promoting environmental goals is not something new to Malta, but to the contrary Malta was a forerunner, when it comes to the promotion of the environment of the interest of mankind, in effect it was the Maltese ambassador to the UN - Avrid Pardo in 1967 - made a recognition in the UN so that the subsoil are recognised as a common heritage of mankind, to be used for peaceful purposes, and for the exclusive benefit of humanity, thus preventing the unsustainable use and misappropriation of resources and minerals. This proposal was rejected as a number of States were not ready to give up their sovereignty. This was an instrumental part - UN convention of climate change and KYOTO Protocol. Hence, Malta was one of the forerunners for sustainable development especially in light of the UN SDG goals. The plan is that by 2030, the world adopts the goals as agreed to by States of the UN.

There has been an important development in light of the UN and the way legislation is developing in the EU. In fact, the EU is on its way to implement, as the notion of sustainable corporate governance - first we have corporate governance - today the buzz word is ESG.

Example of a recent initiative in Malta is ESG. Reference to an initiative by the MSE as there was the listing of green bonds on the MSE that were aimed at giving a number of incentives to issuers that were seeking funds in order to finance green projects. In fact, projects that satisfied the criteria in the MSE green list that are in turn based on the international capital market association GB (GREEN BONDS) principle, would be entitled to reduced listing fees. In order to qualify for such projects, they must have the following objectives: Change mitigation, climate change adaptation, pollution prevention, the sustainable use of water, and marine resources amongst others. Furthermore, last summer, 13 major Maltese businesses agreed to form an alliance to fight for carbon neutrality, their goal was to act as a catalyst, to face issues by Malta since looking after the planet is not negotiable. The overriding objective of the alliance is to increase its members to expand to all forms of economic sectors, the members are there to inspire change through its members.

It was noted that these initiates will make a difference to the Maltese corporate business in reference to the EU's corporate sustainability reporting directive. It was stated that the alliance promotes companies being suitable and also makes more sense by helping these businesses in the long run.

Rights and obligations of Directors

Another general comment, is that you will realise that the duties imposed on directors are pretty serious and quite a lot of duties are imposed on directors, and the question we ask ourselves is why do directors have so many duties and why are some of them so serious that they have serious repercussions on them - one way of looking at it is that directors have a lot of power, and with power comes heavy responsibility.

Article 137 says that the business of the company shall be managed by the directors, who shall have all the powers of the company, except all those that are vested in the shareholder, by law and by the memorandum and articles of association.

This means that all the residual powers of the company vest in the directors, so really, directors have all the powers of the company, except just a few that by law or M&A are put on the shareholders.

Recently, laws have been enacted that give responsibility to directors which go beyond the Companies Act. There are many laws in Malta, which generally apply to persons and a company is a legal person, so by enlarge, the laws that impose regulations on persons will impose them on companies, and the obligations imposed on the companies and not on the directors personally.

Many of the laws also contain provisions setting out criminal offences, in the event of a breach of a certain provision of those laws, and the company could be in breach of a provision in the act that leads to a criminal offence.

Article 13 of the Interpretation Act contains a provision that states that when the offence is by the company, the directors are liable unless they prove that they had no knowledge of the offence and in any case took every reasonable step to avoid the offence. **The onus of proof is thus transferred onto the Directors**.

Income tax legislation, VAT legislation, Planning Authority laws, can impose liability directly on directors.

Broad comments on duties of directors:

2 principal organs:
The general meeting; Shareholders' meeting
Board meetings: Directors

Directors are as a rule appointed by the shareholders, the first directors are identified in the M&A but following that, changes to the Board are affected by the shareholders, either in a general meeting or else you may have different classes of shareholders.

The chronology - of the duties of directors into 3 periods

1. Period 1 - Passing of the commercial partnership ordinance in 1962 up until in 1995 the companies act. Here, there was very little in the law that set out the duties and the obligations of directors (no section or provisions that dealt with the duties of directors). During that protracted period of time, people in business, and even their advisers believed

that it was virtually impossible for a director to be liable for breach of duties.

2. Period 2 - from the coming into force of companies act and up until 2007/8. The Companies Act was a major piece of legislation that contained duties of directors and on that stage, there was a growing awareness of the regulations and functions incumbent on directors - the idea of duties of directors was seeping in but many advisors were not convinced that this had an impact on the duties of directors.

3. Period 3 - from 2007/8 up till the present

Landmark Price club cases (2007/8). With these cases, personal liability had been imposed on the directors of the Price Club, and they emanated from provisions on wrongful and fraudulent trading, and it was only at that time that directors started saying, oh now we have to be careful about the conduct of business and that created a shift in mentality.

In recent years, this idea that directors have a lot of duties has increased significantly, because of certain laws that are in place that affect companies and could lead to personal liability on directors. For example, in the money laundering regulation, if there is a breach, the company can be held liable and so even directors can be held liable as well.

Why is it that this area of the law of duties of directors is complex and wide ranging?

1. <u>The sources of laws of duties of directors are many.</u> These include:
    1. The Companies Act which applies to directors generally.
    2. Provisions in the civil code which have to do with the duties of directors.
    3. Listing rules such as capital markets rules which impose many obligations on directors of publicly listed companies.
    4. Rules in M&A that impose duties of directors.
    5. Duties of directors imposed in the contract of engagement of the director concerned.
    6. Rules and laws on the planning authority act that impose duties on directors. Some of these rules impose duties on directors directly, ex the social security legislation.

2. The nature of the duties
    1. Duties of a civil nature
    2. Duties of a criminal law nature

3. Duties that are contractual in nature

4. Duties that are almost of a sui generis nature - that come out of the M&A

The subject of duties of directors becomes more complicated as it depends on the business of the company and whether the company is solvent or insolvent.

If the company is bankrupt or heading to insolvency, then additional duties are imposed on directors, in breach of which can lead to personal liability.

Public vs Private Companies

Public company directors have more duties than those of private companies, for this course we care about directors of a private company.

It also depends on what sector the company is operating in. It is one thing if the company is involved in general trade, and it is another thing if the company is involved in one of the regulating sectors. Directors of those companies have more obligations imposed upon them, with the imposition of heavy fines on directors even with the possibility of a criminal sanction, which then leads to the question of people who are already a director or not.

Nowadays, many people refuse to be a director due to the many responsibilities.

You need to constantly ensure that proper arrangements are in place.

What is the juridical nature of directors? This depending on what the juridical nature of directors is, duties will apply. Directors have generally been both mandatary and agents of the company.

A director can be regarded as a mandatary since a mandatary is a person engaged to do a job and that is what the director is there for. The law of mandate applies to him. Mandataries have also been considered as agents when dealing with 3rd parties. Agency relates to the law of mandate.

More recently, mandatories have also been regarded as fiduciaries - the law has been amended on fiduciaries and obligations - 1124A and B

The reality is that as much as we consider directors as mandataries and fiduciaries, they occupy a sui generis position. Their duties go beyond the law of mandate and the law of agency.

Who do directors owe their duties to?

Directors owe their duties to the company. Directors do not owe their duties to individual shareholders, but to the whole body of shareholders, to the company as a separate legal personality. There are judgements that establish this: PERSONAL VS WRIGHT and Sant Fournier Vs Attard Montalto. Hence a director owes his / her obligation to the company and not to individual shareholders. If a shareholder alleges that a director has breached its duties, it cannot be those shareholders who can take action directly for breach of duties. It will need to be the company itself hence, the proper plaintiff is the company that will need to sue the directors for breach of director's duties. This creates a problem if the shareholders competing are the minority and the company will not be happy to take action against directors who really breached their duties. A remedy which allows the complaining directors is article 402 of the Companies Act. The directors owe their duties to the company and the company will need to take action against the company.

Do directors only owe their duties to the company? Directors also owe duties to the regulatory authority, hence in a breach as earlier mentioned, the planning authority, for ex the health and safety department, can take action directly against the director.

Directors also owe their duties to the creditors of a company. As a rule, once a company is solvent and continues to be so, creditors have no involvement at all. Creditors are paid and continue to be paid as long as the company is solvent. If the company is not solvent or is approaching insolvency, they must deal with rules in the Companies Act, that impose duties on directors, when a company is approaching solvency but also insolvency. In the price club cases, the courts acknowledged that in a case of approaching insolvency, directors also have a duty to protect the creditors.

Duties of directors

- Duties of a general nature. There are duties that are general in nature which emanate principally from the Companies Act and from general principles of the civil law. This is concerned with the former.

- Duties of a specific and administrative nature. They are primarily, but not exclusively, found in the Companies Act.

- Duties where a breach leads to criminal sanction.

Duties of a general nature

This category is further subdivided into four subcategories:

1. Duties of loyalty: These emanate from the Companies Act and can be divided into 6-7 rules.

    1. The duty to act honestly and in good faith in the best interest of the company.

    2. The duty of directress to remain within their powers

3. No profit rule

4. No conflict rule

5. Not to take benefits from 3rd parties unless entitled to

6. No compete with the company

7. Duty to exercise unfettered discretion.duty of loyalty. To act honestly and in good faith in the best interests of the company. The most important duty that directors have is to act in the best interest of the company and to do so honestly and in good faith . A serious director will not be troubled by this duty as he will act normally in the best interest

2. Duty to exercise due care, diligence and skill - Duty is judged on common sense principles. Even if the decision taken by the directors turns out to have been a wrong decision from the business point of view, as long as the director or those directors acted in good faith in the subjective belief that the decision taken was a right one, then there will be no liability. Directors may decide to engage in some new projects for example, if the business is in catering, the opening of a new restaurant, but plans change and they close it down. Shareholders may say they took the wrong decision and we should hold them liable but as long as they were in good faith, there should be no liability.

3. Duties as a mandatory

4. Duties as a fiduciary

Find the Charterbridge Corp test: Directors' Duty to Act in the Interests of the Company: Subjective or Objective?

Duty of Directors to remain within their powers. We have article **136A of the Companies Act** which states that the directors are obliged to exercise their powers for which their powers were referred and not to misuse their powers. These principles here remind us of the doctrine of ultra vires. Remember that a company has its objects clause in the M&A and a company cannot act beyond those objects. If it does, it is acting ultra vires those objects.

Ultra vires has another significance, it is where directors act within the objects of the company but outside their own powers as directors. For example if the AoA says that any decisions that the company wishes to take that exceeds the expenditure of 100K, not the directors alone but a general meeting. If the directors enter into a contract for 250K, the company will be bound vis-a-vis 3rd parties but the directors would be breaching their duties. **Good faith is not a defence if directors act ultra vires**.

Duties of loyalty. These are commonly referred to as the duty against self.

1. No conflict rule. The fundamental rule is that a director must not put himself where he is in a conflict with the company or more specifically where his personal interests conflict with the company's. The general rule is when advising companies you must not go beyond the general rule. It may well be that the company has a particular provision in the M&A which says that a company cannot enter into a contract where a director has a conflict of interest.

One fundamental rule is that a director is obliged to bring the matter of the conflict to the lotus of the board of directors, during the meeting at which the proposal is made and by the first available opportunity. If he realises that a transaction is going to be entered into in which he has a personal interest.

This rule of the conflict of interest - raises 2 or 3 interesting questions. When is a director obliged to bring to the attention of the board the fact that he has a personal interest in the transaction? Will he be able to vote? It depends on what the articles of association states.

In the majority, he is allowed to vote but in more recent years, the articles of association will prohibit voting on the manner.

What about that director, who although has no vote, is into discussions? Can he be present on the board when that transaction is being discussed?

Articles of association generally state that they do not vote to adhere to the highest standard of corporate governance and that directors should not participate in the discussion at all.

Another issue that has arisen in the case of a conflict of interest is when you have a situation where you have a holding subsidiary relationship and the holding company appoints Mr X on the board of the subsidiary and then a transaction is proposed to be entered into in the subsidiary and the holding company. Does he have a conflict of interest merely because he has been appointed by the holding company? Muscat's view is that there is no conflict of interest on voting on their own.

Him having been appointed as a director, does not mean that the transaction approved will benefit him personally.

Unwarranted or discriminatory benefit to the holding company can not be given. For example a holding company is a lender in a loan and the subsidiary.

What if a director is in litigation with a company on which board he sits? The question is - given that a director is within the company, can the director insist that he is present? Although there is nothing in the law that regulates this, that is an exceptional circumstance.

2. No profit rule - rule against self dealing

If there is a breach in this rule, it will mean that the director has gained something for himself.

The rule is that a director cannot make any personal profit from his position in the company or any personal gain from confidential information. The director cannot use property of the company or take any corporate opportunities of the company unless he is authorised by the company.

What about corporate opportunities? Imagine the company is in the business of software development, the director is himself an expert on software development, but one day the director is approached by some individual or by some company to make development. The director cannot tell the other individual / company that he will do the software development for you, in my own name.

In this regard, an interesting Canadian case - COOLIE CASE - the director having been approached whilst on holiday, he took the opportunity for himself rather than passing it on to the company - and he used the defence that he was on holiday but the company said you are a director at all times not only when art home - hence he breached his duty

Having *confidential information* about the company and the use by a director of confidential information may lend him trouble if he uses that to make some sort of **personal gain**.

The insider dealing rules of companies always apply.

If the director knows that the company on which he sits is going to enter into a very lucrative business but a transaction is not yet made public and he knows that the price of the shares are likely to go up, what type of benefits are we talking about?

Unlawful commissions that the director may have negotiated on behalf of the company. The benefit from the 3rd party need not be payable in cash, but even in kind for example a ticket to a football game, a holiday, or the director gained something like that, then he would be in breach. Even if the company on which he sits makes a profit, he would still have the obligation not to benefit from 3rd party's benefits, unless he is allowed to do so. No excuse for his efforts which led the company to flourish.

Duty not to compete with a company - **The director is bound not to compete with the company on which he sits**. Find article 147 of the Companies Act.

He must not be in competition with the company and without the approval of the company, he cannot carry out business on his own account or account of others or be a partner with unlimited liability, or a partnership, or even be a director.

If you have 2 companies owned by different shareholders, X cannot be a director of both the first and second company as both are in competition with one another. He is only allowed if it is allowed to do so from general meeting approval.

One final duty of directors that falls under the duty of loyalty, is the duty to act with an unfettered discretion i.e., not tied or bound in any way. The principle entails that a director cannot agree to have discretion to decide on a board of directors, restricted on an agreement with somebody else.

Directors are sometimes appointed by different classes of shares. A has the right to appoint directors. Imagine that the class C shareholders are happy to appoint X,Y and Z as the 3 directors of the company. Say look - we will appoint you as directors but when you are ready to discuss, you have to come to us and we tell you how you need to vote. X, Y AND Z cannot agree with the shareholders that they will vote and argue as dictated as that will conflict with the basic rule of loyalty that the directors have a duty to act in the best interest of the company. This reminds us of nominee directors, a notion that some people offer themselves to be nominee directors.

Duty of loyalty

3. Duty to exercise due care, diligence and skill. In this duty, there is the fundamental rule in article 136A that a director of a company has to exercise due care, diligence and skill in the excessive of his functions, but the law does not stop there and it sets out two standard that a director need to abide by - a subjective standard and an object standard and both have to be satisfied. The objective standard os set out in the law 136A - A director is obliged to exercise the degree of care diligence and skill that would be exercised by a reasonable person carrying on the same functions as being carried on by the director in the company concerned, hence assessing the behaviour of a director here will compare what the director would have done with what a reasonable director would have done. The director is judged by an objective standard, judged by the knowledge, skill and experience that a director has, what knowledge skill and experience he has. The question here is simple to put but not easy to answer. If the objective standard is but this director, his knowledge, skill and experience are very high, hence an objective standard that is up there and a subjective standard that is lower - he will be judged by - the objective or subjective standard?

What if the objective standard reaches up there and the director is not very skilled? What will the courts judge the individual by - gut feeling is that the law will look at everything and will hold the director in each case to inherit the 2 standards.

Under our laws, directors have always been considered as mandataries and more recently as fiduciaries because of a set of sections that were introduced in 2004 in the civil code relating to fiduciary obligations.

There is no doubt that a director is a mandatary of the company with the company as the mandator. No doubt that a director is engaged to do something to the company and directors have been engaged. Duties of mandatories are primarily centred around article 1873 and following on the civil code.

Most important duties in the context of directors are:

1. Duty of mandatary to carry out his mandate. In the context of directors an important practical corollary is for example to attend board meetings. A director is obliged to attend that meeting, to prepare for the meeting, and to participate in the meeting. If not, he would not be carrying out his mandate as a director.

2. Duty to render an account of his mandate and to give appropriate explanations as to what you are doing.

3. Duty to pass on the mandator anything that the mandatary received in exercise of his functions even though the company was not entitled to receive it. Hence if a director receives a commission he has to pass that payment on to the company.

4. Duty not to delegate his / her powers to someone else unless specifically authorised to do so. The director needs to carry out the mandate himself.

Alternate directors - A person appointed by a director to attend board meetings instead of the director of a company. That is at law a delegation of authority, hence the principle here, the latin maxim, will apply and hence for a director to be able to appoint someone else as an alternate director to attend the meetings on his behalf that director needs to have been already authorised to delegate his powers and that is generally done in the A&A, in the provisions that regulate alternate directors.

Whilst some articles of association entails any director to appoint any person as an alternate director, there are provisos who appoint an alternate director as another director. So, when dealing with company law matters, there are 2 documents to refer to: Companies Act + A&A.

Directors as fiduciaries

There are situations when fiduciary obligations arise and one of the scenarios is when there is a person in a position of trust.

<u>What are the duties of a fiduciary?</u>

A court judgement to be discussed soon: which appears to find difficulty with applying the provisions relating to the duties of fiduciaries to directors - the judgement says that once there are duties of directors already set up in the Companies Act than those which apply to the directors and hence the civil code don’t apply to the directors. PROFS MUSCAT DOES NOT AGREE WITH APPROACH.

This duty cannot be subject to a contrary agreement, hence it is an overriding fundamental duty on fiduciaries and the person engaging the fiduciary obligation cannot agree that the duties are not so fundamental.

Through this article, directors must act honestly and utmost good faith (a higher standard).

Duty of loyalty - in the case of a fiduciary, this means that a fiduciary must avoid conflicts of interests. A fiduciary cannot make any undisclosed personal gains out of his functions. Once again we have seen similar obligations on directors in the Companies Act.

A duty imposed on fiduciaries when they act for several people, to act impartially, cannot favour one or the other persons who they are acting as fiduciaries for. In the companies act, there is no such duty and hence it is as a director acts only for a company - hence not necessarily acts for one and the other.

Another duty of loyalty is if for a reason whatsoever the fiduciary receives instructions that he receives property, he has to return any property that he holds back to whoever is entitled to it. This duty is not specifically mentioned in the companies act.

Then there is the duty of care (article 136A; imposes an obligation on directors to exercise due care, diligence and skill in the exercise of their functions). The Companies Act sets out both an objective and a subjective standard. In the case of fiduciaries, there are no similar provisions except for one. The fiduciary is bound to act as a bonus pater familias

The duty of the director to exercise care, diligence and skill - Is there a difference between them? In the Companies Act, the director is also judged by his own subjective standard, hence if his own subjective standard is a high one, then he will probably be bound to a duty of an objective standard of the bonus paterfamilias.

There is also a duty to carry out some administrative duties. So, an important point is to keep the property which he holds as a fiduciary. He must not commingle the funds but keep them in a separate account.

It is an implied duty even though no mention of it in the law, it should be obvious.

The duty of the directors to render an account of whatever the fiduciary is doing - no express provision when it comes to duties of directors in the companies act. Find Amadeo Balzan vs Ruggier Balzan et (cit. 281/2011).

P was a shareholder who held almost 49% of the shares of the company and was also a director, the defendants (2 of the 3) were also directors and shareholders of the company. P claimed that the defendants had acted as directors to the prejudice of the company and to his own personal prejudice and alleged that the directors had breached their duties under the Companies Act and also their duties as fiduciaries under the civil code. There are two aspects of this case which are relevant:

In the judgement the court made reference to the fact that what P was alleging was a breach of the duties of the persons who were acting as directors but also claimed a personal loss to himself. The court noted that the duties of directors are owed to the company hence, any claim needs to be made by the company rather than by the shareholder. The court also reassessed the situation where a shareholder might not be in a position to sue directs as the director is not in control to sue for a decision hence there is a remedy in our law which is the derivative action (not used in the courts but we have the same thing in article 402 of the Companies Act) the section on the minority rights. The judge in this case said that he did not have the right to institute the action in his own name but in the name of the company against the directors then the judgement went on to discuss the interplay between the duties of directors in the Companies Act and the duties of fiduciaries in the Civil Code. The court said that there is no doubt that P was invoking rights as a shareholder of the company that is prejudiced against the directors and hence the court said that here the duties of directors of the Companies Act. The duties of the courts in the Companies Act are set under a set of provisions - LEX SPECIALIS LEX DEROGATIS. A special law takes more precedence over more general provisions hence, the duties of fiduciaries have no role as they are more general when it comes to the duties of directors - PROFS MUSCAT DOES NOT AGREE WITH THIS APPROACH - as although the latin maxim is a principle in our law, that principle only applies if there is a conflict between the 2 laws. In PROF MUSCAT'S MIND, the rules that are contained in the civil code on fiduciary are not in conflict with those of the duties directors. There are a few which are considered to be in conflict and in that case you have to use the Companies Act.

Example of conflict. In Commercial Acts you have the duty of care diligence and skill - in the Civil Code you have the duty of a bonus pater familias hence, the duty in the Companies Act will prevail - but there are some provisions in the Civil Code that have to do with fiduciaries which are of a more general application, that have no counterpart, and hence should apply as here you are talking of provisos which have no counterpart in the civil code. One of them is the duty to keep records, to segregate your property to whoever is giving you instructions - all these are of a general nature but they also apply to the duties of directors.

<u>Anthony Caruana and Sons Limited vs Christopher Caruana.</u>

The facts of the case: There was a point in time when a company called Anthony Caruana and Sons Limited was acquired by a 3rd party. At the time, D was involved in the management of P's company and he continued to be so involved. In 2003, a definite contract was entered into between P and D when D was engaged as the General Manager of the company between 2003-2006. Midway through this period, D (general manager) wanted to leave and he was paid an amount by way of a terminal benefit but also gave a contractual commitment to act with continuing good will towards the end of the company after the termination of his employment. P (company) discovered that the general manager was up to some mischief. He was using confidential info for his own personal business. He had approached clients of the company to take them over, approached the suppliers, opened a business in the same line of business, set up a separate company owned by him to operate these new brands. P alleged that by doing so, he has breached his duties as a fiduciary as well as his obligations of the termination of contract of employment. D stated that in his defence:

1. He did not breach anything.
2. Was not a fiduciary in his capacity as a general manager.
3. In any case, the provisions of a fiduciary in the civil code, came after he had done the wrong doing.

FHCC said that D was an employee of the company, a GM of the company but even as a GM, the individual did not qualify as a fiduciary as according to the court only directors or persons responsible for policy making could be regarded as fiduciaries. It said that he still breached the provisions of the contract and hence he was found liable and condemned to 10K EUR.

The COA reversed the sentence and found that a GM is to be regarded as a fiduciary as he was in a position of trust and hence was subject to fiduciary obligations. The COA also observed the provisions raised on the fiduciary obligations enforced later - hence not being applicable as they came into force after the alleged wrongdoing - the court of appeal said yes it is true that these came into force after the behaviour of the GM but these obligations of a fiduciary have always existed and referred to roman law. Hence, these were part of the ius commune - the court came to the conclusion that he breached his fiduciary obligations in the contract and was condemned to pay 10K EUR.

The factual scenario in this case could apply to equal force where the director.

Administrative duties under the Companies Act - refer to a court judgement.

Companies Act: Most pages you will come across duties imposed on companies or duties imposed on the officers of the companies. Some are duties of a general nature in 136A but others are of an administrative nature.

The obligation to keep the register of members, there are obligations to do with minutes, the filing of certain documents, a forms T, A, K, and H (allotment of shares), a form to do with the change of registered office, form to do with keeping of accounts, the financial statements of the company, the filing of the financial statements. Administrative duties also to do with scenarios of a liquidation of a company and a bunch of other administrative duties. These duties are imposed on the company or on the officers of the company. The officers of the company are the directors of the company or the company secretary. The auditor is not considered to be an officer of the company. All these duties carry a sanction with them if the duties are not observed, which generally impose a penalty.

These obligations are imposed on the directors and also on the company secretary. A relevant provision is article 150 of the Companies Act which says that any duty that is required by the Companies Act on a company is also required to be done by the officers of the company. This is why directors have such wide ranging obligations.

In the internal relationship between directors and company secretary a number of these obligations are directed to the company or company secretary. All directors are liable for any that is imposed, when it comes to these fines a director who is sued by the registrar of companies on a particular form cannot say he had delegated this duty to the company secretary.

Find Mariello Spiteri vs the Registrar of Companies (FHCC, 2015)

Facts: A company in which there were 3 directors, 1 of them being Architect Spiteri, and X AND Y.

Things were not going well and in June of 2008, X and Y both resigned as directors and the following month in June of 2008 Architech Spiteri also resigned but in June of 2008, he had received a claim from the ROC for the payment of a fine for failure to file the annual financial statements of 2K EUR.

In court, P argued that fine ought not have been imposed upon him as he said that the position duties of directors (as a whole) were responsible and hence, the submissions of tenders - X was responsible for general administration and Y was responsible for financial matters in order to draw up financial statements and accounting records.

The court said that when administrative fines are on the companies act they are - to get from the case.

In article 150, anything required to be done by the company shall be deemed to be done by the directors of the company and the court also made relevant provisions. The company is liable jointly and severally with the directors for any sanctions imposed.

If one had to apply the provisions of 427 of the Companies Act ,he could make a claim to the company to be compensated for the amount that the director has to pay. The judge also said that the director could sue and could claim a proportionate share of a fine from the other 2 directors. Hence, the payment is the responsibility internally of the company but the company was bankrupt hence the liability falls internally on the directors. Effectively, at the end of the day they would have to pay 1/3 each.

What can directors do to mitigate their risk of reasonability? Directors of certain companies have very stringent and strict duties which if breached could lead to significant sanctions, hence not only the general duties or administrative duties but there are also a number of other laws which didn't have duties on companies and the breach of which could either lead to significant fines on directors personally or the imposition of criminal breaches. There are a number of laws that can have repercussions on imposing fines.

<u>What does one do in order to lessen the risk of liability?</u>

You need to try and do 2 things. What type of company is the director of? It is one thing at one extreme if the company is a single member company or a private member company. Going then to the other extreme of a fully fledged company, having 1000s of customers operating in the insurance sector hence, it is not a one size fits all situation. For a proper analysis you have to think about what set of obligations you are talking about.

Are you talking of the general duties of the Companies Act and mitigate from there? The penalties of breach of admin duties? Potential liability for the breaches of health and safety act

If you are a director you have to look into what company you are being asked to be a director and who will be your fellow directors. Also, it is one thing becoming a director of a company that already has a good reputation and it is another joining the board of a company who is in trouble with the Authority.

It is one thing to have fellow directors with experience and integrity and another to have directors who do what best suits them.

What else needs to be done generally? To always attend board meetings, to always be available to act as a director, and to always be prepared when going to a board meeting or doing anything related to directors. Some of the directors go to a meeting only to be present in the discussion but would not have done enough reading and preparation.

In a board you might have a domineering chairman who might not allow either much time for discussion or might not provide all appropriate documentation and who does not take any challenges. If you are in that position, either you can stand up and do what needs to be done and challenge by asking questions or else you just leave the company.

The boards, especially these days and in recent years, should seek advice whenever something is not entirely clear. If there's a financial issue and the directors are not conversely with legal issues. They should bring in an advisor who advises them on what needs to be done. Directors are not very keen on this as this will come at a cost and not every company is willing to pay.

Other general points - A rule in the companies act in article 147 says that directors are joint and severally bound amongst themselves vis-a-vis their duties in the act, but this section also says that if a particular duty has been delegated to a director then the other directors should be able to say that they delegated this to X hence we are not (general duties of directors) liable.

A director who wants to shield himself from liability can ask the board if there is a particular function to do with finance that they might delegate the function to.

With administrative files however the company can not say that this was delegated.

What can a director do? He can try to get the shareholder of the company to give him an indemnity in the case he has been found liable. The difficulty is that a director cannot ask for an indemnity from the company itself. The law prohibits the company but there is nothing wrong with the directors seeking an indemnity from shareholders.

What is also possible is to take out a director's liability insurance. It is very expensive and will not cover the director from any liability that there could be.

What else can he do? If you are a director and you disagree with what is being proposed, if you are against it and you feel that what is being proposed could land the director in trouble, he will need to minute it and explain why he is dissenting from the proposal.

The ultimate thing to do if the director is not happy with how the business is run is obviously to resign. This does not mean he is absolved.

There are some situations where it would make sense for a director who wishes to resign not to resign but make every attempt to rectify.

A company going insolvent is one risk of liability. For a company approaching insolvency, the relevant section here is 316 of the Companies Act and a breach of article 316 will rise if the people knew or could have known that the company is going into liquidation and failed to protect the interest of creditors.

What does therefore one do if a company is approaching insolvency? What needs to be done if the risk of liabilities goes beyond, for example they need to have more management accounts, more regular meetings, bringing in advisers, not to distinguish between different creditors, speak with suppliers, etc/

Authorities if they see that there is a breach of health and safety. What needs to be done in health and safety situations is to have a health and safety officer.

Capital

One of the main reasons why most entrepreneurs opt for a limited liability company is that it offers the **investor flexibility.** One of the ways this flexibility is translated is because shares are transferable.

Share transfer agreements and pre-emption rights

How is a share defined? A share is a fraction of the capital of the company. When we say ownership or a fraction of the company, what does this mean? This means that that shareholding represents the holders a proportionate financial stake therein. The fact that one is the owner of a thing, what are the consequences? One has rights and obligations in company law in the sense that a person's shareholding also represents the measure of a shareholder's interest in the company and the basis of his membership rights.

Find judgement of **Professor Ganado et noe. vs Dr Borg Olivier (15/6/1973),** the court examined the juridical nature of **the right conferred on shareholders.** The Constitutional Court commenting on the nature of a share observed that on the one hand, a holder of shares in a commercial company is a subject of ownership and owning shares in the modern world is the way to do business. On the other hand, the shares that are owned by a shareholder causes him to become a member of the association.

How do we define a share?

Is a share 'ownership'? **No** but a shareholding is a fraction of the capital of the company.

So, when we say ownership or a fraction of the company, in simple words, what does it represent?

That shareholding represents the holders a proportionate stake they are in. Many times not the sole owner but a pro rata holding. Ownership implies rights and obligations and this also applies in company law.

A shareholding represents the measures of shareholder interest and the basis of his membership rights.

In the **Profs Ganado case,** the court noted:

"Il-Qorti tixtieq tissottolinja wahda li shares f' kumpanija kummercjali huma shares ta' propjeta'..u minn naha l-ohra l-fatt l-iehor li s-shares ta' azzjonista causes him to become a member of an association"

The Cons court observed that on the one hand, a holder of shares in a commercial company is a subject of ownership, and owning shares in the modern world, is a way of doing business. On the other hand, the shares that are owned by a shareholder causes him to become a member of an association.

The Companies Act and text writers define **3 main modes** of becoming a member

- By **subscription** - the original subscribers of the M&A (the first members of the company). - original subscription denotes the subscribers of the memorandum and articles of association who become the first members of the company

- **Allotment of shares** - Becomes a member afterwards by allotment.- reefers to a person who can also become a member by being allotted shares in the company following an issue of shares.

- By **mode of acquisition** other than original subscription or allotment.

The right to transfer shares

When dealing with capital, and share capital, there is difference forms of capital like authorised and issued shared capital.
We are going to focus on the subject of today's subject = the right to transfer sha

The general rule is that a shareholder has a prima facie right to transfer his shares. In fact any restrictions on the right to transfer shares must be stipulated in the M&A or some other agreement. These agreements would be referred to as shareholders agreements.

It is possible for certain classes of shareholders to have restrictions through shareholder's agreements. There has to be no clashes into what the articles of association stipulates and any other shareholders agreement.

Would you give the new subscribers the same rights as the original ones?

No, since you took the initial risk of opening the company, you can save the risk and it puts you in a better position. So essentially, these restrictions on the transferability of shares are generally justified as they give existing members the legal tool to control the membership of the company.

Find Anthony Montebello vs Alfred Darmanin (1996).

Farrar and Hannigan speak on this matter.

What does the Companies Act say with regards to the restriction of share? A distinction between private and public companies is made.

The term transfer appears to refer to disposing of ownership of shares, inter vivos by an agreement. Hence transfer = disposing of shares between people inter vivos (alive).

However, when the Companies Act refers to the word **'transmissions'** it is the disposing of the shares of a person who is dead and his shares are passed on to his heirs.

Practical example of disposing of shares **inter vivos**; sale, exchange, compromise, partition of property, donation

Hence transmission of shares inter vivos and causa mortis.

This is important as these transfers and transmissions are key features that determine what each shareholder can do with the share he holds. What we are saying here is that although we keep on reiterating the fact that shares give each shareholder rights, such rights can be restricted in some manner.

The situation regulating the transfer of shares in Maltese company law has developed significantly over the years and the provisions we have included today are largely modelled on the UK Companies Act of 1985 and the EU directives on company law again - when it comes to the transfer of shares, a fundamental distinction exists in the Maltese company acts between private companies and public companies.

In private companies, **the companies act puts obligations** on the company to put some sort of **restriction,** no matter how minimal this may be on a share transfer. The legislator wanted the members of these companies to control the entry of new members (primarily because MT companies are family businesses).

What form can these restrictions take?

1. The most common form is *preemption clauses*.

2. A second less popular restriction is the *director's discretion to refuse to register* a share transfer.

PRE-EMPTIVE RIGHTS / CLAUSES.

These are defined as any rights shareholders may have to be offered shares in a company before they are made available to anyone else.

These pre-emptive rights can arise on the allotment of shares when transferring shares or on transmission.

They are a means where the shareholder has to offer his shares, firstly to the members of the company where he is a shareholder, and only upon their refusal he has the right to transfer the shares to any 3rd party. The other subscribers have the right to first refusal

When you offer them to 3rd parties, they can be offered at any price.

These preemption rights are important to ensure that a shareholder's proportion of the voting or other rights of the company are kept within the original subscriber's possession, and these would include the right to a dividend. They are not **diluted**.

Another form of restriction is directors' discretion to refuse to register a share transfer. This right must be exercised on the part of the director in good faith - as it is part of the fiduciary duties with which directors are obliged to follow. The director is not obliged to give reason for such a refusal.

These restrictions must be included in the company statute in a clear and unambiguous way that must not lead to any doubt or confusion.

Shareholders agreement - One point to remember is that any shareholders agreement binds only those shareholders who sign such an agreement.

We can have a situation where the M&A only contains a preemption clause and the shareholders agreement enlists more rigorous rules and restrictions that must be abided by its signatories (i.e., shareholders).

Many company articles contain provisions on the allotment of shares which exclude the statutory rules mentioned above or include different rights. No issue of shares should be made without being sure what preemptive rights apply under the articles and how they apply under the statutory provision. Currently, the Companies Act shows no provisions but very often, they are included nonetheless. With regard to shareholders agreement, it is to be said that many shareholders agreements contain provisions restricting further the issue of shares and controlling the transfer of shares and their transmission.

A shareholders agreement will cover many other matters. If one is in place, the other articles are generally included with it. What must be avoided is having share transfer provisions in both the articles and shareholders agreements that are not identical as otherwise, there would be a conflict which would lead to real, practical problems. It is also possible to have a shareholders agreement between certain shareholders, which impose stricter restrictions.

Sections 118, 119, 120 and 123 OF THE COMPANIES ACT

118 (1) Notwithstanding any provisions contained in any other law, a transfer of shares in or debentures of a company shall be made in writing

18 - highlights the fact that a transfer of shares must be in writing

119 (1) On the application of the transferor or of the transferee of any share in or debenture of a company, the company shall enter in its register of members or of debentures, as the case may be, the name and address of the transferee and where the application is made by the transferor the entry shall be made in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.
(2) If a company refuses to register a transfer of shares or debentures, it shall, within two months after the date on which the transfer was lodged, send to the transferee notice of the refusal.

- Transfer of shares or transmission of debentures

120 (1) Every company shall, within two months after the allotment of any of its shares or debentures and within two months after the date on which a transfer of any such shares or debentures is registered with the company, and within one month from the date on which any such shares or debentures transmitted causa mortis have been registered in the name of the person entitled to be registered as the holder thereof, deliver the certificates of all shares, debentures or debenture stock allotted, transferred or transmitted causa mortis to the persons entitled thereto, unless the conditions of issue of the shares or debentures otherwise provide.

(4) If default is made in complying with any of the provisions of this article, every officer of the company who is in default shall be liable to a penalty, and, for every day during which the default continues, to a further penalty.

- deals with the issue of certificates; it is imp that if you are a shareholder, you must have a certificate that demonstrates such a fact - in fact every company shall within 2 months without its allotment of shares or debentures

the company is liable to a daily penalty

123 (1) Every company shall keep a register of its members and shall enter therein the following particulars:

(a) the names and addresses of the members and a statement of the shares held by each member, distinguishing each share by its number, so long as the share has a number, and of the amount paid or agreed to be considered as paid on the shares of each member;
(b) the date at which each person was entered in the register as a member; and
(c) the date at which any person ceased to be a member.

123 - deals with the register of members, which must be kept at the registered office in the registrar of members.
Sub 4
Important to know the actual requirements and procedure which must be followed when it comes to the transfer of shares- part of the process is that of filing a From T

Professor Muscat continues to explain that a person can only be recognised as a shareholder if his name is recognised into the register of members. He justifies this understanding by referring to article 2(1) of the Companies Act which defines a shareholder as “a person entered into the registrar of the members of the company”.

The A&A often provide that the transferor of a share is to be deemed to be a holder until the name of the transferee is entered in respect of the name thereof.

Prof muscat remarks that many companies do not keep a registrar of members, or if they do, they fail to update it.

Find Kaptan SB Fiduciary Limited vs Crocodile Limited (FHCC, 2015). The main issue subject of this case was who has a right to institute an action on 402? A lot of case law determined who may or may not have a right of recourse under 402. Reference was made to article 127 of the Companies Act which deals with trustees, and defines beneficial owner in sub 5 as follows

"beneficial owner" means the person beneficially entitled to the shares under a trust or a fiduciary agreement;

"trustee" shall mean a person who may act as a trustee in accordance with the Trusts and Trustees Act and shall include any fiduciary holding shares on behalf of another person.

What is interesting is that we have a specific meaning of the term member, which is different from the definition of the Companies Act.

In Malta, member or shareholder terms are not interchangeable.

Where does this leave us for the purpose of 402? 402(6) extends the definitions of the term member:

(6) In this article, the term "member" includes a person entitled at law to represent the interests of a deceased member, a person to whom shares in the company have lawfully devolved by way of testate or intestate succession, and a trustee, as defined in article 127, who holds shares in the company.

At a glance, the look at people who instigate a definition are wider than that mentioned in sub 2 - hence we have the element of good faith which is crucial for any act according to law.

The court in the Crocodile case did not have proof that it was registered as according to 119 of the Companies Act. Furthermore, the court did not have in hand proof that the duty of 120 was duly.

Since P did not qualify as a shareholder of Crocodile limited he was prohibited by law from instituting a 402 action.

The importance of following proper procedure.

DR PETER BORG COSTANZI VS CARMELO AND MARIO MICALLEF COA - 27TH FEB 2009. A case where the validity of the share transfer agreement was being questioned = nullity of the share transfer agreement. This was actually a case which dealt with a payment of the debt. There was a claim for payment of the sum due as consideration for shares transferred to the latter. In this case, a shareholder agreement, a repayment programme, all the amount was settled but D was starting to default on a consideration payable on the transfer of shares.

Rita Borg - P was the owner of 199 shares out of 2000 shares in AUSTRALIAN QUALITY Import Ltd and 1 share was owned by one Aquilina.

The shares were sold and transferred to D. She transferred her shares for 14,000 Malta lira. The defendant remained in default. What did P do? She instituted an action to be paid back the balance. D stated that the facts were unfounded in facts and law - they said that they accepted the share transfer agreement. D argued that the information was vitiated. The FHCC accepted the plea of prescription and confirmed its validity. The court ruled in favour of P and the defendants were aggrieved and appealed. The court of appeal entered into the clauses. It stated the disputed clause and made reference to article 981 - fraus omnia corrumpit.

The courts held that there was no element of fraud on the drawing up of the share transfer agreement. There was an agreement between the parties and the sum due.

SB Fiduciary Limited vs. Crocodile Limited & PIVGame Limited

SB Fiduciary Limited (C41069) hija azzjonista fiducjarja ta` mija u sebghin (170) sehem u mitejn u sebghin (270) sehem tas-socjeta` intimata, Crocodile Limited (C46982) ;

Illi s-socjetajiet ntimati, u cioe` Crocodile Limited (C46982) u PIVGame Limited (C44342) ilhom ghal diversi xhur ma jaghtu rendikont ddettaljat tal- hrug u dhul tas-socjetajiet Crocodile Limited

(C46982) u PIVGame Limited (C44342) lis-socjeta` rikorrenti u dan bi ksur flagranti kemm tad-doveri lejn l- azzjonisti kif ukoll bi ksur flagranti tal-ligi li tirregola s-socjetajiet ;

Illi in vista ta` dan is-socjeta` rikorrenti qeghda tipprevalixxi ruhha mill- jedd li ghandha abbazi tal-Artikolu 402 tal-Kap 386 tal-Ligijiet ta` Malta u taghmel s-segwenti talbiet lil din l-Onorabbli Qorti sabiex taccerta ruhha li d- drittijiet taghha jigu maharsa :

Dr Fenech tghid illi ghalkemm it-trasferiment tal-ishma ma kienx intbaghat lir-Registratur, kif trid il-ligi, ir-Registratur xorta wahda zamm bhala unregistered document l-prova tat-trasferiment ghall-beneficcju ta` terzi.

Tixhed li t-trasferiment tal-ishma go Crocodile Limited minn International Trust Limited ghas-socjeta` rikorrenti ma kienx registrat ghaliex il-Form T li ntbaghtet lir-Registratur fid-9 ta` Novembru 2012 ma kenitx iffirmata minn direttur, manager jew il-company secretary kif rikjest mil-ligi, ghalkemm il-beneficial owner tal-ishma baqa` l-istess. Fil-fatt iffirma Silvio Busuttil li ma kienx persuna kwalifikata skond il-ligi.

Skond Dr Fenech, il-Form T hija n-notifika tas-share transfer.

Tixhed illi ghax il-Form T ma kenitx iffirmata kif trid il-ligi r-Registratur kien prekluz milli jeffettwa r-registrazzjoni u ghalhekk baghat lura lil min iffirma u cioe` lil Silvio Busuttil iz-zewg formoli kien ircieva minghandu.

Dr Fenech tghid illi ghalkemm bejn il-kontraenti, is-share transfer kien effettiv, xorta wahda r-Registratur kien prekluz milli jaghmel ir-registrazzjoni.

Ghalhekk il-Form T baqghet ma gietx iffirmata minn min kellu l-obbligu skond il-ligi li jiffirmaha.

Joseph Caruana – Registratur tal-Kumpanniji – xehed illi International Trust Limited u s-socjeta` rikorrenti kienu t-tnejn nominee companies. Ikkonferma li l-Form T li waslet ghandu ma kenitx konformi mar-rekwiziti tal- ligi u ghalhekk intbaghtet lura. Ghalkemm ha konjizzjoni tat-trasferiment tal- ishma, it-trasferiment tal-ishma ma setax jigi registrat. Fl-istess waqt huwa zamm bhala unregistered documents dak li kien ircieva minghand Silvio Busuttil.

Ikkunsidrat :

<u>III. Dritt</u>

Il-Qorti sejra taghmel riferenza fit-test Ingliz ghal dawk id- disposizzjonijiet tal-Kap 386 tal-Ligijiet ta` Malta illi fil-fehma taghha huma rilevanti ghall-fini tal-provvediment tal-lum. Sejra ticcita t-test tal-ligi bl-Ingliz ghall-fini komparattiv ghaliex `il quddiem sejra tirreferi ghal-ligi u l-gurisprudenza tar-Renju Unit.

L-Art 118 tal-Kap 386 jittratta t-transfer of shares or debentures. Id- disposizzjoni taqra hekk :-

(1) Notwithstanding any provisions contained in any other law, a transfer of shares in or debentures of a company shall be made in writing.

(2) It shall not be lawful for a company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer or an authentic copy thereof has been delivered to the company ...

L-Art 119 tal-Kap 386 jittratta the registration of transfer or transmission of shares or debentures. Jaqra hekk :-

(1) On the application of the transferor or of the transferee of any share in or debenture of a company, the company shall enter in its register of members or of debentures, as the case may be, the name and address of the transferee and where the application is made by the transferor the entry shall be made in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.

(2) If a company refuses to register a transfer of shares or debentures, it shall, within two months after the date on which the transfer was lodged, send to the transferee notice of the refusal.

...

(6) If default is made in complying with the provisions of subarticles (2) or (5), every officer of the company who is in default, shall be liable to a penalty, and, for every day during which the default continues, to a further penalty.

L-Art 120 tal-Kap 386 jittratta the issue of certificates. Id- disposizzjoni taqra hekk :-

(1) Every company shall, within two months after the allotment of any of its shares or debentures and within two months after the date on which a transfer of any such shares or debentures is registered with the company, and within one month from the date on which any such shares or debentures transmitted causa mortis have been registered in the name of the person entitled to be registered as the holder thereof, deliver the certificates of all shares, debentures or debenture stock allotted, transferred or transmitted causa mortis to the persons entitled thereto, unless the conditions of issue of the shares or debentures otherwise provide.

(2) The expression "transfer" for the purposes of this article means a transfer on which the relevant duty, if any, has been paid and is otherwise valid, and does not include such a transfer as the company is for any reason entitled to refuse to register and does not register.

(3) In the case of a transfer or of a transmission causa mortis of shares the company shall within fourteen days after the date on which a transfer of any such shares is registered with the company, and within one month from the date on which any such shares transmitted causa mortis have been registered in the name of the person entitled to be registered as the holder thereof, deliver to the Registrar for registration a notice of the transfer or the transmission causa mortis stating the names and addresses of the transferees or the names and addresses of the persons entitled to the shares transmitted causa mortis, as the case may be ...

(4) If default is made in complying with any of the provisions of this article, every officer of the company who is in default shall be liable to a penalty, and, for every day during which the default continues, to a further penalty.

L-Art 123 tal-Kap 386 jittratta the register of members. Ighid hekk : (1) Every company shall keep a register of its members and shall enter therein the following particulars :

(a) the names and addresses of the members and a statement of the shares held by each member, distinguishing each share by its number, so long as the share has a number, and of the amount paid or agreed to be considered as paid on the shares of each member ;

(b) the date at which each person was entered in the register as a member ; and

(c) the date at which any person ceased to be a member ...

(3) The register of members shall be kept at the registered office of the company or at such other place as may be specified in the memorandum or articles.

(4) If default is made in complying with any requirement of this article, every officer of the company who is in default shall be liable to a penalty, and, for every day during which the default continues, to a further penalty.

Fl-Art 127 tal-Kap 386 li jittratta dwar trustees and nominees, hemm tifsira ta` beneficial owner fis-subartikolu (5) li taqra hekk :

In this article :

"beneficial owner" means the person beneficially entitled to the shares under a trust or a fiduciary agreement ;

Ir-rikorrenti ntavolat l-azzjoni odjerna abbazi tal-Art 402 tal-Kap 386.

L-ewwel subinciz tal-Art 402 jibda bil-kliem any member of the company who complains ... (enfasi u sottolinear tal-qorti).

“Member” huwa definit fl-Art 2(1) tal-Kap 386 :-

“except where otherwise specifically defined, means a shareholder of a company and a partner in any other commercial partnership.” (enfasi u sottolinear tal-qorti).

Fl-istess Art 2(1), “shareholder” huwa definit bhala “a person entered in the register of members of a company pursuant to article 123 or the bona fide holder of a share warrant referred to in article 121”

Specifikament ghall-fini tal-Art 402, il-legislatur ried iwessa` t-tifsira ta` “member” ghall-fini ta` dik id-disposizzjoni billi fis-subinciz (6) ighid –

“member” includes a person entitled at law to represent the interests of a deceased member, a person to whom shares in the company have lawfully devolved by way of testate or intestate succession, and a trustee, as defined in article 127, who holds shares in the company.

Hija l-fehma ta` din il-Qorti illi ghall-ahjar interpretazzjoni tal-ligi taghna fejn si tratta tal-Art 402 tal-Kap 386 ghandha ssir riferenza ghas-sources tal-ligi taghna.

Fis-sentenza taghha tad-9 ta` Marzu 2007 fil-kawza "Vella vs Vella Brothers Limited et", il-Qorti tal-Appell qalet senza mezzi termini illi l-Art 402 kien imfassal fuq l-Art 459 tal-UK Companies Act 1985.

L-Art 459 kien imhassar bl-Art 994 tal-UK Companies Act 2006. Pero` id- disposizzjoni l-gdida baqghet l-istess bhal ta` qabel.

Din il-Qorti sejra tirriproduci l-Art 402 fil-ligi taghna u l-Art 994 tal- Companies Act 2006 tar-Renju Unit ghal finijiet komparattivi.

L-Art 402 shih jaqra hekk –

(1) Any member of a company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is, or that any act or omission of the company have been or are or are likely to be, oppressive, unfairly discriminatory against, or unfairly prejudicial, to a member or members or in a manner that is contrary to the interests of the members as a whole, may make an application to the court for an order under this article.

(2) Where the Registrar has received a report on a company under article 410 and it appears to him that the company's affairs are being or have been conducted in a manner falling within the meaning of subarticle (1), he may make an application to the court for the issue of an order under this article.

(3) If on an application made in terms of subarticle (1) or (2), the court is of the opinion that the complaint is well-founded and that it is just and equitable to do so, the court may make such order under such terms as it thinks fit

(a) regulating the conduct of the company's affairs in the future ; or (b) restricting or forbidding the carrying out of any proposed act ; or

(c) requiring the company to do an act which the applicant has complained it has omitted to do ; or

(d) providing for the purchase of the shares of any members of the company by other members of the company or by the company itself and, in the case of a purchase by the company, for the reduction accordingly of the company's issued share capital ; or

(e) directing the company to institute, defend, continue or discontinue court proceedings, or authorising a member or members of the company to institute, defend, continue or discontinue court proceedings in the name and on behalf of the company ; or

(f) providing for the payment of compensation by such person as may have been found by the court responsible for loss or damage suffered as a result of the act or omission complained of, to the person suffering the said loss or damage ; or

(g) dissolving the company and providing for its consequential winding up.

(4) When an order is made for the dissolution of a company in terms of subarticle (3)(g), the company shall be deemed to have been dissolved on the date when the order is made and the provisions of Sub-Titles I and III of Title II of Part V of this Act regulating the winding up of companies shall apply.

(5) An order made under this article may require a company not to make any amendment, or to make such amendment as may be required, in its memorandum or articles.

(6) In this article, the term "member" includes a person entitled at law to represent the interests of a deceased member, a person to whom shares in the company have lawfully devolved by way of testate or

intestate succession, and a trustee, as defined in article 127, who holds shares in the company. (enfasi u sottolinear ta` din il-qorti).

L-Art 994 tal-UK Companies Act 2006 shih jaqra hekk –
1) A member of a company may apply to the court by petition for

an order under this Part on the ground :-

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself) , or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.

(3) In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, "company" means—

(a) a company within the meaning of this Act, or

(b) a company that is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991.

(enfasi ta` din il-qorti)

Ghall-fini ta` kompletezza ta` analizi, trid issir riferenza ukoll ghall-Art 112 tal-UK Companies Act 2006 li jaghti tifsira ta` "member". Id-disposizzjoni taqra hekk –

(1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company.

Ikkunsidrat :

IV. Dottrina

Andrew Muscat fil-pag 816 et seq tal-ktieb tieghu “Principles of Maltese Company Law” (2007 – MUP) ighid hekk dwar is-suggett tad-Disposal and Aquisition of Shares :-

... A specimen form of notice of transfer or trasmission of shares (known as a “Form T”) has been published by the Registrar ...

A person can only be recognised as a shareholder, at least for the purposes of the Companies Act, if his name is entered into the register of members. This rule results from article 2(1) of the act which inter alia defines a “shareholder” as “a person entered into the register of members

of a company ...” Moreover articles of association often provide that the transferor of a share is to be deemed to remain a holder until the name of the transferee is entered in the register of members in respect thereof. Unfortunately many companies do not in practice keep a regisster of members or, if they do, fail to update it ...

Li inghad minn Andrew Muscat (op. cit.) jinkludi footnote li taqra hekk :-

The terms “shareholder” and “member” are interchangeable. In English Law, although the terms are often used interchangeably, there is in fact a distinction. Thus a company limited by guarantee has members but it does not have shareholders. And the holder of bearer shares does not become a member, since entry in the register of members is necessary for this purpose (vide section 122 ta the UK Companies Act 1985 which has been restated by section 112 of the UK Companies Acts 2006). In Maltese law, however, the holder of a share warrant is a “shareholder” and a “member” unless otherwise specifically provided means a shareholder [vide article 2(1) Companies Act]

Rizultati

Ma jirrizultax ippruvat illi wara li International Trust Limited ittrasferiet l-ishma, li

ssemmew fil-kors ta` din il-kawza fi Crocodile Limited, lis-socjeta` rikorrenti, kien hemm registrazzjoni ta` dak it-trasferiment fir-registru tal-membri ta` Crocodile Limited skond l-Art 119 tal-Kap 386. Indirettament jirrizulta li ma kienx hemm registrazzjoni ghaliex is-socjeta` rikorrenti dehrilha li kellha tikteb lil Cesare Florio sabiex jipprezenta l-Form T. Nafu bhala fatt ippruvat li hadd mill-persuni li skond il-ligi setghu jipprezentaw il-Form T ma pprezentaha.

Skond il-memorandum u l-articles of association tal-intimata PIVGAME Ltd, jirrizulta li l-ishma kienu maqsuma in kwantu ghal 279,997 ta` Crocodile Limited u in kwantu ghal tliet (3) ishma ta` Caterina Pellegrini. Id-diretturi huma Av. Salvatore Florio u Malcolm Spiteri waqt li l-company secretary huwa Rodney Lee Berger.

Din tal-lum hija azzjoni skond l-Art 402 tal-Kap 386.

Sabiex azzjoni ta` din i-xorta twassal ghall-ghoti ta` rimedji, trid tkun istitwita kif trid il-ligi ; in partikolari skond ma jghid is-subinciz (1) tal-Art 402. Dak is-subinciz jaghti d-dritt ta` azzjoni lil "membru" ta` kumpannija u lil hadd aktar.

Il-Qorti diga` ghamlet riferenza ghat-tifsira li l-Kap 386 jaghti ghal "membru" ghall-fini tal-Art 402.

Din il-Qorti tghid fil-pront u minghajr xkiel ta` xejn li r-rikorrenti ma tistax tipprezenta azzjoni fondata fuq l-Art 402 tal-Kap 386 – kif inhi dik tal- lum – kontra PIVGAME Ltd, ghaliex ma jirrizultax li s-socjeta` rikorrenti hija "membru" tal-imsemmija socjeta` ntimata.

Ghar-rigward tal-azzjoni kif dedotta kontra Crocodile Limited, il-Qorti tirrileva li hija sprovvista mill-prova li t-trasferiment ta` ishma favur is-socjeta` rikorrenti fi Crocodile Limited kien registrat fir-register of members tal- kumpannija skond l-Art 119 tal-Kap 386. Hija sprovvista wkoll mill-prova li thallset it-taxxa dovuta fuq l-allegat trasferiment ta` ishma skond l-Art 120(2) tal-Kap 386.

Ladarba mhuwiex ippruvat li s-socjeta` rikorrenti tikkwalifika bhala "shareholder" ta` Crocodile Limited skond l-Art 2(1) tal-Kap 386 u allura ma tistax tikkwalifika bhala "member" ta` Crocodile Limited, din il-Qorti, minghajr l-icken esitazzjoni tghid, illi s-socjeta` rikorrenti hija ex lege prekuza milli tistitwixxi l-azzjoni odjerna.

Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi din il-kawza, billi tilqa` l-ewwel eccezzjoni tal-intimati, u konsegwentement qeghda tillibera lill-intimati mill-osservanza tal-gudizzju, spejjez unikament ghas-socjeta` rikorrenti.

L-Avukat Dottor Peter Borg Costanzi bħala mandatarju tal-assenti Rita mart Henry Borg u l-istess Henry Borg.

v.
Carmelo u Mario aħwa Micallef, 2009

Minn dan kollu jidher li meta gie finalizzat il-ftehim ta' bejn il-kontendenti u cioe` dak tad-9 ta' Gunju, 1995, ma kien jezisti ebda eghmil doluz perpetrat mill-atturi fil-konfront tal-konvenuti u konsegwentement il-kunsens tal-istess konvenuti ma kienx vizjat. Dan ifisser li l-kuntratt imsemmi ma jistax jigi dikjarat null u konsegwentement l- kontro-talba, kif sewwa rriteniet l-ewwel Qorti, ma kinitx gustifikata daqstant kemm it-talba ghar-rexissjoni kif ukoll t-talbiet l-ohra konsegwenzjali fl-istess kontro talba ma setghux jigu akkolti.

La darba l-ftehim ta' bejn il-kontendenti ghadu vigenti, u mhux kontestat id-debitu tal-konvenuti favur l-atturi, eccetto ghal aspett ta' nullita` tal-obbligazzjoni, t-talba attrici kellha tintlaqa'.

Ghar-ragunijiet fuq moghtija l-appell tal-konvenuti qed jigi michud u s-sentenza appellata kkonfermata, bl-ispejjez kollha ta' din l-istanza kontra l-konvenuti appellanti.

Listed Companies

- **Examples of listed companies are; Corinthia hotel, Banks, Go plc etc. So you have to do your homework beforehand, and you have to see if it's safe or not to invest in certain companies. Even the government sometimes issues bonds. It is more difficult for the government to become insolvent but it can happen.**

Different formations of companies - private companies; single member companies (same director and shareholders, private exempt companies and normal private companies (exempted from certain obligations like audited accounts)

However there can be companies whereby they cannot risk capital alone, so they will resort to the public, and when you resort to the public that means your going to list your company. You are going to list your company on the regulated market, the only regulated market we have in Malta is the Malta stock exchange market. It is highly illiquid, but obviously some times this needs to be done. For example if you have to watch the news, after the news you will have these shares in GO PLC went up by 0.1c etc, these are listed companies.

Public companies - the distinction between these 2 main categories of company - a higher authorised share capital in authorised companies and at least 2 directors

Listed entities -> by force public companies.

In Malta we only have one regulated market through the Malta Stock Exchange. Foreign countries usually have more than one market.

If a public company decides to list on the regulated market, it is very easy to list on the public company and at least the company must raise. It must ensure to have at least 2 directors, and the name of the company will be PLC. Having said that, when you want to list a company, you need to look at the capital market rules, which go over and above the minimum threshold of the companies act.

Two types of securities can be issued; shares and bonds. This means that other people will become shareholders of the company and therefore, you will lose that right to shareholding. Unless you decide to list a class of shares that is limited in scope. The whole class of shares has to be listed.

When you list shares, these new persons will become shareholders. After each transaction, the form T, which is the transfer and transmission of share form must always be filed and updated. When you become a shareholder you may have certain rights, but to be applied on the dissolution and winding up it may be more difficult.

How can capital be raised? Giving shares, and the people buying them are giving you money for these sales. You can pay in money or in kind. To decide what asset to give to the company, a valuation report is sent to the company. The registrar will look at the report and you will have to transfer the asset. The value of shares can go up and down, depending on supply and demand.

Shares and Bonds

Apart from listing shares, you can also list bonds which can be secured or unsecured.

Shares

- THIS MEANS THAT other people will become shareholders of the company, hence you will lose that right to shareholding. Unless you decide to list a class of shares that is limited in scope - the whole class of shares has to be listed.

If I have class A and B and C of shares -

This means that the persons who are going to buy these shares are going to become shareholders. Obviously these types of shares can be bought and sold freely on the Malta stock exchange, on the regulated market. In conjunction with this whenever there is this buying and selling of shares, you have to fill in the form T with the Malta business registry. In fact if you have to look at these type of listed companies that issue shares, there have to update there form T every time that there is this buying and selling of shares.

When you list shares, these new persons will become shareholders. After each transaction, the Form T - which is the transfer and transmission share form IS ALWAYS BEING FILED - and updated. When you become a shareholder you may have certain rights, but to be payed on the dissolution and winding up it may be more difficult.

How can capital be raised ? Giving shares, and people who are buying them Are giving you money for these shares. You can pay in money or in kind - kind = you will have to decide what asset to give to the company, valuation report sent to the company - registrar will look at report, and you will have to transfer the asset.

Bonds

Bonds are the taking out of loans from 3rd parties. However, the same concept applies and hence when listing bonds, the persons who are going to loan you money will not become shareholders, but simply lenders. If they are secured, you have more of a chance to be paid when something goes wrong, unsecured = more difficult for you to be paid.

Example - . So the company will issue the bonds to certain persons, basically anyone who wants to become part of the company so they buy these bonds. When you are issuing bonds you are just lending the money to the company. Let us give an example, you have an issuance of 100 bonds and you have 100 people so each one of these persons has given an X amount of money to the company for an X period of time, for a specific period of time that will also be stipulated by the company. One can also get an interest rate on that amount for that period of time. It's a like loan agreement with the bank but instead of going to the bank your doing it with the private individuals. For example I am going to buy these bonds from a particular company for a period of 5 years with an interest rate of 4% per annum, so I am going to invest 10,000 euros, on that 10,000 every single year I will get back 4% interest rate after 5 years I will get back 10,000.

- When the company is issuing bonds they can be with or without an interest rate and they can be secured or unsecured. So the distinction is, if you are secured you will become a secured creditor, so if something goes wrong you are at peace you are more likely to get paid back but they can also be unsecured. That means if something goes wrong you will become an unsecured creditor.

Tthe persons who are going to loan you money will not become shareholders, but simply lenders.

The MFSA at times requires a guarantor with unsecured bonds. The normality is that you have bonds, and every year on the amount you lent on the company you will take 8% interest.

A private company can never issue shares or bonds to the public. This is in the Companies Act under the definition of a public company.

When you decide to issue shares or bonds on the regulated market, ultimately you will get EU passporting rights, which means once you submit all forms to the MFSA and it will accept at that moment in time, you will get the right to also list those shares or bonds on another regulated market in the EU.

When you are listing on a secondary market, Malta is a primary market. If you list in Luxembourg, that would be your secondary market. You can also have another company in another MS and that company will decide to also list on the Malta Stock exchange. An official list of all the companies that list shares and bonds in Malta.

Primary - scrutinisation happened in Malta.
Secondary - scrutinisation happened in another Member State.

You would need to send the documents to a foreign authority and since in the EU, they will accept documentation.

Issued share capital and authorised share capital are of the same amount hence in a public company, issued share capital of 47,000, the authorised will be the same 47,000.

Authorised shares capital - the company really uses - to raise this, you need an extraordinary resolution.
Issued share capital to be raised - you need an ordinary resolution

This issued share capital can be at least 1M EUR when the company will list shares

If you want to list the securities, the bonds, the issued share capital will have to be 250K EUR.

Redeemable preference shares = a fixed dividend, payed before ordinary shareholders and
in listed entities, these preference shareholders enjoy a right to vote in certain scenarios.

Ordinary shares can never be bought back by the company but preference shares can.

Market capitalisation - The value of the company in the open market and the company's perception of the future prospects, meaning that market capitalisation can change on a daily basis and the terminology is very different from equity (a statement of companies assets - minus the liabilities).

Hence, unlike market capitalisation, in equity it is fixed, cannot fluctuate - IT IS WHAT IT IS

Another new concept is employee shares. The normality is that certain companies will have and issue shares to employees instead of giving them bonuses - MALTA INTERNATIONAL SHARES.

When one is going to list these types of companies must must also be aware of the capital market rules. These are issued by the MFSA and these rules provide further information that a company must adhere to be able to liToday, they are referred to as Capital Market Rules. One has to see that one sees the updated version of such. These are not laws but however, rules, but obviously they incorporate within them various directives and regulations that were enacted by the EU and one needs to abide by them even if they are not acts or subsidiary legislation.
If you want to list be it shares or bonds you need a higher threshold of an issued share capital which says that, it must be at least 1 million euros if you going to list shares and it must be at least 250,000 euros if you are going to list bonds. In the capital market rules bonds are sometimes referred to as a debt security. Therefore the issued share capital will go up if one wants to issue on the Malta Stock Exchange.
Every company must have at least ordinary shares, these are never redeemable. Redeemable means that those share can be bought back by the company. It means that the company will issue these shares to raise capital but ultimately over time the company may realize that it has enough capital so it will buy back those shares. Redeemable shares can only be preference shares, ordinary shares can never be redeemable. So when you have preference shares they can be redeemable preference shares or non-redeemable preference shares.

WITH RESPECT TO PREFERENCE SHAREHOLDERS - the capital market rules state that these shareholders have a right to vote at any general meeting, which is convened for the purpose of reducing the capital of the issuer, winding up of the issuer, where the proposition to be submitted affects rights or dividends.

There is a specific procedure by the Companies Act which every company has to abide by.

There will be a publication for 3 months, where every interested creditor can object to the reduction. Although it will be reduced, it will still be paid, the court will still allow the reduction of the share capital.

Wind up - liquidator appointed means stopping everything and for this process, it can be triggered by the court - or else by the members themselves, and even when it is triggered by the members, they know that they do not have enough money to pay the creditors.

Shareholders funds refers to the amount of equity that belongs to shareholders and hence it includes: shares, paid up capital, return earnings and treasury stocks and this amount must be at least 3,600 EUR.

A treasury stock is a share bought back by the company.

Outstanding shares - the issued minus the treasury stock.

In relation to directors, the Companies Act states that when you have a public company, you must have at least 2 directors. The Companies Act does not differentiate between different classes of shares so whether you are an executor, manager or any other, they fall under the category of director **if** the person can take decisions that can impact the company

Executive directors: Are involved in the day to day running of the company.
Non-executive directors: Are not engaged in the day to day running of the company but are there to oversee.

There must be both executive and non-executive directors.

You can also have de facto and de jure directors.

De jure = Not officially appointed as director but is still there - ex a manager - taking serious decisions because of his role

Capital market rules state that corporate directors are not allowed when you have a listed company.

- Obligations of directors apply. Article 136A is the starting point.

- And also 143, 144 and 145

When you are officially appointed as director, these apply - when not officially appointed you apply 1124 of the civil code - as fiduciaries of the company.

In the companies act, 136A, states that directors are responsible towards the company. However in the capital market rules, there is reference in the ESV - enlisted shareholder principle. They must ensure that they consider the rights of shareholders.

143 and 144 - The directors can take out a loan from the company so long as the shareholders are not against it.

CSR (corporate shareholder reasonability) - I believe that the company will reduce the carbon footprint by 30%
ESV - How you will reduce that carbon footprint.

Funnily enough, our law is based on their UK companies act 2006 who have already included reference to other creditors. In Malta, we never included it for the listed entities.

Institutional shareholders = Banks or custodians that can hold a large number of shares than private individuals and they can invest these shares. There are these shareholders who take shares from different persons.

COMMITTEES

Other committees which need to be appointed and are mentioned by the capital markets rules are for example, the remuneration committee. This board should establish the remuneration policy of directors and its senior executives. It must be composed of non-executive directors with no personal financial interest other than as shareholders in the company. Having said, that one of them shall be in totality independent of the company and that person must chair this committee.

As one can see, in other types of companies, not listed ones, we do not usually have a remuneration committee. We do not go into detail of how directors are being paid or when they are being payed or who is deciding on this payment. However, in these types of companies there must be a remuneration committee which must delineate specifically how these directors are going to be paid and when they are going to be paid. The remuneration committee must prepare a report which must form part of the annual report and they must provide the information regarding it's membership, the number of meetings held, the attendance over the year and it's main activities. So if you have to look at the annual reports of normal companies and of listed companies they are totally different. Just to make it clear every company must submit it's annual financial report to the MBR.

In certain cases, referring to the private exempt companies, you can only submit the accounts, they do not need to be audited, but appart of those types of companies. Any other type of companies in the end need to submit there audited report to the MBR. The website will provide one with all the information that a company submits to the MBR. In the case of listed companies, they not only submit them to the MBR but they are also published on the MFSA website and they are also submitted on their own website. They must have a website containing all the information; annual financial report, there company announcements, what there going to do and what contracts there going to enter into etc. So everything must be on that website.

Another committee which must be elected is the nominations committee. This committee is composed of non-executive directors and at least one of them must be totally independent of the company. This nomination committee will delineate how directors are appointed. It will provide a transparent procedure that needs to be followed for the appointment of the any person. For example, if a real estate company is to brought, it is assumed that at least some of the directors understand something about real estate. This committee must provide the list of candidates to the office of the director and this must also be accompanied by an exhaustive information on their expertise and their professional qualifications, with an indication where appropriate, of their eligibility to qualify as independent and competent in accounting or audit and shall be deposited at the companies registered office at least 14 day prior of the day of the annual general meeting. Why? Because during an annual general meeting shareholders have a right to appoint and remove directors. Shareholders can also remove directors before a general meeting but in the normal course of cases you will have a general meeting whereby you will appoint the same directors or new directors and therefore you need this information.

Now why is all this information important. For one simple reason. The capital markets rules, the EU, it seems to be that when you are listing a company, you must ensure that you protect your creditors as much as possible. So that is why they are going through all of these details. So it's kinda like they differentiate between these other types of companies that may still have a lot of creditors, but unfortunately they are not regulated to the same rigidity. But in the case of listed companies they look at them for more rigidity and they consider that these creditors are more important and even more so, if you are going to register as a listed company, since you will need to give information to any listed company to ESMA (European Securities Market Authority) so everyone will know these types of companies are listed, it's kinda like that the integrity of the financial market through these companies is more important.

Other committees that have to be elected that are not normally elected or form part of committee e-renumeration committee = must be clear what they are being payed, what they are being payed for -= this is made up of non-exectivuive directors; one of whom has to be a shareholders - here we see the imp of non-executive directors.
Price club case - not listed but ended up with a catastrophic situation
Renumeration committee - shall prepare a report - attendance over the years, main activities…
Another committee is the **nominations committee** - such committee shall be composed only of directors of the company the majority shall be also non-executive directors, one of which shall also be independent in order to check the committee.
There shall be a formal procedure - the list of candidates to the office of director
Nomination committee - to propose candidates to the board - the second function is to periodically assess, the structure compassion of the board ands also make recommendations to the board of any changes and the 3rd to consider issues to succession planning.
3 main roles
And 4th - to review the board for senior management

Remuneration committee = must be clear what they are being paid for. These are usually made up of non-executive directors; one of whom has to be a shareholder. Here we see the importance of non-executive directors.

Price club case - not listed but ended up with a catastrophic situation

Nominations committee - such a committee shall be composed only of directors of the company, the majority shall be non-executive directors, one of which shall also be independent in order to check the committee. It is there to propose candidates to the board. The second function is to periodically assess the structure composition of the board and make recommendations to the board of any changes and the 3rd to consider issues to succession planning. It also makes a review of the board for senior management.

There shall be a formal procedure - the list of candidates to the office of director.

Winding up

Same rules apply as in the other types of companies but in these scenarios, the capital market rules, the voluntary issue - no fees should be regulated by the commissioner.

Last issue - alteration to the articles and memorandum of association.

When you have a listed entity, you can only delete, amend or act if you also get approval of the MFSA.

Listing an the entity on the Malta Stock Exchange

Documentation

When listing securities for the first time - IPO

Issuers must submit recommendations and the list of documentation to be submitted to the MFSA is the following: The complete application provided by open market rules and paying any relevant market rules listing in the capital market rules with any relevant.

You have to give to the MFSA the prospectus and net supplements. One copy of the issuers audited accounts of the last 3 financial years and when the applicant forms part of a group of companies he must also apply the consolidated accounts for the last 3 years and also the last accounts of the guarantor. There is not always the necessity to have a guarantor.

A completed and signed declaration - a certified copy of the M&A. Any info provided by what we call a sponsor - any sanctions that were provided, and a valuation report.

The sponsor is a person who is the intermediary between the authority and the prospective issuer. He is independent from the issuer hence the sponsor must work more closely with the MFSA than the issuer. These documents must be kept for at least 5 years.

Experts must show the evaluation of that report and also the overseas property. It can include any rents, promise of sale.

The prospectus: Its purpose is to convent info on the basis of figures, on which to obtain certain information about business and activities. It must include a summary, in a concise manner and in non-technical language and must apply key words in which the prospectus must have been drawn up. It must be composed of different documents but altogether there will be the prospectus and the summary. In the registration document you will include all documentation and issues per se and include all the recommendations which can lead to the winding up of the company.

The issuers must have executive and non executive directors.

Normal companies vs. Listed companies

Another distinction between the normal companies and these listed companies is where directors are involved. Starting with the companies act, it does not differentiate between executive and non-executive directors or defacto and shadow directors. But in the companies act, we consider all persons appointed as directors to be directors, even if one is not appointed under the name of director. For example, if one is appointed as a manager but my day to day decisions can affect the financial position of the company, in reality in the eyes of the Companies Act and therefore in they eyes of the law, he will be a director. Therefore he would have to abide by Article 136A that regulates the duties of directors. One will also have to abide by Articles 143, 144 and 145 of the Companies Act. These were included into our law with the 1962 Commercial Partnership Ordinance. So basically it very much depends on your role rather than your official title. If the company goes into liquidation there can be issues of wrongful trading and fraudulent trading against me as any other person who falls officially under the title of director.

In the case of listed companies, the capital markets rules differentiate in between these the directors and it provides a definition of non-executive directors. Basically it states that non-executive are not involved in day to day management of the company but they are resorted to whenever there is the need. So the felt the need to do this distinction.

These capital markets rules also say that it is recommend that 1/3 of the board members are non-executive and what is very important that these non-executive members are independent of the company. Now another important thing is that these directors must all be individuals, in these types of companies you cannot have corporate directors. In other types of companies, normal companies under the companies act you can have corporate directors. In listed companies, this is not allowed you always need persons, even more so from experience, if there are a lot of foreign directors there is the need for 1 or 2 Maltese directors. They will not allow all directors to be foreign, they specified that as well.

The capital market rules also say that election of directors take place every year, as in the case of any other type of company in this sense. And these directors shall retire from office after 3 years but one can be re-elected. When you have normal companies, the issuer, therefore the company must give at least 14 days notices to its shareholders to submit the names for the election of directors. And obviously 14 days before the meeting.

These types of distinctions were needed because one has a lot of committees being selected and appointed when you have listed companies. In the normal types of companies, there is only a very basic structure; directors, persons acting as directors, but no more and no less. These types of company you have a lot of checks and balances.

When you are officially appointed as director, these apply - when not officially appointed you apply 1124A of the civil code - as fiduciaries of the company.

In the companies act, 136A, states that directors are responsible towards the company.

ESV and CSR

In fact another distinction that we see in the companies act that applies to all companies and the capital market roles, is the application of the ESV and the CSR principles. The ESV means the enlightened shareholder value, whereby in every decision you must ensure that you are protecting shareholders. Why? Because in reality shareholders are investing money in the company.In reality at the end of the day, if you do not have shareholders investing moneys in these types of companies, you will not have a company in the first place. Therefore, you have separate legal personality but you have the enlightened shareholder value as well.

By time they realized that we have a principle that they need to apply, which is the CSR principle, the corporate security responsibility. This means that all persons and everything around you as a company is important and must be considered. In the companies act, we do not apply the CSR and the ESV. In fact if you read article 136A which was enacted in 2003, it only focuses on the company as a separate legal entity.

In reality if you have to look at Articles 143, 144 and 145 that also regulate the duties of directors, they apply a little bit more the ESV principle than Article 136A, but it stops there. The CSR does not feature at all, so it gives this idea that other creditors are not important. When one is saying creditors they can use the terms stakeholders and when one is saying stakeholders they are including the normal creditors, employees and shareholders. Ultimately all of them are stakeholders and all of them are creditors as they all gave an amount of money to the company. As an employee this is done through your work since you need to be paid back. If you are going to give out a loan one is a creditor as well. If I am going to be shareholder and if I am going to invest my money I am a creditor as well because I am going to get it back in a form of dividend. Therefore in reality one is a creditor or a stakeholder.

The Companies Act does not teach the CSR as the CSR was discussed in the UK way back in the 2000s and than also in the 1990s and when we enacted our Article 136A in 2003, it was enacted before the coming into force in the UK companies act of 2006. In reality if you have to look at the companies act 2006 Article 172 refers to the CSR principle, it refers to other creditors, it refers to the environment. So it takes another approach than our law. Unfortunately our companies it was never amended to reflect that position.

Having said that the capital market routes specify very clearly that listed companies must ensure that they apply the CSR principle, so they make it very clear that these type of companies must ensure that they consider other creditors rights and the environment. How it is being implemented and to what extent that is another story, but on paper it is written down.

If you read the Capital Market rules you have to read only the first 5 chapters. (https://www.mfsa.mt/wp-content/uploads/2021/08/20210729_FullListingRulesAmendmentsCln.pd f)

However in the capital market rules, there is reference in the ESV - Enlisted Shareholder Value -must ensure that they consider the rights of shareholders.
143 and 144- the directors can take out a loan from the company so ling the shareholders are not against it.
CSR - Corporate Shareholder Reasonability - must ensure as directors ta not only shareholders rights but also -= the —
Funnily enough, our law is based on the uk companies act 2006 - section in uk - have already included reference to other creditors - in malta we never included it for the listed entities
Now obviously, in line with the CSR principle it is imp as well To consider the ESV
Example
CSR - I believe that the company will reduce the carbon footprint by 30%
ESV - how you will reduce that carbon footprint

Institutional shareholders = banks or custodians that can hold a large number of shares than private individuals and they can invest these shares - there are these shareholders who take shares from different persons -

By contract the securities note will provide details in relation to the securities that the issuer wants to issue. If I want to issue bonds, I will lay down the application to old bond holders hence they have a right of first refusal.

Then you can have the intermediary offer who can find interested persons to buy these bonds.

Registration documents may change from one issue to another - but the security note will not change - you can decide to issue shares or bonds or both.

The audited annual accounts. When you have a group of companies, you will have one holding company, holding a lot of trading companies. These groups of companies will be for one project.

For a new company, not having a 3 year financial history, will the MFSA still allow the issuer to issue? YES as they will either take issued accounts or make goods for audited accounts of that issuer.

When you give all this documentation to the MFSA it is not automatically accepted. It may still be refused and hence not allowed to list.

If you do not abide by capital market rules the MFSA can remove your listing.

The MFSA lists down the responsibility of the sponsor.

The sponsor must be in possession of a CAT 2 OR 3 licences. He must not hold more than 10% in the issuer and the sponsor must have adequate resources to fill in the forms. You can have more than one sponsor being appointed and hence you can list which obligation falls under which sponsor.

If you do not have a sponsor, the listing cannot continue. The application is suspended until a new sponsor is appointed.

Public sector issuer. The government refers to states, regional and public authorities.

They prepare an equivalent public document and are exempted.

It depends how much you know about the issuer, about that business, how much time you have to see the value of the company, whether you need to invest or not. The safest of them all are government bonds.

You can have a very successful company who wanted to list only because the bank did not want to give it money.

Winding up

Same rules applies int he other types of companies - bit in these scenarios ,t he capital market rules, thee voluntary issue - no fees should be regulated by the commissioner
Last tissue - alteration to the articles and memorandum of association - we need to update the memorandum and articles of association \\
When you have a listed entity, you can only delete amend or act if you also get approval of the MFSA - hence if you d not get the approval you can not chnage the M AND As.
What you need to list the entity on the malta stock exchange
Apart from that these types of companies can also be wound up, they can be wound up voluntarily or also compulsory. Therefore every company can either be wound up voluntarily by the members that is by shareholders. In this case, all creditors of the company know that there going to be paid. Therefore in reality directors will sign the deceleration of solvency. So you show exactly that everyone is going to be paid and how they will be paid.

You can also have a voluntarily creditors winding up. In this case, this type of voluntarily winding up, is also triggered by members, by the shareholders, by an extraordinary resolution, but in this case, in the creditors winding up, directors will not sign a declaration of solvency, because they know the company does not have enough funds to pay all creditors. So in this case that is why it is called a voluntarily creditors winding up, because creditors take over, and so far they have an insolvency committee, that will have at least 5 creditors, whereby they will take over this procedure together with the liquidator to see how creditors are eventually paid out.

Compulsory winding up, by contrast is when you go to the court. You can go to the court either as a creditor or also as a member / shareholder. Article 214 (2) delineates, the causes when the court can order the winding up of a company. Now in the case of normal companies and listed companies they are both wound up in the same manner.

Therefore the distinctions which are provided; in the amount of issued shared capital, in the amount of market capitalization, in the fact that these shares / bonds can be given to employees, with respect to rights of preference shareholders (the right to vote), how we look at directors because the normal companies do not refer to executive and non-executive directors but these companies do and the 2 types of committees that we mentioned; the nomination committee and remuneration committee. While the other things are the same as any type of company.

Now the key issue, if you issue shares or bonds depends on whether you want persons other foreigners to become part of your company. So if you are not comfortable of other persons coming into your company and decide on matters of the companies, go for the issuance of bonds, because if you go for bonds, there owed a simple loan agreement, whereby these types of persons will never have any right to decide on any matter to the company. If it doesn't bother you that these persons may have that right to appoint or remove directors or any other matter of the company, you can issue shares. But ultimately it depends on what the company wants. You can have a company that issues both shares and bonds.

<u>Shares</u>

If your going to issue shares, all the shares of that class must be issued. When you have shares in the companies you can divide them into different classes; Class A, Class B, Class C. And you can name differently as well, for example, Class A ordinary shares, Class B ordinary shares, Class C preference shares etc and they will have there own rights and obligations. For example if you hold class A ordinary shares you will have right to vote and right to dividend, if you hold class B ordinary shares you only have right to dividend you do not have right to vote, so you have different obligations. What is very important is, if your going to issue shares of class A, all of class A must be issued on the Malta stock exchange. You cannot issue half or 1/3 of them, you have to issue all of them or non at all.

Alteration to the M&A

These alterations work in the same manner as any other company. How do you amend these types of documentation? By an extraordinary resolution. In this case as well, you can alter the memorandum and the articles of association by an extraordinary resolution.

The only distinction in this case is, if you are going to alter this documentation, you first need permission from the MFSA (Board of Governors). The board of governs has to be informed and have to give there consent. Why? Because they where the board that has given it's concerns in the first place for it to be issued.

For example, if the company is going to apply the company recovery procedure under the Article 329B of the companies act, this procedure is one where the company does not want to be liquidated because it still thinks that there is hope for recovery. So basically you go to the court and another independent person will be appointed for a period of 4 months which can be to 1 year, who administers the efforts of the company. When you have a listed company for that procedure to be triggered for example, you need the MFSA approval, so the court will go to the MFSA and they will ask there opinion as well. This is one of the distinctions that before going forward you always need to go back for permission.

Documentation

- when listing securities for the first time - IPO - initial public offering

Issuer must submit recommendations and the list of documentation to be submitted to MFSA is the follwogn is a - the complete application provided by open market rules and paying any relevant marketing rules
listing in the capital market rules with any relevant
You have to give to MFSA the prospectus and net supplements - one copy of the issuers audited accounts of the last 3 financial years and when the applicant forms part of a group of companies the applicant must also apply the consolidated accounts for the last 3 years and also the lastt accents ofd the guarantor - but ther eis not always the necessity to have a guarantor b
A completed and signed declaration - a certified copy of the M AND A - ANY INFO provided by what we call a sponsor - any sanctions that were provided, and a valuation report -
The sponsor is a person who is the intermediary between the authority and the prospective issuer - independent from the issuer hence the sponsor must work more closely with the masa than the issuer - these documents must be kept for at least 5 years.
Expert must show the evaluation of that report and also the over seas propery - - can include any rents, promise of sale
Back to the prospectus - the purpose of prospectus - to convent info on basis on figures, on which two obtain certain information about business and activities - now; the prosecutes must also include a summary - in a concise manner and in non technical language must apply key words in which the prospectus must have been drawn up.

Prospectus - must be composed of different documents - but altogether there will be the prospectus and the summary - in the registration document you will include all documentation and issues per se -= and will include all the recommendations which can lead on the winding up of the company -
The issuers must have executive and non executive directors - the
Any material contracts - refer t them tomo on market abuse
By contract the securities note will provide details kin relation to the securities that the issuer wants to issue - if I want to issue bonds, I will lay down the application to old bond holder - hence they have a right of first refusal

Documentation Needed

This is dealing with the documentation that is needed to be submitted to the board of governors to be verified and one can see whether the company can issue these shares or bond. As a first point, when the issuer (the company) will list securities to the general public for the first time, we call it an IPO (initial public offering). This is no different from the normal issuance to the MFSA.

There are 3 classifications of securities that can be issued;
1. Equity – the ownership held by the shareholders in the from of shares.

2. Securities – when one borrows the money from private individuals with certain terms and conditions (interest rates). These can be secured or unsecured.

3. Hybird – whereby one will issue convertible bonds, i.e. these bonds can ultimately be converted into shares.

The issuer must prepare a prospectus and any supplements according to the EU prospectus regulation. Since it is a regulation it is directly applicable. It came into force on 21st of July 2019. The applicant must also submit the documentation below. All of this documentation is also found in the Capital Markets Rules;

- A complete application for authorization or admissibility to listing in the form that is set out in appendix 4.1 of the Capital Markets Rules. The relevant application fee which needs to be paid. This depends on the market capitalization, on what one is going to issue and the fee is provided accordingly.

- A prospectus and any supplement.

- One copy of the issuers audited annul accounts for the last 3 years. If one has a new company, and therefore it will not have these last 3 years, one simply needs to give this information to the authority. Will there be prejudice due to the lack of 3 years accounts? The normality is that if theses cannot be provided one will normally ask guarantor. The guarantor will normally have 3 years audited accounts which can be presented.

- The applicant can form part of a group. So for example Corinthia is a group with various trading companies. The normality is that each one of the companies will have a specific objective. Where the applicant form part of a group of which he is a member, the consolidated accounts of the groups of which the issuer is a member, for the last 3 financial years are also accepted. They must also be given to the authority.

- Any application forms to subscribe for or purchase securities. When one is going to issue shares or bonds (equity or debt) one will have a particular form that the interested person needs to fill in.

- Any formal notices that are regulated by the Capital Markets Rules 4.48.

- Any letter that is referred to in Capital Markets Rules 4.25, that is omission of information. This deals with why one will omit certain information.

- A complete and signed directive deceleration which is provided by appendix 4.3 of these rules.

- A certified copy of the M&A of the applicant or of the issuer highlighting any proposed amendment as part of the issue. As previously mentioned if you are a normal company you have to carry out certain changed to be in line with the capital markets rules to be able to list on the Malta Stock Exchange.

- Any information that is required to be provided by the sponsor in terms of chapter 2 of these rules; that the sponsor has to be independent, there must be a working capital in the company, and profit forecast and anything that is very important to be public.

- Appropriate corporate authorities sanctioning the application for admissibility to the listing.

- Evaluation report that is prepared by an independent expert in compliance with the requirements of Chapter 7 when you have a property company.

Sponsor

A sponsor is another third party that is appointed by the applicant (the future issuer) and this sponsor must be independent of the applicant. The sponsor must not have any conflict of interest with the company / issuer. The sponsor is there to facilitate communication between the applicant and the authority. Therefore basically everything goes through the sponsor. The sponsor in reality must work hand in hand with the authority that is why he should be independent. The sponsor must help the authority to come to an agreement to see whether it makes sense to allow this applicant to issue it securities or not.

Obviously there is the board of governors who must be independent in their own right and they must decide on their own merit. But the sponsor is also there to provide any information that the sponsor feels that the authority must be aware of.

Property Companies

If one has to go to normal companies in the companies act, when one is going to issue shares but they are going to be bought not by transferring money but rather by transferring immovable property, one would need the evaluation of an expert (an architect). This procedure is regulated by the companies act, whereby the evaluation report is drawn up, it need to be delivered to the MBR, the registrar must ensure that it makes sense, then it is allowed. If this is allowed one needs to transfer the immovable property within 5 years form the date of buying those shares.

In the case of property companies, when you have listed companies, it is the same procedure. One needs to have an evaluation report that is drafted by an independent expert. This report must provide whether it is rented out, the amount that it is being rented out for, how much it would be to sell it (the profit) etc. This report is given also to the board of governors who ultimately decide whether to allow this issuance or not.

Prospectus

If one had to look at the scope and contents of the prospectus, the normality is that this prospectus is composed of separate documents whereby there will be the registration documents, the securities note and a summary note. In general a registration document includes all the information about the issue per se. Therefore there will be information about the non-executive directors, who are they with their names and surnames, their qualifications, everything will be included in that document.

The committees will also be included, the audited accounts of the company, so that as a future creditor, one can look at this document and see whether you are comfortable enough to invest in this company or not. This information must be up to date and must be also correct.

In the registration document on will include risk factors which will not allow the company to perform its objective, one may mention the Covid-19 pandemic or a hotel in Russia. One must also mention the directors of the issuer. If there is guarantor one must also mention the directors of the guarantor. Senior management should be mentioned as well. When one has senior management, this does not necessarily mean that they will not fall in the definition of directors because the companies act does not state that only those persons who are officially appointed are seen as directors. The advisors of both the issuer and the guarantor should also be listed. Any information about the issuer and the guarantor, for example, historical developments. The financial history (3 years audited accounts) and any litigation and why. Any material contract, therefore any contracts that are so important to the future of the company. This property evaluation report and any major shareholder as ultimately those will decide on the company.

By contrast the securities note / document contains specific information on the bond or on the shares that will be issued. So while the registration document contains information on the issuer, the securities document contains information on what is being issued. Therefore it is more specific on that particular part. Therefore if I am a company and I will be issuing a bond this year and I will be issuing another bond next year, more or less the registration document will be the same. There might be some variation that might happen from this year to next year but in essence they will be the same. However the securities document is going to be different. One will regulate the bond that will be issued this year while the other securities note will regulate the bond that will be issued the following year.

The first thing one needs to include is an application to the existing bond holders. When you have the issuance of bonds, it is the normality that if you are a bond holder, one can still remain part of this new bond and remaining will be given to the public. Any intermediaries offers are taken upon after the first refusal of the existing bond holders. Intermediaries will take these bond to sell them to the public.

Any plan of distribution and any allotment of shares. This will show how the shares will be distributed and their allotment which is the issuance of new bonds or new shares. Any allocation policy, for example that one cannot have more that 100 bonds / shares or the minimum amount that one would need to invest. The status and ranking of bonds. When you have bonds you can have secured or unsecured bonds. It makes a totally different scenario whether you are a secured creditor or an unsecured creditor. One would need to ensure whether they are secured by a guarantor. Because when there is a guarantor the normality is that they will not be secured by the main issuer but if there is a guarantor he will secure those bonds.

When there is this security one has to look at hypotecs and privileges that are already part with the public registry against the company. This type of documentation needs to be part of the prospectus but who is to invest should do his homework including what other people say about the company.

The interest rate needs to listed. The yield also needs to be shown. Yield refers to the earnings that are generated and realized on an investment over a particular period of time. It is expressed as a percentage based on the investment amounts. Any registration form, the title, pricing, payments, redemption and purchase and this transferability of bonds and shares. The normality is that bonds can be non-transferable, the normality today is that they are transferable as well.

Listing

If one is going to list on the stock exchange, and you are excepted you obtain a primary listing. From the official list on the stock exchange website, it is listed if they are primary or secondary. When it is primary listing all of this is carried out by the board of governors. When the board of governors is comfortable enough to allow the applicant to issue it shares or bonds, one will get the status of primary listing. In this scenario, after that the authority will inform ESMA of its primary listing. When you are issuing these securities on the Malta Stock Exchange, one will also get a right to passporting rights.

Passporting rights mean that you can also list on another regulated market in the EU. When you are going to list on another regulated market in the EU, you do not need to go through this whole process again. All one needs to do is to take this documentation that was submitted to the Maltese authority and that since you have a primary listing they will have to allow you to list of the market. They will get secondary listing. The same thing can happen in Malta. You can have primary listing in another member state on its own regulated market, that information will then be submitted to the Maltese authority, which will not scrutinize it again. Once it is scrutinized by someone else that is final and one will be allowed to list on the Malta Stock Exchange. This is allowed because we have an EU system.

If one is going to list on the regulated market, the Malta Stock Exchange, it is the only method that allows for passporting rights. Therefore if one is going to list on prospects for example, which is created by the Malta Stock Exchange, it is not a regulated market it is a MTF (multilateral trading facility). It was created by the Malta Stock Exchange for the small and medium enterprise which we have in Malta. In reality this is the majority of businesses in Malta. They are given the opportunity to list on this type of market, however they do not have passporting rights.

Before you are listed you need a sponsor and this sponsor needs to have a license (either a CAT 2 or CAT 3 licence) under the investment services act. It must be independent of the issuer. By independent the Capital Market’s rules state that it must not have more than 10% of interest of shares in the issuer otherwise it will lose it independence. One can have more than one sponsor being appointed, but in such case the authority must be informed. One can also terminate the sponsors role and can decide to appoint someone else. If one decided to terminate such appointment they would need to inform the authority. And until another one is appointed there will not be any communication as everything that is done is done through the sponsor.

Once you are listed as a company, this license can be suspended or also canceled. This is provided by the capital market rules. It can be suspended usually for 10 consecutive days. If it is canceled for example as the securities are unsuitable for admission to listing, such as the public company would want to transform itself into a private company. One would need to stop these securities from the regulated market. There can also be a discontinuation of listing. The distinction is that cancellation is more of when the authorities are going to carry it out whereas discontinuation is more akin to when the company wants to discontinue its listing for whatever reason.

It is important that the documentation is converted in the English language so that the authority will understand what is going on. One can also have prospectuses of third country issuers that is outside the EU. In this case, whenever Malta is being sought for primary listing, the prospectus has to be drawn up according to the IOSCO (international organization for securities commissions) disclosure standards and the information requirements including the information of a financial nature must be equivalent to that of the prospectus regulations. IOSCO try to regulate on an international level.

One can also have public sector issuer that means that you can have authorities that want to issue such as the government or the Central Bank. In this case the documentation that is needed is more lenient, which does not mean that you do not have to provide any information, however we have what is called the equivalent offering document, it has less information. This type of issuance is regulated by chapter 9 of the capital market rules.

Market Abuse

Listed entities are entities that list their shares or bonds on the Malta Stock Exchange. Once you are listed, you have continuing obligations which come into play when the company decides to list. Since you can list shares on the Malta stock exchange, you can have certain rules, of certain arrangements to check that ultimately you can get a profit.

What the EU does is that at the beginning they decide to regulate any gap by a directive, they will see that that is not working and then enact a regulation.

When they enacted the market abuse directive, the EU thought they were doing enough.

In 2009, there was a financial crisis and the EU realised that it was not doing enough. The market abuse regulation provides for basic definitions and also for administrative penalties. Being a regulation, it is directly applicable in all EU member states. In relation to administrative sanctions, they allowed us to transpose them as we wanted.

The EU realised that not all EU MS criminalised market abuse. MT transposed it into our law and all of this transposition was done by the PREVENTION OF FINANCIAL MARKET ABUSE ACT. To understand what market abuse is, you have to look at this.

ESMA TECHNICAL STANDARDS - ESMA is an EU body that provides for further definitions and forms that can enhance that particular law. The forms that we need to fill in are the same forms that need to be submitted by the competent authority. The guidelines need to be looked at also. Not all EU MS are bound by guidelines. Some MS have opted not to implement guidelines. Finally, there is also a subsidiary legislation that allows employees to report their employers, like the whistle blowing acts to speak.

The EU is always pushing to create a genuine internal market which ultimately results in more economic growth and job creation. Market abuse applies for all financial instruments such as shares, bonds, commodity contracts (contracts which the value of the contract depends on the commodity).

MOTF - REGULATED BY MIFID

The regulated market - the financial instruments that are submitted on the regulated market.

Emission allowances - you can only emit up to a certain number of carbon dioxide. If the company, who is not producing so much CO_2, there can still be emission allowances.

3 offences of market abuse

1. Insider dealing

2. Unlawful disclosure of inside info

3. Market manipulation

Insider dealing - when a person is involved in a particular issuer and this person has inside information and decides to act upon this information for his own benefit, or for the benefit of a 3rd party.

Example - Includes not only the director but anyone involved with the issuer. Ex you have a director who before the annual general meeting, you have to prepare the annual report and the director knows, through inside info that the issued shares will be negatively impacted, so what he does is he says if the shares are negatively impacted, let me sell them before the annual report, as more money will be gained as if he sells them after the AGM, the value of shares will plummet, so he acted upon inside info information, information he only had at hand. Hence insider dealing - a person who acts upon info for his own benefit or for the benefit of a 3rd party.

If it were to be public, the customers would act differently. We are not only talking about directors, but any person who is in the administrative management or supervisor of the issuer, or senior executive who has access to the info of the issuer, directly or indirectly.

The definition of persons discharging responsibility, we only have one group of directors, the only group of the company. In Germany for example, a 2 tier board, where there are 2 groups of directors,

Insider lists - 2 types of insider lists;

1. The permanent list
2. The temporary list

On the permanent insider list, you have to list down as an issuer, any person who may have access to insider information, from the top management to even a PA.

To see whether any person who had access to information, acted against that.

On the temporary list, you list those persons who have access to insider information only for a temporary period of time. On the temporary list you list down from when to when people had access to information. An example of this are the auditors when they are auditing the accounts, they will only have next 4 months of information, but not all year round. Hence, in order not to prejudice them, we list them on the temporary list, and mention from when to when he had access.

Temporary list is then sent to the MFSA for any verifications that need to be carried out.

In Malta, we had people being found guilty of insider trading in global capital.

2. **Unlawful disclosure of insider information** - a person who has access to inside information, passes that information on to 3rd parties, with the intent to make use of this information and also to make profit. When giving this information, you will not be found guilty of this offence if you are fulfilling your obligation.

Ex a director who has inside information - a friend of mine is a shareholder in the company, and says to his shareholder friend, buy more shares as the shares will go up - so that is unlawful disclosure of insider information vs the MFSA comes and asks to give info - this is lawful as to an authority

3. **Market Manipulation** - when you literally give a false impression of the market, you need not have access to inside information but can have 2 persons

Example: there was a person who was giving a false impression of the company and they were involved with buying and selling shares, and they were making money out of it. This person was working with 2 other people and funnily enough we found out that this person had a lover, and he was dealing with his lover and lived 4 doors down the street. Funnily enough the man was making huge profits, and his lover was always making losses.

When you want to buy or sell shares to an issuer, you go to a stock broker who tries to match your order. As a stock broker, they can also act on nominee accounts, but as authority you have to ask who is the person behind the particular trade.

- A money laundering reporting officer (MLRO) is an employee appointed to oversee a firm's compliance with anti-money laundering (AML) regulations and to alert the company where there is knowledge or suspicion of money laundering.

- Role of the MLRO: An MLRO is responsible for ensuring that, when appropriate, the information or other matter leading to knowledge or suspicion, or reasonable grounds for knowledge or suspicion of money laundering is properly disclosed to the relevant authority.

HOW CAN YOU ENSURE THAT YOU ARE NOT FOUND GUILTY ON THESE OFFENCES ?

I am a director in a company and my extra income is these shares and I know that the shares will suffer after the annual report and I have received a tax penalty, and I can recover this tax penalty by selling these shares. If I sell those shares, I can exonerate myself that I show that I had this tax penalty, I had to pay it on time, and the only way I could was to sell those shares - that would not be found guilty of insider dealing, however if you have other assets then you would be liable so it is a case by case basis.

When you act as the issuer then you have a managerial responsibility, you have to indicate the price of shares, amounts and send it to MFSA.

Now in relation to managers' transactions and these forms, they need to be filled in not only by persons with managerial positions, but also to persons close to them.

The regulations says that persons closely associated refers to any spouse or partner, dependent child under 18, persons living in the same household, for at least 1 year before the date of transactions, or people directly or indirectly controlled.

Ex I am a director and my husband has 500 shares in the company. He wants to sell these shares, I have the obligation to fill in a PDMR form and send it to MFSA - SINCE HE LIVES WITH ME.

Ex I am a director in a company, I am a company secretary in another company and I buy shares in one company through the other company - linked through me to I HAVE TO FILL PDMR FORM

On the insider list, it is crucial to list down the ID card NUMBERS.

Market Sounding - MAR

Before MAR, market sounding was already being carried out. What does it mean? It means that the issuer or a 3rd party acting on behalf of the issuer might ask for certain people to attend a specific meeting with an intent to gauge information about future securities that may be admitted to listing.

First you ask the investors and say, I am interested as ABC plc to issue more projects, are you interested in this project? Market sounding - during that meeting you are giving inside info to these investors and giving that information to potential investors. To ensure that these investors do not act on this information there is a form by ESMA TECHNICAL STANDARDS, that the issuer will need to be filled in by the investors and the issuer will sign it.

The investors have to sign another form, and the investor writes what info he has received - if there is the same info on both forms, the issuer will sign the form of the investor and the investor will sign that of the issuer, hence you have piece of mind as to what info has been passed on.

What happens if the issuer and the investor do not agree on what information was passed from one to the other? The issuer fills his own form, the investor signs and fills his own form and they do not sign each other's forms, the authority, if it believes that either one of them has created market abuse, will assess both forms - hence you keep both forms just In case anything happens.

Sometimes, you can have situations where you know of a particular transaction and as an issuer you may be entering into a future agreement with a 3rd party and this agreement will yield problems with the issuer, so the issuer may believe that publishing information at that time through a public announcement may not be wise. Hence the issuer may decide to delay a bit of public information until things materialise. You can have situations where announcements are made through normal gazettes. If that happens, the issuer will have to publish what was announced.

When you have a credit institution, the publication of inside info is also a decision on what the publisher thinks fit, but it is also imp to ask approval by the MFSA. As you are talking about institutions which can heavily impact the ability of the company, hence you need the approval of MFSA.

If you are guilty of market abuse, there are criminal penalties and sanctions. The burden of proof in a specific case, when administrative penalties are imposed are far less than criminal sanctions.

Administrative penalties - money concept

Our prevention for market abuse act - states that -

No 1 a letter is issued by MFSA to cease and desist from that contract.
No 2- amounts of the profits gained and losses avoided
no 3- a public warning which indicates the person responsible for infringement and the nature of infringement
No 4 withdrawal or suspension
No 5 - a temporary ban of a person discharging managerial responsibilities
No 6 - in the events of repeated infringements, of any oil the 3 offences, a permanent ban is issued and finally, you can also have pecuniary administrative penalties, which say that a person found guilty of market abuse, can get a pecuniary sanction at least 3 times of the losses gained and the profits avoided as can be determined whereby in relation to the 3 offences of market abuse, the sanction can be up to 5 million euros.

In other cases of forgetting to update insider list… basic things - the penalty can be up to 1M EUR

What happens if instead of a natural person, you have a legal person who is guilty of market abuse? The administrative pecuniary sanction shall not exceed 15M EUR or 15% of the total annual turnover of such a legal person if found guilty of any form of market abuse, and in other instances, up to 2.5M EUR or 2 % of the total amount according to the last financial account. For the least problematic cases, if found guilty you have to pay up to 1M EUR.

When the market abuse regulation was being drafted, Malta objected to the high administrative penalties, since Maltese markets are not highly liquid like foreign markets, and companies in Malta make profits, but not enough - our market is highly illiquid. Since these amounts are made by the regulation, we could not go for less, but for these amounts, the bare minimum of the regulation.

Determining the type of level of sanction:

No 5 - without prejudicing the need the extortion of profits gained or losses by that person
No 6 - previous infringements by that person responsible for the infringement
No 7 - measures taken by the person responsible for the infringement to prevent its repetition

- When you issue an administrative sanction you must clearly specify how you calculated it.

You can also be found criminally liable and end up being accused with a freezing order, which means that all of your assets will be frozen until the delivery of the final judgement. That freezing order will be converted into a confiscation order if found guilty.

Monitoring order - the banks start monitoring your bank accounts without you knowing - together with an investigation order. When you issue an attachment to order, unlike a freezing order, not all assets are attached but only a particular list.

This attachment order can be issued for more than 1 year if you are found criminally liable.

When found guilty of market abuse, the law says than on conviction one can be liable and can get a fine in the form of a multa, not less than 5k euros and not exceeding 5 million eu, or up to 3 times to the profit made or loss avoided, whichever is the greater or to imprisonment for not more than 6 years or to both such fine and imprisonment.

We never had a successful market abuse conviction. Temporary or permanent encasement of establishments where this offence has been committed. Punishing companies only allows the person to close it off and form more companies.

Cases- with respect to administrative penalties, the MFSA ISSUES THE ADMINISTRATIVE PENALTIES.

Christopher pace vs MFSA - publicly available - tribunal - no FST3/2009 - filed and delivered - 21ST OCTOBER 2020

In this case, the tribunal goes into detail about the ne bis in idem principle and says that the administrative penalty does not constitute a criminal penalty as it is not a court off law- and that insider dealings must not be carried out with full knowledge of the facts and hence there should not be the mental element as the prevention of market abuse is there to ensure full integrity of the community and investor protection. He also referred to A6 of the European court of human rights, which said that when the accused makes use of insider info for his own benefit it is presumed that the person had full knowledge of the facts and thus it is up to such an accused person to prove his innocence.

James Blake on the same concept

Foreign cases on insider dealing:

JEFFREY SKILLING - ENRON CORPORATION case - Jeffrey hid the company's financial status and what he did was he dumped 60 million dollars worth of Enron stock before he quit his company.

Foster Winans - The Wall Street Journal Journalist - gave info about his upcoming articles in stock to stock brokers, earning 31,000 dollars as a consequence. The market abuse regulation states that if you want to write something you have to indicate that with your issuer. He did not show he had such an interest and hence gave false impression.

Robert Foster Winans (born August 5, 1948) is a former columnist for *The Wall Street Journal* who co-wrote the "Heard on the Street Column" from 1982 to 1984 and was convicted of insider trading and mail fraud.

Marta Stewart. A TV personality who received an illegal tip from her stock broker. She sold her stocks before that information came to light.

With respect to market manipulation

JP MORGAN case - in this case JP MORGAN was ultimately accused and found guilty of market manipulation.

Montgomery Street Research Wash Trading Lawsuit

Protection of Minority Shareholders

Where do you refer to a minority shareholder to see if his rights are being infringed or not?

1. The most important document is the M&A. Here, you can see, how, when it was drafted, what sort of protections and safeguards are used to make sure that minority shareholder rights are protected. One important way of giving protection to a shareholder is to make sure that such a shareholder is represented on the board of directors of the company, unless you have classes of shares who are **excluded** from appointing Directors.

Appointment of Directors: The first directors of a company are listed in the M&A which needs to list who the directors are going to be. The directors must also signify their consent of their appointment. Subsequent directors are appointed in general meetings by shareholders.

Removal of Directors: Article 140 of the Companies Act.

(1) A company may remove a director before the expiration of his period of office by a resolution taken at a general meeting of the company and passed by a member or members having the right to attend and vote, holding in the aggregate shares entitling the holder or holders thereof to more than fifty percent of the voting rights attached to shares represented and entitled to vote at the meeting

(2) The provisions of sub-article (1) shall apply notwithstanding anything in the company's memorandum or articles or in any agreement between it and the director.

This is why it is important to see the classes of shares that the minority shareholder holds. By compartmentalising shares, the M&A takes away the right of appointment of a director representing the shareholder out of the hands of the majority shareholders and assigning it to a class of shareholders.

Section 140 still applies if the M&A applies different rights to the different classes of shares and limits them.

The use of classes of shares is not only there to ensure that you are represented but these can also be used also to ensure that certain decisions by the shareholders of the company have the adhesion of minority shareholders.

You can achieve this by drafting the M&A in a way that such consent is different between the classes of shareholders. You might say that certain reserved matters require a majority.

If you have a company with one asset, a large piece of land, can the directors of that company dispose of the only asset the company has?

This will depend since the directors have the power to do this unless the M&A (for example, reserving the matter to the shareholders') or the Companies Acts prohibits this. They can do it as long as they do it in good faith and in the best interest of the Company.

The minority shareholders do not have the majority's strength to garner decisions. Hence what will happen is that you will have a majority shareholding which controls the company. This is why it is important for the M&A to clearly state shareholders' voting rights **and** voting requirements for decisions (majority, minority, unanimous, extraordinary, etc.)

If you are a majority shareholder and the minority say they will increase the share capital why is it dangerous? If share capital is increased, shares are diluted instead of 10/30, now 10/300 hence, overnight the minority's shares have decreased significantly which impacts the threshold for a resolution.

To amend the M&A, you need an extraordinary resolution. You can draft the best M&A and a year down the road, the majority shareholder can amend it and alter it how he pleases.

That is why in the M&A you are going to find most protection when you come to advise a minority shareholder.

Once the Memorandum and Articles have been exhausted, then one must look to the Companies Act. The section par excellence is Article 402 of the Companies Act, slightly short of which there is Article 214 which provides the just and equitable remedy. Article 402 gives a wide array of possible remedies. Article 214 only gives one effective remedy, that of the right to request the dissolution of the company. Besides these two provisions, there are also various other articles that give protection to minority shareholders.

2. Another protection is found in section 81 of the Companies Act.

Notwithstanding anything in the memorandum or articles of a company no member shall be bound by any alteration made in the memorandum or articles after the date on which he became a member if and so far as the alteration requires him to subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date to contribute to the share capital of, or otherwise pay money to, the company:

Provided that this article shall not apply in any case where the member agrees in writing, either before or after the alteration is made, to be bound thereby

Nothing can compel a shareholder to subscribe for more shares, hence capping your liability. Is this enough protection?

In terms of the proviso, it is possible for somebody to renounce the protection given to him by the legislator. You can contract out of Article 81. The second observation to make is that you cannot be compelled to fork out more money than the share capital given. What happens if the majority of shareholders issue a resolution to issue new shares and the other shareholder does not want to put in more money? The shareholder who did not want to issue more money will have his position diluted and shrunk. Thus, this article does not provide much protection effectively, because if such resolution is passed the shareholder, not willing to issue more money may have his position shrunk by a considerable amount.

Renald Micallef vs Information technology Services Limited, 1996.

3. Pre-emption rights: If a shareholder is going to sell his shares in a company, then he has to offer his shares to the other shareholders first. They have a right of first refusal, even if there is a fresh issue of shares. In this case of **Renald Micallef**, there was an attempt to dilute his shares by passing a decision to remove the pre-emption rights of existing shareholders through a fresh issue of shares and to offer them to other shareholders thus excluding Renald.

4. Section 131 - General provisions as to meeting and votes.

The following provisions shall have effect <u>*in so far as the articles of a company do not contain other provisions*</u> *in that behalf-*

(a) notice of any general meeting of a company shall be given to every member of the company and shall be served in the manner in which notices are required to be served by the First Schedule;
(b) two members personally present shall be a quorum;
(c) any member elected by the members present at a meeting may be chairman thereof;
(d) every member shall have one vote in respect of each share or each euro of stock held by him unless otherwise provided in the terms of issue of such shares or stock.

However, accidental omission is not punishable, as per article 34 of Schedule 1 of the Companies Act. However, note that this article is dangerous because it contains <u>no punishment</u>.

The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice <u>*shall not invalidate the proceedings at that meeting*</u>*.*

5. Section 129(1) - Convening of extraordinary general meetings on requisition.

(1) The directors of a company shall, on the requisition of a <u>*member or members*</u> *of the company holding at the date of the deposit of the requisition* <u>***not less than one-tenth***</u> *of such* <u>*of the paid up share capital*</u> *of the company as at the date of the deposit carried the right of voting at general meetings of the company, forthwith* <u>*proceed duly to convene an extraordinary general meeting of the company*</u>*.*

(2) The requisition shall state the <u>*objects of the meeting*</u> *and shall be* <u>*signed by the requisitionist or requisitionists*</u> *and deposited at the registered office of the company and may consist of several documents in like form each signed by the requisitionist, or if there is more than one requisitionist in any one document by all of them.*

(3) If the directors do not <u>*within twenty-one days from the date of the deposit of the requisition*</u> *proceed duly to convene a meeting,* <u>*the requisitionist or requisitionists may convene a meeting in the same manner*</u>*, as nearly as possible, as that in which meetings are to be convened by the*

directors, but a meeting so convened shall not be held after the expiration of three months from the date of the deposit of the requisition.

(4) Any reasonable expense incurred by the requisitionist or requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionist or requisitionists by the company, and any sum so paid shall be due personally by the directors who were in default and may be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration in respect of their services to such of the directors as were in default.

This is a right given to minority shareholders who hold at least 10% of the shares of a company, to request that a general meeting is to be convened. Its usefulness is that if there is any matter which is being done by majority shareholders, which is prejudicing the minority shareholders, then the minority shareholders can bring that matter for discussion before the highest organ of the company and the majority shareholder will have to either partake in the meeting or not partake at all or vote against any motion that is being proposed.

Example to be used - company majority shareholder 70% and minority 30%. The majority shareholder is leasing out a property to his wife's family to below the market rate, and as a minority shareholder is livid as he knows the company can make more from the asset of the company. If a minority shareholder was me I would propose a general meeting and resolution that the property is to be rented out to the highest possible rate - that will compel the majority shareholder to commit himself to someone and he can sit on the fence he has to take position. He can refuse to attend the meeting, but if he does not, I can use that to show the court that - he refused to attend the meeting will show the court that the m majority shareholder is not in good faith, if he does attend he has to either vote in favour or vote against the resolution, but I doubt that he can then justify himself, or else he can abstain from the resolution - not necessarily vote in favour and against can vote against

Example to abstain - I am a minority shareholder and ii have suspicions that company is not being directed well - when there is financial statements vote, I can not vote in favour as then I can not go to court, so normally in a situation like that is I abstain - do not vote in favour or against.

The request to convene a general meeting must be done by shareholders, must be signed by the requisitionists and must be signed by the registered office of the company. The directors of the company have 21 days to convene the meeting. If within 21 days no meeting is convened by the directors, the law gives the shareholders of the company, the right to convene the general meeting themselves. The meeting must be held within 3 months from when it is requested. Any expenses incurred by the shareholders to convene the meeting should be reimbursed to them by the company itself.

What happens if you don't have 10% and you want to convene the meeting? Your remedy is in section 132 hereunder.

6. Section 132 - Powers of Court to order meetings

If there is a quorum requirement and the other party refuses to call meetings, one can use this article. **This article doesn't require a minimum shareholding percentage.**

PMS vs X - The majority shareholder had passed away, the heirs of the majority shareholder did not convene any meetings and did nothing in the company. Minority shareholders could not appoint a director themselves because no shareholders' meetings were convened and they did not have a 10% shareholding to use Article 129. Therefore, P used article 132 to ask the court to appoint a director to take over the management of the affairs of this company.

Damian Iwueke vs Mark Schembri, 22/10/2004

7. Section 133(1) Shareholder rights to attend a general meeting.

Since this is prescribed by the law, it cannot be done away with through the M&A.

Paul Hili vs McDonald's Franchise Limited. D wanted to remove P as director. Directors sent notice of a general meeting to remove him, and in the notice, they failed to inform him that he can appoint a proxy. P filed a warrant of prohibitory injunction since <u>you must always inform the shareholders that they can appoint a proxy</u> in the stead.

8. Section 137(7) - Powers of the Court to appoint a director.

9. Section 151(4) - Appointments of Auditors.

An important right given to you is the right to appoint an auditor. If the majority shareholders refuse to appoint an auditor, your right as a minority shareholder will be seriously prejudiced as there is no one policing the affairs of the company. The auditor is one of the biggest safeguards and as established by the Companies Act.

10. Section 161 - Statement by Auditor before leaving Office.

This section compels a person who ceases to hold office as auditor of the company.

(1) Where an auditor ceases for any reason to hold office, he shall deposit at the company's registered office a statement of any circumstances connected with his ceasing to hold office which he considers should be brought to the attention of the members or creditors of the company or, if he considers that there are no such circumstances, a statement that there are none.

11. Section 289(1) - Powers of the Court to remove liquidators

The court may, on the application of <u>any member</u>, <u>creditor or contributory,</u> remove a liquidator if it is satisfied that there exist sufficient grounds to warrant his removal and appoint another liquidator.

12. Section 296(3) - Summoning of meetings

13. Section 330 - Requirement for conversion of commercial partnerships.

When you are in a company, your liability is limited to your share capital and when converted into a partnership your liability is out of the window. The law in 330 says that you are not compelled to assume unlimited liability.

14. Section 362 - approval by extraordinary resolution of division

15. 214 and 402

Falla vs Sorotos (Malta), 12/03/1976 stated that the minority has to respect the wishes of the majority. This rule is flawed because the majority may abuse this situation and does not act in the interest of the company, especially if the wrongdoer is in control. This rationale was taken from the Foss case hereunder.

Foss vs Harbottle, HOL, 1843.

In the case, a legal action was pursued by two minority shareholders (Richards Foss and Edward Starkie Turton) on their own, against the directors of a company alleging conduct of concerted and illegal transactions resulting in the loss of the company's property.

Allegation that the directors had misappropriated the company's assets and falsely mortgaged the company property. Main issue in this case - whether a company's right to sue can be exercised by the shareholders in their own name, hence if the shareholders could file an action for wrongdoing to the company.

Main principles of this case - The court of chancery rejected the claim of the petitioners and held that since the actions caused loss to the company, (1) only the company has the right to sue, hence it was the 'proper plaintiff' in this case and not the shareholders. (2) It was also held that the majority rules, hence the decisions of the other shareholders, were binding on the company.

To reduce the injustice and unfairness of the minority shareholders, the 'majority rules' principle does not apply when the majority's decision is an act which oppresses, suppresses or depresses the minority shareholders. Hence, it is not applicable in 'ultra vires' cases, and acts of illegality, breach of fiduciary duties, fraud and oppression against minority shareholders.

Since the majority might be the wrong doers themselves, over the years exceptions to Foss vs Harbottle have evolved and UK law has had established four exceptions:

1. When the majority shareholders have exceeded their power (ultra vires). When the transaction requires the sanction of a special majority i.e. a special threshold to be

performed. In this case, a simple majority can never perform that particular transaction. Edwards vs Hallowel (1950) and Quin & Axtens Ltd. vs Samuel (1989).

2. If the majority shareholders breach a shareholders agreement as listed in the M&A. The shareholders agreement remains confidential between parties and in are the shareholders rights and obligations and if the shareholders breach, then there is a right of action to the minority shareholders.

3. Breach of personal rights. In the past, the Courts used to interpret the A&A restrictively as to what constitutes a personal right and the breach of the articles was not deemed to constitute a breach of personal rights. The situation has evolved and now it is that save for clauses regarding internal procedures, all breaches of other articles are considered to be a breach of a personal right. This has also evolved further so that a breach of a director's fiduciary duty will give an action for a personal cause of action. Find case no. 5136 of 1986 (decided 1987, book 82).

4. Fourth exception, developed by the EU Court. These are cases of fraud on the minority shareholders. For this action to subsist, the wrong doers must be in control of the company. The **derivative action**. Find 2023 case of Debattista vs Debattista. Find also **Daniels vs Daniels (1978)** and **Cook vs Deeks (1968)**, **Spiteri vs Cilia (2013).**

Wrongdoer control:- **Prudential Assurance Company Limited vs Newman Company limited (1980) and Smith and Croft (1988).**

16. 214 - Causes of dissolution and consequential winding up

Derivative action cases:

Towers vs African company (1904)
Nirkom vs Nirkom (1905)
Mixkuka vs Mangion
Pace vs Emanuel Bonello (1996) - they had o apply the law of when the case started
Kenneth Cole
Emanuel Grech (1980)

Fraud on the minority cases:

Edwin Zammit Tabone
Edgar Bonnici Cachia nomine vs Oliver Agius (1961), COA
Meatland Company Limited vs Savior Micallef (2001)
Cornelius sive Maurice Scifo vs Eric Pace Bonello (29/11/1989)
Cecil Pace vs Bonello (1986)

Daniel Cremona vs Joseph Lanfranco (09/09/1975) - In this case the commercial Court said that this remedy 214(2)(b)(iii) was practically the same as 222F of the UK Companies Act (1948) and the court said that since it follows UK law, we are bound to interpret it.
Abrahimi vs Westbourne Galleries
Yendeji Tobacco Company Limited (1916)
Gat vs Gatt - Spare parts in qormi

Second category - justifiable loss of confidence in the management:

Lock vs John Blackwood Limited
Camilleri VS Fredrick Frendo (04/07/2003)

Third category - loss of substratum - no longer possible for the company to achieve the purposes for which it was set up

Camilleri VS Fredrick Frendo - 4th July 2003 - company was established to operate a vessel, once the vessel is sold, what is the purpose behind it? Hence the court liquidated it.
Christian Mifsud vs F1 Auto Test Limited 201

Pioneer Leather Company case.
Emmanuel Bezzina vs Walter Bezzina - 1st October 1986

Collapse of relations between the parties, hence the relationship has been soured immensely and no longer is possible. Case of Dr Andre Mizzi vs Robert Damkjaer Malta Ltd (1/11/2012). In this case there was a total collapse of relations between partners. The Court quoted from an English Case Yenidje Tobacco Company Ltd. In this case there was, 'In the AGM, the power of votes is divided between both votes and there is no hope that the issue be resolved, the company is at the current moment dormant and no remedy has been sought or used in order to resolve the issue, the company must be run with friendship and cooperation, the bad state of affairs has reached a stage in which the company cannot be run anymore'.

The law does not tell you what are the grounds of gravity and it leaves it up to the discretion of the court to decide, basing its decision on all the circumstances of the case. If the court gets a gut feeling of unfairness, it will dissolve. In this remedyONLY DISSOLUTION EXISTS AND NOTHING ELSE.

Another point to keep in mind is that when you file a court case it is like taking a snapshot at how things are at the moment of the court case so things which happen after should not form part of the court case. H we have any exception to the rule. In 214, things that are happening while the proceeding, can still be heard.
Walter Bezzina (1986)
George Borg vs Primrose - Court allowed the bringing of evidence.

Bourdea vs Lorado - Things were happening during the proceedings and BUREDA wanted to bring an affidavit to. Judge said that happened in the time of section 402 but it is still something to keep in mind.

When you file an action in 214, you are entitled to ask that until the case is decided, a provisional administrator is appointed to direct the company himself and take the role of power from other directors. This happens when there is a director where his actions are being contested.

Before you apply for a dissolution in terms of section 214, must you first extinguish all other remedies. Find Camilelri vs Frendo where the court said that it is not a sine qua non that you first exhaust all other remedies but you have to be careful - imagine a situation where no meetings are being held by the company - if you go to the court and ask for a dissolution just because meetings are not held, the court will probably throw your case out as it will tell you that you have other remedies.

17. Section 402 - Protection of shareholders against unfair prejudice

This is the best protection that minority shareholders have which is specifically there to protect shareholders.

Caroline Zammit Testaferrata vs Testaferrata Holdings Limited
Jean Karl Soler vs Vassallo Vibro Blocks
Daniela Galea Suche vs Clealeand and Suche Limited
Michael Cutajar vs SE Companies Limited

It is not the case that the petitioner must prove that he himself is suffering prejudice. He may also bring an action if he shows that another member may suffer a prejudice or the company as a whole will suffer a prejudice.

George Borg vs Primrose
Vella et vs Vella Brothers Limited
Vincent Montreal et vs Lino Mallia - **Cites several jurisprudence**.
O'Neill vs Philips - **Cites several jurisprudence**.

English cases
CANNINGTON VS VAEL PLC
SONS CLOTHING LTD (1983)
RE LONDON SCHOOL OF ECONOMICS (1986)
REKUMANA LIMITED (1986)
RE CRISCSION BELOWS LIMITED (1984)
RE A COMPANY (NO 2612) (1985)

Other local cases:

Ellul vs Ellul - Involved a husband and wife who had shares in the company. The situation deteriorated and the husband decided to pass a resolution in terms of 140 - a simple majority shall suffice. To remove his wife from director. The first hall decided in favour of the husband - as he was entitled. She appealed and relied on the Abrahimili case.

41 Limited vs 41 Full Finance Limited 2012. A person who was a shareholder was removed from being a director and the court held that "in-nuqqas ta' rapresenaznata tal-kumpanija…"

Cases under 402 can also be pigeonholed.

What if the directors are assigning themselves excessive benefits and not assigning dividends? Can you bring an action based on A402 ? Find the case of Rikumana Limited.

Case where the majority shareholders are dealing with associated persons - Raymond Abdilla vs Gaetano Abdilla (21/01/1995) and Joseph Calleja vs Victor Calleja.

Mismanagement of the company affairs George Borg vs Primrose.

The law in subsection 402(3) gives you a various list of remedies, you can either choose or else leave it up to the court to see what remedy to give you; however, this can be very dangerous. The Court can sell your shares in this case **so it is very important to choose your remedy.**

Can second-tier shareholders use this article?

In the case of Suzanne Busuttil and Brian Busuttil vs Francis Busuttil and Sons Ltd, 6th May 2013 the Court held that second tier shareholders are not able to use Article 402 as a remedy. It is clear that the person who may bring an action under 402 must necessarily be a member of the company. In Raymond Vassallo v. Anthony Paralato Trigona, 2011 it was held that you may also have non-members of the company as defendants in such a court case, in this case the defendant will either be the company itself, or the directors who are the wrongdoers. The Court held that you may still be a defendant in the court case.

The Registrar of Company - David Fabri

The role of the Registrar - Originally, as the word implies, the registrar is a conventional registrar, that of keeping books. It is a process of making things available to the public.

Transparency and disclosure are big steps in Company law.

The original companies were large / massive and called Joint Stock Companies.

Originally, businessmen started creating contracts and creating companies from these contracts and within them, they created limited liabilities. However, there was no central place which consolidated a centre for verifying these contracts.

Before, companies were set up by the King or by Parliament. Then there was a "democratic" process and everyone could open a company. This made companies more credible. So first they created the company, gave it its own personality and then limited liability came later. The limited liability charter was called the Rouge's Charter because it was prone to abuse.

In the 1800s, the government did not want to enter into the business sphere because the UK always believed that business should self-regulate unlike Malta, where we regulate. They eventually created the ROC and encouraged standardisation (such as the M&A). By doing so, the procedure to set up a company became very easy and fast. Finally, they added more transparency and more disclosure - I am giving you limited liability by having to disclose your workings, such as the filing of accounts. These documents were eventually placed at the ROC. This promoted "order" in the market.

The Commercial Partnerships Ordinance (1964) the registrar was called the registrar of partnerships because we had the "Italian" way of doing legal things. We spoke of partnerships and you needed at least two persons to form it. The powers of the registrar under the Ordinance were critical and to ensure compliance with the Ordinance. He was a regulator but he was a registrar.

The regulator can say **no** and you cannot operate. The **registrar cannot say no** because the formalities are known. The registrar does not regulate a sector but the regulator does.

Companies Act (1995). In 1994, Malta changed its financial services regulations and there were a lot of amendments to the laws. Find article 400 where the Minister appoints the registrar. Usually the registrar was a senior official at the MFSA because the MBR was part of the MFSA. This was changed in 2020 and created the ROC hence, no longer the appointment of a senior at the MFSA (L.N. 144).

Find pre-insolvency and insolvency Acts (2022) as part of the MBR (article 52).

Companies Act - section 401 lists the powers of the registrar.

The grey-listing era justified the granting of more powers to the registrar and regulators.

In Malta, corporate signatures are not allowed.

