



THE LAW OF  
CIVIL  
PROCEDURE

**CVL5044**



LAWNOTESMALTA

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# The Doctrines in Civil Procedure

Our agenda today is twofold:

1. The history of Maltese Civil Procedure *and*
2. The nature and source of Maltese Civil Procedure.

## 1. The History of Maltese Civil Procedure

Chapter 12 (COCP) was enacted in 1854, the result written largely by Maltese hands, but reviewed in Edinburgh, it was the result of the workings of the second royal commission to produce a second procedure. There was a first commission which they couldn't agree between themselves and therefore disbanded, but the second commission brought it to the state it is. It grew significantly from the Code de Rohan Civil procedure and the Code Manuel. It has retained, to this day, its structure and division. Although many notions were undefined, we had authors and through their intervention, that the doctrines were developed.

The Civil Procedure is the major source, however, over the years there were important attempts to reform this procedure. Starting from 1927, closer to 1995, there were significant amendments – where was a white paper which led to important amendments. At the time, in Malta, an attempt to simplify proceedings. Prior to this Civil Procedure had technical complexity. The emphasis was the substance over form. The idea is to bring *civil proceedings* to something *like a trial by jury*, a different concept from the current idea. They also regulate the pre-trial process. There were other reforms on the law of warrants and other important amendments being on no judicial executive titles and more recently (2014) a major paper not only on Civil Procedure but also the holistic report on Civil Procedure.

Another important instrument of the Maltese Civil Procedure are of course the **jurisprudence and decree**. Other influences, the overarching influence which has influenced Maltese Civil Procedure is Article 6 of EU convention 1995, but contributed to changing radically and contrastingly, the culture.

Maltese Civil Procedure starts in a codified form from the early years of the knights Chapter 12 in 1854 and designed through interpretation including the basic civilian doctrine. The chapter on the law of evidence reproduces the English common rules of evidence. The chapter on evidence is the traditional English common law rules of evidence. There is a distinction between, examination, cross examination etc. there are other areas which might be unclear in the Civil

Procedure, such as electronic evidence. Till now they are still more or less bound to the idea that such evidence is admissible but has to be on paper and confirmed on oath.

Another characteristic is the burden of proof within the law of evidence. This of course has to be seen in the English tradition which has been developed in the context of the chapter. **This is simply a balance of probability.** The judge has to have a moral certainty to see which is the best decision - balance of probability. Where evidence is contradictory then the burden of proof lies on the claimant and if the claimant does not with charge this burden of proof the maxim *non actori non probante absolvitur reus* (*When the plaintiff does not prove his case the defendant is acquitted*).

## 2. The Nature

The term jurisdiction is essentially linked with jurisdiction from the latin *juris dice* and are the various types of jurisdictions:

- Contentious - In contentious Jurisdiction, the respondent does not have the option whether or not to be endorsed as it is mandatory
- Voluntary – Second hall Civil Court and at the time of the knights it was the third hall civil court. Today it is the Civil Court of Voluntary Jurisdiction, where one enters onto his own accord. Originally, it was a court of protection for those who became vulnerable people. Over time, it also extended to fiduciary areas, where there are no contentious matters – it is the court which regulates trusts, foundations and fiduciary obligations. It is therefore a court of wide and complex jurisdiction.
- Executive – An executive title is when a debate is settled through a final judgement/ court recognition (such as notarial acknowledgement of a debt, judicial fees etc.) an executive title is the final basis on which the creditor can be paid. The assets of the debtor are taken and are procreated or sold to enforce the claim of a creditor. The executive titles are *subbasti*, bank assets, shares and securities.
- Precautionary – The basis of these kinds of warrants is to prevent a situation where you bring the course of proceedings and assets are still in a way damaged and at the end of the proceedings, there are no assets on which a creditor can enforce. One can seize and freeze the assets of another party with limited remedies. The situation is very heavily weighted against the debtor.
- Declaration and as certainty – to declare a person married, single etc.

**History** - The all important written document is Cap. 12 but it is not the only source. This was enacted originally in 1854 and it was the result written largely by Maltese hand but reviewed in Edinburgh by the second royal commission charged to produce the Code. The first code was disbanded (from the first commission) because they could not agree between themselves but the second commission brought it to the current state. It grew significantly from the Code Rohan and Code Manuel de Vilhena and to this day, it has retained its structure and division. The COCP does not define certain terms such as *res judicata*, *kontumaci*, etc, because it was a given that these definitions need not be added to the Code because these were supposed to be known by the readers.

It is built principally on Italian authoritative jurists. Nowadays, the COCP is a major source but over the years, there were important attempts to reform it. Over time, there have been interventions and attempts to update the COCP. Find a whitepaper entitled “Justice in a reasonable time”. The 1995 reforms were an attempt to simplify proceedings and prior to this, it was a maze of technical complexity. The emphasis back then was on substance over form and it was the first attempt to speed procedure.

The concept of a pre-trial was introduced and an important part of it is the affidavit. It is a common law feature and it is a written statement. The UK nowadays calls it a witness statement. This is a different idea from what used to happen as nowadays, you submit affidavits and documentations and maybe you have 1 or 2 days of cross examination and then the case goes to judgement. Find S.L.12.06 where it regulates the pretrial process. Other important reforms are the laws of orals such as seizure of a going concern, arrest warrants of ships and aircrafts, and the creation of non-judicial executive titles.

Another important source of Maltese civil procedure are the jurisprudence of the Courts, the distinction between a judgement and a decree, the definition of *res judicata*, the meaning of *contumacia*, etc.

**Important reform - The UK Jackson report which details the overrun of costs in civil litigation because the moment access to the Courts becomes prohibited, there is no real access to the courts and therefore the emphasis was not so much capping lawyers fees but on efficiency. This is soon coming to Malta.**

# The Presupposti Processuali

What is known in civil procedure as the *PRESUPPOSTI PROCESSWALI*. These are the requirements to have in existence a valid civil procedure action. Our discussion, which I expect to span over another action, has to lead to the action - the basis and route of civil procedure which is an action.

PRESUPPOSTI PROCESSWALI - those requirements necessary to have in effect a civil proceeding which is valid, these are:

1. A **demand to a court** which
2. Accepts **jurisdiction and competence**
3. **Legal interest** and
4. **Active and Passive** Legitimation.

Requirements to have in effect a valid civil proceeding -> PRESUPPOSTI PROCESSWALI

Today, trends are changing and we are moving strongly from a dispositive culture in civil procedure to a culture of case management. If you were to read and understand the practice of civil procedure in 30/40 years ago, it would be clear that civil procedure was a proprietary term of the parties, of the claimant mainly as the emphasis was that the proceedings belonged to the claimant and hence the claimant could dispose of proceedings not diligently in the way it deemed best to the plaintiff, hence it was the dispositive emphasis. Something which was considered to belong to the plaintiff.

This has changed and today the shift is on efficiency, the culture that a case has to be properly managed. Nevertheless, it is correct to state the parties in civil proceedings, have to make choices, to appeal not to appeal, to insist on this evidence and therefore, parties still have choices, powers, faculties.

Legacy of the dispositive culture - still a considerable power reserved to the parties. This is a useful background. We come to the first PRESUPPOSTI PROCESSWALI

1. **A demand** - this will find itself in the action as - just to recapitulate - the civil process and its rationale, we have to have a demand and with this demand, something has to be asked from the court. When we are drafting writs, one of the difficult methods/aspects of drafting a writ is the demand as the demand defines the claim. Generally, a demand is formulated in a writ/sworn application/application where the basis has to be legal, traditionally it is considered that there are the major premise, english course of action,

legal basis of the writ, and then there is the minor premise which has narrative effect. Obviously, whoever is proposing this writ, therefore there is an arguable claim.

This is then closed by the demand. It should be clear that the demand should follow from the premise and it should never be that you can not follow or logically deduce a demand to the court which does not follow from the legal reasoning that precedes. So the first PRESSUPOSTI PROCESSWALI is that there has to be a demand, based on factual and legal basis and has something which is petitioned from the court. You will recall the well known statement by the demand/prayer. One has to request something from the court. Whether civil procedure is really a demand against the other party, the better view is that it is a *demand = claimant*, a party instituting proceedings, requests the court a right - that's the first point. Ongoing discussion that in civil proceedings, there is a civil procedural relationship between the parties between themselves and the court.

2. The **demand has to be in a court which accepts both jurisdiction and competence.** We will discuss in some detail what these are but broadly jurisdiction is the power of the court to be seized, hear a dispute. Competence is the measure of power and the division of power of a court. If something is not within the power of the Maltese courts, then competence can not follow. Competence is the next question, so the 2nd requirement for proceedings to be validly in existence is that after the demand, a court will accept to hear the proceedings. **Hence a court has both jurisdiction and competence.** If the court denies jurisdiction, then it stops there. Again the court has to accept to hear the case.
3. The 3rd which will take some time - is **Legal interest** - legal/juridical interest used interchangeably. What we will be saying in conclusion is that for historical reasons and reasons there is a traditional view of legal interest, and a contemporary view of legal interest which we shall discuss. It is essential that not the old supplanting the new, no hint or suggestion that the traditional rules of legal interest are in any way not applicable, the truth is that circumstances have evolved and hence legal has to be projected in more circumstances - with both the tradition and contemporary definitions of legal interest had to co-exist side by side. Old and new co-existing.
4. **Active and Passive Legitimation** - A party acting in the legitimate party who can assert the claim. Passive legitimation - party to whom a claim can be directed - "*legittimu kuntradittur*".

Traditional notion of legal interest as it has various ramifications in the COCP and also as it is linked to certain factors which I think have importance in procedure. Essentially, a legal interest is the relationship between the right asserted and the party claiming it. There are many cases,

which are more or less of the traditional view which recycle the same ideas. Not much novelty or innovation there.

**Judgement: Agatha formosa Gauci vs Lanfranco, QORTI TA' L-APPELL, 28 November 2003**

P wants to annul the secret will of her dead sister, she is alleging fraud. D = beneficiaries of the will. The First Court said she does not have legal interest and the COA agreed.

*“B’sentenza moghtija fit-28 ta’ Frar 2002, il-Prim Awla tal-Qorti Civili, wara li halliet il-kawza ghas-sentenza dwar it-tieni u tielet eccezzjonijiet sollevati mill-konvenuti Lanfranco, iddecidiet billi, filwaqt li laqghet it-tielet eccezzjoni tal-konvenuti “bhala misthoqqa u msejsa fid-dritt”, iddikjarat ukoll li fl-attrici kien jonqos l-interess guridiku mehtieg biex tressaq, u tmexxi ‘l quddiem il-kawza; astjeniet imbaghad milli tqis it-tieni eccezzjoni u helset lill-istess konvenuti milli jibqghu fil-kawza, bl- ispejjez kontra l-attrici.*

*L-appellanti qeghda tissottometti li l-interess guridiku taghha huwa wiehed “morali”, dak li bhala l-oht tewmija tat-testatrici ma setghetx thalli mhux protetta u mharsa r- reputazzjoni tajba ta’ ohta Carmela sive Carmelina De Battista. Issostni li in konsegwenza ta’ l-agir frawdolenti maghmul fuqha mill-konvenut appellat, ohtha ghamlet testament li jhassar il-memorja tajba taghha, u l-azzjoni in ezami ma hijiex, u ma tistax, tigi merament evalwata u meqjusa fuq konsiderazzjonijiet pekunjarji ghal fini ta’ interess guridiku. Jekk hemm dottrina legali li tillimita jew tekwi para l-interess guridiku f’termini ta’ gwadann ta’ materjali biss, allura din id-dottrina hija zbaljata u jinhtegilha tinbidel.*

*sottomissjonijiet kopjuzi li sarulha da parti tal-kontendenti, u hija tal-fehma li dak li gie sostnut u finalment deciz fiha huwa gust u korrett, u din il-Qorti tikkondividi pjenament dak li gie ritenut mill-ewwel Qorti u dan ghar-ragunijiet li ser jinghataw.*

*Huwa minnu, u l-partijiet jaqblu dwar dan il-punt, li l-ligi taghna tezigi li min jipproponi azzjoni gudizzjarja jrid ikollu interess guridiku, l-ghaliex altrimenti jkun ifisser li kull min ikun irid jivvessa lil xi hadd inutilment ikollu l-oppportunita` shiha li jaghmel dan billi joqghod “jiqqortja” mieghu fuq kwalsiasi protest li jkun, imqar jekk il-materja lanqas biss ma tkun tikkoncerna lillu. Il-Qorti tinnota li qabel ma l-ewwel Qorti waslet ghad-decizjoni taghha dwar in-nuqqas ta’ interess guridiku da parti ta’ l-attrici, hija ezaminat b’mod mill-aktar approfondit il-gurisprudenza ta’ dawn il- Qorti, kif ukoll id-dottrina legali in materja. Mid-diversi decizjonijiet imsemmijin fis-sentenza tal-Qorti ta’ l-ewwel grad jemergu kjarament, is-segweni principji li ghandhom, fil-fehma anki ta’ din il-Qorti, iservu ta’ gwida li fuqhom ghandha timxi Qorti biex tirrizolvi vertenza ta’ din ix-xorta. Dawn il-principji huma s-segweni:*

*(i) l-interess (guridiku) mehtieg irid ikun wiehed dirett, legittimu, kif ukoll attwali.*

(ii) *l-istat attwali ta' ksur ta' jedd jikkonsisti f'kundizzjoni pozittiva jew negattiva li xxejjen jew tinnewtralizza dritt li jkun jappartjeni lid-detentur jew lil dak li lili jkun misthoqq;*

(iii) *l-interess guridiku fl-attur huwa dak li l-imharrek jirrifjuta li jaghraf il-jedd ta' l-istess attur u dan billi kull persuna ghandha d-dritt titlob li, fil-konfront taghha, isir haqq jew tigi msewwija ingustizzja li tkun giet maghmulha kontriha.*

(iv) *l-interess guridiku irid ikun iwassal ghal rizultat ta' utilita` u vantagg ghal min irid jezercita l-jedd. Jekk l-azzjoni ma tistax twassal ghal tali rizultat ghal min jibdiha, dik l-azzjoni ma tistax tregi.*

(v) *l-interess guridiku jrid jibqa' jissussisti matul il-hajja kollha ta' l-azzjoni, u mhux biss fil-bidu taghha. Jekk l-interess jintemm, il-konsegwenza immedjata tkun li l-imharrek jinheles milli jibqa' fil-kawza;*

(vi) *l-interess ta' l-attur ghandu jkun jidher mill-att tac-citazzjoni nnifisha. Ghalkemm il-mottiv ta' l-interess mhux mehtieg li jkun imsemmi fic-citazzjoni, dan ghandu jirrizulta mill-provi jekk kemm-il darba jigi kkuntrastat;*

(vii) *fil-prattika gudizzjarja, wiehed jista' jippromuovi kawza biex jikseb dikjarazzjoni preordinata ghal azzjoni definittiva u ahharja, minkejja li din ma tkunx giet inkluzja fl-azzjoni ta' accertament. Madankollu, f'kaz bhal dan, il-Qorti trid tkun soddisfatta li jkun hemm l-interess mehtieg, anki preordinat ghall-kawza l-ohra, u li d-dikjarazzjoni hekk miksuba tkun tifforma l-bazi tal-kawza l-ohra li tista' ssir aktar 'l quddiem;*

(viii) *l-interess mhux bilfors ikun wiehed li jigi kkwantifikat f'somma determinata ta' flus jew gid, imma jista' jkun imsejjes biex ihares jew jaghti gharfien ghal jedd morali jew soggettiv, imbasta l-jedd invokat ma jkunx wiehed ipotetiku.*

*L-attrici tipprova pero` tiddezumieh anki mill-kontenut tat-testment impunjat u l-att tac-citazzjoni fih innifsu jikkontjeni diversi allegazzjonijiet mirati proprju biex dan l-element ta' fraus johrog fil-berah, imma l-appellanti stess tirrikonoxxi li biex hija tirnexxi jinhtigilha tghaddi ghal aktar provi konkreti. Biex dan isir izda nergghu nigu ghall-ostakolu sollevat mill-parti konvenuta dwar nuqqas ta' interess guridiku dirett, legittimu u attwali fil-persuna ta' l-attrici.*

*appellanti sahqet principalment fuq l-argument li interess morali hu bizejjed ghal fini ta' l-azzjoni biex jirradika d-dritt ta' azzjoni favuriha. Apparti minn kull konsiderazzjoni ohra ta' gwadann ta' natura pekunjarja jew materjali, hi tikkontendi li l-interess taghha li thares u zzomm integru l-memorja u r-reputazzjoni tajba ta' ohtha, hu fih innifsu interess guridiku tajjed bizejjed biex hija tista' tkompli bl-azzjoni li hadet kontra l-konvenuti.*

*Din il-Qorti, bhal dik ta' qabilha, hasbet fit-tul dwar dak li gie abilment – imqar jekk dan sar b'insistenza xi minn daqqiet ripetuta ad nauseam – sottomess mill-parti appellanti, pero`*

*madankollu xorta wahda ma jidhrilhiex li l-ewwel aggravju huwa wiehed fondat. Kif tajjeb qalet l-ewwel Qorti mhux kull interess jista' jissarraff fi dritt ta' azzjoni. Fi kliem iehor, mhux bizzejjed ghall-appellanti li tghid u tinsisti li d-dritt taghha jemani mid-dritt taghha li tiddefendi l-memorja ta' ohtha. Dan ghaliex, kif tajjeb kiteb fit-tezi tieghu Joseph Said Pullicino (wara Prim Imhalled ta' dawn il-Qrati), intitolata proprju The Civil Action with Special Reference to the Element of Interest (Universita` Rjali ta' Malta, 1961, pag. 30),*

*"...not every interest is sufficient to ground a right, and further, not every interest which is sufficient to ground a right, is considered to be sufficient for the creation of a legal right."*

*14. Din il-Qorti, bhal dik ta' qabilha, ma tistax taghlaq ghajnejha ghal certi konsiderazzjonijiet, pjuttost ovvji, li jimmilitaw sew kontra t-tezi attrici. Li kieku kellu jigi impunjat it-testment sigriet de quo, il-beneficjarju ewlieni in bazi tat-testment notarili maghmul precedentement ma kenitx tkun l-attrici imma zewg it-testatrici, jigifieri Robert De Battista. Issa, minkejja dak li qeghda tallega l-attrici, l-imsemmi Robert De Battista fil-fatt m'huwiex u ma jridx jimpunja t-testment sigriet. Kjarament ghalhekk jidher mhux biss li l-attrici ma kenitx parti beneficjarja fit-testment unica charta maghmul antecedentement mill-mizzewgin De Battista, imma l-parti li suppost sejra tibbenefika b'tali impunjazzjoni (jigifieri Robert DeBattista), m'hijiex tikkondividi il-hsieb ta' l-attrici. U kif tajjeb qalet l-ewwel Qorti,*

*"...il-premura ta' l-attrici ghat-telf ta' beneficju li garrab zewg it-testatrici bit-testment sigriet, ghalkemm mimlija b'sens ta' altruwizmu, ma jista' qatt ikun il-bazi ta' l-interess li jinhtegilha li turi li hi ghandha biex tibda u tissokta l-kawza."*

*15. L-appellanti ghadha sa dan l-istadju ta' appell tinsisti fid-dritt taghha li tmexxi 'l quddiem din il-kawza a bazi ta' interess purament morali konsistenti fil-harsien tal-memorja ta' ohtha. Issa apparti l-fatt li hawn ukoll l-attrici ma jidher li ddejjet xejn milli tippercepixxi l-legal imholli lilha fis-somma ta' ghaxart elef liri maltin (Lm10,000), jibqa' xorta wahda l-argument li f'kaz ta' ezitu favorevoli l-beneficju li jista' attwalment jinkiseb bl-impunjazzjoni tat-testment sigriet ma jmurx biex iwweggah la lill-attrici u anqas lil ohtha. Dan ukoll ghaliex kull operat u agir tal-konvenuti, dak reali jew dak allegat, ma kien qatt mirat jew dirett, kif intqal fis-sentenza appellata, "biex inaqqsu mill-gieh jew mill-fama taghha" (i.e. ta' l-attrici). Fi kliem iehor, l-attrici hija ghal kollox estraneja minn kwalsiasi operat tal-konvenuti. L-azzjoni taghha, u dan hu punt importanti, ghandha l-ghan specifiku li jigi impunjat it-testment sigriet maghmul mit-testatrici Carmelina De Battista u mhux li tigi mharsa l-memorja taghha cioe` ta' din Carmelina. L-appellanti tipprova anke tissormonta l-ostakolu mahluq mill-fatt li wara kollox hija gia` ghaddiet biex tirrikonoxxi l-validita` tat-testment impunjat billi hadet il-legal imholli lilha, u dan billi en passant, tissottometti li "hija qed tigri wara principju mhux wara l-flus". Dak li jirrendi improponibbli l-azzjoni attrici gej proprju mill-konsiderazzjonijiet dwar in-natura u il-htiega ta' interess guridiku kif fuq espressi li jrid ikun wiehed dirett, legittimu u attwali. Fil-fehma kunsidrata ta' din il-Qorti l-azzjoni ta' l-attrici ma tistax tinkwadra ruhha fil-parametri ta' dan ix-xorta ta' interess guridiku.*

16. *Fil-mori ta' dan l-appell, l-attrici appellanti pprezentat nota ta' osservazzjonijiet ulterjuri fit-8 ta' Mejju 2003 segwita b'kopja ezatta taghha, pero` bil-visto tal-kontroparti appellata, fit-12 ta' Mejju 2003. F'din in-nota ulterjuri, filwaqt li l-appellanti terga' taghmel riferenza ghan-nota ta' osservazzjonijiet li hija kienet ipprezentat quddiem il-Prim Awla tal-Qorti Civili, kif ukoll ghar-rikors ta' appell, hija ghaddiet imbaghad biex taghmel xi sottomissjonijiet ulterjuri a bazi ta' l-Artikoli 605, 610, 684 u 685 tal-Kodici Civili (Kap 16) b'riferenza ghall-kwistjoni ta' l-interess guridiku. Il-kontroparti appellata wiegbet debitament ghal din in-nota permezz ta' nota responsiva in data tas-26 ta' Mejju 2003 fejn irribattiet l-argomenti espressivi fin-nota ta' l-attrici.*

*Fil-fehma tal-Qorti, din is-sottomissjoni qeghda timplika limitazzjoni fuq it-talba kif dedotta fl-att tac-citazzjoni u din il-Qorti ma tistax taccettaha. Mhux hekk biss imma jidher li l-attrici tippretendi wkoll li darba li hija tibqa' intitolata li tippercepixxi validament is-sehem taghha, nonostante li t-testment sigriet suppost kellu jigi ddikjarat null (fl-intier tieghu), dan allura jgib il-konsegwenza u jfisser ukoll li l- interess guridiku taghha (ara n-nota ta' l-attrici paragrafu penultimu)*

*“huwa mhux biss interess morali (biex jigi impunjat il-qerq li sar fuq ohtha) izda wkoll interess patrimonjali, kif jidher car minn ezami ta' l-artikoli 605, 684 u 685 tal-Kodici Civili”.*

*Din il-Qorti, wara li hadet kont tas-sottomissjonijiet tal- partijiet dwar dana l-aggravju, u fliet is-sentenza f'dan il- kuntest, ma jidhrilhiex li dan l-aggravju hu wiehed fondat. Anzi fil-fehma taghha huwa aggravju fieragh. F'materja ta' disposizzjonijiet kontradittorji fis-sentenza, il-Qorti taghna dejjem affermaw li tali kontradizzjoni trid timmanifesta ruhha fil-parti dispositiva.*

*Fil-kaz in ezami hemm talba unika, u s-sentenza ta' l- ewwel Qorti hija cara u inekwivoka. Minbarra dan, minn qari tas-sentenza, din il-Qorti ma sabet xejn kontradittorju fiha. Fl-ahharnett, l-ewwel Qorti, bhal kull Qorti ohra fis- sistema guridiku taghna, m'hijiex marbuta ma' sentenzi anterjuri u antecedenti billi l-prassi maghrufa bhala “stare decisis” li fuqha jimxu xi sistemi guridici ohrajn ma tapplikax ghalina. Ghalhekk isegwi li anke dan l-ahhar aggravju huwa infondat u qieghed jigi respint.*

*Ghal dawn ir-ragunijiet:*

*Tiddeciedi billi, filwaqt li tikkonferma in toto s-sentenza appellata, tichad l-appell ta' l-attrici appellanti bl-ispejjez taz-zewg istanzi kontriha, minghajr pero` ma takkolji t- talba ta' spejjez doppji avanzata mill-konvenuti appellati.*

**Strickland vs. Luke (1939)** - “rule of traditional jurisprudence that there can be no action where there is no interest”

**Chircop vs. Chircop (2004)** - Whoever files a case must show that one of his rights have been violated and must prove that he may retrieve an advantage out of the civil action.

**Stepson vs. Spiteri** - Action had to be in pursuance of a right or benefit protected by law.

Article 960 COCP - Legal Interest

**Mortara** - Legal interest not only of P, but also of D and other parties to the suit.

**Pulo vs. German (1921)** - action has to be exercised against the person who has a lawful interest in opposing P’s claim.

**Jacqueline Rasenberg vs. AM Language Studio (2020)** - “*presupposti processwali dawk l-ingredjenti procedurali tad-domanda gudizzjali li jaghmlu l-istess domanda bhala wahda proceduralment amissibli u legittima*”

“*Dawn jehtiegu li jezistu kemm qabel u kif ukoll fil-proposizzjoni tad-domanda gudizzjali*”

**Catherine Galea vs. Raymond Galea (2015)** - The Plea of lack of jurisdiction may be raised by both the parties and by the court *ex officio*.

**Igino Trapani Feriol vs. Planning Authority, (1997)** - Neighbours, local council and neighbourhood organisations had *locus standi* to make submissions or appeal in the planning process.

**Alfred Buhagiar vs. Prime Minister** - First time where a trade union was granted *locus standi* to represent its members in civil proceedings.

### **Collective Interests**

Class Action = *You have one party but in virtue of a prior agreement you have an agreement with other parties on a similar interest, who will be bound by judgement. Instead of 100 of the same case you have one case on the same subject.*

**Bhopal Case** - In India many people were injured as a result of a nuclear leak.

**Thalidomide Case** - A drug company which produced drugs for morning sickness in pregnancy. Those who took the drug had severely deformed babies.

The traditional characteristics of **legal interest** is that:

1. It has to be **legal**
2. It has to be **personal**
3. It has to be **direct and actual**

*Now, so the point is that the civil proceedings have to lead to a tangible benefit, the question arises can you sue for a declaration?*

Declarations of status, ownership are very imp, from a procedural perspective, a declaratory action (asking for a declaration for the court to declare that...) or remedy is acceptable insofar as it can be shown that this declaratory demand can be followed up by some further concrete action. Hence, *declaratory* remedies in vacuum are not followed up unless can be followed up by some concrete action. The interest of a D is not like that of the P. For sure there has to be a reason why to go against the respondent. But it is essential that the D be the property party against whom the claim is to be addressed.

Whoever addresses a claim against a defendant has to be ready against a response. Whoever files a claim against a D, has to be prepared for the response and be able to show why the D was involved? Why is the D here? The original question. Still speaking of D, the code of civil procedure and the practice of civil procedure, we said that practice is very imp but based on code, there is the notion of the respondent being the *LEGITIMMU KONTRADITTUR*;

The adversary party. Party against whom the party should be addressed. This has a further bearing and effect because in civil procedure there is difference between **a claim being dismissed**, accepted against the respondent, where the respondent is the party cast and condemned on the merits, against what is known as the *liberatio Observanzia Iudici*. IN OTHER WORDS, it is what we call a declaration of being non-suited = LIBERANZA MILL-OSSERVANZA TAL-GUDIZZJU - not a pronouncement on the merits but a pronouncement of the proceedings. Not a judgment on the merits, as if it were, it would be a res judicata. This is a statement that the person has a reason to be heard. LIBERAT MILL-OSSERVANZA. This shows the point that claims - there has to be a reason why a claim is allowed on a defendant, a failed obligation, - has to be a personal responsibility attributed to the respondent.

# CHIAMATA IN CAUSA

## CHIAMATA IN CAUSA JOINTER IN THE CASE AND THE INTERVENER.

It is clear and obvious that interest also apply to the jointer, since he would be a party to the case, on this 2 conflicting views that; one should not supplement for a defect for a commission in the parties originally included in the proceedings, one train of thought which says the calling of a party into the case is not there to substitute the party as a proper defendant - more moralist view VS. the more pragmatic view: if we have to decide the issue, is this a correction? If so, let's correct it.

Now, such is the importance of the party called into the case that since the jointer can be condemned to bring his own evidence, party C has the right to challenge and condemn all evidence which has been produced so far, in other words, the party challenged can also bring its own evidence. The party called into the case can end up with the bill - hence the CHIAMATA In causa the jointer can also challenge this and bring its own evidence. Therefore, whilst the request for the calling of parties into the case can be done in any stage, at any event if the COA believed a party should be called into the case, it will not call the party itself but it will send the records and the case back to first instance to call the party into the case. The COA will not call him into the case but will send it back to the first instance as the party to be called in has the right to bring new evidence. The party called into the case has to reach the interest benchmark.

# INTERVENER

Another party which is the intervener. It is generally held that the intervener is not a full party into the case and hence at least in theory, can not be condemned. The procedural possibility of intervening in the case is allowing the party who has an interest in the case to ask to be admitted to make submissions and evidence to the court, because the party has an interest to be present in the proceedings as an intervener without being condemned as a full party. Unlikely an intervener will have - a party has to be present to tell the court to tell the court certain facts. INTERVENER referred to in the code - in *STATU TERMINES*, intervener is allowed to intervene at any stage of the proceedings, even on appeal. And it has to be solely the initiative of the parties to intervene, not the case of the court or party to ask.

### *How is the intervener treated?*

The courts are not very consistent - some allow, to file pleadings. Some cases the intervener is allowed to bring evidence, in others he is allowed only to bring submissions.

2 relevant considerations - the first is that in our system, saving intervener and saving the calling to the case, the original parties can not change except through **death**, the heirs succeed or thought **change in status** (directors change).

**Ellul Sullivan vs. Abela (1971)** - Intervener does not become party to the case, not P or D. The Court still must consider his submissions. He does not become "*legittimu kontradittur*". It is different from *chiamata in causa* whereby he is a full and proper defendant. Who intervenes, can not be "*ikkundannat jew illiberat*" but can present documents and take an active role.

**Testaferrata Bonici vs. Micallef** - "*Intervenuti*" had direct legal interest since the Court's decision would affect their property.

**Maltacom Plc vs. Raymond Mallia 2003, Court of Appeal** - P filed a claim against D for Lm3554, for unpaid bills of telephone service installed at a property in San Gwann (on Mallia's request). He said that he is not the legitimate defendant since the property was occupied by Missoum. The First Hall ruled in favour of P ordering D to pay the full amount as the relationship of P company was always with D.

Missoum was called into the case but was eventually released from the claim. Upon appeal by D, the appeal was dismissed and Mallia had to pay as he was contractually liable. He was claiming that Missoum should be liable. But the COA upheld the First Hall's decision and dismissed Missoum from the case as the contract was between P and Mallia.

**Giuseppe Farrugia vs. Farrugia** - *Chiamata in causa* should be used to call someone in the case when such need arises during the case and not when this exists from the start of the case. If this is the case. The *chiamata in causa* can not be granted.

# L-INTEGRITA' TAL-GUDIZZJU

For a judgement to be effective, all interested parties have to be part who have a potential interest - this is what we call *INTEGRITA TAL-GUDIZZJU* - all parties who potentially can be involved, have to be involved in the proceedings. There is a problem of enforcement, so very often parties are included in the proceedings. Underlying, unifying factor in the thinking of traditional interest. So far we have said that we are discussing the *PRESSUPPOSTI PROCESSWALI*.

Legal interest confers **LOCUS STANDI** - why are you here?

Because you have an interest. What is the technical reply? I am an interested party and my interest gives me *locus standi* - INTEREST DEFINES LOCUS STANDI, the right to be present during proceedings. Lack of interest creates a *LIBERAZIO*. This code was written - interest is nowhere defined but you get the odd reference to interest.

**Article 236 of the COCP** - speaks of the *LAPPELLO DEL TERZO INTERSSATO*. A party who is not in any way a party to the proceedings but has an interest in outcome to the proceedings, may appeal, if I see you are not interested to appeal, you may appeal saying that I have grounds for your *KONVENJU*.

**236.** An appeal may be entered not only by the contending parties but also by any person interested. Interested third parties may appeal.

Articles 236-238 of the COCP - which speaks about which parties may appeal - not only the contending parties. We have a very imp article, article 237: have not written and stated that a person – and then, in article 238 - sub 2 - we have a variation to the principle that a *res judicata* only binds the parties involved with 3 exceptions; a party having an interest in the assets, joint ownership and joint liability. As a starting point, we need to look at this - *res judicata* means that once the matter has been finally decided upon there can be no further related litigation. And historically there are 3 requirements to *res judicata*:

1. **Aedem Persone** - the same persons - or personal successors - it means that a judgment obtained amongst 2 personal successors in inheritance does satisfy the requirement of a *res judicata* - does not cover successions in title -
2. **Aedem Res** - The same object in litigation
3. **The same case**

2 and 3 are often blurred in the sense that these 2 requirements in substance refer to the object which is in contestation, the *res*, but very often the object of controversy is given into the *causa petenti* - *kawzali*, legal basis, cause of action. important for the *talba* to be the same.

KAWZA PEDENTI => PREMISSA IS VERY OFTEN LINKED TO THE DEMAND - one has to look at the 2 writs, what was demanded in one and what was demanded in the other. What was a stake was also defined in the decide, operative part and the reasoning as clearly a decision is preceded by legal reasoning and legal explanation. Hence, 2 and 3rd requirements include a mixture of these 2 elements.

**John u Maryanne konjugi Buhagia vs. Registratur tal-Qorti, Marixxall Leonard Falzon u Josephine Mangion f'isimha propju u bhala legittima rapprezentanti ta' wliedha minuri Miriam, Nicolette u Joseph ahwa Mangion ghall-kwalsiasi interess li jista jkollhom u b'nota ta' l-1 ta' Novembru 2001 Miriam u Nicolette ahwa Mangion assumew l-atti tal-kawza minflok ommhom Josephine Mangion stante li illum huma maggiorenni, 4 ta' Gunju, 2004, First Court Civil Court**

Sentenza tal-Bord u l-Mandat ta' Zgumbrament

Illi mill-provi u minn ezami ta' l-atti relettivi l jirrizulta manifest li l-atturi ma kienux parti la fil-proceduri quddiem il-Bord tal-kera fil-kawza fl-ismijiet "Josephine Mangion pro et noe vs Mary Louise Camilleri et", la fis- sentenza fl-istess ismijiet li nghatat fis-19 ta' Jannar 1993 u lanqas fl-atti tal-mandat ta' zgumbrament [nru.29/93] fl-istess ismijiet. Ghaldaqstant it-tezi tal-atturi li s-sentenza ma tistax tiffirma stat fil-konfront taghhom issib gustifikazzjoni fil-ligi, u t-tieni talba attrici ghandha tigi milqugha.

Il-bazi legali ta' din il-konkluzjoni tinstab fl-Artikolu 237 tal- Kap.12 li jiddisponi testwalment: "Is-sentenza ma' tista' tkun qatt ta' hsara ghal min, la huwa nnifsu u lanqas bil- mezz ta' l-awturi jew ta' rapprezentanti legittimu tieghu, ma jkunx parti fil-kawza maqtugha b' dik is-sentenza" - regola fundamentali li tirrifletti l-massima antika: res inter alios acta vel judicata aliis nec nocere nec prodesse potest.

Fuq l-istess binarju legali jinghad li l-mandat ta' zgumbrament ma jistax jigi ezegwit kontra min mhux indikat fl-istess mandat. Dan il-principju gie applikat mill-Onorabbli Qorti tal-Appell Kummercjali fil-kawza Gulab Chatlani vs George Grixti fejn gie deciz li mandat ta' zgumbrament mahrug kontra l-inkwilin originali ma setghax jigi ezegwit kontra s-sub inkwilin li ma kienx indikat f'dak il-mandat u li kien res inter alios acta f' dawk il-proceduri. Ghaldaqstant l-eccezzjoni tal-konvenuti li huma ghandhom titolu ezekuttiv biex jizgombraw lill-atturi hija nfondata fil-fatt u fid-dritt u ghandha tigi respinta.

**Article 116 of the Constitution** - Actio Popolaris - Another type of legal interest in Constitutional Cases

*116. A right of action for a declaration that any law is invalid on any grounds other than inconsistency with the provisions of articles 33 to 45 of this Constitution shall appertain to all persons without distinction and a person bringing such an action shall not be required to show any personal interest in support of his action*

**Michael Vella vs. PM and Broadcasting Authority** - At first instance, creatively the Court, with the late Justice Wallace Gula found that the political party had sufficient interest to require the proper constitution of the broadcasting authority. The demand was that the Gov. be ordered to constitute the broadcasting authority as it was a watchdog on impartiality and the threshold on legal interest was surmounted as the court held at first instance, the court held there exists sufficient public interest in the sense, which as a question, there is an interest to continue litigation, Gov. had changed and broadcasting auth. was instituted and proceedings were not continued. Initial sweep at judgment of first instance - mid 1980s. First real change came to be felt with the first planning authority act in 1992. And this first planning authority act introduced the right of the citizen to object and be involved in the development application. The point is that interests not only of the applicant developer but also of the affected parties.

**Igino Trapani Feriol vs. Planning Authority, 30th May 1997** - Important judgement - The point of interest in a planning context was extended to immediate neighbours, local council, and of course neighbourhood organisation. Planning appeals board held that the neighbours and neighbors association had a *locus standi* to make submissions and appeal.

**Sliema Local Council vs. The Planning Authority, 20th August 1998** COA Chief Justice - he COA here qualified and examined the meaning of “*legal interest*”. In essence, it concluded that legal interest related to quality of life, so the usual argument is that my property will lose value. The court noted that here it was related to quality of life. Factors not only ekonomici but issues such as light and noise pollution, traffic incidents were relevant factors to define interest, within a planning context, and therefore to justify *locus standi*. So we have here, the element of quality of life which affects one’s life. A development of the DOM MINTOFF CASE which held that beyond the value of the property, there is also the enjoyment of family life and privacy. There is also the quality of life, which the court here in the Attard Montalto case developed this notion.

**Aarhus Convention** - Aarhus is a village in Denmark. They had the EU at one point in time joined as a party in the Convention, as did Malta in 2002. And the EU joined and ratified later. 2 points in this convention:

1. That the first is the **right of the citizen to information** - Citizens where there are developments are entitled to access records. Aarhus convention granted citizens the right to be given access to information.
2. **The right of the citizen to participate** - This Aarhus Convention guaranteed to the citizen the right to be able to - does not go into detail as to how the citizen is entitled to participate but citizens are heard and make their points and leave it to domestic legislation to then qualify the exact terms. This then brought to the core, the locus standi of NGOS. In this context read cap. 551 of the laws of Malta, which are the environment and planning review tribunal act. Today it still exists.

**Environment and Planning Review Tribunal Act, Cap. 551 - Article 11** - refers to the jurisdiction of the environment and planning review tribunal act. The tribunal under Article 11 has the jurisdiction and competence to decide on scheduling and conservation orders, both by interested and affected parties. The tribunal has the competence to hear appeals by any interested 3rd parties. It is allowed to any 3rd party to register as a party in the proceedings, the interested 3rd party, this interested 3rd party has to be asked to be an interested 3rd party on planning grounds. Any interested 3rd party may ask to become a party and what is also very relevant is that such a 3rd party does not have to show a direct personal interest as the traditional rules.

**Article 22(1) of cap 551.** - Where an appeal has been lodged by an interested 3rd party - when you appeal - not necessary to demonstrate personal direct interest - written that document of juridical interest does not apply to interest. The Aarhus Convention gave the right to any person to intervene in issues which *do not need to show a direct interest*. Same applies when the tribunal has jurisdiction and competence to consider appeals of the decisions of the ERA.

**Article 47 sub 9 Cap 551.** Any person on planning and environmental grounds - even if no personal grounds - therefore in this what the question of *locus standi* of NGOs became

**19th January 2017** - *Din L-Art Helwa* - Planning Appeals Board and the Appeal no is 265/2016 and 272/2016. One related to a high rise in Sliema town square and another in Mriehel. The question which arose was whether *Din L-Art Helwa* as a registered NGO had *locus standi* to appeal from the permit. The point decided here is that the planning appeals board - the regulations we have just discussed put an end to the question.

### **Cultural Heritage Act - Cap. 445**

**Article 68 of cap 445.** - This control of the movement of cultural heritage goods - rather than by this general tendency to widen the broad base of the legal interest.

The state and the superintendent for cultural supervision has various powers to control export and re export goods - requires the permits of the cultural heritage. The superintendent has a right of first refusal on any goods of first refusal.

**Cap 520 - Collective Proceedings Act** - Consumer Conservation - you will recall that the consumer and competition act - the point here is that there are certain areas listed on the schedule - page 10 on the law.

Collective proceedings - group action or class action - proceedings which are by a class representative - and may be instituted by a group action or a representative action. To avoid contributory cases - there common bit not necessarily factual or legal issues. This regulation has

interesting facts but we go through part of it. Collective proceedings can be instituted by a group action - no. of parties appoint a representative and because of this communality of facts or law, this appointed representative will pursue proceedings and will bind all those who have opted to have participated in the proceedings.

*"collective proceedings"* means proceedings which are brought by a class representative on behalf of persons whose claims raise common issues and which may be instituted as a group action or a representative action;

Relevance here is that you do not need to have 50 parties with 50 of them making submissions and 50 judgements, a more efficient way of conducting proceedings where there is a representative of proceedings in a group action. There is this novelty to *locus standi* - somebody whom a number of parties have by outcome and proceedings and there is also a pre-trial procedure. Back in fashion even locally as the idea of some Judges is to try and appeal the spirit of the report. Collective proceedings can not be instituted without this term, can not file a group or representative action for this pretrial proceeding and these are 5, 6, 7 stating the requirements of the pre-trial proceedings. It has interest, a bearing on the legal interest.

**Article 12** -Representative action - registered association of what is referred to as a constituted body, one which is approved by - it is a consumers association on the cast members - the term here is that a consumer association is a representative action, the first is a group action the second is a representative action.

# **Jurisdiction and Competence**

**Jurisdiction** is the power of a court to decide a matter. Jurisdiction is partly defined in article 742 and 743 of the COCP. Another important rule is Brussels 1, which recognises the choice of court. What is jurisdiction, tends to be territorial. Only exceptionally that courts assume extra territorial jurisdiction and, may be - jurisdiction is presumed and is not a matter of choice.

**Competence** entails that once jurisdiction has been established, it is the division of power between various courts. Competence is the division of this power and we know that there are various courts which have their own specific subject matter. There can be no question of competence without jurisdiction. If the presupposti stops, - one is that there would be a court which would accept jurisdiction and competence. THE FIRST IS COMPETENCE RATIONE MATERIE (**competence by the subject matter**). In other words, where the power to hear and decide on a particular dispute is granted to a court on the basis of a subject matter, it could be criminal. Example, the power of the various boards particularly the rent board, administrative review tribunal. Then there is competence, COMPETENCE RATIONE MATERIE, then competence RATIONE VALORIS, in other words, competence by the value of the interest thing, unsophisticated put, up to 5k, it is competence to euros 5k over 15 it is within the first hall. An indeterminate value, always and invariably within the competence of the civil court first hall as always questions of real rights over immovable.

**Profs Caruana Galizia** - defines jurisdiction as the power judicial authorities exercise in the performance of their functions, and to hear and decide issues. Such powers in Malta are granted to the Judiciary by the Maltese Constitution. The Plea of jurisdiction should be raised in *limine litis*.

**Article 21 COCP** - Maltese is the Language of the Courts but there is a provision for proceedings to be heard in English where the party is English Speaking.

**Article 29 COCP** - A rulemaking board to provide for the management of sittings and the management of the Court.

Advocates and Legal Procurators are deemed to be observant of the law - underlines propriety of behavior, correct behavior in front of the courts. An advocate owes duties to a client, when we appear before the courts, we are court officers. Do not forget as this imposes the duty of correctness of loyalty towards the board.

**Article 32 COCP** - Speaks on the Civil Court - having established a Commercial Court, which existed until 1995, then abolished, then a lot of time, years were wasted on deciding who was competent in the civil or commercial court at the end, the same law as applied. The civil court

assumed the competence of the commercial court. The logic of the commercial court was that historically acts of trade in the commercial code attracted the competence of the commercial court. More expeditious court. You Need specialised courts. The point I am making is that since 1995, the Civil Court article 32 sub 2, the court shall take cognizance of a civil and commercial nature. Number of subsidiary laws which define in detail the competence of various courts.

**Article 32.** (1) *One Judge shall sit in each section of the Civil Court.*

(2) *The Civil Court shall take cognizance of all causes of a civil and commercial nature, and of all causes which are expressly assigned by law to the said Civil Court.*

**COURT OF APPEAL** - Superior and Inferior competence - Superior is made of 3 Judges (hears appeals from family court, limited appeal in asset recovery section and also from the not invariably the commercial section, no appeals from companies act 402 actions but a right to challenge this order under companies act and an appeal from this judgment of challenge, so you disagree with the order, you can't appeal but can file a writ, sworn application from which there is an appeal).

Then the COA in its inferior competence is made of 1 judge - wide competence, from many courts except those which are and also except those from admin review tribunal and - a very busy court. In income tax, beyond a certain threshold, above 5k eu it is composed of 3.

**First Hall, Civil Court** - In money claims over 15k eu - any issues relating to ownership - not remit of court of mag but the first hall civil court. The First Hall attracts any real right questions and the reasoning of this is 47 sub 3 - causes - supplemented by a provision on how to determine jurisdiction. Indeterminate claims, undefined value and of property claims not Court of Mag. (NO DETERMINATE VALUE).

**Courts of Magistrates in Gozo** - the idea was to create a First Hall in Gozo and Family Court but not in force - hence the division of Court of Mag. in inferior and superior jurisdiction applies. The Courts of Mag. has an inferior jurisdiction, equivalent to a Mag in Malta, and the Courts of Mag in Gozo Superior has a competence equivalent to First Hall Civil Court Malta.

### **Thesis Alexander Sciberras - Reforming the Principles of Juridical Interest**

In Italy, Article 100 of the Italia Codice di Procedura Civile, defines that a person must have legal interest, unlike Malta whereby our law does not provide this expressly. The only reference we have is in Article 236 of the COCP and Article 960 of the COCP.

*“Hence, if interest is necessary for the intervener and 3rd party appellant, it is even more necessary in the case of the plaintiff and the defendant.”*

**Mortara** - such a person who is a party to a case must be in a position to stand to gain or lose from the decision given by the court. It can be said that interest is a prerequisite as much as a requisite to an action. Without a recognised juridical interest, no person may sustain or even initiate an action before the court.

**Veronique Amato Gauci vs. Marco Zammit** - *“presuppost specifiku tal-azzjoni gudizzjarju hu l-interest guridiku” “Dan ghaliex, kif maghruf u accettat pacifikament, ma jistax jinghad li tezisti azzjoni minghajr interest”.*

**Joseph Pace vs. John Zarb** - *“il-mizura tal-interest hija determinata u cirkoskritta mit-termini tac-citazzjoni, Mill-ogget tad-domanda u mill-mottivi indikati fic-citazzjoni.”*

**S.L. 12.19 - CIVIL COURTS (ESTABLISHMENT OF SECTIONS) ORDER - 16th December, 2003**

**Article 2**, there shall be 5 sections of the Civil Court to which the category of cases will be assigned - the sections are family section, voluntary section. Asset recovery, general jurisdiction - this merits a no man's cause and this was a wise amendment to the general jurisdiction which is the First Hall of the Civil Court. More study and discussion is required but the reasoning is that where no other court is competent then it is by default the First Hall. Basis of this reasoning is found in judgements of the late 1800s which defined the general and - of the Civil Court First Hall. This has not been in depth.

**2.** There shall be five sections in the Civil Court to which shall be assigned, as provided by this Order, the category of cases, hitherto falling within the jurisdiction of the Civil Court (First Hall) and the Civil Court (Second Hall), or as may be assigned to the Civil Court by any law.

Civil Court to have four Sections.  
*Substituted by: I.2018.21.*  
*Amended by: V.2021.65.*

**3.** The sections of the Civil Court shall be the Family Section, the Voluntary Jurisdiction Section, the Commercial Section, the Asset Recovery Section and a general jurisdiction to be styled the First Hall of the Civil Court.

Designation of Sections.  
*Substituted by: L.N. 8 of 2004; I.2018.21.*

Filing in the wrong court - not as tragic, it is sent to the right court - it is the point here that the - family section: rights and obligations of spouses, marriage obligations, rights and duties of ascendants and descendants, separation, divorce, filiation and parental authority, civil unions, by default - there is something a bit unclear that the competence of the family section is only concerned with surname issues but the civil union act says that one should try and be guided by the principles of marriage and quality of spouses. Civil court family section.

**4.** To the Civil Court (Family Section) shall be assigned those cases falling within the competence of the Civil Court and which relate to matters regulated by:

Assignment of cases of the Civil Court (Family Section).

(a) Titles I, II and IV of Book First the Civil Code;

Cap 16.

(b) the Maintenance Orders (Facilities for Enforcement) Ordinance;

Cap 48.

(c) the Maintenance Orders (Reciprocal Enforcement) Act;

Competence of the voluntary jurisdiction - are adoption, guardianship, interdiction, incapacitation, absentees, - these are the rules of the civil court where also the family section has competence. Second Hall has the power to dispense certain impositions in the creation of the entail, the procedure for edicts was a procedure whereby the hypothetical or privileged creditors cannot be praised. Then the voluntary jurisdiction has a role in interdictions and incapacitations... executorships, curatorship of the interdictaries.

- 5.** To the Civil Court (Voluntary Jurisdiction Section) shall be assigned applications falling within the Competence of the Civil Court and which relate to matters regulated by:
- (a) Titles III, V, VI and VII of Book First of the Civil Code; and
  - (b) Part II of Book Second of the Code of Organization and Civil Procedure.

Assignment of cases to the Civil Court (Voluntary Jurisdiction Section).  
Cap. 16.

Cap. 12.

The Commercial section refers principally to the Companies Act, Pre-Insolvency Act, Competition Act, and Personal Bankruptcy and issues related under regulations under the competition act and the representative action, Consumers Act. Article 5A - the 5B is that the → Cap. 621 proceeds of crime act. Specifically for our purposes article 38-53, cap 621. Preambles are useful and very good in practice to know but for our purposes part 5 - discussing special procedures before the civil court recovery section.

Assignment of cases to the Civil Court (Commercial Section).  
Cap. 13.  
Cap. 386.  
Cap. 378.  
Cap. 379.  
Cap. 510.  
Cap. 632.  
*Added by:*  
*I.2018.21.*  
*Substituted by:*  
*XVI.2019.72.*  
*Amended by:*  
*XVII.2023.62:*  
*XXIII.2022.14.*

**5A.** To the Civil Court (Commercial Section) shall be assigned applications falling within the competence of the Civil Court and which relate to matters regulated by the Third Part of the Commercial Code and any regulations made thereunder, by the Companies Act, by the Pre-Insolvency Act the Competition Act and any regulations made thereunder, by the Consumer Affairs Act and any regulations made thereunder, and by the Malta Competition and Consumer Affairs Authority Act, and by the Representative Actions (Consumers) Act.

Assignment of cases to the Civil Court (Asset Recovery Section).  
*Added by:*  
*V.2021.65.*

**5B.** To the Civil Court (Asset Recovery Section) there shall be assigned applications relating to matters concerning the recovery of proceeds of crime and to non-conviction based confiscation of property by the State or by an entity of the State as may be provided by any law from time to time in force and all other causes expressly assigned by law to the said section of the Civil Court.

Assignment of cases to the First Hall of the Civil Court.

Amended by:  
L.N. 8 of 2004.  
Substituted by:  
I.2018.21.

Registrar to assign cases.

Chief Justice to determine Section in particular cases.

Court of Magistrates (Gozo) in its Superior Jurisdiction.  
Cap 12.

**6.** To the First Hall of the Civil Court shall be assigned all cases within the competence of the Civil Court and not assigned to the Family Section or the Voluntary Jurisdiction Section or the Commercial Section.

**7.** Subject to any rules of court or to any regulation, cases shall be assigned to the different sections of the Civil Court by the Registrar in accordance with the category to which the case refers.

**8.** Where any dispute arises as to whether a case should be assigned to one section or another of the Civil Court, or where a case involves more than one category falling to be assigned to different sections of the Civil Court, the matter shall be referred to the Chief Justice who shall, *in camera*, determine the section to which the case shall be assigned. The determination by the Chief Justice shall be registered in the records of the case and shall be final.

**9.** Without prejudice to the provisions of article 54 of the Code of Organization and Civil Procedure there shall be in the Court of Magistrates (Gozo), in its Superior Jurisdiction, two Sections to be styled respectively "The Family Section" and "The General Jurisdiction Section". To the Family Section shall be assigned cases falling within the competence of that Court in its Superior Jurisdiction and which are regulated by the provisions referred to in article 4(a) to (e) of this Order, and to the General Jurisdiction Sections shall be assigned cases falling within the competence of the said Court in its Superior Jurisdiction which are not assigned to the Family Section or to which the said article 54 of the said Code does not apply. Articles 7 and 9 of this Order shall *mutatis mutandis* apply with respect to cases falling within the competence of the said Court in its Superior Jurisdiction with regard to the assignment of cases to the various Sections.

# **CHAPTER 621 - PROCEEDS OF CRIME ACT**

There are also rules whereby interested 3rd parties may challenge and intervene. This is article 38 sub 6, Cap. 621 - the Court shall issue and order confiscating property on the findings that – all issues. The Criminal Court makes a list of assets which are subject to confiscation. So Article 38(1) - it shall include a confiscation order confirming such order, on a balance of probabilities, which is subject to confiscation. The after conviction, court shall order asses to confirmation and this has to be subject to the civil court.

## **PART V**

### **Special Procedures Before The Civil Court (Asset Recovery Section)**

Determination of  
property subject to  
confiscation.  
*Substituted by:  
VI.2024.25.*

**38. (1)** When a Court of criminal jurisdiction sentences a person convicted of a relevant offence, it shall include in its sentence an order, hereinafter referred to as a "confiscation order", confiscating any property which the Court determines, on a balance of probabilities, to be property subject to confiscation, as defined in article 3(6), as a consequence of the conviction.

(6) The Court shall issue an order confiscating property pursuant to this article based solely on its finding that the property is subject to confiscation and without regard to the ownership or the rights of any third parties over the property. All issues regarding the rights of third parties shall be determined in separate proceedings in accordance with article 39. Accordingly, third parties may not participate in the determination of which property is subject to confiscation in accordance with this article.

The accused, or party found guilty can challenge and the point here is that the civil court recovery section will simply decide on the face of the record, simply it will decide the confiscation of those - the Civil Court will simply order and confirm confiscation on the face of the record without examining ownership rights, up to the accused to challenge ownership rights.

Articles are based on what grounds - it is unclear whether the discretion of Criminal Court can be reopened, probably not. Third parties have also the right to challenge saying the confiscation order is not property of the accused but - it therefore should not be subject to confiscation and generally the level of evidence should be that the property involved subject to a confiscation order was done in a bone fide order.

**Article 43 Cap. 621** - where the state has the right to request this section - right to ask this section of the civil court to confiscate assets, absent a criminal conviction, so non conviction

based confiscation. This happens in terms of article 43 sub 1 - where perpetrator absconds or is not in Malta, where perpetrator is dead or dies during the procedures. These refer to drug offences, terrorism, money laundering, international sanctions. Sanctions carry this risk of confiscation. This is a form of confiscation in rem - article 44 sub 1. Burden of proof to show that the property is involved in these offences.

**Article 44 sub 2 -**

actions in rem against property subject to - confiscations.

Competence of the Civil Court (Asset Recovery Section).  
*Amended by: VI.2024.29.*

**44.** (1) The Civil Court (Asset Recovery Section) shall be competent to hear and determine all matters arising under this Part if the property subject to confiscation is found in Malta or if the offence giving rise to the confiscation occurred in Malta.

(2) Actions under this Part shall be actions *in rem* against the property subject to confiscation and not against individuals. The burden of proof required in proceedings under this Part shall be that applicable in civil law proceedings.

(3) The Government may commence an action under this Part to recover any property subject to confiscation. In such a proceeding, the Government is the plaintiff, the property shall be designated as the *res* subject to confiscation, and persons contesting the confiscation are interveners who may intervene in the action upon showing that they have an ownership interest in the property.

(4) The burden of proof shall be on the intervener to establish an ownership interest in the property and to establish any affirmative defence under article 49. Otherwise, the burden of proof shall be on the Government.

**S.L. 12.20 - THE CIVIL COURT (FAMILY SECTION), THE FIRST HALL OF THE CIVIL COURT AND THE COURT OF MAGISTRATES (GOZO) (SUPERIOR JURISDICTION) (FAMILY SECTION) REGULATION**

- Overlap between 3 regulations trying to create and define the competence of the various courts. In these regulations which are courts of mag, family section,.. These regulations provide for the appointment of mediators, child advocates, support persons, so basically there is nothing much to say.. What is relevant is that to start a separation or divorce you have to file a letter or rikors etc.
- A qualified privilege that what was said in front of mediator can not be replicated further in the court proceedings - it seems that there are conciliation support persons - Article 67G civil code.
- Article 4 sub 10 SL 12.20 - + Article 5- there exists this power and this possibility of a remedy

- Why the commercial section was included in 5A Patrick can not understand. Where decree to continue by contentious procedure, here we have a form of pre-trial procedure , which is a bit particular to the family court.. The classic pre-trial procedure, which is evolving but that is that prior to hearing time, parties exchanged affidavits... etc

**Article 7sub 2 S.L. 12.20** - Interesting reference to pre-trial period - the court in sub 2 shall fix time limit where this pre-trial procedure - not identical with next SL we will look at but idea here is to have a pre-trial procedure which will close within a year.

Not going into whether mediation is a waste of resources but article 10 S.L. 12.20 -> disputes, if you want to change a deed, the power of the *REBUS SIC STANTIBUS* process, mediation here is mandatory.

### **S.L. 12.09 - COURT PRACTICE AND PROCEDURE AND GOOD ORDER RULES**

Court practice and procedure and good order rules. This bears the elegant drafting of the hand of the late Chief Justice Mifsud Bonnici. Not only reflects his style of writing but thoughts at the time. Naturally, one has to read things in context, but these remain the court practice and procedure rules - last time this was done in 1932. Give attention to subheadings - first refers to part 1 Constitutional matters, and these ride directly into chapter 47 the enforcement provisions of the Constitution, proceedings before the Cons. Court First Hall, are by application, articles involved and also note that 3 sub 2, the redress requested, so this doesn't bring nullity but it is noted that the redress is requested and parties go a step further asking for a provisional remedy. The remedy has to be indicated.

**Article 4** - There is enjoined on the court the duty to give an early hearing, to fix a date of hearing within 8 working days - not adhered to but unless there is urgency, respondents have 20 days and unless there is a reference of when the civil court refers, the ordinary time limit for application is 20 days not 30 days as in the COCP. If the procedure is an order for reference, and orders the Constitution Court competence, it is 8 working days. Hence, note these as they are NOT THE SAME AS IN THE ORDINARY CIVIL CASES.

**Article 6** - Once a case is for hearing, expeditious case, directory guide that there is the urgency in human rights proceedings. We will come back to this, when we speak of the sessions of court, victory, epiphany and pentecost, but here there's a hint that in article 8, in non-urgent cases, courts will avoid hearings from July to Sept.

**Article 8** - Unclear if article 8 applies to issues in the constitution or generally, the indication is that it is of general application, but notwithstanding the foregoing provisions of these rules, these refer to human rights cases. Whereas the general court holidays of the sup. Courts, Civil Courts

of Voluntary Jurisdiction are July till 15th Sept. In Constitutional cases, this applies only in non urgent issues, in urgent issues, the normal holidays do not apply.

**Part 3** - is a general directory but useful guide to the way cases are held. Cases are drawn by lot, administratively drawn by lot then the judges to whom cases are assigned are a matter of priority, general urgency.

**Article 10** - is not generally applied, which prohibits the adjournment of cases - where a period of late 90s, and a period of great enthusiasm. We try to organise the courts but this says that cases are only adjourned exceptionally and by application only 2 weeks before. More relevant is article 11, conduct of proceedings which establishes that evidence is either in person or by affidavit and there is a general presumption of the restriction of technical referees, one has to look at the historical context, whereby there were many cases before legal and technical referees which really should have been heard by the courts. The courts do not need opinion of perit legali, unless the case is highly specialised.

**Part 4** - speaks of a pre-trial procedure - here the pre-trial process is more of an administrative organisation in nature and it seems to me that this is to be generally

Pre-trial hearing is to identify the factual and legal issues article 13 sub 10 - corrections needed - if a claim is not liquidated, the administrative aspect, the playing of hearing and sittings and what will happen. Contemplated here - not identical with the retrial in the family court situation. The article I referred to earlier, Article 11 sub 2 where no pre-trial hearing has taken place, a judge has an organizational discretion to either appoint a case for hearing and carry out the planning of the case on the first hearing or appoint a pre-trial hearing.

Pre-trial hearing can be presided by a judicial assistant –part of the functions but in practice, today it is difficult, there are some who try to carry out with greater emphasis a pre-trial procedure. Others proceed on the old system that something happens every 3 months.

WE HAVE A [PRETRIAL PROCEDURE SYSTEM DEPENDS ON WHICH CASE, BUT DEPENDS ON HOW THE COURT WILL GIVE EFFECT TO PRETRIAL PROCEDURE

**Part 5** - Court practice and procedure - today overtaken by email communication - Article 173 COCP

**Articles 17-20:** Refer to the recognition and enforcement of foreign judgment - it is clear Brussels 1 first hall, Brussels 2, Family Court, Child Abduction Act: proceedings under the EU regulation - family court, the points here to note are that under the Hague and Luxembourg Conventions, it is again the family court but the registration of (Article 19 ) the Hague

Convention is the registry of the Court of Appeal. Now, that is for registration but for any issue on any notice, the Civil Court Family section in an issue of child abduction has to give an early hearing, however appeals from child abduction cases, 8 working days (from the judgment of the court of first instance to appeal).

**Article 21** - to note a reference to the court of justice, we have had a view that there is an article telling us what we should and should not wear, before the courts.

Article 28 - The forensic year - The first is victory session, then epiphany up till tuesday of holy week from 7th jan and pente coste is then holidays.

### Relevant Articles to Determine Jurisdiction

**Article 741 COCP** - looking at the sub-title of *pleas to the jurisdiction* - Articles **741-777**. Now the first rule here is where is it lawful to plead the jurisdiction of the maltese courts?

Article **741(a)** - Where an action is not within the jurisdiction of the courts. The Maltese courts have the jurisdiction confirmed by procedural regulations and EU regulations such as brussels 1 and 2.

### **When is it lawful to plead jurisdiction in a civil court?**

Distinction between *jurisdiction* and *competence*:

(a) *Maltese court*: EU regulations apply.

(b) If there is a mistake or wrongful institution of proceedings before a court that lacks competence, this previously had serious adverse consequences. For example, the court would dismiss the case outright for lack of competence.

**Article 741(b)** - is a wise amendment - which is to the effect that if there is a mistake or a wrong institution before a court which is not competent. In the past it had serious adverse consequence in the sense that the court would simply throw out the case as it did not have the competence however, in 2016 amendment has provided that in the event that proceedings are instituted before a court which does not have power, it is not anymore the end of the story but proceedings are sent to that court which the first court considers to have competence. If you institute lease agreements in family court, not the end of the story you get a few looks but then you file in the ren board, if rent board, is not within its competence as competence on the earlier courts, then the receiving court sends the matter to the court of appeal for a final determination. First court, then there is the receiving court, then if the receiving court disagrees it will send the matter to court of appeal for determination.

**Article 774** - speaks about how far a court in its own motion can raise the plea of lack of jurisdiction when this is not needed. As you know a party can choose to submit to jurisdiction of the courts even though it can plead lack of jurisdiction. 774 refers to situations where a plea to this effect, when court shall - jurisdiction is a matter of public order, not up to court, unless arbitration - revise grounds of jurisdiction hence there is his character of public order, indeed historically, civil procedure was also considered one of public order, then over time, it acquired dispositive character - changed to more management of proceedings - but the imperative public order character has not been entirely lost and it is implied where for example not within the power of court to extend or change mandatory time limits, so when Article 774, The Court shall of its own motion, declare that it has normal jurisdiction - The circumstances when the court is bound of its own motion and the good practice of the court says that the court is raising of its own motion the point of jurisdiction

React in 1995 and the first ground is that where the action is one where the jurisdiction is one of the grounds of jurisdiction and the D is contumacious, has not replied and -

1. Not within jurisdiction of Maltese Courts
2. D is in Kontumaci
3. Or is an absent defendant represented by curators? The thinking behind this is why impose these 2 requirements?

**Why not leave within these 2?** *KONTUMACJA* is deemed an opposition but no substantive position taken hence defendant respondent can not - plea the jurisdiction of the court - the same with an absent party, not resident in these islands the reason is that even if the absent defendant is represented by a curator the curator may choose not to plead jurisdiction and nevertheless the court is given this mandatory task to raise itself. This is now it seems that this can be raised even at appeal stage, this remains a discuss question - as if the party enters an appearance without lack of jurisdiction here is tacit submission - but what if it is stated that if the COA started to think absent appeal of jurisdiction it may not be within the jurisdiction within the maltese course - it is at liberty to open at appeal stage

**Why impose these two requirements?** In the case of *kontumacia* or absent defendant, the Court must intervene to protect the jurisdictional framework because neither the defendant nor their representative is likely to raise the issue themselves. If a party enters an appearance without pleading jurisdiction, this is considered *tacit submission*.

However, the jurisdiction issue i.e. belief the case may not fall within the jurisdiction of the Maltese courts, can be raised at appeal stage and provided the respondent is in default (*kontumacja*) or absent.

Ratione Materiae vs. Ratione Personae:

**Article 743 and 744; Counterclaim and Jurisdiction:** articles 743 and 744 - principle is that a counterclaim extends jurisdiction but not competence.

Counterclaim - a situation where a respondent. D claims back in records of the same case where matter is connected and claimant becomes a respondent and the respondent is a claimant in the counterclaim procedure. A counterclaim extends jurisdiction but not competence, by counterclaiming a respondent is necessarily submitting to the jurisdiction of a court and a counterclaim is incompatible with the plea of lack of jurisdiction. To the contrary, counterclaim does not necessarily confer competence to the original court because the counter claim may be beyond or less than the competence.

Ex: A claim in front of the First Hall, exceeds 15k counter claim for 2k. The fact for counterclaim does not given *ratione valoris* to 1st court and the counterclaim will be null.

**Article 772;**

Multiple Defendants:

This article applies when there are multiple defendants.

Rule: If more defendants reside in Malta, they can raise a plea for the case to be heard in Malta, and vice versa.

Example: If a deceased person was a resident of Gozo, but the heir resides in Malta, the heir cannot claim privilege in fori (a privilege to have the case heard in a specific court).

There is a general principle that jurisdiction, both *ratione valoris* (by value) and *ratione materiae* (by subject matter), is determined by the plaintiff's demand.

The defense may raise a plea challenging the jurisdiction of the court.

**Article 745** - relevant because there are situations in the code where precedence is a defining factor of jurisdiction - will move on to *privileggi infori*, determined by residence of the parties, in 745 are rules to determine and establish where jurisdiction between various courts arises the presumed residence of parties all those whose affairs are administered by others. This is sometimes overridden by competence of parties.

**Article 746;**

This article refers to jurisdiction based on the value of the claim (*ratione valoris*).

Remember:

**Actions in the Court of Magistrates (CoM) concerning immovables and eviction:**

- Such actions may be considered outside the competence of the CoM.
- The First Hall of the Civil Court would have competence in such cases, as the CoM does not have jurisdiction.

**Article 747(2);**

Cases outside the competence of the Court of Magistrates:

This applies where the value or amount in question is not specified in the plaintiff's demand.

**Article 748;**

Judicial Demand Establishing Competence *Ratione Valoris*:

Where no value is specified or can be determined from the demand, the case falls under the competence of a court with indeterminate value jurisdiction.

**Default Rule:** If the value cannot be ascertained, the First Hall of the Civil Court assumes competence.

Where there is a minor, a dispute relating to immovable property.

**Article 767-772:** basically - these are - if more defendants reside in Gozo than in Malta, they can raise the case to be held in Gozo, the *privileggi in fori*, can be waived and if not raised is deemed to have been waived. Can only be raised by an heir in circumstances where the couple be claimed by a predecessor entitled.

3 points

1. Relationship between *ratione valoris* between *rationale materiae*
2. Eventhough there is a principle that the jurisdiction both *ratione valoris* and *ratione materiae* are determined by the demand, as the demand defines jurisdiction and competence and cuts across both - there is another point that sometimes a plea, a defence plea may put in question the competence of the court.

**Article 746** - refers to the value of the thing - *ratione valoris*, determinate value or indeterminate value.

Actions involving honour and prominence

The point is that there are actions where the claim is determinate or where it is not determinate it is unquantified and this is a very imp basis for establishing competence *ratione valoris*. Remember the statement - actions relating to immovable property and evictions are considered to be outside the competence of the court with limited competence. Real rights and ownership rights are in the competence of the First Hall as the First Hall does not have a limited competence.

**747 sub 2** - chase competencies - where a value, amount does not result from the amount of the plaintiff. In the next article, article 748 values are determined by the demand, the judicial demand which establishes competence *ratione valoris*, now where in the premise and in the writ, no value can be established, it is within the competence of the court of an indeterminate value.

### **Ratione Materie vs Ratione Valoris**

*Ratione Materie* prevails over *Ratione Valoris* because it determines jurisdiction based on the *subject matter* rather than the monetary value. The subject matter takes precedence over the amount, as it involves substantive issues rather than just financial considerations.

### **Defense Pleas and Competence**

A **defense plea** can sometimes raise questions of **competence**, for example:

If, before the Court of Magistrates, there is a claim for payment of ground rent and a plea of title is raised:

§ Who decides the plea of title?

§ The *existence* or *absence* of a title determines whether there is entitlement to ground rent.

§ This could potentially raise an issue of the court's competence.

In such cases, the Court of Magistrates may direct parties to institute proceedings in another competent court.

### **Real and Personal Actions:**

Although there is no strict definition, real and personal actions frequently arise.

Mixed Actions:

· For instance, an action for termination of an emphyteutical concession (*real*) combined with a claim for payment of arrears in ground rent (*personal*).

· Such cases can simultaneously involve real property issues and financial claims for arrears.

When an action is taken to enforce an obligation, the entire amount in question comes under consideration.

The administrative head of the courts is the **Director General**, who is appointed by the Prime Minister.

### **Article 58(8):**

- The registrar is required to take orders from judges.
- It is explicitly stated that, in judicial matters, the registrar is subordinate to and subject to court orders.

### **Article 61 – Certification of Authenticity by Registrar**

#### **Judicial vs. Extra-Judicial Costs**

- Judicial costs refer to expenses directly related to litigation.
- Extra-judicial costs include consultations and drafting outside of direct litigation.
- The distinction between judicial and extra-judicial costs is increasingly seen as counterofficial.

#### **Tariffs**

apply in various situations for services rendered by the court.

#### **Archives**

#### **Executive Officers**

Executive officers include marshals and ushers, who are officers of the court.

- They have the authority to detain individuals who resist them.
- They also have powers similar to executive police to maintain good order and decorum in court.
- They may request assistance from the executive police if needed.

Resisting a court order or a marshal is considered part of the offense of contempt of court.

#### **Subsidiary Legislation (S.L. 12.21)**

- This legislation establishes an administrative framework for the courts.
- The **Director General of the Court** oversees court operations, assisted by three directors inc Director of Civil Courts and Tribunals:

Subsidiary legislation also provides details on:

- Court registry opening hours
- Schedules for court sittings

# **The Legal Profession**

**Article 78A COCP** - we follow the continental tradition, more the french - the Advocate is the party to a right of audience, the right to appear and plead before a court and also to give advice - recently term has expanded to include what the code of civil procedure refers to legal services.

A person cannot be on the register unless given a warrant to practice by the President of Malta under public seal acting on the recommendation of the Chamber. A person is to be recommended as to fulfill a number of criteria, also foreign universities have attended for a year at least the office of a practicing lawyer, be fit and proper, and there are other specific grounds. Today, the area is not very clear as then we have regulation of corporate service providers which tend to overlap with activity - there could be other areas of regulation - mainly the right to advice and the right to plead before the court.

Article 78A Legal Profession: This is divided into the advocate and legal procurator. This goes back to the Code De Vilhena. We have followed this tradition. We follow the continental tradition - the French, that the advocate is the party entitled to a right of audience. The right to appear and plead before a court and also to give advice. Recently the term has expanded to include what the Code of Civil Procedure refers to as legal services. Apart from the COCP there could be other areas of regulation. Domestically today there is a register maintained by the Chamber of Advocates and a person or a firm cannot offer practice to offer advocacy or a legal person's services unless it is in the register.

Domestically today, there is a register maintained by chamber of advocates and a person or a firm can not offer practice or hold yourself to offer advocacy or legal persons services unless it is in the register. Chamber of advocates keeps record of warranted advocates and a person can not be on the register unless given a warrant to practice by the president of Malta under public seal acting on the recommendation for chamber of advocates. To be able to be recommended, a number of criteria need to be fulfilled - also foreign accredited universities have attended, for a year at least the office of a practicing lawyer be fit and proper.

Introduced the concept of fit and proper - and there are specific grounds for – now, Article 81F introduces a full knowledge of the Maltese language as being the language of the courts. So, does it mean you can not practice as an advocate, unless you show proper proficiency? When you look at the European regulation, lawyers directive and which establish themselves for other jurisdictions.

Proficiency test is also done. Warrants to practice may be withdrawn for anti money laundering, crimes affecting public trust etc or temporarily withdrawn. So, there is therefore this register, this

criteria to be admitted to the bar - let's speak about the legal procurator. These are straightforward many of them.

**Articles 82 and 83 COCP** - tend to suggest no negotiation, law says bargaining - it is specifically said that there can be no bargaining about fees. The practice of proposing a letter of engagement - this letter will regulate various citations, not only the bidding situation but also exit provisions for a lawyer - how if you want to stop assisting, how it is done and also it is necessary today to add the compliance clause and money laundering and document retention. Data processing and data privacy.

→ The legal Procurator: Articles 82 and 83 which tend to suggest that there could be no negotiation/bargaining about fees. At a certain serious level, a client will reasonably ask an indication of what he or she is to pay and the criteria. It is becoming more and more the practice of proposing a letter of engagement.

This letter will regulate various situations. Not only the billing aspect but how you are going to bill, time basis ect. If you want to stop assisting how it is done and also it is necessary to add the compliance clauses and the AML regulations ect. These are all delicate questions. The GDPR is not consistent with our professional practice. At the same time there is also the question of how long you should be burdened with the obligation to have a client's file. If a client does not pay, can you stop? When can you disengage and the procedure to do so. The chamber of advocates is regulated specifically and is given statutory protection at law. There is also an interesting discussion of how far the ethical rules of the Chamber of Advocates today form part of soft law.

The GDPR is not consistent with our professional practice - not supposed to keep client records beyond a certain period. There is also the question of how long you retain client files, how long one should be burdened to remain client files. Ex. If a client does not pay, are you entitled to stop, when can you disengage, what is the procedure to disengage ?

You propose a letter of engagement and the client will come back and negotiate very hard. One of the questions will ask - what is the limit of professional indemnity. So there is more than meets the eye.

Chamber of advocates regulated - given statutory protection in the law - and there is also an interesting discussion how far the regulations form part of soft law - chamber of advocates reduces these 2 practices.

**Article 85** - Legal Procurator - the standard contributions are both people who are deceased - , late Judge Norris Caruana Curran. Historically, the legal procurator was there to carry out functions of the parties, in other words it represented the party absent to the party, in the past, legal procurators used to attend court hearings along the advocate as there is a presumed mandate of representing the parties. This is also borne out. Provisions on court of procedure, on who may file acts - most acts are physically deposited and among the people who visit the court registry.

Also very significantly the legal procurator - so much so that in articles of civil code of mandate - except in the case of a legal procurator saving that instance, it is not possible to have a judicial mandate to act in court where the mandator is present in Malta. Judicial mandate is only allowable if the party is absent and hence this tallies perfectly with logic of legal procurator as LP is entitled to file documents in court. Now, this is rather an entitled system and harms back that the LP no longer performs today but this is a result of tradition and also relevant to add - LEGAL PROCURATORS are entitled to 1/3 of the judicial fee of advocate.. This has a history of - if you read the Code Manoel - and Code de Rohan, there is a specific title on 'Prokuratori'. More or less this is the logic of the legal procurator.

**Article 88C** - possible any of partners sign on part of law firm

The amendments of 2021 also regulated law firms. This was left open whether it is the full partnership model or the barrister model. Operation as a partnership all the partners take the profits, liabilities ect. There are assets co-owned ect. ect. The article did not distinguish the barrister model. There are a group of lawyers compatible with sharing expenses but each with their own independent practices. The articles of the law do not distinguish this.

Article 88C: "may" – it is possible that any of the partners sign on behalf of the law firm not only in its personal capacity but also in the capacity of a lawyer.

### **S.L 12/17 – Mutual Recognition of Qualifications of Legal Profession Regulations**

SL 12.17 - the mutual - this tries to mesh tog. 2 - mutual recognition of qualifications and the admission to practice in another jurisdiction within the EU - Transposition of a no of EU directives limited to EU context.

It is limited to EU context. What is relevant for our purposes (not examinable) is the question of lawyer mobility. The notaries are excluded entirely from this process. This refers more to the possibility because you are a Maltese lawyer and want to go abroad. There are three different possibilities. Why would a lawyer go to a different jurisdiction? London for example is set up to advise people wanting to purchase properties in Spain or France.

**Article 97 COCP:** A case on prohibited practices whereby indirectly the article is prohibiting advertising of legal services. There are two schools of thought. But this article goes back to former times when this was round upon de facto the market has far out run.

There are some historical survivals and the first is Curators: Curators are appointed to present in the proceedings those who are for some reason cannot show up to court. Here, we are looking at those situations where curators are appointed ex officio to represent absent parties. A party at its own risk may accept to be the curator of someone else.

A special mandatory or curator voluntarily accepted means that you are a party to proceedings. Those situations where there is nobody appointed as a curator and there is a system whereby curators are appointed ex officio. One must be aware that if as a party you ask for the appointment, you ask for the fees.

The arrangement and compromise are that curators also have to serve as advocates for legal aids. Being a curator has heavy responsibilities - trying to communicate with the party. If you are nominated by the court as a curator, you ask the counter party details of the party presented. You have to diligently be in a position to answer - record keeping etc.

**Article 96 COCP:** The Court has the power to remove the Curator and substitute. The Curator is also bound to act as advocate for the legal aid. Those acting as curators are given a salary and they have to give a service free of charge. There is also another function of the curators - to assist parties who are unable to find a lawyer to defend them. There is also the function of a Judicial Assistant: this has been largely taken over by the office of the judicial attorney.

**Article 97A COCP:** This was originally intended to create a subordinate team for the judge. They have their duties aligned in these articles. Their function is that each judge will give them their mode of work. The judicial assistant is empowered to decide questions which arise for example during the course of a sitting. Example: admissibility of evidence, objections etc. When it is seriously controversial this judicial assistant is to report to the judge and the decree given by the judicial assistant will stand unless disagreed by the judge. General Provisions of the Code BOOK 2: Judicial Acts.

**Article 98 COCP:** "*Quod nullum est nullum producit effectum*" – it is true that what is null cannot produce valid effects. These have to be raised initially. A legal time limit cannot be extended by the court. The 30days to appeal cannot be extended by the court. judicial times may be extended by the court. a time limit established by the court may be extended but by law may NOT. it is possible to substitute an act as long as one is within its time limit. This is the sense of Article 99.

**Article 99 COCP:** Any act which is null may be replaced by another provided that it is done within the preliminary time. If it is outside time, then there is no remedy for a null act. It is not possible to plead the nullity of one's own act. One can plead the nullity of another party but not of his own.

When you are counting the days, the day of receipt is NOT calculated. If you have 20 days and you receive it today, the 20/30 days start elapsing from the following. On the other hand, the last day is counted- "*dies a quo non computatur in termino*"

Where there is a formality, the time limit starts to run from the day of the latest publication.

As a rule, days are counted, and a day is deemed to expire at closing of registry business. Days mean running days NOT working days with the proviso that if the last day is a public holiday or weekend (a procedural term not stipulated in the code) it is the next day when the registry is open (Monday). Holidays do not suspend as it used to be in the past, the running of judicial time. Likewise, Holy Week – the registry is closed on some days, but time limits do not stop. You still need to count these days. If the last day is Good Friday, then you file it next Monday.

Normally, registry copies are allowed to parties. There is an important rule to access court records. There is the rule that there is access to public records. Each judge normally deals with cases assigned before it, but certain routine acts can be carried out by judges.

There is a provision: Witnesses are required to take the oath – "*The truth, the whole truth, nothing but the truth.*"

# **PLEAS - ECCEZZJONIJIET**

Article 728-810B of the COCP - to get the language right, please use the Maltese *ECCEZZJONI*, italian *ECCEZIONE*.

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**Sub-titolu I** *FUQ L-ECĊEZZJONIJIET IN ĠENERALI - Articles 728-732A*

**Sub-titolu II** *FUQ IR-RIKUŻA TA' MHALLFIN U MAĠISTRATI U FUQ IS-SURROGA - Articles 733-740*

**Sub-titolu III** *FUQ L-ECĊEZZJONI TA' INKOMPETENZA - Articles 741-780*

**Sub-titolu IV** *FUQ L-ECĊEZZJONI TA' I-LLEGITTIMITÀ TAL-ATTUR JEW TAL-KONVENUT - Article 780-788*

**Sub-title V** *OF THE PLEA OF NULLITY OF JUDICIAL ACTS - Articles 789-790*

**Sub-title VI** *OF PLEAS IN SPOILIATION SUITS - Article 791*

**Sub-title VII** *OF THE PLEA OF LIS ALIBI PENDENS OR OF CONNECTION OF ACTIONS- Article 792-794*

**Sub-title VIII** *OF THE PLEA AS TO BENEFICIUM EXCUSSIONIS - Article 795-801*

**Sub-title IX** *OF THE PLEA OF FALSIFICATION - Article 802-805*

**Title III** *OF THE CHANGE OF PARTIES BY DEATH, ETC - Article 806-810B*

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**Dr. Robert Staines vs. Carmelo Ellul Sullivan, 1995** - “dawk dilatorji ghandhom jinghataw fil-bidu tad-difiza (728), waqt li dawk perentorji jistghu jinghataw f’kull waqt tal-kawza, anke fil-grad ta’ appell”

Article 730 COCP - “eccezzjonijiet ta’ transazzjoni u preskrizzjoni” ...”li huma t-tnejn notarjamnet ta’ xorta perentorja u mhux dilatorja”

**Carre** - says that the word dilatory = diferre and dilatum - because dilatory pleas tend to defer the procedure and the judgment.

**Mortara** - test used to see if plea is dilatory or peremptory is to look at the result that it tries to produce.

**Carmelo Farrugia vs. Avukat Grazio Mercieca** - “*Eccezzjonijiet dilatorji jistghu jinghataw biss in limine limis, filwaqt li l-eccezzjonijiet perentorjijistghu jinghataw f’kull waqt tal-kawza anke waqt l-appell. Izda eccezzjonijiet li huma perentorji biss tal-gudizzju u mhux ttal-meru jitqiesu bhala eccezzjonijiet dilatorji u ghalhekk jistghu jinghataw biss in limine litis.*”

Essentially, the term plea, refers to a legal or factual defense which is intended to oppose or neutralize in whole or in part claimants, a claim or action. So, it is essentially related to defense, whether I be in a statement of defence or in a reply to a counterclaim.

Historically known as **NOTA TA' ECCEZZJONIJIET**. What is relevant for our point, what is very important, is that a court will or should decide according to the claim and to the defence pleas. It is essential to be aware that those defence pleas which are not formally raised, cannot and should not be considered by a court.

In other words, you can not raise a defence plea in a submission - if this has not been formally pleaded can not raise a new additional plea in a submission unless this has been formally pleaded, court can not consider it. THE FIRST THAT THE TERMS OF THE WRIT, AND THE RES JUDICATA ARE defined by the claim and its premises and the defence plea. Meaning otherwise that a court will not consider arguments not formally raised, defended. Much of this title was written a while ago - there were recent amendments but in most cases the amendments, and therefore - sub title 1 of Article 728 - on pleas and this subtitle 1 and title on pleas - assumes knowledge on the practitioner and of the reader.

## **Dilatory vs. Peremptory Pleas**

**Peremptory pleas** - further distinguished into peremptory pleas on the merits and peremptory pleas on the proceedings.

1. Peremptory pleas on the **merits** = strike at the essence and defeat the merits ex. Set off, prescription - all those defences which if successful have the effect of creating a *res judicata* on the merits.
2. Peremptory pleas on the **proceedings** = those which may be a pronouncement on the proceedings - will speak about nullity as a separate plea but a plea on the proceedings. Writ not signed by a lawyer - or writ which is issue not served and signed by a counter judge - these may impinge on the validity and existence of the proceedings but do not defeat the merits, saving therefore any question, where a peremptory plea on the proceedings is raised, the question of costs, the claim may be reinstated, whilst on the question of costs, if you withdraw a case, you can not re-institute without paying the costs of the first case - if so a case of nullity. You have to pay the costs of the first case. Therefore, in the case of peremptory pleas on the proceedings, not a question on the merits, but a pronouncement on the validity of proceedings.

**Peremptory plea** = can be raised at any stage - this was accepted prior to 1995 amendments - a no of judgments of the Mifsud Bonnici Court of Appeal which accepted this point. However, it remains largely undefined and fluid. With the exception that with desertion of proceedings has to be raised immediately.

**Dilatory pleas** = likewise can be on the merits and on the proceeding. Dilatory pleas = those which delay the issue. *Dilare = to delay*. In Maltese = those which simply postpone or delay the issue.

1. On the merits = plea on INTERPESTIVITA' - not yet due, claim is premature:

Therefore, and this refers to dilatory pleas on the merits and dilatory pleas on the proceedings = very similar to in the sense they are a pronouncement on the validity of the proceedings, not on the substance of the claim, whether the claim is founded and accepted. So this is something which the articles assume knowledge of.

**DR. Robert Staines et Noev s Carmelo Ellul Sullivan Et Noe. Et., 30/05/1995 Court of Court Appeal (Commercial)**

Il-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili (Kapitolu 12) jirreferi espressament għall-eċċezzjonijiet b'mod ġenerali fil-kontenzjuż fl-artikoli 728 sa 732 u jiddistingwi bejn eċċezzjonijiet dilatorji u eċċezzjonijiet perentorji. Jiddisponi li dawk dilatorji għandhom jingħataw fil-bidu tad-difiza (artikolu 728), waqt li dawk perentorji jistgħu jingħataw f'kull waqt tal-kawża anke fi grad ta' appell. L-artikolu 730 isemmi ċerti tipi ta' eċċezzjonijiet fosthom dik ta' l-illegittimita' ta' persuna biex jgħid li eċċezzjonijiet simili għandhom jiġu deċiżi b'kapi għalihom qabel jew flimkien mas-sentenza fil-meritu. Importanti li jiġi hawn irrilevat li l-Kodiċi ma jgħidx ukoll li dawn it-tipi ta' eċċezzjonijiet huma dilatorji. Di fatti fosthom jissemmew l-eċċezzjonijiet ta' transazzjoni u preskrizzjoni li huma t-tnejn notarjament ta' xorta perentorja u mhux dilatorja. Aktar minn hekk ma jispeċifikax;

## **Thesis by John Ludovic Gauci, 'The Nature of Pleas in Maltese Civil Procedure'**

*Carre* defines the nature of dilatory pleas by delving into the etymological origin of the word. He states that the word dilatory is derived from the Latin terms *differre* and *dilatatum* because dilatory pleas tend to defer the procedure and the judgment. In fact, *Mortara* stipulates that the test to be used to identify whether a plea is dilatory or peremptory is to look at the result that it produces or tries to produce. Accordingly if a plea postpones or clears the discussion and the settlement of the judicial controversy it is a dilatory one.

Our Courts have described dilatory pleas as being pleas the effect of which is to postpone the action and not to totally exclude it. According to Raymond *Fenech et v Antoine Bajada et* (First Hall Civil Court, 4th June 2004); “*din l-eccezzjoni m'għandhiex effett iehor hliet li tikkonstringi lill-attur jerga' jipproponi l-azzjoni tiegħu*”

According to our jurisprudence, dilatory pleas also include those pleas which may be regarded as peremptory pleas on the proceedings (such as *Mattirolo's eccezioni perentorie del giudizio*). Therefore, the rules that the COCP lays down with respect to dilatory pleas are also applicable to the peremptory pleas on the proceedings. *Saku Mintoff & Sons Limited v Road Construction Limited et* (Court of Appeal, 2<sup>nd</sup> December 2005) defined a peremptory plea of the proceedings as follows:

*Għaldaqstant il-punt imqanqal mill-korrenuti jolqot il-kawża odjerna fil-qofol tagħha – din hiha eccezzjoni perentorja tal-gudizzju li darba tigi milqugħa twaqqaf l-azzjoni kollha bla hliet li jiġi investit il-mertu.*

The case of *Emmanuel, Borg pro et noe v Neg Joseph Gnxti et* (Court of Appeal, 15th March 1948) explained that the law when making the distinction that the dilatory pleas must be raised *in limine litis* was referring to pleas that are dilatory of the merits. A different interpretation would run counter to the rationale and utility of that provision, since the law desires that before a party produces its pleas on the merits, such party must specify whether there are any procedural grievances.

The Court also said that the term 'peremptory plea' is not inclusive of peremptory pleas on the proceedings as the latter are akin to dilatory ones. Similarly, in *Charles Debono pro et noe v John Caruana, noe* (Court of Appeal, 5th April 1971) it was held that for purpose of the procedural rules in which pleas are to be set up, peremptory pleas of the proceedings have to be considered as dilatory pleas: '*din id-dispozzjoni tal-ligi tirrefrixxi għall-eccezzjonijiet perentorji tal-gudizzju; dawn ta' l-ahhar għall-fimjiet ta' l-istadju li fih għandhom jigu eccepiti, għandhom jitqiesu bhala eccezzjonijiet dilatorji*'

This principle was then reaffirmed in *Carrnela armla ta' Joseph Fanugia v Avukat Dr Grazio Mercia: a LL.D. noe* (Commercial Court, 22nd June 1988) where it was held that:

*“Eccezzjonijiet dilatorji jistghu jinghataw biss in limine litis, waqt li eccezzjonijiet prentorji jistghu jinghataw f’kull waqt tal-kawza, anke waqt l-appell. Izda ecceznjonijiet li huma perentorji biss tal-gudizzju u mhux tal-mertu jitqiesu bhala eccezzjojijiet dilatorji, u ghalhekk jistghu jinghataw biss in limine litis”*

As a general rule, in actions instituted by (sworn) application, all pleas whether dilatory or touching the merits must be included in the sworn answer and no other pleas can be set up at a later stage.

**Article 728(1) of the COCP** - Was rewritten in 1995 and there is a background - there is an old rule which was left there by mistake, 156 sub 10 you will see it. An old rule whereby before claimant, plaintiff, declared that it had no further evidence, and as you know at the time, the dispositive culture was more strong than today, since dispositive culture was strong, claims used to take years and the practice was that prior to P declaring that its case rested and had no further evidence, there was the *NOTA TA ECCEZZJONIJIET ULTERJURI* - at the time, you can not by today's eyes the past - back then it was ok to reopen the defence and hence put new pleas. P would have to organise himself again - often it required additional evidence. Prior to P claiming his evidence, D used to file a *NOTA TA ECCEZZJONIJIET ULTERJURI*.

Additional defence pleas change totally the perspective, P also has to be guided by the defence pleas. This did not require any authorisation - and was a right, but the truth of it was that it gave rise to a lot of abuse.

In 1995, and Act 24 of 1995 - rule was introduced that all defence pleas preliminary, dilatory and peremptory have to be raised together in the filing of the then statement of events, *SWORN REPLY*. IN A 20 day period one has to mentally try and project what defence pleas one can raise - a serious burden - a question of just making the dead line somewhere.

Now, can additional pleas be set up ? Article 728 - yes by permission of the court or if these become necessary. Typically evidence which is hard and comes through justifies the raising of this additional plea. Not a right of D or or Respondent. Additional pleas only can be raised by permission of court by a reasoned application - saying because of this, I should feel allowed to raise this. Declining of this can not be appealed - article 229, yes or no at that stage the court can say.

Thesis by **Thesis by John Ludovic Gauci, ‘The Nature of Pleas in Maltese Civil Procedure’**

Pleas to be raised  
in sworn answer.  
Amended by:  
*XIII.1964.22.*  
Substituted by:  
*XXIV.1995.279.*  
Amended by:  
*XXII.2005.60;*  
*L.N. 181 of 2006.*

**728.** (1) Subject to the provisions of article 731 in actions instituted by sworn application, all pleas whether dilatory or touching the merits shall be raised in the sworn answer, as the case may be. Those pleas touching the merits shall be raised without prejudice to the dilatory pleas.

(2) No other pleas can be set up at a later stage; provided that the court may on an application by the defendant or respondent allow the setting up of additional pleas, if it is satisfied that there

*As a general rule, in actions instituted by (sworn) application, all pleas whether dilatory or touching the merits must be included in the sworn answer and no other pleas can be set up at a later stage. Article 728(1) of the COCP states:*

Article 728(1) when applicable is interpreted rather strictly. In fact the court in Pace Associates Limited vs. Drawing Techniques Ltd (Court of Appeal, 7th December 2005) held:

*“Kif saput, il-procedura hi ligi ta’ ordni pubbliku u, allura, jekk il-provvediment tal-ligi jippreskrivi certu konvenzjonizmu, kemm ta’ forma jew ta’ kontenut mhux amnessa interpretazzjoni ohra hlief dik letterali, u hi din li ghandha tigi osservata u segwita’.”*

However, there are a number of exceptions to this general rule. The first exception arises when the party who intends to raise dilatory pleas at a later stage (*pendentelire*) requests this possibility from the Court by means of an application and the Court has the discretion of allowing the setting up of these additional pleas if it is satisfied that there were valid reasons for not raising them *in limine litis*.

There are exceptions - an imp exception to this is

1. Firstly **Article 731** that the provisions state you have to plead everything initially - there were doubts as 731 refers to this code, whereas prescription can arise at any stage in the Civil Code, but prescription can be raised before or during appeal submission stage. 731-ENIGMA unsolved situation

Pleas which may be raised at any stage of proceedings.  
Substituted by:  
[XXIV.1995.280](#).

**731.** The provisions of article 728 shall not apply to such pleas as by an express provision of this Code may be raised at any stage of the proceedings, or to pleas the reason for which arises during the trial.

2. Article 732 sub 1 - saving always the provision of this code respecting evidence - evidence raised at appeal stage, indirect contradiction with 728 sub 1 which says all pleas should be raised together and can not be later pleaded except by permission of court.

Peremptory pleas.  
Amended by:  
[IX.1886.99](#).

**732.** (1) Saving always the provisions of this Code respecting the production of evidence, peremptory pleas may be raised even before the appellate court although they may not have been raised before the court of first instance.

(2) Nevertheless, the plea of desertion of a cause shall be deemed to have been waived, if not raised before any other peremptory plea.

Thesis Continues...

Article 732 of the COCP in actual fact expressly lays down that peremptory pleas may be raised even before the appellate court although they may not have been raised before the court of first instance. Thirdly, if the reason for a particular plea arises during the trial, then the general rule, i.e. that all pleas have to be necessarily included in the sworn answer, does not apply.

Therefore, unlike peremptory pleas, almost all dilatory pleas have to be set up in the note of pleas or in the answer and cannot be set up at a later stage. The rationale behind this rule was expounded in the *Borg v Grixti* case. The law wants that before the defendant raises his pleas on the merit, he states whether he has any objections vis-a-vis the procedure. It would be against the spirit of the law if procedural pleas were to be raised at the appellate stage. In fact, when a plea does not attack the merit but just the procedure, it is considered to be a dilatory plea and as such must be raised *in limine litis*. Some cases even examined why it is so desirable that dilatory pleas are not raised at an advanced stage of the proceedings.

**Article 730 COCP** - if there were any need to show that the code assumes knowledge on the distinction between peremptory and dilatory pleas - this is a case in point. Does not tell us what these are but the only including we have is that certain pleas have to be decided - in a separate head - which means that in the formal - this tells us that 1. The court has discretion on how to deal with the pleas. Sometimes the courts for efficiency of their calendar, and their problem, say, I will decide all the pleas together when it should be evident that if pleas are decided, proceedings should stop immediately. DISCRETION OF COURT WHEN TO DECIDE PLEAS, EVERYTHING TOGETHER OR SEPARATE - pleas have to be decided under a separate head. The operative part has to have a sep paragraph on each of the separate pleas.

**Article 732A COCP** -> apart from drafting could have been more clear, it fills a much needed lacuna. Where a point was not needed by parties and needed by lawyers, a court would decide the case on a plea which was raised before it. We have said that the pleas define the proceedings. What claimant says, the pleas of the defence. The court can not decide cases beyond these parameters.

Now, this article 732A is to the effect that if the court is considering or intends to consider a plea not formally raised by parties, it should inform the parties, that they should decide on what is pleaded and if court wants to decide on a point it considers relevant, should inform the parties and should give evidence and make submissions to the parties. If there is any other relevant law, that other law prevails. Where the law allows court to raise *ex officio* a plea - there are things court cannot raise *ex officio* - plea of jurisdiction = drafting limited the power of the court to apply this procedure = relevant direction of judgements which is not a question *ex officio* and therefore may not be in power of court to raise, as against this entire argument, there is agreement not to raise a plea. A court should infer the renunciation to the plea as it was not raised when it could not have been raised. Drafting is careful in *ex officio* pleas but does not

entirely address the question - what should have been - silence of article respects tradition as the court should infer a renunciation to the plea.

*Ex officio* pleas  
raised by the court.  
Added by:  
[IV.2016.19](#).

**732A.** Saving the provisions of any other law, in those instances where the law allows the court to raise *ex officio* a plea in a judgment without raising such plea prior to the action being put off for judgment, without allowing the parties to take cognizance of such plea before judgment is delivered, and without the parties being allowed to produce such evidence or plead in relation to the plea, the court shall not raise such a plea in its judgment but shall raise such a plea in open court or by decree *in camera* and the parties shall be allowed to produce evidence and make oral submissions thereupon before judgment on the plea raised by the court is delivered.

Something more challenging - RIKUZA = CHALLENGE - and subrogation of judges.

The basic difficult, most of this these are Articles 733 to 748 - many of them are straight forward but basic question is whether these are exhaustive - ex if a lawyer has been professionally involved with a company for 30 years, is it right a case is decided by situations where there is close social connection between parties, lawyers and judges? The Court has to be indeed independent - and written many years ago, what about the human rights question of judicial bias - not written here but if judge shows manifest bias, that could be the ground of a challenge.

Writing of Article 733 is very clear except in cases mentioned hereunder - except for change in 1975, following the republic, the article has not changed since 1854. If not raised in *limine litis*, parties have to confirm that it was not confirmed on oath. When a judge decides to abstain, the decision is his or hers alone, when a request for a RIKUZA of the parties, then it is a collective decision in which the judge challenges and takes oath.

### *Sub-title II*

#### OF THE CHALLENGE OF JUDGES AND MAGISTRATES AND OF SURROGATION

Challenge or  
abstention of  
judge.  
Amended by:  
*L.N.148 of 1975.*

**733.** The judges may not be challenged, nor may they abstain from sitting in any cause brought before the court in which they are appointed to sit, except for any of the reasons hereinafter mentioned.

**Article 734 COCP-** grounds are there - many are obvious - relationship by consanguinity or affinity - consanguinity or affinity a ground for challenge, giving advice, written, pleading the cause - then there is a - this was changed - 734D - as before there was a ground expressed himself or herself - having expressed yourself - if you wrote extra it doesn't mean you have

expressed yourself on the case - it was narrowed down - advice, written pleading to the case or any matter connected therewith.

A bit of a contradiction - or lines difficult to baffle, no ground for challenge when the judge did not dispose of the merits in issue - are we saying that a judge has started hearing the case then came you say that because a judge expressed himself or pleaded the impartiality of case or should there be a total extraneous lack of involvement - where judge did not definitely - judge at first instance decided the case, merits have not been definitely disposed of - doesn't mean the same judge did not sit on appeal

Sub 2 - where a judge sat in a court of voluntary jurisdiction, on the same merits there is preclusion in sitting in a court which sits and hears continental merits. If all parties agree that a Judge should continue the case, then the case could proceed

Final articles - when spouses are directly or indirectly interested in the issue - and finally it is not allowed that a spouse or descendant or ascendant pleads before the judge. Some years ago a question arose if this can happen in a law firm. This applies when a lawyer acts in an individual capacity and not as a member of a law firm.

**Antonio Mario Vella vs. L-Avukat tal-Istat, 2022** - The Court said that the Plaintiff had every chance to challenge the Judge - the 3 Judges *“kienu disponibbli ghal kulhadd meta gie pprezentart ir-rikors t'appell xhur qabel.”*

Hence, Article 739 Cap.12 could not raise the plea for *“rikuza tal-Imhallef”*. The Court said that Article 737 should be read with Article 739. P knew beforehand and admitted to it but during the sitting this was not raised. Since this was not raised in time, they can not raise it now. 737 and 739 can not complain about a lack of right to fair hearing.

## **Plea of Jurisdiction**

**Article 742 COCP** - Lays down when the Civil Courts have the jurisdiction to try and determine an action. If it does not fall within the list in 742, one may plead a lack of jurisdiction of the civil courts in Malta.

**Article 741 COCP** - when it is lawful to plead the jurisdiction of the court.

**Article 745 COCP** - Rules as to the jurisdiction between several courts of Malta

**Said vs Ellul Sullivan (2003)** - Lack of jurisdiction must be brought in *limine litis* (at the very beginning of the case). If not it is deemed to be renounced.

**Calleja vs. Pace (1996)** - Plea of jurisdiction may also be raised by the court *ex officio*, but must be raised in *limine litis*.

**Mangion vs. Gauci (1955)** - Plea of jurisdiction must be decided by the Court under a separate heads, either together or before the decision on the merits. Non-observance of this brings about the nullity of the judgement.

**Gatt vs. Debono** - Plea of lack of competence or jurisdiction may be raised *ex officio*.

**Mifsud vs. Vella (1955)** - Such *ex officio* shall not be raised at appellate stage

## **Plea of Res Judicata - Article 730 COCP**

Peremptory plea = can be raised at any stage of the proceedings, however this should be raised in *limine litis*, as failure to do so amounts to a huge waste of time and resources on the part of the court.

**Dr. J Herrera vs. A. Cassar (1992)** - The Court said that such a plea has at its basis the public instrument, and a judgment from which no appeal is possible is held to be good, right and just.

For this plea to be raised, the judgement has to be FINAL and BINDING. Hence, no appeal and no re-trial is possible,

The court in **Camilleri vs. Mallia (1998)** held that for the plea of res judicata to be upheld, 3 elements must subsist:

1. **Identity of the parties - Grixti vs. Schembri (1958)** the Court held that for this plea to be successful, there must be an examination to see if the same issue and claim there must be an examination to see if the same issue and claim has been decided between the parties.
2. **Identity of the subject-matter** - The case has to be on the same merits. There must be the same talba and same object/claim/issue. **Camilleri vs. Mallia** - Court said that what must be examined is whether or not the issue discussed in the 2nd case was already decided upon by the previous judgment.

**Mandrioli** - holds that the object is that which is asked in the application

**Laurent** - If the second judgment can co-exist with the 1st, without contradicting or changing it, then the object must be necessarily fairly different.

3. **Identity of the cause of the claim** - Cause of the claim contained in a new document is the same as that of a previous demand settled by a judgment of a *res judicata* .

**Joseph Zammit vs. Dun Karm Busuttil, (2020)** - D held that the case was already res judicata, hence it has been altered and pleaded to the Court to reject P's claims. The court said that since there is a peremptory plea, as per article 730 COCP, it has to be heard and decided separately from the rest of the pleas. It held that for this to be accepted, it had to have the same parties, same object, and the same merits as a judgment already decided.

The Court stated how in a previous judgement, the Court established that a debt was due to D, established the amount of such debt and also, how the property was to be divided, and technical

experts were appointed. Court noted how all the 3 parties were the same and Court held that what is being asked by P is identical to the judgment already decided. The Court accepted the plea of res judicata and ordered the costs to be paid by the applicants.

**Ciappara vs. Ciappara (1993)** - P wanted D to remove drain pipes in Zebbug property. D claimed res judicata. P said that the case was opened because the perit tekniku did a wrong job. P said that he is asking what he already asked in another case. *“Il-Kawza tal-lum qed naghmilha fuq l-istess ilmenti tal-kawza l-ohra”*.

# PLEA OF CAPACITY OF PLAINTIFF AND DEFENDANT - ILLEGITTIMITA TAL-PERSUNA

Plea as to capacity  
of plaintiff or  
defendant.

**780.** The plea as to the capacity of the plaintiff or the defendant may be raised, if the one or the other is under any legal disability to sue or be sued or if he sues or is sued in the name and on behalf of others without being lawfully authorized for the purpose.

Incapacity to sue or  
be sued.

*Amended by:*  
*XV.1913.148;*  
*XLVI.1973.108;*  
*[II.2012.10.](#)*

**781.** The following persons may not sue or be sued:

- (a) a minor, except in the person of the parent exercising paternal authority, or, in the absence of such parent, of a tutor or a curator;
- (b) an insane person, a person with a mental disorder or other condition, which renders him incapable of managing his own affairs, and any other person who is not vested with the free exercise or administration of the rights to which the action refers, except in the person of the party to whom such administration is lawfully entrusted, or of a curator *ad litem*.

## Following persons may not be sued or sue:

1. Minors
2. An insane person or with a mental disorder
3. Curator ad litem - maybe it is wrong to say it is a remedy but truth is that there is no app. Procedural representation, this would be the solution.

Here is a question of not being able to stand in judgment.

So, there are some exceptions some are historical - but one is relevant - a minor represented by a curator ad litem, can sue a person

It is significant that a curator ad litem can also be appointed by the courts before which proceedings are pending. Often it happens in personal sep. suits that a persona acts on its own behalf or on behalf of children, requesting appointment ad litem and this may or may not be given

The 1995 amendments - provisions which were designed to remove a lot of nullities, ex; that at the time it was necessary to sue a company. Had to sue directors on behalf of the company - back in the time and this had many

**786.** (1) It shall not be lawful to raise the plea as to the capacity of a party suing or sued in the name and on behalf of any other party against the Economo or other official performing an equivalent function at the Archbishop's Curia in Malta and at the Bishop's Curia in Gozo, against any of the persons mentioned in article 180(1)(a).

(2) Nor may such plea be raised against the Attorney General or against the State Advocate in any action in which they are especially authorised by law to appear, or where they are authorized by the competent authority to appear in regard to any action touching public policy, and in so far as the public interest is concerned.

(3) Nor may such plea be raised against any official in charge of any branch of the public service in Gozo, who appears before the Court of Magistrates (Gozo) in connection with matters pertaining to his office, provided the head of the department to which the said official may by reason of such office belong, be residing in Malta; in such cases, the provisions of this Code relating to heads of departments, shall be applicable to such official.

Plea as to capacity  
of person may not  
be raised against  
procurator of  
revenue of  
Diocesan Bishop  
of Malta,  
*Amended by:*  
*XI.1859.31;*  
*L.N. 46 of 1965;*  
*LVIII.1974.68;*  
*XXIV.1975.2;*  
*VIII.1990.3;*  
*[XXIV.1995.291.](#)*

or Attorney  
General or State  
Advocate  
*Substituted by:*  
*[XXV.2019.23.](#)*

or public official in  
Gozo.

problems with it - many qualities which are time wasters; which caused a limit to raising of the pleas.

Article 786 - excludes the raising of judgment where the *ekonomu* - a person who has the judicial representation of the archbishop. The Archbishop does not sue, but the ECONOMU does.

**Dottor Michelle Tabone fil-kwalita' tagħha ta' Ekonomu ta' Monsinjur Arcisqof bhala Amministratur tal-Beni Ekklesjastici Djocesani kollha ta' Malta għan-nom u fl-interess tad-Dar tal-Providenza kif ukoll l-istess Dottor Michelle Tabone bhala prokuratrici għan-nom tal-Ordni Karmelitan f'Malta vs. Joseph Sultana**

**First Hall, Civil Court, 18th April 2023**

Il-kwistjoni tittratta fond bin-numru 6, Blanche Huber Street, Sliema. Fih kienet tgħix ċertu Emmanuela Mallia. L-Attriċi nomine isostni li hija kellha l-pusses ta' dan il-fond u li kien ipprevjenta għandha permezz ta' testment li tul dawn il-proċeduri qatt ma gie esebit.

Xi jum lejn l-aħħar gimghatejn ta' Frar 2011, il-konvenut mar jara dan il-post flimkien mal-kuġini tiegħu, li milli tista' tifhem din il-Qorti, dawn jinsistu li kienu wirtu lill-imsemmija Emmanuela Mallia li kienet tiġi iz-zija tagħhom

Il-Attriċi nomine kif saret taf b'dan kollu għamlet rapport lill-Pulizija u bdiet dawn il-proċeduri biex il-konvenut jpoġġi kollox għall-istat li kien qabel ma inbidlet is-serratura.

Pero' fost l-eċċezzjonijiet mogħtija mill-konvenut, hemm l-ewwel waħda li trid tkun deċiża qabel ma din il-Qorti timbarka fuq is-sejba o meno tat-tlett elementi fuq imsemmija. Din l-eċċezzjoni hija merament waħda proċedurali fis-sens li "*l-attriċi trid tipprova l-kariga u l-mandat tagħha, kif ukoll l-interess guridiku tagħha f'din l-azzjoni*" (l-ewwel eċċezzjoni a' fol 15).

L-Attriċi qed tagixxi f'din il-Kawżza fil-kwalita' tagħha bhala Ekonomu ta' Monsijur Arcisqof bhala Amministratur tal-beni Ekklesjastici Djocesani kollha ta' Malta għan-nom u fl-interess tad-Dar tal-Providenza kif ukoll bhala prokuratrici għan-nom tal-Ordni Karmelitana.

Tul il-Kawża l-partijiet ikkoncentraw fuq fatti rigwardanti l-elementi tal-azzjoni ta' spoll, b'uhud minnhom reppetitvi u mingħajr valur u naqsu li jindirizzaw u jgħibu provi dwar din l-eċċezzjoni.

F'għajnejn il-Qorti kulhadd huwa l-istess u meta tingħata eċċezzjoni bħal din fil-każijiet fejn l-Awtorita' Ekklesjastika tkunu Attrici, għadarba tingħata, trid tara li tressaq il-provi bħal kull persuna oħra li tidher quddiem din il-Qorti kemm jekk fizika u kif ukoll jekk ente morali.

Artikolu 180(1) tal-Kap 12 tal-ligijiet ta' Malta jiddisponi hekk:

*“Bla ħsara tad-dispożizzjonijiet tal-artikolu 181, il-preżentata tal-iskrittur tista' ssir (a) mill-parti stess li tidher fl-isem tagħha nfisha, jew mill-persuna li tidher bħala l-ġenitur tat-tfal taht is-setgħa tiegħu ta' ġenitur; jew bħala tutor; kuratur amministratur tal-komunjoni, esekutor; kap ta' dipartiment jew amministratur pubbliku ieħor; jew bħala prokuratur ta' knisja, xirka, sptar; jew ta' istituti piji, jew bħala Ekonomu ta' proprjetà f'kawża, jew bħala soċju jew rappreżentant ta' ditta, jew bħala wieħed mill-persuni msemmija fis-subartikolu (2) tal-artikolu 181A fil-każ ta' korp li jkollu personalità ġuridika distinta, jew bħala aġent jew rappreżentant ta' soċjetà oħra kkonstitwita skont il-liġi, jew bħala prokuratur ta' persuni li jinsabu barra mill-Gżira ta' Malta jew ta' Għawdex, li fiha l-iskrittura tiġi ppreżentata”.* (Emfażi ta' din il-Qorti).

Mela huwa paċifiku, li skrittura, f'ċirkostanzi bħal dawk li għandha quddiemha din il-Qorti, tista' tiġi presentata minn Ekonomu jew prokuratur. F'dan il-każ Dr. Michelle Tabone qed tidher kemm bħala Ekonomu u anke bħala prokuratriċi għan-nom tal-Ordni Karmelitana. Pero' b'rabta ma' dan l-artikolu irid ukoll jittiehed kont ta' dak li jiddisponi l- artikolu 786 (1) tal-Kap 12 tal-ligijiet ta' Malta li jiddipsoni hekk:

*“L-eċċezzjoni tal-illegittimità tal-persuna li tidher jew tkun konvenuta fl-isem jew fl-interess ta' haddiehor ma tistax tingħata kontra l-Ekonomu jew uffiċjal ieħor li jkun qiegħed jaqdi funzjoni ekwivalenti fil-Kurja Arċiveskovili ta' Malta u fil-Kurja Veskovili ta' Għawdex, jew kontra waħda mill-persuni msemmijin fil-paragrafu (a) tas-subartikolu (1) tal-artikolu 180”.*

Dan ifisser, li ladarba stabbilita l-kwalita' rappreżentattiva kif premissa, eċċezzjoni bħal dik li għandha quddiemha din il-Qorti, ma tistax tingħata. Fir-rigward ta' din il-parti tal-liġi, dawn il-Qrati qalu li *“din id-dispożizzjoni ma hix intiza bhala xi forma ta' carte blanche biex min ifettillu jgħid li għandu r-rappreżentanza ġuridika ta' ez. Club jista' legalment jahlef id-dikjarazzjoni a nom ta' dak il-Club, jew jipprezenta skrittura f'isem dak il-Club fit-termini ta' l-Artikolu 180(1)(a) tal-Kap.*

*L-iskop ta' l-Artikolu 786A – kif ukoll ta' l-Artikolu 786(1) – hu li, galadarba tkun stabbilita r-rappreżentanza ġuridika tal-korp jew il-kariga ta' kaptan tal-bastiment li jkun (għall-finijiet tal-Art. 786A) jew ikun gie stabbilit li persuna hija verament l-ekonomu tal-Kurja jew li verament hemm in-ness ta' missier u tifel taht l-eta', jew li verament persuna hija l-prokuratur ta' knisja, xirka, sptar ecc. (għall-finijiet tal-Art. 786(1)) – stabbilit dan ma tistax tingħata (u jekk tingħata, għandha tiġi respinta) l-eċċezzjoni ta' l-illegittimità tal-persuna, in kwantu dik il-persuna tkun qed tirrappreżenta lil haddiehor, u dan irrispettivament min-natura tal-kawza li tkun jew il-meritu involut”* (Emfażi tal-Qorti) (**Ara Sentenza tat-3 ta' Marzu, 2006 Appell fl-ismijiet Dennis Burke nomine et -vs- Anthony Grech Sant u martu Mary sive Moira Grech Sant**).

*L-atti jikkonfinaw l-apprezzament tal-Qorti. Issa ma jirrisulta minn imkien, li l-Attriċi tasew għandha l-kapaċita' rapprezentattiva minnha premissa, kemm bħala Ekonomu u wisq anqas bħala prokuratriċi tal-Ordni tal-Karmelitani. Ma kien hemm xejn li jżomm lill-Attriċi milli tressaq id-dokumenti opportuni f'dan ir-rigward, iżda dan baqgħet ma għamlitux minkejja li minn fuq din il-Kawża għaddew ben 12-il sena!*

*Għalhekk fid-dawl ta' dawn il-konsiderazzjonijiet din il-Qorti ma għandha ebda triq ħlief li tilqa' l-ewwel eċċezzjoni tal-konvenut u tilliberah mill-osservanza tal-ġudizzju.*

Article 786A - has a history - ENACTED BY ACT 24 OF 1995 - which introduced that a company, legal institution, is instituted by the corporation. This article in line with this amendment swept away the plea of nullity on lack of judicial representation.

Therefore, does it mean you can sue - rarely ever one sues the director on behalf of the company. Locally a company within jurisdiction, rarely ever one sues directors on behalf of the company. In 1995 if one is wrongly sued as a director of a company, it doesn't bring nullity of proceedings, but only a correction in the records. Judicial representation problem - with wrong person - NOT NULLITY BUT ONLY A CORRECTION

Article 786A - 2nd part refers to 187 SUB 7 - which refers to the service of a vessel-person acting instead of a master or the local ship agent. So here again, no nullity, no question of incapacity. That is the sense of what we are saying here

**786A.** It shall not be lawful to raise the plea of incapacity of a party against any of the persons mentioned in article 181A(2) in the case of a body having a distinct legal personality, and in the case of any person mentioned in article 187(7) in the case of a ship or other vessel.

When plea of incapacity is not allowed.  
Added by:  
[XXIV.1995.292.](#)

Article 187(7) COCP -

(7) In the case of an action against a ship or other vessel, service shall be affected by the delivery of a copy of the pleading to the master thereof or any other person acting in that behalf or, in the absence of such persons, on the agent of the ship or other vessel, as the case may be, or in the absence of such persons and agent, on curators appointed by the court in terms of article 929:

Provided that the court may also adopt such other measures as it may deem fit to bring the pleading to the notice of the person upon whom the same is to be served.

**Article 787 - Nullity of acts by or against person under disability**

**787.** (1) Any judicial act performed by, or against, any person who is under disability to sue or be sued, and not duly authorized for the purpose, is null.

Nullity of acts by  
or against persons  
under disability.  
*Amended by:*  
*XLVI.1973.108.*

(2) Any nullity arising from minority may not be alleged except by the minor himself or his heir.

(3) Any nullity from want of assent of the parent, may not be alleged except by the parent; nor may it be alleged by the parent after the child ceases to be subject to paternal authority.

Article 787 is a throwback in the sense that any judicial act performed by a person with a disability to sue/be sued is null - SO, THE SWINGING HERE, IN 787 a flashback from the past. A very serious statement WHICH IS IN CONTRADICTION W PREVIOUS ARTICLES.

Article 787 - goes back in time. The only way of living with these provisions - presumably the subsequent laws prevail on the earlier laws - is the only way you can understand the chapter.

## Plea of Nullity of Judicial Acts

**Plea of nullity** is admissible if the nullity is expressed by law - if it emanates from a Court. No irremediable prejudice has been caused or if the act is affected in any of its essential particulars. A high list of nullity of judicial acts. Nullity is expressly declared by law. Violation of a mandatory form.

**Plea of Nullity of Judicial Acts** - subtitle 5 - an interesting title, as on the one hand we have statements of nullity - this nullity is of judicial acts. So not a nullity of contract, but of judicial acts. Here the same situation of the pendulum swinging to and fro. On one hand we have very serious statements but later a proviso which takes away the strength of nullity. Remember also the article 175 which was again amended after 1995 but in 1995 it was re-written. Was considered a scandal every time, as a typo in a name could be annulled a bit - could have a problem of nullity - how serious the situation was BEFORE 1995. Much to the surprise of people in the older generation in 1995, doors were flung wide open to correct administrative technical errors.

The 1995 amendments were that anything could be corrected except those amendments/corrections which affect the substance of the claim and it is alternative or which affect the defence of the Respondent. So in 1995, corrections and amendments were admissible as long as they did not either affect the substance of claim or prejudice the defence of the R. So the 1995 act has to be read and seen in light of this, because of the very wide powers of Article 175.

1 matches

Sub-title V

OF THE PLEA OF NULLITY OF JUDICIAL ACTS

789. (1) The plea of nullity of judicial acts is admissible -
- (a) if the nullity is expressly declared by law;
  - (b) if the act emanates from an incompetent court;

Plea of nullity of judicial acts.  
Amended by:  
[XXIV.1995.293](#).

14 CAP. 12.]

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- (c) if the act contains a violation of the form prescribed by law, even though not on pain of nullity, provided such violation has caused to the party pleading the nullity a prejudice which cannot be remedied otherwise than by annulling the act;
- (d) if the act is defective in any of the essential particulars expressly prescribed by law:

Provided that such plea of nullity as is contemplated in paragraphs (a), (c) and (d) shall not be admissible if such defect or violation is capable of remedy under any other provision of law.

(2) The plea of nullity of an act, under sub-article (1)(c), shall not be admissible if the party pleading such nullity has proceeded, or has knowingly suffered others to proceed, to subsequent acts, without pleading such nullity.

Provided that the plea of nullity when expressly declared by law, or violation of the mandatory form or violation of an essential particular shall not prevail, plea can not be validly raised if the defect is otherwise curable under another provision of the law. Nullity can not be raised if defect is capable - of being remedied or substituted. Hence you can not read this article without having a good look at article 175. Does it mean that anything goes? ABSOLUTELY . NOT.

The courts have set boundaries and limits as to what they tolerate and not. The general comment is that the essential form and content has to be respected and even though there is the statement that the plea shall not succeed if it is capable of being remedied under any other law, because procedure is a matter of public order, the Court will insist on certain minimum certain standard requirements. A mistake to think that these articles are a get out of jail free card.

**Article 798 COCP** - you will recall that we said that what follows from another act is NULL - here in article 789(2) - plea of nullity shall not be admissible if person has - if other party wants to plead nullity, this has to be done *in limine litis*. This is now allowed.

Il-Prokuratur Legali Vera Lungaro Mifsud vs Amand Veranneman, 20th December 2007

li b'sentenza moghtija fit-23 ta' Settembru 1988 mit-Tribunal "De Premiere [recte Premier] Instance de Bruxelles" gewwa l-Belgium fil-kawza fl-ismijiet "Andre Van Klest vs Armand [recte Amand] Veranneman" il-konvenut gie kkundannat ihallas lill-attur is-somma ta' tmien mitt elf Frank Belgjan (BF 800,000) rapprezentanti kwantu ghal erba' mitt elf Frank Belgjan (BF 400,000) ammont dovut skond skrittura privata tal-15 ta' Marzu 1982 u kwantu ghar-rimanenti erba' mitt elf Frank Belgjan (BF 400,000) imghax legali skond il-ligi Belgjana, kif ukoll is-somma ta' wiehed u ghoxrin elf u tletin Frank Belgjan (BF 21,030) spejjez tal-istess proceduri (Dok.A);

Illi kif jirrizulta fis-smiegh ta' din il-kawza, l-imsemmija sentenza ghaddiet in gudikat u tista' tigi esegwita minn din il-Qorti bhala sentenza moghtija f'Malta u hemm ir-rekwiziti kollha li tirrikjedi l-ligi ghal dan l-iskop ai termini u skond l-Artikolu 826 et sequitur tal-Kodici ta' l-Organizzazzjoni u Procedura Civili, salv il-modifiki necessarji fir-rata tal-imghaxijiet u dan konformement mal- Ordni Pubbliku Malti;

Rat in-nota tal-eccezzjonijiet tal-konvenut li eccepixxa:

1. preliminarjament li l-attrici nomine trid tipprova l-mandat spejali taghha minghand l-atturi;
2. in-nullita' tac-citazzjoni ai termini tal-Artikolu 789(1)(b) tal-COCP Kap 12 billi l-Qorti kompetenti li ghandha tiehu konjizzjoni ta' din il-kawza hija l-Qorti tal- Magistrati (Ghawdex) Superjuri Kummercjali;

3. in-nullita' tac-citazzjoni ai termini tal-Art.789 (1)(d) tal-COCP Kap 12 billi c-citazzjoni hija nieqsa minn indikazzjoni sewwa u kompluta minn kollox ghall-identifikazzjoni tal-partijiet in kawza li hija partikolarita' essenzjali mehtiega mill-ligi bl-Art.174(3) tal-COCP Kap 12;

4. li minghajr pregudizzju ghall-eccezzjonijiet gia sollevati s-sentenza li taghha qeghdha tintalab l-esekuzzjoni hija mpunjabbli ai termini tal-Art.811(b)(c) u (d) tal-COCP Kap 12;

5. li wkoll minghajr pregudizzju ghall-eccezzjoni precedenti jirrikorru cirkostanzi li jirrendu kompetenti l-Qrati ta' dawn il-Gzejjer ai termini ta' l-Art 742(b)(e) u (f) tal-COCP Kap 12;

Ikkunsidrat:

Il-kawza titratta esekuzzjoni ta' sentenza, kopja ufficjali taghha esebita kif tradotta fil-lingwa Ingliza (folio 6 et seq), moghtija mit-'Tribunal du Premier Instance' ta' Bruxelles, fit-23 ta' Settembru 1988.

Fil-konfront ta' l-ewwel:

Il-Qorti sejra hawnhekk tirriproduci dak li ssottometta l-attur nomine fin-nota tal-osservazzjonijiet tieghu stante illi l-posizzjoni legali tinstab ineccepibbilment spjegata u ssib l-adezzjoni minghajr riservi ta' din il-Qorti. L-attur nomine jghid:

Fil-konfront tat-tieni:

i. l-ewwel eccezzjoni dwar il-mandat specjali tinsab sorvolata;

ii. t-tieni eccezzjoni bazata fuq in-nullita' tac- citazzjoni stante li l-att inhareg minn qorti mhux kompetenti (Artikolu 789/1b tal-Kap 12) billi, fi kliem l- eccezzjoni, 'il-qorti kompetenti li ghandha tiehu konjizzjoni ta' din il-kawza hija l-Qorti tal-Magistrati (Ghawdex) Superjuri Kummercjali' hija wkoll insostenibbli billi f'kull kaz il-qorti llum adita bil-kompetenza hija dina l-Qorti, sede superjuri, sezzjoni generali;

iii. l-insostenibilita' wkoll tat-tielet eccezzjoni imsejsa fuq l-Artikolu 789(1/d) tal-Kap 12 billi c-citazzjoni m'ghandha xejn nieqes mill-partikolaritajiet rikjesti bl- Artikolu 174 tal-Kap 12;

### **Formal pleas can only be raised in a formal reply.**

Article 790 - rewritten in act 24 of 1995 - never researched the earlier version - this has given powers to the court to avoid the certain important exceptions, annulling a judgement of the court of first instance on grounds of nullity of the judgment. Now, we know the difference between an appeal and the nullity of the judgment of the first instance. Appeal will decide the merits, and the nullity of the judgment of court of first instance, means judgement is annulled by appeal court and sent back to first court to be decided again. So here we are talking abo

Where plea of nullity of judgment may not be entertained.  
*Substituted by:*  
[XXIV.1995.294.](#)

**790.** Where before an appellate court the plea of nullity of a judgment appealed from is raised, such plea shall not be entertained if the judgment is found to be substantially just, unless such plea is founded on the want of jurisdiction or default of citation, or the incapacity of the parties, or on the judgment of the court of first instance being *extra petita* or *ultra petita* or on any defect which prejudices the right to a fair hearing.

Certain imp grounds that we have spoken of is, except where in other words what this article says is this that a judgment of first instance shall not be annulled if notwithstanding some technical defects, the judgment is found to be in substance (note contrast w/ procedure form and substance here) - so if the court of appeal thinks a judgement is in substance fair, will not annul on technical formal grounds unless, and the COA can not annul - if defect is among the following - lack of jurisdiction, incapacity of parties, extra petita, ultra petita, or a defect which prejudices the right to a fair hearing.

So basically if the CoA thinks that the judgment is correct in substance, it will not annul, unless the procedural defect is the following; lack of jurisdiction, lack of property service, incapacity of the parties, right which prejudices right to a fair hearing. Hence, if the COA sees that there is such a defect and mentioned it before, it has to annul, or otherwise if not on these grounds, it will not annul.

### **Darrell Micallef v. Awtorità tad-Djar, 13 ta' Marzu, 2025, QORTI TAL-APPELL**

Din hija sentenza dwar appell imressaq mill-attur Darrell Micallef minn sentenza mogħtija mill-Prim'Awla tal-Qorti Ċivili nhar it-12 ta' April, 2024, li biha każdet it-talbiet tiegħu sabiex isir kuntratt mal-Awtorità tad- Djar ta' xiri-u-bejgħ ta' ġid immobbli minhabba li sabet li kien laħaq skada l-konvenju ta' bejn il-partijiet.

L-ilmenti tal-attur jistgħu jingabru hekk:

(i) li l-Ewwel Qorti ma setgħetx tiddeċiedi biss it-tieni eċċezzjoni ladarba l-partijiet mhux biss ressqu l-provi fuq kollox iżda anke għamli s-sottomissjonijiet tagħhom dwarhom;

(ii) li l-analizi tal-fatti mwettaq mill-Ewwel Qorti ma kienx wiehed sħiħ ladarba hija ddeċidiet biss fuq it-tieni eċċezzjoni, tant li l- Ewwel Qorti ma ħaditx kont tas-sentenza tat-Tribunal ta' Revizjoni Amministrattiva mogħtija fit-23 ta' Settembru, 2021, li biha l-Awtorità tad- Djar ġiet ordnata terġa' ttipproċessa t-talba li saret mill-attur sabiex jiġi rikonoxxut bħala kerrej;

(iii) li f'dan il-każ il-konvenju ma sarx bejn żewġ ċittadini privati iżda sar bejn ċittadin privat u awtorità pubblika, b'dana li l-Ewwel Qorti kellha tħaddem kejl differenti;

(iv) li l-konvenju kien għadu validu għaliex l-Awtorità konvenuta zammet id-depożitu; u

(v) li l-artikoli tal-liġi dwar il-konvenju għandhom jiġu interpretati bħala obligazzjonijiet magħmula b'rieda tajba u mhux *stricto iuris*;

Konsiderazzjonijiet:

12. L-attur isemmi għadd ta' raġunijiet għalfejn fil-fehma tiegħu s-sentenza appellata għandha tiġi mħassra. Din il-Qorti għalhekk sejra tipprova tqishom wiehed wiehed fl-istess ordni li dan ġew magħmula fir- rikors tal-appell.

L-ewwel ilment tal-attur huwa ta' sura proċedurali. L-attur jgħid li ma jaqbilx mal-Ewwel Qorti meta fis-sentenza appellata qalet li hija kienet ha tillimita ruhha biex tiddeċiedi biss it-tieni eċċezzjoni tal-Awtorità konvenuta minhabba dak li kien ġie mniżżel fil-verbal tat-13 ta' Mejju, 2021. Isostni li l-verbal tal-udjenza tat-13 ta' Mejju, 2021 ma kienx digriet u li f'kull każ l-Ewwel Qorti ma zammitx miegħu peress li hija semgħet il- provi u s-sottomissjonijiet fuq kollox. B'hekk l-attur jargumenta li ladarba l-Ewwel Qorti semgħet il-provi kollha, mela allura kien mistenni minnha li hija tiddeċiedi fuq il-punti kollha li ġew sollevati waqt il-kawża jew għallinqas li tgħarraf lill-partijiet dwar kif kienet sejra tipproċedi sabiex b'hekk il-partijiet ikunu jistgħu jirregolaw ruħhom.

Din il-Qorti tabilhaqq ma tistax tifhem kif l-attur qed jgħid li dan il-verbal ma holoq l-ebda digriet, meta mhux biss għandek il-verbal innifsu li qiegħed jgħid ċar u tond li l-Ewwel Qorti kienet qiegħda tagħti digriet; iżda meta jirrizulta mill-mod ta' kif inkiteb dan il-verbal li l-Ewwel Qorti kienet qiegħda tagħti ordni ta' għamla interlokutorja dwar kif għandha titmexxa l-kawża billi l-ewwel il-partijiet jindirizzaw it-tieni eċċezzjoni dwar jekk għadx hemm konvenju li għadu jorbothom.

Naturalment l-attur jista' jgħid li l-Ewwel Qorti ddeċidiet hażin meta laqgħet din it-tieni eċċezzjoni u dan sejrjn narawh aktar 'il quddiem meta nistharrġu l-ilmenti l-oħra tiegħu mressqa f'dan l-appell; b'danakollu però l-attur ma jistax jgħid li s-sentenza appellata hija nulla għaliex waqfet mal-istharrġ tat-tieni eċċezzjoni. Jinħass xieraq li l-attur jiġi mfakkar li sentenzi għandhom jiġu annullati biss għal raġunijiet serji u gravi (ara *Francene Cini v. Domenic Zammit* deċiża mill-Qorti tal-Appell fis-17 ta' Ottubru, 2024). Ir-raġunijiet maħsuba fl-Artikolu 790 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili li jwasslu għat-tħassir ta' sentenza jitolbu ċirkostanzi ferm aktar gravi u radikali minn dawk imsemmija mill- attur.

It-tieni ilment tal-attur jirkeq fuq l-ewwel wiehed. Huwa jgħid li ladarba l-Ewwel Qorti ddeċidiet biss it-tieni eċċezzjoni allura hija spicċat biex m'għamlitx analizi sħiħa tal-fatti kollha li ġew miġjuba quddiemha. Fosthom jgħid li l-Ewwel Qorti ma haditx kont tas-sentenza mogħtija mit-Tribunal ta' Revizjoni Amministrattiva fit-23 ta' Settembru, 2021.

## **Deċiżjoni**

Għaldaqstant għar-raġunijiet fuq imsemmija, din il-Qorti qiegħda tiċhad l-appell imressaq mill-attur Darrell Micallef u tikkonferma għalkollox is-sentenza appellata, bl-ispejjeż kollha tal-appell jithallsu għal darbtejn mill-istess Darrell Micallef peress li l-appell tiegħu huwa fieragh u vessatorju.

## Pleas in Spoliation Suits

### OF PLEAS IN SPOLIATION SUITS

In article 791 COCP, the D in a spoliation suit shall not raise any pleas other than dilatory pleas unless there has been RINTEGRAZZJONI. This means that the Court will not, mandated and joined to limit their inquiry to dilatory pleas and the question of detention, possession and the 2 month time period. Questions on possession are not allowed.

Article 791 sub 3 - the Court shall limit its inquiry on detention and spoliation. Comment which raised some debate and if we look at article 791, Defendant in sub 1 may not raise any plea other than dilatory pleas before there has been reinstatement. Now the way it is written has prompted the question - let's say there is reinstatement, are there any petitory pleas? The drift is that in spoliation cases, petitory cases are inadmissible as pleas. The way the article is written has prompted the question.

**Plastichem Ltd vs. Renova Company Ltd (2001) First Hall** - P alleged that D in May 1999 broke down the divisory wall and 2 tanks and in land of P a wall of 75cm was built. All requests constituting spoliation were proved to exist as per article 535 Cap. 16 and 791 of the COCP:

*“Din l-azzjoni ta’ spoll hija konceptita’ bhala azzjoni rapida u effikaci”*

*“Hija ntiza biex iggieghel lill-konvenut li jerga jqieghed il-haga fl-istat li kienet qabel” 791(1) COCP.*

Court declared that D committed spoll - *“meta waqqghet il-hajt divizorju, kissret it-tankijiet u invadiet art tas-socjeta’ attrici”*

**791.** (1) The defendant in a spoliation suit brought within the period of two months from the day on which the spoliation took place may not raise any plea other than dilatory pleas, before he shall have restored the thing to its former condition and fully re-vested the party despoiled within the time which, according to circumstances, may have been fixed in the judgment, without prejudice to any other right appertaining to the defendant.

(2) The provisions of this article shall also apply in the case where a tenant has been dispossessed of the thing let out to him whether by the lessor or by a third party.

(3) The court shall limit its inquiry to the question of possession or detention, and to the question of spoliation.

(4) In a spoliation suit the depositions of witnesses given in criminal proceedings for an offence under article 85 of the [Criminal Code](#) for the same conduct concerned in the suit shall be admissible as evidence in the suit without prejudice to the right of the other party to cross-examination.

## **Lis Alibi Pendens - Article 792 COCP**

**Professor Caruana Galizia** - argues that the plea of *lis alibi pendens* is similar to that of a *res judicata*.

We have an idea of what LIDIS PENDENZIA IS - how does a court deal with a situation where there is a case which is similar or where one case will wait for a judgement in another case. First of all - SOPRASESSIONJI: to sit above - point is that SUPRAMESSJONI IS TOTALLY ABSENT HERE - could be that they had this in mind - we know from -lis pendens we know what it means - but here SOPRASESSIONJI IS ABSENT - and this SOPRASESSIONJI means where a case would stop until another case is decided. There are pleas - generally there is identity of parties, and a situation where the outcome of the 2nd case depends on the first, and above all, the sense that the 2nd case can not proceed if the 1st case is decided.

NOW, the benefit of discussion - requires - when someone is faced with execution. You can ask for other assets to which you can execute before mine. We know that the party pleading the benefit of discussion has to produce a list within jurisdiction and deposit costs of execution, at which point the diligent pursuit of the execution is shifted on the creditor. The party raising a plea of benefit of discussion has to cover costs of execution, if all these requirements are satisfied, then, the court will order a suspension of proceedings nOT TERMINATION.

SO COURT WILL SAY LET'S STOP UNTIL WE SEE WHAT HAPPENS

Not excluding that party pleading may if execution is incomplete provide additional lists of property, over which execution takes place, the process is repeated. Finally, the plea of discussion is a dilatory plea - NOT A PEREMPTORY PLEA, has to be raised in *limine litis*, if raised can be withdrawn and if not raised is deemed to have been renounced to.

- Caruana Galizia - aim of this plea is to avoid useless duplication of suits.
- 3 main requirements of this plea;
  1. Suit on the same other claim must be brought up previously before another court and is pending - Zammit vs. Minuti (1959): The court determined that the relevant moment in order to establish whether another action on the same claim has already been brought is the date of filing of the action.
  2. Successful identification of the 2 actions - Axel Johnson International vs, Aluminium Extrusions Ltd - The Court said that the plea of *lis alibi pendens*, means according to the jurisprudence there are 2 cases pending before the courts with both cases having the same merits.

3. Competence of the same court hearing and deciding a case - Court first seized must be competent to hear and determine a case in order for the court second seized to remit the case to the first court.

## **Plea of Falsification**

First of all, we are talking of the word document - this refers - includes the traditional paper document as we know it - when it was written, to a paper document to challenge the document but today, term document may have additional extensions and one may ask whether document includes videos. If they are admissible as evidence, they are documents. What does the term document include here? Who may challenge the document? Not only inter parties; one of the parties - but also here, standing is created in 802 that a party extraneous to the litigants to whom a document is attributed, may challenge it. Here we are creating a direct *locus standi*.

Article 803 - avert to be false, it means claimed or alleged - claimed to be false.

### **Carmel Scicluna vs. Angelo Scicluna, 2021 - First Hall - Onor. Chris Falzon Scerri**

According to article 803 COCP, since these documents are not relevant, for this cause, it does not have to go into the plea of falsification

*“Din il-qorti lanqas ghandha ghalfajn tqis din l-eccezzjoni ta’ falsifikazzjoni”*

The Court still considered it - and despite D instilling doubts in the documents, no witnesses were brought to place doubt on this authenticity factor. So much so that P had 2 witnesses to declare the genuine nature of the documents. Hence the Court rejected the 9th plea.

#### OF THE PLEA OF FALSIFICATION

Plea of falsification.

**802.** The plea of falsification may be raised not only by the party to whom the document is attributed but also by any other party against whom the document is produced.

Where cause can be decided irrespective of plea.

**803.** Where the cause can be decided independently of the document averred to be false, the court shall decide on the merits, irrespective of the plea of falsification.

Plea to be determined independently of criminal action.

**804.** The plea of falsification shall be determined independently of any criminal action.

Arrest of person suspected of falsification.  
*Amended by:*  
[VIII.1990.3.](#)

**805.** If, at any stage of the proceedings, it shall appear to the court that there are strong grounds to suspect the falsification of any document, it shall of its own motion order the party suspected of such falsification to be arrested and brought before the Court of Magistrates, in order that he may be dealt with according to law.

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## **KONTUMACJA - Article 158(10) COCP**

Historically more linked with contempt of court, disregarding the court notice to appear. In fact in the earlier judgements, and they are replicated today, you will find the term KONTUMELIA, disrespect arising from ignoring a court summons. Now *kontumacja*, if established, has very serious consequences.

A party who is declared in a state of *kontumacja*, can not claim evidence, can not counterclaim, can not cross examine witnesses. There are significant situations - on the other hand, a party in *kontumacja* can appeal - can ask for at first instance other parties to be called into the suit. Can ask for a retrial, but still the basic limitation that no evidence is allowed, will continue to apply all through. The party in *kontumacja* will remain hand strung for the entire limit of the proceedings - a very serious limitation.

**Article 158** - OBLIGATION TO REPLY - in a particular form and manner and within a time limit. Our system has opted, what is known as traditional jargon as the fictitious, *litis kontestazio*. In other words, where a party is in KONTUMACJA, it is presumed to be contesting and therefore KONTUMACJA IS CONTESTATION. This is different from the English system where failure to respond, default = admission.

In our system KONTUMACJA = contestation. **What constitutes Kontumacja?**

1. A Valid Service - if service can be challenged, effects of *kontumacja* do not flow.

Key Judgements have developed a distinction between *kontumacja formali* and *kontumacja sostanzjali*.

***Kontumacja Formali*** - situation when from records of the case there appears to be valid service and no response and no reaction - NOTHING. Only the originating writ. From the formal aspect of the records

***Kontumacja Sostanzjali*** - this is the second stage. On the first hearing of the case, the case is called and - sometimes a lawyer appears, a party appears, that is why that 20 day template. The 20 day template is very important.

On the date of the first hearing, the Court will verify what is happening. And if again on the first hearing no one appears, then the **KONTUMACJA IS CHANGED FROM FORMAL TO SUBSTANTIVE**. The Court then formally declares the party to be *kontumaci* and the case will continue. If party appears in first hearing or lawyer appears, then the court is under the duty to investigate the circumstances of what is a formal apparent *kontumacja* and the practice is that if

there is a reaction, the Court will invite respondent to explain and justify why there was no proper response to the KONTUMACJA. *PRO CONTUMACIA, OMNIA JURA CLAMAT.*

### **How do you justify a KONTUMACJA/?**

The first justification is that it has to be a result of a sitwazzjoni **IINVINCIBBLI**. A situation which can not be overcome. Also, no negligence or no voluntary contribution. I can not understand a judgment where a party went to a lawyer in time but the lawyer called off and nothing was done. The client had a remedy. There has to be serious justification; illness, travel but not always, personal depression - very lenient with such cases. Needless to say, proper service has to be accepted, these are the parameters of kontumacija.

**C.V. Mizzi vs. C. Mizzi** - *“mhux permess ghall-konvenut kontumaci li jressaq ebda eccezzjoni, inkluzo dik tal-preskrizzjoni, ghax jekk dan isir, l-istess konvenut qiegħed b’dan il-mod jissana l-pozizzjoni tiegħu tal-kontumaci”*

### **To Justify Kontumacija:**

1. Must result out of an invincible situation illness, travel...
2. **Mifsud vs. Andolfo (1926)** - Lawyer who failed to inform the client - valid reason for justifying contumacia
3. **Bugeja vs. Farrugia (1996)** - Contumacia was justified in cases of sickness or due to serious personal problems

**Victor Cassar vs. Carmelo Vassallo** - 1937 - Contumacia can not be justified if:

1. It is intentional (voluntary)
2. If there is *culpa*

**Noel Calleja vs. Middlesea Co Ltd (2005)** - If D is contumacious, ikun wera *“disrispett lejn is-sejha tal-Qorti biex jidher quddiemha, liema disrispett il-ligi thares lejha bhala għemil li jisthhoqqlu piena- dik li ma jkunx jista’ jindahal fit-tressiq tal-provi ...dizordni soċjali”*

**HSBC Malta vs. Darren Dimech (2020)** - P owed sum of money by D. Despite notification, D did not reply hence should be kontumacti for all effects at law.

D are kontumaci - which is “kontestazzjoni”. “Fl-ilsien Taljan il-kelma “contumacia” originarjament tffisser dizubbidjenza b’risultat ma’ supervja li wieħed ma jnbaxxix rasu għall-awtorita’ tal-knisja, minkejja l-konsegwenza serha li jista’ jigi skumnikat . In general terms, ma jnbaxxix rasu għas-superjuri tiegħu.” Court declares D contumaci.

# Further Introduction on the Law of Civil Procedure

*We are going to cover the COCP, the basis for the law of procedure*

## 1.1 Introduction to start a case in Court and the Parties in a case

### Rikorrent u Intimat

Whenever you file a case in Court, there is the Plaintiff and the Defendant. **Rikorrent** jaghmel ir-rikors i.e., min jiftah il-kawza. Today, strictly speaking, all cases are initiated using af “Rikors”. We also use the word “**tintavola r-rikors**”.

Who receives the Rikors is called the Respondent i.e., “*l-intimat*”. These are the two parties in the case. Unfortunately, we still use the terms Plaintiff (attur) and Defendant (il-konvenut). Strictly speaking this should not be the case because this was used when we had the writ of summons (*citazzjoni*) which we no longer have. This has ended but sometimes the Court interchanges them.

### Juridical Interest

Any litigant, be it P with D or otherwise, has to enjoy **Juridical Interest**. There can never be a case where one does not have a juridical interest. All parties to a case **have to enjoy** juridical interest. Ironically, no title in the code deals with juridical interest but every now and then, the Code does refer to it. We thus use doctrine and caselaw. For example, see **article 236 COCP**. Here, the law does not tell us who the third-party interested is. This does not mean that you can poke your nose in your neighbour’s affairs, but you need to enjoy juridical interest. Who decides whether one has juridical interest? The Court itself.

# Code of Organisation and Civil Procedure

*Why does the law mention Organisation in the COCP?*

Because it sets up the Courts and their respective competences. If you go to Article 3, the law starts off by laying down who the Superior Courts are. It goes to reason that since you have Superior Courts, then you obviously have Inferior Courts. The Inferior Courts are decided by Magistrates whilst the Superior Courts are presided by Judges. The Court of Appeal (COA) is a Superior Court. Likewise the Civil Court (Prim Awla) is also a Superior Court because you have a Judge.

For it to be an Inferior Court, it has to be presided by a Magistrate. The Civil Court is presided by one judge but the COA is made up of three judges. Hence, in the Civil Courts, you appeal the case of a Superior Court to another Superior Court. The Jurisdiction of the Superior Courts enjoys general jurisdiction bar what the law states. However, the jurisdiction of the inferior courts is defined in law.

## Language of the Courts

**Article 21 of the COCP** - The Language of the Courts has been Maltese since 1964. The Maltese version prevails over the English version and if there is any discrepancy, the Maltese version prevails. This excludes EU law where the prevailing language is English. If the parties agree to hold the case in English, then it may be convened in English. Cases are tried in public unless for Family cases because as a rule they respect the privacy of the individuals concerned. However, if the Court feels that it is best to be held behind closed Courts, it may order so.

For now, the Civil Court deals with Civil and Commercial matters. All matters are subject to appeals to the COA. It is very rare that a judgement is not appealed - every judgement is usually appealed. Formally, we have the Privy Council (UK) but since independence, we have lost this. The rule is that once the COA decides, that is the end of the matter **unless you ask for a retrial** which is very rare.

# **The Court of Voluntary Jurisdiction**

**Article 35 COCP** - 35. *No appeal shall lie from any decree of the Court of voluntary jurisdiction; but it shall be lawful for any party, who deems himself aggrieved, to bring an action before the Civil Court, First Hall, for the necessary order.*

## **The Court of Voluntary Jurisdiction - The Sekond' Awla.**

Civil Court and COA deal with **litigation** whilst in the CVJ there is **no litigation** - one is filing an application to request Court authorisation such as adoption of an infant, opening of succession, interdiction. Keep in mind that an application is not a Court case. Court of Contentious jurisdiction (Civil Court) vs Court of Voluntary Jurisdiction - in the latter there is no opposite party therefore you go voluntarily and you are not summoned to defend yourself, nor do you contest a dispute. CVJ - Once it's a CVJ and there is no litigation, then there cannot be a judgement. Hence, there cannot be an appeal. The CVJ will only issue decrees. If the person refuses the decree, he can do so by filing a Court case in front of the Civil Courts and here you have an appeal.

Who is the respondent if you file a case contending a decree? **The Court Registrar.**

## **Competences of the Civil Court**

**Article 36 COCP** - was introduced by the legislator. The idea was to introduce a Civil Court in Gozo hence you need a Judge but no one was willing to go to Gozo. Hence most of the articles are ineffective.

*36.(1)\*The Civil Court, First Hall and the Civil Court(Family Section) shall be competent to hear cases in Malta and Gozo.*

*(2)†The Civil Court, First Hall and the Civil Court (FamilySection) shall hold sittings both in Malta and in Gozo.*

*(3)When the Civil Court, First Hall and the Civil Court(Family Section) hold sittings in Malta, they shall take cognizance of all claims against persons residing or having their ordinary abode in the Island of Malta, and of all other causes expressly assigned by law to such sections of the Civil Court.*

*(4)\*When the Civil Court, First Hall and the Civil Court(Family Section) hold sittings in Gozo, they shall take cognizance of all claims against persons residing or having their ordinary abode*

*in the Islands of Gozo and Comino, and of all other causes expressly assigned by law to such sections of the Civil Court.*

*(5)†The rules set out in this Code concerning the privilegium fori and the exceptions thereto shall apply also between the Civil Court, First Hall and the Civil Court (Family Section) when sitting in the island of Malta and when sitting in the island of Gozo.*

*(6)‡Causes which are not included in the causes which may be heard by the Civil Court, First Hall and the Civil Court (Family Section) when holding sittings in the island of Gozo shall be heard by the said Courts sitting in Malta.*

*(7) The Civil Court (Commercial Section) shall take cognizance of all claims against persons, whether natural or legal, residing or having their ordinary abode or registered office in the Islands of Malta and the Islands of Gozo and Comino and of all other causes, expressly assigned by law to such section of the Civil Court:*

*Provided that where the Civil Court (Commercial Section) is to hear causes concerning claims against persons, whether natural or legal, residing or having their ordinary abode or registered office in the Islands of Gozo and Comino, it shall hold its sittings in the building of the of the Courts of Gozo:*

*Provided further that the provisions of Sub-title IV of Title I of Book Third of this Code, sub-titled "Of Referees" shall, mutatis mutandis, apply to matters relating to the Competition Act and any regulations made thereunder and the Consumer Affairs Act and any regulations made thereunder.*

*(7A) The Civil Court (Asset Recovery Section) shall take cognizance of all claims against persons whether natural or legal residing or having their ordinary abode or registered office or owning assets or property of any kind in the Island of Malta and in the Island Of Gozo and Comino and of actions in rem, for the recovery of proceeds of crime by the State or by an entity of the State or for the non-conviction based confiscation of assets and property of any kinds may be provided in any law from time to time in force and of all other causes expressly assigned by law to such section of the Civil Court*

*Provided that when the Civil Court (Asset Recovery Section) shall take cognizance of claims against persons, whether natural or legal, residing or having their ordinary abode in the Islands of Gozo And Comino it shall hold its sittings in the building of the courts of Gozo.*

*(8)\*The Civil Court (Voluntary Jurisdiction Section) shall also sit in Malta and in Gozo.*

*(9) It shall be lawful to add the words "(Gozo)" in any written pleading, judicial act, court decree, court judgment, procès-verbal, form or any other document whatsoever filed or used by the Civil Court, First Hall, the Civil Court (Family Section) or the Civil Court (Voluntary Jurisdiction Section) when such documents relate to acts, claims or proceedings of the said courts in respect of which sittings are held in the island of Gozo.*

## **Inferior Courts**

Organisation of the Courts - set up of the courts. Inferior courts- presided by courts of mag, as opposed to the superior courts. Superior courts are the civil courts, which else? Constitutional court, and the more imp court, court of appeal and civil court first hall. COURT OF SECOND INSTANCE.

Court of first instance - we do not refer necessarily to the court of mag, but could be a court hearing the case for the first time, from which there is an appeal, in the COA or in constitutional cases cons. Court.

### Court of Magistrates

Cases not exceeding 15,000 euros. The court fixed it at 15,000. Very soon we will be considering an exception. The Legislator did not point it out at an early stage. A Mag. sits in court of mag, for any amount not exceeding 15k. Able to hear cases. The Court of Magistrates can only hear cases where the Defendant would be residing in Malta, ordinarily residing. Not a holiday in Malta, or study purposes. Hence Court of Mag. not exceeding 15k.

**Article 47 COCP** - Law in sub 3 makes it clear that any dispute relating to immovable or any burdens relating to immovable, or even the eviction of any tenant, that will be outside the competence of the COM.

*47. (1) A magistrate shall sit in the Court of Magistrates (Malta), and such court shall, as a court of first instance, hear and determine all claims of an amount not exceeding fifteen thousand euro (€15,000), against persons residing or having their ordinary abode in any part of the Island of Malta.*

*(2) Such court shall also take cognizance of all other causes expressly assigned to it by law.*

*(3) Nevertheless, causes involving questions of ownership of immovable property, or relating to easements, burdens or other rights annexed to such property, including any claim for the*

*ejection or eviction from immovable property, whether urban or rural, tenanted or occupied by persons residing or having their ordinary abode within the limits of the jurisdiction of such court, shall not fall within the jurisdiction of the Court of Magistrates (Malta) independently of the value of the claim.*

**Article 49 COCP** - *From the judgments of the Court of Magistrates (Malta) or from the Court of Magistrates (Gozo), an appeal shall lie to the Court of Appeal, constituted as provided in article 41(9).*

**(9)** *The Court of Appeal shall also hear and determine appeals from judgments of the Court of Magistrates (Malta) and Court of Magistrates (Gozo) in its inferior jurisdiction. But, for the purposes of such appeals, the Court of Appeal shall be constituted by one of its members only, and any one of the judges, appointed by the President of Malta to sit for the hearing of such appeals, shall be deemed to be a member of such court. The Court of Appeal as constituted under this sub-article may also be referred to as the Court of Appeal (Inferior Jurisdiction).*

Judgments from the COM Malta and COM Gozo, an appeal shall be to the court of appeal. COA is made up of 3 judges, Chief Justice and 2 Senior Judges, – now only 1 Judge. SEDE INFERJURI - an appeal from the COM - goes to COA made up of just 1 judge.

**Article 50** - COURT OF MAG. Gozo takes cognizance of all claims against persons who reside in Gozo Comino. The Gozo courts are competent to deal with cases where a person is ordinarily resident in Gozo. The Gozo court would be competent to hear cases against Gozitans.

**50.(1)** *Subject to the provisions of article 770 and 771, the Court of Magistrates (Gozo) shall, to the exclusion of the courts of Malta, be competent to take cognizance of all claims against persons residing or having their ordinary abode in the Island of Gozo or Comino, as well as of all other causes expressly assigned by law to such court.*

**(2)** *Such court shall consist of one magistrate, and shall have a twofold jurisdiction, namely:*

**(a)** *an inferior jurisdiction, by virtue of which it shall take cognizance of all causes of the nature of those which, according to articles 47 and 48, are triable by a magistrate for the Island of Malta; and*

**(b)** *a superior jurisdiction, by virtue of which, subject to the provisions of article 46 of the Constitution of Malta and article 4 of the European Convention Act, it shall take cognizance of all causes of the nature of those which, according to article 32, are triable by the Civil Court, First Hall.*

*ACTUS SEQUITUR FORUM REI* - one sues at the place of residence

Gozo Mag. would hear cases which he would be precluded from hearing in Malta. If mag is appointed just after 7 years have elapsed, it can be a bit problematic. The Gozo Court enjoys a voluntary competence. Malta was presided over by a judge - in Gozo, the Courts of Mag. decided in the Gozo court would be the one who would be sitting in the court, a court of voluntary jurisdiction.

**Article 56A COCP** - *Notwithstanding any of the provisions of this Code the inferior courts shall not take cognizance of any claim falling within the jurisdiction of the Small Claims Tribunal established under the Small Claims Tribunal Act.*

Article 56 COCP - Provides that COM will not deal with cases falling in front of the small claims tribunal. The competence of the small claims tribunal is Chapter 380, Article 3 - provides that there shall be this tribunal the small claims tribunal and this tribunal shall have jurisdiction to hear all money claims not exceeding 5k euros. We have to be careful about the law. Another special law and any money claims - up to 5k is within the competence. This will prevail over the general law. Perhaps you can point it out earlier. Not a judge or mag, but an adjudicator, a practising lawyer - this can raise problems as if a case law A vs. B, what if B is appointed as an adjudicator, A has to appear in front of B as an adjudicator. Is this ideal to have a lawyer with whom you may just have defended your arguments and then you will decide in a case where another lawyer will be appearing in front of you.

**Article 7, Cap. 380**

*7.(1) The Tribunal shall determine any claim or counter-claim before it principally in accordance with equity.*

One basic element of the small claims tribunal - Article 7 - in accordance with justice. Tribunal is not acting strictly speaking according to law, but according to equity and this could raise problems. But the law makes it clear that in determining any questions of prescription in front of a tribunal, the adjudicator has to decide it according to law. Adjudicators have to apply the law. Law goes so far that he is not even bound by the rules of best evidence. Paramount importance as the evidence you have to produce has to be according to law, one has to produce the best evidence available.

**Article 8(3), Cap. 380**

*(3) Nothing in the preceding sub-article shall be deemed to preclude a judge or magistrate from communicating with the advocate or legal procurator of a party in connection with any matter concerning the management of a cause pending before the judge or magistrate:*

*Provided that a magistrate shall not be debarred from holding any communication for the purposes of any inquiry into any criminal matter when such magistrate is holding an inquiry under Title II of Part I of Book Second of the Criminal Code.*

Appeals - though there is a right to appeal in Article 8, the amount has to exceed 1,500eu. So if the case is on a 800eu case, no appeal. If it exceeds 1500, should the court of appeal consider the application frivolous or vexatious, the court besides dismissing the appeal, will order the applicant, the appellant, to pay a penalty not less than 250 and not more than 1250. Normally a lawyer will help the applicant to file an appeal. From small claims tribunal to the court of appeal (Inferior jurisdiction).

The court of appeal in the case of a frivolous and vexatious appeal can impose a penalty. The tribunal is entitled to do so. Point of difference. Chapter 380 is a very short chapter. Do go through it. The one filing for the taxed bill of costs - this starts running from - the other party will have the one month starts running from the judicial act.

Time limit of 1 month - Article 8 cap. 380.

The law continues to mention the archives and duties.

**Article 14, Cap. 380**

*14. The parties may be assisted by any person.*

The Parties may be assisted by any person, a legal procurator or a lawyer - any person could assist the person concerned

## **Executive Offices - Registries, Directory General...etc**

Article 64 COCP - One duty of the register is to issue a taxed bill at the end of every case - the register has to assess and bill the judicial costs in Malta.

*64.(1) Judicial costs shall be taxed and assessed by the registrar, and the assessment made by him may not be impugned after the expiration of one month. Such action shall be instituted by application which shall be heard summarily by the court. Such period, in regard to the person applying for the taxed bill of costs, shall commence to run from the day on which the taxed bill was issued and, in regard to the debtor duly served with such taxed bill by means of a judicial act, from the day of such service.*

*(2) The applicant shall cause a copy of the application to be served on any person having an interest therein, who shall have twenty days within which to file a reply.*

*(3) The written pleadings in respect of the application shall be deemed closed by the reply or failing such reply with the expiration of the time allowed for such reply. The parties shall be notified with the date for the hearing of the application.* 64.(1) *Judicial costs shall be taxed and assessed by the registrar, and the assessment made by him may not be impugned after the expiration of one month. Such action shall be instituted by application which shall be heard summarily by the court. Such period, in regard to the person applying for the taxed bill of costs, shall commence to run from the day on which the taxed bill was issued and, in regard to the debtor duly served with such taxed bill by means of a judicial act, from the day of such service.*

*(2) The applicant shall cause a copy of the application to be served on any person having an interest therein, who shall have twenty days within which to file a reply.*

*(3) The written pleadings in respect of the application shall be deemed closed by the reply or failing such reply with the expiration of the time allowed for such reply. The parties shall be notified with the date for the hearing of the application.*

→ The fees to the lawyers and legal procurators involved, they are usually entitled to 1/3 of the fee which the lawyer gets. Table of costs is issued. COURT EXPENSES - taxed bill of costs: prepared by the registrar.

→ The one who won would be eager to have it read to send over the costs, only 1 month to contest it if the fees which have been assessed by the court registrar are too low. The winning side can contest the fees - fees of the lawyer can not be recovered - once a taxed bill has been

issued with only 1 month to contest. You could potentially convince him - you have to go to court.

→ Principal - AMMONT DOVU? IS-SORTE - AMMONT DOVUT - L-ISPEJJEZ TAL-QORTI.

File an application requesting the Court to order the registrar to change his assessment. These would be held summarily. These could take years. There would be an appeal - if therefore one sends the bill to the party cast, the party cast would think the fees are excessive - the party case would then have 1 month to contest such a taxed bill of costs. To file an application to order the registrar to make a new assessment. The law tells us that in order for the time limit of 1 month to start running you need to have the taxed bills of costs with a JUDICIAL ACT - with a letter - letter ITTRA BONARJA - private letter is it a judicial act? How does it become a judicial act? If an official letter is sent ITTRA UFFICJALI.

*Article 70 COCP - Saving the provisions of article 992, if any person knowingly avoids, obstructs or refuses service of any act or court order or execution of any warrant or order by any executive officer of the courts, he shall be guilty of contempt of court and shall be liable, on conviction, to the punishments mentioned in article 990. Any person refuses service of any act for execution of any warrant - guilty of contempt of court - failure to accept service is a contempt of court - can amount to contempt of court and on conviction will be liable to Article 990.*

**What do you do if you're threatened?** Go to the police station - and say I am threatened. Officers will accompany them (court officers) to carry out their duty.

# **The Legal Profession**

## **Who can obtain the warrant? Article 81 COCP**

Many lawyers who graduate are not obtaining the warrant out of their own free choice. Get your warrant. Article 81 lists the conditions, it has to be a fit and moral person, of good conduct and morals.

Article 87 COCP - this is not required of them. Of good conduct and morals. The lawyer will have to sign that you attended his office for a full year. You are expected to attend court procedure. You make it a point - or can have problems.

### **81.(1) No person shall be entitled to obtain the warrant referred to in article 79, unless -**

*(a) he is a fit and proper person as recommended by the Committee;*

*(b) he is of good conduct and good morals, and is not or has not engaged in or is not or has not been associated with any activity or practice which in the view of the Committee is not compatible with the exercise of the legal profession or has not otherwise conducted himself in such manner which casts doubt on his honesty and integrity;*

*(c) he is a citizen of Malta or of a Member State or is otherwise permitted to work in Malta under any law;*

*(d) he has obtained the academic degree in law in accordance with the provisions of the Statute of the University of Malta, or such other qualification as the Minister, after consultation with the Committee, may from time to time prescribe, or a comparable degree from such other competent authority in accordance with the principles of mutual recognition of qualifications, after having readlaw in Malta or in a Member State;*

*(e) he has, after satisfying the requirement of paragraph (d), or, in the case of persons regularly following the academical course of law in the University of Malta, at any time after the commencement of the last academic year of the said course, for a period of not less than one year regularly attended at the office of a practising advocate of the Bar of Malta and at the sittings of the superior courts;*

*(f) he possesses a full knowledge of the Maltese language as being the language of the courts;*

*(g) he has been duly examined and approved by two judges who shall issue, under their signature and seal, a certificate attesting that they have found him to possess the qualifications mentioned in paragraphs (b) to (e) and that he is competent to exercise the profession of advocate in the courts of Malta.*

*(2) The Committee shall from time to time and with the approval of the Minister, prepare and publish rules and guidelines setting out the requirements that a person shall need to satisfy from time to time to comply with the requirements of article 81(a),(b) and (c).*

→ Possibility of appointing judicial assistants - regulated by law. Now, Judges have judicial assistants so that one relieves the judges of this duty. Besides this, there are also the court attorneys which are not regulated by this law - court attorneys help the judges draft judgements. Only magistrates had these court attorneys before. Judges - have income guaranteed. Court attorneys are different and not mentioned in the code.

# The Procedure used in Courts of Civil Jurisdiction

**Article 98 COCP**- *Any judicial act done in virtue or in pursuance of an act which is null is equally null.*

If something is null, it can not have a valid effect, something null can not produce a valid legal effect. So suppose you're trying to sign an application, unless it is signed, it is invalid.

**Article 99 COCP** - *Any act which is null may be replaced by another, provided the peremptory time within which the act is to be done has not elapsed.*

If you forget to sign the application - the law says that article 99 - any act which is null, maybe replaced by another one, as long as the peremptory time in which the act is to be done has not elapsed. Time limit to file an appeal - 30 days. If an appeal is filed after 20 days, you can file another application if still in time and you will be able to claim that this second act substituted the other one. Even though you made a mistake, you can still make it up. Important not to leave it to the very last day.

## Time Limit

***Peremptory time limit*** = IN MALTESE, it is *HIN PERENTORJJU jew ta' DEKADENZA* - *perente in italian = finished. Time limit which can not be extended. If law provides for a time limit, it can not be extended, not even the court itself can change it. The court can change the time limit it has given.*

TIME limit which can not be extended - DEKADENZA - FORFEITURE. CAN NOT BE EXTENDED. Which time limit can be extended? A collision and one suffers damages has 2 years for damages - One files a judicial act to interrupt prescription - that can be interrupted. As if not a period of forfeiture, then one can extend it and the 2 years start running once not stopped.

**100.** *No person may plead a nullity of form, of which he or his agent has been the cause.*

**Article 100 COCP** - Person responsible for the nullity, can not claim himself that the issue is null, who can raise the issue then if not the party himself? The other party can, but the one responsible for the nullity can not do it himself.

Ex. Someone files application on behalf of minor, the one filing the case, JEKK IKUN HEMM KWAZA, ICCEDIHA (You withdraw a case if you had a mistake - but can not plead the nullity of the case, the other party can file the case). Once a minor does not raise the issue of nullity himself, the person making the case can not raise nullity himself.

Article 101 - Running of legal or judicial times

**101.** *Any legal or judicial time the running of which is dependent on an act requiring service or publication, shall commence to run from the day on which such act has been duly served or published.*

**Article 102 COCP - 102.** *Where any legal or judicial time is to be reckoned from a stated day, such day shall not be considered as included in the time itself; and where it is to be reckoned by hours, the hour in which service is effected shall not be considered as included in the time.*

**DIES (DAY) A QUO** - deriving from roman law - short term for - the day service is affected by court officers is NOT and no exception is not to be counted in concluding the time limit for the answer. Ex: Someone needs to answer in 10 days and the court officer hands papers today. To start counting those 10 days, you start from the next following day and do not start from the day service is affected.

Day service is not to be counted, even if within hours, the hour in which service is affected is not to count. We start counting from the next following day, in cases of urgency the court can abridge (shorten) time limits. The court can from 20 days say 5 days - in urgent cases. **THE DAY SERVICE IS EFFECTED IS NOT TO COUNT.**

**Article 106 COCP - 106.** *Any legal or judicial time, not being peremptory, may be extended on good cause being shown, provided the request for such extension is made within the time the extension of which is sought.*

As long as it is not peremptory, it can be extended. If you want to ask for an extension, ask before the time limit elapses. Do be careful as long as it is not a peremptory time limit, not a peremptory time limit - meaning it can be extended, as long as the original time limit has not elapsed. One can ask the court to file an answer.

**Article 115 COCP** - passing mention - judicial acts are open to all persons - anyone can sit and hear cases.

**115.** *The acts of every court shall be accessible to all persons, and copies thereof shall be given out at the request of any person.*

**Article 124 COCP** - provides the work "working days: does not include Saturdays. Normally we mean that Saturdays, working days do not cover Saturdays.

**124.** *In this Code, the phrase "working days" does not include Saturdays.*

# **The Ordinary Mode of Procedure in Contentious Matters**

*Article 125 COCP - 125.(1) In the superior courts and in the Court of Magistrates(Gozo) in its superior jurisdiction, proceedings are ordinarily instituted by application, whether sworn or not, as provided by law.*

*(2) In the Court of Magistrates (Malta), and in the Court of Magistrates (Gozo) in its inferior jurisdiction, proceedings are instituted by application.*

In the superior courts of Gozo, what does the Gozo Court enjoy? Superior court - It enjoys a superior and inferior court - so the Gozo court, even though Gozo court can enjoy a dual jurisdiction - in the superior court and the Court of Mag. in its superior jurisdiction, proceedings are ordinarily instituted by application. Hence, in the superior courts, proceeding instituted by application, whether sworn or not, hence in the superior courts, now to file proceedings you have to file an application, formally, we used to have a writ of summons which in Maltese it is Citazzjoni (no longer used).

Not all applications in the superior courts are given on oath. What happens when you file a case at first instance and lose it? You appeal, and in filing an appeal, application on appeal is not confirmed on oath. Yet, an application in front of the court of appeal is not confirmed on oath, whereas to file a case in the civil court, you have to confirm it on oath.

It is possible to have a sworn application or not a sworn one, whereas in the court of magistrates, proceedings are given by application not sworn in the superior courts. They need not be sworn to file an application, in the superior courts it is an application which needs to be confirmed on oath and it is a case of nullity if not confirmed.

**Inferior - not sworn**

**Superior - sound and may be confirmed on oath**

# Contents

**Article 142** - Mode of procedure before an appellate court, application shall contain the prayer, that:

**142. (1)** *Save as otherwise provided by this Code or by or under any other law, the mode of procedure before an appellate court is by application.*

**(2)** *The application shall contain the prayer that the judgment appealed from or any part thereof be reversed or varied.*

## Why would the law state that a judgement could be reversed or varied ?

Reversal or variation - why is the law mentioning this?

Varying = part of judgement is in your favour but another party has won, so I like part of it and I don't want the Judge to change all of it, leave the bit I like and the one I don't like I'm asking to change it.

JIBDEL/JIKKONFERMA I-ECCEZZJONI. The court will decide on each TALBA, which is called, if there is 6 TALBIET, the court will, HEAD OF JUDGEMENT - FOR EVERY claim which is filed, there will be corresponding head of judgements.

Defendant can appeal because he lost 5 heads of judgement and the plaintiff lost only 1 - the point in issue is this, if a head has been won and another lost, when one appeals, one will ask for a variation as part of it will stand. Whereas you would ask for a complete revocation, if P asked 3 demands and the court accepted all demands, the P wont file the appeal, the D will appeal and what will he ask for? Not a variation but all heads are reversed. The whole judgement needs to be revoked. So there is a distinction between revocation and variation.

The application for reversal of a judgement - whoever files a case not always wins. The application should have a reference of the claim, the judgement appealed from and the detailed reasons on which the appeal is entered.

APPLICATION For variation - shall contain a reference to claim and judgement and shall distinctly state the heads of judgement complained of. So the one about which you are complaining on you need to appeal. In conclusion, shall state specifically, the manner in which the judgement be varied under each heading. So do be careful.

Variation = some heads went in our favour.

**Article 144 COCP - 144.(1)** *An appeal may be entered by any party against all the other parties or against any one of them. The appellant shall indicate in the application of appeal the parties against whom the appeal is directed. The application of appeal shall be served on all the parties but only the parties against whom the appeal is directed shall, within the time of thirty (30) days, file their respective answer containing the reasons why the appeal should be dismissed:*

*Provided that in causes where there are more than three plaintiffs or more than three defendants the application of appeal and any other notice, including the notice of trial relating to the appeal, may be served upon any two of the plaintiffs or upon any two of the defendants, as the case may be, and upon an advocate and a legal procurator who before the court at first instance had acted on behalf of the other plaintiffs or defendants:*

*Provided further that where there is no advocate or legal procurator as referred to in the first proviso or where any such advocate or legal procurator has informed the appellant of the cessation of the character in which the advocate or legal procurator has acted, the party requesting to effect service of the application of appeal may request the court before which the appeal is filed to authorise service to all parties, other than the two plaintiffs or the two defendants as the case may be, referred to in the preceding proviso, by publication in the Gazette and in one or more daily newspapers as the court may direct, without any further procedures or requirements.*

*(2) In the case of a cross appeal in terms of article 240, the party against whom the cross appeal is directed shall within the said time of thirty (30) days file a reply rebutting the allegations included in the cross appeal.*

*(3) When two (2) or more parties file an application of the appeal or the reply together, they shall, on filing the written pleading, state a single address for the execution of service of the notice about the security for costs related to the appeal and for the service of the notice that the case was left for sentencing appeal, may be served upon any two of the plaintiffs or upon any two of the defendants, as the case may be, and upon an advocate and a legal procurator who before the court at first instance had acted on behalf of the other plaintiffs or defendants:*

*Provided further that where there is no advocate or legal procurator as referred to in the first proviso or where any such advocate or legal procurator has informed the appellant of the cessation of the character in which the advocate or legal procurator has acted, the party requesting to effect service of the application of appeal may request the court before which the appeal is filed to authorise service to all parties, other than the two plaintiffs or the two defendants as the case may be, referred to in the preceding proviso, by publication in the Gazette and in one or more daily newspapers as the court may direct, without any further procedures or requirements.*

Article 144 - Appeal may be entered by one party against all other parties - in application must indicate **against whom appeal is directed towards**. Application even if directed against one of the other parties, has to be served on all the parties.

- If there is lack of service on any one party this could nullify the whole procedure. Have to serve applications to all parties. Even if you have to directly appeal against them all. Against whom it is directed will have a time span of 30 days within which to file an answer. So parties, even if served, do not need to file an answer. Only those who want to file an answer, if they want to. One should still bother to answer.
- One must answer within the 30 days time limit. - no time limit mentioned to file an appeal, the party against whom appeal is directed has 30 days within which to answer. Time limit to file appeal - rather strict.
- **The party served with the application has 30 days within which to file a reply. You can say that you are fully in agreement.**

## **CROSS APPEAL**

In the case of a cross appeal - A filed 4 claims, demanded 4 remedies and the Court accepted only 3 of them but rejected 1 of them. So A won the case but only 3 of his claims were accepted by the Court.

The only not accepted was really not important and would resist the temptation to appeal. The party on the other side may appeal, as the party on the other side would have lost the case on 3 grounds. He would have just 1 ground, the party who loses the case is the SOKKOMBENTI - *party telliefa*. He lost 3 claims out of 4, won 1 = in english he would be the party cast, PARTI SOKKOMBENTI - SO party who lost  $\frac{3}{4}$ , might wish to appeal, would be happy you have won 1 but disappointed court did not accept the other 3.

Once he files an appeal, he would be asking for a TOTAL OR PARTIAL vary - either to vary part of it or reverse all of it. He won on 1 ground, so he would ask the court to vary judgement - to change those 3 grounds which he lost. Hence, necessarily, his appeal, B's appeal, the party cast has to be served on A.

Every pleading has to be served on the other party. B won only 1 ground, but decided to appeal as he lost 3 claims. So 2 main appeals in that situation. If B files an appeal, B's application has to be served on A and A on realising the appeal has to go on, as the case is not yet finally decided can decide to utilise B's appeal and having replied to B's appeal enter a cross appeal, which the court has rejected. So if B appeals, to ask for judgement to be varied, that application is served on A, who was initially reluctant to file an appeal but once served with application, and then he decides to utilise B's appeal to file a cross appeal to rebut B's appeal and to ask the court to vary that party of the judgement in respect of the judgement on that one claim.

## **APPELL INCIDENTALI - CROSS APPEAL**

Once you file a main appeal, you can not file a cross appeal so only if he didn't bother to file an appeal in the first place, he will then file a cross appeal. B's appeal has to be served on the other party who won the case and other party, and then answer B's appeal and then go on to pass on to file a cross appeal. This answer and cross appeal have to be served on B again, who will be entitled to reply to A's cross appeal. Hence the main appeal filed by B and cross appeal filed by A. Two appeals will be heard simultaneously. B will have the opportunity to reply to A's appeal.

**Article 145 COCP** - Before, one could file any document with the application - you revise everything which has been produced in the court below. Any document could be filed in the court of appeal. Today the situation has changed. 145 provides that no new documents may be produced at appeal stage

**145.** *No new documents may be produced together with the application, reply, or rejoinder without authorization from the court.*

**Article 146 COCP** - One point - Article 146 sub 1 *“(1) The written pleadings in appeal shall be deemed to be closed by the answer to the application, or, in default, on the expiration of the time allowed for such answer”* BUT sub 3 provides that the default of any party, failure of any party to file an answer within prescribed time limit shall not stop such party from appearing before or making submissions to the court during the hearing of the appeal. Can make one submission at that point. Submission not completely lost.

Article 146 COCP - *146.(1) The written pleadings in appeal shall be deemed to be closed by the answer to the application, or, in default, on the expiration of the time allowed for such answer.*

*(2) Where, according to the provisions of article 144(2), a reply is allowed, the written pleadings shall be deemed to be closed by the reply, or, in default, on the expiration of the time allowed for such reply.*

*(3) The default of any party in filing an answer or reply within the prescribed time limits shall not preclude such party from appearing before, or making submissions to, the court during the hearing of the appeal*

**Article 146** - deemed to be closed by an application 30 days from service - time starts running from the day after - from the following day - WHAT LATIN PHRASE IS USED? DIAS a QUO - day from which we start counting does not include the day of service.

Hence once written pleadings have been filed, no more pleadings are filed. Besides this stage a few years ago, there was the oral stage, lawyers meet in court to make submissions in court

orally. With so many cases in court, they would possibly not be updated with all that has been written. Lawyers would prefer themselves - the law today has been changed.

BUT **Article 150** - the COA says the COA may allow production of new documents, but the rule is no new documents may be produced, but the COA may in the right circumstances allow the production of new documents. The law mentions that if the opposite party under c, the court of appeal can disregard his consent. The court can still reject applications to produce new documents.

**150.(1)** The Court of Appeal shall only allow the production of new documents -

(a) if, notwithstanding all due diligence, the document could not be obtained before the filing of the pleading with which it should have been produced, and the filing of such pleading could not, without prejudice, be delayed; or

(b) if the court is satisfied of the necessity or expediency of having the document before it: Provided that, in any such case, the court may, in adjudging the costs of the cause, take into account the tardy production of the document; or

(c) if the opposite party, by a separate note, or by an annotation in the margin or at the foot of the note by which the document is produced, gives his consent thereto; or

(d) if it is proved, by oath or otherwise, that the party providing the document, had not been aware of it, or could not, with the means provided by law, have produced it, in due time; or

(e) if the document to be produced is a book or other paper in the original, copies whereof or extracts wherefrom, relating to the matters at issue, were produced in due time; or

(f) before any referee, if bearing on the subject-matter of his reference.

(2) Any necessary demand concerning any collateral issue shall, however, be allowed at any stage of the cause, as occasion may require.

**Article 207 COCP** - All proceedings before an appellate court shall be contracted in writing. So what about 146? Can not rely on it if you failed to reply. Today all appeals have no hearings. The court will only allow a hearing if there is an exception, if it has to hear them. Exceptional cases. To point out specifically, the court may believe it is too busy. The court is satisfied that what has been said in written pleadings is enough. If you fail to answer, there will be an appeal but no option for you to answer. BE CAREFUL ON 146.

**Article 153 COCP** - **153.(1)** *The default of the filing of a reply to an appeal or cross-appeal shall not debar the party who was entitled to file such act by bringing an application before the court for the purpose of being awarded the right to submit written submissions and to produce evidence thereof provided he gives, in the opinion of the court, a good reason for such default within the time required by law.*

*(2) Such application may not be brought if more than ten (10) days have elapsed from the service of the notice of the day of when the cause was scheduled for judgment.*

*(3) Where a hearing of an appeal is to be held, the failure to file written pleadings shall not debar the party who was entitled to file such written pleadings to appear at the hearing of the cause and bring his evidence if he gives, in the opinion of the court, good reason for failure to file such.*

→ One can apply to the court to be allowed to make written submissions even though the time limit has lapsed. Time limit provides in 153, that the court will only allow the application if a good reason for such default is induced. It is up to the court to decide whether to allow written submissions or not. If the time limit is not followed, there will be implications. This will only be possible should the court accept that the applicant will give a reason.

COA composed of A, B and C might accept and the court composed of X Z Y - might reject the application. Always see the time limits which the law imposes. No time limit within which to file an appeal - case of bad drafting.

## Mode of Procedure by Sworn Application - First Hall Stage

**Article 154 COCP - 154.** *(1) The procedure by sworn application is considered to institute a cause, when the court issues or gives an order to a party to appear before it on the day and at the hour appointed, in order to show cause why the claim contained in the sworn application should not be allowed.*

*(2) In the appointment of such day allowance shall be made for the time required for the preliminary written procedures of the case to be closed, provided that in urgent cases the court may appoint a day for the trial of the case before the close of the preliminary written procedures*

Article 154 provides that the procedure by sworn application - considered to institute a cause - if A files an application how is it a court order = A the applicant is demanding a remedy. A mix up. The mix up occurred as originally instead of application, procedures before he first hall were instituted by, writ of summons: ordering the D to appear. Then that would make sense, he would be ordered, summoned, to appear in the day and hour appointed. English does not make sense.

**Article 156 COCP - 156.***(1) The sworn application shall be prepared by the plaintiff and shall contain -*

- (a) a statement which gives in a clear and explicit manner the subject of the cause in separate numbered paragraphs, in order to emphasise his claim and also declare which facts he was personally aware of;*
- (b) the cause of the claim;*
- (c) the claim or claims, which shall be numbered;.and*
- (d) in every sworn application, the following notice shall be printed in clear and legible letters immediately under the Court heading:*

*“Whosoever is in receipt of this sworn application in his regard shall file a sworn reply within twenty (20) days from the date of service thereof, which is the date of receipt. Should no written sworn reply be filed in terms of the law within the prescribed time, the Court shall proceed to adjudicate the matter according to law.It is for this reason in the interest of whoever receives this sworn application to consult an advocate without delay that he may make his submissions during the hearing of the case.”.*

*(2) Such documents as may be necessary in support of the claim shall be produced together with the sworn application.*

*(3) The sworn application shall be confirmed on oath before the registrar or legal procurator appointed as Commissioner for Oaths under the Commissioners for Oaths Ordinance.*

*(4) The plaintiff shall together with the declaration also give the names of the witnesses he intends to produce in evidence stating in respect of each of them the facts and proof he intends to establish by their evidence..*

*(5) Where several actions are brought together as provided in article 161(3), (4) and (5), it shall at least be one of the plaintiffs who shall confirm on oath before the registrar or the legal procurator appointed as Commissioner for Oaths under theCommissioners for Oaths Ordinance, and the provisions of sub-article (1)(a) shall apply.*

*(6) The application shall be served on the defendant.*

*(7) The registrar shall not receive any application which does not satisfy the element of sub-article (1) and the court shall not allow any witness to be produced unless his name shall have been given together with the application. If the necessity of producing a witness arises at any time after the filing of the sworn application or if the opposite party gives his consent in the manner prescribed in article 150(1)(c), or if the court deems it in the interest of justice to hear a particular witness, the court may allow such witness to be heard.*

*(8) When the proof intended to be established by each witness not stated or adequately stated in the declaration, the court shall on the first day appoint for the pretrial hearing order the plaintiff to adequately indicate the proof he intends to establish by each witness within a time to be fixed by the court.*

Article 156 COCP - Sworn application - person filing an application - RIKORRENTI qed jamel Rikors, APPLICATION. Sworn application is instituted by the plaintiff. The cause of the claim - KAWZA - Claim or claims, having mentioned the premises, one asks the court to; claims are to be numbered. More important, at the very top, today, the applicant has to give a notice, so that the person, respondent who receives the application will be told that he has - at first hall stage, sworn application. **A person receiving a sworn application has 20 days in which to reply.** A person must consult a lawyer to file an answer. Unless this is not inserted, the case will be thrown out.

A SINE QUA NON CONDITION (essential; impairs the validity of the application). This application will have to be confirmed on oath either in front of the court registrar or in front of the legal procurator. A legal procurator practising in the lawyers office will have - APPLICATION FILED BY LP himself. If pl is not there, the client has to go there to confirm the application on oath the application, by oath, since a sworn application. You have to give the list of witnesses in the case.

## **Sworn Reply**

**158.(1)** *The defendant shall file his sworn reply within twenty days from the date of service, unless he intends to admit the claim.*

*(2) Where the defendant intends to admit the claim wholly and unconditionally, he shall file a note to that effect.*

*(3) Otherwise, he shall file a sworn reply containing -*

*(a) any such pleas as would be taken to be waived if not raised before the contestation of the suit;*

*(b) a clear and correct statement of the pleas on the merits of the claim or claims without reference to authorities;*

*(c) the defendant, or one of the defendants if there are more than one defendant, shall also confirm on oath in the sworn reply with numbered paragraphs, all the facts concerning the claim, denying, admitting or explaining the circumstances of fact set out in plaintiff's declaration, while stating which facts are within his own knowledge*

*(4) The sworn reply shall be confirmed on oath before the registrar or legal procurator appointed as Commissioner for Oaths under the Commissioners for Oaths Ordinance. The defendant shall also indicate the names of the witnesses he intends to produce and to state with regard to each one of them what he intends proving by means of their evidence. There shall also be filed together with the sworn reply such documents as may be required to sustain the pleas.*

*(5) The registrar shall not receive any sworn reply which is not accompanied by the listed requirements in sub-article (3), and the court shall not allow any witness to be produced whose name shall not have been given in such declaration. If the necessity of producing a witness arises at any time after the filing of the declaration, or if the opposite party gives its consent in the manner prescribed in article 150(1)(c), or if the court deems it in the interest of justice to hear a particular witness, the court may allow such a witness to be heard.*

*(6) When the proof intended to be established by each witness not stated or adequately stated in the declaration, the court shall on the first day appointed for the pretrial hearing order the defendant to indicate adequately the proof he intends to establish by each witness within a time to be fixed by the court.*

*(7) Where the defendant is absent or is a minor or a person incapable according to law or a vacant inheritance, and is represented by an attorney or a curator, then, instead of the declaration referred to above, a declaration may be made to the effect that the facts of the case are unknown and that it has not been possible to obtain the necessary information to contest the claim.*

- 158(7) - a case can not go against an absentee or a minor, and hence the one representing him could and may not know anything on the case.

*(8) Simultaneously with the filing of the note admitting the claim or of the sworn reply, as the case may be, the defendant shall cause an identical copy thereof, certified by himself or his advocate, to be served through the registry on the plaintiff or his advocate.*

*(9) Non-compliance with the provisions of sub-article (7) may be taken into account by the court in the application of the provisions of article 223(3).*

*(10) If the defendant makes default in filing the sworn reply mentioned in this article, the court shall give judgment as if the defendant failed to appear to the summons, unless he shows to the satisfaction of the court a reasonable excuse for his default in filing the sworn reply within the prescribed time. The court shall, however, before giving judgement allow the defendant a short time which may not be extended within which to make submissions in writing to defend himself against the claims of the plaintiff. Such submissions shall be served on the plaintiff who shall be given a short time within which to reply.*

- 158(10) if the D makes default, fails to file a sworn reply, to the summons - escape the notice of the legislator - once responded net, D fails to answer the court can - escape judgement - Unless he shows to the court a reasonable excuse
- If you don't convince the court., to grant you this opportunity, today, in an effort to be less rigid, the law allows the court to give D a brief time, within which he is going to make submissions in writing to point out what the court ought to hear. Merely make submissions - such notes will have to be served on the P, given a short time within which to reply.

*(11) The sworn reply, after the conclusion of the evidence of the plaintiff and before the defendant produces his evidence, may be amended by means of a separate statement either withdrawing any of the pleas set up or adding new pleas, saving those pleas which may be set up at any stage of the proceedings.*

*(12) With the filing of the sworn reply or on the expiration of the terms laid down in sub-article (1), the preliminary written procedures shall be deemed to be closed, and articles 151 and 152 shall apply.*

*(13) Notwithstanding the foregoing provisions of this article, where the court has appointed a day for the trial of the case before the time allowed for the filing of the sworn reply in accordance with this article, the defendant shall file the sworn reply not later than the time at which the case is first heard, and may also file them before the court at such hearing and serve a copy thereof on the plaintiff by delivering a copy to him or his advocate at that same hearing.*

- 158(13) The Court appoints the case for hearing - will have 20 days within which to file the answer. Nevertheless, notwithstanding, when the court has appointed day for trial, when the time limit has not as yet expired, day appointed by court, has to be before 20 days still running, answer has to be filed by the day of hearing so you will not have 20 days to answer, so will have to answer within 5 days if case is within 5 days.
- Normally judges are tolerant enough to say even though the term is still running, they put off the case until 20 days expire. Certain judges say once the time limit has not expired and the day set for hearing happens to be within a 20 day time frame can only answer - within that time frame.
- Article 158 - Now, going to 158 directly, the D shall file the sworn reply and application - **BOTH HAVE TO BE CONFIRMED ON OATH WITHIN 20 DAYS**. He may file a note claiming that he admits the claim. Otherwise if he contests he must state and file a sworn reply. The law itself otherwise would assume you would not want to raise them. If not at a very early stage you can not then raise them.

- Latin phrase - IN LIMINE LITIS - from the very threshold, beginning of the application - you will not be able to raise it later on, and then you proceed with the matter. Must contain pleas which are raised in *limine litis*, if not are renounced, and clear and correct statement of the pleas/ ECCEZZJONIJET. Then, the D will have to again present a statement of facts in numbered paragraphs again whereby he will either deny, permit or explain anything mentioned by the applicant. This has to be confirmed on oath.
- Sworn reply - statement of - NOTA TAL ECCEZZJONIJET.

Article 160 COCP - *Any party intending to produce a witness in any proceedings before any court may, together with the sworn application or the sworn reply, as the case may require, file in the registry of such court an affidavit taken by such witness before a judicial assistant or any other person authorised by law to administer oaths, and a copy of such affidavit shall be served on the other party.*

Affidavit: sworn statement - instead of bringing witness, you have the person prepare a sworn statement, the other party might still wish to cross examine the other person. Today, to save time to ask the party concerned - it may be the case that you do not want to cross examine the witness - that will be filed in court. With reply you will have to file a list of witnesses.

## **Order and mode of procedure in contentious matters**

**161.(1)** *In the Superior Courts and in the Courts of Magistrates in Malta and in Gozo, proceedings are ordinarily taken by application while those in the superior shall be sworn.*

*(2) Proceedings may also be taken by application in the cases prescribed by or under a law.*

*(3) Two or more plaintiffs may bring their actions by one sworn application or by one not sworn application as the case may be, if the actions are connected in respect of the subject matter thereof or if the decision of one of the actions might affect the decision of the other action or actions and the evidence in support of one action is, generally, the same to be produced in the other action or actions.*

*The cause and subject matter of the actions shall be clearly and specifically stated in respect of each plaintiff.*

*(4) Nevertheless, any of the actions so brought together shall be tried separately at the request of a plaintiff with regard to his action; and the court may also order that any action be tried separately when it is not expedient that the actions of all the plaintiffs be tried together. Any such order may be made at any stage of the proceedings before final judgement.*

*(5) Where the several actions are brought together as provided in sub-article (3) they shall be taken cumulatively for determining the competence of the court. Such court shall remain competent in respect of any action separated in accordance with sub-article 4.*

**Article 161 (Mode of procedure in the Civil Court, First Hall, and in the Court of Magistrates (Gozo) in its superior jurisdiction)** - Provides that in the superior courts and courts in Malta and Gozo, proceedings, normally taken by an application - no longer used other forms. Those in the superior court have to be confirmed on oath.

**164. (1)** *Saving the provisions of article 175, nullity shall ensue if proceedings which should have been instituted by sworn application or by application of appeal are instituted by any other judicial act.*

*(2) No nullity shall ensue if a cause which should have been instituted by application is instituted by sworn application:*

*Provided that any additional costs incurred shall be borne by the plaintiff:*

*Provided further that the provisions of this sub-article shall apply where in accordance with any law other than this Code proceedings are to be instituted by application.*

**Article 164 (Nullity of proceedings)** - Nullity shall not ensue if proceedings which should have been instituted by sworn applications or applications by appeal, there would be nullity if the proceedings are instituted by any other judicial act. If instead of application you file a sworn application, there would be nullity, as these are rules of public order.

In the superior courts, if you apply by application and confirm it on oath, that is acceptable and therefore not null.

On the other hand, no nullity shall ensue if merely by application is instituted by a sworn application. So in inferior courts if you also institute a sworn application instead of a mere application - valid not nullity but the other way round would amount to nullity.

## **Article 166A of the COCP**

166A. (1) *In actions for the recovery of a debt certain, liquidated **and due not consisting in the performance of an act - this is an obbligazione di dare.***

So in an action for a recovery of a debt which is certain liquid and due, and that, obbligazione di fare and di dare + amount can not exceed 25k euros. You will file a judicial letter, *ittra officjali*. If the respondent who is served with a judicial letter does not answer it, then in that case, in the lapse of those 30 days, that judicial letter shall constitute an executive title, as if judgement has been given by a court.

**Promise of sale - obbligazione di fare**

**Payment for damages - obbligazione di dare**

*166A. (1) In actions for the recovery of a debt certain, liquidated and due not consisting in the performance of an act, and where the amount of the debt does not exceed twenty-five thousand euro (€25,000), or such other sum as may be established from time to time by Order in the Gazette by the Minister, it shall be lawful for the creditor to proceed in accordance with the following sub-articles of this article:*

*Provided that where the debt is not liquidated the creditor may proceed in accordance with this article if he limits his debt to an amount not exceeding twenty-five thousand euro (€25,000) and expressly renounces to any part of his claim that may upon liquidation exceed the said sum of twenty-five thousand euro (€25,000), or such other sum as may be established from time to time by Order in the Gazette by the Minister:*

*Provided further that the **creditor may only proceed according to this article if the debtor is present in Malta** and is not a minor or a person incapacitated according to law or if the debt is not due by a vacant inheritance. The appointment of curators under Title XI of Book Third of this Code shall not apply to proceedings under this article:*

*Provided further that, without prejudice to the provisions of the Motor Vehicle Insurance (Third Party Risk) Ordinance, when a debt to which this article applies is covered by an insurance policy the insured shall, without prejudice to that stipulated in the insurance policy, within fifteen days from service upon him of the judicial letter made in accordance with this article, give to the insurer notice in writing of the said judicial letter and of any particulars of the claim of which he is aware. In default, any executive title obtained in accordance with this article shall have no effect with regard to the insurer.*

*(2) The creditor shall proceed by filing a judicial letter which shall be drawn up in the form established by legal notice by the Minister responsible for Justice and the content of which shall be **confirmed on oath by the creditor**, either before the registrar or legal procurator appointed as Commissioner for Oaths under the Commissioners for Oaths Ordinance, to be served upon the debtor wherein shall be stated clearly, under pain of nullity, the cause of the claim, the reasons why the claim should be upheld, and a statement of facts in support of the claim.*

*Provided that sub-articles (3), (5) and (6) of article 187 of this Code may not be availed of to effect the service of the aforesaid judicial letter.*

*(3) The judicial letter shall also on pain of nullity contain an intimation to the debtor that if he **does not reply within thirty days** from service upon him of the said judicial letter by presenting a note in the record of the said judicial letter rebutting the claim and which note may be signed and presented in court by the debtor himself without the signature of an Advocate or of a Legal Procurator being required, such official letter shall, constitute an executive title:*

*Provided that:*

*(a) the debtor may in such note admit the claim in part only and oppose it in other parts, and where the claim is opposed in part only it shall be deemed admitted to the extent that it has not been so opposed;*

*(b) where the debtor shall have opposed a claim or part of a claim which is subsequently upheld, the costs relative to the claim or part thereof opposed and subsequently upheld shall be borne by him;*

*(c) the costs of any claim or part thereof that is opposed and not subsequently upheld shall always be borne by the creditor;*

*(d) where the debtor has duly opposed the claim, the special procedure contained in this article may not be used again against the debtor as regards the same claim contained in the judicial letter served on the debtor;*

*(e) where the claim arises under the Motor Vehicle Insurance (Third Party Risk) Ordinance the said judicial letter shall under pain of nullity be also notified to the authorised insurance which shall have the same rights under this article as though it were the debtor as aforesaid.*

*(4) Where the debtor does not oppose the claim, within thirty days from the notification thereof to the debtor, or where the debtor only opposes the claim in part within the aforesaid term, the judicial letter shall for the purposes of any law in respect of the claim so unopposed or the part therein so unopposed, constitute an executive title as if such judicial letter were included in article 253(a).*

*(5) Any executive title obtained according to the provisions of this article in the absence of any opposition on the part of the debtor shall be rescinded and declared null and void if upon a*

*request by application in the Court of Magistrates (Malta) or in the Court of Magistrates (Gozo), as the case may be, to be filed by the debtor within twenty days from the first service upon him of any executive warrant or other judicial act based on the said title, the court is satisfied that:*

*(i) the debtor was unaware of the said judicial letter because he was not duly notified; or*

*(ii) the judicial letter did not contain the requirements laid down in sub-articles (1), (2) or(3):*

*Provided that the said application shall be appointed for hearing within two weeks.*

*(6) No opposition other than that specifically provided for insub-article (5) shall stay the issue or execution of any executive act obtained thereunder or the paying out of the proceeds of any warrant or sale by auction carried out in pursuance thereof.*

*(7) Notwithstanding the other provisions of this article, where a judicial letter filed in terms of this article is not notified upon the debtor within six months from when the said letter is filed, the procedure provided for in this article shall no longer apply without prejudice to the right of the creditor to file another judicial letter in terms of this article with respect to the same claim*

**Noel Sultana vs Andrew Mercieca, 15 Feb 2010** - *“l-Qorti hi tal-fehma li l-ittra ufficjali hi xotta hafna u ma jistax jinghad li fiha ... dikjarazzjoni tal-fatt tat-talba”*

*“Il-Kliem ‘ghal xoghol u parts’ mhumiex bizzejjed sabiex jissodisfa l-htiega li l-ittra ufficjali jkun fiha ‘dikjarazzjoni tal-fatti’....Madankollu, dan ir-rekwizit hu ad valitatem u s-sanzjoni hi n-nullitta’ tal-ittra ufficjali ghal finijiet tal-Artikolu 166A”*

**Fortunata Mizzi vs. Rosina Coleiro, 14th December 1949** - *“mhux allura bizzejjed li fl-ittra ufficjali wiehed illimtta ruhu ghar-raguni li fuqha tkun msejsa t-talba - f’dan il-kaz ‘appaltt tal-injam’” “Fil-fehma ttal- Qorti l-kliem ‘appaltt fuq l-injam’ ma jikkonsistwixxux dikjarazzjoni certa u cara tal-fatti.”*

This is a new procedure which is not in front of a Magistrate or Judge. New procedure in force - the law tells us that actions for the recovery of a debt which is certain and due, a debt which is certain liquidated and due. How would you render the phrase in maltese? CERT, LIKWIDU U DOVUT. IN ENG it is assumed, but **dovut** can have 2 meanings:

Suppose A lends 5K TO B, is the amount due or not? Yes it is due. But if he gave him 5 years to pay and after 1 year A demands payment. In that case it is not due, as only 1 year has elapsed. In Maltese we have to make this distinction which in English is not done, LI JKUN GHALAQ, which in English would be, SER JISKADI, SKADUT iktar milli DOVUT. Hence, in Maltese we have a final distinction, CERT LIKWIDU U SKADUT. In Maltese we distinguish between **dovut**

and *skadut* (owed vs due). Under 166A, you have to ensure that the sum is due as the time limit for payment has elapsed.

→ One has to send a judicial letter, which has to be served on the respondent, where problems can start arising. This judicial letter has to be confirmed on oath by the sender. Unlike other judicial letters, which you may have come across, this judicial letter has to have a notice at the very top, saying that whoever receives this has 30 days within which if he wants to he can contest. If he believes that the sum demanded is exaggerated or believes he has already paid.

→ If he disregards the answer and doesn't bother to file a reply, then it will create further problems as on the laps of those 30 days, the judicial letter will constitute an executive title.

→ Why can it be a bit difficult? There has to be a notice that the respondent can answer, and needs no lawyer - can send the answer directly to court himself. This is a big problem as if he contests, the proceedings come to a stop. This is relatively an inexpensive procedure (around 50 EUR). But if at the end of the day, he were to answer that he does not owe anything, this procedure comes to an end. No hearing in front of a judge or mag. It all depends on certain unopposed claims (many claims which are unopposed). Instead of going to a court case, you can utilize his procedure, that judicial letter will become an executive title.

There are problems that may arise:

1. If he sends a judicial letter, it need not be confirmed on oath.
2. What if the respondent is a minor? Can you file a case against a minor using this procedure? Or the respondent is absent from Malta, so you have to appoint a curator, or a person is dead, a vacant inheritance. If you demand the money from a vacant inheritance, you can not use this procedure.

What if the debtor lives in Malta, but refuses to pay and hence it is difficult to reach him? The door is always locked. What should you do? Last known address, has not left Malta, what can you resort to? **YOU NOTIFY BIL-PUBLIKAZZJONI / BL-AFFISSJONI. GOVERNMENT GAZETTE.**

If he lives there, he will try to remove it. **NOT APPLICABLE IN THIS CASE.** The debtor may still be running around and you cannot serve him with the judicial letter. This can only last for 6 months. If within 6 months, respondent has not been served, proceedings come to an end (although one may restart the proceedings). What if you finally serve him after 5 ½ months?

For example, one demands 5000 EUR and he admits he only owes 2000 EUR, the sender would have to send for 3000 in court. As far as the 2000 EUR which has been admitted, the sender already has an executive title on those 2000 EUR. The idea of resorting to his procedure to cut

down on time would be vague. A good number of positives. Not as plain sailing as might appear at first glance.

The one sending it has to confirm it on oath, the other disputes the amount. Now, having said so, finally he was served, 30 days have elapsed, he has got an executive title, but law goes on to tell us that there is another possibility although executive title is obtained. What would you normally do if the person is still not paying? MANDAT TA SEKWESTRU (garnishee order, the only warrant without the name warrant in Maltese law). The debtor still has one final possibility. He can claim that he was not served with the judicial letter, as when the judicial letter was served he was given a certificate of service at the back. Original always remains the court, the copy which is served has to be a true copy. Once a copy is served, then at the back, the court officer will have the certificate of service. A judicial letter was served on such a date.

A person under 14 years can not be served, he can claim that the judicial letter was not properly served. What if the person to whom it was given suffered from some mental disability? The debtor can successfully plead that the person to whom it was served was given to a person mentally unwell. Garnishee order - banks are first informed then the very next step is informing their client. He can therefore file an application requesting that the judicial letter which could declare an executive title could be null and void. Another that the debtor can raise is that the judicial letter lacked the required requisites, mentioned prior, and that the lawyer omitted to include the info of 30 day notice. If those particulars are missing, the court can declare that that judicial letter is null and void. If he successfully proves to the court that there was an irregularity with the judicial letter or its service, the court will declare that there is no executive title.

One has to go in front of the Magistrate to contest the letter if the amount in question does not exceed 25K. (competence under a Magistrate is 15K EUR max. The claims under this article is 25K, so it exceeds, but this could be an exception). The legislator is saying even if I exceed 15K, it can go in front of the Magistrate.

**You cannot divide a debt into two - You cannot have 50K and send two or three letters under 166A.**

Once you will go to court for the balance, go to court for the full amount. The legislator wanted to ensure that the debtor would not claim a human rights breach. Law tells us specifically that only 2 grounds on which debtor could attack the executive title - an irregularity of service or missing a formality.

**Article 166B COCP - Melita Co Ltd vs. Refan Parfumeries and Co, 9th May 2025 -**  
“It-titolu eżekuttiv jitwieled meta l-kreditur ikun talab lir-Registratur sabiex jghaddi l-inkartament relattiv mill-gharbiel tal-166B COCP u l-ittra tigi finalment registrata.” From that moment onwards, the executive title is acquired.

According to 258(c) COCP - this procedure can be done after 5 years from date of 253(b) or (e) or according to the procedure in 166A, whe it is "esegwit".

## **Special Summary Proceedings - Article 167 COCP**

*167. (1) In actions within the jurisdiction of the superior courts or the Courts of Magistrates (Gozo) in its superior jurisdiction, where the demand is solely -*

*(a) for the recovery of a debt, certain, liquidated and due, not consisting in the performance of an act; or*

*(b) for the eviction of any person from any urban or rural tenement, with or without a claim for ground rent, rent or any other consideration due or by way of damages for any compensation, up to the date of the surrender of the tenement, or*

*(c) for the eviction of an operator, lessee or other occupants, including any members of their staff from seagoing vessels or aircrafts,*

*It shall be lawful for the plaintiff to pray in the sworn application that the court gives judgment allowing his demand, without proceeding to trial:*

*Provided that the plaintiff shall, in his declaration made in terms of article 156(3) state that in his belief there is no defence to the action:*

*Provided further that the plaintiff may also file a sworn affidavit of any other person, containing facts relative to the claim, and confirming that such facts are within the knowledge of such a person.*

*(2) In the cases provided for in this article, the sworn application shall be in writing according to the prescribed form and shall contain an order to the defendant to appear before the court, on an appointed day and at a stated time.*

*(3) The provisions of article 156(1)(a), (b) and (c), (2) and (3) and of article 159 shall apply to the said sworn application.*

→ Article 167 we are going in front of superior courts where proceedings are solemn, but in view of the special circumstances, the judges will act fast. Article 167 stated that once one is acting for a debt which is certain liquid and due, MANDAT TA ZGUMBRAMENT.

→ **EXECUTIVE WARRANT** - warrant of eviction. Moreover, in giving the facts, the applicant would have to state under oath, that as far as he knows, the respondent has got no defence whatsoever in his claim. **Sworn application** has to be at the very top -> the notice, there has to be a notice at the very top so that the defendant on receiving it knows that he has 20 days to

answer, should he fail to answer, it would be crossed out. A client comes to you with that notice crossed, out, a case of special summary proceedings, PROCEDURI TAL GILJOTTINA.

You will be asked by P, to appear on that day on 15th Nov. only 2 possibilities, the Court will ask him what do you have to say, is there any irregularity? He cannot claim lack of service if he is present in Court. Once he is aware and makes an appearance in court and tries to raise issues of either irregularity or applicability if obligation is DI FARE NOT DI DARE.

Finally, the only possibility, the court will ask P what defence D may raise. If he cannot satisfy the Court that on a prima facie basis he cannot offer any viable ground of defence, the Court will proceed to deliver judgement there and then, KAWZA TINGATA DAK IL-HIN STESS. Hence, special summary proceedings where proceedings are solemn and the legislator has initiated proceedings where proceedings are solemn, so legislator has tried to create a balance where they will be decided in one sitting. You do not enter any sworn reply, simply have to appear in court, tell the client to be there on time, if the case is called out and he is not there, the case is decided. Be before the other lawyer - be very careful on the special summary proceedings and always be there before.

Superior courts act solemnly, that's the rule - inferior courts act summarily. Over here one exception, superior courts which act solemnly, has to be a hearing, all this is done away with as in front of the court which acts solemnly, you can resort to special summary proceedings, decided there and then. The law itself is making an exception to the solemn aspect, acting solemnly still a judge and a lawyer with a gown. If no necessary grounds - court will grant him 20 days to file a sworn reply and will take its usual course, like any other case but if successful you have a case decided there and then.

**Central Cement Ltd. vs. JAJ Company Limited, 2012** - P is the creditor of D for cement amounting to 33,439.45euros. P notified D with a legal letter in August of 2011. *"Is-socjeta' konvenuta baqghet inadempjenti"*. This debt is certain, liquid and due and has no exceptions to raise, hence it should be determined by article 167 of the COCP. The court decided according to article 167. D did not appear even though he was duly notified. P said D has not paid and the court decided by article 167 condemning D to pay.

**Saviour Cachia vs. Boris Arcidiacono, 1987** - *"Procediment sommaju speċjali maghruf bhala "tal-giljottina" fl-Artikolu 167."*

**Emanuel Formosa vs. Charles Casha, 2004** - P leased tenement in Hamrun until January 2003. D received many legal letters for him to vacate the property. D did not pay rent of Lm1148 and P started a case on 167(b). The Court said P's claims are sufficiently proven and says tha D must vacate the property within 1 month.

# **Applications in the Court of Magistrates**

**Article 171** - proceedings shall be by application - in the superior courts, applications are merely sworn

*171.(1) In the Court of Magistrates (Malta) and in the Court of Magistrates (Gozo) in its inferior jurisdiction, proceedings shall be by application which shall be according to the prescribed form and take the form of a mere notice signed by the Registrar, containing the name and the surname of the plaintiff and of the defendant, the demand of the plaintiff, and the day and hour when the defendant is to appear, besides other particulars as may from time to time be prescribed.*

*(2) The cause shall be summarily heard in terms of article 215.*

*(3) Without prejudice to article 23, in the said courts, the judgment need not contain all the reasons thereof, but may merely list the main points upon which the court would have based its conclusions.*

In the inferior courts, a cause shall be summarily heard - not solemn. We have to be careful as, how fair it would be to deal with issues summarily if the competence is increased? Now the courts are also entitled that the case is referred to mediation - why litigate in court, try to mediate if possible, not compulsory as such.

**Article 172 COCP - 172.** *(1) Where a reversal or variation of any judgment delivered by the Court of Magistrates (Malta) or by the Court of Magistrates (Gozo) in its inferior jurisdiction, is sought, proceedings shall in all cases be taken by application of appeal.*

*(2) The application of appeal as well as any other subsequent act may even be signed by the appellant or by the respondent only.*

- Incidentally good to know that sub 2 provides that the application may even be signed by the appellant himself only. No need for it to be signed by the lawyer. Just the appellant himself and the respondent may file the application.
- Article 172 provides that where there is a reversal or a variation of any judgement - which has been delivered by the court of mag, then proceedings are taken by application, not sworn, but an application only.

**Article 173 COCP** - provides that the Court may give orders *in camera* so as to expedite proceedings.

*173.(1) The court may, in order to ensure full compliance with all matters of procedure, or to seek more detailed information, or to expedite or facilitate proceedings or to avoid the unnecessary appearance of parties or witnesses, give in camera all such orders and directives it may think fit, and it shall be sufficient that such orders or directives be communicated by the registrar even by letter to the advocates or legal procurators of the parties, which letter is to be handed personally to such advocate or legal procurator, and, by post, to the parties themselves. This provision shall apply to any stage of the proceedings before judgment is delivered. An appeal from such orders or directives, where admissible, may be entered only after the definitive judgment and together with an appeal from such judgment, and such orders or directives may not be challenged before the definitive judgment is delivered.*

*(2) Without prejudice to the foregoing provisions of this article the court may, at any stage of the proceedings -*

*(a) either on its own motion or on an application by any party to the proceedings, direct that the evidence of any person intended to be produced as a witness be taken before a judicial assistant at such place and time under such conditions as may be specified in the order;*

*(b) on an application by any party to the proceedings, desiring to confirm a fact stated in the application, or in a note accompanying it, by the affidavit of a person named by the party, order the person so named to appear for that purpose before a judicial assistant at such place and time as may be specified in the order;*

*(c) either on its own motion or on a note filed by any party to the proceedings, direct that proceedings be stayed for such period as it considers appropriate, and refer the parties to a mediator in accordance with the Mediation Act.*

*(3) In the case of an order given under sub-article (2)(b), the judicial assistant shall ask the person named whether he confirms or denies each fact specified in the application or note and shall make a record of the replies given together with any other statement, if any, qualifying his reply, and cause such record to be confirmed on oath by the person aforesaid. The judicial assistant shall insert the affidavit in the records of the case and cause a copy thereof to be served on the parties.*

*(4) When an application as referred to in sub-article (2)(b) is filed together with any written pleading referred to in article 160, the Court may direct that the service of such written pleading shall be suspended for such period, not exceeding three months, as the court may determine.*

# **Provisions Applicable to Written Pleadings and Other Acts of Procedure**

The provisions applicable to written pleadings - whenever you file any pleading in court, in a limited sense a plea could be an ECCEZZJONI, raising a plea. A submission in court - filing a pleading in court. You have to create it and you start writing where the crease exists. you have to have a 1 inch margin, you start writing from that line inwards, not from the edge as the court or courts register shall - it is bound by the court.

Top left hand corner, name of the court where you are filing the plea, you have to indicate the court which is going to hear the plea - dealing with the case, have to have the description of the court, on the right hand side, the names of the parties, MARIO BORG VS GIANNI SALIBA - have to be in full names, not initials. Then, the description of the pleading, from crease inwards and say RIKORS, APPLICATION - NOTA, HAVE TO describe the pleading., what's the difference between a rikors and an application?

Rikors - GEJJA TALBA = l-esponent/rikorrent jitlob li

NOTA - m'emmx talba - no demand made in this - nota li biha qed jezebixxi -

Sketch - SKIZZ

No need for an application in inferior court to be confirmed on oath.

**Article 174 COCP** - (1) Every written pleading shall contain -

(a) an indication of the court or section thereof in which the pleading is filed, and, in the case of the Court of Magistrates (Gozo), an indication of the jurisdiction of the court;

(b) the name and surname of the party pleading and of the party against whom the pleading is directed, and the designation, if any, of the capacity in which the parties appear:

Provided that in any case as is referred to in article 181(1), it shall be sufficient to designate the office of the party pleading or of the party against whom the pleading is directed, as the case may be;

(c) the description of the pleading; and

(d) if the pleading refers to an action already brought before any of the superior courts, the number of that sworn application to which it refers.

(2) Every written pleading or other act requiring service, must be accompanied by:

- (a) a legally valid identification document number, if any, if the person is pleading in his personal capacity
- (b) the company number if the person pleading is a partnership or company registered in accordance with the Companies Act;
- (c) a proper and full indication of the place of residence or business of the party pleading and the professional address of his advocate and, or, legal procurator;
- (d) a proper and full indication of the place of residence or business and of the party against whom the pleading or act is directed;
- (e) any other particulars may serve to identify the said parties as may be established by law or regulation.

#### **Article 175 - Power of court to order or permit amendment of written pleadings**

Allows court a no of mandates - the name of the individual - GANNI MAGHRUF GANNINO, doesn't really make a diff as the id no tallies, and formally they were very strict, whereas today courts are allowed to make any changes

*175.(1) The court may, at any stage of the proceedings, at the request of any of the parties, until judgment is delivered after hearing where necessary the parties, order the substitution of any act or permit any written pleading to be amended, either by adding or striking out the name of any party and substituting another name therefor or by correcting any mistake in the name or in the character of the parties, or by correcting any other mistake or by causing other submission of fact or of law to be added even by separate note, provided that no such substitution or amendment shall affect the substance either of the action or of the defence on the merits of the case.*

*(2) Any court of appellate jurisdiction may also order or permit, at any time until judgment is delivered, the correction of any mistake in the application by which the appeal is entered or in the answer, including any mistake in the indication of the court which delivered the decision appealed from, in the name or character of the parties, or in the date of the judgment appealed from:*

*Provided that any court of appellate jurisdiction may also order corrections in the judgment of the court of first instance and other corrections that the court of appellate jurisdiction considered to be justified in the acts of the case at any stage of the appeal proceedings until the*

*appeal is adjourned for judgment, at the request of any of the parties, and after granting the parties an opportunity to be heard:*

*Provided further that a court of appellate jurisdiction may also order corrections in a judgment which it has delivered upon an application filed by any of the parties within thirty days from the date of the judgment.*

*(3) Any judicial or administrative omission or mistake in a judicial act may until the court has delivered judgment and disposed of the case be remedied by a court of its own motion.*

## **Article 176 COCP - Mode of drawing up pleadings**

*(1) Pleadings shall be printed, type-written or written in ink:*

*Provided that in every case they shall be drawn up in clear and easily legible characters, without blank spaces, interlinear words, abbreviations or erasures, and, except with the written authority of the registrar given before the filing of the act, without corrections, alterations or additions.*

*(2) Any quantity, sum or measure shall, at least where it first occurs in the pleading, be expressed in words.*

*(3) The copies of the pleadings, as would be required for the service thereof, shall be signed by the same persons as the original*

Pleadings must be written, type written or written in ink - as long as legible, it is valid. Do not leave blank spaces. Any quantity sum or measure is first done in words, then in figures. Subsequently, once it has been tallied the words and figures, you can use the figures only after in the document. Written pleadings are signed by the advocate and by a LEGAL PROCURATOR.

A BIG problem in court as magistrate is saying certain pleadings can not be filed by the LP

## **Article 180 COCP - Persons who may file written pleadings — who may file a pleading?**

**180.***(1) Subject to the provisions of article 181, written pleadings may be filed -*

*(a) personally by the party pleading in his own name, or by the person pleading in a representative capacity as the parent of the children placed under his paternal authority, or as the tutor, curator, administrator of the community of acquests, executor, head of a department or*

*other public administrator, or as attorney on behalf of any church, community, hospital, or other pious institution or as administrator of property under litigation, or as partner or representative of a commercial firm, or as any of the persons mentioned in article 181A(2) in the case of a body having a distinct legal personality, or as agent or representative of any other lawful association, or as attorney on behalf of persons absent from the Island, either of Malta or Gozo, in which the written pleading is filed;*

*(b) by a legal procurator;*

*(c) by any other partner of a commercial firm to which the written pleading refers;*

*(d) by an ascendant, descendant, brother or sister, uncle or aunt, nephew or niece, any one of the parents of his spouse, any one of the spouses of his children, spouse, appointed as an attorney for the purpose, by the party pleading whose signature is duly attested in accordance with article 634(2);*

*(e) by any joint party to the suit;*

*(f) by an advocate, if the written pleading is to be filed in any of the inferior courts, or in the Court of Appeal in cases of appeal from judgments of the inferior courts.*

*(2) Nevertheless, no written pleading containing a waiver of the proceedings or an admission of the claim or the consent for the withdrawal of any deposit, may be filed by any person other than*  
*(i) the persons mentioned in sub-article (1)(a) and (c), or*  
*(ii) an attorney specially authorized for the purpose, or*  
*(iii) the advocate, if any such written pleading is filed during the hearing of the cause.*

**RIKORS PROMOTORJU** - the one starting the case, then there will be other applications - (to appoint an expert etc..) but the very application which starts the case is the rikors promotroju. If the LP did not sign this initial application, you will not be entitled to the final case, but only the fee that he would have filed during the case.

Article 181 - written pleadings filed by a minister - formally you had to write the name of the minister filing the application but if he resigns, you had to file applications which had the pleadings changed. This was done away with and this was enough to mention the minister of agriculture, for finance etc...

When we need to change the name of the parties, the original names of s case will remain. if the case started as JOHN BORG VS SALIBA. Even if one of them passes away, or both, and

another person has taken their place, there will be an asterisk, and by a decree of such a day, Mario Saliba replaced by X, but the original name would still remain. IMP!

*Asterisks in maltese = Postilla.*

## **Article 181A - Written pleadings filed by or against a body having a distinct legal personality**

*181A.(1) Where a written pleading is filed by or against a body having a distinct legal personality, it shall be sufficient to state the name of such body.*

*(2) Any declaration or pleading to be sworn in terms of law shall, in the case of a body having a distinct legal personality, be sworn by the person or persons vested with the legal or judicial representation thereof or by any company secretary or by any other person authorised in writing by such body to file judicial acts on its behalf or to make any such declaration, sworn reply or sworn pleading.*

*(3) When a written pleading is to be filed by or against a ship or other vessel, it shall be sufficient if there is designated the name of such ship or other vessel, as the case may be, and it shall not be necessary to mention the name of any person to represent such ship or other vessel:*

*Provided that the written pleadings mentioned in this sub-article shall be served in accordance with the provisions of article 187(7)*

→ Likewise with 181A, we fading that if a pleading is filed against 1 with a distinct legal personality, today it is enough to name the company, ABC limited, but after the name, COMPANY Number, we have to identify the company concerned. We had to have the name of the director, secretary.. The name of the company remains.

## **Article 181B - Judicial Representation of Government**

**181B.** (1) The judicial representation of the Government in judicial acts and actions shall vest in the head of the government department in whose charge the matter in dispute falls:

Provided that, without prejudice to the provisions of this article:

- (a) actions for the collection of amounts due to Government may in all cases be instituted by the Accountant General;
- (b) actions involving questions relating to Government Employment or to obligations to serve Government may in all cases be instituted by the Principal Permanent Secretary;
- (c) actions relating to contracts of supplies or of works with Government may in all cases be instituted by the Director of Contracts.

(2) The State Advocate shall represent the Government in all judicial acts and actions which owing to the nature of the claim may not be directed against one or more heads of other government departments.

(3) Every application, whether sworn or not, or other judicial act filed against Government shall be served upon each head of a government department against whom it is directed and upon the State Advocate and every time limit for the filing of any reply to any such act by any head of a government department being a defendant or a respondent in judicial proceedings shall not commence to run before the act is served upon the head or heads of the government departments against whom it is directed and upon the State Advocate. The registrar shall not charge any fees for effecting the service on the State Advocate

→ 181B - judicial representation of government in judicial acts, rests in the government department concerned. That would be enough. Except in cases of collections due to gov, responsible by the accountant general. In questions relating to employment, the accountant general.

## **Article 185 COCP - Service on all parties**

**185.** *Saving the provisions of article 186(1), where an act is to be served on two or more persons even if they live together in the same address each of them shall be served with a copy of such act.*

185 - law provides that any person is entitled to be served. If an application is served on 2 brothers you have to have 2 copies, even if the copies will be served in the same premises.

## **Article 187 COCP - Mode of Service**

187.(1) Service shall be effected by the delivery of a copy of the pleading to the person on whom the pleading is to be served, wherever such person may be found. Service may also be effected by leaving such copy at the place of residence or business or place of work or postal address of such person with a member of his family or household or with a person in his service or with his attorney or person authorized to receive his mail. If service is not effected on a first attempt, the officer charged with the service shall make two other attempts to serve the copy of the pleading without further authorisation by the court and such attempts shall be made at different times of the day with the last attempt at service to be made after judicial hours. Each attempt of service is to be made after the payment of the appropriate fee due to the registry. The officer charged with the service shall file a separate certificate of service for each attempt made in the acts of the proceedings:

Provided that it shall not be lawful to leave such copy with any person under the age of fourteen years, or with any person who, at the time of the service, has a mental disorder or other condition, which renders him incapable of giving evidence of such service. A person shall be presumed to be able to give such evidence unless the contrary is proved; and no objection may be raised on the ground of irregularity of the service for any of those reasons, if it is shown that the copy has actually reached the person to be served therewith:

Provided further that where a person to whom a pleading is addressed refuses to receive it personally from an executive officer of the courts, the court may upon an application by the interested party and after hearing the executive officer of the courts and considering all the circumstances of the incident, declare by means of a decree that service shall have been effected on the day and time of the refusal and such decree shall be considered as a proof of service for all purposes of law.

(2) In the case of persons on board merchant ships, or members of the crew having no place of residence in Malta, service may be effected by delivering such copy to the master of the ship or any other person acting in that behalf.

(3) If it appears from the certificate of the officer charged with the service of a written pleading or any judicial act that, although it does not result that the person upon whom such a pleading or act is to be served, is abroad, access to his place of residence cannot be obtained, or his place of residence is not known, the court may direct service to be effected by the posting of a copy of the written pleading or act at the place, in the town or district in which official acts are usually posted up, and by publishing a summary of such written pleading or act in the Gazette and in one or more daily newspapers as the court may direct and, where possible, when the residence is

known, by posting up a copy of the pleading on the door leading to such residence. The court may also adopt such other measures as it may deem fit to bring the pleading or act to the notice of the person upon whom the same is to be served. In such cases, service shall be deemed to have been made on the third working day after the date of last publication or after the date of such posting, whichever is the later. In cases where service has been ordered with urgency, service shall be deemed to have been made at such time, after posting or publication as the court may determine, which time is to be stated in the publication or posting.

(4) In the case of a body having a distinct legal personality, service on such body shall be effected by leaving a copy of the pleading:

(a) at its registered office, principal office, or place of business or postal address with any of the persons mentioned in article 181A(2) or with an employee of such body; or

(b) with any of the persons mentioned in article 181A(2) in the manner provided for in sub-article (1).

(5) If it appears from the certificate of the officer charged with the service of a written pleading that service as provided in sub-article (4) has not been effected, the court may, if it appears that at least one of the persons mentioned in article 181A(2) is in Malta, direct service to be effected by the posting up of a copy of the written pleading at the place in the town or district in which official acts are usually posted up, where the body has its registered office, principal office, or place of business, and by publishing a summary of such written pleading in the Government Gazette and in one or more daily newspapers as the court may direct and, where possible, by posting up a copy of the pleading on the door of the registered office, principal office, or place of business. The court may also adopt such other measures as it may deem fit to bring the pleadings to the notice of any of the persons mentioned in article 181A(2).

(6) Where it appears that all the persons mentioned in article 181A(2) are absent from Malta or there exist no such persons, the court shall appoint a curator in the interest of such a body as provided for in article 929(d).

(7) In the case of an action against a ship or other vessel, service shall be affected by the delivery of a copy of the pleading to the master thereof or any other person acting in that behalf or, in the absence of such persons, on the agent of the ship or other vessel, as the case may be, or in the absence of such persons and agent, on curators appointed by the court in terms of article 929:

Provided that the court may also adopt such other measures as it may deem fit to bring the pleading to the notice of the person upon whom the same is to be served.

(8) Saving the provisions of article 193, service may also be affected by officers of the Post Office in such manner and under such rules in conformity with postal regulations as the Minister responsible for justice may order by notice in the Gazette:

Provided that, applications of appeal, and sworn applications made under the provisions of the Constitution of Malta And the European Convention Act, shall be served by the executive officers of the courts.

→ 187 - Mode of service - whenever such a person may be found. A court officer can have him served there and then. Second attempt, have to pay once more and a third attempt, even beyond normal hours. A person under 14, he can not be served with a plea or you can not leave it with a person suffering from a mental condition, even though he's above 14.

→ If after these 3 attempts, service has not been affected then we resort to publication and posting up ***Pubblikazzjoni u Affissjoni*** - WE POST IT AT THE PLACE OF RESIDENCE OF THE INDIVIDUAL - as well as publication in in 1 or 2 news appears and the GOVERNMENT GAZETTE - once posted up at his place of residence, as long as individual is in malta, he no longer sees and is living in the address you know of, you need to resort to PUBLICATION AND POSTING UP AS A MEANS OF SERVICE. Until there is service, the respondent has not been served. It can be quite problematic.

## **Article 188 COCP - Certificate of Service**

*188.(1) The officer charged with the service of an act shall, on the same day when he serves or unsuccessfully seeks to serve the act, or, at the latest, on the following day, draw up a certificate stating whether the service was effected or not. In the affirmative, the certificate shall state the name and surname of the person on whom service was effected and, if the act was not served directly on the person on whom service was to be effected, the name and the surname of the person to whom the copy was delivered and the place where the act was served; in the negative, the certificate shall state the reason why service was not effected.*

*(2) Any certificate referred to in sub-article (1) shall be drawn up in the manner prescribed by the registrar, who may also direct that a form or forms printed, impressed or otherwise prepared be used for the purpose.*

*(3) The registrar may also require that any such certificate be confirmed on oath by the officer entrusted with the service and any such oath shall be administered by the registrar.*

## **Article 191 COCP - Modes of Preparing Copies**

*191.(1) Copies shall be printed, typewritten, made by other mechanical or electronic means or by any photographic process or written in ink:*

*Provided that in every case they shall be drawn up in clear and easily legible characters.*

*(2) Copies shall also be certified by the person presenting them or by an advocate or legal procurator to be true copies of the originals.*

**Article 191** -> copies can be printed, typewritten, written in ink - in court you won't have these available - write legibly and these will be accepted. If you will file copies, they will be fooled by a legal procurator and must ensure that these are true copies of the original.

# **The Trial of Causes**

## **Article 195 COCP - Trial of Causes**

*(1) A cause the written pleadings of which have been concluded shall be set down either for pre-trial hearings or for trial hearings as may be provided in regulations and shall be brought to conclusion as expeditiously as possible:*

*Provided that in causes before the courts of inferior jurisdiction, the conclusion of the written pleadings shall take place when the party to be notified of the relative cause has been notified in accordance with the provisions of this Code.*

*(2) (a) The Court shall -*

*(i) at the first hearing of both at first instance as well as at the court of appeal stage, make a record stating the parties who have been served with the application, with the application on oath or with the application on appeal as the case may be and, if it is determined that there are any parties who have not been so served, give such orders as it may deem fit so that services may be effected or other acts prepared; and*

*(ii) at the first hearing of both the pretrial stage and the trial stage, plan in advance, after consulting with the advocates of the parties, all the sittings to be held as well as the projected date of judgement and shall also direct the parties on what evidence and submissions it expects to be made at each sitting:*

*Provided that the court shall, for grave reasons to be expressly stated in the records of the case or for reasons of urgency, call any other sittings and request any other evidence or submissions it deems fit.*

*(b) The Court may delegate its functions under paragraph(a) to a judicial assistant.*

*(3) Unless rules of court are made under article 29, all causes shall be appointed for hearing within two months and sittings shall be held on a bi-monthly basis*

*(4) The date and time for the hearing shall be determined at least two months prior to the date fixed for the hearing, provided that the court may decide, either where it deems to be appropriate or after consultation with the advocates of the parties or in any other case where the cause is to be heard with urgency, to fix an earlier date, and where such date and time has been so fixed, no*

*adjournment of the hearing shall be granted except for grave and exceptional reasons to be stated in the records of the case:*

*Provided that in causes which are to be heard with urgency the said period of two months shall not apply.*

*(5) (a) Where a cause has been pending before a particular court for three or more years, any party to the case may, personally, and without the need of representation by any advocate, present an application, (which application shall, however, not form part of the acts of the case) to the Chief Justice requesting that, for the simple reason that the cause has taken so long, the presiding member of the court be changed and the case assigned to another member of the judiciary; the decision of the Chief Justice, which shall be taken in camera, shall be final and conclusive; and where such assignment takes place there shall be no need for any notification of such assignment.*

*(b) Where a cause has been pending for judgment before a particular court for eighteen months or more, any party to the case may, personally, and without the need of representation by any advocate, present an application, (which application shall, however, not form part of the acts of the case) to the Chief Justice for this purpose, and the Chief Justice may, for the simple reason that the judgment has taken so long to be delivered, allow the request for the presiding member of the court to be changed and for the case for judgment to be assigned to another member of the judiciary; the decision of the Chief Justice, which shall be taken in camera, shall be final and conclusive; and where such assignment takes place there shall be no need for any notification of such assignment.*

*(c) The Chief Justice shall draw up a yearly report on any causes transferred in accordance with the provisions of paragraphs (a) and (b), detailing the possible reasons for such delays, and shall send the report to the Commission for the Administration of Justice. The Commission shall take such action as it may deem appropriate in accordance with the provisions of the Commission for the Administration of Justice Act, and shall, within three months, publish such report.*

*(6) Nothing in this article shall preclude the court from deciding a cause on the day fixed for first hearing where the claim is not contested or the court is satisfied that the plaintiff has no claim or the defendant has no valid defence.*

*(7) Where, after the written pleadings of an appeal are deemed to be concluded, the Court of Appeal considers an appeal to be frivolous and vexatious, the Court of Appeal may dismiss the appeal in open court on the day fixed for the first hearing.*

**Article 195 COCP** - Within Title 5, tells us that once the written pleadings have been closed, and therefore written pleadings are closed, then we will pass on to the oral stage - a case will be passed on for hearing either for a pre-trial hearing, up to the court to have the first hearing, PA primo APPUNTAMENTO (very first hearing not because it is in front of the PRIM AWLA). HERE, we have a problem as the court shall attest at first instance and at the court of appeal stage. Law tells us the first instance or court of appeal hearing, it is at pre-trial stage - does this ring a bell?

No, hearing at appeal stage any more - when they changed the law saying there will be no hearing at appeal stage but the court may order that a hearing is heard. The rule is that no hearing at appeal stage. Just informed the case is put off for judgement unless the COA orders that a hearing is changed, hence under 195, you can have a first hearing its telling us - but there is a mistake the law was not changed, failed to amend this one.

NO HEARING AT COURT OF APPEAL STAGE, ONLY EXCEPTIONALLY THAT THE COURT WILL ORDER A HEARING. OTHERWISE THE RULE IS THAT THE COURT WILL PUT UP THE CASE FOR JUDGEMENT MAL-EWWEL.

IN THIS **PRIMO APPUNTAMENTO** - The Court will ask how much time you need, court will move the case forward - TISTRADAHA. 2 seduti tressaq x-xhieda, in 6 months time it should be ready. But in practice this is not followed and done.

Final point we made - if the case has been put off for judgement why has it been within 18 months - not made for judgement. cases are to be tried in their order but government cases are preferred.

## **Article 199 COCP- Default of appearance of contending parties at trial.**

199.(1) If, after a cause is called on three times, the contending parties or their advocates or, in the causes before the inferior courts, the contending parties or their advocates or legal procurators, fail to appear, it shall be lawful for the court to order the cancellation of the cause from the list at the expense of the plaintiff.

(2) If only the defendant or his advocate or legal procurator, as the case may be, appears, he shall be entitled to demand that the plaintiff be non-suited with costs.

(3) In either case, if the plaintiff desires that the cause be restored to the list to be heard and determined upon the same acts, he shall, by means of an application to be filed within three months, make a demand to that effect. Such demand shall be granted once only, and the court shall appoint a day for the trial of the cause at the expense of plaintiff, on condition that the plaintiff shall make payment, or deposit in the registry of the court before the day fixed for the trial, all the costs stipulated in the tariff, in the consequence of the non-appearance of plaintiff, or of his advocate or legal procurator, as the case may be.

(4) The provisions of this article shall not apply when a case is awaiting the outcome of another cause.

→ If a case is called out 3 times, the parties themselves or the lawyers or the LP do not turn up, lawful for the Court to order cancellation of the case. If a case is cancelled, you can only ask for it to be reappointed for hearing which can be done once.

→ If nobody turns out, especially the plaintiff, if no plaintiff no legal procurator, or lawyer turn up - could mean they reached an agreement - in maltese - BONARJA - CASE is pending and parties have reached an agreement - TRANSAZZJONI (TITRANSIGI kawza) - wasalna biex nitransigu kawza.

→ Compromise = reaching an agreement, in Maltese you cannot use *kompromess*, *Titransigi* is the verb *transazzjoni* is the noun. The parties *jitransigu l-kawza*. *ittransigew l-kawza*.

→ The Court is fully ordered to cancel the case. If no agreement has been reached, only by pure chance they didn't turn up - P can ask for the reappointment of the case, which can only be asked once. More frequently, having both parties not turn up is more unusual, if only D or his legal procurator turn up, the P be non-suited.

→ In English we say if D does turn up, and only he turns up, he can ask the P to be non-suited, **IL-LIBERAZZJONI MILL-OSSERVANZA TAL-GUDIZZJU**. In maltese it is the defendant

who asked the court that he be discharged, in English we say the P is non-suited. Different currents which make up Maltese law. The D asks court for the P to be non-suited (without a lawsuit). KONVENUT JITLOB LI JIGI LIIBERAT MILL-OSSERVANZA TAL-GUDIZZJU.

If NO Plaintiff is non-suited. Plaintiff is non-suited, divested of his lawsuit as he is not turning up. EVIDENCE, the plaintiff did not bring proof, the D can be asked for the ILLIBERANZA MILL-OSSERVAZZJONI TAL-GUDIZZJU.

Now if unfortunately it happens that P had a valid reason for not turning up, he can file an application requesting his case to be put on the list again for hearing. Before he pays the case can not be heard before he settles the fee.

*201. If the defendant or his advocate, or, in the causes before the inferior courts, the defendant or his advocate or legal procurator, fails to appear, the cause may be determined according to law on the acts available after hearing such evidence as the court may consider necessary, notwithstanding his default of appearance.*

- In fact this article. Not mentioned in the context of 199 - should D fail to appear, without a lawyer, the judge can decide the case on the facts available.

- The Judge/Mag. can decide to hear more evidence. The law is silent but the court is clear, it can pass judgement immediately, the superior court the judge would demand and confirm on oath that he has not been paid.

-If D fails to turn up, the case can proceed but in the inferior courts we have a special situation in that, when dealing with evidence, there is an institute known as **subizzjoni**, in fact in any sworn application or in any application in inferior courts, when you list witnesses you always end up with *subizzjoni tal-konvenut*. In the inferior courts, it is used everyday, in English, the English version is reference to the oath of the defendants. In Maltese **subizzjoni**, you submit to something. What happens in the inferior courts? Once mentioned here, the court can proceed to pass judgement. The law will tell us under **subizzjoni** that the P, especially his lawyer, is to prepare a list of questions which he is going to ask the defendant, so we will have the heading, left hand side, right hand side, lower down, names of parties, and kapitolu tal attur ghas subizzjoni tal-konvenut - and according to law the P is to prepare a set of questions. **Questions meant to asked D**

1. Am I correct to understand you borrowed x date on date y?
2. Am I correct to state we weren't to notary z ?
3. Am I correct to say that you have failed to pay?
4. Am I correct to say that interest is also due?

The practice has evolved, we do not list these questions - SUBIZZJONI TAL KONVENUT LI BIHOM IRIDI JIPPOROVA BIL-GURAMNET TIEGHEK LI INT DEBITUR LEJH U GHAL RAGUNIJET INDICKATI FL-AVVIZ.

We are making a reference to what is contained in the application - hence making a reference to them. What has been mentioned in the text of application and the amount, plaintiff is demanding, we are making a slight reference to them in these kapitoli. Questions made to be put to D. once he has not turned up, once he has been served and failed to turn up, P may resort to these kapitoli, Mag. will sign, that they have been tendered to court, once he doesn't turn up, mag can sign and mag delivers judgement.

I agree I failed to pay the sum, once this reference to an oath to the defendant, the mag will deliver judgement there and then. Once D has been served (gie notifikat), P can then demand that judgement be delivered there and then. KAPITOLU TAL-ATTUR GHAS-SUBIZZJONI TAL-KONVENUT. Hence, in the inferior courts it asks that these kapitoli be submitted.

Hence do be careful and unfortunately 201 is not tied up with 199.

## **Article 207 - Order of trial in appellate court**

207.(1) Save for the provisions of sub-articles (5) and (7), all proceedings before an appellate court shall be conducted in writing.

(2) Written pleadings shall be deemed closed as provided in the provisions of article 146.

(3) When a reply for an appeal raises issues about the nullity of validity of the appeal or mentions facts or points of law which were not raised by the appellant in the appeal application, the appellant may within thirty (30) days from being notified of the reply, by way of application, request the court to authorise him to file a rejoinder to address only those points which were raised for the first time in the reply to the appeal application. The court shall, if it considers it reasonable and expedient in the circumstances, grant leave to the appellant to file his rejoinder within a period, which shall not exceed thirty (30) days from when the appellant's lawyer is given written notice of the decree.

(4) Upon the closing of written pleadings and payment of security for costs related to the appeal, the court shall proceed to judgment on a date and time it sets for this scope.

(5) Notwithstanding the provisions of sub-article (4), the court may set a sitting for hearing of the cause, if it deems fit to hear evidence or oral submissions from the parties.

(6) Security for costs related to appeals shall be produced and deposited as provided in article 249, and in case of default, the court may declare the appeal as abandoned.

(7) Notwithstanding the provisions of sub-articles (1) to (6) all causes before the Constitutional Court and all causes before the Court Of Appeal where no oral hearing took place at first instance, shall be appointed for an oral hearing.

(8) The oral hearing shall be conducted as follows:

(a) when the appeal is entered by the plaintiff only, or by both parties, the order of hearing of the cause shall be the same as provided in article 204(1);

(b) when the appeal is entered by the defendant only, he shall commence by briefly stating the grounds of complaint and praying that the judgment appealed be reversed or varied, and the order of hearing of the cause shall then be as provided in article 204(1).

Article 207 - all proceedings before an appellate court shall be conducted in writing - hence no more hearing in front of the COA, — in the COA no more hearings are held unless the court exceptionally orders a hearing, if court feels or parties demand that where parties ask the court that a hearing be held so that a point at issue. What is to state has to be said in writing as today no more hearings are ever held unless the court grants you permission. Be careful as if you are not careful you will be adjudged what is in the application

## **Article 209 COCP - Appeal to be declared abandoned in default of appearance of the parties**

*209. (If, the court sets an appeal for oral hearing, and after that the cause is called on three (3) times, neither one of the parties nor their advocates appear, or if only the respondent or his advocate appears, the court may declare the appeal abandoned:*

*Provided that on an application by the appellant, that shall be filed within eight (8) days from such day that the appeal is declared abandoned, the court shall order that the cause be again put on the list for hearing and determination, provided the appellant shall have deposited, within the said time, the amount of costs occasioned by his non-appearance.*

If a court appointed a case for oral hearing - DOESN'T HAPPEN ANYMORE - have to be very careful about it.

Article 213 COCP - In inferior courts, the court may adjudge on a right although not falling precisely within original claim.

*In first instance, in the Court of Magistrates (Malta) and in the Court of Magistrates (Gozo) in its inferior jurisdiction, where the claim as stated in the application has not been made to appear, but nevertheless, another right has been made to appear although such other right does not fall precisely within the terms of the claim as originally framed, the court may adjudge upon such other right so made to appear on the same application:*

*Provided that the court shall, if a request is made to that effect, or if it shall deem it proper so to do, allow a short time to the defendant to prepare his defence against such other right:*

*Provided further that in no case shall the court award a sum beyond that originally claimed*

**Article 203 COCP** - suppose you have a case where - you demand payment following sale. Your client comes to your office, client asks that the D be condemned to pay a price which is owed to the client. During hearing, you must not say price, it was money lent to D, by mistake lawyer or client, said it was a case of sale, in the Superior Courts you have had it as if you demand he causa, what is the case all about - the case arose because of a sale - not a sale but a case of lending money - case thrown out as you have cited wrong causa - in inferior courts situation is different - in Court of Mag, be it Malta or Gozo, where the claim as stated in the application has not been made to appear, which is not the case, but another right has evolved, but such right does not fall within the parameters, but the amount is correct, so just a lapsus, a mistake of the pen.

Instead of saying money paid, saying money due for sale of a thing then the court may adjudge or decide the case upon such other right emerging during the hearing. But this raises an issue, when this article was introduced in the code, the inferior courts were inferior, really low - and the legislator argues what if by mistake the judge was demanding the payment of one thing instead of another.

Reasoning at the time - since we are looking for such petty amounts - and in fact it has been proposed that this competence has been increased. Once there is this article, that unlike what happens today, if today the hearing is being held in front of the mag court, the court can still judge for a new right, which is not the one mentioned by the plaintiff. The competence then was limited, very limited, but with today's competence how fair is to have such increased competence.

## Article 215 COCP - Inferior courts to proceed summarily

*215. The courts mentioned in article 213 shall proceed summarily and with the utmost despatch consistent with the due administration of justice, and shall comply with the provisions contained in this Title in so far as such provisions may be consistent with the manner of proceeding of the said courts as aforesaid.*

Article 215 - The Inferior Courts shall proceed summarily - QRATI TAL MAG - proceed *sommarjament* - the inferior courts they do not wear a gown - not in the superior courts, they wear a gown. Courts have always acted summarily. What if we increase further and further the competence of the mag's court. Can we just file kapitoli?



## **Decrees, Judgements and Appeals**

Judgement shall be delivered by Judge or Mag. hearing the case - what if the Court is composed of more than one Judge? Today more than 1 Judge in COA. In COA it is enough for one judge to deliver the judgement - he can be sitting by himself - normally they are sitting 3 but in coa, the judgement has been signed at least by 2 of the judges.

The signatures of the other 3 judges have to be signed. The situation of only 2 judges has signed judgement. It could be that the other judge did not agree with the other 2 judges. Man in the street would not know who signed but you can be asked to see the original copy of the judgement. If you have an inclination that a judge may be unconvinced, you might be confirming it, if there is something wrong. Absence of 3rd judge could be

**Article 219 COCP - Conclusive or binding declarations to be included in the operative part of judgment.**

*219. Every declaration intended by the court to be conclusive or binding shall be included in the operative part of the judgment.*

Article 219 says that any declaration - conclusive and binding has to be concluded in the operative part of the judgement - not really binding - to be binding, it has to be in the conclusive part. IN MALTESE CONCLUSIVE PART = *decide The conclusive part which is binding - the others are all not binding.*

**Article 220 COCP - Recording of decision and reasons**

*220. When judgment is delivered, the registrar shall record the decision together with the reasons given by the court for such decision.*

→ Where are judgements delivered? In Court - certainly not in chambers - L-EBDA MHALLEF/MAG MA jista jaqta kawza fis sigrieta.

**Article 221 - Delivery and recording of interlocutory decrees**

(1) Saving the provisions of article 173, interlocutory decrees shall be delivered and recorded in the manner provided in the preceding articles of this Title.

(2) The provisions of article 218 shall also apply to the said decrees, when they are subject to appeal according to the provisions of article 229.

→ INTERLOCUTORY DECREES HAVE TO BE DELIVERED WHERE? Interlocutory decree, delivered like a judgement in an open court.

## Article 223 COCP - Costs

*223.(1) Every definitive judgment shall award costs against the party cast.*

*(2) In the case of an interlocutory decree, it shall be lawful for the court to reserve the issue as to costs for decision in the definitive judgment or to award costs against the party cast.*

*(3) In all cases, it shall be lawful for the court to order that the costs shall not be taxed as between party and party, when either party has been cast in some of the points at issue, or when the matter at issue involves difficult points of law, or where there is any other good cause.*

*(4) In the case of any frivolous or vexatious appeal or retrial, the Court of Appeal or the Constitutional Court may award double costs against the appellant in favour of the respondent.*

*(5) In the case where an ex parte expert witness is produced by any of the parties in a cause, the court shall in the definitive judgment establish a fair amount which can be claimed as costs for the said witness. In determining the said amount, the court shall take into account the seriousness of the claims, in the case of an expert witness not resident in Malta, whether local expertise was available and all the other circumstances of the case. The court shall also establish how the said costs are to be apportioned between the parties to the cause.*

*(6) Subject to article 173(2)(c), when a party without just cause refuses or fails to participate before or collaborate with a mediator, the Court may award double costs in the other party's favour due to such refusal or failure*

—> Every definite judgement will award costs - etc etc -223 sub 4 - in a frivolous and vexatious appeal or in a re-trial, the COA or cons court can award double costs against the -  
Vexatiously - useless appeal - clients can be insisting - Article 223 sub 4

## Article 224 COCP - Award of costs in solidum or pro rata

*224. If two or more persons are condemned in costs, each person shall be deemed to be condemned in solidum or in proportion to his interest in the cause according to the decision on the merits.*

Article 224 COCP - capital sum and the expenses - at law they are known to be liable in solidum - the law uses the latin phrase - IN SOLIDUM - IN ENGLISH - joint and severally liable.

Will be liable in solidum - A can demand full amount from B - B can not say i will only pay 1k and try to recover rest from C - B is entitled and liable for full amount.

→ In English RIGHT OF RELIEF? RIVARSA - DRITT TA RIVARSA - A entitled for full sum of B.

## Article 226 COCP - Time for filing application of appeal

*226.(1) An appeal is entered by means of an application to be filed in the registry of the Court of Appeal within thirty (30) days from the date of the judgment.*

*(2) Where an appeal is not entered from the whole judgment, there shall be stated in the application of appeal, the heads of the judgment against which an appeal is entered*

→ Article 144 - an appeal may be entered by one party against all other parties - only against whom the appeal is directed. Very bad drafting on part of the legislator.

## Article 227 COCP - Judgments by appellate courts not subject to appeal.

*227. Judgments delivered by the Court of Appeal are not appealable*

→ Article 227 - judgements delivered by the Court of Appeal are not appealable - judgements by court of appeal - possibility - of RETRATTAZZJONI - very STRINGENT grounds - enforced very strictly - rule is judgements became final and conclusive once court of appeal pronounces itself.

## Article 228 COCP - Other judgments not subject to appeal

**228.(1)** *No appeal shall lie from any judgment given upon admission of the claim, or accepted by the renunciation of the right of appeal or by acquiescence in the findings of the judgment.*

*(2) Nor shall an appeal lie from any judgment of the Court of Magistrates (Malta), or of the Court of Magistrates (Gozo) in its inferior jurisdiction as a court of first instance, where the amount of the claim, assessed or assessable as provided in articles 748 and 761, does not exceed four hundred and sixty-five euro and eighty-seven cents (465.87), and the matter at issue does not involve a point of law determined in the judgment or the determination of a claim for the eviction of any person from immovable property.*

Article 228 - can one file an appeal in criminal matters following judgement? No admission of appeal - can you appeal? In what case can you appeal if you admit in a criminal case? What happens if you admit crime - admit guilt - PIENA TISTA TAPPELLA MINNHA. *In civil matters A VS B - no punishment - in civil matters a vs b, if b admits claim, case comes to an end.*

Article 228(2): this sub article provides that there will be no appeal from the court of magistrates when the amount of the claim does not exceed 500 as long as NO point of law was involved. The legislator is trying to limit appeals. If the amount in question does not exceed this then you are not in a position to file an appeal.

# **Article 229 COCP - Appeal from decrees**

(1) *An appeal from the decrees mentioned hereunder shall only lie after the definitive judgment and together with an appeal from such judgment, and such decrees may not be challenged before the definitive judgment is delivered:*

*(a) a decree allowing a request for urgency;*

*(b) any order or directive under the provisions of article 173;*

*(c) a decree allowing or disallowing a request for the adjournment of a cause under article 195(3);*

*(d) a decree allowing or disallowing an objection to the competency of a witness under article 567;*

*(e) a decree allowing or disallowing a request to put questions to a witness under article 587;*

*(f) a decree allowing or disallowing a request for the production of documents under article 637 except if the decree allows or disallows the production of a document which is an exempt document in terms of article 637(4);*

*(g) the appointment of a referee under article 646;*

*(h) a decree allowing or disallowing a request for the connection of actions under article 793(1);*

*(i) a decree allowing or disallowing a request for suspending the delivery of a decree;*

*(j) a decree allowing or disallowing the expunging of a document from the records of the case;*

*(k) subject to the provisions of this article, a decree allowing or disallowing a request for the revocation or amendment of a decree;*

*(l) a decree disallowing a request for special leave to appeal under sub-article (5);*

*(m) a decree disallowing a request for stay of proceedings.*

(2) *A decision of the court in the cause listed hereunder shall be given by a decree to be read out in open court on a day duly notified to the parties, and an appeal from such decree may be entered before the definitive judgment subject to the procedure laid down in sub-article (4) and (5):*

*(a) a decree refusing the appointment of additional referees under article 674;*

*(b) a decree transferring an action for trial to another court under article 792,*

*(c) a decree refusing the joinder of a third party under article 961;*

*(d) a decree disallowing a request for urgency;*

*(e) a decree ordering the stay of proceedings*

*(f) a decree that orders the production of a document which is an exempt document in terms of article 637(4).*

(3) *Save as otherwise specifically provided for in this Code an appeal from any other interlocutory decree not included in sub-articles (1) and (2) may be entered before the definitive judgment only by special leave of the court hearing the case, to be requested by an application to*

*be filed within ten days from the date on which the decree is read out in open court. The court, after hearing the parties, may grant such leave of appeal if it deems it expedient and fair that the matter be brought before the Court of Appeal before the definitive judgment and the time limit for the filing of such an appeal shall commence to run from the date of the said decree.*

*(4) In the case of any decree under sub-articles (2) and (3), provided that any application for an appeal has not been filed, the aggrieved party may file an application within six days from the date on which the decree is read out in open court, requested the court which delivered the decree to reconsider its decision. The application is contain full and detailed reasons in support of therequest and is to be served on the other party who shall have the right to file an answer thereto within six days from the date of service.*

*(5) The court shall decide, as expeditiously as possible by decree to be read out in open court, the application for special leave to appeal in terms of sub-article (3) or the application to reconsider its decision in terms of sub-article (4), expounding fully therein the reasons for the decision.*

*(6) The period for appeal from a decree before a definitive judgment shall be six days from the date on which the decree is read out in open court: Provided that in the case contemplated in sub-articles (3) and (4) such term for appeal shall run from the day on which the decrees in terms of sub-article (5) are read out in open court.*

*(7) Subject to the provisions of this article, the provisions of this Code relating to appeals from judgments shall apply to appeals from decrees under this article.*

*(8) The security referred to in article 249 shall not be required in the cases referred to in sub-article (6).*

*(9) In the case of any frivolous or vexatious appeal, the Court Of Appeal shall award double costs against the appellant in favour of the respondent, and may condemn appellant to pay respondent a sum not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37) by way of penalty, saving any right for damages that may be competent to respondent.*

*(10) Where an interlocutory decree has been given in camera, it shall for the purposes of this article and for the purposes of the calculation of any time therein established be deemed to have been read out in open court on the date of the first sitting in the case immediately after the decree was given in camera by the court.*

**Article 229:** Before this article was amended, we were in an awkward situation because the law, doctrine tells us that we distinguish between three decrees: those which are definitive, those which are interlocutory and those which are neither definitive nor interlocutory and which normally would be delivered in chambers. The law does not furnish us with any list of such decrees. It is only through case law and practice that one could decide that a particular decree was definitive or interlocutory.

The legislator intervened because in a hot case, you may have the party against whom that decree was delivered wishing to appeal. In this case one would try all possibilities because you would not know what type of decree it was. To lessen these complications, the legislator carried out amendments listed in Article 229.

Sub-article (1) mentions that you can only file an appeal once it has been decided by the court of first instance. You have to await the outcome of the case. Together with this, if a decree is pronounced against the interest of your client but the client wins the case, he is not going to appeal so neither can he appeal from that decree which did not go in his favour. These are decrees which can only be appealed from after judgements have been delivered and together with an appeal from such judgement.

Sub-article (2)- six decrees where such decree may be appealed from immediately. The case has not yet been decided but during the hearing an incident arises, the court delivers its decree, and he is dissatisfied with this. Here you can file an appeal immediately in these six instances. Its decree is to be delivered in open court (seduta stante).

1. *A decree refusal the appointment of additional referees (espert)- A case decided by the first referee and if one is dissatisfied, one can ask the court to appoint three additional referees (periti perizjuti)- the court can decide to continue with the case and deliver a judgement but if the case goes against you, it is obvious that you will file an appeal. In this case, the law immediately provides that one can file an appeal if the court refuses to accept the appointment of a new referee.*

2. *Trial to another court- there is an appeal immediately if you do not agree with this*

3. *A decree refusing joinder of third parties - 'kjamat in kawza' vs intervention. Intervention as opposed to joinder.*

4. *A case is urgent you file a request, and the court does NOT allow it- you can file an appeal*

5. *Stay proceedings*

*We have two sub articles each containing a list. First list gives us those decrees which cannot be appealed to whereas then we have those decrees which can be appealed from immediately. Then we have another category under sub-article (3). Here we are introducing the interlocutory decree. Not falling under category 1 or 2 – you can appeal provided the court gives you permission to do so. We do not have any list. You have to check whether the decree given by the court falls under category 1 or 2 if NOT it can only be appealed from if you obtain the courts permission. This decree has to be pronounced in open court.*

*Any decree falling under sub-article (2) and sub-article (3) so we are excluding sub-article (1), the law tells us that in the case of any decree you may decide instead of appeal that you may ask*

*the court to reconsider its decision. Instead of wasting time one can ask the court to reconsider its decision so as not to file an appeal.*

*The period of appeal under sub-article (6) shall be 6 days from the date on which the decree is read out in open court.*

*Sub-article (9)- The law envisages the possibility of any frivolous or vexatious appeals – ‘frivolu u vessatorju’ (biex tahli l-hin) the COA will give double costs and may condemn appellant to pay a penalty.*

*Sub-article (10)- Where an interlocutory decree has been given in camera (we have seen open court in all above sub-articles and now we have in camera). An interlocutory decree can only be delivered in open court. Here we have a problem. Go to article 221. Interlocutory decrees shall be delivered and recorded in the same manner provided in the preceding article. Can judgements be delivered in chambers? NEVER. A judgment has to be delivered in open court. The law is telling us in article 221 that interlocutory decrees shall be delivered and recorded in the same manner. How is it possible under article 229(10) permitting a decree to be given in camera? It is not possible. The law mentions the possibility of an interlocutory decree and so the magistrate can make use of it but this is an example of a very bad drafting of the law.*

*What if an interlocutory decree is given in camera ? it can not be given in camera. What is an interlocutory decree?*

**Article 229 COCP** - good job but question still remains - What is an interlocutory decree? Open court - can a judgement be delivered in Chambers? No it has to be in open court. In chambers - you won't be present in chambers - won't know when the judge / mag. Delivers his decree. In chambers - something private - done in camera. The law in sub 10 mentions that if the court were to deliver an ordinary decree in camera - it can not be.

**Paul Tanti vs. Sammy Mifsud (2001)** - There are 3 types of decrees; *“dawk definittivi, dawk interlokutorji u (t-tielet kategorija) li la huma definttivi u lanqas interlokutorji u filwaqt li ghall-ewwel u t-tieni hemm appell, ghat-tielet kategorija m’hemmx dritt t’appell.”*

**Josef Gatt vs. Maria Gatt** - Id-dikrieti definittivi huma dawk li [ermezz taghhom tigi determinata u mitmuma kontroversja bejn il-partijiet.

Ez: Dezerzjoni (abandoned the cause ), 166A - case stops because of them

**Philip Gatt vs. Adrian Busietta** - Id-digriet interlokutorju min-naha l-ohra huwa dak li permezz tieghu tigi deciza xi kwistjoni li tirregola l-andament tal-kawza waqt li tkun ghadha miexja .

It-tielet tip ta’ digriet - Digriet li permezz ttieghu l-Qorti tichad it-talba ghar-revoka ta’ mandat kawtelatorju + Dawk li jinghataw b’rabta ma atti ezekuttivi jew procedura ta’ bejgh bl-irkant.

**Francis Grima vs. L-Onorevoli Prim Ministru** - “propju li minnu ma jistax isir appell u jistta’ biss jigi kkontestat permezz ta’ kawza istitwita skont il-procedura ordinarja.”

**Dottor Giovanni Sammut vs. Giuseppe Mifsud** - “Dikrieti moghtija fl-atti tal-procedura ta’ subbasta ma huma qatt appellabli.”

**Karen Mangion vs. David Anastasi 2012** - In this case, RIKORS fl-atti tal-bejgh bl-irkant permess tieghu intalab provediment dwar kif kellha ssir it-tpacija ghal liberazzjoni ta’ propejeta’ komuni taghhom u d-depositu tta’ prezz tal-liberazzjoni. Sar appell minn dan il-provvediment. Court of Appeal declared such as null as a decree given in that manner was not interlocutory and not definite, hence could only be challenged by instituting a case.

### **Article 230 - Interlocutory decrees not to operate as res judicata for court delivering them**

*230. Interlocutory decrees shall not operate as a res judicata in regard to the court by which they are delivered, if a good cause to depart therefrom is shown to the satisfaction of the court*

- Article 230 - interlocutory decrees; those which can be delivered only in open court and certainly not in camera, do not operate as a res judicata - one of the hall marks to distinguish between one decree to another. If judge/mag delivers a wrong judgement, he can not change that judgement, the only possibility is to have to appeal, not so with an interlocutory decree, the judge / mag may change his opinion and may change his decree as interlocutory decrees do not bind the judge/mag, the judge can change his decree.

- For example A has asked the court for permission to produce a witness who had not been listed in the list of witnesses which one is bound to include in the sworn application or sworn reply. The case is heard and the client informs you that his relative who has been in Australia, m has finally turned up in Malta. His name was not included in list of witnesses as client only knew this individual had left Malta 50 years ago, he knew the whole story but now emigrated and all if a sudden he turns up. you file an application to have this person be allowed to give his evidence., the judge/mag refuses saying he was not included in the list. Granted but how can i include him in the list if he was presumably going to die there.

**Azzopardi vs Joseph Calleja, 15th Dec 2003** → A decree was not delivered in open Court - party wishing to appeal ended up filing it after the time limit and the other party understandably said, this appeal has been filed too late as only a limited no of days but how could I know the Court delivered its decree in chambers when it had to deliver it in open Court - irregularly pronounced - as pronounced in chambers and not in an open court.

The Court made a big mistake - hence instead of declaring the appeal to be declared - "IRRITU U NULL";- court said instead of declaring appeal as being IRRITU U NULL, I will declare the DECREE AS BEING IRRITU AND NULL and the appeal send the decree back to the first court - sent it back as it was wrong.

## **Article 231 COCP - Appeal in case of separate judgments on several issues in the same action.**

*231.(1) Where several issues in an action have been determined by separate judgments, appeal from any such judgments may only be entered after the final judgment and within the prescribed time, to be reckoned from the date of such final judgment; and in such an appeal express mention of the judgment or judgments appealed from shall be made:*

*Provided that an appeal from such separate judgments may be entered before the final judgment only by leave of court to be read out in open court; such request for leave to appeal shall be made either orally immediately after the delivery of such judgment or by application within six days from such judgment and when such leave to appeal from such separate judgements is granted the time for the filing of the appeal in respect thereof shall commence to run from the day on which the said leave is read out in open court.*

*(2) In an action involving more than one plaintiff or more than one defendant a judgment disposing of the action in respect of any particular plaintiff or defendant may only be appealed from within the prescribed time to be reckoned from the date of such judgment*

What if several issues have been determined by separate judgements?

Plea of prescription was rest - sometimes difficult to distinguish between judgement and a decree - when in an action point has been decided by a sep judgement - any appeal by such judgement can only be entered into after final judgement so if the court upheld a plea of prescription by judgement, you can decide to appeal at the end of the case as they will be other heads to be examined - head of final judgement would be the relevant date., final judgement has been pronounced. From final judgement you can file an appeal even from other judgements delivered earlier. As appeal entered into only after final judgement, provided that if the court gives you permission, (judgement and not a decree) the law can allow you to appeal immediately instead of awaiting the final judgement. Up to court to grant you permission or not - only granted in open court - what if granted in chambers? You will have the same problem.

## **Harold Said vs. John Mary sive Jimmy Muscat, Court of Appeal 29th October 2024**

Dan huwa appell mill-konvenut minn sentenza *in parte* mogħtija mill-Qorti tal-Maġistrati (Għawdex) fil-kompetenza Superjuri Ċivili, Sezzjoni Ġenerali tagħha, tat-3 ta' Ottubru 2023 li ħadhet it-tmien eċċezzjoni tiegħu u ordnat it-tkomplija tas-smiġ tal-kawża.

Il-konvenut talab lill-Ewwel Qorti permess biex jappella permezz ta' rikors fl-10 ta' Ottubru 2023. Li kif tajjeb irrilevaw l-appellati fir-risposta tal- appell tagħhom, sar *fuori termine* billi skont Art. 231(1) tal-Kap. 12, talba bħal din trid issir fi żmien sitt ijiem mid-data tas-sentenza. Ir-rikors ġie ppreżentat wara sebat ijiem. L-atturi wiegħbu għar-rikors iżda m'eċċepewx li kien sar wara li skada t-terminu. L-Ewwel Qorti tat il-permess tagħha biex isir l-appell bla ma semmiet xejn dwar it-terminu.

It-termini prefissi fil-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili huma t'ordni pubbliku u ma jistgħu bl-ebda mod jiġu nJORATI. Lanqas jistgħu jiġu rinunzjati jew mibdula bil-kunsens tal-partijiet. Għalhekk it-terminu ta' sitt ijiem kellu jiġi mħares taħt piena ta' irritwalità u nullità tal-proċeduri.

### *Decide*

Għal dawn il-motivi l-Qorti tiddikjara l-appell irritu u null u tibgħat l-atti lura lill-Ewwel Qorti għall-kontinwazzjoni tas-smiġ tal-kawża.

Spejjeż ta' dan l-appell a karigu tal-appellant.

**Article 235 COCP** - *Where a court of first instance omits to determine any of the claims brought forward, no appeal shall lie ab omiss a decisione:*

*Provided that it shall be lawful for each of the parties, within the time of fifteen days from the date of the judgment, by means of an application, to request the court of first instance to determine such claim; and upon such application, the parties being summoned anew, the court shall adjudge upon the claim; in such case, the time for entering appeal from the whole judgment, or from any part thereof, shall commence to run from the day of the last judgment: or by sworn application at any time.*

*Provided further that it shall be lawful for each of the parties, at any time, to sue by sworn application before the court of first instance for a decision on the claim the determination of which had been so omitted.*

- If the Court grants you permission this ought to be pronounced in open court - right or wrongly
- The law mentions that in 235 - decrees of jurisdictions are always subject to appeal - you can

see when legislators are a bit negligent in these issues and matters. The Pleas should be covered by Dr Galea.

→ Article 235 - you filed a case with 3 heads, demand court to establish who is responsible, request damages to be liquidated and ask the court to pay D to pay damages, what if the court omits to decide one of these 3 heads? Missing head of judgement - no appeal - our first reaction would be we file an appeal. In this case, there is no appeal, you do not file an appeal - are you without a remedy? No - either of parties may draw courts' attention within 15 days - asking the court to decide upon the head which has not yet been decided. If these 15 days elapse the court can change and decide this head after filing a sworn application - new case having to be filed asking court to determine head of judgement it forgot to decide - what happens if 15 days elapse and one only knows of this decision later - shall time limit run -

**Article 236 COCP** - *An appeal may be entered not only by the contending parties but also by any person interested.*

Article 236 - An appeal may be entered not only by other contending parties but also by any person interested any person enjoying juridical interest - could be so many interested. You have to file the rules of juridical interest which we find in doctrine and in case law - 236 law allows this possibility and interested 3rd parties may file an appeal.

## **Article 240 COCP - Cross Appeals**

*240.(1) Any party may avail himself of an appeal entered from a judgment, including a partial judgment and from a head or heads of any judgment, or from an interlocutory decree and may enter a cross appeal not only in respect of the judgment, partial judgment, head or heads of a judgment, or interlocutory decree appealed from, but also in respect of any judgment or heads therefore interlocutory decrees given in the same cause even if not appealed from by the appellant. Such cross appeal may be made even against or by any party not being one against whom an appeal is directed in terms of article 144(1):*

*Provided that a party may not so avail himself of the appeal in respect of the particular judgment, if he has already appealed from such judgment or any head thereof.*

*(2) The party who intends to avail himself of such appeal shall make a declaration to that effect in the answer stating therein his demands and the grounds for his cross appeal.*

→ Cross-appeals - IN MALTESE ARE APPELL INCIDENTALI - only cross appeal - what happens ? A won 4 of heads of judgement lost just 1, Respondent is happy he won 1 head but wants judgement to be reformed so the 4 heads against him be reversed so he will ask for a revocation.

→ He will file an appeal about those 4 and his appeal is served on the person who won the 4 heads - on realising that the case will continue he did not care about the 1 head he lost, the R filed his appeal so the winning party will answer his appeal and at the end of his answer he will file his cross appeal requesting the 1 head of judgement to be overturned. This answer and cross appeal will be served on respondent and will be entitled to the cross appeal by the winning party.

## Cross-Appeals

Article 240: Cross-appeals – “Appell incidental”: A files a case under five heads and won four of them. Respondent is happy that he won this one head but wants the judgement to be reformed so that the four against him will be reversed.

He will ask for a variation NOT a revocation. He will file an appeal about these four heads of judgments which he lost, and his appeal will be served on the person who won the case (the four heads). The winning party who won four out of five will answer his appeal and at the end of his answer he will file a cross appeal requesting this one head. This will be served on the respondent – the one who filed an appeal, and he will be entitled to reply to the cross appeal.

- A having finished the answer, can file the cross examination

In answering A's appeal, B filed a cross appeal so the court will have to deal with B's main appeal and A's cross appeal

Names will always remain the same - A v. B - what if one files an application?  
B's appeal and A's cross appeal

Now, this is 240 - DEALS WITH CROSS APPEALS - if one has already appealed, (A on the one head rejected) and filed the appeal and B again - once one has filed an appeal, one can not make use of a cross-appeal - so as a starting point, you can have 2 main appeals - if A does not appeal, in answering B's appeal, he will be entitled to file a cross appeal but would not be so entitled if - IF BOTH PARTIES AND BOTH FILED APPEAL, A can not file a cross appeal, even if he realises he made a mistake in his appeal

**Article 241 COCP - Cross-appeal to hold good notwithstanding abandonment of appeal.**

**241.** *The declaration referred to in the last preceding article shall continue to be operative even if the opposite party abandons his appeal.*

So 2 appeals but in 241 - the law says the cross appeal will continue to run even if the opposite party abandoned his appeal. Should the appeal be dropped = logically one B drops his appeal, the two appeals are distinct. Even though A in filing the appeal would have used - if B withdraws his appeal - A's cross appeal would continue - legislator has opted to have the cross appeal continuing despite the fact that B's appeal has been dropped.

## Article 242 COCP - Notice as to validity of laws

**242.** (1) *When a court, by a judgment which has become res judicata, declares any instrument having the force of law or any provision thereof to run counter to any provision of the Constitution of Malta or to any human right or fundamental freedoms set out in the First Schedule to the European Convention Act, or to be ultra vires, the registrar shall send a copy of the said judgment to the Speaker of the House of Representatives, who shall during the first sitting of the House following the receipt of such judgment inform the House of such receipt and lay a copy of the judgment on the table of the House.*

(2) *Where there has been a judgment as is mentioned in sub-article (1) the Prime Minister may, within the period of six months from the date that the judgment has become res judicata and to the extent necessary in his opinion to remove any inconsistency with the Constitution of Malta or with the relevant human right or fundamental freedom set out in the First Schedule to the European Convention Act as declared in the said judgment, make regulations deleting the relevant instrument or any provision thereof declared to run counter to the Constitution or the First Schedule to the European Convention Act as mentioned in sub-article (1).*

→ 242 - A bit of a problem - if the law considers a law to be anti-constitutional - that is an-constitutional for one and all - only parliament which can enact laws, only parliament can enact laws. Only in respect to those litigants - if not in accordance with the constitution, it is wrong and it should not be there. Hence our courts have taken the line that unless a legislator has changed the law, the anti-constitutionality will still stem. The way the law is phrased, the court registrar = parliament's intervention is needed. Once law is declared anti-constitutional, it comes to an end.

Now, Article normally appeals will require security for costs - court registrar will assist the fees and tell the appellant to pay money - unless paid appeal will fail, security for costs. One can ask to be exempted if the fee is very high /

- If person fails to pay, one has to refer to execution

## **Article 253 COCP - Executive Titles**

One can resort to enforcement only in virtue of an executive title - 253 - the following are executive titles - leading to executions, enforcement - judgements and decrees of the court are executive titles - judgement has been delivered, a decree has been delivered, it can be enforced. Once a case is pending, it can still be enforced.

**253.***The following are executive titles:*

- (a) judgments and decrees of the courts of justice of Malta;*
- (b) contracts received before a notary public in Malta, or before any other public officer authorised to receive the same where the contract is in respect of a debt certain, liquidated and due, and not consisting in the performance of an act;*
- (c) taxed bills of judicial fees and disbursements, issued in favour of the Registrar, any advocate, legal procurator, notary public, perit, judicial referee or witness, unless such taxed bills are impugned according to law;*
- (d) awards of arbitrators registered with the Malta Arbitration Centre;*
- (e) bills of exchange and promissory notes issued in terms of the Commercial Code:*

*Provided that the court which is competent according to the value of the bill of exchange or promissory note may, by decree which shall not be subject to appeal, suspend the execution of such a bill of exchange or promissory note in whole or in part and with or without security, upon an application of the person opposing the execution of such bill of exchange or promissory note, to be filed within twenty days from the service of the judicial letter sent for the purpose of rendering the same bill of exchange or promissory note executable, on the grounds that the signature on the said bill of exchange or promissory note is not that of the said person or of his mandatory or where such person brings forward grave and valid reasons to oppose the said execution and in such case any person demanding the payment of the bill of exchange or promissory note shall file an action according to the provisions of the Commercial Code.*

*The judicial letter referred to above in this proviso shall, under pain of nullity, notify the debtor of the right given to him by this proviso;*

- (f) mediation agreements made enforceable by the parties hereto in accordance with the provisions of the Mediation Act;*
- (g) decisions of the Consumer Claims Tribunal;*
- (h) decisions and awards of the Arbiter for Financial Services in accordance with the provisions of the Arbiter for Financial Services Act.*
- (i) Decisions of the Adjudicating Panel for Private Residential Leases*

→ Contracts before a notary public - in respect of a debt, which is certain liquid and due. Article 166A - Not all contracts are or can be executive titles - in respect of certain contracts you still need to file a court case - certain liquid and due - one can pass on to execute that contract as if it were a judgement. Can enforced by the bank instead of filing a court case, where the contract is certain liquid and due

***BILLS OF EXCHANGE AND PROMISSORY NOTES - kambjali - CONSTITUTE AN EXECUTIVE TITLE.***

**Phoenix Domestic Appliances Ltd vs. Joseph Vassallo** - Court declared BOE null and void as it was not signed by the drawer.

## Article 255 COCP - Judgments enforceable after twenty-four hours

**Article 255.** *The following may be enforced after the lapse of twenty-four hours from delivery:*

- (a) any judgment on any collateral issue or any interlocutory decree, provided the time for enforcement is not stated in the judgment or decree itself;*
- (b) any judgment rescinding a warrant of impediment of departure of any ship, or rescinding any warrant of seizure or any garnishee order relating to ships or merchandise;*
- (c) any judgment ordering the supply of maintenance;*
- (d) any award of an arbitrator in accordance with the Arbitration Act.*

- A judicial letter would have to be served to the person who signed the contract but once served that contract would be like a judgement pronounced by the Court. All other executive titles which court mentions apart from judgements require a judicial letter to be served on the other party.

## Article 260 COCP

Enforcement of executive title can be carried out on movable and immovable property of the debtor.

*260. Saving the provisions of article 353, the enforcement of any of the executive titles referred to in article 253, may be carried out on the movable as well as on the immovable property of the debtor, as the creditor shall state.*

Article 262 COCP - Payment or fulfilment in part of debt or claim not to operate as waiver of execution.

*payment on account = doesn't mean one has renounced to the balance*

**262.** *The receipt of any payment on account of the debt, or the fulfilment of or the release from any part of the claim, shall not operate as a waiver of execution in respect of that part of the debtor claim as yet unpaid or unfulfilled, unless the contrary be made to appear.*

If one accepts the payment on account, one is not renouncing to the balance - but if one sends a cheque in full and final settlement - (*AKKONT U PERSALDU*) and matter is closed, as in full and final settlement. *If the amount is not collected, the creditor should not accept it.*

*DEBTOR may file a case against his own debtor - A creditor of B - B owes money to A - C owes money to C - where*

*Actor debitoris mei - A CAN FILE AN ACTION AGAINST B AND C CONJOINTLY =*

**IMP to remember - Which court enforced the title?** *Judgements are delivered by the court which delivers the judgement even though execution will take place - If one is part of the eu, one can not say look here, the competence of the malta port only goes as far as the maltese islands - one can enforce it in Gozo.*

TODAY THIS HAS BEEN CHANGED - any judgement delivered by the coa is not enforced by the COA - - whether he COA confirms, varies or rejects the appeal unlike situation formally, coa today never enforces any judgement - today always the court of first instances which enforces the judgement even if the COA reverses the judgement of the first instance, which is a bit ironic, but the JUDGE A in court of first instance which will enforce the judgement. Not COA. IMP TO KNOW THE DIFFERENCE VS BEFORE.

**Example:** A v. B - decided in X manner - coa reversed judgement. The court of first instance will enforce the judgement not the COA which reversed the judgement.

## **Article 267 COCP - Provisional enforcement by operation of law**

*267. The following shall be in all cases provisionally enforceable:*

- (a) any judgment referred to in article 255(c);*
- (b) any judgment providing redress against infringement of the individual's right to life or providing remedies against illegal arrest or forced labour; and*
- (c) any interlocutory decree*

Possibility of provisional enforcement - normally the courts don't authorise provisional enforcement - only exceptionally done that the court pending appeal authorises enforcement of a judgement - with regards to maintenance, 267 provides that these are automatically provisionally enforceable. Any interlocutory decree, can be provisionally enforceable.

Any provision in a supply of maintenance is provisionally enforceable - pending the appeal stage, if the court grants you permission to appeal at appeal stage.

**Side Note:** The Law lists it as an executive act - but this is wrong- Why? As the object of a warrant of seizure is - first there has to be a seizure, only after the item has been seized then it can be sold by auction only. First you have to seize something. A judicial sale by auction is a natural off shoot. One proceeds to sell it, but the law lists it as something which is by itself - means where someone can enforce an executive title.

### **Any of the executive titles -How do we put them into execution? Article 273 COCP**

*273. The executive titles mentioned in article 253 may, according to circumstances, be enforced by any of the following executive acts:*

- (a) warrant of seizure of movable property;*
- (b) warrant of seizure of immovable property;*
- (c) warrant of seizure of a commercial going concern;*
- (d) judicial sale by auction of movable or of immovable property or of rights annexed to immovable property;*
- (e) executive garnishee order;*
- (f) warrant of ejection or eviction from immovable property;*
- (g) warrant in factum;*
- (h) warrant of arrest of sea vessels;*
- (i) warrant of arrest of aircraft;*

*(j) warrant in procinctu;*

*(k) warrant of ejection or expulsion from seagoing vessels or aircraft*

Executive garnishee order = mandat ta' sekwestru - the only warrant in English which does not carry the name warrant. The court executing officer (marixxal) who is ordered by court to execute any of his warrants - may order breaking any outer or inner door.

### **Harry Braithwaite vs. Avukat William Cuschieri 2015**

P - creditor wanted the judicial sale by auction on the immovable of debtor, the Defendant. Article 273(b) and (d) - mandat ta' qbid ta' hwejjeg immobbli u kemm il-bejgh fl-irkant mill-qorti huma atti ezekuttivi.

“Jintlaqtu bi procedura taht l-artikolu 281 ghat-thassir tal-att”

Article 326 does not exclude the remedy under 281, “anzi jistennieh ghax it-twaqqif huwa biss riimedju provvizorju sakemm ikun deciz l-att ghandux jithassar jew le.”

## Article 276 - No opposition to the execution of warrant

*276. No opposition to the execution of any warrant or garnishee order shall be considered until the execution has been effected*

## Article 281 COCP - How executive acts may be impugned (challenged)

*281.(1) Without prejudice to any other right under this or any other law, the person against whom an executive act has been issued or any other person who has an interest may make an application, containing all desired submissions together with all documents sustaining such application, to the court issuing the executive act praying that the executive act be revoked, either totally or partially, for any reason valid at law.*

*(2) The application shall be served on the opponent who shall, within ten days, file a reply containing all submissions which such opposite party may wish to make together with all documents sustaining the reply which are within its ability to file:*

*Provided that the court may, in urgent cases, reduce the period referred to in this sub-article. In default of such opposition the court shall accede to the demand.*

*(3) The court shall decide on the application after hearing the parties and receiving such evidence as it may deem fit, if it so considers, within a period not later than one month from the filing of the said application.*

*(4) An appeal from a decree delivered under sub-article (3) may be entered by application within six days from the date on which the decree is read out in open court. The Court of Appeal Shall appoint such appeal for hearing within one month from the date when the decree is read out in open court, and the appeal shall be decided within three months from the date when it has been appointed for hearing.*

*(5) The security referred to in article 249 shall not be required in the cases referred to in the previous sub-article.*

**Article 281** - This article deals with how one can impugn acts of execution - against a person who has been issued or any person having an interest, may file an application in court which he'd issued the warrant asking for the act to be revoked.

This application if filed by the debtor or by a person who has had an interest will have to have it served on the party who issued the warrant. The person who will contest the application will be served by the party who issued the warrant. Once the party who issued the warrant failed to answer, the application for revocation will be upheld.

The Court - for revocation of warrant - not later than 1 month from filing of application. If court takes longer, it takes 1 month to decide. Ironically, under sub 4 of 281, an appeal from a decree may be entered within 6 days. So this has got nothing to do with 229 - appeals from decrees. We have to learn where to look for our law. 6 days and 1 more from the day decree is read out in open court. The law allows the person who has an interest to file the application.

**When is a warrant confirmed on oath?** Why would it be confirmed **BIL-GURAMENT** - When would you need to confirm on oath? When it is a precautionary warrant. One of those executive titles, a precautionary warrant, no court judgement, no title, as yet. If you are going to utilize an executive warrant, you have to cross out JIGI KKONFERMAT BIL GURAMENT, BUT ONLY SAY "*JINGHAD BIL-QIMA*".

L-kredtitu = IS-SORTE (AMOUNT) which B debtor has to pay A, INTERESTS AND SPEJJEZ. How do you know the expenses are? At end of court case, there is the taxed bill of costs, it taxxa = somma mahduma, spejjez li jahdem r registrat fi tmiem kull kawza.

EZEKUZZJONI - will be seizing the items from where they are - address at ezekuzzjoni may be different from name of the debtor - AS X MAY LIVE HERE AND ITEMS ARE Y

Page 2 - if debtor no longer resides in the address, that you can change as corrections are allowed - minor corrections - up to now not being allowed

# **WARRANTS**

## 1. WARRANT OF SEIZURE OF MOVABLE PROPERTY (Mandat ta' qbid)

**282.** *The warrant for the seizure of movable property shall, besides the particulars stated in article 274, contain Court orders About:*

*(a) (i) the appointment of the day, place and time for the judicial sale by auction and the subsequent seizure and removal thereupon of all such articles from the place which has been indicated by the creditor or from the person of the debtor;*

*or*

*(ii) the seizure from the place indicated by the creditor, including from the person of the debtor, of any such article which the debtor may possess or such article or articles as may be mentioned in the warrant; and also that after the execution of the warrant, the court executing officer shall be ordered to fix, together with the advocate or the legal procurator of the creditor, the day when the judicial sale by auction is to be held in consultation with the executing officer responsible therefor, and such executing officer shall also fix with the creditor the date, which shall at least be seven days prior to the date of the judicial sale by auction, when the removal of the articles which the executing creditor selects to have removed shall take place;*

*(b) the execution of the warrant, if so required, after legal hours or on a Sunday or public holiday, and if after two attempts to execute the warrant the court executing officer fails to effect such execution, he shall be authorised to force open the place;*

*(c) the transport of the property seized and to be removed to the storage places indicated by the consignee, and about the transfer of their possession from the debtor to the consignee;*

*(d) the appointment of a consignee and the taxing and receipt of payment due to the consignee by the creditor for such period during which the articles seized and to be removed would be under the care of the consignee, so however that such payment may be divided in proportion to the periods established by the Registrar depending on the nature of the articles seized and to be removed. Such payment is made subject to the right of regress against the debtor when such right exists;*

*(e) the appointment of experts to make a valuation of the property seized, if so required by law, either in special circumstances which the court may deem appropriate, or on the demand of any interested party or of the debtor;*

*(f) the appointment of an auctioneer who shall receive a fee in terms of the Auctioneers Act, if so required by law;*

*(g) an order for the judicial sale by auction of such articles as are seized and to be removed on the appointed day in terms of regulations to be made by the Minister responsible for justice, without further service of any notice to the debtor.*

**The most popular warrant** - not popular as much today - 282 tells us that the warrant of moveables shall, besides the particulars in 274, contain court orders by judicial sale by auction - case law, you will find the situation to be different. Before, a *primo appuntamento* first where the court would order the seizure of items. Then the court would order the seizure of the items seized - the debtor would make it very difficult to be served with the 2nd application - hence the legislator has now changed the law and appointed a date, time and place for the auction -so be careful as this has changed and case law might be different. It will order the seizure but order also the time and place

**Sub d** - *Appointment of a consignee* - in maltese KUNSINNATARJU - *a person to whom the items seized by the court officer, will be transferred to the one responsible for their upkeep. He remains owner of items seized by the debtor but will no longer be in possession. A court officer will remove possession and assign a consignee - and this costs money - the longer it takes the more money you will fork out, this warrant has lost its effectiveness.*

Court in 283 will attach to the said officer, a detail of the property seized - will not be in a position to give the value thereof. Eventually experts will give us a value of the items seized

**283.(1)(a)***The court executing officer shall attach to the said warrant a detailed description of the property seized.*

*(b) The creditor or the debtor or any interested party may demand the court executing officer to take any photograph or film shot of the detained articles either by electronic or by any other means at the expense of the party making the demand.*

*(2) If the court executing officer finds no movable property, or finds only such property as is not liable to seizure, he shall make a certificate to that effect, stating therein the nature of the movable property, if any, not liable to seizure, and he shall attach such certificate to the warrant.*

## **Article 284 COCP Payment of the amount due**

284.(1) When a warrant of seizure is being executed, it is only the full amount claimed by the creditor that may be paid by the debtor to the court executing officer.

(2) The court executing officer shall describe in detail the property seized and -

(a) where the property includes any merchandise, he shall cause such merchandise to be weighed, measured or gauged, as the case may be;

(b) where money or securities for money, jewellery, or articles of precious metal are seized, he shall accurately state the amount or nominal value or weight thereof and he shall within the shortest time possible take the same to the registry and lodge them therein by means of a schedule;

(c) where papers are seized, he shall seal them and deliver them to the Registrar, and such seals may not be removed except by the authority of the court.

→ Article 284 has been changed - originally. Quite often that debtor would only offer a partial amount - say can pay you 1000 out of 2000 and yet today this is not allowed, only if the full amount is paid, will the court officer stop in his tracks so the debtor either pays the full amount or else the seizure will continue.

→ This took place as whenever a debtor had paid on account, the amount paid to the court officer did not reach the creditor in full. So if the creditor was owed 3000 and the debtor paid 2000, the creditor was only given 1500 as the court officer would keep the rest. So in order to cut on that, either full amount is paid or else the court officer can not accept part payment.

*What if the court includes any merchandise?*

## **Article 285 COCP**

285.(1) Seizure may be effected on any movable property including:

(a) shares in commercial partnerships;

(b) licences issued by any competent authority as may be established by regulations made by the Minister responsible for justice;

(c) insurance policies;

(d) credit securities and any intellectual or industrial property right:

Provided that on such property the warrant shall have effect as from the date of the service on such authority or such person who would have issued such movable property. Any transfer made

or burthen incumbent on such property after that date shall be ipso jure null as from the date of the service of the certificate of seizure to such person or authority issuing same:

Provided further that, in respect of any shares or securities registered at a central securities depository, as defined in terms of article 2 of the Financial Markets Act, a warrant of seizure shall also be served on such central securities depository and shall take effect only if no transfer order or netting affecting the said shares or securities shall have been entered in a securities settlement system, authorized in terms of article 34 of the Central Bank of Malta Act, prior to the service of the warrant to the depository.

(2) Where in any commercial partnership its statute attributes any right of preference with regard to the transfer of shares, the shareholders shall be informed of the date when such sale is due to take place and they may exercise the said right during that sale.

(3) When the judicial sale by auction of an insurance policy is due to take place, notice shall be given to the insurance company of the date of such sale.

What if the court includes any merchandise?

Share → *sehem* - *ishma* - *malti legali* = shareholder = *azzjonist*. *Azzjonijiet* = shares. Hence *azzjoni mhux bilfors ACTION*, but it can also mean a share in a company. Shareholder = *azzjonist*. Shares in commercial partnerships = movable as well. Licenses are subject to seizure, insurance policies- POLZA

CONSIGNEE - Article 286 COCP = the one to whom the items have been given

*286.(1) Such property as is removed from the possession of the debtor, in terms of article 282(1)(c) subject to the provisions of article 293, shall be transferred forthwith to be retained in the hands of the consignee in the presence of the court executing officer, and the consignee shall receive and hold such property in a storage place authorised by the Registrar until such time as that property is sold or the consignee is ordered to do otherwise.*

*(2) The consignee shall issue a receipt, to be signed by him, for such property as would have been seized and removed from the possession of the debtor and which he would have received:*

*Provided that the consignee may, with the written consent of the Registrar, retain such property in any place other than the official storage place in such circumstances where, due to the nature or the size of the articles seized, it would not be feasible to dispose otherwise*

Article 287 COCP

*287. A consignee may not be appointed under this Title when he is either:*

- (a) the execution creditor;*
- (b) the spouse of the debtor or of the creditor;*
- (c) any one of the parents, the creditor, his daughter or son, or his brother or sister, his uncle or aunt, any one of the parents of his spouse or any one of the spouses of his children;*
- (d) directly or indirectly employed with the creditor;*
- (e) the person who claims to be the owner of the property seized*

287 - Execution creditor can never be a consignee - neither can the spouse or debtor off the creditor - can be problematic. You have to have an outsider, which means you have to pay money and this can cost money.

### Article 288 COCP - Attendance of the consignee.

**288.** *At the time of execution of the warrant of seizure under article 282, the consignee shall attend together with the court executing officer to execute the warrant. The court executing officer may seize and remove property without informing the creditor.*

288 - consignee is to act with the court executing officer. His duties 289, 290 - consignee to act as a bonus paterfamilias - still being used up to this very day - you will be responsible should these items disappear - there will be problems

### Article 293 COCP - Property not subject to seizure

**293.**(1) The property mentioned hereunder is not subject to seizure:

- (a) such clothes for daily wear, bedding and such utensils and furniture as are considered reasonably necessary for the decent living of the debtor and his family;
- (b) personal documents and books relating to the profession of the debtor, of the debtor's spouse or of the debtor's children;
- (c) the registers and minute-books of notaries public;
- (d) tools and implements necessary for the instruction in or the exercise of any science or of any art of the debtor, of the debtor's spouse or of the debtor's children;
- (e) animals and tools required for agriculture and any fruit either cut or not yet separated from the ground;
- (f) aircraft, exclusively appropriated to a state service, including the postal service, but excluding commercial service;
- (g) sea vessels wholly chartered in the service of the Government of Malta;
- (h) sacred vestments and vessels which are used in a consecrated church, or belonging to a priest, a religious order or any member thereof;
- (i) any property of any member of the Police Force or of the Armed Forces of Malta being arms, ammunition, equipment, instruments or clothing used by him in the discharge of his duties:

Provided that any such property as is mentioned in paragraphs (a) to (g) may be seized -

(i) if the execution is demanded in respect of the price of such property;

(ii) if the execution is demanded in respect of rent or ground-rent of the tenement in which such property is kept;

(iii) if the executive title by virtue of which the warrant has been issued specifically condemns the debtor to effect the return of such property.

(2) The seizure may be effected of unseparated movable property belonging to both debtor and a third party, insofar as no sale of such property may take place except after their separation.

So we can seize movable - but certain items can not be seized - clothes for everyday wear, bedding - things considered necessary for living - reasonably necessary for the debtor. Any personal documents and books relating to the profession of the debtor - can not be seized or those of debtors' spouses or children.

Registres and minutes and books of notary publics - these are exempted from seizure. Why would registries not be subject to public seizure? If a lawyer/notary is a debtor - he should be able to pay enough and earn enough money to pay debt owed to the creditor - so those registers, he is enabled to work. In fact you will see this applies to animals and tools required for agriculture. Not to impair the efficiency of the police force

### **Judgements**

The **Honorable Judge Grazio Mercieca** stated that the consignee should “*ghandu juza d-diligenza li juza ghall-hwejjgu stess*”

**Rudolphe Gaerty vs. Paul Caruana - First Hall, Civil Court - May 2005 Judge Valenzia -** On the 30th October 2001, the First Hall “akkordat mandat ta’ qbid kontra Paul Caruana” on the number plates of his vehicles BMW, Ford Escort, Maserati, and Lotus. Tamara Brincat, his relative was appointed as consignee and she failed to honour her obligations by never removing the number plates on the car as well as let Paul Caruana use his vehicles. The Court, according to Article 298 COCP, could notice how Tamara left the cars in a family garage where Paul could access the cars in detriment to the Plaintiff. The court ordered the removal of Tamara from consignee and article 601 COCP was quoted. The Court ordered the number plates to be kept by the authorities and ordered the arrest of Paul Caruana for false testimony.

## **Warrant of Seizure of Immovable Property**

The warrant of seizure - law says this has to be done by application - detailed description of the property including the mode in which the property has been acquired. You have to carry up searches. How will the creditor know? Any burden attached to the same land - and a plan clearly indicating the site., so problematic.

The court in issuing the warrant will order the register to appoint experts who have to carry out valuations of items seized and then order the register to inform the public registry that there has been the decree ordering sale of the property. This is known to 3rd parties, who know there is a sale of the report.

### **Article 305 - Form of demand by application**

305.(1) The demand for the seizure of immovable property is made by an application.

(2) The application shall contain a detailed description of the property of which the sale by auction is demanded, including the mode in which the property has been acquired and any burden attached to the same land and a plan clearly indicating the site:

Provided that the provisions of this article apply to ships or other vessels exceeding ten metres in length and such articles shall also be described in detail, including any rights and encumbrances thereon; and an appraisalment shall only be made if required by the creditor or by the debtor.

(3) In the event of a decree as provided in the proviso to sub-article (2), the procedure to be followed shall be that laid down in this Sub-title for the judicial sale by auction of immovable property.

### **Article 307 COCP - Appraisalment by debtor**

307.(1) Within twenty days from the time notice of the court decree is served on the debtor, he may file a separate appraisalment and demand that a new appraisalment need not be effected, provided that such appraisalment be a sworn appraisalment.

(2) The sworn appraisalment filed by the debtor shall, within twenty days, be served on the creditor who shall then have twenty days to lodge an opposition to it.

(3) When a creditor lodges such opposition to the appraisal filed by the debtor, the court shall, after hearing both parties, decide whether it shall appoint a new expert or not.

(4) An appraisal of the property to be sold shall always be made before the sale takes place provided that if an appraisal, made not earlier than twelve months before the judgment that is being executed, has been accepted by the court in its judgment, the court shall take cognizance of such appraisal and it shall not appoint new experts to effect a new appraisal.

→ 307 - within 20 days from time notice of court decree is served on debtor, it could be a separate appraisal - so why appoint experts to have a new valuation? The court will accept the value which the debtor forked out in order to acquire the property.

**Article 309 COCP - Appraisal of gold or silver articles to show intrinsic value, etc**

309. In any appraisal of gold or silver articles, the expert shall state separately the intrinsic value thereof and the cost of manufacture, as well as the total

Article 309 - you will find the appraisal of gold and silver articles - this should be under moveables not here - a case of bad drafting. Incidentally this was added in 2006 hence legislator should have been more careful

## **Article 310 COCP - Valuation of immovable property to contain description of property**

310.(1) In the valuation of immovable property, the experts shall include a description of the property stating the burdens, leases and other rights whether real or personal, if any, to which the property is subject, as well as the last transfer of such property according to the information obtained from the creditor or from the debtor and such description shall include the following:

- (a) an indication of the area and height of the property subject to judicial sale;
- (b) a plan or a sketch which shows the number of rooms constituting the property and their size;
- (c) a report as to whether the property is built in line with building permits and sanitary rules;
- (d) a copy of the deed of acquisition; and
- (e) a declaration as to whether the place is inhabited occupied by third parties, and under which title it is so occupied:

Provided that if the occupier, when so requested by the expert to give the information referred to in paragraph (e), fails to do so, the expert shall include a declaration to that effect in his report:

Provided further that if the Court is satisfied that the occupier failed to give the information referred to in the first proviso without just cause, the Court may find the occupier to be in contempt of court and he shall be liable on conviction to a punishment consisting of a fine (multa) of not less than two hundred euro (€200) and not more than one thousand euro (€1,000)

(2) It shall be lawful, at the written or verbal request of the expert or the creditor, to compel the debtor to confirm on oath, to be administered by the court or the registrar, the information given to or required by the expert

(3) The debtor shall be called upon to give the above information by means of a letter from the registrar. Applicability to debtor of provisions relating to witnesses.

(4) The provisions relating to witnesses shall apply to any debtor called upon as aforesaid.

**310** - all the details which the experts which would normally be a court appointed architect would have to go into

Creditor has to keep on forking out money - expert is entitled to a fee - have to be paid and the creditor has not seen as yet a single cent just forked out money

**HSBC Bank Malta vs. Mizzi Group Limited, March 2022**

D appealed a decree whereby the Court did not allow that “li jithassar mandat ta’ qbid ezekuttiv” as per article 281 COCP.

305(2) COCP - “huwa mashup biex tkun tista’ ssir stima tal-propjeta”

*“Il-Kreditur li jitlob l-hrug ta’ mandat ghandu jaghti dan it-taghrif fir-rikors u wkoll pizijiet reali fuq il-propjeta’ jirrizultaw mir-ricerki u ghalhekk il-kreditur huwa mistenni li jkun jaf bihom . Il-Kreditur mhux bilfors ikollu mezz kif ikun jaf bi drittijiet personali li jolqtu l-propjeta’ ghax dawn mhux dejjem ikunu registrati u ma jidhrux fuq ir-ricerki”*

Article 310 COCP - *“japplika wara li jkun sar ir-rikors ghall-hrug tal-mandat, jghid illi l-esperti mahtura biex jaghmlu stima tal-immobli jistghu jiehdu informazzjoni minghand il-kreditur u d-debitur”.*

Appeal Rejected. HSBC initiated judicial proceedings for the sale of D’s immoveable property so as to recover a debt from a 2008 contract acknowledging such debt. D challenged the execution of the warrant claiming that the debt was not due and procedural errors in the first instance decision. COA dismissed the appeal.

# OF THE WARRANT OF SEIZURE OF A COMMERCIAL GOING CONCERN

## Article 312 COCP - Sale by auction of movable or immovable property and going concerns

*312. The movable or immovable property or the going concerns which are seized from the possession of the debtor, shall be sold by public auction according to the provisions of this Title*

GROWING CONCERN = *AZJENDA* = a going concern can own both movables and immovables - *sid ta mobbli u immobli* - If the debtor fails to pay, debtor can seek the seizure of the going concern. However, the procedure is different from before as in 312D court will order the registrar to appoint experts who are to list.

DO NOT ENLIST ITEMS - the experts will list the assets of the going concern and will file a report as to whether such going concern ought to be sold or put under administration., an administrator will be appointed who will provisionally put the going concern, so to try to help debtor not be deprived the going concern, besides listing all items, will advise the court whether the going concern can survive with the right administration

Supervising the bankruptcy - this expert who will advise the court whether the going concern will survive and whether it needs to be sold, then the court will appoint a short peremptory time limit, *TERMINU PEREMPTORJU* for the filing of such report, these are confirmed on oath 312E and the court will within 1 week appoint the application for hearing.

The Court will - after hearing parties, decide whether a judicial sale by auction or whether the administration will continue to try and save the going concern. If there is a possibility the going concern will survive, the court will appoint an administrator to survey going concern

## **Article 312A - Auctions to be held whenever the need arises**

312A. Such auctions shall be held whenever the need arises, there being a sufficient amount of property to be sold.

Article 312I COCP - Where the court decides that going concern shall continue to be administered.

312I.(1) Where the court decides that the going concern shall continue to be administered until payment of the amount due is effected, it shall appoint an administrator and give such orders and make such provisions which it deems appropriate, taking into consideration the debt, nature and value of the going concern.

(2) The appointed administrator shall take control of the going concern and he shall have the right to sell and carry on trade in its day to day business, provided that with regard to any decision of an extraordinary nature he shall be bound to demand the court for its authorisation:

Provided that a commercial bank cannot be appointed as administrator.

312I - administrator will take control of the going concern and will have the right to sell and trade on business. Only items of an extraordinary nature which will require authorisation. So the administrator can save his going concern, not to deprive debtor off his going concern, but law wants to ensure that debtor pays any debts to creditor.

Article 312K - Term of a going concern def.

**312K.** *For the purposes of this Title, the term "going concern" means any kind of commercial enterprise conducting a business activity and includes machinery, apparatus, goods, corporeal and incorporeal rights, movable property, immovable property, licences, copyright and good-will.*

Goodwill = l-avvjament - the goodwill - of a shop - guarantee you will served well - that costs well - you can sell the good will

**THESIS: 2009: Michela Spiteri Debono** - there are 2 objectives in this warrant. The first is there to preserve the coherent totality of the assets, including licences and good will, so that the company is sold as a whole and not hacked into pieces. The second is to keep the company running in the course of the lawsuit between the parties. The positive side is to maintain its value and employment will not be lost.

## **OF JUDICIAL SALES BY AUCTION**

Judicial sales by auction - can only follow a warrant of seizure yet the law deems them the only means to execute the title - now, the registrar shall regularly publish lists of judicial sales by auction.

### **Article 314 Place and Time of Sale of Judicial Auction**

314.(1) Subject to the provisions of this article, the auction shall be held in public either -

(a) in the building of the courts of justice; or

(b) in any other building provided by the Minister responsible for justice for the purpose of such auctions and at such time as may be determined by the court:

Provided that the court shall have the power for just cause to order that an auction shall be held at any place and at any time, due notice of such place and time being given in the advertisement.

(2) In the case of sacred vestments and vessels, the auction shall not be held in public but the court shall give such directions as it may deem proper for their disposal in the manner most advantageous to the interested parties with due respect to the sacred nature of the object to be sold by auction. Cap. 345.

(3) In the case of a judicial sale by auction of listed securities in regulated markets, the auction shall be held in accordance with the procedures prescribed in rules and bye-laws made under article 4(2) and 28(2) of the Financial Markets Act

- These are held **314** either in the buildings in the court of justice or any other building provided by the minister

## **Article 315 - Valuation of property to be sold by auction**

315.(1) Immovable property or rights annexed to such property, or movable property consisting of gold or silver articles, pearls or precious stones or of other precious articles, and commercial going concerns, shall always be appraised before the sale thereof by auction.

(2) With regard to other movable property, an appraisal shall only be made if required by the creditor or by the debtor.

(3) An appraisal made in conformity with the provisions of articles 308, 311 and 312F and existing in the records of a sale by auction shall be accepted by the court to be the appraisal for the purpose of this article.

## **Article 317 COCP**

317. The marshal shall cause the movable property to be removed to the place of sale where it shall be exposed to public view at least two hours before the auction begins

317 - Marshall does not exist anymore and yet the law still refers to it.

## **Article 319 COCP - Opening of sale by auction.**

319.(1) The auction shall be, save the exceptions mentioned in the preceding articles, conducted by a public auctioneer in the presence of the Registrar.

(1A) The auction shall commence at the time established by the eCourt and shall continue until the highest public bid is adjudicated.

(1B) The sale of different items to be sold by auction may be held during the same time, each one separately and in consecutive order.

(2) Bids are made orally. Each bid shall be announced at least three times, unless a higher bid is previously made. The highest bidder, within the time stated in the advertisement, shall be the purchaser.

(3) An offer shall no longer be valid immediately when a higher offer is accepted, even though such a higher offer is later declared to be null.

(4) The public auctioneer or broker shall be entitled to a fee which is taxed by the Registrar in accordance with a tariff to be established by the Minister responsible for justice.

(5) No offer may be accepted if such offer is less than sixty percent (60%) of the value at which the movable or immovable property or the going concern has been appraised:

Provided that if no offer is made which is at least equivalent to sixty per cent (60%) of the value at which the movable or immovable property or the going concern has been appraised, the creditor may request that the movable or immovable property or the going concern be placed again for public auction

:Provided that this sub-article shall not apply to ships and other vessels exceeding ten metres in length only.

(6) The public auctioneer shall have the right to demand that a person submitting an offer should be in possession of the necessary guarantees

319 - Auctioneer - sub 2 319 - each bid is said 3 times and highest bid is the winning bid - lower offer is no longer applicable if there is a higher offer. The offer which preceded it is no longer applicable. One null, then the previous offer is the winning bid.

Sub 5 - No offer may be accepted if the offer is less than 60% of the value of the moveable or immovable - hence field worth 100,000 - first offer has to be 60k. What if no more offers? If debt is for the 100,000 and no more offers, then the end result - creditor has not been paid as of yet all the debt, hence must take further action to more items seized and the one seized is sold at half price.

**GUCCIONE CAPITAL vs BOV** - Their property was seized and it was sold for 60k. They filed a court case claiming that this provision is anti-constitutional. As depriving them of a property for selling such a property for less, is daylight robbery. The Constitutional case and first court upheld their claims. It found that it quoted EU law and said the article is anti-cons. The creditor was BOV. BOV appealed - and cons court - reversed judgement of the first hall - guccione couple - went to eu court and a hearing is due next january.

We have referred briefly to 319, opening of sale by auction - an experience of bids - highest bidder gets the item being sold. Under 319 sub 5, no offer may be accepted unless 60% of the value at which the moveable and immovable has been appraised. The first and only bid there is which can be problematic. Immovables can be sold at half price. The debtor would need to fork out more money and the creditor would be getting something for half price. First court found for the guccione couple but the constitutional court reversed the judgement - took the case abroad and had to await a decision.

## **Article 328 COCP**

*328. The purchaser shall pay the price into court within seven days from the date of the final adjudication, in the case of sale of immovable property or of rights annexed to such property, or of ships, or of aircraft, or of commercial going concerns; and, within twenty-four hours of the adjudication, in the case of other movable property*

## **Article 329 COCP - Defaulting purchaser liable to personal arrest**

**329.**(1) In default of such payment into court, the purchaser shall, upon the demand by application of the party at whose suit or against whom the execution was granted, be liable to personal arrest.

(2) Moreover, in such case, the property adjudicated may, upon demand by means of an application made by the party at whose suit or against whom the execution was granted, be again put up for auction at the expense of the purchaser; in which case, if the bids be lower, such purchaser shall be responsible for the difference; and if the bids be higher, the difference shall go in favour of the debtor, saving any right thereon of the execution creditor.

(3) The decree made on the said application shall be served on the purchaser

Article 329 COCP - in default of payment, highest bidder gets the item, should he fail to do so, he should within 7 days - FROM FINAL ADJUDICATION = **LIBERAZZJONI** - WHY WOULD you think we use this word, LIBERAZZJONI? Judicial sale by auction follows the warrant of seizure, when items have been seized, where do they end up? They are under court authority hence once there is adjudication, they are no longer under court authority, handed over to the highest bidder.

In the case of moveables, 329, you have to do it within 24 hrs - what happens if the highest bidder fails to deposit the price in court? The purchaser will be liable to personal arrest, even in civil matters there is this residual criminal aspect. Here we are dealing with the civil court - the purchaser who fails to deposit money in court, will be liable to personal arrest seeing that he has failed to deposit the money in court.

## **Article 331 COCP - Delivery of immovable or movable property to purchaser.**

**331.**(1) The delivery of immovable property or of rights annexed to such property, or of commercial going concerns, takes place *ipso jure* on the final adjudication and upon the payment of the price into court or the approval of the set-off.

(2) The delivery of movable property takes place upon the handing over of the thing and the deposit of the price or the approval of the set-off.

(3) In the case of ships or other vessels or aircraft, the court may make such orders, as it may deem fit, to ensure that the property adjudicated be delivered to the purchaser forthwith, upon the purchaser giving such security as the court may determine to safeguard the claims of the parties. Such orders may also be made in other cases in which the court considers that delay in the delivery of the property can cause serious prejudice to the purchaser. An order made under this sub-article shall not be challenged in anyway and shall be implemented forthwith

Article 331 - delivery of an immovable and rights annexed to such property, the law tells us takes place ipso jure - ON FINAL ADJUDICATION AND PAYMENT ON THE PRICE. We draw up a contract by a notary public usually but in this case there was no need for the notary public to draft any deed as it was held under court authority.

Property will be transferred and the delivery will be placed on the final adjudication - that will constitute the transfer of the immovable property, price still has to be deposited.

**Article 332 COCP - No payment into court is necessary on adjudication upon a bid animo compensandi.**

*332. Saving the provisions of article 337(1) and (2), the purchaser is not bound to pay the money into court if he shall have made his bid animo compensandi.*

ANIMO COMPENSANDI - with the intention of compensation - a creditor who has insisted on the judicial sale by auction of property which has been seized may be interested in buying that property himself. Out of these 6 judicial sales mentioned 3 have been brought about by the bank - BANKS ARE interested in buying property *animo compensandi*. They would have lent - the bank would pounce on him and would want the amount and price which had tendered.

If the property is really worth it, the bank and any other creditor may file a note stating that he will make bids, with the intention of having that property bought by the creditor himself. No other creditor or debtor can stop this process. Up to the court whether to accept this application or not. Usually the court will agree if it agrees, the creditor no need to take money to purchase the property but it will be set off against the original debt. Ironically, it will still run after the balance if the actual value of the property which was caught was correct. That is why it is interesting seeing the GIUCCIONE case - the first hall found that - the constitutional court reversed the judgement. Interesting what the ultimate court decided.

**Article 352 COCP Disposal of immovable property, etc., by debtor within a year from registration of order of sale to be null.**

352.(1) Any disposal of immovable property or of rights annexed to such property made by the debtor within a year to be reckoned from the date of the original or renewed registration of the judgment or decree by which the sale by auction of such property or rights was ordered, shall be null in regard to the person at whose suit the judgment or decree was obtained, in which case the court shall on a demand made by application proceed, after hearing the parties, to declare such transfer as null and void and to adopt such measures as it may deem necessary.

(2) In regard to such person, any lease or other disposal of the enjoyment of such property or rights and any diminution or restrictions of the enjoyment of such property or rights made by the debtor within the said year without the authority of the court by which the judgment or decree was delivered shall also be null.

(3) If, pending the auction proceedings, the debtor remains in possession of such property, he may be compelled to lodge into court the fruits actually collected or which might have been collected

**Article 352 COCP** - Any disposal made by the debtor within a 1 year to be made - might try to dispose of property within 1 year, within decree/judgement ordering the sale was pronounced. If the debtor disposes of the immovables, then such disposal will be regarded as being null as long as such disposal occurs within 1 year from the decree ordering the sale. Likewise any lease, KIRJA, **LOKAZZJONI multi legali ta kirja.**

***Any kind of lease entered into within that one 1 year shall likewise be null - debtor now having failed to pay***

**Article 353 COCP** - 353.(1) If the debtor offers for auction movable property sufficient to meet the claim of the creditor without any obstacle or difficulty, the auction of the immovable property or of a commercial going concern shall be suspended.

(2) The auction of the immovable property or commercial going concern stated by the creditor shall likewise be suspended, if the debtor offers other immovable property sufficient to meet the claim of the creditor without any obstacle or difficulty

**Article 353** - Debtor may have moveable property which has not yet been seized. If debtor becomes - whereas debtor can resort to a no of tricks, at least he is allowed to offer other property. Up to the court to decide.

## **Article 354 COCP - Execution of a judgement of the Court of Magistrates (Malta) on Immovable property**

*354.(1) When the judgement the execution of which is sought is a judgement given by the Court of Magistrates (Malta), its execution, insofar as it has to be executed on immovable property or rights attached to immovable property, is to be effected by the Civil Court, First Hall.*

*(2) The same rule applies when a demand is made for the execution of two or more judgements, whose total joint amount, not taking into account any expenses, exceeds the sum of fifteen thousand euro (€15,000)*

Article 354 - Malta - presumably applies to Gozo also, even though not mentioned. Once you will sell immovable property, that has to be done under the First Hall - another instance that the inferior courts are to act summarily. This is an inclination of that situation. Today, the competence of the mag court is increased, another increase soon in the competence of the magistrates court. It can not be sold under authority by a Court of Mag., the same rule would apply.

## **Article 355 COCP - Jus redimendi**

*355.(1) The debtor shall have the right to repurchase his immovable property and of a commercial going concern sold by auction provided such right is exercised within four months from the date of registration of the act of adjudication in the Public Registry.*

*(2) The right of repurchase shall be exercised by the filing of a schedule of redemption, and a concurrent deposit as is provided mutatis mutandis, in Sub-title VI of Title VI of Part II of BookSecond of the Civil Code*

> Under Article 355 - debtor is entitled to repurchase the immovable or the going concern, as long as this is exercised within 4 months from act of adjudication in the act of the public registry, act of adjudication has to be filed in the public registry. Within 4 months from such registration, the debtor is entitled to repurchase the immovable property he previously owned. Debtors may try to recover the premises of which he was formally the owner, naturally he has to pay all expenses paid by the creditor. The bank will get the property for half price. One local bank set up a company to manage the properties at the judicial sale by auction.

## **Article 357 COCP - Eviction after adjudication**

*357. The adjudication of immovable property as of itself constitutes an executive title and if either the debtor against whom execution is being sought or a third party occupying the premises without title fails to vacate the premises so adjudicated, the purchaser shall be entitled, within one year from the adjudication, to seek the issue of a warrant of eviction on the basis of the said title of adjudication.*

**Article 357** - Relatively recent introduction - this provides that the adjudication of the immovables of itself constitutes an executive title. We did not meet it under the list of executive titles. There is an article listing executive titles, the other is not an exhaustive list.

The adjudication of the immovable of itself, constitutes an executive title and if either the debtor himself or a 3rd party occupying the property without any title, fails to vacate from those premises, the purchaser will within 1 year from adjudication will seek the warrant of eviction **MANDAT TA' ZGUMBRAMENT**, before this article, one would have had to file another court case to be able to evict them and able to enjoy the property. Today this article has been - which entitles the purchaser to seek the warrant of eviction., should the debtor himself refuse to vacate the premises.

## **Article 357A - Action to annul or rescind a judicial sale by auction**

*357A. No action to annul or rescind a judicial sale by auction of an immovable property shall be filed or acceded to unless such action is filed before the lapse of one year from the date when the adjudication of the immovable property has been registered in thePublic Registry.*

This was added MORE RECENTLY Article 357A - Today not possible to file any action, to annul or rescind the judicial sale by auction of the immovable - 1 year within which to do so. If more has elapsed, what can he do as an alternative? If he claims there has been some irregularities - If he found out the nullity - something which he could not be aware of - he got to know of it after 1 year has expired, he can demand an action of damages - but is it enough? REMAINS TO BE SET.

## **THESIS by Jean Pierre Attard, 2010: The Law of Sale by Auction in Maltese Civil Law**

The word 'Auction' derives from the Latin word 'Augere' and 'Auctum', which means to increase. In the past the thing auctioned was not a moveable or an immoveable but a person, with the highest bidder getting a wife.

The purpose of judicial sales by auction are to secure the fairness and justice both with the debtor and creditor. In a judicial sale by auction, the debtor does not sell the property voluntarily but the Court affects the sale on their behalf.

For a creditor to enforce an executive title, by a judicial sale by auction, 3 elements must exist:

1. An Executive Title
2. Credit - must be due and not consisting in the performance of an act
3. Ownership of property by the debtor.

## **Kevin Caruana vs. Ronald German, 27th October 2021, Court of Appeal**

This is an appeal from a First Hall, Civil Court decision in 2016, which rejected an application for a judicial sale by auction 39/2014 to be declared null and without effect. The Appellant argues that the formalities of such sale were missing since;

1. More items were sold than authorised by Court
2. 'Avviz' of Judicial Sale by auction did not satisfy the criteria by law

Decree in 2005 - "Ordnat il-hrug ta' mandat ta' qbid numru 980/2005. Ezekuzzjoni saret Meju 2008"

Rikors 2011 - "Il-Kredituri talbu lill-istess Qorti biex l-ezekuzzjoni ssir fuq aktar mobbli ghax l-oggetti li nqabdu fl-ewwel ezekuzzjoni ma jkopru il-kreditu"

Digriet - Il-Qorti laqghet it-talba u fl-istess sena nqabdu iktar mobbli

Rikors 2014 - Kreditu totali ta' 75,889eu -b'mandat ta' qbid - u talbu l-Qorti tordna l-bejgh b'subbasta ttal-istess oggetti u tappunta hin, jum u lok qabel il-11 ta' Jannar 2015, f'liema data tiskadi is-sentenza.

Fl-Atti tas-Subbasta hemm kopja ta' mandat ta' qbid numru 980/05 + Lista ta' oggetti li nqabdu f'Gunju 2008:

- 8 siggijiet, 2 pultruni, televizjoni, arlogg tal-hajt, 6 inkwatri tal-pittura, pjanu, gradenza, u vettura.

Il-Qorti ghazlet 7 ta' Jannar 2015, f'nofsinhar ghall-bejgh bl-irkant tal-oggetti msemija fl-atti u dan ghandu jsehh fi Triq il-Witja gewwa Tarxien. L-Irkantatur pubbliku jkun Edward Gingell Littlejohn.

L-Avviz mahrug mir-Registratur tal-Qrati Civili - ippublikat fil-Gazzetta tal-Gvern “ u oggetti ohra”. Dan l-avviz gie ppublikat f'2 gazzetti, wahda bil-malti u ohra bl-ingliz.

F'Rikors ta' 30 Dec 2014 - Il-Kredituri talbu li l-bejgh isir f'indirzz f'garaxx l-Gudja fejn kienu jinsabu minflok Tarxien. Il-Qorti laqghet it-talba.

B'Rikors iehor - il-kredituri talbu li jigu awtorizzati jaghmlu offerta animo compensandi. Il-Qorti laqghet it-talba.

Vincent Camilleri - wiehed mill-kredituri, offra 100eu animo compensandi ghall-oggetti li jissemew. L-ghada 8 Jan 2015, Camilleri prezenta rikors u cedola ta' kompensazzjoni li kellhom jigu ppublikati fil-gazzetta tal-gvern u notifikati lid-debitur u l-kreditur tenur 338(1) COCP b 20 jum ghatt-twegiba.

Article 313 and 314 COCP

The Appellants in this appeal are saying that the list did not include everything and also that the place of auction was not the one indicated in the AVVIZ; “ma saritx fil-fond indika fl-avviz mahrug u ppublikat mir-Registratur izda go fond iehor.”.

The Court said that despite lack of certain procedural requirements, these do not lead to the nullity of the Judicial sale by Auction “mhux tali li jivvizjaw il-procedura, li jwasslu ghan-nullita' skont din il-Qorti”

Fl-Atti tas-subbasta, the appellant did not make talba as per 315(2) for a valuation of the moveables and also did not inform the court that there were silver items which as per 315(1) there had to be an evaluation. No proof that they were actually silver. The Court rejected the appeal and confirmed the sentence.

### **Anthony Mario Vella vs. HSBC Malta, 2016**

“Din il-Qorti taqbel illi r-regoli kollha tal-procedura komprizi dawk li jirregolaw is-subbasta ghandhom ikunu osservati minuzjozament u dan dejjem bl-intiza li filwaqt li l-kreditur jiehu dak li jisthoqqlu skont il-ligi, u d-debitur jigi ukoll protett minn manuvri li jistghu jkunu ta' pregudizzju.”

**John Baptist Chiappa vs. Joseph M. Formosa**

“Propjeta’ in vendita tigi rejalizzata bl-ahjar prezz possibli”

“Fl-osservanza stretta u preciza tar-regoli li l-ligi procedurali timponi f’kull stadju tal-process tal-bejgh”

Tali irregolaritajiet kienu ta pregudizzju ghad-debitur.

Fejn ikun hemm inosservanza tar-rekwiziti proceduri — twassal ghan-nullita’ skont article 789COCP.

# **COURT APPROVED SALES FOR SHIPS, VESSELS AND AIRCRAFT**

## **Article 358 COCP - Private sale of a ship, vessel or aircraft**

*358. Notwithstanding any other provision of this Code, the Court may, on the application of any creditor with an executive title, approve a private sale of a ship or vessel or aircraft, in favour of an identified buyer and in consideration of a determined price*

Court approved sales for ships, vessels, etc... - In this case, there will already be a price and a buyer. Instead of following the usual rules, there will be an application saying I found a buyer for this. It will not be a case where bids will be made, but a creditor himself where there will be a buyer willing.

# **OF THE EXECUTIVE GARNISHEE ORDER**

## Article 375 COCP - Executive garnishee order

*375. Where a creditor under a judgment or any other executive title, in order to obtain the payment of a debt owing to him, desire to attach in the hands of a third party moneys or movable property due or belonging to his debtor, he may do so by means of garnishee order*

→ EXECUTIVE GARNISHEE ORDER - the only warrant which does not carry the WORD WARRANT - MANDAT TA SEKWESTRU.

## Article 376 COCP - Contents of Garnishee Order

*376.(1) The creditor shall, in the application for the issue of a garnishee order, correctly state the name and surname of the debtor, giving other particulars concerning the debtor as may be ordered by the Minister responsible for justice for the purpose of the identification of the debtor by the garnishee.*

*(2) The order shall:*

*(a) state the name and surname of the debtor and other particulars included in the application for the purpose of identification of the debtor, including, where possible, a legally valid identification document number or the company registration number;*

*(b) state the amount or thing due;*

*(c) state the title under which the creditor sues out execution;*

*(d) enjoin the garnishee not to pay or deliver up to the debtor, or any other person, such moneys or things as may be in his hands but which belong to the debtor, under penalty of payment of damages and interest; and*

*(e) enjoin the garnishee to lodge, at the debtor's expense within nineteen days from the date of service of the warrant, through the Registrar any moneys or things belonging to the debtor, as attached by the order.*

*(3) The lack of any of these particulars in the garnishee order shall render the said order to be ipso jure null*

Provided that in the case of private pensions and pensions issued by foreign governments the amount which is not subject to attachment shall not exceed the amount established for the highest pension issued by the Government;

- (c) any charitable grant or donation made by the Government;
- (d) any bequest expressly made for the purpose of maintenance, if the debtor has no other means of subsistence and the debt itself is not due in respect of maintenance;
- (e) any sum due for maintenance whether awarded *officio judicis*, or by public deed if the debt itself is not due in respect of maintenance;
- (f) moneys which have been made available to the debtor by deed of loan for the building,

### Mode of executing garnishee order - Article 377 COCP

*377.(1) A garnishee order is executed by the delivery of a copy thereof, by the court executing officer, to the garnishee or by such electronic means as may be prescribed by the Minister responsible for justice.*

*(2) A copy of the order shall also be served on the debtor in the same way as is provided under article 187, or if he is absent from Malta, on his lawful representative.*

### Article 378 COCP - Declaration by garnishee. Time for such a declaration.

**378.** A garnishee who, although being in possession of moneys or other articles, belonging to the debtor, or which are due to the debtor, which may have been attached by means of the order, and who does not effect the deposit referred to in article 376 within such time as may be laid down in the order, shall be responsible for ensuing damages and interest in favour of the creditor and the court may, upon application being made for that purpose by the creditor, issue such orders as may be required, including his personal arrest for a period not exceeding three months, in order to force him to lodge such property:

Provided that where the garnishee is a Bank, that Bank shall declare what fixed deposits or other bank books are in its possession, the property of the debtor, without having to deposit them; however the person responsible for the Bank's management shall always remain responsible in accordance with the provisions of this article

**Garnishee order** - people mix them up - you do not seize any time but order the person who holds the item not to release them to the debtor. If one issues or files an application for this order, the bank will order the banks not to release money to the clients. Can only be done by a court

order, court order telling bank not to LET THE ITEM OUT OF YOUR HANDS, DO NOT HAND THAT BACK TO ITS OWNER.

A court order to the 3rd party in possession of the debtor's property not to release the item and instead you deposit it in court. Like a car - not physically brought to court, but a *cedola*.

**JEWELLERY IS PHYSICALLY DEPOSITED IN COURT.** The third party will be enjoined to deposit the monies, item, in the court registry under the court's authority within 19 days.

## Article 381 COCP - Property not subject to attachment.

**381.** (1) It shall not be lawful to issue a garnishee order upon -

- (a) any salary, or wages (including bonus, allowances, overtime and other emoluments);
- (b) any benefit, pension, allowance or assistance mentioned in the Social Security Act or a private pension or any other pension, benefit or allowance issued by the Government or other foreign government:

construction and maintenance of houses intended as a main dwelling place for the debtor;

(g) overdraft banking facilities excluding credit cards by means of which commercial going concerns run by the debtor are being operated;

(h) bank guarantees and letters of credit;

(i) benefits or subsidies issued by the Housing Authority;

(j) bank accounts which are used solely and exclusively to receive therein deposits in accordance with paragraphs(b), (c) and (i). Banks which are indicated as garnishees in a garnishee order shall ensure that these accounts are not affected by the same garnishee order:

Provided that banks are obliged to open, maintain, bank accounts for the above-mentioned purposes

(2) Notwithstanding the foregoing provisions of this article, in cases for maintenance, the court may, either in the judgment or in a subsequent decree upon an application to that effect by the creditor suing for maintenance, where such creditor is the spouse, or a minor or an incapacitated child, or an ascendant of the debtor, order that a specified portion of the salary, allowance or bequest mentioned in sub-article (1)(a),(b) and (d) or of the salary of any person, be paid directly to the creditor; the service of any such order on the person by whom the said salary, allowance or bequest is payable shall have the same effect as a garnishee order; and the person so served shall pay directly to the creditor the portion of the salary, allowance or bequest specified in the order.

(3) The provisions of article 149, 150 and 151 of the Malta Armed Forces Act shall apply in respect of the pay of an officer or man of the regular force of Malta.

(4) Notwithstanding any provision in this Code or any other law, when the debtor is an employer, the order shall not attach upon any salary, wage (including bonus, allowances, overtime and other emoluments) of the employees of the debtor:

Provided that, the garnishee be formally notified in this regard.

**MOST POPULAR OF THE WARRANTS - article 381 - not lawful to issue a garnishee order upon any salary or wages. Any pension. That account receives the credit for the wages, BILL MALTI TTISSEKWESTRA. BL-INGLIZ? To attach.**

### **Article 382 COCP - Salary or wages not subject to attachment.**

**382.(1)** In the case of any salary or wage mentioned in article 381(1)(a), when the same exceed one thousand two hundred and thirty-three euro (€1233.00) per month or such amount as may from time to time be established by order made by the Minister responsible for justice, the issue of a garnishee order shall be applicable on that part in excess of the amount afore-stated:

Provided that if the debtor, upon an application shows to the satisfaction of the court that he needs such excess or part thereof for his maintenance or for the maintenance of his family, the court shall revoke the garnishee order with respect to the excess or such part thereof, whereupon the said order shall be deemed to be and to have been without effect to the extent to which it had been revoked:

Provided further that this article shall not apply to the pay of an officer or man of the regular force of Malta.

(2) The court may, at any time, vary the order given under sub-article (1), on a demand by application of the creditor or the debtor, if there be any change in the material circumstances of the debtor.

What if the 3rd party fails and does it on the 20th day?

The law still stands at 19 days. Eventually, once the bank deposits the money in court, the creditor would ask the court's permission to deposit the money. Third party would be in Maltese - person who is holding property owing to debtor - mandat ta sekwestru -

**SEKWESTRANT:** min jamel s sekwestarju. Il-bank - huwa SEKWESTRATARJU.

**SEKWESTRAT:** - min jigi ssekwestrat.

**APPELLAT** - min iwiegeb l appelll.

**L-APPELLANT:** min ghanel l-appell.

## **Article 383 COCP - Garnishee order may not be extended**

*383.A garnishee order may not be extended and shall remain in force up to such time as it is revoked by a decree issued by the court.*

**383** provides that a garnishee order NEED NOT be extended, law says may not be extended until revoked. The moment a person has money in his own name, that money can be frozen and deposited in court. Extended garnishee order need not be extended

If the bank account belonging to the debtor receives only the wages, and the employer deposits the money to the bank directly, that amount can not be attached. If that is the only account the debtor has, it becomes very problematic. The Overdraft facilities list is quite long. So a potentially successful warrant will still come up against - if the debtor does not have money in the bank and only accounts related to his wages, that bank account can not be blocked and money can't be deposited in court.

The law changed - incidentally, no 1 if the creditor demands payment for maintenance, wife acting against husband, husband only has money for wages which employer deposits in the bank account, in that case you can exercise the warrant due for maintenance. Instead of depositing the full amount, the sum is paid directly to the applicant. Again, if the salary exceeds 1233 per month, or any amount as minister shall establish, then the warrant can be exercised on any EXCESS.

If one is earning 5k a month the warrant can still be accessed except that if the debtor shows to the courts satisfaction that he needs the full amount of 5k for his own maintenance, then in that case the court will rescind the order to issue the warrant. If the debtor convinces the court he is in desperate need of 5k, the court will revoke the warrant. All depends on the court's discretion on the needs of the creditor and also of the debtor himself. Today according to 383. Today a warrant does not need to be extended; the garnishee order will remain in force until it is revoked. Today it remains in force.

### **Alexandra Caligari vs. Nicholas Caligari, 2024 First Hall**

D wants as per Article 281 COCP to cancel and revoke a mandat ta' sekwestru numbered 517/2023. Court accepted after the first warrant was done by P stemming from a notarial contract of separation. The Court rejected the mandat (warrant of eviction) due to an invalid clause. Instead of appealing the decree, Alexandra instituted a garnishee order for the amount of 293,000 euros. The Court stated that one can not ask for 2 warrants like she did but she should have instead appealed such decree.

“Hija ma setghetx tipprocedi bit-talba taghha ghall-hrug ta’ att ezekuttiv iehor ghall-istess raguni li dwarha kienet michuda t-talba precedenti taghha”.

# OF THE WARRANT OF EJECTMENT OR EXPULSION FROM IMMOVABLE PROPERTY

Article 384 COCP - Mode of execution of warrant of ejectment or expulsion from immovable property.

*384. In the execution of any warrant of ejectment or expulsion of tenants or other occupants of immovable property, the court executing officer shall enjoin the tenants or occupants to quit the tenement within a period of not less than four and not more than eight days; at the expiration of such period, the court executing officer shall cause the tenant or occupant to quit the tenement which shall be cleared of all things belonging to such tenant or occupant.*

**384 - Warrant of expulsion or eviction** - what happens here? Court executing officer shall make sure tenants evict tenement not later than 8 days. Shall be declared of all belongings of the tenant - where will the items of the tenant be placed? Debtors problem - once he did not provide any place, any items moved out will be out in the street.

# OF THE WARRANT OF EJECTMENT OR EXPULSION FROM SEAGOING VESSELS OR AIRCRAFT

Recent introduction - one article warrant Article **384A COCP**

**384A.**(1) In the execution of any warrant of ejectment or expulsion, on the demand of a lessor or a mortgagee, of the operator, lessee or other occupants, including any members of their staff from seagoing vessels or aircraft, the court executing officer shall enjoin the operator, lessee or other occupants, including any members of their staff to quit the vessel or aircraft indicated in the warrant in favour of the lessor or a mortgagee or his duly authorised representative within a period of not less than four (4) and not more than eight (8) days. If the operator, lessee or other occupants, including any members of their staff do not quit the vessel or aircraft indicated in the warrant at the expiration of such period, the court executing officer shall ensure that the operator, lessee or other occupants, including any members of their staff are removed from the vessel or aircraft concerned, which shall also be cleared of all things belonging to such persons.

(2) The vessel or aircraft indicated in the warrant shall be detained in Malta for the purposes of the execution of a warrant of ejectment or expulsion and insofar as the detention of the vessel or aircraft is concerned, the provisions of article 388C for vessels and article 388E for aircraft shall apply, mutatis mutandis.

## WARRANT IN FACTUM

### Article 385 COCP

*385.(1) In the execution of a warrant in factum, the court executing officer shall proceed in such manner as ordered in the warrant.*

*(2) The warrant in factum shall contain the order that the party against whom the warrant is issued is to be conveyed to prison, in order to be therein kept at his own expense, until the performance of the act ordered by a judgment or until such time as the court may deem necessary to ensure such performance.*

*(3) The warrant may not be issued other than by an explicit order of the court to be issued on a demand made by application by the creditor.*

*(4) The court shall only issue the warrant if it is satisfied that the creditor does not have any other means of execution available.*

Warrant in factum - not very often - **385** provides that the court executing officer will - person against whom the warrant is issued will be conveyed to prison. This warrant will enable a court officer to convey to prison the warrant to whom it is issued.

Case law - has established that this warrant would only be available in the case of an obbligazione di fare, not in an obbligazione di dare. If the debtor fails to pay the creditor, the creditor can not utilise the warrant, as the debtor is obliged to pay. Whereas this through case law has been interpreted as an obbligazione di fare, one has undertaken an obligation and one has not performed what one bounds himself to do. The creditor in favour of whom there is this obligation, can resort to this warrant. But the debtor, who has to perform this obligation, will be kept there temporarily at the creditors expense. Creditors would have to fork out money to keep debtors over corradino. He will have to run after the debtor should the debtor have performed an obligation he would have been bound to do. The debtor could have been fed up and said okay i will perform this obligation hence no longer detained in prison anymore. He will be reimbursed the expense he would have paid towards jailor.

## Article 386 COCP

*386. A warrant in factum, if so required for the enforcement of any judgment and where an express order to that effect is made by the court, may be executed in any place, other than a church, and against any person, other than the ascendants of the person suing out the warrant or any minister of religion while in the exercise of his ministry*

## Article 388 COCP - Execution of warrant in factum not to bar action for damages.

388.(1) The execution of any warrant in factum shall not affect the right of action for damages and interest consequent upon the non-performance of the act ordered by the judgment.

(2) Saving other provisions of the law as to damages interest or for other purposes, no warrant in factum may be demanded for the purpose of compelling any one of the spouses to live with the other spouse.

3888 - the fact this warrant has been resorted to does not preclude the creditor from suffering damages. If the creditor suffered damages, he can sue for those damages as well. That penalty was meant to make you perform the obligation - does not mean the creditor is not entitled to pay up damages. Then we get another 2 warrants, relatively recently introduced, of sea vessels and of aircrafts.

# THE EXECUTIVE WARRANT OF ARREST OF SEA VESSELS

388C. An executive warrant of arrest of sea vessels is effected by application in terms of articles 858 and 860. Court to decide about the sale or to fix time-limit for payment.

388D. (1) The court shall, when a demand is made for the issue of an executive warrant of arrest, establish whether it shall order the sale of the said article or fix a time-limit within which the debtor is to pay the amount due or order the said article to be returned to the owner or lessor or mortgagee.

(2) When the court orders such a sale, it shall proceed according to the procedures laid down in the provisions relating to judicial sale by auction.

(3) When the court fixes a time limit within which the debtor is to pay, it shall order the executive warrant to be definitely in force until payment of the amount due is effected.

(4) When the said time limit passes without any effect the court shall, on a demand to be made by the interested party, order the sale to take place according to the provisions of sub-article (2).

(5) When a demand is made for the execution of an order pursuant to article 1526 of the Civil Code for the issue of an executive warrant of arrest of the ship for the purposes of repossession thereof, the court shall expeditiously order the operator, lessee or other occupants, including any members of their staff to return the seagoing vessels in favour of the owner or lessor or mortgagee as the case may be and, if necessary, issue such orders as are stated in article 384A

- For the arrest of a vessel or aircraft, court will have to decide whether to give time for the debtor to pay, and court will decide, should it order sale immediately or give some time to debtor to pay. If it gives time and he still fails to pay, then it is immediately sold under court authority.

# OF THE WARRANT IN PROCINCTU

*It is known as the warrant of last resort after exhausting all other remedies.*

## Article 388G COCP

**388G.** (1) Subject to the other provisions contained in Title VII of this Code, the court may on demand of the party, issue such orders to the Registrar as it may deem necessary for the orders contained in the judgement to be executed:

Provided that this warrant shall not be issued except after an application has been made to this effect by the creditor and after the court is satisfied that the creditor does not have any other means of execution.

(2) There shall be clearly indicated in the application the reason for the necessity of such orders and a decree shall be given thereon after that the debtor has been served notice thereof, to which he may file a reply within four days.

## WARRANT IN PROCINTU 388G

One may demand court to give any order it deems fit - Cassar vs Cassar case - matrimonial case whereby the wife claimed after the case came to an end that husband was not paying his share, maintenance and apparently she was running a souvenir shop and seeing it was owned by both of them, husband had the half share. In trying to put the claims on the half share, she found out that not even banks had been paid by her husband. She tried the warrant of seizure but still nothing. She asked the court to keep all the profits from running the shop, the court examined the application, seeing that she had exhausted all other remedies and the court did exceed the demand and hence in an effort to cut down the balance that the husband owed her. Not many cases of it, of relatively recent introduction.

Whenever one is appointed an administrator, one will have to give an account of one's administration and one will be liable for any maladministration. You will have to give an account to your administration.

**Espedito Mugliett vs. Ministru Tal-Gustizzja** - Court said that following this warrant, it can issue any necessary orders to enforce a judgement, but only if the court is satisfied that no other enforcement methods are applicable.

**Bella Claudia Nicolette Cassar vs. Anthony Cutajar** - COM Gozo awarded the P 33,500 eu but struggled to enforce it due to insufficient assets and ineffective remedies such as the warrant of seizure and garnishee. Hence, the Court was requested to issue a warrant in procintu. Court found that Bella had exhausted all other remedies and concluded that this warrant in procintu was appropriate. Hence, the Court ordered a transfer of Anthony's lease rights to Bella.

**Cassar vs. Cassar** - Banks were not paid by her ex-husband, and the warrant of seizure was not of any help. The Court exceeded this type of warrant as she exhausted all other remedies.

# Certain, Special Proceedings - COMMON IN EXAM

## Article 396 COCP

*396. In any action, it shall be lawful for the defendant to set up a counter-claim against the plaintiff, provided the claim of the defendant be connected with the claim of the plaintiff as stated hereunder:*

*(a) if the claim of the defendant arises from the same factor from the same contract or title giving rise to the claim of the plaintiff; or*

*(b) if the object of the claim of the defendant is to set-off the debt claimed by the plaintiff, or to bar in any other manner the action of the plaintiff, or to preclude its effects*

Reconvention - the law tells us that 396, in any action it is lawful for the defendant. Konvenut, in any action lawful for the defendant to set up a counterclaim. KONTRO-TALBA - against the plaintiff, person filing the action. Writ of summons no longer used. Rikorrent = Attur

Lawful for the defendant against the plaintiff on condition that the claim of the defendant is connected to the claim of the plaintiff. It has to be a connection, the law does explain how this connection arises?

From the same fact, contract, title to the claim of the plaintiff. The defendant who may owe money to the defendant is entitled in respect to the sale, contract of lease. Plaintiff suing Defendant - D has to go to court if he wants to contest claim.

Why don't we file a counterclaim? A is contesting X, but B did not honour his obligations in respect of lease. D in answering the claim is also entitled to a counterclaim, if there is a claim in the connection arises, or a second possibility, if the D intends setting off the debt by the plaintiff or bar the action of the plaintiff. **Set-off = TPACIJA.**

ORIGINAL claim (filed by P) and counterclaim (filed by D) - both are dealt with in one single record, PROCESS WIEHED. One case where the claim of P and D will be heard and disposed of in the same action. Much more expeditious if a second case would be filed by the P. reconvention = just one case.

Sworn application - numbered paragraphs and then made demands. Plaintiffs' claim normally should not be upheld. The D will pass on to state that he is going to set up the counterclaim and he will proceed in the same manner as if filing an action himself. In the end, he will claim that P

ought to be condemned to pay me this amount. Sworn reply of D, having completed sworn reply, the D will file his counterclaim. Both the answer and counterclaim are to be found in the same paper. Whatever the case, both must be served on the P, and the P is once more given time to answer the counterclaim filed by the D. P files action, D hands in defence, if he wants to, coupled with the counterclaim.

## Article 397 COCP

*397. The effect of reconvention as regards procedure, is that the original and the counter-claim are dealt with in one single record and both claims are disposed of in the same action*

Defence and counterclaim are served to the P. P will be given time to answer counterclaim. Hence 2 actions held in one proceeding, in one action.

## Article 398 - Form of reconvention

398.(1) The defendant who desires to set up a counter-claim shall set up his claim in the written reply to the application, whether sworn or not.

(2) The counter-claim shall be set up after the defence to the original claim made out as required by law; and the defendant shall, with respect to the counter-claim, observe, as far as practicable, the rules established by this Code or by any other law for the written pleading by which the proceedings were first instituted.

(3) Where proceedings are by sworn application, the setting up of a counter-claim in a sworn reply shall be equivalent to the filing of a sworn application with respect to that claim, and shall be served on the plaintiff, who shall proceed as if he were the defendant with respect thereto; and in any such case, the closing of the preliminary written procedures and the application of articles

## Article 400 COCP - Capacity of parties in reconvention

*400. The defendant may not set up a counter-claim in a capacity other than that in which he has been sued, nor may he, in setting up the counter-claim, sue the plaintiff in a capacity other than that in which the plaintiff has claimed.*

400 - Law tells us that the defendant can only act in the same capacity in which he has been sued. So, A who is suing B seeing that B was director of company X and B also running company Z, claims that he is owed money from A. That can not be allowed. Once B is sued as he is running company X, if B also runs company Z, which is owed money by A, B can not resort to

a counterclaim. Once B has been sued in his capacity. Company X which can resort to the counterclaim. If money is due by company Z, then B has to file another case, and can not resort to the counterclaim. But seeing that in the first case and being sued, and a counterclaim is filed by him as running company Z then that is not allowed.

There can not be any counterclaim unless there is the claim of the plaintiff. There has to be a claim and then a counterclaim. What if A drops his case. What happens to counterclaim? Counter claims could only be filed as there is claim. Even if P drops his case, he abandons his case, counterclaim will still say and should they lose interest, B can claim that his counterclaim be proceeded with.

Should ring a bell, similar to - cross appeal - what is a cross appeal? appell incidental. jekk l-appell jaqa' ha jaqa l incidental. imma jekk ma jitkmplix l-appell principali, **l-appell incidental ikompli**. only 1 case where appell incidental jaqa u din hija meta - meta l appell ikun null. jekk lappell ikun null, mela gie prezentat aktar minn 30 jum wara sentenza originali. jekk appell originali huwa null, appell incidental, huwa null wkoll - not the law says that, but the case law.

Factum warrant - HLINKA CASE - husband ran away with child, he came to Malta and she came after him. A court abroad had afforded custody to the mother. The police could not find him. How was the father and child found? She resorted to this warrant. She paid for an advert in the papers. 1000 pounds as to the whereabouts of the child. The child was taken to gozo and left with her husband. Only by an advert in the newspaper was this successful.

Once main appeal is null, cross appeal is null. Incidentally, there will be one judgement disposing of the claims

#### **Article 401 - Discontinuance of action by plaintiff not to bar prosecution of counterclaim**

**401.** If, in any case in which the defendant sets up a counter-claim, the action of the plaintiff is in any manner discontinued, the defendant may nevertheless insist on his counter-claim lawfully set up being proceeded with

#### **Article 402 - Connection of actions**

**402.** Where the defendant in an action brings another action in respect of a claim connected with that of the plaintiff as provided in article 396, it shall be lawful for the court to order the two actions to be heard simultaneously

402 - mentions something different - instead of a different title it is under this article - one article warrant - he had received a sworn application and went to lawyer's office with just 2 days to go -

let us contest P's action. If D is really interested, can file a second case, another case, a second case, but there will be the so-called notion of connection of actions.

Hence whereas under reconvention there are 2 claims, in connections of actions you have 2 actions, they will be heard simultaneously. The second case will be assigned to a different judge. Connection of actions.

### **THESIS 2005: Roberta Brinca**

Example: Landlord's demands to be paid the rent by tenants. Reconvention by a demand that the landlord pay damages incurred due to failure to fulfil his obligations imposed upon him by a contract.

**Anthony Calleja vs. Joseph Debono, 1964** - *“jigu evitati spejjez ta' kawzi godda meta ma jkunx hemm raguni li dawn jigu ripetuti”*

**Stefan Zrinzo Azzopardi vs. Michael Vella, 1995** - *“il-kontro-talba ssir mhux biss meta tkun konnessa mat-talba tal-attur izda tista' ssir ukoll bl-iskop biex iggib fix-xejn l-azzjoni tal-attur. Il-Kontra-talba tista' ssir bl-iskop ta' tpacija”*

**Ex:** B rents a house to A for 750euros. A gives 300 upfront and promises to pay the remaining at the end of the lease. A does not pay the remaining as some of A's possessions were missing. B sued A for the remaining amount. A makes a counter-claim against B for the value of goods which disappeared. A's counter-claim is decided in the same judgement with B's claim - article 397 COCP. After a demand for reconvention is made, the judge ascertains the existence of credit as a counter-credit, and proceeds to liquidate it.

The judge is not always bound to accept the reconvention. He may reject it, if the liquidation demanded would bring many complications or if P would incur damages as a result of it. If the counter-credit is not evidenced by any time, the court can limit itself on the P's demand.

### Connection of Actions 402 (somewhat diff from reconvention)

Ex: A institutes actions against B demanding payment of a debt. B is already a plaintiff in another action instituted with the aim of obtaining payment owed to him by A. In action where A is the Plaintiff, B may bring forward the other action so if the judge accepts, ordered that compensation is effected between the two claims.

Hence, a connection of actions depends on the discretion of the Judge and not upon the parties. Whilst in a connection of actions, the Judge delivers 1 sentence, in a reconvention 2 sentences are delivered as the claim and the counter-claim may not always be connected.

**Carmelo Mifsud vs. Guiseppi Schembri, 2004** - P sued for spoliation in a field in Zurrieq. D put a counterclaim (396), on lack of title of p. P said that the counterclaim is inadmissible and the court said that this is not true as the counter claim is on the same fact. It is not true since the same fact is there.

396(b) - igib fix-xejn l-azzjonii - if kontro-talba of D succeeds, A would lose the case. “Ghax jekk tirnexxi l-kontro-talba u tigi milqugha t-talba tar-rikorrent, l-attur jitlef dak il-pussess”.

# **JACTITATION SUITS - GUDIZZJU TA' JATTANZA**

## **Article 403 COCP - Jactitation**

*403. Where any claim is vaunted in any judicial act, or otherwise in writing, the party wishing to be liberated from such jactitation may, within a year of such jactitation, demand, by sworn application, that a time be fixed within which the jactitator shall bring the claim for trial, and that in default thereof, the jactitator be precluded from ever proceeding on that claim.*

403 - where any claim is vaunted in any judicial act or in writing, or in a judicial act, the party who is offended by such allegation, B is offended, but others are not bothered, but it may irritate him as A actually mentioned it in a judicial act. A is making a claim that B owes him a million euros. If one is owed money what does one do ? One files a court action and takes action, he is merely alleging here and stops there.

This could be very damaging to B. A alleges B owes him 1 million. If B wants to get rid of such jactitation, within 1 year, he may demand by a sworn application that a time be fixed within which A, being the JACTITATOR, the one making the jactitation, be ordered to bring the claim for trial, as one does not simply make an allegation and stops there.

One usually resorts to court action, except making the allegation. One can make an application whereby B is to file his case. Should he fail to abide by court's order within which to file his case, then the JACTCTITATOR will not be able to proceed on that claim by filing the action. If he fails to do so, he will be forever precluded on ever taking action on his allegation. Law tells us time can not exceed 3 months.

### **Article 404 COCP - Time for bringing claim to trial**

*404.(1) The time mentioned in the last preceding article shall not exceed three months.  
(2) Such time shall be suspended during the pendency of an application to sue with the benefit of legal aid, provided the application is filed by the jactitator within the first four days of the said time.*

### **Article 405 - When jactitation suit is inadmissible**

*405. The court shall not allow the demand referred to in article 403 if the jactitation is in respect of an uncertain right, contingent upon any event or condition, or of a right with regard to which no action can, for the time being, be taken.*

**Article 406 COCP - Jactitator to proceed before court to the jurisdiction of which the party aggrieved is subject.**

406. Any jactitator to whom a time has been fixed within which to bring his claim for trial, shall institute proceedings before the court to the jurisdiction of which the party aggrieved by the jactitation is subject.

**Article 407 COCP - Where jactitator declares before court that he has no claim against party aggrieved**

407. Where the jactitator, on appearing before the court, declares, by means of a note, that he has no claim against the plaintiff or his property, as the case may be, according to the demand in the sworn application, the court shall not dispose of the merits, but shall only adjudge on the costs, where necessary; and in such case the said declaration of the jactitator shall have the same effect as an injunction of perpetual silence and it shall no longer be lawful for the jactitator to proceed on the claim to which the demand refers.

**Article 408 COCP - Fixing of time to jactitator**

408. Where the fact of the jactitation is proved and no declaration as provided in the last preceding article is made, the court shall allow the jactitator a time in accordance with the provisions of article 404, and shall reserve giving judgment as to the issue of perpetual silence in one of the first sittings to be held after the expiration of the time allowed as aforesaid.

**Article 409 COCP - Extension of time**

409. If in the course of the said time the jactitator shall ask for an extension thereof, the judgment on the issue of perpetual silence reserved as provided in the last preceding article, shall be adjourned until the demand for the extension be dealt with, or until the enlarged time shall elapse. Injunction of perpetual silence

**Article 410 COCP - Injunction of perpetual silence**

410. If the jactitator fails to bring his claim for trial within the time fixed, the court shall dispose of the second demand contained in the original sworn application enjoining perpetual silence upon the jactitator in respect of such claim.

**Article 411 COCP - Perpetual silence to apply only to jactitation referred to in a sworn application**

**411.** The perpetual silence enjoined as provided in the last preceding article shall be deemed to be restricted to the jactitation to which reference was made in the sworn application.

**Article 412 COCP - Where jactitator brings his claim for trial.**

412. If the jactitator shows that he has, within the time fixed, brought his claim for trial, the court shall abstain from disposing of the second demand contained in the original sworn application, and shall leave the question of costs to be determined in the action instituted by the jactitation.

**Article 413 COCP - Effects of non-suit in action by jactitator.**

413. Where in the action instituted by the jactitator the court shall give judgment of non-suit against the jactitator, the time allowed under article 408, shall commence to run anew from the day on which the judgment of non-suit shall have become a res judicata but may not be enlarged.

**Article 414 COCP - Effects of default by jactitator to take fresh proceedings**

414. If, within the time renewed as provided in the last preceding article, the jactitator fails to institute fresh proceedings, the plaintiff in the jactitation suit may demand, by sworn application before the court which fixed the original time, that perpetual silence be enjoined on the jactitator in regard to the claim which he had brought for trial.

**Article 415 COCP - Jactitation suit inadmissible against absent persons, etc.**

A jactitation suit may not be instituted against any absent person nor may any such suit be instituted or prosecuted against any minor or other person who is under any disability to sue or to be sued:

Provided that the provisions of this article shall not apply in relation to any person who within three months immediately preceding the institution of the jactitation suit shall have, either personally or through a mandatory, filed a judicial act vaunting his claim

This action allows a person, natural or legal, who has had a form of right vaunted against him in written form to request the court to order the 3rd party claimant to either bring an action within 3 months or be forever precluded from proceeding with such a claim in the future.

**Schembri and Sons Limited vs. Carmelo Abdilla and Sons Limited, 24th March 2015, First Hall Civil Court**

A judicial letter (ittra ufficjali) was sent by D alleging that P owes money in the amount of 235,954.38 eu. P is rejecting such claims and wants the Court acc to 403-415 Cap. 12:

1. To set up a time not more than 3 months for D to bring the action.

2. In the event of D not bringing any action, granting perpetual silence.

1 year in Article 403 for limitation suits starts running from the last judicial letter. P is saying that D is owed nothing. D sent P 2 judicial letters in 2009 and 2014.

“L-azzjoni tal-jattjanza ghandha l-ghan li tiggarrantixxi l-pozizzjoni guridika tal-individwi kontra t-tfixkil li jkun espost ghalih il-patrimonju taghhom, jekk dak li jippretendi li huwa kreditur tithallielu l-fakultaa’ li jkun jista’ jivvanta b’mod perpetwu il-pretensjonijiet tieghu”.

D tried to attack the action on procedural grounds, prescription. The Court said that this action is admissible under 403, and 404, and allocated 3 months for the D to bring an action indicated in the judicial letter.

## **COMPETING CLAIMS**

### Article 416 COCP - Competition of creditors on money deposited in court

*416.(1) If, in the superior courts or in the Court of Magistrates (Gozo) in its superior jurisdiction, there shall be deposited money in respect of which more than two parties allege claims of preference or priority or any other interest whatsoever, the court, upon the application of any of such claimants, shall, through the registrar, cause a notice to be published in one or more periodical newspapers, including in any case the Government Gazette, stating that the said money is standing in court, that there are claims upon such money, and calling upon all parties interested therein, to put in their respective claims within the time of one month, on the expiration of which it shall not be lawful for any party failing to put in a claim within that time, to delay or otherwise hinder the decision on the competition proceedings between the parties putting in a claim.*

*(2) The said notice shall state the day on which, after the expiration of the said time of one month, all the parties interested who shall have put in a claim shall appear in court for the trial of the claims.*

*(3) In commercial matters, the time above referred to may be abridged to any such shorter period as the court may deem adequate.*

*(4) The said notice shall be served on the persons making the deposit, the debtor, the execution creditors as well as on any other creditor at whose suit any garnishee order may have been issued.*

**416** - Competing claims - judicial sales by auction, debtors property which is sold but not merely the creditor would have demanded the sale by auction of the items. To his horror, creditors find that other creditors are likewise claiming money. Once the item has been sold, here comes the privileged creditor who will demand the money himself. If not enough money, the privileged creditor will take the whole amount if amount owed exceeds proceed to the sale.

## **Uncertain or unknown heirs**

Article 436 COCP - State Advocate to take possession of inheritance where no known heirs are present in Malta.

**436.** If a person dies without leaving any known heir present in Malta, the State Advocate shall take possession of the inheritance to safeguard the interests of any person who may be entitled thereto.

436 - if no known heir, state advocate takes over possession of their interests just in case an interested person shows up at a later stage.

### **Disentail not for exam**

Fedekommess - does not exist anymore. Property goes to the primogenitura. However there are properties that are still caught up in court cases regarding this.

## **OF CAUSES OF THE GOVERNMENT**

**460.**(1) Subject to the provisions of sub-article (2), no judicial act commencing any proceedings may be filed, and no proceedings may be taken or instituted, and no warrant may be demanded, against the Government, or against any authority established by the Constitution, other than the Electoral Commission, or against any person holding a public office in his official capacity, except after the expiration of ten days from the service against the Government or such authority or person as aforesaid, of a judicial letter or of a protest in which the right claimed or the demand sought is clearly stated.

(2) The provisions of sub-article (1) shall not apply -

(a) to actions for redress under article 46 of the Constitution; or

(b) to warrants of prohibitory injunction; or

(c) to actions for the correction of acts of civil status; or

(d) to actions to be heard with urgency;

(e) to referrals of disputes to arbitration,

and where in accordance with the provisions of any law a particular procedure including a time-limit or other term is to be observed, the provisions of sub-article (1) shall not apply and the procedure aforesaid, including any time-limit or other term, shall apply and be observed in lieu thereof.

(3) Causes against the Government in respect of which there is in force a warrant of prohibitory injunction shall be heard by the court with urgency in preference to other causes

460 - No judicial act commencing any proceedings may be filed...and no warrant may be demanded against the government or any authority established by the constitution except after expiration of 10 days from service against the government of service of judicial letter or protest.

If you want to proceed against any government department, you can only do so after firstly filing a judicial letter (IU) or a protest whereby your demand is spelled out. The case cannot continue without this requirement and the Government may raise it against you. The law also mentions that no warrant may be demanded hence no precautionary warrants may be filed.

Recently, an individual won a case for payment of a sum of money, the department did not comply with the court order and the winner resorted to a warrant. Gov immediately filed the revocation of the warrant and it was accepted. However, is this article still applicable to cases that you won? Apparently, yes.

The law mentions “no warrant” hence includes ALL warrants. The idea behind this article was that the Government should not be taken by surprise. If the case is res judicata, one cannot enforce his judgement if you do not use this article.

Exceptions: actions for redress under article 46 of the Constitution (Human Rights cases).

Warrants of prohibitory injunction - this is a precautionary warrant however, the law limits only to this. It is the only mentioned warrant. Actions regarding extra civil status - birth, marriage, death certificates. Issues / corrections / mistakes in these certificates.

Actions meant to be heard with urgency - this is at the Court’s discretion. Referral of disputes of arbitration. Sub article 3 - cases where there are warrants of prohibitory injunction will be heard immediately. This is because something that the government is doing has been stopped and therefore, it is important to be heard immediately.

The Court will then set a hearing within days, hear both parties, and then confirm the stoppage of works. It will either confirm or revoke the warrant.

#### **Article 461 COCP - Proceedings for recovery of fine (multa) by civil process**

461. For the recovery of any fine (multa) recoverable by civil process, the State Advocate shall proceed in the Civil Court, First Hall, or in the Court of Magistrates (Gozo) in its superior jurisdiction, as the case may be, by application

#### **Article 462 COCP - Proceedings for forfeiture of goods by civil process.**

**462.** In the case of seizure of goods subject to forfeiture by civil process according to law, the State Advocate shall likewise proceed in the Civil Court, First Hall, or in the Court of Magistrates (Gozo) in its superior jurisdiction by application demanding that the goods in question be declared forfeited.

#### **Article 463 COCP - Person against whom application is to be directed.**

**463.** *The application referred to in the last preceding article shall be directed against the person in whose possession the goods shall have been found*

#### **Article 464 COCP - When application is to be directed against official curators**

464.(1) Where the goods were not in the possession of any person, the application shall be directed against the advocate and the legal procurator next in turn as curators on the rota

(2) Such curators shall represent the unknown owner of the goods.

(3) A copy of such application shall be posted up at the entrance of the building in which the court sits, at least two days before the day appointed for the hearing

**Article 465 COCP - Any interested person may appear at the trial to contest action**

465. It shall be lawful for any person interested, although not summoned, to appear at the trial of the action, and enter his objections against the demand referred to in article 462.

**Article 466 COCP - Proceedings for debts due to the Government.**

466.(1) Where the head of a government department or the person vested with the legal representation of a body corporate established by law or with the legal representation of any company or other body which has been authorised by or under any law to collect any amounts due to a government department or to a body corporate established by law, desires to sue for the recovery of a debt due to a government department or to any administration thereof or to a body corporate established by law, for any services, supplies, penalties, rent, ground rent, other burdens on property, compensation for occupation or for any licence or other fee or tax due, he may make a declaration on oath before the registrar, a judge or a magistrate wherein he is to state the nature of the debt and the name of the debtor and confirm that it is due:

Provided that the provisions of this article shall also apply in respect of amounts due for the supply of water and electricity and for the rental of the relative meters but they shall not apply where prior to the service required under sub-article (2) the person from whom the amount is claimed shall have notified the claimant either by means of a judicial act or by registered post that he is disputing the metering, calculation or the charge in respect of such supply or rental.

(2) The declaration referred to in sub-article (1) shall be served upon the debtor by means of a judicial act and it shall have the same effect as a final judgment of the competent court unless the debtor shall, within a period of twenty days from service upon him of the said declaration oppose the claim by filing an application demanding that the court declare the claim unfounded.

(3) The application filed in terms of sub-article (2) shall be served upon the head of department, who shall be entitled to file a reply within a period of twenty days. The court shall appoint the application for hearing on a date after the lapse of that period.

(4) In the cases of an urgent nature the court may, upon an application of the creditor or the debtor, shorten any time limits provided for in this article by means of a decree to be served upon the other party

– Article 466 – this is an interesting article – proceedings for debts due to governments. Article 466(1) states that where a head of department of government desires to sue for a recovery of a debt due to such department for any services, supplies or rent etc., such department may make a declaration on oath before the registrar or judge or magistrate wherein he states the nature of the

debt, the name of the debtor and confirm that it is due. Here, the head of the department can drop a statement and confirm it on oath. This also applies to water and electricity debts.

→ This declaration confirmed on oath by the head will be served on the debtor by means of a judicial act and the debtor is given 20 days within which the debtor is entitled to oppose the claims by filing an application demanding that the court declares that the claim is unfounded. Once the debtor decides to file his opposition through an application, this will be served on the department head which is then allowed another 20 day period to reply to this.

→ This is not like any ordinary case but shows that governmental departments can just proceed by way of a judicial letter attached with the declaration confirmed on oath. If the case is urgent, the court can amend the time limits. If the debtor fails to contest, then the department will enjoy an executive title. Article 253 states what are executive titles which makes no reference to article 466 however, it is still an executive title if not contested by the debtor.

466 - If the head of a government department desires to sue for any debt (see full details of the actual article), such head may make a declaration on oath before the registrar wherein he states the nature of the debt and the name of the debtor and confirms that it is due. This declaration will be served on the debtor by means of a judicial act. Debtor is given 20 days within which the debtor is entitled to oppose the claims by filing an application demanding the debt is not due. The application will then be served on the Head who is allowed another 20 day period to file a reply.

This is not an ordinary case. As far as government departments are concerned, they can try to recover what is due to them by a judicial letter and not going to a fully-fledged court case.

If the debtor fails to contest, the Department will enjoy an executive title.

Remember 253 - the list of executive titles which does not mention 466 however, 466 is thus an executive title.

IL-LODO - an arbitration award.

However, under 467, anything under 466 shall be rescinded if upon a request by application by debtor within 20 days from being served with the warrant, within which to demand that that warrant be rescinded.

REVOKAT.

The court must be satisfied that the debtor was unaware of the service of the judicial letter.

It is not enough to prove to the court that the letter did not reach its destination. You must also convince the Court that that letter did not reach the respondent and the respondent would have to convince the court that the claim in the declaration is unfounded.

### **Opposition to proceedings under article 466.**

**467.(1)** Any executive title obtained according to the provisions of the last preceding article in the absence of any opposition on the part of the debtor shall be rescinded if upon a request by application to be filed by the debtor within twenty days from the first service upon him of any executive warrant based on the said title or of any other judicial act wherein reference is made to the said title, the court is satisfied that the debtor was unaware of the service of the declaration referred to in sub-article (1) of the last preceding article during the period during which he could oppose the same and that the claim contained in the said declaration is unfounded on the merits.

(2) No opposition other than that specifically provided for in this article and in the last preceding article shall stay the issue or execution of any executive act obtained thereunder or the paying out of the proceeds of any warrant or sale by auction carried out in pursuance thereof

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***Grazio Mercieca*** - Article 460 COCP does not apply to chiamata in causa - 460 does not apply - Gov. can not say no, you need to notify me.

*“L-imsemmi artikolu huwa privilegg procedurali moghti lill-Gvern f’kawzi li fihom ikun mharrek u gie mfisser bhala regola t’ordni pubbliku”*

**Ellis vs. Kontrollatur Tad-Dwana** - Konrollatur tad-dwana fetah kawza kontra Ellis. Ellis fetah kontro-mandat. Their Defence was 460 was not used hence the action is not valid. But the Court said 460 is not applicable to kontro-mandat ghax mhux intt ftahtha l-kawza.

In **Government Gazette - 18th Sept 2023 - Jonathan Cassar, Flat 4, Triq Salvu Buhagiar, Marsaskala.**

EneMalta Plc and water services Corporation notifies you with a swim in the collusion for all purposes and the fact of article 466 of the COCP, Water Services Corporation notifies you with a sworn declaration for all purposes and the fact of article 466 of the code of organisation in civil procedure, and solicitor solicitor you to pay for thousand €4,134, which amount is sure, liquid and due, representing the amount of water and electricity. Despite various solicitations by the applicant company for the payment of the amount due, you remained in default and did not pay until the filing of a judicial letter. No valid reason for your failure to pay. In default of payment

or opposition, within the time established in Article 466, the applicant company shall proceed to enforce this credit according to law.

### **ARMS Limited vs. Uddin Hallim, 2017**

In D's application he explained he filed the action in article 466 COCP, after ARMS filed a judicial letter for the payment of pending utility bills. He left the island and returned in 2016, and was not there while the usage happened.

ARMS filed a statement that the action was filed beyond the time limit in 466(2), which establishes a 20 day period. The judicial letter was filed to Hallin on the 18th Nov 2016 and action filed on the 21st December 2016.

The Court agreed that action was time-barred. The Court said various judgments are of a public order nature and can not be ignored. The Court held the action was null and void.

### **ARMS vs. Ignazio Licari, Article 466 COCP**

The Court said that the D must bring the best proof to oppose claims. The Court stated that for such a procedure to be asserted, the debt has to be certain, liquid and due. The defendant claimed that he sent a judicial letter contesting the amount, hence this could not be applied. The court denied this counter-claim, due to the fact that the letter was not produced during the hearing, but provided official record that it was sent but contents were never revealed. The Court held that it is the responsibility of the parties to bring proof. The Court dismissed D's claims and even 466 procedures due to deficiencies on the part of P.

### **Emmanuel Bugeja vs. Mary Rose Bugeja et.**

The Defendants are Mary Rose Bugeja, The Attorney General, The Commissioner of Police and the Director General of Courts are arguing that the P's action was procedurally flawed as it did not comply with article 466.

No legal action can be initiated against the Government or public authority unless 10 days have passed from when the Government or authority received an official notification (judicial act or protest) stating P's claim.

Purpose: Provides Government with a procedural privilege, ensuring it is properly informed before being dragged into litigation. It only applies to actions against the Gov. or authorities BUT does not apply to exceptions in 460(2). This case did not fall under 460(2). The Court upheld the objection on 460, and ruled that no prior official notification - so the action was null and ineffective against them. All of Bugeja's claims were dismissed.

*“Privilegg Procedurali moghti lill-Gvern f’kawzi li fihom ikun mharrek”*

*“L-imsemmi privilegg, jekk ma jithassarx iwassal ghan-nullita’ tal-azzjoni li tkun ttiehdet bi ksur tieghu”*

*“Din in-nullita’ tqieset bhala wahda assoluta, u li tista’ titqajjem mill-Qorti ex officio”*

**George Zammit vs. Alfred Zammit**

416 → Decree in line with 416 in Gov. Gazette, calling out all interested parties to see if there are any creditors of Alfred Zammit.

By a decree issued by the Civil Court, First Hall, on the 7th Nov 2023, in the Acts of the Sale by Auction (Immoveable Property). The following publication was ordered pursuant to 416(1) COCP. The applicant this court that proceedings be initiated for the ranking of claims in terms of 416.

Anyone who may have an interest must bring forward the rights within 1 months from date of publication.

## **Article 469A Judicial review of administrative action**

Article 469A – the local courts are entitled to inquire into the validity of any administrative act but only in a limited number of cases. The point is that if there is a government department whereby one feels that its decision is unfair, one can request the court to look into it.

It is also possible that one can ask for judicial review for a decision taken by the attorney general.

**FOR EXAM - IF YOU DO NOT AGREE WITH THE DECREE GIVEN BY THE CVJ, YOU APPEAL TO THE PRIM AWLA AND THEN IF YOU DON'T AGREE WITH THAT JUDGEMENT, YOU APPEAL TO THE COA.**

**469A.** (1) *Saving as is otherwise provided by law, the courts of justice of civil jurisdiction may enquire into the validity of any administrative act or declare such act null, invalid or without effect only in the following cases:*

(a) *where the administrative act is in violation of the Constitution;*

(b) *when the administrative act is ultra vires on any of the following grounds:*

(i) *when such act emanates from a public authority that is not authorised to perform it; or*

(ii) *when a public authority has failed to observe the principles of natural justice or mandatory/procedural requirements in performing the administrative act or in its prior deliberations thereon; or*

(iii) *when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or*

(iv) *when the administrative act is otherwise contrary to law.*

(2) *In this article - "administrative act" includes the issuing by a public authority of any order, licence, permit, warrant, decision, or a refusal to any demand of a claimant, but does not include any measure intended for internal organization or administration within the said authority:*

*Provided that, saving those cases where the law prescribes a period within which a public authority is required to make a decision, the absence of a decision of a public authority following a claimant's written demand served upon it, shall, after two months from such service, constitute a refusal for the purposes of this definition;*

*"Public authority" means the Government of Malta, including its Ministries and departments, local authorities and any body corporate established by law and includes Boards which are empowered in terms of law to issue warrants for the exercise of any trade or profession.*

*(3) An action to impugn an administrative act under sub-article(1)(b) shall be filed within a period of six months from the date when the interested person becomes aware or could have become aware of such an administrative act, whichever is the earlier.*

*(4) The provisions of this article shall not apply where the mode of contestation or of obtaining redress, with respect to any particular administrative act before a court or tribunal is provided for in any other law.*

*(5) In any action brought under this article, it shall be lawful for the plaintiff to include in the demands a request for the payment of damages based on the alleged responsibility of the public authority in tort or quasi tort, arising out of the administrative act. The said damages shall not be awarded by the court where, notwithstanding the annulment of the administrative act the public authority has not acted in bad faith or unreasonably or where the thing requested by the plaintiff could have lawfully and reasonably been refused under any other power.*

*(6) For the purposes of this article, and of any other provision of this and any other law, service with the government is a special relationship regulated by the legal provisions specifically applicable to it and the terms and conditions from time to time established by the Government, and no law or provision thereof relating to conditions of employment or to contracts of service or of employment applies, or ever heretofore applied, to service with the government except to the extent that such law provides otherwise.*

### **Judicial Review**

Principles of Natural Justice:

- 1. Nemo iudex in causa sua*
- 2. Duty to give reasons*
- 3. Audi alterem partem*

### **Sabri Rezk vs. Awtorita' Ghat-Transport F'Malta, 31st October 2019**

P challenged the refusal of the re-export of his Jeep (Italian vehicle), without paying motor vehicle registration tax. P moved to Malta in 2015, and applied for an exemption from such tax. His application was denied in 2016. Rezk could appeal his decision within 21 days to the Administrative Review Tribunal, but did not do so.

He filed a judicial review under 469A COCP, alleging violations of his human rights under both the Maltese Constitution and the Convention. He claimed that the authorities were unlawful, discriminatory and lacked due process. He also sought damages from them.

Court notes that since Rezk had another remedy by appealing to the Administrative Review Tribunal, which he failed to utilize under 469A(4) action was inadmissible. The Court said that the important thing is to exhaust all remedies before 469A.

**Paul Gauci & E&G Properties Limited vs. Superintendent of Cultural Heritage , First Hall Civil Court, 2019**

P owned a building complex in St Julians. During the demolition of works, D issued a conservation and Protection order mandating an immediate halt to the works. P contested this order, seeking judicial review 469A, as this order was ultra vires hence beyond the legal power.

The issue was whether P were required to serve D with a judicial letter to the Government under 460 COCP, before proceeding with 469A.

Article 460 - necessitates 10 days notice to Gov. before legal action. The Court said that 469A operates independently from 460, and said that 469A is a distinct legal remedy and does not require steps in 460. The court said that such a requirement in 460 could infringe upon the principle of equality before the law. The court said that 469A is autonomous and the said court should proceed with judicial review without prior notification.

# Court of Voluntary Jurisdiction

*(no litigation, only court permission)*

This Court will come in useful once we mention the opening of succession - you have to go to court to order the succession, either intestate, no will (*ab intestato*) and even if he drew up a will it was null.

Sometimes if you allege nullity of a will you would have to go to the first hall - as it is a contentious matter, there is litigation. In a court of voluntary jurisdiction with no litigation, you go there only to ask permission for something. He would be alleging I would be the heir.

One way of disentailing property - you ask the courts permission to remove the property from *fede commessa*. Could not be sold, had to pass to the heir. Interdiction and incapacitation - if a person falls sick, he is infirm of mind, interdiction could be required - can not sell property, can not buy property, whatsoever. Up to the court of voluntary jurisdiction. A lesser form of interdiction is *incapacitation = INABILITAZZJONI* - *one of the functions performed by the court of voluntary jurisdiction.*

He still can not carry out any contract before there is the decree revoking the interdiction - just because the person recovered, does not mean anything. He will have to file an application in the court of voluntary jurisdiction for the decree of revocation. Once court revokes the original one then he can contract and is declared as not incapacitated.

**THESIS: Dorianne Vella, 2009 - Second Hall** - Applications to proceed with the tutorship of minors, adoptions, interdiction and incapacitation and opening of successions and confirmation of testamentary executors.

# **OF THE MODE OF PROCEDURE BEFORE THE COURT OF VOLUNTARY JURISDICTION GENERAL PROVISIONS**

## **Article 470 COCP - Procedure in matters of voluntary jurisdiction**

470.(1) Saving the provisions of article 489 of this Code and of article 37 of the Civil Code, any demand for any authorization or leave to enter into or make any contract or disposition in respect of which the law requires a previous authorization or leave, or for another order or direction in civil matters of voluntary jurisdiction, shall be made to a section of the Civil Court as may be prescribed by regulations.

(2) Such application shall be signed by the applicant himself or by an advocate, notary, or legal procurator

## **Article 471 COCP - Powers of judge**

471. Upon any such application the judge shall obtain the necessary information, and for such purpose he shall order the production of documents, examine, on oath or otherwise, the applicant himself or any other person, and also, if he deems it material to ascertain the value of the property forming the subject-matter of the application, appoint one or more experts.

## **Article 472 COCP - Court may, in certain cases, order the production of an opinion in writing of an advocate**

472. If the matter refers to any waiver, compromise or security, or to an authorization to begin a suit, it shall be lawful for the court to order the applicant to produce a reasoned opinion in writing of one or more practising advocates.

## **Article 473 COCP - Judge may examine any person on subject-matter of application**

473. It shall be lawful for the court to order any person to appear on a given day, at a stated time, to be examined on the subject-matter of the application.

**Article 474 COCP - Collection of information**

474.It shall also be lawful for the court to appoint one or more persons to collect the necessary information on the subject-matter of the application

**Article 475 COCP - Any person may appear to give information**

475.It shall be lawful for any person spontaneously to appear to give to the court the said information.

**Act to be within terms of decree - Article 476 COCP**

476. Any act done in pursuance of an authorization granted by the court shall be within the terms of the decree; and if after A decree is given, it shall be found necessary to add any new stipulation, or agreement, or any other matter requiring authorization, another application shall be made for the necessary authorization.

**Article 478 COCP - Presence of judge at execution of acts**

478.(1) Where at the execution of any act, the presence of the judge of the said court is required by law, he shall attend personally:

Provided that the presentation or withdrawal of a secret will may be effected in the presence of any other judge, notwithstanding that such judge may not be the judge assigned to the said court.will not validate defects.

(2) The presence of the judge at the execution of an act shall not cure any defect arising from any departure from the express terms of the decree of authorisation, nor shall it validate such part of the act as requires authorization if such authorization has not been granted by a decree of the court.Judge may depute judicial assistant.

(3) It shall be lawful for the judge to depute a judicial assistant to be present at the execution of the act. It shall also be lawful for the judge to depute a judicial assistant to receive the information referred to in article 471, or any sworn declaration mentioned in this Part, if the person to be examined or heard, or the deponent, is prevented by illness from attending in court or in such other place as may have been appointed by the judge.

## **Decrees - Article 479 COCP**

**479.** Decrees are issued in the name of the court, and shall be signed by the judge and countersigned by the registrar.

Examination of applications with closed doors

482.(1) The court may, and in the case of adoption proceedings shall, proceed with closed doors in examining and determining applications.

(2) In the case of adoption proceedings, every application, decree and record connected therewith shall be secret and shall not be accessible to any person except by authorisation of the court.

### **Service of application on interested third parties.**

**483.** If it shall appear from the contents of the application, or from the examination, or from the information obtained, that any third party is interested in the matter, the court shall order the application to be served on such interested party to whom a reasonable time shall be allowed to file an answer

### **Article 486 COCP**

486.(1) Every application and every decree shall be kept in the Registry.

(2) A decree authorizing the execution of any deed shall state the name of the notary before and by whom such deed is to be received and published. Copies to be countersigned by judge.

(3) Any copy of a decree to be inserted in any notarial act shall be countersigned by the judge. Indexes of applications and decrees.

(4) Regular indexes shall be kept of all applications and decrees

### **Article 489 COCP**

**489.** The provisions of this Part of this Code relating to the Voluntary Jurisdiction section of the Civil Court, and to the judge thereof shall also apply to the Court of Magistrates (Gozo) as a court of voluntary jurisdiction, constituted under the provisions of article 54, and to the magistrate sitting in such court.

### **Emanuel Bugeja vs. Mary Rose Bugeja, 2002, First Hall Civil Court**

P filed a case against his ex-wife, D, contesting the validity of a decree (71/2001) issued by a court of voluntary jurisdiction. The decree ordered him to pay maintenance of Lm 270 per month, despite a legal separation agreement via a notarial deed in May 2000. Bugeja claimed this decree to be invalid as it conflicted with terms agreed upon in the separation contract

The case challenged the competence of the second hall of the civil court, to issue orders contrary to a separation agreement without initiating new and contentious proceedings.

Article 470 and 480 of the COCP - quoted in this case. The court emphasized that once the separation contract is executed, only the First Hall has jurisdiction over disputes regarding that contract.

Article 35 COCP - states that the party who feels aggrieved by a decree of the Second Hall, must challenge it before the First Hall through a separate case as an appeal is not allowed. The Court said the Second Hall exceeded its jurisdiction, by issuing maintenance after the separation contract was in effect, and was valid. Any modification must be through another contract/judgment before the First Hall. The court declared the decree null and void and lacked legal basis and was issued without proper notification (*audi alterem partem*).

# OF THE DECLARATION OF THE OPENING OF A SUCCESSION

## **Article 536 COCP - Declaration of the opening of succession.**

536. In the absence of opposition, the declaration of the opening of a succession may be made by the Court of voluntary jurisdiction, upon an application, in favour of any person in whose name a claim thereto is made.

## **Article 537 COCP**

537. (1) Upon the filing of the application, the court shall issue banns which shall be published in the Gazette and in at least one daily newspaper and be posted up at the entrance of the building in which the court sits, calling upon all parties interested to enter their opposition by a note, within a time of not less than eight days nor exceeding one month, to be fixed by the judge.

(2) Such time shall commence to run from the day on which the banns are posted up, or last published in either the Gazette or the periodical newspaper, whichever is the latest.

(3) The registrar shall cause a notice signed by him, containing a summary of the contents of the banns, to be published in the Government Gazette, and affixed in the place in which Government Notices or other official acts are ordinarily affixed in the city, suburb or district in which the deceased resided at the time of his death.

(4) If at the time of his death the deceased did not reside in Malta, the said notice shall be affixed in the place in which Government Notices or other official acts are ordinarily affixed in the city, suburb or district, in Malta, wherein it is proved to the satisfaction of the court that he has resided within the last ten years preceding his death; and, failing such proof, the said notice shall be affixed in the place where Government Notices and other official acts are ordinarily affixed in Valletta.

(5) Nevertheless it shall in all cases be lawful for the court to order that the said notice be also affixed in any other place

**Article 538 COCP - Decree of court.**

538. At the expiration of the said time, the court, in the absence of opposition, shall examine the claim of the applicant; and if the claim appears to be justified, the court shall allow the demand and shall declare the succession opened in his favour and may, at the request of the applicant, also establish in its decree, the identity of any other person called to the inheritance and his relative share therein

**Article 539 COCP - Conservatory measures.**

539. Pending the application and until the expiration of the said time, it shall be lawful for the court to make any special order with a view to preserving such hereditary rights or property as might suffer prejudice or deterioration.

**Article 540 COCP - Declaration of opening of succession not to bar action by other person before court of contentious jurisdiction**

540. The declaration of the opening of a succession in favour of any person in virtue of a decree of the Court of voluntary jurisdiction, shall not operate so as to bar any other person entitled thereto from claiming the inheritance or any portion thereof before the competent court of contentious jurisdiction.

## **Title VII OF THE INVENTORY**

Title 7 - inventory - once a person has a number of debts then it is acceptable for the heirs to accept the inheritance with the benefit of inventory - if not you are responsible for all the debts which may be due. Whenever you suspect an individual, a client, if one is unsure whether debts are greater than assets, then accept inheritance under benefit of inventory.

Accepting inheritance through benefit of inventory - through a note filed in the court in the court of vol jurisdiction

**541.** The declaration by any person that he accepts an inheritance, whether testamentary or *ab intestato*, with the benefit of inventory, or that he will not accept the inheritance before the making up of an inventory, shall be made by a note to be filed in the Court of voluntary jurisdiction

**542.** (1) Upon the filing of such a note, the person desiring to make up the inventory shall swear, before the registrar, that he will faithfully describe the estate.

(2) The registrar shall at the foot of the note make a mention of the oath so taken

**543.**(1) The inventory shall contain a description of all the estate, specifying in detail all wearing apparel and household goods, gold and silver articles, jewellery, money and other movable property, the debts due to the deceased, all rights of action and all immovable property as well as all debts or other liabilities of the estate.

(2) The inventory shall also state the value of the movable property, according to a valuation made by experts, unless the court, if it be satisfied that the absence of such valuation will not be prejudicial to the parties interested, shall, in lieu of such valuation, allow a mere statement of the value to be made by the person making the inventory.

**544.** Upon the application of the person making the inventory, the court shall, by a decree, fix the place, day and time for the publication of the inventory by a notary to be nominated by the applicant. Summoning of interested parties, Amended by: V.1864.2.545. The court shall, in the said decree, direct that all parties interested be summoned to be present, if they so desire, at the publication of the inventory. by application, by banns.

**546.**(1) The parties interested shall be summoned: those known, by application, and those unknown or uncertain, by means of banns to be posted up at the entrance of the building in

which the court sits. The registrar shall also publish a notice in the Gazette and in a daily newspaper inviting all those parties interested to be present at the publication of the inventory.

(2) The application as well as the banns shall state the time and place of the publication of the inventory, and the name of the notary by whom the publication is to be made. Publication of inventory

**547.**(1) The publication of inventory shall take place on the date and at the place and time established by the court. Interested persons may impugn inventory.

(2) The inventory, after its publication, may be impugned by any person interested, even though such person may have been present at such publication.

**548.** The default of compliance with the provisions of the preceding articles of this Title, with intent to cause prejudice to any party interested, shall deprive the heir of the benefit of inventory. Applicability of ss. 542 to 547 to all inventories under the authority of the Court of voluntary jurisdiction.

**549.** The provisions of articles 542 to 547 inclusive shall apply to every inventory which, according to law, is to be made under the authority of the Court of voluntary jurisdiction.

## OF THE TAXATION OF CERTAIN FEES

**556.**(1) Upon the demand of any party interested, the registrar shall tax the fees due to advocates, notaries public or legal procurators, for extra-judicial services performed by them, saving the right of appeal by application, within one month, to the court of contentious jurisdiction praying that the taxation be amended.

(2) The demand for the taxation of fees shall be made by means of a note showing the services in respect of which the taxation is demanded.

(3) If the taxation is demanded by the creditor he shall verify on oath, before the registrar, the contents of the note.

(4) The said time shall commence to run, in regard to the person demanding the taxation, from the day on which the taxation is made, and in regard to the debtor, from the day on which the taxed bill is served on him.

(5) The expiration of the said time shall not operate so as to bar the debtor from impugning the existence of the claim or from proving its extinguishment in any manner admissible according to law.

**Article 556 COCP-** taxation of certain fees. At the end of the case, the court will draw up a tax bill of costs. Not during the court hearing., but coming to the office, there is no judicial fee for that and if the client never pays, you can resort to the court of voluntary jurisdiction to have the amount due fixed by fees for extra judicial work. Important as this happens - you meet clients at the office and still need to be paid.

HE HAS NEVER TURNED UP, you have to confirm on oath that you have meetings to make it a point to have these fees fixed by the court registrar. Then evidence covered by dr justice quintano and dr galea.

**Article 557 COCP - 557.** *The provisions of the last preceding article shall not dispense the registrar from taxing the fees due to advocates, notaries or legal procurators, where such fees, although not relating to causes brought before the courts, refer to proceedings under the authority of the courts.*

# **OF THE CHANGE OF PARTIES BY DEATH, ETC**

## **Article 806 - Where party to the suit dies**

**806.** *In the case of death pendente lite of any party to a suit, the heir or executor of such party, or any other person interested may make an application for an order enabling him to continue the suit in substitution for the party deceased.*

**806** - whilst a case is pending - PENDENTE LITE - of any party than the heir of such party, or any other person interested, may make an application for an order for the substitution for the party deceased, applicant will make an application.

Asking the Court to allow him to continue the case instead of the party deceased, assuming the ASSUNZJONI TAL-KAWZA, jassumi l-atti tal kawza. WERRIET allura, l kawz ddur fuq ismu - BUT THE COURT RECORDS GANNI BORG. VS. - names never change, an asterisk is added and in the margin and by decree of that date, JOHN borg assumed the case of Ganni borg - so *occu* remains the same. Does not change at all, just a and b.

***What if no application is filed?*** *Where no application is made, lawful for another party, to file an application himself to demand that the suit be continued in the name of the presumptive heir or in the name of the deceased. If no one turns up, the other party in having the case continued can demand that the presumptive heirs will continue the case, and step in the shoes, this application will be served on the presumptive heir/s who are entitled to file an answer within 1 month. Heirs could not be interested, and would not want to be burdened with any eventual debts. So they are giving 1 month time within which they are to declare whether he/they are prepared to continue with the lawsuit./ Once you continue the lawsuit, you are the heir then and even debts not connected to the debts will have to be borne by the one that steps in. What if the heir does not put up an answer within a month? Then the court will appoint a curator ad litem, to represent the interests of the deceased.*

## **Article 807 COCP - Continuation of suit by presumptive heir or curators.**

**807.(1)** *Where no application is made by any person to continue the suit in substitution for the deceased party, it shall be lawful for the other party, by means of an application, to demand that the suit be continued in the name of the presumptive heir or heirs of the deceased party, if known.*

**(2)** *Such application shall by order of the court, be served on the presumptive heir or heirs who shall have the time of one month within which to declare whether he or they are prepared to continue the suit.*

*(3) If no such declaration is made, then the court shall of its own motion proceed to appoint a curator ad litem to represent the interests of the deceased in the suit in accordance with article 809.*

*(4) Where no person entitled to represent the deceased is known, such application may contain only the demand for the appointment of curators to continue the suit.*

*(5) The curator shall take all the necessary measures to identify and locate the presumptive heir or heirs of the deceased and when the presumptive heir or heirs are identified and located the curator shall request the court to notify him or them about the pendency of the case ordering him or them to declare within a specified time whether he or they are prepared to continue the suit*

### **Who pays the debts then if a curator is appointed?**

Whenever a lawyer is appointed as a curator, there is always a legal procurator there with him to assist him. What is the function of the legal procurator? It is his duty to file acts in the superior courts, as lawyers can not do so in the superior courts. These are all done by a legal procurator likewise appointed to assist the lawyer, to prepare the SUBPOENA.

If one actually is admitted to continue the case, one is assumed to have accepted the inheritance.

#### Article 808 COCP

**808.** The default of the heir or executor to continue the suit shall not imply renunciation of the inheritance or executorship; and it shall be lawful for the heir or executor, by application, upon proving his title to the court, to assume at any time the continuation of the suit, and cause the effect of the appointment of curators to cease in regard to further proceedings. The application shall be served on the curators and the other parties in the suit who may file an answer thereto within such time as the court may establish.

**808** - provides that the default of the heir to continue the suit, the fact that the heir did not accept the case, does not mean that he is renouncing the inheritance. BE CAREFUL. Just because he decided not to accept the inheritance (to renounce you need to go to the court of vol jurisdiction). The fact an heir chooses not to continue a lawsuit doesn't mean he has renounced the inheritance.

#### **Article 809 COCP - Service of banns on presumptive heirs**

*809. The banns for the appointment of curators shall be served on the presumptive heir or heirs, if known; and if unknown such banns shall be published twice, in at least two daily newspapers, at an interval of one week between such publications, at the expense of the applicant without the need of any notification*

**809** - BANNES - BANDU - hareg il bandu - USUALLY published in the gazette. Now, what if this was

### **Article 810 - Acceptance of curatorship**

**810.(1)** It shall also be lawful for a party who has not as yet declared his acceptance of the inheritance of executorship, to appear and accept the appointment as curator, and in such capacity continue the suit.

(2) It shall be lawful for the court, if it deems it expedient, to appoint, in addition to the said heir or executor, a curator from among the advocates on the rota referred to in article 91

### **Article 810A COCP - Change of parties due to other causes**

**810A.** *In the case of any other change of parties to the suit other than by the death pendente lite of any party to the suit, the person who wishes to take up the case shall file an application requesting authorisation to assume the acts of the case in addition to or instead of the party concerned, and any judgment shall also bind such party assuming the acts*

**810A** - a newly introduced article - 30 YEARS AGO - when compared to the rest of code. In any change of parties other than debt, the person who wishes to take up the case, shall file an application for authorisation to assume the case. BUT, any judgement shall also bind such parties. One can not say, ah the name continued in the original names. There will be the asterisks and the person assuming the case will be there and can be liable for any fees against it.

### **Article 810B COCP**

**810B.** Where, within six months from the death pendente lite of any party to a suit, no application is made by any person to continue the suit in substitution of the deceased party or where during the said time no application has been filed by a party to the suit demanding that the suit be continued in the name of the presumptive heir or heirs of the deceased party, the suit shall continue in the name of the deceased party and any judgement delivered in such suit shall be enforceable against the heirs of the said deceased party:

Provided that notwithstanding the lapse of the six month period stipulated in this article, any interested person as referred to in article 806 and the other party as referred to in article 807 may, until such time when the suit is adjourned for judgement or after judgement in the case that the said person or party files an application of appeal, avail himself of the provisions of the said articles 806 or 807 respectively:

Provided further that no judgement delivered in respect of a deceased party shall be deemed to be null or defective only by reason of the fact that the period of six months referred to in this article had not lapsed at the time when the suit was adjourned for judgement.

**Mario Aquilina vs. Vivian Psailam 2021** - Mario and Sharon were married on the 4th Dec 2001. In 2015, Sharon was interdicted and her mother, Vivian was appointed as her curator. In 2016 the marriage was declared null, and she died in 2018. In the unica charta will, Mario was declared as universal heir. Her family challenged this will, arguing that the marriage had been annulled. They sought to intervene in separation proceedings to protect their interests.

Article 960 COCP - Allows 3rd party intervention if legal interest is proven.

The Court said that interest must be direct and legal - since testament naming Mario Aquilina was unannulled, he remained her legal heir. The Family Court was wrong to allow intervention without proper reasoning. Mario appealed this decision.

Court of Appeal - Revoked the decree which allowed Sharon's family to intervene. Article 806 COCP - after the death of Sharon Psaila, Mario Aquilina requested "trasfuzjoni tal-gudizzju" into his name, as universal heir. He wanted to continue the case in his own name to gain more control but the court noted that this was not procedurally sensible: "*Ovvjament, kawza ma tistax titkomplu fejn l-atur u l-konvenut huma l-istess persuna*"

**Joseph Gauci vs. Jane Galea** - The original defendant, Martina Galea, died in October 1999. Article 807(2) COCP states that the Court must notify the presumptive heirs of the proceedings so that they can step up into the shoes of the deceased before judgment. Judgement was delivered in July 2000, in favour of Jane Galea, condemning P to pay Lm 42,750. The Court issued a decree in 2000 for heirs to be notified as per article 807. This notification was never made and despite this not being there, the court issued judgment against Martina Galea, without hearing the heirs 807(2).

The heirs renounced Martina's inheritance but Jane still enforced judgment against them, article 259 COCP. P said that they were not notified in time and that they had no chance to defend themselves, 807(2). The Court agreed with Plaintiff, as the procedural requirement was not

followed. Hence, the garnishee order should not stand. The court revoked the executive garnishee order, and heirs should not be responsible since they renounced the inheritance.

## New Trial or Re-hearing

**IMPORTANT** - in maltese *rehearing* = *IR-RITRATTAZZJONI* - *new trial, re-trial*.

Contrary to what may have been our impression up to now, a judgement has become res judicata by pronouncement by COA or if the time limit of appeal lapses. Or once one has filed the appeal, we wait for the court of appeal, what if the case has been discontinued? Then the first judgment which has been appealed from becomes a res judicata. The one of the first courts.

Exceptionally, very exceptionally, there is the possibility that a final judgement either delivered by a court of first or second instance is not a res judicata and this is catered for by the system. An exceptional remedy rarely given. Normally 12 applications at most in a year, 10, 11 would be rejected, 1 only is accepted. As the courts have come down heavily, a concept to be treated with the strictest of terms.

### Article 811 COCP New trial of decided causes

**811.** *A new trial of a cause decided by a judgment given in second instance or by the Civil Court, First Hall, in its Constitutional Jurisdiction, may be demanded by any of the parties concerned, such judgment being first set aside, in any of the following cases:*

*(a) where the judgment was obtained by fraud on the part of any of the parties to the prejudice of the other party;*

*(b) where the sworn application was not served on the party cast, provided that, notwithstanding such omission, such party shall not have entered an appearance at the trial;*

*(c) where any of the parties to the suit was under legal disability to sue or be sued, provided no plea thereanent had been raised and determined;*

*(d) where the judgment was delivered by a court having jurisdiction in terms of article 741(a), provided no plea thereanent had been raised and determined;*

*(e) where the judgment contains a wrong application of the law;*

*For the purposes of this paragraph there shall be deemed to be a wrong application of the law only where the decision, assuming the fact to be as established in the judgment which it is sought to aside, is not in accordance with the law, provided the issue was not in reference to an interpretation of the law expressly dealt with in the judgment;*

*(f) where judgment was given on any matter not included in the demand;*

*(g) where judgment was given in excess of the demand;*

*(h) where the judgment is conflicting with a previous judgment given in a suit on the same subject-matter and between the same parties, and constituting a res judicata, provided no plea of res judicata had been raised and determined;*

*(i) where the judgment contains contradictory dispositions;*

*(j) where the judgment was based on evidence which, in a subsequent judgment, was declared to be false or which was so declared in a previous judgment but the party cast was not aware of such fact;*

*(k) where, after the judgment, some conclusive document was obtained, of which the party producing it had no knowledge, or which, with the means provided by law, he could not have produced, before the judgment;*

*(l) where the judgment was the effect of an error resulting from the proceedings or documents of the cause. For the purposes of this paragraph there shall be deemed to be such error only where the decision is based on the supposition of some fact the truth whereof is incontestably excluded, or on the supposition of the non-existence of some fact the truth whereof is positively established, provided that, in either case, the fact was not a disputed issue determined by the judgment*

**811** - cause = decided by judgement given in 2nd instance or by the civil court first hall in its cons jurisdiction may be demanded by any of the parties concerned. may be set aside. Law only mentioned the second instance.

The court had to decide once, is there a retrial for a case of the cons court or not? Since there is conflicting and no law on it., you had conflict. In any of the following cases but the first judgement being set aside.

Many case law on this - 2 stages in IN RESCINDITE AND THE STAGE IN RESCISSORIO - first we put aside the first judgement and then the rehearing. Only recently a case was thrown out as the lawyer concerned failed to demand that the first judgement be set aside. How can you have a hearing unless the 1st judgement is not set aside?

Unfortunately, the lawyer opted to opt for - and he argued once I want a retrial i am obviously saying that the first case is set aside. The court did not accept this still as the court is VERY STRICT IN THE APPLICATION OF THIS INSTITUTE.

1965 JEWISH MIZRAHI Cassar - who found that one of the properties he had in the warehouse were removed and he said how come and he found out that a court case was instituted to evict him. Seeing that he was abroad a curator was appointed and he did not try to get in touch with him. But they didn't and he said I should be deprived of the possibility of having the warehouse and property. As the curator did not carry out theory properly.

The court had to decide, once there are cases, the court said there is the remedy of RESISITUI IN INTEGRUM - provided for in roman law and since we follow it, the court had to decide whether this institute was still applicable and available in today's law and the court, presided by sir anthony mamo, following the introduction of that institute, that remedy is no longer available in Maltese law. Today remember that maltese judgements can be appealed to the EU court of human rights.

#### **Article 812 COCP - New trial of causes decided in first instance**

**812.** A new trial may also be demanded in respect of a causes decided by a judgment of a court of first instance and constituting a res judicata, by any of the parties concerned, on any of the grounds mentioned in the last preceding article, provided the facts constituting the grounds for such new trial shall have come to the knowledge of the party after the expiration of the time limited for the appeal

813. A new trial shall not be granted except on any of the grounds mentioned in article 811 and shall not be granted except in regard to such heads of the judgment complained of in respect of which any of such grounds exists and in regard to such other heads as are dependent thereon.

## **RE-TRIAL**

### *Change of parties*

#### *2 phrases not found in the code:*

1. Suppose one of the parties changes, not by death, for whatever other reason. In Maltese we tend to use the phrase “jehtieg li ssir il-legittimazzjoni tal-atti”- if a party's not continuing the case, acts have to be regularised, as there is something wrong. In general that is the umbrella phrase. Never used in English, won't find it in code
2. When one of the parties passes away and change of parties by death, we tend to use in and instead of referring to “legittimazzjoni tal atti” (in general) you would rather more particularly say, “ghad irid jsir t-trasfussjoni tal gudizzju” (more specific) - used in the passing away of an individual.

## **Article 814 COCP**

*814. Subject to the provisions of Sub-title II of Title II of Book Third of this Code the demand for a new trial shall be made to the court by which the judgment complained of was given, and the same judges or magistrates may sit.*

IR-RITRATTAZZJONI - delicate topic, it has featured in the exams a number of times - PARTIES apply for a retrial - such judgement being first set aside. This is imperative - you must demand first that the judgement be first set aside so that the court would be able to hear the case.

1965 JEWISH MIZRAHI Cassar - tried to claim that even if the case does not fall under this one, there is still a remedy. Yet, the court of appeal stated in the Mizrahi case that even though there are shortcomings, that the Roman remedy which was also applicable in Malta, the remedy *restitutio in integrum* is no longer available. Your case has to fall under any one of those grounds.

## Grounds for Re-Trial

**811 sub-article(1)(a)** - “judgement obtained by fraud by one party to the prejudice of the other parties” ground 1 - one party would have obtained a judgement by fraud, to the detriment of the other party - fraud has to be of such proportion to render the — fraudulent - courts have taken the line that would not entitle the party cast to file for a retrial. So when has fraud really affected? Evidence has to prove that the means used by one party is prejudiced to the other party. Must be something substantive, something which really affects that case, not something marginal. There is the latin phrase, FRAUS OMNIA CORRUMPIT. ONCE FRAUD is proved, that judgement is no longer valid.

What if one party engages a third party to commit fraud? Can you imagine a situation where not the parties can commit fraud? Use your imagination isa, ? BY THE JUDGE

A 3rd party who tries to approach the judge so that the case goes one way instead of another. Whenever this was raised. History has taught us a lesson as we had instances recently where judges were bribed. The law still has not been changed. Without the knowledge - this third party acted independently as he realised that if case goes one way, it will affect his property ex. This will leave the issue open now that if there is such, it would fall under 811 a - this law under this ground is applied VERY STRICTLY and the law only mentions the parties involved.

**811 sub-article(1)(b)** - “Where the sworn application was not served on the party cast, provided that, notwithstanding such omission, such party shall not have entered an appearance at the trial;”

Certificate of service - REFERTA - it is for all to see, so how is this possible? There was a case that service had not been effected, what did he do when asking for a retrial, he demanded a legal copy - which showed a negative service but he said that he may try to change it - so he - said that service had not been effective - party cast must have been served. If the party cast had not really been served, but he may have been informed, possibly by a friend of his working in court, that they were calling his name in court.

The fact that he puts in an appearance the following week as he knows when next sitting - is not a ground for retrial. Once it results that party cast would have made an appearance at the hearing of the case, even though not served, it is not a case for a retrial. Once he put in an appearance, that would put an end on the possibility of calling a retrial. Whenever a party turns out - the court will ask TAGHTI RUHEK B NOTIFIKAT MELA - AS If you had been served originally. Should that party end up losing the case he can not claim he was not originally served if he puts up an appearance.

**811 sub-article(1)(c)**- third possible ground to demand a retrial - whenever the parties, under a legal disability to sue or be sued - interdicted, minor. That judgement is not sound as if a party is under a disability to sue, much more so to be sued, in both instances, that judgement is not sound and case can be reheard. Provided that no plea raised by D - that P could not file their case or he himself could not be sued. If a plea is raised and court decides that plea, one can not demand a rehearing. Now we are at appeal stage

**811 sub-article(1)(d)** - no jurisdiction by article 741a - if D raises plea that court raised jurisdiction and plea was rejected and case was eventually decided against the D, the D can not resort to a rehearing even if he still believes that that court lacked jurisdiction as once the plea was raised, submissions were made by both parties and one has to decide - so the issue would have been seen by both courts. So now we started dealing with judgements of the court of appeal.

**811 sub-article(1)(e)**- MOST GROUND INVOKED FOR A REHEARING - wrong application of the law, the court wrongly decided the case -applied law wrongly - one can understand that anyone dissatisfied with the court judgement could easily resort to a rehearing. Usually no one is satisfied when a case is decided wrongly. A rehearing would give another possibility but a longish proviso - whereby the law goes on to say, for the purposes of this paragraph, wrong application of the law, there shall be deemed to be a wrong application - facts are correct as established in the judgements are correct - it is the law which is the problem.

Another proviso - law is very specific, you can not ask for a retrial as you believe that the judge has interpreted the law wrongly, if so - most judgements would be subject to a retrial or attempt to. It could be that he attempted the law wrongly but wrong interpretation is excluded - so what else is there for wrong interpretation?

They won't mention interpretation. How can you have a rehearing because of a wrong application of the law - to simplify the matters - and understand better, over the years case law has established that what the law really means in practice is that there will only be a rehearing on this ground if the judge concerned applies the wrong law. AND NOT THE RIGHT LAW!! IF THE JUDGE APPLIES THE RIGHT LAW, WRONGLY, --- THERE WILL NOT BE A RETRIAL. There will only be a case for rehearing if the judge applies the wrong law not if the judge applies the right law wrongly as that would be an interpretation, and an interpretation is excluded/

Example of wrong law applied by judgement -special rent laws - if decontrolled property you can not use civil code articles reg lease.those are not applicable once there is a special law, the special law would override the normal provisions if applicable. So if mistakenly the judge applies the civil code provisions to a case relating to decontrolled property instead of resorting to

the decontrol ordinance, then that would be an unsound judgement as the judge would have applied the wrong law.

But if the judge applied the decontrolled ordinance so applied the right law but applied it wrongly, at that point it would be a case of interpretation. He interpreted the law to refer to article 1 not 3, whereas he should have applied 3 not 1 - that is an interpretation - and that would prevent party cast from filing wrong interpretation.

INTERPRETATION WON'T LEAD TO A RETRIAL Ground 5 - wrong application of the law.

Very restricted because in order to have a valid ground, this will only be accepted if it results if the judge or magistrate applied the wrong law. If the J or M applied to right law, even if wrongly, this ground won't stand. The Judge must have relied on the wrong law. This is only possible in limited circumstances for instance, where rent law is concerned - special laws.

Decontrol law, rent law vs Civil law remedies for rent, etc.

**811 sub-article(1)(f)** - Ground 6 - Where judgement was given on any matter not included in the demand. *Extra petita*. Extra means outside the limit.

Ex - collision case. A vs B where A claims that B rammed his car into A's car. Unless there's agreement, A sues B and normally there are three demands.

- 1) A asks the Court to establish that B was responsible for the collision.
- 2) To liquidate the damages caused in this collision.
- 3) A asks to condemn B to pay the damages liquidated under claim B.

If by mistake, one only includes the first two claims, the Court is bound by what has been demanded. The Court, even if it finds that B was responsible, seeing that there are only those two claims, the Court cannot condemn B because there was a claim missing. Hence the Court cannot pronounce itself on that 3rd ground. Where it is to do so, it would be deciding on a matter not included in the demand. This example is extra petita.

**811 sub-article(1)(g)** - Ground 7 - where a judgement was given in excess of the demand. **Ultra petita**. Ultra means over and above.

**Same example above but if A only claims damages for the car, then if the Court awards damages to injuries suffered by A (physically), then this would be Ultra petita.**

Very easily, lawyers mix them up. Whenever a lawyer files a retrial on ground f, they usually include ground g.

If there is a case of res judicata, it has between the same parties, the same subject matter. So if one raises the plea of res judicata, one cannot claim a retrial that this second judgement is res judicata.

Where judgement contains contradictory dispositions - A judge, who in deciding in the operative part of the judgement (the *decide* or the *dispositiva* i.e. the binding part / the operative part). Not in the reasoning, but in the operative part.

The reasoning part is called the **obiter dictum** hence this is not part of the operative part.

Where judgement was based on evidence which in a subsequent judgement, it was declared that the evidence tendered in the first case had been false. Once there is a second judgement that the case in the first case was false, there is room for retrial. Or it had been so declared in a previous judgement but the party case (losing side) was not aware of such previous judgement.

Where after judgement, some conclusive document was obtained and the party producing it had no knowledge thereof, or if the means provided by law, he could not produce it.

For example, a contract was lost from the public registry and after judgement was delivered in

Ground 6 & 7: There is room for retrial where judgment was given on any matter not included in the demand. They do not really distinguish between the two. Ground f is also known as extra petita (outside the limit). Whereas ground 7 (g) that would be known by the ultra petita. The court cannot pronounce itself on a third ground which has not been demanded, where it would be demanding on a matter not included in the demand because the demand did not contain a claim for payment of damages. Once the demand is missing the court cannot do so, should it do so it would be extra petita, it would not be a complete decision. The court also cannot go in excess of what it has been demanded. The court cannot extend the damages also to things which was not included in the demand.

**811 sub-article(1)(h)** where the judgment is conflicting with a previous judgment given in a suit on the same subject-matter and between the same parties, and constituting a res judicata, provided no plea of res judicata had been raised and determined;

Ground 8: If there has already been a judgment on a particular issue, there cannot be another judgment, because there could be contradictory judgments. Provided no plea of res judicata has been raised and determined. If the plea has been raised and court has dismissed it it means there

has not been a res judicata, so there is a second case and so it means there can not be a rehearing on this ground.

**811 sub-article(1)(i)** where the judgment contains contradictory dispositions;

Ground 9: where you have a judge, where in the operative part (parti dispozittiva) of the judgment. We are not referring to the reasoning, but to the operative part! There has to be a contradiction in the operative part! Obiter dictum - it is only if there is a contradictory part whereby the case is decided whereby you can have this ground arising.

(j) where the judgment was based on evidence which, in a subsequent judgment, was declared to be false or which was so declared in a previous judgment but the party cast was not aware of such fact;

Ground 10: it need not always be the case there is a subsequent judgement that the evidence has been false, it could be that there was a previous judgment but that the party case had not been aware of that situation.

(k) where, after the judgment, some conclusive document was obtained, of which the party producing it had no knowledge, or which, with the means provided by law, he could not have produced, before the judgment;

Ground 11: a document which has been missing from the public registry has been missing. After the case is decided this original document was traced after the judgment has been delivered and res judicata, then there is a room for retrial.

(l) where the judgment was the effect of an error resulting from the proceedings or documents of the cause.

For the purposes of this paragraph there shall be deemed to be such error only where the decision is based on the supposition of some fact the truth whereof is incontestably excluded, or on the supposition of the non-existence of some fact the truth whereof is positively established, provided that, in either case, the fact was not a disputed issue determined by the judgment.

Ground 12: in order to have this situation occurring - that there was an error resulting from the proceedings - there shall be deemed to be such error only where the decision is based on the supposition of some fact the truth whereof is incontestably excluded - for example a succession case, in the case it was assumed according to the document produced that the couple had three children, whereas in fact, today it results that that couple had no three children. or on the supposition of the non-existence of some fact the truth whereof is positively established, provided that, in either case, the fact was not a disputed issue determined by the judgment - on the decision

## **Thesis: Alexander Ellul - The Institute of Retrial, 2003**

**FROM THESIS:** Maltese law introduced the modern concept of retrial in 1854. The reason that article 811 COCP lists 12 exhaustive grounds is that there is a high threshold in order not to undermine the final judgements. Retrial is only admissible if a judgement constitutes a *res judicata* and the request must originate from one of the parties with a legal interest. Retrial = balance between fair trial and legal certainty.

This extraordinary remedy represents a derogation from the principle that once a judgement has become *res judicata*, that judgement has the force of law between a number of individuals, the principle of *res judicata pro veritate habetur*. Such derogation is inevitable and justified whenever a judgment is intolerably unjust.

### **Judgements**

**Zonda vs. Parthenis** - Court of Appeal said that negligence on the part of the party's defence can never grant that party a retrial.

**Medical Council vs. Isabella Zananian Desira** - The Medical Council sought a retrial under 811(e) arguing that the Court of Appeal misapplied article 11(1) of the Health Care Professions Act by recognising the Plaintiff's qualifications without proper authority. The Court emphasized that retrials are an extraordinary remedy and hence did not grant a retrial.

**Cosimo Marziano vs. Silvia Marziano** - Defendants wanted a retrial under 811(e) and (k) challenging a partial judgement by the Court of Appeal. The Court held that retrials are not permissible for a partial judgment.

**Maxovitch Bernstein vs. Mukhortova** - The Plaintiff sought a retrial under 811(a)(b) & (h) alleging fraud, lack of notification and conflicting judgements. The Court annulled the previous judgement and ordered a retrial, highlighting the importance of a proper notification and the absence of conflicting judgements.

**Negozjant Giuseppe di Ruggiero case** - In this case, the institute of retrial was said to be an extraordinary remedy and awarded only in those cases specified by law.

**Giorgio Galea vs. Carmelo Cuschieri** - If fraud (in 811(a)) is done not by one of the parties but by the witness, a retrial is not granted. (witness was fraudulent in giving his testimony). For a retrial to be granted under 811(a), the P or D must have participated in the fraud.

**Emmanuele Inguanez vs. Giovanni Testa** - The curator was served with a writ of summons at the time to appear on behalf of a person who was thought of still being a minor (but was in fact

of age). The Plaintiff argued that the writ of summons was not served on the party who should have been cast (Carmelo Inguanez). Since the now adult did not enter an appearance at the trial, it was a good enough reason for a retrial under 811(a).

**Shaun Formosa vs. Alex Mercica - Judgement decided on the 8th May 2025** - The case started in 2023, and was originally assigned to Judge Miriam Hayman. Judge was changed to Henry Mizzi without the Plaintiff being informed. Due to this, the P missed hearings and could not submit his affidavit in time. The Defendant was contumacia and P filed for a retrial on 811(l). Re-trial was granted since no proper notice was given and since Shaun was misled and missed the chance to present his evidence.

### **Article 815 COCP - Form of demand of a new trial**

*815. In the superior and inferior courts, the demand for a new trial shall be made, before a court of first instance, by means of a sworn application, and before a court of second instance, by means of an application; the application shall be accompanied by security for costs in terms of article 249.*

815 - Before a Court of First Instance by means of a sworn application. Note that usually applications are not sworn here but this is an exception.

### **Article 816 COCP - Contents of sworn application.**

*816. In the application, whether sworn or not, the plaintiff shall distinctly state the heads of the judgment which are complained of, and the grounds for the new trial in the terms in which they are stated in article 811, making reference to the relative provisions of that article. Moreover, the plaintiff shall state, in a concise and clear manner, the facts giving rise to every such ground; and where the ground is the wrong application of the law, the plaintiff shall make reference to the law which should have been applied.*

**816** - you must choose the heads that you want a retrial for, P must provide the facts **and where the ground is wrong application of the law, P must state which is the law that should have been applied.**

### **Article 818 - Time for demanding new trial**

818. (1) The time for demanding a new trial is three months, which shall commence to run -

(a) in regard to the cases referred to in article 811(a) and(k), from the day on which the fraud was discovered, or the document obtained;

(b) in regard to the case referred to in paragraph (b), from the day on which the plaintiff became aware of the judgment;

(c) in regard to the cases referred to in paragraph (j), if the falsity was, at the suit or complaint of the plaintiff himself, declared subsequently to the judgment complained of, from the day of such declaration, and if it was declared subsequently to such judgment, but at the suit or complaint of other parties, or if it was declared previously, from the day on which the plaintiff became aware of such declaration;

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(b) in regard to the case referred to in paragraph (b), from the day on which the plaintiff became aware of the judgment;

(c) in regard to the cases referred to in paragraph (j), if the falsity was, at the suit or complaint of the plaintiff himself, declared subsequently to the judgment complained of, from the day of such declaration, and if it was declared subsequently to such judgment, but at the suit or complaint of other parties, or if it was declared previously, from the day on which the plaintiff became aware of such declaration;

(d) in regard to all other cases, from the date of the judgment complained of.

(2) A new trial may in no case be demanded after the lapse of five years from which the first judgment was given

**818 - time to demand retrial, depending on nature.**

**Article 819 COCP - Time to be peremptory and run against minors**

819.(1) The time limited in the last preceding article is peremptory.

(2) Such time shall run indiscriminately even against minors and persons interdicted.

819 - time limit is peremptory - you cannot interrupt it. It runs “indiscriminately” even against minors and persons interdicted.

**Article 820 COCP - If new trial is allowed, rehearing of cause to be proceeded with.**

(1) If a new trial is granted, the judgment complained of being set aside, the rehearing of the cause in respect of the merits shall be proceeded with on the same day or on some other day appointed by the court.

(2) Nevertheless a separate judgment shall in all cases be given on the demand for a new trial.

**Article 821 COCP**

The demand for a new trial may not be made more than once, except on grounds which may arise subsequently to the first demand

821 - if a new trial is granted, **you have to demand that the judgement complained of be set aside.**

### **Article 822 COCP**

822.(1) The demand for a new trial may also be availed of by any of the defendants who, in the answer to the libel or petition, or in a note filed previously to the trial on that demand, shall have agreed to it.

(2) In any such case, the defendant may continue the proceedings, notwithstanding that the party who made the demand shall have waived it.

822 - There is no libel anymore. There is no petition anymore. These were abolished.

### **Article 823 COCP**

*(1) The demand for a new trial shall not operate so as to stay the execution of the judgment sought to be set aside*

*(2) Notwithstanding the provisions of sub-article (1), the court before which a new trial is demanded may, at the instance, by application both before the Court of Appeal and before the court of first instance, of the party making such demand, order a stay of execution of the judgment if -*

*(a) together with his demand such party gives sufficient security for the execution of the judgment, if it is not set aside, including such security as is mentioned in article 266(10); and*

*(b) it is shown to the satisfaction of the court that the execution of the judgment is likely to cause greater prejudice to such party than the stay of execution would cause to the opposite party.*

*(3) The security referred to in sub-article (2)(a), when given, shall in all cases operate as a stay of execution of a judgment ordering the arrest or imprisonment of the debtor.*

*(4) The filing of the application containing the demand for the stay of execution of the judgment sought to be set aside shall not operate as a stay of execution of such judgment unless, upon an application to that effect, the court shall for just cause order such stay of execution.*

*(5) Where the enforcement of a judgment has been authorized by the judgment sought to be set aside the provisions of sub-articles (2), (3) and (4) shall not apply*

*(6) An appeal from a judgment disallowing the demand for the stay of execution of the judgment sought to be set aside shall in no case operate as a stay of execution of the latter judgment.*

823 - the demand of a new trial does not operate so as to stay an execution of judgement set aside. It is true that it is res judicata but one is claiming that that judgement is improper.

The other party may file security should the first judgement continue to be approved and the demand for retrial is rejected. It is imperative that one shows to the Court's satisfaction that the execution of the judgement is likely to cause greater prejudice than if the judgement is upheld in favour of the other party.

The rule is, demanding a retrial does not stop execution. The party demands retrial, besides giving of security, he needs to prove that the prejudice that he would be suffering is much greater than what the winning party will suffer if the first judgement is stopped from being executed. If that is so, the Court will stop execution of the first judgement. Security is established by the Court.

**824.** *It shall not be lawful to grant another new trial in respect of a judgment given upon a new trial.*

824 - It is not lawful to grant another trial in respect of a judgement given upon a new trial. Judgement is res judicata. **One cannot demand a rehearing of a rehearing.**

**825.(1)** *Nothing in this Title shall operate so as to bar the court, upon the application of any of the parties to be served on the other party, from amending at any time, by a decree, any error of calculation incurred in the judgment. Errors of expression.*

*(2) Nor shall the court be debarred from correcting any error in the wording of the judgment, or from altering any expression which is equivocal, or which may bear a construction different from that evidently intended by the court, provided that an application is made to that effect within thirty days from the date of the judgment, and in such case, the time allowed by this Code for entering an appeal from any judgment so amended, shall commence to run from the date of the decree given on the demand for the amendment.*

825 - The possibility of an error of calculation in the judgement or an error of expression. If it is a mathematical error, any of the parties may at any time, ask the Court to amend the error of calculation. The Court may issue a decree. You don't need to file an appeal or a rehearing.

This is not about the merits but an error of calculation. For example the Court notes that 10x10 is 50.

826 - Errors of expression. The moment the Judge signs the judgement, he cannot touch it. This applies even if he realises it. The application to have the Court change the equivocal expression has to be filed in 30 days. The time allowed to enter an appeal from any judgement so amended, shall commence to run from the date of the decree given on the demand.

# **PRECAUTIONARY ACTS**

## Article 829 COCP - Party may safeguard his rights by precautionary acts

**829.** *It shall be lawful for any person, without the necessity of any previous judgment, to secure his rights by one or more of the following precautionary acts, which shall be issued and carried into effect on the responsibility of the person suing out the act, provided he shall have complied with the conditions prescribed by this Code.*

830(1) There are some warrants that do not feature in the list of acts. The warrant of prohibitory injunction is meant to be used in a precautionary manner.

(2) One can resort to any warrants above but these acts shall be rescinded if the party against whom the act is issued makes such deposit or gives such security as in the Court's opinion...may be sufficient to safeguard the rights stated in the warrants.

There is no one precautionary warrant which need not be followed by a Court case. Every precautionary warrant has to be followed-up by a Court case. If not, the other party may ask for a revocation and even sue for damages.

Once the precautionary act is filed, time shall start running.

**830.**(1) The precautionary acts referred to in the last preceding article are the following:

- (a) warrant of description;
- (b) warrant of seizure;
- (c) warrant of seizure of a commercial going concern;
- (d) garnishee order;
- (e) warrant of impediment of departure;
- (f) warrant of arrest of sea vessels;
- (g) warrant of arrest of aircraft;
- (h) warrant of prohibitory injunction.

(2) (a) Saving the provisions of article 870 of this Code and of article 357 of the Merchant Shipping Act, such acts mentioned in sub-article (1) shall be rescinded, if the party against whom the act is issued makes such deposit or gives such security as, in the court's opinion, according to the circumstances of the case, may be sufficient to safeguard the rights or claims stated in the act, or if it is shown that a judicial act accepting liability as provided in sub-article (3) has been filed in the proper registry.

(b) Notwithstanding that a deposit is made or security is given as aforesaid, the time limits established in this Title on the creditor to bring forward his action shall continue to apply.

(c) Such time limits shall run from the date of the issue of the precautionary act, and failure by the creditor to institute proceedings within the said time limits shall entitle the debtor to withdraw the deposit or cancel the security

(3) Where a precautionary act has been issued against any person, or such as to affect any property of such person, to secure a claim for damages, and a locally registered insurance company or local bureau thereof, as established in the Motor Vehicles (ThirdParty Risks) Ordinance, such person or company shall by means of a judicial act, filed in the registry of the said court, within ten days from the date of the insured person's demand, declare that he or the company is accepting liability to pay all sums that may be due for such damages, in connection with the claim contained in that act if such insured person is found to be responsible for such damages -

(a) the insurer or local bureau, as the case may be, shall be liable to pay all sums that may be due for damages arising as aforesaid;

(b) the claim for such damages may be pursued against the insurer or the local bureau directly; and

(c) the precautionary act against such person shall be rescinded

.(4) No precautionary act as provided in sub-article (3) shall be issued against the insured if the person intending to sue out the warrant is cognizant that the insurer or the local bureau has issued to the insured a valid insurance certificate accepting liability for the payment of damages; and in such case the claim for such damages may be pursued against the insurer or the local bureau or agent, as the case may be, directly

## Article 831 COCP - Application for issue of warrant

1.(1) The demand for the issue of any of the said acts shall be made by an application prepared by the applicant and containing, under pain of nullity of the act, other than further details which may be prescribed by regulations:

(a) the origin and nature of the debt or claim sought to be secured; and

(b) when the right sought to be secured by the act is a debt, or a demand which may be satisfied by the payment of a sum of money, the amount of such demand. If the case has already been filed in court, such demand may specify and include all judicial costs.

(2) The application shall be confirmed on oath by the applicant: Provided that where in an application there is more than one applicant demanding the issue of any of the precautionary acts mentioned in article 830(1) against the same respondent, the oath shall be taken by at least one of the applicants.

(3) Any of the warrants or order mentioned in article 830 shall be issued by the court:

Provided that, where in the opinion of the Registrar the signature of a judge or magistrate empowered to issue a warrant of seizure or a garnishee order or a warrant of impediment of departure cannot be obtained within a reasonable time and that delay may be prejudicial, the said warrants or order may be issued over the signature of the Registrar personally after having first obtained verbal authorisation from the judge or magistrate to do so. In this case, the judge or magistrate is to append his own signature under that of the Registrar at the earliest opportunity to confirm that he had given the said verbal authority or, if it is not possible for the Registrar to obtain such verbal authority, the Registrar shall under his authority issue the said warrant or order over his signature, subject to the ratification of such action by a judge or magistrate at the earliest opportunity.

831 - The demand for the issue... shall be made by an application. **Pain of nullity.** One mistake = nullity of the act.

- 1) The original and nature of the debt or claim sought to be secured.
- 2) When the right is a debt... the amount of such demand.
- 3) If a case has been filed, such demand may demand all judicial costs.
- 4) Application is to be confirmed on oath by the applicant. This is not needed in an executive warrant (Court judgement for example).

Normally, the judge / magistrate always signs the Court order but today, following amendments in the law, it is possible for the Court Registrar to issue the warrant **if the Judge or magistrate cannot be contacted.**

## Article 832 COCP - Where claim is for payment of sum of money

832. Where the right sought to be secured by the act is a debt, or a claim which may be satisfied by the payment of a sum of money, the applicant shall also in this sworn statement referred to in the last preceding article indicate approximately the sum to which, in his belief, the debt or claim

amounts, and if a cause has already been filed in court, such a claim may specify and include any judicial costs, under pain of nullity of the act

832 - where there is a debt or may be satisfied by a sum of money, one has to indicate approx. the sum to which he believes amounts to the debt in question.

If an LP is appointed as commissioner of oaths, the applicant will confirm the application in front of the LP.

### **Article 833 - Administering of oath**

833. The oath referred to in this Title may be administered by the registrar or by a legal procurator appointed as Commissioner for Oaths under the Commissioner for Oaths Ordinance.

## Article 833A

*833A. Where a judicial letter is filed and sworn according to article 166A, there may also thereupon be sworn and filed the precautionary warrants referred to in article 830(1)(a), (b) and (d)*

*:Provided that when such judicial letter is filed, the applicant shall file a sworn application or application or petition, as the case may be, within twenty days from the date of filing of a full or partial note of contestation or else within sixty days from the date of the issuing of a warrant, unless a note of contestation will have been filed, according to which date first occurs:*

*Provided also that no sworn application or application or petition, as the case may be, shall be required in the case where the precautionary warrant is converted to an executive warrant or it is removed by means of a counter-warrant*

833A - not all warrants - only A, B, D.- Filing of precautionary warrants with judicial letter

Proviso - you have 20 days within which to proceed with action. If there is no contestation or service days are taking long, within 60 from the issue of warrant. **The maximum limit is 60 days.**

If on the other part, the respondent has contested the letter, you have got only 20 days within which to proceed, or else, if there is no contestation or it could be that service is taking a bit long, within 60 days of the issue of the warrant. Maximum is 60 days, if there has been contestation in the meantime you only have 20 days.

If you note the marginal note, this was added in 2008. If you go to 166A, with a letter, introduced relatively recently as well, this was introduced in 2004. So the question arose: can you resort to a precautionary warrant to safeguard your rights? To put a stop to any controversy, the legislator allowed the issue of precautionary warrants even under 166A. So during 2004 - 2008, you probably could not be entitled to resort to it.

Legislators allowed the issue of precautionary warrant even in the case of proceedings under 166A - during the period of 2004 and 2008, probably, you could not have resorted to it.

### **Richard Ghirxi vs. Clayton Cremona**

Article 833A COCP allows for precautionary warrants to be issued after a judicial letter under 166A is filed. P sent a judicial letter to D under 166A, demanding 23,000 euros. He obtained a precautionary garnishee warrant. D contested the letter but did not inform Ghirxi of this contestation. Ghirxi filed a court case 44 days from contestation date and more than 20 days from the deadline. Cremona said since P did not file within 20 days, the warrant should be revoked, as per 833A. Ghirxi said that the contestation was not notified to him and he still has a 60 day window from the date of the warrant. The court rejected the request to revoke the warrant. The court rejected the request to revoke the warrant, as the action was valid. Court did not revoke the warrant. “Jittanta xortih li jhassar mandat ta’ sekwestru mahrug kontrih”

**833B - Introduced in 2017 - Article 833B - Letter lodged in accordance with article 34 of the Mediation Act.**

**833B.** Where a letter has been lodged in accordance with article 34 of the Mediation Act, there may also thereupon be filed the precautionary warrants referred to in article 830(1)(a), (b) and (d):

Provided that when such letter is filed in accordance with article 34 of the Mediation Act, the applicant shall nonetheless attach a copy of such letter in the acts of the precautionary warrant, and such warrant shall conform with the provisions of Title VI of Book Third of this Code

### **Article 833C**

Filing of precautionary warrant with judicial letter for execution of bills of exchange and promissory notes issued in terms of the Commercial Code

**833C.** Where a judicial letter has been filed to render bills of exchange or promissory notes executable in accordance with proviso to article 253(e) there may be filed the precautionary warrants referred to in article 830(1)(a), (b) and (d)

:Provided that, when such letter is filed to render bills of exchange or promissory notes executable in accordance with the proviso to article 253(e), the applicant shall attach a copy of such letter in the acts of the precautionary warrant, and such warrant shall conform with the provisions of Title VI of Book Third of this Code.

833C - Introduced in 2021. The possibility of filing for a warrant when you have BOE or PNs which are rendered executable acc. To 253(e).

## Article 836 COCP - Counter-warrants

836.(1) Without prejudice to any other right under this or any other law, the person against whom any precautionary act has been issued, may make an application to the court issuing the precautionary act, or, if a cause has been instituted, may make an application to the court hearing such cause, praying that the precautionary act be revoked, either totally or partially, on any of the following grounds:

(a) that the precautionary act ceased to be in force;

(b) that any one of the conditions requested by law for the issue of the precautionary act does not in fact subsist;

(c) that other adequate security is available to satisfy the claim of the person at whose request a precautionary act was issued either by the issue of some other precautionary act or if such other security can to the satisfaction of the court adequately secure the claim;or

(d) if it is shown that the amount claimed is not prima facie justified or is excessive; or

(e) if the security provided is deemed by the court to be sufficient; or

(f) if it is shown that in the circumstances it would be unreasonable to maintain in force the precautionary act in whole or in part, or that the precautionary act in whole or in part is no longer necessary or justifiable

(2) The person making the application according to sub-article(1) shall, together with the application, file in writing all submissions to be made together with all documents in support of the demand that is being filed.

(3) The application, except for any application in terms of sub-article (1)(a), shall be served on the opposite party who may, within seven days from the service, file a note containing all submissions to be made together with all documents in support of the demand that is being filed.

(4) The court shall decide the application with urgency either in camera or after hearing the advocates of the parties, if it deems fit, provided that not more than one sitting may be fixed for such purpose.

(5) No appeal and no challenge shall lie from a decree acceding to an application referred to in sub-article (1), and such decree shall be final and irrevocable, and except in the case contemplated in sub-article (1)(a) a similar precautionary act may not be issued in security of the claim against the person against whom the precautionary act so revoked was issued, unless in the application for the issue of such similar precautionary act the applicant states that circumstances have arisen since the revocation of the previous precautionary act which justify the issue of a similar fresh precautionary act to that which has been revoked, and the provisions of this article shall thereupon apply to such precautionary act freshly issued on the basis of such application.

(6) The provisions of article 831(4) shall apply to the decree issued under sub-article (1)(a).

(7) Notwithstanding that adequate security for the satisfaction of the claim of the person at whose request the precautionary act was issued is deposited in the registry of the court, the court which issued the counter-warrant under the provisions of this article may still, on a request made by application by any interested person, investigate the legality or otherwise of the relative precautionary act and the court may also order the reduction of the amount of security deposited or declare the precautionary act to be contrary to law, in which latter case it shall give such orders as it may deem appropriate, including, if the case so warrants, the giving of the security back to the debtor.

(8) The court may condemn the applicant at whose request a precautionary act was issued to pay a penalty of not less than one thousand and one hundred and sixty-four euro and sixty-nine cents (1,164.69) and not more than six thousand and nine hundred and eighty-eight euro and twelve cents (6,988.12) in favour of the person against whom the precautionary act was issued, in each of the following cases:

(a) if the applicant, without any valid reason, does not bring the action in respect of the claim, within the time established by law;

(b) if, on demand of the defendant for the rescission of the precautionary act, the plaintiff fails to show that the precautionary act had to be issued or that within the fifteen days previous to the

application for the precautionary act, he had in any manner called upon the defendant to pay the debt, or, if the debt be not a liquidated debt, to provide sufficient security:

Provided that the provisions of this paragraph shall not apply where it is shown that there were reasons of urgency for the issue of the warrant;

(c) if the circumstances of the debtor were such as not to give rise to any reasonable doubt as to his solvency and as to his financial ability to meet the claims of the applicant, and such state of the debtor were notorious;

(d) if applicant's claim is malicious, frivolous or vexatious

(9) In the case under the previous sub-article, the court at the request, by application, of the person against whom the precautionary act was issued may condemn the applicant at whose request the precautionary warrant was issued to pay such damages as may have been caused by the issue of the warrant, and in any such proceedings the court shall refer to, and make use of, the records of the proceedings of the precautionary act and of any other proceedings arising therefrom or consequential thereto, and such records shall be admissible evidence for the purposes of this action.

836 - May ask the Court to revoke (totally or partially) the warrant on a number of grounds. Hence, the case has not yet been decided but the party may contest the warrant. For example, there is other security that may be used or if the amount is excessive or prima facie unreasonable.

The application has to be served on the opposite party - within 7 days of service can file a note containing all submissions again. Has to submit all reasons necessary to contradict his demand.

Can be heard in camera or can ask the advocates that it needs a hearing. **Only one sitting is devoted to this hearing.**

(5) no appeal and no challenge - a challenge is filing a new case to revoke that decree whilst an appeal you appeal to another Court. Here we are only dealing with the issue of the warrant.

### **THIS ARTICLE IS REFERRING TO PRECAUTIONARY WARRANTS**

(8) Any interested person may contest. **Note instances when this can be used.** See point (b) which is very important. You have to wait 15 from the date of service before you may proceed. Besides the penalty for acting when one should not be acting that way, if the PW would have caused unnecessary damages, the Court may condemn application to pay any damages.

## **Article 837 COCP**

**837.**(1) It shall not be lawful for the Court of Magistrates(Malta), or the Court of Magistrates (Gozo) in its inferior jurisdiction to issue any warrant of description or impediment of departure for the purpose of a reference to the oath of the opposite party

(2) It shall not be lawful to issue any precautionary warrant of seizure or garnishee order in security of any right or claim against the Government of Malta.

(3) It shall not be lawful to issue any warrant of seizure organizer order, in security of any right or claim against any of the persons mentioned in sub-article (4)(a), or any warrant of impediment of departure in security of any right or claim against any of the persons mentioned in paragraphs (b)or(c)of the saidsub-article.

(4) The persons to whom sub-article (3) refers are: (a) any person belonging to the armed forces of any country or any person belonging to any vessel wholly chartered in the service of the Government of Malta if such person is in Malta with the force or vessel to which he belongs;(b) any master, seaman or other person regularly enrolled,if the ship to which he belongs has obtained her clearance; and(c) any engineer of any rank, employed on any steamvessel

(5) (a)If any such warrant or order has been unduly issued and carried into effect against any of the persons above-mentioned, it shall be lawful to obtain the rescission of the warrant or order or of anything done thereunder by making an application to that effect, stating out the cause for his exemption, and producing in support thereof any certificate, document, or other evidence to the satisfaction of the judge or magistrate by whom the warrant or order was issued.

(b) The release of the person from the warrant or order may also be applied for as aforesaid by the officer commanding the vessel on which such person is enrolled, or by the officer commanding the force, the regiment or the company to which such person belongs, or by any other military, naval or air force authority.

(6) It shall not be lawful to issue any precautionary warrant of seizure, warrant of seizure of a commercial going concern or garnishee order in security of any right or claim against any person for damages for libel or other defamation under any law

837 - The Courts of Magistrates cannot issue any warrants of description - Mandat ta' deskrizzjoni. This is subizzjoni (oath of the other party).

## **Article 838 COCP - Precautionary acts**

**838.** The court may, when any party makes an application before it which is served on the other party, give any order as maybe required so as to prevent any damage or deterioration being caused to the things described in the precautionary act

838 - if the article which has been possibly seized and is deteriorating, the court may give order to preserve it or sell it.

### **Article 838B**

838B. (1) Unless rescinded by the court or withdrawn by the party suing out the warrant, all precautionary warrants shall remain in force for a period of fifteen days after the cause becomes res judicata.

(2) Notwithstanding the provisions of sub-article (1),precautionary warrants issued under article 830(1) become executive warrants after that the cause becomes res judicata or when in accordance with article 166B, article 253(e) and article 466,such judicial letter, bill of exchange or promissory note constitutes an executive title, so however that:

(a) in the case of a warrant issued under article 830(1)(b), (c),(d) and (f), the creditor shall file a note within fifteen (15)days from when the executive title is obtained in the acts of the same warrant and demand an extension or reduction of the effects of the warrant to an amount equivalent to the legal costs, interest and the principal amount due in terms of the executive title obtained, and such note is to be served upon the debtor and such persons as may have any interest therein;

(b) in the case of a warrant issued under article 830(1)(a)and (e), the creditor shall file an application under the provisions of article 388E within fifteen days from the cause becoming res judicata.

838B - all PW today shall remain in force for a period of 15 days after the cause becomes res judicata. In practice, it is impossible to obtain a taxed bills of costs after judgement has been delivered. Therefore, in practice, LPs resort to an EW.

**THESIS Erica Grima 2024:** Important to mention that up until Court accedes to the precautionary warrant, a person initiating the precautionary act may be viewed as a ‘potential

creditor'. Only once the Court accepts the act and issues the precautionary act that the 'potential creditor' is seen as a creditor.

**Precautionary act** - aims to grant a right to the creditor to secure a good, even if such right has not come into existence or ascertained.

**Calamandrei** - one may view a precautionary warrant as a provisional or temporary measure since the effects of this warrant anticipate the Court's *decide*.

**SS vs. MS (2023)** - *“mandati kawtelatorji qeghdin hemm biex iservu bhala tarka ghal min jippretendi li ghandu dritt fuq haddiehor”*

**Article 836 COCP** - counter warrants are used to revoke the precautionary warrant  
(5) Court has the final say whether to issue it or not

836(1) - Application of a precautionary warrant - it is not necessary for the creditor to attach any documents in support of the claim, whereas in application to a counter-claim this is necessary.

Karmenu Callus vs. Dione Cassar: *“Mkien ma huwa mitlub fil-ligi li l-kreditur ta' mandat kawtelatorju irid ta' bilfors iressaq xi dokumenti li juru jew isahhu t-talba. Dak li titlob il-ligi huwa li r-rikorrenti bil-gurmament tieghu jsemmi x'inhu l-origini tad-dejn.”*

**836(4)** Once a precautionary warrant is countered - there is a higher level of urgency and seriousness.

**838B** - Effects of Precautionary warrants

**Therese Mangion Galea vs. Desmond Stanley, 2005** - 4 procedural requirements for a person to be issued a precautionary warrant:

1. One must have a claim against a person (debtor)
2. A case is instituted for the claim
3. Warrant must have all the requisites at law
4. Warrant is executed by the person asking for it

**Article 836(8) COCP** - *“Ordni pubblika bl-iskop li jigi assikurat is-serjeta' tal-process gudizzjarju u sabiex l-istitut ta' mandat kawtelatorju ma jigix uzat abbuzivament.”*

**Article 838A** - allows the Court to award payment of penalty and damages and interest upon a demand by application of a person against whom a precautionary act has been issued.

When a judicial letter (166A), precautionary warrants in 830(1)(a)(b)(d) may be filed. If contestation of judicial letter, for warrant to remain in vigore, applicant must file a sworn application or application:

- Within 20 days of note of filing of contestation OR
- Within 60 days of the issuing of the warrant

## **Warrant of Description - 839 et. seq. - Mandat ta' Deskrizzjoni**

- Utilised to secure a right over a moveable thing.
- The warrant is executed by the Marshall describing the moveables in detail - to the extent that Marshall shall also state the weight or measure Article 840.
- The person presently in custody of such moveables retains such and shall be responsible for their safekeeping 841
- The objective of such a warrant is to document the moveables' condition and quantity which the debtor holds at that particular moment in time, so that the debtor can not dispose of it at a later stage to the creditor's detriment, hence securing the creditor's right.
- Article 837 also notes that this precautionary act shall not be issued by an inferior court.

### **Article 839 COCP - Object of warrant**

839.A warrant of description may be issued in order to secure a right over movable things, for the exercise of which the applicant may have an interest that such movable things remain in their actual place or condition.

839 - When do you normally use it? When you want to keep the immovable in place. Court Marshall will then go onsite and list down each and every item that he finds.

When do we normally resort to this warrant? If there are any problems arising, for example, the husband is disposing of the things found in the matrimonial home, then one can resort to this one. Or if there is a home where there are multiple heirs, and they want to preserve what is in the house since there is someone else living there. The executive officer would have to list each and every single item found therein - a very detailed list. Sometimes it takes days to do this exercise.

### **Article 840 - Manner of executing warrant**

*840.(1) The marshal shall execute a warrant of description by describing the things in detail stating the number and quality thereof.*

*(2) He shall also state the weight or measure, and the value thereof, if the applicant makes an express demand to that effect in the application for the issue of the warrant, or subsequently, by means of a note; in any such case the value shall be stated upon an appraisalment made by one or more experts appointed by the court*

840 - We still call him the Court marshal but he is not the Court Executing Officer. He must give a good and accurate description and therefore, he cannot just state "4 chairs". He must give an accurate description of the thing. If he deems fit, he may weigh or measure the thing.

The law mentions that in order to obtain this remedy (to be weighed or measured) it is by note if you don't do it in the rikors.

## Article 841 COCP - Liability of person in possession of thing described

841. The things so described shall remain in the custody of the person in whose possession they are found, and such person shall be responsible for their safe keeping, an express injunction to that effect being included in the warrant

841 - Things remain in the custody of the person in whose possession they are found. The items are not seized.

## Article 842 COCP - Power of Court

842. It shall be lawful for the court, upon the application of any party notice whereof is given to the other party, to give any order calculated to prevent any loss, damage or deterioration of the things described.

842 - the applicant for this warrant is bound to bring the action in respect of the rights stated in the warrant, within 20 days of its issues. Since this is a precautionary warrant, it has to be confirmed on oath. Not when you file the warrant but when it is issued i.e. accept by the court, within 20 days, you must file the Court case.

There is one exception to the 20 days period - separation cases. You have to go to mediation and only if the mediation fails the Court may grant permission. This is because you need Court authorisation before starting a case for separation. In this case, the 20 days will commence from the date the person requesting the separation from the date gives permission when the Court authorises the filing of a separation case.

843(2) - liable for damages if you do not proceed with the Court case. The applicant must fail to lodge the case without just cause. Remember 836 - a counter warrant.

## Article 843 COCP - Time within which to bring action

843.(1) The applicant is bound to bring the action in respect of the right stated in the warrant within twenty days from the issue of the warrant:

Provided that where the issue of the warrant is demanded by any spouse against the other spouse, and the spouse issuing the warrant has commenced proceedings in court, the time limit herebefore mentioned shall commence running from such date when that spouse is authorised to proceed by the court, provided that the warrant shall cease having its effect immediately upon the proceedings being withdrawn or abandoned.

(2) If the applicant fails, without just cause, to bring such action, the effects of the warrant shall cease and he shall be liable for all damages and interest.

You can also file a case in Court to delay the submission however, the law is not clear. For example, if one is not in good health.

## Article 844 COCP

844. Where the party against whom the warrant was executed shall, by means of a note filed in the registry, allow to the applicant a time longer than that mentioned in the last preceding article, the warrant shall remain in force for such extended time.

**844** - warrant to remain in time if an extension is granted to the **debtor**. The purpose of the law is to grant the debtor time to rectify his position. For example, he tells you that in a matter of 1 month, he will be in a position to fulfil the debt. If the creditor believes the debtor, he may take this opportunity. It also pays your client to delay the action because the higher the debt, the higher the costs will be to file a court case.

## 845 - Executive warrants.

### Article 845 COCP

845. The provisions of articles 275, 276 and 279, shall apply to the execution of a warrant of description

# **WARRANT OF SEIZURE**

## **Article 846 COCP**

846.(1) The warrant of seizure of movable property shall, other than the details referred to in article 282, also contain an order to the Registrar to seize from the debtor such articles or articles from the place therein indicated.

(2) When a demand is made for the removal of the seized articles the court shall appoint an official consignee.

(3) The provisions of articles 275 to 293 and articles 842, 843 and 844, shall apply to warrants of seizure.

846 - Of movables, besides the details mentioned in 282, also contain an order to the registrar to seize from the debtor the articles from the place there indicated. You must tell the court marshal where the items are located to be seized. Once you opt for this, the Court appoints a consignee "il-kunsinnatarju".

Note sub-article 3 of this article where amongst others, the time limit is taken from the warrant of description.

## **Article 847 COCP**

847. The judicial sale by auction of the property seized shall not take place without a previous judicial acknowledgment or rendering as an executive title of the debt or claim:

Provided that in the case of perishable goods or other deteriorating assets, the court, on the application of claimant in pending litigation before the court, may order the sale of the asset pendente lite if it appears to the court upon an application of a creditor that the debtor is insolvent or otherwise unlikely to be able to continue trading and maintaining the asset. In reaching its conclusion the court shall consider all the circumstances connected therewith including the nature of the claim, if any, and such other steps which the debtor has taken to secure the claim, or otherwise to preserve the asset.

847 - the judicial sale by auction shall only take place after there is judicial acknowledgement of the debt. You have to wait for the outcome of the Court case. What if you have perishable goods? The Court, following an application by claimant.

**Thesis by Erica Grima, 2024** - may take the form of either a precautionary or executive title. In a precautionary title, the potential creditor files an application which the court accedes to, granting a court order in order for the executive officer to seize the debtor's moveables/immovables.

Upon seizure, the creditor may proceed to a judicial sale by auction - but to move forward with the judicial sale, the creditor requires either judicial acknowledgement or an executive title of the debt.

## **Article 848 COCP**

848. Saving the provisions of articles 466 and 467 respecting the claims of the Government, no warrant of seizure shall be issued by the Court of Magistrates (Malta) or by the Court of Magistrates(Gozo) in its inferior jurisdiction, unless the warrant is sued out accompanied by a demand that the credit or claim are judicially acknowledged and the debt or claim exceeds one thousand, one hundred and sixty-four euro and sixty-nine cents (€1,164.69), or the demand for such warrant is for an article which, as stated, is property belonging to the person suing out the warrant

848 - **very important article**. In the inferior court, you can only proceed with a precautionary warrant of seizure that has to accompany the filing of the case. This is an exception to the 20-day rule.

The sum has to exceed 116K. When filing the warrant and court case together, in maltese this is called "kontestwalment".

What if you file the case and then you discover that the debtor is in serious financial debt and you didn't file a precautionary warrant? The Court Registrar pointed out to the Magistrate that the case is already filed and the warrant is being asked for only now. It would be extremely unfair for the Court to not accept the warrant. The Magistrate, on reading the note **refused the warrant** saying that this should have been filed contemporaneously. However, the Magistrate struck out her sentence and in writing she wrote that the warrant will be granted.

# Warrant of seizure of a commercial going concern - Azjenda Kummercjali

## Article 848A

848A. (1) A precautionary warrant of seizure of a commercial going concern may solely be issued to secure a debt or claims which could be frustrated by the sale in part or in whole of the saidgoing concern and, for this purpose, no other warrant may be issued against the going concern, unless it is this warrant of seizure.

(2) The effect of a precautionary warrant of seizure of a commercial going concern is to preserve the totality of the assets of the going concern, including licences and good-will, to order that same is not sold in part or in whole and are to be concurrently kept in business, provided that in any case the court shall not accept a demand for the issuing of a warrant if it is satisfied that there are other means to safeguard the amount due.

(3) The court shall not issue any such warrant unless it is satisfied that such warrant is necessary in order to protect the rights belonging to applicant who, prima facie, appears to have such rights.

(4) The provisions of articles 840, 842, 843, 844 and 848 shall apply to this warrant

848A - may be issued **solely** to secure a debt or claims which could be frustrated by the sale in part or in whole of said going concern. No other warrant may be issued against the going concern. The warrant of prohibitory injunction is not applicable here.

Effect of such warrant. To preserve the totality of the assets including all licences and goodwill.

L-avvjament - the goodwill. What is the effect of such a warrant? The effect would be to preserve the totality of the assets including licenses and goodwill (lavjament). Moreover, the court has to be satisfied that the applicant prima facie has got the right he is claiming and also that the warrant is necessary to protect the rights which the applicant would have shown the court on a prima facie concern.

## Article 848B COCP

848B. (1) When a demand is made for the issue of this warrant the court shall, after hearing the parties, appoint an administrator and in order to effect such action it shall consider whether to allow the going concern to continue being run by the debtor or by such persons as may be entrusted by the debtor with the assistance of the administrator, or that an administrator is appointed who in the opinion of the court has the necessary qualifications to run and administer the going concern on his own.

(2) The court shall appoint an expert under article 89 and establish a short and peremptory time within which there shall be filed an itemized list, to be confirmed on oath, of the value of the whole property forming the capital of the commercial concern.

(3) The appointed administrator shall be responsible for the commercial going concern and shall have the right to sell and administer the ordinary running of the concern provided that for any decision of an extraordinary nature he shall file a demand in court for the granting of such authorisation.

(4) The administrator may, if he is of the opinion that the going concern will incur a market loss in its value, demand the court either to authorise him to sell the whole going concern or any part thereof.

(5) The administrator appointed under this article shall have the right to such payment as the court may, in its discretion, be of the opinion that is due to him in consideration of the value of the going concern and of the activity undertaken with regard to the running of the business

Sorte imghaxx u spejjez - if the party only pays part of the sum they first remove/pay the fee (spejjez), then you pay the interest (imghaxx), and the capital / principal sum (sorte). If the sorte is not entirely paid, interest is calculated at the rate of 8% on the remaining sum.

Recap: There will be an action in respect of a debt not settled by the debtor - it is a going concern. So resort to the warrant of seizure. It is the only warrant applicable against a going concern.

**THESIS Erica Grima** - No other warrant except a precautionary warrant of seizure can be utilised with the sole scope of securing a claim against a commercial going concern. TThis warrant features both moveables and immoveables.

## **The Garnishee Order**

Difference from a warrant of seizure and garnishee order: you seize items belonging to the debtor which are in his possession, but when a garnishee order is issued it means that the properties in the hands of a 3rd party - ex: he has money in the bank, or he has his car at a mechanic, so you cannot seize the item. But if the client deposits money at the bank, one can ask the court to order this third party not to allow the property out of its hands, and cannot hand it over to the client (the debtor). So you ask that the court order the attachment - that the money be attached in the hands of the bank. They would then have to deposit the money or car attached (which was in their temporary possession) in court.

A garnishee order is a precautionary warrant, so the case may not as yet have been filed, and you resort to such a warrant to safeguard your client. However, you have to proceed with a court action after. (remember in the inferior court an action and warrant have to be filed at the same time)

### **Article 849**

*The effects of a precautionary garnishee order are the same as those of an executive garnishee order, and the provisions of articles 375 to 383 inclusive, and articles 842, 843, 844, 846 and 848, shall apply to such order:*

*Provided that where the garnishee is a bank, a precautionary garnishee order shall not apply to money payable by the bank in execution of any guarantee given by the bank that it will effect payment on the demand of the person in whose favour the banker's guarantee is made out; and in any such case, notwithstanding the garnishee order, the bank shall have power to pay out or otherwise dispose of any such money as free from any garnishee order and shall also be entitled to withdraw any such money from any court or other place, or from any person, into which, or with whom, it may have been lodged or deposited, and it shall be the duty of the Registrar of such court or other person in possession or having control over such money to return it forthwith to the bank.*

The proviso was added at what if banks have already guaranteed the payment of a sum? Will it honour its commitment or do as the court orders? The law provides that if the bank gives a bank guarantee to pay a certain amount of money, that sum will not be affected by the garnishee order and the bank can honour the guarantee. Also be careful as you do not block the entire assets of the debtor, but only the requested amount by the creditor.

The banks are the first to be served, and eventually the debtor is served. Frequently, the bank itself gets in touch with the client.

What won't bank deposit? The bank is entitled not to deduct the expenses it incurs in depositing the money.

These warrants remain in force till eventually they are revoked. Before they lasted for a year and had to be renewed but this article was repealed.

## Article 851

*(1) The court may, at any stage of the cause, on the demand of either of the parties, or of its own motion, make an order for judicial sequestration.*

*(2) The sworn statement referred to in article 831(2) shall not be requisite in regard to any such sequestration.*

*(3) The sequestration order shall remain in force until rescinded by the court.*

*(4) Under such order, the court may direct that the thing in litigation be deposited with, or delivered to a third party who shall bind himself to restore such thing, on the termination of the cause or within the time fixed by the court, to the party to whom the court shall order the thing to be restored.*

It could be the court itself making the order.

## Article 852

*The sequestration mentioned in the last preceding article may also be ordered in regard to immovable property, where the possession or ownership thereof is in dispute, or where it is necessary for the security or preservation of the rights of any party interested.*

## Article 853

*(1) The sequestrator shall be chosen either by consent of the parties interested, or by the court ex officio.*

*(2) The sequestrator shall be subject to the same liabilities as the depositary.*

## Article 854

*The sequestrator appointed under article 851 shall be entitled to a remuneration, in the discretion of the court.*

**Jimcam Enterprises Limited vs. Charles Zammit, 2009** - “L-ghan tal-mandat ta’ sekwestru, kemm jekk wiehed ezekuttiv u jekk kawtelatorju huwa dak fejn kreditur ikun irid izomm li ma jghaddux f’idejn id-debitur tieghu, flus jew hwejjeg mobbli li jinsabu f’idejn haddiehor, imsejjah bil-ligi bhala sekwestratarju.”

**Lina Micallef vs. BOV** - This warrant includes both for “gid” li jkun f’idejn is-sekwestratarju fil-waqt li jinhareg mandat, kif ukoll il-gid li jaqa’ f’idejn is-sekwestratarju wara l-hrug tal-mandat, sakemm dan il-mandat ikun fis-sehh.”

**Fenech vs. Montalto, 2010** - The Garnishee who receives this mandate has 19 days to deposit money with the Court Registrar, money or other things in the debtor’s hands. 376(2)(e) and 849 Cap. 12.

If the garnishee has in his hands “*il-gid tad-debitur*”, and does not honour his obligations at law, he is considered acc to 378 and 849 as responsible for damages.

**HSBC Malta Plc vs. Joseph Dimech, 2021** - The D want their money from pension funds to be released from the precautionary garnishee order numbered 1221/2021. On the 13th September 2021, HSBC obtained a precautionary garnishee warrant against them for 22,791 euros. This affected their money deposited in an account in BOV. D is alleging that this money as per 381(1)(b) can not be subject to such warrant.

P is saying that since the garnishee is not the Director for Social Security, the D’s claim is invalid. No money was deposited in the precautionary warrant.

On the 12th Aug 2021, the First Hall accepted HSBC’s demand to have a precautionary garnishee order for 22,791.03euros.

10 garnishees were notified but none of them deposited any money with the Court Registrar.

Article 381 - not everything can be subject to a garnishee order list - “tnaqqar mill-jeddijiet tal-kreditur”, “allura ghandha tigi interpretata b’mod dejjaq hafna”

Rule in 381 not absolute - 382(1)

If such a warrant cannot touch upon certain things, it doesn’t mean that such warrant should be revoked; “Ma jgibx b’daqsekk in-nullita’ tal-mandat ta’ sekwestru”

If anything, “igib fix-xejn biss, il-helsien ta’ dawk il-flejjes mill-effetti tal-mandat”

\_ if pension funds end in a bank account mixed with other monies, there is the possibility for such to lose their character as they are mixed with other monies.

Hence, what HSBC is saying is correct as the Department for Social Security is not listed as one of the garnishees.

# **THE WARRANT OF ARREST OF SEA VESSELS**

## Article 855

*(1) A precautionary warrant of arrest of any sea-going vessel having a length exceeding ten metres may solely be issued to secure a debt or claims, whether in personam or in rem, which could be frustrated by the departure of the said ship, and no other warrant may be issued against a sea-going vessel, with the exception of a warrant of ejectment or expulsion, unless it is a warrant of arrest, and whether such vessel is at sea or at some other place:*

*Provided that a precautionary warrant of arrest may also be issued by the Court in the circumstances provided for under article 1526(5) of the Civil Code to secure, in the event of a default, the rights of lessor against a lessee and the provisions of this title shall also apply to such warrants of arrest, mutatis mutandis:*

*Provided further that for the purposes of article 843, the lessor shall be obliged to file the application pursuant to article 1526(5) of the Civil Code within twenty (20) days from the warrant of arrest.*

*(2) The provisions of article 843 shall apply to the warrant.*

## Article 857

*(1) The authority which has in its hands or under its control the sea going vessel against which such warrant of arrest has been issued shall take all necessary measures to display the court order for the general attention of third parties.*

*(2) For the purposes of this warrant the Authority for Transport in Malta or such other authority as may be designated from time to time by the Minister shall be deemed to be the authority having in its hands or under its power or control the arrested ship or vessel.*

*(3) A vessel is deemed to be in the power or control of the Authority for Transport in Malta as soon as the vessel enters Maltese territorial waters.*

*(4) All expenses as may be necessary for the preservation of the arrested ship or vessel shall, from the moment that the warrant of arrest is served on the Authority for Transport in Malta, be borne by the party issuing the warrant, saving his right to recover such expenses together with his claim.*

## Article 859

*A warrant may be demanded and obtained before the Court of Magistrates (Malta) or before the Court of Magistrates (Gozo) in its inferior jurisdiction or before the First Hall of the Civil Court in security of a debt or any other claim whatsoever amounting to not less than seven thousand euro.*

## Article 861

*Where it is found that the warrant was obtained upon a demand maliciously made, the penalty in terms of article 836(8) shall not be less than eleven thousand and six hundred euro.*

In this case he was negligent and he did not realise it was paid.

## Article 862

*It shall be lawful for the court, on good cause being shown, upon the demand by application by a person whose ship or vessel is detained, by the master of the ship or vessel, or by any person being in charge thereof or by its agent, to order the party suing out the warrant to give, within a time fixed by the court, sufficient security, in an amount not less than eleven thousand and six hundred euro, for the payment of the penalty, damages and interest and, in default, to rescind the warrant.*

The party against whom the warrant has been issued, if he feels that the amount could have been safeguarded by other means, he can ask the court to order the plaintiff to provide sufficient security should it result that the case would be unsuccessful.

If the other party convinces the court that there could be doubts about the plaintiffs action, he shall ask that sufficient security is given.

## Article 863

*(1) No warrant shall be issued against any ship or vessel wholly chartered in the service of the Government of Malta or employed in any postal service either by the Government of Malta or by any other government.*

*(2) No warrant shall be issued against any ship of war.*

*(3) Following the arrest of a ship or vessel in any port or harbour in Malta and on the application of the Authority for Transport in Malta, a court may, if it is satisfied that because of its cargo, its length or draught and, or other circumstances concerning safety, pollution, navigation or port operation, it is advisable that the seagoing vessel should leave port without*

*delay, order that the ship or seagoing vessel be shifted from that port or harbour to any other anchorage within territorial waters.*

*(4) Following the arrest of a ship or vessel in any port or harbour or in the territorial waters of Malta, and on an application of the Authority for Transport in Malta, a court may, if it is satisfied that because of the nature of its cargo and, or other circumstances concerning safety or pollution it is advisable that the ship or vessel should leave port and, or Maltese territorial waters, rescind the warrant of arrest and order that the ship or vessel should leave Malta and its territorial waters without delay.*

## Article 865

*(1) If, notwithstanding the issue and execution of a precautionary warrant of arrest, a ship or vessel is removed from the jurisdiction of the court in breach of the warrant of arrest, the owner, bareboat charterer or other person being in possession of the ship or vessel at the time of such breach shall be jointly and severally liable to a penalty of one hundred and sixteen thousand and four hundred and seventy euro payable to the party issuing the warrant.*

There is joint and several liability for any personing acting in breach of the court order. This is over and above the penalty of lack of respect of the court.

*(2) The liability for the payment of a penalty arising under this article shall be without prejudice to any other possible sanction arising under the provisions of Title XVII of Book Third of this Code.*

# **THE WARRANT OF ARREST OF AIRCRAFT**

These replicate the previous title. The difference is that we can arrest not just the aircraft but also the aircraft engine as they may be owned by two separate individuals.

## **Article 865B**

*(1) The warrant of arrest shall have the effect to seize the aircraft from the debtor and also to attach the same in the hands of the authority where the property is, and also to order that the said authority shall not release such aircraft or allow the debtor to divest himself in any way from the same in whole or in part or to give or surrender to any person any rights on the same .*

*(2) The warrant is executed for all effects of the law when notice is served on the executive officer of the authority which has the aircraft in its hands or under its power or control.*

*(3) A copy of the warrant of arrest shall also be served on the person whose aircraft is arrested or the aircraft commander or other person in charge of the aircraft or the agent of such aircraft.*

*(4) Notwithstanding the provisions of sub-article (1), where aircraft engines are not owned by the owner of the aircraft, the effect of the warrant of arrest applies to the engine only to the extent that the application for the warrant of arrest expressly states that the warrant is also intended to operate in relation to the engine and in all other cases it shall be presumed that if the engines are not owned by the owner of the aircraft, the warrant is not intended to extend to the engines and the Authority for Transport or the Court shall act on such presumption if petitioned by the owner of the engines who also provides satisfactory evidence of his title to the engines.*

*In this sub-article the term "owner" of an engine shall include any mortgagee or holder of any international interest or other security interest over the engine.*

## **Article 865C**

*(1) The authority which has in its hands or under its control the aircraft against which such warrant of arrest has been issued, shall take all necessary measures to display the court order for the general attention of third parties.*

*(2) For the purposes of this warrant the Authority for Transport in Malta, or such other authority or person as may be designated from time to time by the Minister shall be deemed to be the authority having in its hands or under its power or control the arrested aircraft.*

*(3) An aircraft is deemed to be in the power or control of the Authority for Transport in Malta as soon as the aircraft enters Maltese airspace.*

*(4) All expenses as may be necessary for the preservation of the arrested aircraft shall, from the moment that the warrant of arrest is served on the Authority for Transport in Malta, be borne by the party issuing the warrant, saving his right to recover such expenses together with his claim.*

## Article 865E

*(1) A warrant may be demanded and obtained before the Court of Magistrates (Malta) or before the Court of Magistrates (Gozo) in its inferior jurisdiction or before the First Hall of the Civil Court in security of a debt or any other claim whatsoever subject to the following limitations:*

*(a) aircraft:*

*(i) in all cases the amount of the claim must not be for less than seven thousand euro;*

*(ii) in case of an aircraft being used for public air transport of passengers or goods:*

*(aa) for aircraft permitted to carry less than ten passengers, the claim must not be for less than two hundred and fifty thousand euro; and*

*(bb) for aircraft permitted to carry more than ten passengers the claim must not be for less than one million euro;*

*(b) engines:*

*(i) if the engine is not attached to the aircraft the claim must be for not less than seven thousand euro;*

*(ii) if the engine is attached to an aircraft referred to in paragraph (a)(ii)(aa) the claim must not be for less than fifty thousand euro;*

*(iii) if the engine is attached to an aircraft referred to in paragraph (a)(ii)(bb) and the engine is not owned by the owner of the aircraft, the claim must not be for less than one hundred thousand euro; and*

*(iv) if the engine is attached to an aircraft referred to in paragraph (a)(ii)(bb) and the engine is owned by the owner of the aircraft, the claim must not be for less than one million euro.*

## Article 865G

*(1) Where it is found that the warrant was obtained upon a demand maliciously made, the penalty in terms of article 836(8) shall not be less than the commercial value of a lease which the aircraft or aircraft engine may attract, notwithstanding that the aircraft or engine may not have been subject to an actual lease, and depending on the type, value and operation of the aircraft, or engine, and which in no case shall be less than eleven thousand and six hundred euro.*

*(2) The Court shall take into consideration only the daily lease value and no other type of damages.*

## Article 865I

*(1) No warrant shall be issued against any aircraft wholly chartered in the service of the Government of Malta.*

*(2) No warrant shall be issued against any aircraft of war.*

*.... Longer article ...*

## Article 865K

*(1) If, notwithstanding the issue and execution of a precautionary warrant of arrest, an aircraft is removed from the jurisdiction of the court in breach of the warrant of arrest, the owner, lessee or other person being in possession of the aircraft at the time of such breach shall be jointly and severally liable to a penalty of one hundred and twenty thousand euro payable to the party issuing the warrant.*

*(2) The liability for the payment of a penalty arising under this article shall be without prejudice to any other possible sanction arising under the provisions of Title XVII of Book Third of this Code.*

Again besides the penalty the court may also take action for lack of respect (if they do not abide by the courts order).

# **PRECAUTIONARY WARRANTS**

Warrant of prohibitory injunction VERY IMP mandat ta inibizzjoni

**Article 873 COCP** - OBJECT OF this warrant is to restrain a person from doing anything prejudicial from person suing out a warrant -

- Each case will depend on its own merits, were it to be upheld you have a good tool,

Why there are problems - with this warrant sub 2 - even at this stage, the law tells us that the court will not issue such a warrant. The court will not issue such a warrant unless it is satisfied that the warrant is necessary to - to the person suing out the warrant. The court has to be satisfied that a warrant is necessary to preserve the right. The court must ensure that prima facie the person has the power to possess such a right.

You are asking for a preliminary remedy but the court has to be satisfied that this issue of this warrant is REALLY NEEDED and hence on a prima facie basis, the person claiming the right appears to possess such right. Hence what appears helpful is rather awkward.

We go on, sub 3 - court will not issue such a warrant. Any person holding a public office, unless the authority concerned or person in public office against whom the warrant is being demanded confirms in open court, not in camera, that the thing sought to be restrained is in fact intended to be done, hence already almost discriminatory.

If by time – that warrant would be useless, but even at the outset - gov stands in a privileged position. Gov is meant to be acting on the common good. In order to obtain it you have to have actual confirmation from the department concerned, one case where the judge decided that once this proof had not been made in open court, court said then the warrant is rejected as you need to have it confirmed on oath. In other instances we have the court accepting the issue of the warrant, seeing that it resulted from the documents exhibited.

The court did not insist on having a confirmation on oath, sensing that this was creating a prejudice this advantage to gov. In one case, the judge allowed evidence submitted in writing, in another the court said these are rules of public order. I will reject the issue of the warrant. Simply representing the - is the first step, all this becomes really problematic. The court has to be satisfied, which means the applicant has to make sure that the court has got enough evidence in front of it after hearing explanations given that unless a warrant is issued, the prejudice of the person suing out the warrant would be disproportionate when compared to the actual thing sought out to be restrained. The court demanded 2 conditions,

1. Confirmation on oath
2. And up to the court in its discretion

Is the prejudice to the applicant greater than the thing if it were to be stopped? If the court believes no disproportion, the court will reject the warrant. The court must be satisfied that

unless a warrant is issued, prejudice suffered by the applicant is disproportionate. Which means that if there is some prejudice, one is a bit annoyed that one's wall has been demolished but if not disproportionate, no room for the issue warrant - one has to prove to court that the prejudice would be enormous, suffering immensely so much so that court is forced to stop the gov to stop workers.

Sub 4 - if on application - court shall condemn a person to allow the applicant to carry out any works necessary - you might have respondents who will still go ahead with the works they were prevented from doing.

**Article 874 - Warrant of Prohibitory Injunction** - provides that this warrant may be resorted to by a creditor to secure a debt exceeding 11,647 - how is one helped ? The object of this warrant is to restrain the other person from alienating or transferring such other property as may be indicated in the application. Once B owes you money and debt exceeds the 11k, if you actually submit to court that you have enough evidence that you have a problem to getting paid, if owner sells or donates it, you can stop such person such debtor from transferring the property, so the property is bound by that warrant and you stand a good chance at being paid, so at least there is this apparent situation.

Sub 2 - application will include all particulars all necessary to identify person in the public registry so as to prevent the possibilities of a sale and hence they should come across this in the public registry

Sub 3 The law tells us the warrant is served - and registered in public registry

Sub 4 - upon registration - any future sale, disposal or - shall be void and of no effect, but who is going to decide who is right? You have to go to court, not plain sailing. Law itself is envisaging that a sale takes place, but it can never take place. Law is envisaging that the disposal of property has taken place. Any disposal of such property will be null and void. But can you automatically say so? In all probability the acquirer will tell you - this sale is valid as far as i am concerned and he will contest that the sale is null.

Where the debtor likes to transfer shares in a commercial partnership

**Mario Ellul u Christine Ellul vs. GrandMasters Properties Ltd, 8th April 2025, Court of Appeal**

P opened a court case as D did not want to sign the final deed for the sale of a garage in Zabbar. On the 26th September 2024, the Court (First Hall Civil Court) said that the P could not oblige company D for the contract of sale for a garage in Zabbar (Konvenju signed on the 3rd April 2019). The First Court said that since there is a warrant of prohibitory injunction in place, on the whole block of apartments where this garage is situated, D can not be obliged to sell.

The Court of Appeal reversed the judgement and sided with Plaintiffs as it said that such a warrant should not interfere with Article 1357 of Cap. 16.

The court in this case quoted article 152(5) COCP - where written pleadings have been closed, it is lawful for the court to proceed with the judgement. The COA saw a clause in the promise of sale agreement that the property is to be sold “hielsa minn kull xorta ta’ litigazzjoni” and “minghajr dejn u/jew ipoteka”.

The Plaintiffs insist that they did not know of this warrant of prohibitory injunction. Since the D knew they were selling the property subject to the warrant of prohibitory injunction, and since this warrant was in effect, Article 874(4), any transfer or alienation is null and without effect. However, the D company still promised to sell the property free and unencumbered. The COA stated that P did not fully understand the existence of the warrant being in place so much so that the testimony of Mario Ellul, no warrant was ever mentioned. Hence since no mention was evident, D have to honour their obligation and sell, so much so that if up until the contract date, the D have not yet removed their warrant, they must duly compensate the Plaintiffs.

### **Joseph Micallef vs. Joseph Bartolo, 2005**

P + D - owned tenements on top of each other with common ownership of “kamrin tal-injam”. Before the case was filed, D threatened to remove the partitions. In June 1991, he obtained a warrant of prohibitory injunction in his favour and initiated proceedings to confirm this injunction, and prevent the D from destroying and damaging the wooden room. The Court did not uphold the request to confirm the injunction as such is a temporary measure and once judgment was given, that serves as protection.

**875** - application for warrant shall be served - the application confirming that form shall be served on the party on whom it is issued who shall file a reply within 10 days, the court will normally agree to the issue of the warrant. Precautionary warrant hence needs the confirmation on oath and the court will temporarily uphold it. The party needs to know that he will be stopped from carrying out the works. In urgent cases this time limit of 10 days can even be reduced. 10 days within which to reply. In default, the court will confirm the warrant.

Sub 2 - court may issue a warrant for a short period and then once it appoints a hearing, it will decide on the merits, once it considers the application and any answer filed by the debtor, the person being restrained who is stopped. This has to take place not later than 1 month. Court may have initially - on hearing parties it dismissed the warrant hence it will no longer be valid.

Another instance where we meet this warrant 876 -1a case of a spouse who brought or brought case for personal separation hence the spouse who intends filing the case may ask for the issuing of this warrant against other spouse to stop him/her from selling whether by gratuitous or

Shareholding - shareholder - AZZJONISTA -

As long as such shareholding is comprised in the COMMUNITY OF ACQUETS -

**876A** - 876A. The provisions of articles 829 to 844 shall apply to the warrant of prohibitory injunction.

**877** - the warrant may also be resorted

That disproportionate element starts getting an even sinister reputation - it could be argued by the other side could be remedied by the payment of damages - -- whereas ~

**889** - Main difference between - judicial letter and a protest will interrupt prescription - hence if a client approaches you and claims damages in a car accident in June 2023 - seeing where the time limit is near, you file a judicial letter.

**Awtorita' ghat-Trasport f'Malta vs. Ronald Gerada**

P said that D should pay 1,665eu for damages caused whilst he was driving - D said this action is time barred. For a Judicial letter to interrupt prescription, it must be notified to D.

891 COCP - provides that the judicial letter sent interrupts prescription as long as 8 days or else Gov Gazette.

Registered in court and interrupts prescription whereas the private letter – which will make the 2 year period from damages will make it running once more - do be careful - don't send them unnecessarily but if needed send them both - il protest -

**ITTRA UFFICJALI** - JUDICIAL LETTER - *OFFICIAL LETTER DOES NOT EXIST BE CAREFUL!!!!*

HOW YOU END A PROTEST -

IPOGGI IN DOLO MORA ET CULPA ALL EFFETTI U L FINIJET KOLLHATAL LIGI - YOU will suffer damages and you have o pay interest for all effects at law

**890** - THE LAW - from day at the day of service

# DISCONTINUANCE

## OF DISCONTINUANCE

Withdrawal of acts.  
*Amended by:*  
[XXVII.1979.20](#);  
[XXIV.1995.328](#).

**906.** (1) Any of the parties may, by means of a note signed by him or his advocate, at any stage of the trial before definitive judgment is given, withdraw the acts filed by him.

(2) If on the day appointed for the trial as stated in article 152, the notice mentioned in article 152(2) was not served upon him, his advocate or his legal procurator, and the failure of service has persisted for more than one month from the date first set for the trial, the court shall adjourn the case *sine die*.

Effect of  
withdrawal.  
*Amended by:*  
[IX.1886.109](#).

**907.** (1) The withdrawal produces the same effects as desertion.

Payment of costs  
before institution  
of fresh action.

(2) The party discontinuing the action shall pay the costs of the proceedings, and he may not commence another action for the same cause before he has actually paid such costs to the other party.

Conditional  
withdrawal.  
*Amended by:*  
[IX.1886.109](#).

**908.** Where the withdrawal is not unconditional, it shall be lawful for the other party not to accept it and to insist that the action be proceeded with and determined.

Annexing of  
exhibits to fresh  
record.  
*Amended by:*  
[XXIV.1995.329](#).

**909.** If the party discontinuing the action desires to commence another action for the same cause, any of the exhibits or any other evidence produced by him in the former proceedings, shall at his request be inserted in the record of the new action; and where the new action is, or has been instituted in another court, any such exhibits or any other evidence shall, upon a demand to that effect by an application, be forwarded to such other court.

Effect of  
discontinuance of  
appeal by some of  
the co-appellants.

**910.** Where several parties having the same interest have entered an appeal against a judgment and some of the parties have discontinued their appeal, it shall not be lawful for the other parties continuing the appeal to demand, in the same proceedings, the adjudication in their favour of the shares of the parties discontinuing the appeal in addition to what they have originally claimed.

### **Saviour Borg Et Noe Vs Alex Zammit Noe, 18/01/1989, Appeal Superior**

*Appell jitqies irtirat minghajr kondizzjoni jekk l-avviz tas-smigh ma jigix notifikat fi zmien tliet xhur mill-ewwel smigh ta' l-appell.*

L-Artikolu 906 tal-Kap. 12 jiddisponi illi l-appellant ghandu jitqies li rtira l-att ipprezentat minnu minghajr ebda kondizzjoni jekk wara li guranta tkun stabbilita ghas-smigh l-avviz imsemmi fl-art.152(2) ma jkunx gie nnotifikat lilu u dana n-nuqqas jibqa' ghal aktar minn tliet xhur mid-data ta'l-ewwel gurnata tas-smigh. fil-kaz prezenti kif inhareg l-avviz, dan ma seta' qatt jigi notifikat fil-kwalita' li qed jidher fil-kawza u fil-kwalita' li qed jappella u dana billi l-avviz qatt ma nhareg

kontra tieghu f'dik il-kwalita'. konsegwentement ma jkienx hemm lok ghall-applikazzjoni ta' l-artikolu 906 tal-Kap. 12.

**Sebastian Brincat noe et vs Antonio Mifsud**” (P.A. (RCP) - 28 ta’ Frar 2001), giet ritenut is-segwenti:-

“l-konvenuta illum qed isostni li a bazi ta’ dik is-sentenza, din l- kawza ma setghetx issir, qabel mal-atturi odjerni jhallsu l- ispejjez ta’ dik il-kawza lill-atturi, u milli jidher l-istess konvenuta qed tibbazza din is-sottomissjoni taghha fuq l-artikolu 907 (2) tal-Kap 16 li jipprovdi:- “Il-parti li tirrinunzja ghall-atti ghandha thallas l-ispejjez tal-kawza u hija ma tistax tibda kawza ohra ghall-istess haga qabel fil-fatt ma tkun hallset l-ispejjez tal-parti l-ohra.”

“Illi skond l-artikolu 907 (1) “ir-rinunzja ggib l-istess effetti ta’ dezerzjoni”.

“Illi huwa rilevanti wkoll f’ dan il-kuntest dak li jipprovdi l-artikoli 906 (1) tal-Kap 12 u cioe’ illi:-

“Kull wahda mill-partijiet tista’, b’nota ffirmata minnha jew mill- avukat taghha, f’kull waqt tal-kawza sas-sentenza definittiva, tirrinunzja ghall-atti illi hija tkun ipprezentat”.

“Illi kif jidher car mill-istess artikoli, r-rinunzja hemm indikata tirreferi ghal xi att li jaghmel l-attur fil-kawza, b’mod li jgib it- terminazzjoni tal-pendenza quddiem il-Qorti li jkun originarjament ressaq huwa stess, u zgur li dan jirreferi ghall- atti ta’ cessjoni ta’ kawza (“Doris Arry et vs Emmanuel Zammit” - P.A. (RCP) 17 ta’ Jannar 2001).”

# Desertation of Causes

963. (1) Saving the provisions of sub-article (3) and of articles 416 and 420, the written pleadings in any cause shall be closed, in first instance, within the peremptory time of six months, and, in second instance, within the peremptory time of one year.

Time for close of pleadings.  
Amended by:  
[IX.1886.120](#);  
[XXXI.1934.81](#);  
[XXIV.1995.350](#);  
[IV.1996.13](#);  
[XXII.2005.74](#);  
[VIII.2007.29](#).

(2) The time shall commence to run, in first instance, from the day on which the sworn application is filed, and, in second instance, from the date of the application of appeal for the reversal or variation of the judgment appealed from.

Running of time in first and second instance.

(3) If, even where the peremptory times referred to in sub-article (1) shall have lapsed, it is found that the written pleadings in any cause are not closed, the court shall once only give such orders which it may deem fit so that such pleadings may be closed as soon as possible in order to avoid that such cause be deserted by reason of some failure to notify or by reason of the failure of performance

Power of court.

**Brian Tonna bhala stralcjarju tas-socjeta`  
European Insurance Group Limited  
(C35708)**

v.

**Luciano Rotondi,**

**13th July 2018, Court of Appeal**

Pleadings to be deemed closed if party not served with pleading appears at trial.

(4) Notwithstanding the provisions of sub-article (3), the pleadings shall be deemed to be closed if the party not served with the pleading necessary for the close of the record, appears at the trial and does not raise the question that the pleadings are not closed and proceeds or knowingly allows others to proceed to further acts without raising such question.

If pleadings are not closed, cause to be deemed deserted.

(5) Saving the provisions of article 732(2), the causes the written pleadings whereof are not closed, in spite of the orders given by the Court in accordance with sub-article (3), within the said time shall:

- (a) where the cause is before a court of first instance be deemed to be a cause which has been set down for hearing and subsequently by order of the court, adjourned to an unspecified date, and the provisions of articles 964 to 967 shall apply thereto; and
- (b) where the cause is before a court of second instance, be deemed to be deserted.

Effects of desertion.

(6) The desertion of any cause in first instance shall operate as an abandonment of the proceedings, but shall not bar the right of action. In second instance, the desertion shall operate as an abandonment of the appeal and the judgment appealed from becomes *res judicata*.

Causes adjourned *sine die* or otherwise suspended.  
Amended by:  
[XI.1859.40](#);  
[IX.1886.120](#);  
[XV.1913.173](#);  
[XIII.1964.24](#).  
Substituted by:  
[LII.1981.3](#).  
Amended by:  
[VIII.1990.3](#);  
[XXIV.1995.351](#).  
Substituted by:  
[XXXI.2002.188](#).  
Amended by:  
[XXXII.2021.12](#).

964. (1) Any cause in any court of civil jurisdiction which, after having been set down for hearing, is subsequently by order of the court adjourned to an unspecified date or otherwise suspended, shall be deemed to be deserted unless it is re-appointed for hearing by the court within the peremptory time of three (3) months of it having been so adjourned or suspended or an application for its re-appointment has, within such period, been filed in court:

Provided that where the cause has been suspended until judgment is pronounced in another cause, the said time shall commence to run from the date when such judgment is delivered.

(2) Re-appointment shall be made either by the court on its own motion or following the application of any of the parties

Minn ezami tal-atti jirrizulta li l-appell in ezami gie appuntat ghas-seduta tal-10 ta' Ottubru, 2017, disa' xhur wara li gie ntavolat ir-rikors tal-appell u ghalkemm ma kienx ghadu ghalaq it-terminu perentorju ta' sena mahsub taht l-Artikolu 963(1) tal-Kap. 12, waqt dik is-seduta nghataw l- ordnijiet li jistghu jinghataw ghal darba wahda biss kif mahsub taht l- Artikolu 963(3). Kwindi l- orti tat koncessjoni lill-appellanti ta' oltr tliet xhur sabiex isiru n-notifiki li kien baqa' u b'hekk jinghalqu l-istess proceduri bil-miktub. Kif jipprovdi l-istess subartikolu in ezami, dan huwa permess ghal darba wahda biss.

Id-dezerzjoni ma ssehhx jekk dak li jkun ordnat il-Qorti jitwettaq. Fil-kaz in ezami jirrizulta li ghalkemm l-appellanti sehhlhom jinnotifikaw lil erba' mill-appellati, ghalkemm fittxew li jinnotifikaw ukoll lill-appellat Andrea Ratti, dan baqa' ma giex notifikat la fit-terminu moghti mill-Qorti kif kontemplat taht

l-Artikolu 963(3), u lanqas fit-terminu perentorju ta' sena kif kontemplat taht l-Artikolu 963(1), peress li jirrizulta li t-talba ghall- hatra ta' kuraturi deputati sabiex jirraprezentaw lill-istess Ratti saret oltr t-terminu ta' sena minn meta kien intavolat ir-rikors tal-appell.

Jigi osservat li ghalkemm l-appellanti ghamlu zewg tentattivi ta' notifika wara l-ewwel udjenza quddiem din il-Qorti, liema tentattivi ma rnexxewx, l-istess appellanti ghamlu disa' xhur shah wara li gie ntavolat ir-rikors tal-appell fejn baqghu passivi u ma sar ebda tentattiv da parti taghhom li jintraprendu l-proceduri opportuni sabiex issir in-notifika lill-intimati barranin li jghixu l-Italja. Il-fatt jibqa' li ghalkemm il-Qorti tat ordni lill- appellanti sabiex isiru n-notifiki li

kien ghad baqa' li jsiru, sabiex tigi evitata d-dezerzjoni, l-intimat appellat Andrea Ratti baqa' ma giex notifikat u wisq inqas inghalqu l-proceduri bil-miktub fit-terminu perentorju ta' sena kif kontemplat mil-ligi, li jwasslu lil din il-Qorti ghall- fehma li l-appell ghandu jigi dikjarat dezerz.

Ma jaghmel ebda sens jinghad li peress li l-appellanti ghamlu zewg tentattivi ta' notifika wara li l-Qorti akkordat terminu sabiex isiru n-notifiki, jew il-fatt li kien ghadu ma skadiex it-terminu perentorju ta' sena meta din il- orti akkordat lill-appellanti l-opportunit li jsiru in-notifiki mehtiega, dan iwassal sabiex tigi evitata d-dezerzjoni, altrimenti tkun qieghda tixxejjen in-natura eccezzjonali tar-rimedju kontemplat taht l- Artikolu 963(3). Din il- orti hija propensa li taqbel ma' dak osservat mid-difensur tal-istralcjarju appellat waqt it-trattazzjoni, li l-fatt li t-test tal- ligi fil-bidu tas-subartikolu (3) juza l-kliem: “Jekk, ukoll”, dan ghandu jfisser li fin-nuqqas li tigi osservata dik l-ordni, ukoll jekk ma jkunx ghadu ddekkorra t-terminu ta' sena, dan ghandu xorta jwassal ghad- dezerzjoni. Multo magis f'dan il-kaz fejn il-proceduri bil-miktub baqghu ma nngalqux fit-terminu perentorju ta' sena.

Dan qieghed jinghad ukoll peress li s-subartikolu (3A) tal-Artikolu 963 jipprovdi li meta minkejja l-ordnijiet moghtija mill-Qorti skont is- subartikolu (3), il-proceduri bil-miktub jibqghu mhux maghluqa, l-kawza quddiem il-Qorti tat-tieni grad ghandha tigi dikjarata bhala kawza dezerta. It-terminologija adoperata hija certament wahda mandatorja u mhux wahda fakoltattiva, u dan fil-fehma ta' din il-Qorti, sabiex jigi enfasizzat il-htiega li l-proceduri jsiru bl-ispeditizza mehtiega sabiex tigi deciza kawza fi zmien ragonevoli.

l-fatt li l-appellanti baqghu passivi ghal disa' xhur shah isahhah il-fehma ta' din il- orti li hija ghandha tapplika b'rigorozit l-provvedimenti tal-ligi tal-procedura, f'dan il-kaz l-istitut tad-dezerzjoni, mahsuba bhala disinceniv ghad-dewmien li jirrizulta fil-proceduri gudizzjarji dovut ghal traskuragni. Huwa ritenut li l-appellanti kellhom jadoperaw il-proceduri opportuni ta' notifika minnufih. Wara kollox mill-atti jirrizulta li ghalkemm l-istralcjarju appellat ghamel uzu mill-procedura ta' notifika idoneja minnufih sabiex jigi notifikat Ratti, fl-indirizz moghti ta' “Via Alessandro Manzoni nr.253, Pi 2, Quartiere Posillipa, c.a.p. 80123 – Napoli, talia”, mir-referti in atti jirrizulta li l-istess intimat appellat kien jirrizulta “Destinatario Trasferito” sa minn Marzu 2017 (kif jidher mir-referta a tergo ta' fol. 28). Kwindi t-tentattiv tal-appellanti li jaghmlu n-notifika fl- istess indirizz f'Ottubru u Novembru, 2017, zgur li ma kienx ser ikollu r- rizultat mixtieq.

Id-diffikultalji li sabu ma' wicchom l-appellanti wara li nngat li l- opportunit li jaghmlu n-notifiki mehtiega ma kienux insormontabbli, izda l-appellanti hallew tard wisq sabiex jittantaw jaghlqu l-proceduri bil- miktub permezz tal-hatra ta' kuraturi deputati. Huma kellhom jinqedew b'din il-procedura qabel u mhux wara li skada t-terminu perentorju ta' sena.

Kwinda ladarba rrizulta li l-proceduri bil-miktub ma nghalqux wara l-ordni li tat din il-Qorti fl-10 ta' Ottubru, 2017, u baqghu ma nghalqux anqas fiz- zmien perentorju ta' sena, tiddikjara l-appell dezert. L-ispejjez ta' dan l- episodju jibqghu a karigu tal-appellanti.

L-atti qed jigu rinvjati lill-ewwel Qorti ghall-kontinwazzjoni.

# The Law of Evidence

**Cap. 9 Article 520** - you will see a list of references to articles found in Cap. 12 - many of the things you will have with Quintano will be referred to in these paragraphs, d and e particularly. Example: We deal with documents here. If you have a case of money laundering or of fraudulent accountancy, you may deal with a suicide note. Usually people leave a message before committing suicide. You may find that but also other documents. Money laundering - not the favourite to us lawyers. The idea that a lawyer does not have to worry about numbers and sides; old fashioned incorrect assumptions.

## Cardinal rules of evidence Article 558

1. **Relevant to the matter** in issue between the parties - the Court does not have time to wait for irrelevant material - documents on how this house devolved on me and then you have the work of an expert, an architect and he sells how one should calculate the rent which is in the ownership back to 1987, as it was then that the eu convention on human rights began part of Malta's laws now chapter 319.

**Article 558, Cap 12** - "558. *All evidence must be relevant to the matter in issue between the parties.*"

**Cauchi vs. Malta** - first you calculate the rank how much it is then you start deducting. A collision: you spend 6 weeks in hospital, then you start paying for pills, medication, then the receipts of your doctor. When you buy the pills you have to produce those receipts. What your current or last pay was, how old you are, then work it out whether that date until 65 or some other day.

2. **No Irrelevant Material** - In all cases the court should accept **the best evidence** the parties are willing to produce. A contract of donation, testimony, you produce those if not originals you produce a true faithful copy of the original. When someone passes away, you have to provide certificates in all of these and if there is a will - if you have noticed - you get a certificate of wills. As lord of the UK once said, normally this has to do with documentation - what documents do you have of marriage of X with husband in the Philippines. You need to get a certificate that the marriage was celebrated in the Philippines. As a rule you must not only sign but also use your special stamp. In other cases if I am examining whether a fair distribution has been made of a small partnership, then you have to check the invoices as well.

“Article 559, Cap 12. - “559. In all cases the court shall require the **best evidence** that the party may be able to produce.”

3. **He who alleges must provide the evidence** - (562 skipped) - Burden of proving a fact shall in all cases rest on the **party alleging it**. If in civil proceedings and alleging that my wife is having an extramarital affair, I have to prove that claim. I have recorded her conversations over the telephone. Circumstantial evidence. Aaron Bugeja -**IL-PULIZIJA vs RISTIC LELA**. The suspended sentence you are trying to save the victim by saying pay the victim within 6 months. People used to pay.

“Article 562 Cap. 12 - 562. Saving any other provision of the law, the burden of proving a fact shall, in all cases, rest on the party alleging it.”

## **Circumstantial Evidence**

Circumstantial evidence is indirect evidence that does not, on its face, prove a fact in issue but gives rise to a logical inference that the fact exists. Circumstantial evidence requires drawing additional reasonable inferences in order to support the claim.

For instance, circumstantial evidence of intentional discrimination can include suspicious timing, ambiguous statements, different treatment, personal animus, and other evidence can allow a jury to reasonably infer intentional discrimination.

**Circumstantial evidence** is proof of a fact or set of facts from which one could **infer** the fact in question. For example, that a suspect is seen running away from a murder scene with a weapon in hand is **circumstantial evidence** he committed the murder. This contrasts with **direct evidence**, which directly proves the fact in question. An eyewitness who testifies to seeing the suspect shoot the victim is **direct evidence**.

Both direct and **circumstantial evidence** are considered legitimate forms of proof in federal and state courts. A person may be convicted of a crime based on **circumstantial** proof alone. And indeed, with the prevalence of mistaken identification and false testimony, **inferential proof** is oftentimes thought to be even more reliable than direct proof.

In trials for criminal cases, the prosecution commonly relies on **circumstantial** evidence. Defense lawyers typically respond with one of two **strategies**. The first is to **cast doubt on the circumstantial proof** itself. If the premise(s) are not proven, then the **inference** should not be drawn.

The second is to show that even if all the circumstantial facts are true, they lead to two or more **reasonable conclusions**. And at least one of them is **consistent** with the defendant being innocent. In other words, there is **reasonable doubt** as to whether the accused is guilty.

## Examples of circumstantial evidence

- Evidence that establishes a motive.
- Evidence of an opportunity to commit the offence.
- Evidence of the accused's state of mind when the offence was committed.
- Evidence of the accused preparing for the crime.
- Evidence of the accused having items that could be used to commit the offence.

### Hearsay Evidence - Further Case Law.

459/53 14<sup>th</sup> January 1986. Hugh Harding.

**Dr Giovanni Bonello v Alfred Mifsud.**

**Ħsara f'incident stradali. L-appellant fuq quantum tad-danni – il-Qorti ma jmissiex qaghadet fuq hearsay evidence. Il-Qorti ma taqbilx ma' din is-sottomissjoni.**

F'ċerti każijiet il-Qorti tista', skont icċirkostanzi, tippermetti xhieda fuq kliem ħaddiehor u fost dawn il-każijiet hemm il-każ ta' meta dan l-istess kliem ħaddiehor ikollu, fih innifsu, importanza sostanzjali fuq il-mertu tal-kawża jew ikun jagħmel parti mill-lertu, (Ara wkoll Koll. Drċ. Vol.XXXVII – II- 693 Av.Dr.Albert Ganadao v Grech nomine 16.04.1953 fejn dik il-Qorti f'każ ta' adulterju ħadet in konsiderazzjoni dak li qal xhud fuq l-għajdut tan-nies appunta għaliex ta' importanza fuq il-mertu.)

L-attur appellat kien xehed dwar iċ-ċirkostanzi li tawh it-tellari verbalment. Il-kliem tagħhom kellu fih importanza sostanzjali fuq il-mertu fil-kawża prezenti. Ma setax jesibixxi riċevuti għaliex il-karozza nbiegħet u ma kenitx imsewwija minnu.

Stima mhux ġuramentata minn min għamilha u na setax isirlu kontro-eżami fuqha. Seychell v Seychell 27.03.1936 (Koll. XXIX – I – 570, 580 U Strickland v Chretien (Koll..Deċ. Vol XXIX – I – 860, 863) 'meta l-legislatur qal tista' tkun ammissa prova simili kien ammetta prova ta' bla ġurament u li ma sarx fiha l-kontro-eżami u kieku kien xort'ohra taht l-ebda ċirkostanza ma kienu jistgħu jkunu riċevuti dettalji simili bħala prova. Il-ġudikant pero' f'kawżi simili għandu juża ċirkospezzjoni kbra qabel ma jirċievi dawk id-dikjarazzjonijiet bħala provi konkludenti.'

<b>Date</b>	13/01/1988
<b>Court</b>	Constitutional
<b>Judiciary</b>	Harding Hugh, Herrera Joseph A., Agius Carmel A.
<b>Parties</b>	Joseph Mary Vella Et Vs Il-Kummissarju Tal-Pulizija Et
<b>Keywords</b>	Ammissibilita' Ta' Eccezzjoni Dwar Sigriet Professionali - Hearsay - Provi (Evidenza) - Valutazzjoni Ta' - Xhieda
<b>Summary</b>	Appell minn digriet interlokutorju dwar l-ammissibilita' ta' xhud. F'kawza pendenti quddiem il-Prim' Awla tal-Qorti Civili għar-rimedju minhabba ksur tad-drittijiet fundamentali tar-rikorrenti, konsistenti, fl-arrest illegali u assogettazzjoni tagħhom għal minacci, swat u tortura, dawn talbu li jipproducu bħala xhud prokuratur legali biex jixhed dwar fatti rilevanti li kien sema' minghand terza persuna fil-kors ta' l-ezercizzju tal-professjoni tiegħu minghajr ma jizvela l-identita' ta' l-istess. Il-Prim' Awla ppermettiet tali xiehda; il-Qorti Kostituzzjonali kkonfermat. Ix-xhud ma setax jizvela l-isem tal-persuna li kienet tatu l-informazzjoni billi kien marbut bis-sigriet professjonali. Kellu biss il-permess minn dik il-persuna li jixhed il-fatti lilu rakkontati. Tali xiehda tikkostitwixxi "hearsay". Ir-regola li tipprojbixxi tali xiehda ma hix wahda assoluta imma soggetta għal diversi eccezzjonijiet. Il-Qorti tista', skond ic-cirkostanzi, tippermetti xiehda fuq kliem ħaddiehor u tiegħu konjizzjoni tagħha meta dan l-istess kliem ħaddiehor ikollu, fih innifsu, importanza sostanzjali fuq il-mertu tal-kawża jew jagħmel parti mill-mertu, inkella meta dan ħaddiehor ma jkunx jista' jingieb biex jixhed u l-fatti jkunu tali li ma jkunx jistgħu jigu ppruvati sewwa xort'ohra. Għalhekk ix-xiehda fil-kaz prezenti kienet ammissibbli.

*Hearing 13/01/88*

## **558-599 SECTIONS TO KNOW**

Court of criminal appeal inferior - **Il-Pulizija vs. Janis Caruana, 14th May 2012, Judge Lawrence Quintano** - went into great detail about this - because it is important to have a clear mind on hearsay evidence. It is considered and was considered admissible evidence by the eu court of human rights.

### A. Il-Current Incident Report u s-sottomissjoni ta' Hearsay Evidence

16. Illi d-difiza qed tissottometti li l-current incident report huwa biss hearsay evidence kif ukoll li qatt ma ttellgħet tixhed Rosana Vargas Escarpita- il-persuna li għamlet ir- rapport. Din tgħix għewwa San Filepe del Agua, Daxaca, Mexico.

17. Minn dan ir-rapport jirrizulta li din il-persuna rrapportat is-serq tal-laptop tagħha mill-Hotel Gorganis , Triq Santu Wistin, San Ġiljan fit-12 ta' Frar 2009 bejn in-12.30 u 17.30. Ir-rapport ittiehed minn WPC 174 Giovanna Battista Bonello. Fit-18 ta' Frar 2010, din ikkonfermatu bil-gurament hekk:

‘Jiena fit-13 ta' Frar tas-sena l-oħra giet persuna ta' Nazzjonalita' barranija tagħmel rapport li l-gurnata ta' qabel hija kienet residenti l-Gorgianis Hotel, ħarġet minn ġol-kamra u x'hin irritornat lura sabet il-laptop li kien qiegħed fil-luggage nieqes. Jien ħadtilha rapport ta' din is-serqa. Hi qalet li kienet fil-kamra 325 mingħalija.’

18. Skont l-istess rapport Rosana Vargas Escarpita hija s-sid tal-lap top li jiswa madwar 1300 Euro.

F'dan ir-rapport ma tissemma ebda persuna bħala suspettata li wettqet is-serqa. Hemm biss imniżżel id- dettalji li jagħmlu ħafna turisti li jkunu jivvjaġġjaw barra minn pajjiżhom, jintebħu li nsterqu u jagħmlu rapport fl- eqreb għassa tal-Pulizija.

20. Id-difiza tissottometti li dan ir-rapport huwa hearsay u għalhekk m'hemmx prova fil-proċess li s-serqa filfatt seħħet.

21. Bir-rispett kollu, il-hearsay rule tagħna (fl-artikolu 599) mhix daqshekk rigida daqs kemm wiehed jahseb. Fil-fatt l-ewwel parti ta' dan l-artikolu jgħid hekk:

‘599. Il-qorti tista', skont iċ-ċirkostanzi, tippermetti xiehda fuq kliem ħaddiehor u tiehu qies tagħha, meta dan l-istess kliem ħaddiehor ikollu, fih innifsu, importanza sostanzjali, fuq il-meritu tal-kawża jew ikun jagħmel parti mill-meritu; inkella meta dan ħaddiehor ma jkunx jista' jingiebi biex jixhed, u l-fatti jkunu tali li ma jkunux jistgħu jiġu ppruvati sewwa xort'oħra,’

22. Fil-fatt fil-kawża ‘Joseph Mary Vella et versus il- Kummissarju tal-Pulizija’ il-Qorti Kostituzzjonali nhar it-13 ta’ Jannar 19881 qalet hekk:

‘Issa, fil-każ preżenti, si tratta ta’ depożizzjoni ta’ xhud dwar x’qallu haddiehor li ma jistax jiġi prodott minhabba li x-xhud ġie marbut bis-sigriet professjonali fuq l-identita’ ta’ dan il-haddiehor. Ċertament il-klem ta’ dan il-haddiehor jistgħu, fiċ-ċirkostanzi tal-każ, ikollhom importanza sostanzjali fuq il-mertu tal-kawża. Għalhekk il-Qorti ma tara l-ebda raġuni l-għala għandha tidpartixxi mill- konlużjoni tal-ewwel qorti ( li tħalli lil dan ix-xhud jiddeponi).’

23. Ukoll fl-Ingilterra u f’Wales ir-regola tal-hearsay m’għadhiex stretta daqsa qabel. Il-Qorti Ewropea Dwar id-Drittijiet tal-Bniedem fil-każ ‘ Al-Khawaja and Tahery versus the United Kingdom’ tal-15 ta’ Diċembru 2011 (deċiżjoni tal-Grand Chamber) qalet hekk f’pargrafu 130:

‘However, the Court notes that the present cases have arisen precisely because the legal system in England and Wales has abandoned the strict common law rule against hearsay evidence. Exceptions to the rules have been created, notably in the 1988 and 2003 Acts, which allowed for admission of ST’s statement in Al-Khawaja’s case and T’s statement in Tahery’s case.’

24. Fil-każ ta’ Al-Khawaja, ST kienet għamlet rapport lill- Pulizija numru ta’ xhur sewwa wara li kienet allegatament assaltata minn tabib. ST għamlet suwiċidju qabel il-ġuri. L-Imħallef li ppresieda ħalla li jinqara r-rapport waqt il-ġuri u ta direzzjonijiet appożiti. (Ara paragrafi 9 -19 tal-istess sentenza). Il-Grand Chamber ma sabitx vjolazzjoni tal- artikolu 6 (ara par.158 tas-sentenza).

25. Issa, jekk wiehed janalizza s-sitwazzjoni fil-każ li jinsab fil-preżent quddiem il-Qorti, ir-rapport bl-ebda mod ma jgħid li min għamel ir-rapport dwar is-serqa indika lill- appellant. Kieku kien hekk ir-rapport kien ikun prova li sar it-tali kliem izda mhux prova li l-appellant wettaq is-serqa għalkemm l-istess rapport kien ikun jista’ jintuża biex jikkorobora provi oħra. (Ara: Subramianiam v Public Prosecutor (1956) 1.W.L.R.956 at 969, PC).<sup>2</sup> Fir-rapport odjern m’hemmx xi allegazzjoni bħalma ma għamlet ST fil-każ ‘Al-khawaja vs UK’ jew xi sitwazzjoni simili għal dak li aċċettat il-Qorti Kostituzzjonali. Hawn għandna biss rapport li saret is-serqa, ta’ xhiex, fejn u meta. Min għamel ir-rapport mhux Malti, ma semma lil ebda persuna bħala suspettat, u ma jistax joqgħod jingieb Malta biex jikkonferma li saret serqa ta’ laptop. Terġa’ min għamel ir- rapport ma joqgħodx f’xi pajjiż fil-vicin.

26. Għalhekk il-Qorti, wara li rat iċ-ċirkostanzi tal-każ, u wara li rat l-artikolu 599 tal-Kap 12 res applikabbli għall- Kap 9, qed tiddeċiedi li fil-proċess teżisti prova li hija ammissibbli. Ir-rapport huwa prova li saret is-serqa u ta’ xejn aktar.

B. Jekk hemmx provi li jorbtu lill-appellant mas-serqa.

27. Il-Qorti ezaminat il-provi kollha mill-gdid biex tara jekk hemmx evidenza biżżejjed li turi li kien l-appellant li wettaq is-serqa.

28. Mill-istqarrija li għamel l-appellant fis-16 ta' Marzu, 2009, huwa nnega li kien daħal fil-kamra ta' hadd iehor u ħa l-laptop. Meta ntweraw s-sett tar-ritratti, huwa qal li fil-jiem ta' meta saret is-serqa, hu u t-tfalja kienu marru fil- lukanda għal erbat il-jiem izda s-sidien kienu talbuhom jitolqu għax ma kinux ħallsu bil-quddiem. Is-sular kien is- sular fejn kienu hu u t-tfalja tiegħu. Dwar il-camera huwa qal hekk:

‘Il-kamera jista’ jkun dawwartha għax kont fis-sakra u dawwartha biex niċċajta.’

29. Fit-tieni stqarrija tiegħu tas-27 t'April 2009 huwa identifika l-oġġett bħala ‘ Dak mobile naħseb.’

30. Meta mistoqsi fejn kien qiegħed il-mobile, huwa qal li kien neħħieh. Imbagħad l-istqarrija tkompli hekk:

‘M. X'qiegħed iddaħħlu tagħmel taħt il-flokk il-mobile? T. Mhux taħt il-flokk qiegħed nidher indaħħlu pero’ fil- but.’

31. PS 516 Alfio Borg xehed li hu kien qed jippreżenta DVD ta' footage li kien għaddielu l-Ispettur Trevor Micallef kif ukoll DVD u sitt ritratti li estra hu stess mid-DVD.

32. Mill-analizi tal-espert maħtur mill-Qorti biex janalizza is-CCTV irriżulta hekk:

‘tidher persuna, kemm diehla fl-istabbiliment kif ukoll fil- kuritur. Dina l-persuna tidher tuża diversi oġġetti, fosthom xkupa, sabiex tbiddel il-pożizzjoni tas-CCTV camera fil- kuritur.’ (fol 48).

33. Iċ-ċaqliq tal-camera jirriżulta wkoll mir-ritratt u l- appellant ammetta li kien ċaqliq il-camera izda dan hu għamli b'ċajta.

39. Il-Qorti qieset dak kollu li juru r-ritratti. Jekk il-mobile kien proprjeta' tal-appellant ma kienx hemm raġuni biex jaħbieh taħt il-flokk. Barra minn hekk, ebda mobile ma jagħmel bulge bħal dik għax issa l-mobiles żgħar u eleganti ilhom żmien fis-suq u għalhekk tista' taħbihom mingħajr ma johlqu balla fuq iż-żaqq. Hemm ukoll il- logħob mal-cameras. Il-Qorti ma temminx li din kienet xi ċajta. Ma' dawn wieħed iżid ir-ritratt TM5 li ma jħalli ebda dubju li l-appellant għandu laptop f'idejh. Għalhekk il-Qorti qed taqbel mal-konkluzjoni tal-ewwel Qorti li l-appellant huwa l-awtur tas-serqa.

## D. Konkluzjoni

45. Ghalhekk il-Qorti qed tiċhad l-aggravji kollha tal- appellant għajr dik il-parti tal-aggravju dwar il-gravanti tal- mezz. Ghalhekk qed tirriforma s-sentenza mogħtija fl-14 ta' Frar, 2011 fl-ismijiet 'Il-Pulizija vs Janis Caruana' billi tikkonfermha fejn sabet lill-appellant ħati tal-ewwel imputazzjoni bil-gravanti tal-valur u tal-persuna u fejn sabet lill-appellant ħati tat-tieni imputazzjoni, fejn imponiet piena ta' prigunerija ta' tlettax-il xahar dwar l-ewwel imputazzjoni, fejn irrendiet operattiva s-sentenza 'Il-Pulizija vs Janis Caruana' tal-15 ta' Jannar 2009 u kkundannatu għall-perjodu ieħor ta' prigunerija ta' tmintax-il xahar, b'total ta' wieħed u tletin (31) xahar prigunerija u qed tħassarha f'dik il-parti fejn sabet lill-appellant ħati tal-gravanti tal- mezz fis-serqa msemija fl-ewwel imputazzjoni u minflok qed tillibera lill-appellant minn din il-gravanti.

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### **Article 560 COCP - What are the 3 cardinal rules of evidence?**

**560.** (1) The court shall disallow any evidence which it considers to be irrelevant or superfluous, or which it does not consider to be the best which the party can produce.

(2) Where evidence tendered by any party is disallowed, it shall be lawful for such party to demand that the ruling of the court in regard to the disallowing of such evidence be made by a decree; but, where only a question to a witness has been disallowed, the party may demand only that a record thereof be made in the proceedings, in the manner which the court shall, according to circumstances, direct.

(3) Where in any cause or matter it is not possible, in consequence of damage to or loss of any court or other document, for any party to such cause or matter to comply with any requirement of this Code relating to the formal production of documents or otherwise, the court may either dispense with such requirement or give such other directions as the circumstances of the case require:

Provided that in proceedings before the courts of civil jurisdiction, the parties to the cause shall be bound to assist the registrar in compiling a copy of the court records or other documents which have been damaged or lost and, within such time as the court may establish, they shall provide the registrar with such information and documentation in their possession which will assist the registrar in compiling the court records or other documents damaged or lost in as full a manner as possible.

**Article 560** - tells us when the court rejects irrelevant material - "**shall**" - court may say no i am not accepting that evidence as it is irrelevant. Lawyer can ask the court if he can have a decree on this that the person did not take a witness stand. Sometimes Judge or Mag. will not allow a direct question

Power of court to require object of evidence.

**561.** It shall be lawful for the court to require the party tendering evidence to state the object of the evidence.

Onus of proof on person alleging.

**562.** Saving any other provision of the law, the burden of proving a fact shall, in all cases, rest on the party alleging it.

What about experts? **An ex parte expert** - not possible in criminal law per se as experts are appointed by the court in section - of the law - in civil proceedings you may have these ex parte experts. You need experts where there is something the court can not deal with, a padlock or something more complicated - valuation left of the jewellery.

The panel of the jury can decide whether to trust us or not. The court is not bound by the report of the expert but there must be serious reasons why not to follow this expert. But they may only put aside the report of an expert with a solid reason why they are putting it beside. Psychiatrist, psychologists, to state what the state of the mind of the accused is. IL-GURIN - lasts only 1 or 2 days but then you have to tell the panel of the jury whether to accept what the experts have said but you can only put it aside if there is a solid reason for doing so. If not qualified to give expert evidence, in that case the evidence is admissible not as an expert but what she perceives, what she heard if not an expert in the field.

So if you have an ex parte expert, the court can not appoint an expert on its own? The court may still appoint an expert and it is in the hands of the court, within its discretion as to whether to appoint an expert or not. Unlike criminal proceedings, if there is a technical matter to be decided you have to appoint an expert.

If a magistrate has been called for the case of drugs in the Corradino facility - First thing you do is appoint an expert - to see if there is a drug or not, so you establish that.

## **OF WITNESSES**

### OF WITNESSES

**563.** All persons of sound mind, unless there are objections against their competency, shall be admissible as witnesses.

Competency of witnesses.  
*Amended by:*  
*VII.1880.14.*

**563A.** (1) Where a person is called as a witness, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence only if, in the opinion of the court, he is suitably qualified in the relevant matter.

Admissibility of *ex parte* expert opinion and certain expressions of non-expert opinion.  
*Added by:*  
[\*XXIV.1995.217.\*](#)

(2) Where a person is called as a witness, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

(3) The opinion given by any person according to the provisions of this article shall be without prejudice to the provisions of article 681 and to the court's power to appoint a referee according to the provisions of article 646.

### **Emanuel Sammut Vs Alfred u Pauline konjugi Bezzina**

Huwa minnu li l-artikolu 171(3) tal-Kap 12 tal-Ligijiet ta' Malta jiddisponi li s-sentenza li tinghata fil-qrati tal-Magistrati (Malta) u dawk ta' Ghawdex, ma tehtiegx li tkun tinkludi r-ragunijiet kollha li wasslu ghalha, izda tista' biss issemmi l-punti ewlenin li fuqhom il-Qorti tkun ibbazat il-konkluzzjonijiet taghha. Dan id-dritt izda ma jeskludix lill-gudikant li fil-parti operativa tas-sentenza, li, skond l-artikolu 23 tal-istess Kap 12, ghandha tinqara fil-pubbliku, tinkludi talbiet jew l-eccezzjonijiet li jkunu gew decizi u kull dikjarazzjoni mahsuba li tkun konklusiva jew vinkolanti.

F'materja teknika bhal ma huwa xoghol ta' tqeghid ta'madum, sew tal-art kif ukoll ta' mal-hajt, fejn qed jigi allegat li x-xoghol ma kienx sar skond l-arti u s-sengha, kien mistenni li l-Qorti tqabbad persuna kompetenti biex tirrelata dwar l-fundatezza tal-allegazzjoni u finalment tiddecidi skond din ir-referenza jekk jkun jidhrilha li hija gusta u ragionevoli u dana b'rispett lejn dak li jipprovdli l-artikoli 681 tal-Kap 12. Fl-assenza ta' din il-hatra l-Qorti trid ta' bilfors tifli sewwa l-provi biex tara jekk l-allegati nuqqasijiet jirrizultawx u anke tiehu in-konsiderazzjoni dawk il-provi teknici li setghu resqu l-partijiet. Fil-kaz in ezami jirrizulta li l-istess konvenuti, minhabba li ma kienux sodisfatti bix-xoghol ta' l-attur, inkarigaw perit Arkitett u cioe l-AIC A.P.

Buontempo li, wara li spezzjona x-xoghol tal-madum, u wara li ghamel id-debiti osservazzjonijiet u riduzzjonijiet fuq il-kont prezentat mill-attur, ikkonkluda li l- kont finali ghandu jkun fl-ammont ta' LM594.50 kif ahjar dettaljat fid-dokument PB3 a fol 31 tal-process. Dan ir- rapport gie ezebit mill-konvenuti in sostenn tal-eccezzjoni taghhom dwar xoghol hazin. Dan ifisser li ghall-konvenuti l-attur kien baqalu jiehu s-somma bilancjali ta' LM294.50 wara li jitnaqqas il-hlas akkont li kien sar.

L-artikolu 563A tal-Kap 12 tal-Ligijiet ta' Malta jiddisponi li:

“Meta persuna tissejjah bhal xhud, l-opinjoni taghha fuq kull kwistjoni rilevanti li dwarha hi kwalifikata taghti xiehda bhala espert, ghandha tintlaqa' bhala xiehda biss jekk, fil- fehma tal-qorti, dik il-persuna jkollha l-kwalifiki mehtiega dwar dik il-kwistjoni.” Ma hemmx dubbju li Perit Arkitett ghandu l-kwalifiki necessarji biex jesprimi opinjoni dwar xoghol ta' madum. Isegwi li l-opinjoni espressa fir-rapport fuq imsemmi ghandha l-effett ta' xiehda ta' espert in materja li torbot lill-kontendenti.

Ghalkemm huwa minnu li l-Perit Buontempo, debitament ingunt ghall- udjenza tad-9 ta' Ottubru 2001 ma deherx u sussegwentement l-konvenuti ddikjaraw li ma kellhomx aktar provi, ma jidhirx li hemm kontestazzjoni dwar l- validita' tar-rapport tieghu a fol 31 tal-process, li ghalhekk jista' jittiehed bhala prova ta' dak li fih.

F'dan ir-rigward l-attur jghid li ma kienx hu li xtara l- materjal izda kienet l-konvenut. Da parti taghha l- konvenuta filwaqt li tammetti li kienet hija stess li xtrat il- materjal, il-grouting kien abjad u kien l-attur li haltu u pproduca il-kulur li ma kienx accettat. L-attur ma jikontestax dan il-fatt. Jidher ghalhekk li l-attur, li kien l- espert in materja, ma ghamilx tahlita tajba ta' kulur u grouting bir-rizultat li dan gie ta' kulur mhux accebbli u konsegwentement l-Perit fuq imsemmi kien korrett meta ghamel l-osservazzjoni tieghu u d-debita riduzzjoni fil- prezz.

Ghar-ragunijiet fuq moghtija l-Qorti tipprovdi minn dan l- appell billi tirriforma s-sentenza appellata billi tiddikjara li l- attur huwa dovut is-somma bilancjali ta' mitejn erbgha u disghin lira maltin u hamsin centezimu (LM294.50) u dana in bazi ghar-rapport peritali ppresentat mill-istess konvenuti tal-AIC Buontempo, u bl-imghax legali mil-lum.

U tordna li l-ispejjes tad-din is-sentenza kif ukoll tas- sentenza tad-19 ta' Dicembru 2001 moghtija mill-Qorti tal- Magistrati (Malta) jithallsu kwantu ghall-tlett kwarti mill- konvenuti u kwart mill-attur.

U tordna li l-ispejjes tad-din is-sentenza kif ukoll tas- sentenza tad-19 ta' Dicembru 2001 moghtija mill-Qorti tal- Magistrati (Malta) jithallsu kwantu ghall-tlett kwarti mill- konvenuti u kwart mill-attur.

**Article 563B** - you should keep the - Evidence of Foreign law - LAW of Austria, i need not be a lawyer myself but i need to give some sort of evidence to know what the Austrian law says on the law of succession.

**563B.** (1) A person who is suitably qualified on account of his knowledge or experience, is competent to give expert evidence as to the law of any other foreign state, irrespective of whether he has acted or is entitled to act as an advocate, or in any judicial or legal capacity in that state.

Evidence of foreign law.  
Added by:  
[XXIV.1995.217.](#)

(2) The provisions of article 563A(3) shall *mutatis mutandis* apply to the provisions of this article.

## **AVUKAT DR. MICHAEL ZAMMIT MAEMPEL vs. ANTOINE U MARLENE KONJUĠI ATTARD, QORTI ĊIVILI – PRIM’AWLA, 28 ta’ Ġunju, 2024**

### **Ligi barranija**

Qabel ma l-Qorti tgħaddi biex tagħmel eżami tad-danni u x’inhu dovut jekk jirrizultaw, jinhtieg li ssir referenza għal dik li hi l-ligi barranija, fil-każ odjern franciża, riferuta mill-attur noe fin-nota ta’ sottomissjonijiet tiegħu.

Intqal mill-Qorti tal-Appell fid-deċiżjoni fl-ismijiet Eleazar Galea vs Dr.Simon Micallef Stafrace et102:

“*Huwa magħruf sewwa fil-ġurisprudenza li, fi kwistjonijiet bħal dawn, il-ligi barranija għandha tiġi trattata bħala punt ta’ fatt u mhux punt ta’ ligi*103 *u, minħabba f’hekk, trid titressaq prova tagħha daqslikieku kienet xi fatt ieħor u mhux fis-sura ta’ sottomissjoni*104. *Is-sentenzi msemmija mill-appellanti kienu jkun ta’ fejda għalihom li kieku ngabet prova dwar il-ligi Kanadiża fil-waqt xieraq quddiem l-Ewwel Qorti u kieku daww is-sentenzi jsaħħu dik il-prova. Huwa wkoll mifhum li prova bħal din issir bil-mezz ta’ xhud espert fil-ligi barranija li jkollu l-ħiliet misjuba fl-Artikolu 563B tal-Kap. 12 tal-Liġijiet ta’ Malta.*105”.

Bla tlaqliq jingħad li kull fejn mill-attur noe saret referenza għal-ligi franciża din ma tressqetx *qua* prova bil-metodologija mitluba mill-ligi kif intqal, għalhekk hemm karenza ta’ prova fir-rigward.

**Article 564** - is age a ground of disability ? no - you can not give false testimony

**564.** Whatever may be the age of a witness whom it is intended to produce, he is admissible as such, provided he understands that it is wrong to give false testimony.

Age not to constitute ground of inadmissibility.

## Article 564 of the COCP

Sometimes there are children taking the witness stand. This is not inadmissible evidence. The important thing is that they understand that they cannot lie. In fact, those who may unfortunately be involved in child abduction cases, the children have to be heard. you have to see where they really want to live, especially when you have parents who are living in the UK and one of them takes the child away and comes to Malta. You have to hear what this child has to say to see what he prefers. It is a crime to abduct your child – Article 89A and carries one year term imprisonment.

## Article 565

Anybody can be heard as a witness even if you are a party of a suit. Either because you requested it or because the other party wants you to be a part of it. The court may also call you *ex officio* where it insists on hearing a particular witness to have its mind clear on a certain point.

**565.** (1) Any of the parties to a suit, whatever his interest therein, shall be competent to give evidence, either at his own request, or at the request of any of the other parties to the suit, or if called by the court *ex officio*.

Admissibility of parties to give evidence.  
*Amended by: XV.1913.110.*

(2) The provisions of this Code respecting witnesses shall apply to such party.

## Article 566

What happens when we have the spouse, a civil union partner (added in 2017) or a cohabitant of a particular to a suit?

They may not be compelled to disclose any communication made to him by the spouse, cohabitant or civil partner during the marriage, cohabitation or civil union. They are not to answer any question tending to discriminate against their spouse, partner or civil union. Can my wife be compelled to take the witness stand and to be a witness against me?

Admissibility of spouses, civil union partners and cohabitants of party to a suit as witness.  
*Added by: XV.1913.111.*  
*Amended by: XXIV.1995.218;*  
*XV.2017.51.*

**566.** (1) The spouse, civil union partner or cohabitant of a party to a suit shall be competent and compellable to give evidence in such suit at the request of any of the parties thereto:

Provided -

- (a) that the spouse, civil union partner or cohabitant may not be compelled to disclose any communication made to him by his spouse, civil union partner or cohabitant during the marriage, civil union, or cohabitation, and vice versa;
- (b) that the spouse, civil union partner or cohabitant may not be compelled to answer any question tending to incriminate his spouse, civil union partner or cohabitant.

(2) The provisions of this Code respecting witnesses shall also apply in the case of the spouse, civil union partner or cohabitant.

Probably you understand b more than a - a prohibits the disclosure of any communication but in b can my wife be compelled to take the witness stand and to be a witness against me?

If my mother and father completely ignored me in the will and someone took me to court to rescind that will, can I be an interested party? A big yes. ]

Interest in suit not to be a bar to admissibility of witness.  
*Amended by:*  
*XV.1913.112.*

**567.** No objection to the competency of any witness shall be admitted on the ground that he is interested in the issue in regard to which his evidence is required or in the event of the suit, saving any objection touching his credibility.

**568** - how do you summon witnesses ? with the name of the parties that are taking part in this issue. The court shall not adjourn a case because a witness has not turned up, in other words you have to summon the witnesses - have you summoned them? Rule is you go on, as a rule you always give the chance for the parties to have the witnesses heard. C is used very often - for some reason one of my witnesses did not turn up - and you write up a note saying my colleague will bring the other witness next time that we meet.

Summoning of witnesses.  
*Amended by:*  
*IX.1886.91.*

**568.** (1) Witnesses shall be summoned to appear by means of a subpoena to be issued on the application of the party interested.

**569** - SUBPOENA → IT TAHRIKA - signed by the court, an order giving you time and place to give evidence, whether before the court, arbitrators, referees, it is an order by the court of appeal - it shall be the prescribed court. Shall fill in the particulars. Id card number has been a sine qua non - duca to leave in latin - in duca - tequm = means duces tequm - time you are summoned not only to take oath and produce evidence but also anything which is under the charge or custody of the witness, you also bring with you such an invoice or certificate. In the court of magistrates, Malta and Gozo, the demands for an issue of a SAPPINA =--- court of mag. Are dealing with many serious cases.

Have a look at the list of cases that the judge of the inferior courts civil jurisdiction appeal has given.

Subpoena *ad testificandum*.  
*Amended by:*  
*XV.1913.113;*  
*XV.1983.9.*

**569.** (1) The subpoena shall contain an order to appear at a stated place and time, for the purpose of giving evidence, whether before the court, arbitrators, or before referees, or before one or more officers authorized by law to examine witnesses.

Form and contents of writ.

(2) The writ of subpoena shall be in the prescribed form. The party applying for a subpoena shall fill in the particulars to be contained in the writ as provided in sub-article (1) and in article 570, and shall file the writ simultaneously with the application for the issue thereof.

***If you appeal and it is a frivolous appeal you have to pay double the expenses.***

**Paul Portelli vs. Peter Portelli, 2006**

*Jikkonsegwi minn dan illi, in forza tal-principju li l-piz tal- prova huwa mixhut fuq minn jafferma fatt u mhux fuq min jinnegah, l-attur appellant htiegli jgib prova aktar rilevanti u perswasiva ghall-konvinciment tat-Tribunal. Hu ben maghruf, skond gurisprudenza pacifika, illi f' kaz ta' zewg versjonijiet dijametrikalment konfliggenti jiffavorixxu lill- konvenut in kwantu kien l-attur li kellu l-obbligu li jipprova l-allegazzjoni tieghu. Ara "Gemma Cassar Saetta -vs- Imco Distributors Ltd", Appell Inferjuri, 13 ta' Jannar 1999;*

*Issa huwa veru li f' certi kazijiet il- Qorti tista', skond ic-cirkustanzi, tippermetti xhieda fuq kliem haddiehor u fost dawn il-kazijiet hemm meta dan l- istess kliem haddiehor ikollu fih innifsu, importanza sostanzjali fuq il-meritu tal-kawza jew jaghmel parti mill- mertu. Ara, a propozitu, "Avv. Dr. Giovanni Bonello -vs- Alfred Mifsud", Appell Inferjuri, 14 ta' Jannar 1986 u "Joseph Mary Vella et -vs- Kummissarju tal-Pulizija et", Qorti Kostituzzjonali, 13 ta' Jannar 1988. Fil-kaz hawn diskuss, pero', din l-istess "hearsay evidence" ma tistax isservi bhala xi prova konkludenti illi tabilhaqq l- appellat kien immanifesta l-hsieb tieghu li ried jappella. Minn dak rikavat supra l-kontra hu pjuttost il-kaz;*

**570** - Appeal *DU CEST TETUM* - when summoned you have to take certain documents with you. Is the witness bound to appear in court? Yes at a date and time in the sappina

**Article 570 Cap. 12**

*570. The writ may require the witness to produce any book, document, or other thing, which belongs to the contending parties or to any of them, or which is under the charge or custody of such witness, or which, according to law, he is bound to produce.*

**571.** In the Court of Magistrates (Malta), and in the Court of Magistrates (Gozo) in its inferior jurisdiction, the demand for the issue of a subpoena may be made orally.

Demand for issue of subpoena in inferior courts.  
Amended by:  
XV.1913.114;  
[VIII.1990.3.](#)

**572.** A witness is bound to appear in court on the date and time prescribed in the subpoena provided that he is served with the said subpoena four days before such date, which period is to run from the date of service of the subpoena:

Time for attendance of witness.  
*Amended by:*  
[XV.1913.115](#);  
[XLIX.1981.6](#);  
[VIII.1990.3](#).  
*Substituted by:*  
[XXIV.1995.219](#).

Provided further that it shall be lawful for the court, in urgent cases, to order any witness to appear from day to day, or from hour to hour, or even only within such interval of time as may be necessary for him to appear in court.

**Article 573** - deals with the usual problem of Malta and Gozo - must state why they need to come to Malta.

**573.** No witness residing in Malta is bound to attend to give evidence in Gozo, or vice versa, unless the advocate of the party applying for such evidence, or the party himself if he has no advocate, shall swear that in his opinion the evidence is material, and unless, simultaneously with the issue of the subpoena, he deposits with the registrar such allowance as may be due to the witness according to law.

Oath as to relevancy of evidence of witness outside the jurisdiction.

Deposit of allowance.

**Article 573A** - what is this about, when there are departments being asked to appear in court - normally you ask the director or land registry. Another person to give evidence instead of the person. Change had to be introduced so that any officer of the government department may be authorised by a person in sappinga to give evidence instead. In order to have a witness to be heard from court hailing from - department section 4,3 of chapter 143 - permission - note that you would not divulge anything you seen in the files. A note before the court of civil appeal superior.

If you do not appear and you are a witness, the court may impose a fine on you - if stuck in a traffic jam, the lawyer may ask the court to forgive you the fine and give an explanation. Instances in the past where a judgment was given not in their presence.

**573A.** Any officer or employee of a government department or any officer or other employee of any body having a distinct legal personality may be authorised by the person subpoenaed to give evidence in his stead on any matter about which he is more knowledgeable and relating to the said department or body and on which the said person subpoenaed was required to give evidence:

Another person to give evidence instead of the person subpoenaed.  
*Amended by:*  
[XXIV.1995.220](#).

Provided that the person subpoenaed shall give such evidence personally if it is so stated in the subpoena.

**574.** Any person being present in the court may, upon the oral demand of either of the contending parties, be called upon forthwith to give evidence, as if he had been summoned to attend by means of a subpoena.

Persons present in court may be called to give evidence.

**575.** If any witness duly summoned fails to appear when called on, he shall be guilty of contempt of court and shall forthwith be punished accordingly; and it shall also be lawful for the court, by means of a warrant of escort or arrest, to compel such witness to attend for the purpose of giving evidence.

Penalty for non-attendance of witness duly summoned.

**576.** In the case referred to in the last preceding article, it shall be lawful for the court, on good cause being shown to its satisfaction, to remit the punishment.

Power of court to remit punishment.

**Article 576** - court has power to take away punishment if there was a good reason

For a long time, save as otherwise provided in this code, the witnesses shall be examined viva voce in a trial of the court - **Article 577**

**577.** (1) Save as otherwise provided in this Code, the witnesses shall be examined in open court at the trial of the action and viva voce

(2) Witnesses may not be assisted or advised by any person.

(3) Witnesses shall be sworn previously to their examination, and the oath shall, unless the law provides otherwise, be administered to them by the registrar.

Evidence by affidavit - you take an oath to confirm what happened at home, when you were at work.... Etc but then remember this, you will have the right to cross examine the witness on the evidence he brought about. You have a right to cross examination - also under section 39 of the constitution, and under Article 6 European convention of human rights. Now we have the charter of fundamental human rights to which we automatically became parties upon joining the eu. Also there is another thing few know about the United Nations convention on human rights - Civil and political rights. A lot when it comes to human rights on our plate.

Right to *KONTRO EZAMI* - constitutional cases are being decided on affidavits. Things move with the times. Things change, and I want you to be prepared. Before it was unheard of to have affidavits.

When someone passes away you need a death certificate. YOU NEED to go to the public registry to do a search on the public wills, then you have to go to the court of voluntary

jurisdiction on secret wills. When someone passes away, transfer of his property needs to be registered in the public registry. We have to know how one thing devolved into another. That was a very good reform, how the property has devolved. Before moving anywhere you have to get certificates from the public registry and you have to take care to pay any taxes due on the transfer of land asap. This is why you have to get a death certificate.

**Article 577(2)** witnesses may not be assisted or advised by any person. Some witnesses sometimes have lawyers near them but they need to testify, the witnesses. If you happen to be a magistrate you administer the oath yourself if in higher courts, by the register. In a trial by jury Judge Quintano used to administer the oath himself to realize how important it is to administer the truth and minimize perjury.

**Article 578** - *Leading or suggestive questions may not, without special permission of the court, be put on an examination-in-chief.*

Leading questions without special permission of the Court may - examination chief - I am the plaintiff and she is a witness for the plaintiff and she is testifying, I can not put words in her mouth. Ex: Can you tell me where you were on Sunday 25th January? I can - but can not ask oh you were at Sliema on 25th january weren't you? That you can not, put as it is a leading question. Can not put direct or leading questions.

CAN NOT PUT ANSWERS INTO THE MOUTH OF YOUR WITNESS IF IT IS AN EXAMINATION IN CHIEF

Cross Examination - leading or suggestive questions are allowed...

Cross-examination.

**579.** The opposite party has the right to cross-examine a witness; and in such cross-examination leading or suggestive questions are allowed.

**IMPORTANT** - In the cross-examination, you can only ask questions (including direct questions) to the witness about what he has testified only. ONLY. NO REFERENCE about this subject matter in the person's testimony hence you can not. This is a cross-examination and this is only about what witness has testified. If in 1999 he was having an affair with X, the other party can only cross-examine about what he testified on that particular date, he can not ask but what did you do the other day? REMEMBER THIS GOLDEN RULE. IT EMERGES from the law. Know what the law says, otherwise it is like learning a language without learning the grammar. You have to know what the law is about.

Questions in cross-examination.

**580.** (1) In cross-examination, a witness may only be questioned on the facts deposed in his examination, or on matters calculated to impeach his credit.

(2) When the party cross-examining desires to prove by the same witness any circumstance not connected with the facts deposed in the examination, he must, unless the court, for just cause, shall direct otherwise, produce such witness in due time and examine him as his own witness; and in such case, it shall be lawful for the court, upon the oral demand of such party, to order the witness not to leave the court in order that he may be again called and questioned; and such order shall have the effect of the subpoena mentioned in article 568(1).

→ He must unless, unless court for a just cause, examine him as if his own witness. Can not use the cross examination to undermine the provision that you can not put leading questions to your witness as this is what is normally done by smart lawyers unless their opponent immediately wakes up and other lawyers stop him.

*Be careful that the lawyer is not using cross examination to put questions which he can not put in examination in chief. You can not use cross examination to avoid this written law by putting questions on facts which the witness has not testified about. In fact, the court is giving the right to keep witnesses there. Bound by the law that no direct questions are made in examination in chief but in the cross examination and only on the information which he testified.*

**Article 581** - In other words, examination or cross examination - as a court is used not to interfere when the examination and cross examination were going on but at the end, Quintana made his own questions. You have to ask questions on what he has testified.

Questions arising out of answers given by witness.

**581.** When both the examination and cross-examination are concluded, no further questions may be put by either of the parties; but it shall be lawful for the court, or for the party with the permission of the court, to ask such questions as arise out of the answers given in the course of the examination or cross-examination.

**Article 582** - the court is free to intervene and ask questions at any time, even during examination or cross examination - to have a free flow as much as possible about what the witness is saying. The court can do that, the problems arise when you need some clarification,

Questions by court.

**582.** It shall be lawful for the court, at any stage of the examination or cross-examination, to put to the witness such questions as it may deem necessary or expedient.

**Article 583** - can witness refresh his memory from a piece of writing. Writing was done by himself or under his direction. At the time where the fact occurred or immediately afterwards. Important to refresh memory - must not be something written after a lot of time after, but written to refresh his memory. If you are refreshing your memory from your report, that piece of writing has to be produced by the opposite party.

Witness may refresh his memory.

**583.** A witness may refresh his memory by referring to any writing made by himself or by another person under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing; but in such case, the writing must be produced and may be seen by the opposite party.

These details are important. Type of car, time, street, no entry sign you note it - not only police who have to do these things, sometimes I have friends - who have been stalked, i go to police and ask police whether i have recorded this encounter.

**Double jeopardy** - ne bis in idem - can not arraign me under another charge changing the am to pm when accused of rape ex. Provided for the criminal code, prosecution, charter of fundamental rights, constitution. He may challenge his memory.

**584, 585** - If i produce a witness myself i can not - opposite party may impeach witness, show that there is contradictory evidence or if general testimony is bad as has already been accused of perjury. But if I have summoned a witness, I can not impeach his credibility. This was a problem in maintenance cases. I used to record everything. Just because it is a minor charge, subject to 3 months imprisonment.

Party producing witness may not impeach his credit by evidence of bad character.

**584.** A party producing a witness shall not be allowed to impeach the credit of the witness by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony.

How opposite party may impeach witness.

**585.** A witness may be impeached by the party against whom he is called by contradictory evidence, or by evidence that his general reputation for truth is bad.

The way they are testifying -you have to have an eye for the truth - one or 2 tutorials with information on body language or even - by looking up body language on the internet. May help you. Even as a lawyer you start noticing who is telling the truth and not, before becoming a judge/ magistrate.

586. (1) *Before impeaching the credit of a witness by evidence that he has made at other times statements inconsistent with his present testimony, the alleged statements together with the circumstances of time, place and persons present must be related to him and he must be asked whether he has made such statements and he must be allowed to explain them.*

(2) *If the statements be in writing, they must be shown to the witness before any question concerning such statements is put to him*

As a lawyer in the first 10 years, we used to make oral submissions in court before civil court, cons court and civil court superior. Nowadays you see sittings of the Strasbourg court with only judges and no people and that is that.

**587** - witness is bound to answer questions bound by court.

**587.** The witness shall answer any question which the court may allow to be put to him; and the court can compel him to do so by committing him to detention until he shall have sworn and answered.

Witness bound to answer questions allowed by court.

**588.** (1) No advocate or legal procurator without the consent of the client, and no clergyman without the consent of the person making the confession, may be questioned on such circumstances as may have been stated by the client to the advocate or legal procurator in professional confidence in reference to the cause, or as may have come to the knowledge of the clergyman under the seal of confession or *loco confessionis*.

Privileged communications.  
Amended by:  
[XXIV.1995.221](#);  
[XVII.2003.20](#);  
[X.2004.20](#).

(2) Unless by order of the court, no accountant, medical practitioner or social worker, psychologist or marriage counsellor may be questioned on such circumstances as may have been stated by the client to the said person in professional confidence or as may have come to his knowledge in his professional capacity.

(3) This privilege extends to the interpreter who may have been employed in connection with such confidential communications.

Privilege to extend to interpreter.

**Article 588 COCP** - Privileged Communications - accused gave his consent to the lawyer to take the witness stand - that has to be recorded and noted in the records of the case, to avoid litigation afterwards and as a court you can not allow a lawyer or medical practitioner or social worker, psychologist or interpreter. When a case comes before court, the court has to appoint an expert to see if the object found is chemically made up of. Experts have to be paid.

# Hearsay Evidence

Article 598 COCP - has not been amended since 1918 - as a rule, the court shall not consider any testimony respecting facts the knowledge which... information of 3rd persons who can be produced to give evidence of such facts.

It starts with "as a rule court shall not consider any testimony" - i take witness stand and say mr Tony Zahra told me it was one of his servants who entered the bank at night and took a huge sum of money - i am saying what others have told me. Some people have difficulty in accepting such testimony. Not what I have seen or heard personally and directly. In mammo notes, says that hearsay evidence must be taken with a lot of caution. Best evidence rule in court, and this would be secondary evidence.

**589.** A witness cannot be compelled to answer any question the answer to which may subject him to a criminal prosecution. Incriminating questions.

IMPORTANT DIG - in para 1 of 598 we are told, who have obtained information of such persons - once quintano had a case, where one saw a person driving at full speed and running over a dog and killing the dog. This person reported to the police the car number, the make of the car responsible and, the owner of the car was accused of cruelty to animals and excessive driving, but the only person who took the witness stand was the police officer. He did not produce that person and the question arose whether this type of evidence could be accepted, if the person accused is still alive and not a foreigner.

Something which EU law is insisting on in certain circumstances even in domestic violence or corruption of minors. In fact now, minors have to take witness stand in a separate room by video conference. In other words, police could have arraigned the person in order to take the witness stand. Unfortunately the police thought the report would be enough.

Section 13 - animal rights. This man charged with the dog, had to be cleared as defence raised the plea he should have been here to take the stand and give his evidence himself.

French man being accused of being done to over 299 persons - in court and has already said that he admits the case against him and is ready to face the consequences. Violation of article 6 in strasbourg - hearsay evidence. Appealed to grand chamber 11th may 2012. Grand chamber said no hearsay evidence can be accepted in criminal cases.

Article 599 COCP - court may according to circumstances allow any testimony of 3rd persons where such relation has of itself a material bearing on the subject matter in issue or forms part thereof.

And our cons. Court had to deal with this on the 13th jan 1988 of Joseph mary vella vs. commissioner of police - PL Mifsud Bonnici asked for the permission of the court to take the witness stand to witness about what other persons had told him, but this other person could not find the courage to go to court and take the witness stand because he was terribly afraid about what happened to him.

**Article 599.** *The court may, according to circumstances, allow and take into consideration any testimony on the relation of third persons, where such relation has of itself a material bearing on the subject-matter in issue or forms part thereof; or where such third persons cannot be produced to give evidence and the facts are such as cannot otherwise be fully proved, especially in cases relating to births, marriages, deaths, absence, easements, boundaries, possession, usage, public historical facts, reputation or character, words or deeds of persons who are dead or absent and who had no interest to say or write a falsehood, and to other facts of general or public interest or of public notoriety.*

Court of criminal Appeal - Republic vs Mario Azzopardi 28th june 2012 - para 18 - read it for sure for hearsay evidence.

### **Il-Pulizija vs. Natasha Cassar, Fil-Qorti tal-Magistrati, 9th April 2019**

F'dawn il-proceduri l-prosekuzzjoni strahhet esklussivament fuq informazzjoni li ntbghatitilhom minghand *Facebook* u fuq rizultanzi t'investigazzjonijiet li ghamlu minn *open sources* u *mas-service providers* lokali kif jixhed ir-rapport esebit minn PS 1335 Duncan Schembri.9 Jigi sottolinejat li dak kontenut f'dan ir-rapport kif ukoll ix-xhieda tal-istess xhud tammonta biss ghall-*hearsay* u ghaldaqstant mhix wahda ammissibbli ai termini tal-artikolu 598 tal-Kodici t'Organizzazzjoni u Procedura Civili kif rez applikabbli bl-artikolu 520(1)(d) tal-Kodici Kriminali.

### **Illi l-Professor A.J. Mamo jghallem kif gej:**

There are many reasons assigned for rejecting hearsay, the two principal being first, that the person originally stating the facts does not state them on oath, and secondly, that the person against whom the evidence is offered had not the opportunity of cross-examining that other person as to his recollection, veracity or means of knowledge. ....

In **Fitzgerald vs Fitzgerald (1863)** it was stated that the foundation of the admissibility of any evidence is that it should be on **oath**, and that the party against whom it is tendered should have had a reasonable opportunity of **cross-examination**.

Issir riferenza ghas-sentenza tal-Qorti tal-Appell Kriminali (Sede Superjuri) fl-ismijiet Ir-Repubblika ta' Malta vs Mario Azzopardi. Fis- sentenza minn tagħha l-Qorti studjat *funditus* ir-regola dwar il-*hearsay evidence*:

### **“Punt ta’ Liġi – il-Hearsay Rule**

“Li l-artikoli rilevanti dwar il-Hearsay Rule huma l-artikoli **598 u 599** tal-Kap 12 reżi applikabbli għall-Kap 9 bl-artikolu 645 tal-Kap 9.

‘**598.**(1) Bħala regola, il-qorti ma tihux qies ta’ xiehda dwar fatti li x-xhud iġhid li ġie jafhom mingħand haddiehor jew li qalhom haddiehor li jista’ jingiebi biex jagħti xiehda fuq dawk il-fatti.

(2) Il-qorti tista’, *ex officio*, jew fuq oppożizzjoni tal-parti, ma tħallix jew tiċhad li jsiru mistoqsijiet bi skop li jittiehdu xiehda bhal dawk.

(3) Izda l-qorti tista’ ġgiegħel lix-xhud li jsemmi l-persuna li mingħandha jkun sar jaf il-fatti li għalihom jirreferixxu dawk il-mistoqsijiet. ....

**599.** Il-qorti tista’, skont iċ-ċirkostanzi, tippermetti xiehda fuq kliem haddiehor u tiegħu qies tagħha, meta dan l-istess kliem haddiehor ikollu, fih innifsu, **importanza sostanzjali**, fuq il-meritu tal-kawża jew ikun jagħmel parti mill-meritu; inkella meta dan haddiehor ma jkunx jistax jingiebi biex jixhed, **u l-fatti jkunu tali li ma jkunux jistgħu jiġu ppruvati sewwa xort’ohra**, l-aktar f’kazijiet ta’ twelid, taż- żwieġ, tal-mewt, tal-assenza, ta’ servitu’, ta’ rjieħ ta’ immobbli, ta’ pussess, ta’ drawwiet, ta’ grajjiet storiċi pubbliċi, ta’ reputazzjoni jew ta’ fama, ta’ kliem jew fatti ta’ nies li mietu jew li jkunu assenti u li ma kellhom ebda interess li jgħidu jew jiktbu l-falz, u ta’ fatti ohra ta’ interess ġenerali jew pubbliku jew li jkunu magħrufa minn kulhadd.’

**“Il-każ li mhux l-ewwel darba li ġie ċitat b’approvazzjoni dwar il-hearsay rule f’kawzi ta’ natura kriminali huwa Subramaniam v. Public Prosecutor fejn insibu dan il-kliem:**

*‘Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement.*

*It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.’*

“Jekk wieħed jimxi mal-principji ta’ dan il-każ allura ċerti persuni li magħhom ikun tkellem l-allegat vittma jistgħu jkunu prodotti (per eżempju, psikologu, għalliem jew social worker, il-ġenituri jew qraba fil-qrib tal-allegat vittma). Dawn jistgħu jixhdu li l-allegat vittma tassew qal

hekk. Tali xhieda hija biss prova li l-allegat vittma tassew qal hekk, izda mhux li dak li qed jgħid l-allegat vittma huwa tassew minnu.

***“Jekk wiehed jeżamina l-ewwel sentenza tal-artikolu 599 tal-Kap 12, wiehed jista’ jikkonkludi li l-hearsay rule fil-Liġi tagħna mhix daqshekk assoluta. U fil-fatt hekk qalet il-Qorti Kostituzzjonali hija u tiddeċiedi il- każ ‘Joseph Mary Vella et versus Il-Kummissarju tal-Pulizija’ (13 ta’ Jannar 1988) fejn il-Qorti kkonfermat digriet tal-Prim’Awla biex jithalla jixhed Prokuratur Legali li kien marbut bis-sigriet professjonali. Dan thalla jixhed minghajr ma kellu jikxef isem it-terza persuna li kienet qattlu biex il-fatti li fuqhom kellhom jixhed il-Prokuratur Legali.***

“Peress li d-depożizzjoni, li tista’ tkun hearsay, tista’ tkun prova diretta li ntqal xi haġa, ma tistax tiġi eskluza fl-istadju tal-eċċezzjonijiet preliminari.

“F’dak li huma deċizzjonijiet kriminali, il-Qorti tagħna issa ilhom sew isegwu il-prattika dwar il-hearsay rule. (Ara dwar dan il-punt: Ir-Repubblika versus Meinrad Calleja). Reċentement il-Qorti tal-Appell Kriminali diversament preseduta qalet hekk:

“Fil-limit tal-użu li għamlet l-ewwel Qorti tal-okkorenza msemmija, ma hemm xejn irregolari. Hu ben stabbilit li waqt li prova hearsay ma hix prova tal-kontenut ta’ dak li jiġi rapportat li ntqal, hi prova li dak rapportat li ntqal fil-fatt intqal fiċ-ċirkostanzi, data, post u hin li ntqal u in kwantu tali hi ċirkostanza li mehuda ma’ provi u ċirkostanza oħra tista’ wkoll tikkontribwixxi għall- apprezzament li tagħmel il-Qorti.’ (1 t’April 2011 ‘Il-Pulizija versus Fabio Schembri’ preseduta mill-S.T.O. il-Prim Imħallef Dr Silvio Camilleri).

“Għaldaqstant, il-Qorti qed tiċhad ir-raba’, il-hames u s-sitt eċċezzjoni.”

18. .... Ilu ben stabbilit minn din il-Qorti, kif anki rilevat mill-ewwel Qorti fis-sentenza tagħha, li mhux kull relazzjoni ta’ x’qal haddiehor tikkostitwixxi hearsay evidence izda jekk dak rapportat hux hearsay evidence jew le jiddependi mill-uzu li wiehed jippretendi li jsir minn dak rakkontat. Jekk dak rakkontat jiġi prezentat bhala prova tal-kontenut tiegħu allura dak ikun hearsay evidence u bhala tali inammissibbli izda jekk dak rakkontat jiġi prezentat mhux bhala prova tal- kontenut tiegħu izda bhala prova li dak li ntqal verament intqal fic-ċirkostanzi ta’ data, post u hin li fihom intqal allura dan ma jkunx hearsay evidence u huwa ammissibbli għal certi għanijiet legali legittimi bhal sabiex tiġi kontrollata x-xiehda diretta tax-xhud li l-kliem tiegħu ikun qieghed jiġi rapportat jew, fic-ċirkostanzi idoneji, anki sabiex tiġi korroborata xiehda diretta oħra. Huma għal dawn ir-ragunijiet, kif tajjeb spjegat l-ewwel Qorti, li din it-tip ta’ xiehda ma tistax tiġi eskluza a priori izda d-decizjoni dwar l-opportunita` o meno li tithalla tinghata dik ix-xiehda u titqieghed quddiem il-gurija trid necessarjament tiġi rimessa lill-Imħallef togat li jippresjedi l-guri li jkun tenut jaghti d-decizjoni tiegħu skont ic-ċirkostanzi li fihom jizvolgi l-guri u skont l-esigenzi evidenzjarji u procedurali tal-process.

19. Hekk, jekk tigi messa in dubbju l-kredibilita` jew il-veridicita` ta` xhud, speċjalment jekk dak ix-xhud ikun persuna minuri, il-prosekuzzjoni ma tistax legalment tigi mcahnda mill-possibilita` li tikkorroborata dik ix-xieghda bil-mezzi li taghtiha l-ligi, inkluz it-tip ta` xieghda li ssemmiet hawn. Daqstant ukoll jekk tinqala` xi kwistjoni dwar jekk ix-xhud ikunx qieghed jiftakar sew dak li jkun qieghed jixhed dwaru jista` jkun mehtieg li jigi ezercitat kontroll ta` dik ix-xieghda bil-mezz tax- xieghda ta` haddiehor dwar dak li jkun qallu l-istess xhud fiz-zmien relevanti. F`dawn l-eventwalitajiet, kif inghad mill-ewwel Qorti fis-sentenza appellata, ikun mistenni li l-ewwel Qorti tispjega lill-guriya il-portata u l-limiti tal-valur tax-xieghda ta` persuna li tixhed dwar x`qal haddiehor. Naturalment, hu ugwalment mistenni li l-ewwel Qorti ma tammettix ix-xieghda fuq kliem haddiehor jekk mhux unikament ghall-ghanijiet u fil-limiti permessi mil-ligi kif gia` spjegat...

20. Mill-mod kif gie spjegat l-aggravju tal-akkuzat appellant f`dan ir-rigward jidher li l-akkuzat hu konsapevoli tal-pozizzjoni legali dwar il-hearsay kif spjegata kostantement mill-Qorti taghna u li din hi fis-sens kif spjegat mill-ewwel Qorti izda dak li jidher qieghed ihasseb lill-akkuzat appellant hu l-abbuz li jista` jsir mir-regola msemmija dwar il-hearsay peress li dak li jkun qal haddiehor jista` jigi malizzjozament uzat sabiex minflok biex jikkontrolla dak li jkun xehed haddiehor jew sabiex jikkorroborata provi diretti ohra jintuza sabiex effettivament jissostitwixxi dik ix-xieghda ta` haddiehor jew dawk il-provi diretti l-ohra. [sottolinejar tal-Qorti]

Issir riferenza ghas-sentenza moghtija minn din il-Qorti fl-ismijiet Il-Pulizija vs Neil Attard:14

Illi l-fatt li l-legizlatur jaghti drittijiet lid-difiza anke f`kazijiet fejn smiegh ta` xhieda issir b`rogatorji – u dan fuq domandi li Qorti esklussivament ghandha s-setgha li tawtorizza, liema domandi jsiru wara li jigi assigurat li l-process ghall-smiegh xieraq jigi aderit *inter alia* permezz ta` domandi jkunu jirrispettaw ir-regoli procedurali (per ezempju li ma jsirux domandi diretti, li x-xhieda tkun konfermata b`gurament etc) - ikompli jibni fuq ir-regola li in principju xhieda ghandha tinghata dejjem *viva voce* kif jipprovi l-artikolu 577(1) tal-Kodiċi ta`Organizzazzjoni u Proċedura Ċivili kif rez applikabbli bl-artikolu 520(1)(d) tal-Kodici Kriminali:

577. (1) Hlief meta dan il-Kodiċi jiddisponi xort`ohra, l-eżami tax-xhieda fis-smiegh tal-kawzi ghandu jsir fil-qorti bil-miftuħ u *viva voce*.

Ghaldaqstant filwaqt li tastjeni milli tiehu konjizzjoni ulterjuri tal-ewwel imputazzjoni, tillibera lill-imputata minn kwalunkwe htija u piena rigward it-tieni imputazzjoni.

**Article 600**  
**COCP**

Dying  
declarations, etc.  
Amended by:  
V.1913.122.

**600.** It shall be lawful to produce any declaration made in writing in any place before a magistrate or other person, whether *in articulo mortis* or at any other time, in the presence or in the absence of the parties, with or without oath, provided it is shown that such declaration was made deliberately and in such circumstances as lead to the belief that there was no intention to depart from the truth, and that the party who made such declaration would have been a competent witness if he could be called to give his evidence at the trial.

Anton Delicata ghan-nom ta' A D Properties Ltd. vs. Maurice Pisani, 28 April 2011, Qorti tal-Magistrati

*Qabel ma tidhol fil-mertu tal-kaz il-Qorti tibda biex tinnota li fost id-dokumenti esebiti mill-konvenut permezz tan- Nota a fol. 22 tal-process hemm affidavit ta' Josette Pisani, mart il-konvenut illi mietet fl-10 ta' Dicembru 20082. Billi dan huwa affidavit ta' persuna mejta, li effettivament mietet diversi xhur qabel ma gew istitwiti il- proceduri odjerni, il-Qorti hija tal-fehma li biex dan l- affidavit jikkostitwixxi prova ammissibbli irid ikun gie pprezentat in konformità ma' dak dispost fl-Artikolu 600 tal-Kap.12 tal-Ligijiet ta' Malta*

*L-imsemmi artikolu tal-Ligi jiddisponi li jistghu jingiebu d- dikjarazzjonijiet maghmulin bil-miktub f'kull lok li jkun quddiem magistrat, jew persuna ohra, sew in articulo mortis kemm fi zmien iehor; sew quddiem il-partijiet kemm mhux quddiemhom, bil-gurament jew minghajru, basta li jigi ppruvat illi dawk id-dikjarazzjonijiet saru bil-hsieb u f'cirkostanzi tali li wiehed ghandu jahseb li min ghamilhom ma riedx ibiddel is-sewwa, u li kieku seta' jigi msejjah biex jixhed fil-kawza, kien ikun xhud kompetenti<sup>3</sup>, izda fil-kaz in ezami ma jirrizultax illi saret il-prova rikjesta biex l-affidavit ta' Josette Pisani jitqies bhala prova ammissibbli ghall-finijiet tal-ligi. Il-konvenut semplicement ipprezenta dan l-affidavit, qalb diversi dokumenti ohra, permezz ta' Nota u waqaf hemm. Il-fatt li seta' ghadna din in-Nota bid-dokumenti annessi, inkluz ghalhekk l-affidavit, lill-kontro-parti ma jbiddel assolutament xejn mis-sitwazzjoni u l-istess affidavit jibqa' mhux ammissibbli bhala prova. Fid-dawl ta' dan ghalhekk il-Qorti tordna l-isfilz ta' l-affidavit ta' Josette Pisani, li jinsab a fol. 24 sa' 26 tal-process, mill-atti tal-kawza.*

**Article 520 of the criminal code** - what we are saying here also applies to criminal proceedings.

*Hearsay evidence rule* - things have moved a lot, both in Malta and also on a European scale. Last time we referred to the cons. Case **Joseph Mary Vella et vs. Il-Kummissarju tal-Pulizija.** One comment - it is hard time to try and have a companion edition where you find the most imp cases under the civil code.

*The problem here was, an appeal from what we call an interlocutory decree. A case on the illegal arrest and the cruel and degrading treatment of a person and they wanted a legal procurator as a witness so that he could take the witness stand and say what another person had told him and this person said to him his was a professional secret of the profession. First Hall has agreed with this and the Constitutional court confirmed this that the LP could take the witness stand and say what another person had told him 598, without revealing the identity of the person who provided him with the info. It is said a person can not convey the identity of the person but only the facts*

*which were provided to him. That evidence can be considered as hearsay. The rule which prohibits hearsay is not absolute but subject to many exceptions, the court.*

**ARTICLE 599** - *has a side note saying this is about when hearsay evidence is admissible.*

When the person who saw/heard cannot be produced in court, as ex of death, then. The Grand chamber reversed the judgement of the chamber and said no violation if at times you also allow hearsay evidence and that has remained of the judgements of European court of human rights.

*The problem in Malta still remains the compiling of evidence which may take ages.*

## **Privileged communications in Article 588 COCP**

**Article 589 COCP**- incriminating questions. Witnesses can not be compelled to answer any incriminating questions. He may refuse to answer that, what about degrading questions? It is in the hands of the court to decide whether this exposes him to his own degradation. Ex of a degrading question; have you had affairs with other women? Or where a witness will not be compelled to give. You better have with you the freedom of information act. Certain parts of it where no information can be given.

Sensitive matters in which the government is not disclosing to the people. Matter in which may be very important and one may expose Malta to certain dangers if these are revealed. When 590 was being enacted, it referred to a section we will be doing 637(3), which deals with - and will be dealt with later on in the year. Cap 496. We shall come across this when dealing with documents. What about a person who is present during the trial for a cause? No person can be present during the trial of the hearing of the civil law case and then be a witness.

**Article 591 COCP**- Each witness has to be examined separately but it is possible to have a confrontation.

**591.** In general, no person who has been present during the trial of a cause may be produced as a witness in the same cause; nevertheless it shall be in the discretion of the court, for just cause, to dispense with this rule in particular cases.

Person present at trial may not be produced as witness. Discretionary power of court.

**Article 592 COCP**- Referees, experts - THEY WERE only asked in front of each other, have to examine the accused person to see if he is fit to stand trial and to see if he is fit to have committed the crime. GURIN= small jury lasting only 2 days. Referees shall be examined in the presence of each other.

**592.** (1) Each witness shall be examined separately. It shall, however, be lawful for the court to allow two or more witnesses to be confronted with each other; and in any such case, each of the witnesses may be questioned in the presence of the other witnesses.

power of court.

Witnesses to be examined separately. Confronting witnesses. Amended by: XI.1858.5; XV.1913.117.

(2) Referees shall be examined in the presence of each other, unless the court deems it expedient, in any particular case, to examine each referee separately.

Examination of referees.

**Article 593 COCP** - deaf and dumb witnesses - you need somebody who can explain this to them. A boy who was abused by his own father, could not express himself and no one could understand what he was saying unless a member of his family. His mother could not be called up as there are proceedings also against his mother. Not everyone who can understand him. His mother passed away. If deaf and dumb but able to write, then the questions are written down and read out by register. If deaf and dumb but unable to write, then an interpreter is appointed.

*Gozo* - a case where a father used to abuse his children, even those with special problems.

**Article 594 COCP-** not common to happen - where these are being recorded and transcribed, these do not arise at all. You need not waste time at the appeal stage hearing the witnesses again.

Notes of the evidence.  
Amended by:  
Order-in-Council,  
1899, s. 12;  
XV.1913.118;  
XVI.1929.7;  
XI.1932.3;  
XXXI.1934.53;

**594.** (1) The substance of the answers given by the witnesses shall be taken down. Every answer which may have a material bearing on the merits of the case shall be taken down word for word:

Provided that in the inferior courts, it shall be sufficient that notes of the evidence of the witnesses be taken down in brief.

**Article 595** - nowadays has lost much of its importance - cinographs are shorthand writers.nowadays all recorded and transcribed.

**Article 596 COCP** - Employment of interpreter - section 39 of the constitution of Malta, you need to provide an interpreter if one does not understand the language being used. The use of english acts. If one is speaking in english you conduct the trial in english. Quintano has presided over 3-4 trials by jury in english. Fees of the interpreter can not be charged to the defendant - super imp. As in criminal proceedings, if I am accused of selling drugs and the court appoints a drug expert, in that case the court pays the drug expert but if I am found guilty and go to prison, I have to pay a fine and also have to pay for the fees of the experts appointed. Article 533 criminal code. You can not charge pero the charges of an interpreter.

**596.** (1) If the court does not understand the language in which the evidence is given, it shall appoint a qualified interpreter at the provisional expense of the party producing the witness.

Employment of interpreter.  
Amended by:  
XV.1913.119;  
XXXI.1934.55;  
L.N. 46 of 1965;  
XXIV.1995.223.

(2) The official interpreter shall, on entering upon the duties of his office, swear before the court that he will faithfully report the words of the witnesses.

Oath by interpreter.

(3) The interpreter appointed by the court shall take the said oath previously to the examination of the witness.

Oath by interpreter appointed by court.

(4) The oath shall be administered to the interpreter by the registrar.

Registrar to administer oath.

(5) Any interpreter may be objected to on good cause shown.

Objection to interpreter.

**Article 597 COCP-** cross examination of any witness can not be interrupted except by leave of court - not only in trials by jury, at around 6.30 you need to step as you need to take the panel of the jury back to their hotel in mellieha bay. That is the cheapest there, and so they use that one. Dinner used to be at 7.30.

*Article 597. The examination or cross-examination of any witness shall not be interrupted, without leave of the court.*

**Article 601 COCP-** IMP - you as a court have to assess whether he is lying or telling the truth. If you are a false witness. Witness

**601.** (1) Where it appears to the court that a witness has become guilty of false testimony, it shall order that he be forthwith arrested, and shall cause a copy of the acts to be transmitted, without delay, through the registrar, to the Court of Magistrates in order that proceedings may be taken according to law.

(2) In any such case, it shall be lawful for the court, upon the oral demand of either of the parties, to stay the proceedings in the action in which the witness has deposed, until the criminal proceedings against the witness shall have terminated, provided this may be done without prejudice to the other party, and provided the testimony impeached as false be such as to be likely to bear

guilty of false testimony, the court orders the person to be arrested immediately and proceedings are taken against him according to law.

**Article 602 COCP** - If the witness or interpreter wishes to may make any addition, the court shall allow such addition or correction and shall give weight. Any addition shall be noted down.

**Article 603 COCP**- be careful for this, in criminal proceedings when you are a mag on duty you may go to police headquarters in Floriana as a parade is being held.

In criminal proceedings you have to identify the persons, in all the cases, somebody was chosen by the victim. Sometimes they can make their own decision.

**602.** (1) If the witness or interpreter, at any time before the hearing of the cause is concluded, wishes to make any addition or correction, the court shall allow such addition or correction and shall give weight thereto according to circumstances.

(2) Any such addition or correction shall be noted down and

**603.** In order to prove the identity of any person or object it shall not be necessary that the witness should point out such person from among other persons, or pick out such object from among other similar objects, unless the court should think it expedient to adopt such course.

**Article 604 COCP**- no witness can leave court except by permission

**Article 605 COCP** - witness can not communicate with any other witness. As a rule there shouldn't be other witnesses in the hall whilst the witness is taking the witness stand. The court can issue an order, do not make any communication with any other witness waiting outside the hall.

**Article 606 COCP**- What about witnesses who will leave malta? Or witnesses who are inferm? You can appoint a judicial assistant who will carry out the examination - the questions put to the witness and answers shall be taken down in writing and deposition shall be signed by the witness himself. If a person is leaving Malta, all you need to do is make an application in court, RIKORS and swear that the witness is about to leave Malta, or he is ill, old age etc so that he is heard. During hearing you need to do this orally. No need to write a rikors.

**Sub 3** - where the cause is pending before the court of mag. Gozo - it shall be lawful, judicial assistant. Courts can rely on judicial assistants to carry out these duties. Judicial assistants shall contend any objection - regarding the competency or credibility of any witness.

Now, we have examined Gozo as he is sick, but can the court order that this person be heard once again in Malta? **YES 610(5)** - whilst the law is providing for such, it is not excluding the possibilities, the court is not excluding to hearing evidence yourself. If you have not been told, there was a case by Mr Justice De Gaetano, Mag. became a judge, witnesses were all heard by the Mag so i told prosecution and defence okay you can make your submissions. She decided

that the accused was really guilty and took matters to the court of criminal appeal. It was decided no, the mag. Should hear all the evidence himself and the case was sent back to the mag's court.

*606.(1) Where any person whose evidence is required in a cause which is pending, is about to leave Malta, or is so infirm or advanced in years that he might die or become unable to give his evidence before the time when such cause will come up for trial, or is unable to attend the trial, it shall be lawful for the court, saving the cases referred to in article 611, to commit the examination of such person to a judicial assistant; and in any such case, the questions put to the witness, together with his answers thereto, shall be taken down in writing, and the deposition shall be signed or marked by the witness himself. Form of demand for examination.*

*(2) The demand for the examination of any person as provided in sub-article (1), if made before the day appointed for the trial or the continuation of the trial of the cause, shall be by an application and the applicant shall swear that he has reason to believe that the witness is about to leave Malta or is unable to appear before the court, as the case may be; during the hearing such demand may be made orally. Examination of witness outside jurisdiction of court.*

*(3) Where the cause is pending before any of the superior-courts, or before the Court of Magistrates (Malta), and the person to be examined under the provisions of this article is in the Island of Gozo or of Comino, it shall be lawful for the court to commit the examination of such person to a judicial assistant; and where the cause is pending before the Court of Magistrates (Gozo), and the person to be examined as aforesaid is in the Island of Malta, it shall be lawful for the court to commit the examination of such person to a judicial assistant. Judicial assistant to administer oath.*

*(4) In the cases referred to in this article, the oath may be administered by the judicial assistant.*

*(5) The party by whom the evidence is required shall, before the order of the court is carried out, deposit with the registrar a sufficient sum to cover any expense which may be incurred for the execution of the order; and in default of such deposit, it shall be lawful for the court to decide the cause without such evidence*

**Articles 610 and 611 COCP**- will still make a distinction between the criminal court and the court of magistrates. The distinction between 2 articles is mostly about this.

**Article 612 COCP**- provisions of 606 - are also - NOT SO IMP - HARDLY EVER USED!

**Prorogatory lessons** - *progare* = in latin means 'to ask'

**Article 610.**(1) The provisions of article 606 shall, independently of the reasons mentioned in that article, apply also in any case in which, in an action before the Civil Court, First Hall, a demand to that effect is made, by means of a note, by all parties to the action, and also in the case where the court so orders.

(2) In any such case, the provisions of the last part of article 606(1) shall not apply; but the answers given by the witnesses shall be taken down in the manner provided in article 594(1), and the deposition shall be signed or marked by the witness and countersigned by the judicial assistant who shall transmit it to the registrar.

(3) If any question shall arise before a judicial assistant as to the competency or relevancy of a witness, or as to the admissibility or relevancy of any question put to a witness, the judicial assistant shall decide the question and record his decision, saving the right of the party aggrieved, in the case of rejection of the witness or question, to apply to the court.

(4) All other provisions of this Code relating to the examination of witnesses before the court shall apply to any examination under this article, in so far as they are applicable.

(5) Nothing in this article shall prevent the court from ordering, either of its own motion or upon the demand of any of the parties, where necessary, that a witness examined under the provisions of this article be recalled and re-examined before it.

**Article 611. COCP** (1) Where the evidence of any person as provided in article 606 is required before the Court of Magistrates (Malta), or before the Court of Magistrates (Gozo) in its inferior jurisdiction, the witness shall be examined by the magistrate himself, but in the latter case the magistrate shall reduce the evidence to writing and shall cause it to be signed or marked by the witness.

(2) Whenever the Magistrate of the Court of Magistrates (Gozo) is temporarily absent from Gozo with the permission of the Minister responsible for justice, or is, through a lawful impediment, precluded from performing his duties, the registrar of the said court may be authorized by the State Advocate to take the evidence of any person as provided in article 606 and to administer the necessary oath.

(3) Nevertheless, the provisions of article 606(3) shall be applicable to any of the courts mentioned in sub-article (1) where the person to be examined is not in the Island or Islands where the court, before which the evidence is required, sits.

**Article 612 COCP.** (1) The provisions of article 606 shall also apply in the case where, for the reasons set out in that article, there are sufficient grounds to believe that a witness whose production has been disallowed in the court of first instance will not be able to attend before the appellate court.

(2) In any such case, the examination of the witness shall be ordered by the court before which the cause is pending, but the deposition shall be kept closed and sealed until the appellate court.

### **Why is hearsay evidence not accepted?**

1. *Strong objections* - The original person from whom the witness heard the statement may have incorrectly perceived the events.
2. The same person who confided in me about what happened may not be of sound mind, or has a faulty memory. (not so extreme)
3. This person who told me about these events may have lied or distorted the events which he told me.
4. I, The witness, may have misunderstood what the other person told me.

Not to accept hearsay evidence, but the rule is not absolute.

### **Maroushka Cesare vs. Shaun Bonello - 30th May 2014, Civil Appeal Superior**

D had both criminal and civil proceedings against him. Criminally, he was acquitted, but the civil court, focusing on what other witnesses had testified, and on the sketch drawn up by the architect, he was civilly liable.

### **Dr. Giovanni Bonello vs. Alfred Mifsud, 1986**

In certain cases, court can allow “xhieda fuq kliem haddiehor” + “Il-gudikant pero ghandu juza cirkospezzjoni kbira qabel ma jircievi dawk id-dikjarazzjonijiet bhala konkludenti.”

**Joseph Mary Vella et. vs. Il-Kummissarju tal-Pulizija 1988** Constitutional - Appell minn digriet interlokutorju dwar l-ammisibilta’ ta’ xhud. The Court was asked whether “xhud prokuratur legali biex jixhed dwar il-fatti rilevanti li kien sema’ minghand terza persuna fil-kors tal-ezercizzju tal-professjoni tieghu minghajr ma jizvela’ l-identita’ tal-istess”

Prim Awla - ppermettiet tali xhieda, il-Qorti Kostituzzjonali kkonfermat;

“Ix-Xhud ma setax jizvela l-isem tal-persuna li kienet taghtu l-informazzjoni billi kien marbutt bis-sigriet professjonali. Kellu biss permess minn dik il-persuna biex jixhed fuq il-fatti li lilu gew rakkonttati.”

“Tali xhieda tikkonstitwixxi ‘hearsay’”

Not absolute and subject to various exceptions.

The Court can consider to take “xhieda fuq kliem haddiehor” and takes such into account when such has substantial importance “sostanzjali”

Hence in such a case, the witness was admissible.

**Paul Portelli vs. Peter Portelli, 2006** - In some cases the court allows “xhieda fuq kliem haddiehor” when this has “importanza sostanzjali fuq il-mertu tal-kawza”.

**Il-Pulizija vs. Janis Caruana, 2012 - Judge Lawrence Quintano** – D is saying that current “incident report huwa biss hearsay evidence” + person who made the report never testified in Court (she was in Mexico). She reported the theft of a laptop from a Hotel Gorganis, costing around 1300euros . In the report, no suspected person is mentioned. D is saying that this report is hearsay hence no prova fil-process li s-serqa filfatti sehhet.

Hearsay rule in 599 - not as rigid as one may think.

The court after applying article 599 sees that there exists admissible evidence - ir-rapport huwa prova li saret is-serqa u xejn iktar. The court saw all evidence afresh to see if enough evidence exists for D to have committed the theft. D denied ever going into her room - “Il-Kamera jista’ jkun dawwartha ghax kont fis-sakra u dawwartha biex niccajta”

In footage he was seen placing something in his shirt - “*Il-Qorti ma ttemminx li din kienet xi cajta*” + *if it were a mobile, like D is alleging, he does not have to put it in his shirt and a bulge would not appear. Hence the Court confirms in the first sentence that D is guilty.*

**Al-Khawaja and Tahery vs. UK (ECHR)** - *Al-Khawaja Case* - This case was decided by the Grand Chamber of the European Court of Human Rights on 15th Dec 2011. Al-Khawaja was a consultant physician who was convicted of indecently assaulting 2 patients. One complainant died before trial and her police statement was read to the Jury. The Judge instructed the Jury on the limitations of this evidence and additional corroborative testimony was presented.

The Legal Issue was whether admitting hearsay evidence from absent witnesses violates the D’s right to a fair trial under article 6(1)(3)(d). The Court held that there was no violation of Article 6 as the hearsay was corroborated, and sufficient, counter balancing factors ensured the trial’s fairness. The witness was unavailable for a good reason (she died) and if there is corroborating evidence, and the judge directs the Jury - then there is no violation.

*Tahery case* - separate cases but were enjoined. Tahery was accused of wounding with intent (sabbing). The key witness refused to testify in Court due to fear and his statement was read instead. The Court decided that there is a violation as the lack of cross-examination of the witness undermined the fairness of the trial especially since the statement was decisive of the conviction.

*BOTH CASES TESTED HOW FAR HEARSAY EVIDENCE CAN BE USED IN CRIMINAL TRIALS.*

The difference between the level of proof needed in civil proceedings and the level of proof needed in criminal proceedings. This Shaun Bonello first appeared in the criminal court but in the meantime civil proceedings were going on in the first hall. One interesting fact is the sketch of the architect, which was in particular, where the motorcycle was found and distance from the helmet. Criminally, he was acquitted. But the civil court first hall said, appealed sentence from.

The court of civil appeal superior overturned the judgement of the first hall and found this person civilly liable. What the court of appeal did was it concentrated on what other witnesses had testified. On the other hand, both civil court first hall and in the criminal court, emphasis was made on the sketch drawn up by the architect and which created a question mark, with the situation or on site provision of the helmet and motorcycle.

Certain crimes are very difficult to prove.

If police know that person X in Paola is selling drugs, they would definitely go and try to see whether it is true. They lurk in some safe place.

They have to investigate whether the person indicated was the person - they have to see whether they are wasting time or not. As one could divert attention.

# **PROGATORY LETTERS 613-622, (622A \*evidence by affidavit of witness residing abroad)**

*Progo* = To ask, in Latin. If I have a witness in the UK and I need his evidence.

**The Convention** - when I file a suit against you, you reply, but in the same instrument, you file a case against me. KONTRO-TALBA. We covered that indirectly when dealing with set-offs in 3rd year.

*Can I prepare a list of questions so that these are answered in a foreign court?*

## **Why is hearsay evidence not accepted?**

- 1. *Strong objections* - The original person from whom the witness heard the statement may have incorrectly perceived the events.
- 2. The same person who confided in me about what happened may not be of sound mind, or has a faulty memory. (not so extreme)
- 3. This person who told me about these events may have lied or distorted the events which he told me.
- 4. I, The witness, may have misunderstood what the other person told me.

Not to accept hearsay evidence, but the rule is not absolute.

## **Maroushka Cesare vs. Shaun Bonello - 30th May 2014, Civil Appeal Superior, no. 359/2005/1 (a good case of criminal + civil liability)**

The difference between the level of proof needed in civil proceedings and the level of proof needed in criminal proceedings. This shaun Bonello first appeared in the criminal court but in the meantime civil proceedings were going on in the first hall. One interesting *fact is the sketch of the architect, which was in particular, where the motorcycle was found and distance from the helmet. Criminally, he was acquitted. But the civil court first hall said, appealed sentence from.*

The court of civil appeal superior overturned the judgement of the first hall and found this person civilly liable. *What the court of appeal did was it concentrated on what other witnesses had testified. On the other hand, both civil court first hall and in the criminal court, emphasis was made on the sketch drawn up by the architect and which created a question mark, with the situation or on site provision of the helmet and motorcycle.*

Certain crimes are very difficult to prove.

If police know that person X in Paola is selling drugs, they would definitely go and try to see whether it is true. They lurk in some safe place.

They have to investigate whether the person indicated was the person - they have to see whether they are wasting time or not. As one could divert attention.

**PROGATORY LETTERS 613-622, (622A \*evidence by affidavit of witness residing abroad)**

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*Can I prepare a list of questions so that these are answered in a foreign court?*

This normally happens in the superior courts. What happens is this. Court makes an order, declaring examination to be necessary. And no 2, it stops the proceedings or suspends the proceedings, to wait for the evidence to come from abroad.

Is this done by word of mouth in court? No you have to make a Rikors, if this is done at any time before the hearing, it may be done orally however, if the end arises during the hearing of the cause. Before the case is underway, in that case you do it by word of mouth. You have to provide a list of the questions in writing, besides the questions, you also need to add.

**iWorld Group Holdings vs. Bettina Vossberg, 2007 - Court of Appeal**

P wanted to produce various witnesses via “ittri rogatorji”. The Court said that who starts the action must be prepared to bring in their evidence. One should never start a case and not know who the witnesses are and how this will be conducted.

In this case the case started on the 25th June 2004 with many witnesses indicated. The Court wanted more specifications in this regard.

16th September 2004 - more precise indication given that 8 witnesses will give evidence via affidavit.

26th May 2006 - no affidavits in their hands.

26th October 2006 - P wanted 8 witnesses to give evidence “bil-procedura tal-ittri rogatoji”

The Court did not agree. Before a case is opened, “ix-xoghol preparatorju” + “kellhom jagixxu tempestivament u mhux ihallu minn Gunju 2004 sa Ottubru 2006”

“L-atturi ghal aktar minn sentejn m’ghamlu xejn.”

**Article 613 COCP-** *Where it is made to appear to the satisfaction of any of the superior courts, or of the Court of Magistrates (Gozo) in its superior jurisdiction, that the evidence of any person*

*who is absent from Malta is indispensable for the determination of any cause pending before any of such courts, it shall be lawful for the court to make an order declaring the examination of such witness to be necessary and the court may stay the proceedings after having complied with the provisions of article 158 and adjourn the cause to a time within which such evidence is to be obtained*

**Article 614 COCP-** translator will have to pass through criminal proceedings and the court will appoint him as a translator. Has this happened? Yes.

**Article 615 COCP-** tells us you have to indicate where this witness lives, how can we notify a witness whose address we do not have. It all stands to reason, very logical.

**615.** *The party demanding the examination shall affirm upon oath that he knows, or, that he possesses information which he has sufficient reason to believe to be true, that the proposed witness is in the place stated by him and that such witness is in a position to certify the truth of the facts stated in the interrogatories.*

If you start winning time, and these examinations are not carried out immediately, especially in Italy, use your brains so that the child becomes accustomed to Malta and you go back to the UK. Cases of child abduction should take no more than 6 weeks.

## **PROGATORY LETTERS**

opposite party may also appoint a witness in the foreign country, in that case he has to establish the address of this lawyer,

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Transmission of letter of request and documents to Minister responsible for justice.  
*Amended by:*  
[L.N. 4 of 1963;](#)  
[XXIV.1995.232;](#)  
[XXXI.2007.27.](#)

**619.** The letter of request referred to in the last preceding article, together with the accompanying documents, shall be transmitted by the registrar to the Minister responsible for justice, who shall forward it to the proper authorities with a request that it may be executed:

Provided that the court may dispense with the requirement of this article where any treaty, convention, agreement or understanding, between Malta and another country or which applies to both such countries or to which both such countries are a party, provides for direct transmission of letters of request between judicial authorities.

**Article 619 COCP-** you have to draw up a letter

of request, addresses to judge or mag in the place to be executed - not the same in Italy. You have to be very specific in which court.

Letter of request is made - what does the request have in it? A copy of the decree

Letter of request referred to in 618, together with the documents, shall be transmitted by the registrar of the court. You have no idea the duty of the registrar entails.

We have to see if the country where the mother has taken my child, then I have to see if the place is not part of Hague convention if a reciprocal agreement exists. So you go to the minister of

justice, provided the court may dispense with this article, one is using the minister of justice or if we have a bilateral agreement, we may send these letters of request directly from the court of Malta directly to the court of another country. Best source of knowledge is the minister of foreign affairs.

**Article 620 COCP-***It shall be the duty of the party demanding the examination to solicit the authority or person requested to take the examination, to carry out such examination in accordance with the terms of the letter of request.*

**Article 621 COCP-***Before the authority or person requested to take the examination, the questions shall be put according to the interrogatories transmitted with the letter of request, and, in cross-examination, there shall be put such other questions as the agent of the opposite party may require; the examiner may also put any other questions which, as a result of the answers given, he may deem or the agent of the party demanding the examination may show to be necessary or expedient*

*“in cross examination”* POSSIBLE TO HAVE IT IN ITALY, FRANCE, UK...

EXAMINATION in chief may have certain questions on what was said in the answers in the cross-examinations, and the other party after hearing my questions may also have a right to put certain questions

**Article 622 COCP-** all it tells us is that the parties involved will have to be informed about the date and time of examination. Duty of agent of party to produce witness with him. Not signed by the court here but by witness and examiner.

In Malta 1995, the idea of having affidavits in our courts was very alien. But then the same minister decided to introduce even an affidavit in Malta. Rent laws start by the applicant immediately filing in court an affidavit by person A or more than 1 affidavit, as you have to produce proof of title of the apartment, garage and that the tenant does not want to leave. This normally happens in the superior courts. What happens is this. Court makes an order, declaring examination to be necessary. And no 2, it stops the proceedings or suspends the proceedings, to wait for the evidence to come from abroad.

Is this done by word of mouth in court? No you have to make a Rikors, if this is done at any time before the hearing, it may be done orally however, if the end arises during the hearing of the cause. Before the case is underway, in that case you do it by word of mouth. You have to provide a list of the questions in writing, besides the questions, you also need to add.

## **Article 622A COCP**

*(1) Notwithstanding the provisions of articles 613 to 622, where the evidence of a witness residing outside Malta is required, and such person has made an affidavit about facts within his knowledge before an authority or other person who is by the law of the country where the witness resides empowered to administer oaths, or before a consular officer of Malta serving in the country where the witness resides, such affidavit duly authenticated may be produced in evidence before a court in Malta; and the provisions of articles 623, 624 and 625 shall apply to such affidavits.*

*(2) The affidavit so obtained shall be served on the opposite party or parties, and any party to the proceedings desiring to cross-examine such a witness shall apply to the court for the examination of such witness by letters of request not later than twenty days from the service of the affidavit; and the provisions of this Code relative to letters of request shall apply with such modifications and adaptations as may be necessary.*

*(3) If no application is made as aforesaid no cross-examination of the witness shall be allowed unless the court for a good reason otherwise directs; and the affidavit shall be taken into consideration notwithstanding the absence of cross-examination.*

*(4) Notwithstanding the foregoing provisions of this article, if the parties agree, and the court deems it proper to act, the Court may make such other provisions concerning the conduct of the cross-examination as may be appropriate according to circumstances.*

Such affidavit duly authenticated in Malta and the provisions which we will see will apply. First thing you do upon getting an affidavit, is serve it to the other party. Then, once we have the affidavit, can you make a cross examination? YES.

By letters of request of the person who is residing - we have a time limit - not later than 20 days from later than the service of the affidavit. We receive an affidavit from abroad, 20 days from today (time runs from tomorrow) to ask the court to put questions of cross examinations to the person who made the affidavit in New Zealand, Australia. If no application is made within 20 days, no cross examination is allowed.

Affidavit shall be taken into consideration - sub 3 - if no cross examination is made within 20 days, the affidavit will still stand. Sub 4 is left to the parties altogether.

**622B.** (1) Without prejudice to the provisions of article 622A, the court may, if it deems it proper so to act, allow for the audio-recording or for the video-recording of any evidence required from a witness as aforesaid, in accordance with such codes of practice as the Minister responsible for justice may, by regulations, prescribe.

Audio-recording or  
video-recording of  
evidence.  
Added by:  
[XXXI.2002.159.](#)  
Amended by:  
[VIII.2017.7.](#)

(2) The Court may also allow for the testimony of any witness even if present in Malta to be given by video conference or by teleconference from such place as the court may order and subject to such conditions and directions as the court may deem necessary:

Provided that the Minister responsible for justice may, by regulations, provide for any procedures, formalities, modalities or restrictions which are to apply to the taking of evidence in Malta in respect of proceedings in Malta by video conference or by

**Article 623 COCP** - sufficient time has elapsed, lawful for the court of its own motion, to be ordered the court has been set down for hearing of its own motion. Through experience, the same experience is going through and the same experience may inspire you to follow, to decide the point which has arisen before you with the help of what you did in a similar situation.

**Article 624 COCP**- Production of evidence taken upon letters of request - only after the cause shall have been received by the appellate court. Present all your evidence before the court of first instance and when appealing make sure the grounds of appeal are numbered and remember you can not during proceedings add a fresh ground of appeal. But here the law takes the possibility. These purgatory letters reached Malta. Once they were received late, they were used in the appellate court as well. As the general rule is that all evidence must be produced in the first hall. So here there is an exception.

**Article 625 COCP**- or absent from Malta. As a rule, such disposition is taken, although this continues to exist. Finally, we have

**Article 626 COCP** - does not deal with rogatory letters, affidavits, but deals with examination of witnesses by referees. The Court appoints referees, either by its own motion or because parties have asked for it. Referees in criminal proceedings have to be chosen by the court. I appoint a referee in the Civil Court, the court as a rule empowers the referee to hear witnesses. If the referee has heard a witness, and you feel that that witness should appear in court, it is possible with the permission of the court to have that witness to be produced before the court. Lawful for the court of its own motion - tiddeciedi l qorti.

As you grow older, you will start feeling that what the person is saying is not the truth, the 6th sense. Another good book is one about body language - some people dispute this and say body language is not enough, but others will say it will help you in an investigation.

*Documentary evidence - subtitle 2 and 3 - 17 sections - at home go through - Articles Cap. 496 freedom of info act, section 637 sub 3, 4, 6. Read under these subsections under exempt documents. Then in sub section 4 refer to —>*

**I World Group Holdings vs. Bettina Vossberg, 2007**

Rat l-appell interpost mis-socjetajiet attrici li in forza taghha talbu:

"lil din l-Onorabbli Qorti toghobha (a) thassar u tirrevoka l-provvediment tas-26 ta' Ottubru 2006, u ghalhekk tawtorizza l-esponenti biex jipproducu s-segweni xiehda permezz ta' ittri rogatorji: Pauntea Morshedi, Christopher Apap, Andreas Gerdes, Jed Alpert, Richard Leitermann, Raphael Veit u Daniel Scalisi; kif ukoll l-affidavits tas- segweni persuni Pauntea Morshedi, Andreas Gerdes, Christopher Apap, Jed Alpert, Richard Leitermann u Maria Micallef.

Kif ukoll (b) tbiddel u tirrifirma s-sentenza premessa billi filwaqt li tikkonferma in kwantu cahdet l-eccezzjonijiet tan- nullita` tac-citazzjoni; tar-rinunzja ta' l-azzjoni; u tal- preskrizzjoni; tirrifirma s-sentenza billi previa li tichad l- eccezzjonijiet l-ohra tal-konvenuti takkolji t-talbiet attrici bl- ispejjez kontra l-istess konvenuti; u (c) tirmimetti l-kawza quddiem l-ewwel Onorabbli Qorti ghall-kwantifikazzjoni tad-danni sofferti mill-esponenti."

Rat ir-risposta tal-konvenuta li fiha talbet ic-cahda ta' l- appell u l-konferma tas-sentenza appellata;

Rat l-atti kollha tal-kawza u d-dokumenti esebiti; Semghet lid-difensuri tal-partijiet;

Ikkunsidrat;

Illi din il-Qorti sejra, fl-ewwel lok, titratta l-aggravju ta' l- appellant fir-rigward tad-digriet ta' l-ewwel Qorti tas-26 ta' Ottubru, 2006. Din il-Qorti tara li l-aggravju mhux misthoqq. Min jibda kawza ghandu, f'dak il-mument, ikun ippreparat li jressaq il-provi tieghu kollha, f'seduta wahda jew aktar skond ma tordna l-Qorti. Id-disponibilita` o meno tal-provi ghandha tkun maghrufa mill-bidu, u parti m'ghandhiex tibda kawza u ma tafx min se jixhed u kif.

F'dan il-kaz, l-atturi pprezentaw il-kawza fil-25 ta' Gunju 2004, b'numri kbar hafna ta' xhieda elenkati. L-ewwel Qorti riedet li l-atturi jkunu aktar specifici dwar il-modalita` ta' kif kienu bi hsiebhom imexxu l-kawza. B'nota tas-16 ta' Settembru 2004, l-atturi taw indikazzjoni aktar preciza tal- provi li kienu se jipproducu, u indikaw, fost affarijiet ohra, li kien hemm 8 persuni li kienu se jiddeponu b'affidavit. Avvolja ghamlu din l-istqarrija, jidher li dawn l-affidavits ma kienux f'idejn l-atturi, u ghal sentejn shah – sas-26 ta' Mejju 2006, data ffissata mill-ewwel Qorti ghall-ewwel smigh tal-kawza – baqghu ma ghamlu ebda talba biex iressqu l-prova ta' dawk ix-xhieda b'mod iehor. Fl-udjenza tas-26 ta' Mejju 2006, l-ewwel Qorti ffissat jum f'Ottubru 2006, ghall-provi ta' l-atturi. Fl-udjenza tas-26 ta' Ottubru 2006, l-atturi ressqu l-provi taghhom u hemmekk, ghall- ewwel darba, ressqu talba biex ix-xiehda tat-8 persuni indikati tittiehed bil-procedura ta' l-ittri rogatorji. L-ewwel Qorti cahdet it-talba u din il-Qorti taqbel maghha.

Kawza ma titmexxiex biss fl-udjenzi quddiem il-Qorti, imma x-xoghol preparatorju u l-follow-up mehtieg irid isir qabel ma tinfetah il-kawza jew, ta' l-anqas, qabel ma jibda s-smigh

tal-kaz. L-atturi, f'dan il-kaz, riedu x-xiehda ta' persuni assenti minn Malta; xtaqu li dawn jiddeponu bil- procedura ta' affidavit, izda jekk ix-xhieda ma kienux disponibbli ghal dan, kellhom jagixxu tempestivament, u mhux ihallu minn Gunju 2004 sa Ottubru 2006 biex jitolbu rimedju alternattiv. Forsi l-atturi kienu jkunu gustifikati jistennew ftit xhur ghall-affidavits, izda meta dawn baqghu ma gewx prodotti, kellhom obbligu sabiex, qabel ma l- Qorti tappunta l-kawza ghas-smigh, jitolbu, kif xtaqu, ittri rogatorji. L-atturi ghal aktar minn sentejn ma ghamlu xejn, jistennew guranta ghas-smigh minghajr ma jipprovdu ghall-provi li riedu. Kien biss dakinhar li kellhom igibu l- provi li l-atturi talbu li jinqdew bil-procedura ta' ittri rogatorji, u dan meta sa dakinhar il-Qorti ma kellha ebda hjiel dwar din it-talba. Fl-udjenza tas-26 ta' Mejju 2006, il- Qorti ffissat jumejn shah ghal gbir tal-provi, u da parti ta' l- atturi ma ntqal xejn dwar il-problema li kellhom biex jakkwistaw l-affidavits li riedu. Fis-seduti ffissati ghall- provi, l-atturi ppretendew li l-Qorti, li zgur kienet mehuda b'sorpriza bit-talba li saritilha, twaqqaf il-process kollu,

ippjanat xhur qabel, sakemm l-atturi jgibu l-provi li riedu minn barra! Bir-ragun, l-ewwel Qorti ma accettatx li tkun parti f'din l-ingustizzja li riedu jwettqu l-atturi! Din il-Qorti, fil-kawza Micallef v. Cassar, deciza fit-13 ta' April 2007, kienet diga` rrimarkat fuq il-htiega li l-partijiet ikunu ppreparati mill-bidunett fuq il-provi li jkunu se jipproducu, u f'dan il-kaz tara nuqqas kbir da parti tas-socjetajiet attrici f'din il-materja.

L-aggravju ta' l-atturi appellanti dwar il-provvediment tas- 26 ta' Ottubru 2006 qed jigi ghalhekk michud.

## **DOCUMENTARY EVIDENCE**

When these experts prepare these documents, they hand it to the magistrate and the magistrate writes the report, and this report appears as part of the proceedings and experts are called in to testify on this report. If you have receipts, you better produce them - now to your lectures with dr patrick galea, you know the special laws of cap 69 and 158 of the laws of malta. Mathematics all the time with them.

Documentation - problem of our preliminary agreement - have to produce a copy of the relevant preliminary agreement in court. When law is passed through parliament, it is presented in the gov gazette. Certificates issued by the minister - what 227 is all about.

627. The following documents shall be admissible in evidence without the necessity of any proof of their authenticity other than that which appears on the face of them, and shall, until the contrary is proved, be evidence of their contents:

- (a) the acts of the Government of Malta, signed by the Minister or by the head of the department from which they emanate, or in his absence, by the deputy, assistant, or other officer next in rank, authorized to sign such acts;
- (b) the registers of any department of the Government of Malta;
- (c) all public acts signed by the competent authorities, and contained in the Government Gazette;
- (d) the acts of the Government of Malta printed under the authority of the Government and duly published;
- (e) the acts and registers of the courts of justice and of the ecclesiastical courts, in Malta;
- (f) the certificates issued from the Public Registry Office and the Land Registry;
- (g) the sea-protest made under the authority of the Civil Court, First Hall;

### **Anthony Briffa vs. Vincent Oliver Abela, First Hall Civil Court, 28th March 2003**

Premess illi l-konvenut proprio et nomine huwa debitur ta' l-attur proprio et nomine ghas-somma ta' tnejn u tletin elf, sitt mija u tlettax-il lira Maltija u tlieta u tmenin centezmu (Lm32,613.83), kwantu wiehed u tletin elf, tmien mija u ghaxar liri u hamsa u tletin centezmu (Lm31,810.35) kapitali, u kwantu tmien mija u tlett liri Maltin u tmienja u erbghin centezmu (Lm803.48) imghax bi tmienja fil-mija sal-31 ta' Marzu 1994, prezz ta' merkanzija minnu ordnata u lilu kkonsenjata;

Hemm imbaghad fuq kollox id-decizjoni tal-Qorti ta' l- Appell Kriminali tal-31 ta' Lulju 1998 (kopja esebita a fol. 178) li certament tindebolixxi d-difiza tal-konvenut

Jinghad fid-decizjoni fl-ismijiet "Paolo Abela -vs- Antonio Bonnici et noe", Prim' Awla, 23 ta' Jannar 1958 illi "ma jidhirx fil-ligi li hemm xejn kuntrarju ghall-esebizzjoni f'kawza civili ta' kopja ta' sentenza moghtija mill-Qorti Kriminali fuq l-istess fatti.";

Dan l-insenjament jaghmel rikjam ghal dak traccjat fid- decizjoni ta' din il-Qorti fl-ismijiet "Carmelo Camilleri -vs- Gejtu Cassar", 1 ta' Dicembru 1955 fejn jinghad a propozitu dan:-

"Mill- principju sancit fl-Artikolu 6 tal-Kodici Kriminali, jigifieri ta' l-ezercizzju taz-zewg azzjonijiet, tidderiva biss il- konsegwenza illi l-provi ta' l-azzjoni simili ghandhom isiru ex

integro quddiem il-Qorti Civili kompetenti, u dawk ta' l- azzjoni kriminali, anke ex integro quddiem il-Qorti Kriminali; pero` xejn ma josta illi jsir il-konfront bejn dawk il-provi, għall-fini ta' attendibilita` tagħhom u ta' l-ahjar amministrazzjoni tal-gustizzja. Minn hawn jidher ukoll illi konformament għar-regola relattiva għall-provi, tista' tigi prodotta f'kawza civili, li tkun għadha pendenti, kopja tas- sentenza mogħtija mill-Qorti Kriminali fuq dawk l-istess fatti; u dan in forza ta' l-Artikolu 627(e) tal-Kap 12." F'dan is-sens hi l-gurisprudenza tagħna (Vol. VI P I p 143 u Vol. XXVII P I p 617)

Naturalment il-gudizzju in sede penale jikkostitwixxi biss wahda mill-provi pero` hi prova importanti anke għaliex ukoll kull prova hi ammissibbli jekk hi logikament rilevanti għall-kwistjoni fil-kawza bejn il-partijiet (Artikolu 558 tal- Kapitolu 12);

Difatti bhala proposizzjoni dottrinali rakkolta mil-Laurent, "si ritiene che il giudice civile puo` al bisogno attingere gli elementi della sua canonizzazione alle prove raccolte in procedimento penale" ("Carmelo Xuereb et -vs- Giovanni Micallef et", Appell Civili, 26 ta' Novembru 1923;

**Reference also to Article 628 COCP** - evidence of the register kept by the master - certificates which you need

274 - says articles 224, 227, 229 etc

Do not need to know these by heart.

Acts of foreign

government or department of a gov - Article 628, authenticated = so here we need a signature.

**What does this mean?** Of any country - not only in Malta, so we are too small a country, from time to time gov does not have enough money to have an embassy in say Afghanistan so what it normally does is to have an agreement with another country so the diplomatic service of the other country can represent malta in that other country, it can be the diplomatic service of Italy. We have an agreement with the Italian government when the Maltese are travelling through Afghanistan.

Malta can not afford to do so - not the first time an embassy finds itself in Egypt, representing Malta.

Last preceding article - authenticated in 628 imp = someone who had formal responsibility in the foreign country, particularly when Malta does not have an embassy of its own who can

**629.** The following documents are admissible and shall, until the contrary is proved, be evidence of their contents, provided their authenticity be proved:

- (a) the acts and registers of any establishment, or public body, authorized or recognized by law or by the Government;

Acts of foreign Governments, et Amended by: XXII.1976.4.

Acts requiring proof of authenticity. Amended by: XI.1973.377.

authenticate that particular document. Then we have acts which prove the lists of authenticity - imp to distinguish between 627 and 629, then we have a section 628 about acts on foreign governance.

**Article 629 COCP** - acts which require proof of authenticity. These are admissible as evidence and shall - provided their authenticity be proved - subarticle (c) VERY

IMPORTANT - where the seller obtained his flat, plot of land, this is the place you have to know about, MIKIEL ANTON VASSALLI STREET. Archive of all the acts of the notaries.

*Question of authenticity - **9th January 1991** - Joseph Schembri LLD nom vs Joseph Gasan et nomine*

Admissibility of a foreign judicial act - a document may be admissible - ok but how far - does that doc tell the truth? Here we are told - “il prova li jikkontjeni dokument hija dejjem soggetta all kontro prova li tista tingieb quddiem dawn il qrati’ what is being said here, it is authentic and admissible but it doesn't mean that the details contained in that document are true.

Acts and registers of foreign notaries - are they imp? Ofc they are important.

**Article 631 COCP**  
- books of traders - straightforward

**631.** The books of traders and ships’ books shall constitute evidence against the traders themselves or the masters or owners of the ships, notwithstanding that such books are not kept according to law.

Traders’ books, etc., to constitute evidence against traders, etc.

**Article 632** - parents ask to have a private writing and they declare that they gave you 50k euros which they have lent me to buy the property. Can this be used against me? These are civil proceedings and not criminal proceedings. Here 632 is imp - any declaration made by a party against his interest, is admissible as evidence.

*632.(1) Any declaration made by a party against his interest, or any other writing containing any admission, agreement, or obligation is admissible as evidence.*

*(2) Any writing, whether printed or not, and any inscription, seal, banner, instrument or tool of any art or trade, tally or score, map, sign or mark, which may furnish information, explanation or ground of inference in respect of the facts of the suit, are admissible as evidence.*

**Charles Camilleri vs. Chalres Dimech, 2002** - D stole bottles of beers from P. P. had various damages caused. D admitted with him that they used to steal and when interrogated by Police they also admitted. Evidence = 3 statements of D signed by them. The Police present confirmed

that they were done in front of them and done voluntarily. Hence article 632 COCP - the statements were “prova valida skont il-ligi”.

**Ground of inference** = sometimes as a lawyer or as a judge, you have to make conc out of the things that you see. Any sign or mark which may furnish information and if you are appointed mag or judges or a member of the panel of the jury - sometimes you have to make a conclusion - how is it, that a red shirt was found when person was murdered, no blood on it etc. but then, a few days later you went to valletta and is there is a man wearing same shirt before the murder was committed. This was taken as a point of inference - no blood was found on it but the film showed exactly the same shirt, and same jersey as well and an inference was drawn out of that, a conclusion.

What would you say if you had a case such as this? A case with 35 ecstasy pills found in Paceville, would you draw any other conclusion?

**Article 633 COCP** - ex public act which has not been authenticated whatsoever - or authenticated by a public officer who could not have the power to do so. Mandate comes back to might -

**633.** *Any act which, by reason of the incompetence or incapacity of the officer by whom it was drawn up, compiled, or published, or which, owing to the absence of some formality prescribed by law, has not the force of a public act, shall be admissible as evidence as a private writing between the parties, if the parties have signed or marked the same, or if it is proved that such act has been drawn up or signed by some other person acting on their instructions.*

### **Article 634 of the COCP**

Rules of evidence as to signatures or marks.

Amended by:

[IX.1886.96](#);

[XV.1913.128](#);

[XII.1924.5](#);

[II.1947.2](#);

[XV.1983.10](#);

[XXI.1993.87](#);

[XXIV.1995.238](#).

**634.** (1) A person against whom any paper apparently signed by him is produced, is bound to declare positively whether the writing or signature is his own or not, and in default of such declaration, such writing or signature shall, until the contrary is proved, be deemed to be his own.

(2) Any signature or mark attested by an advocate, a notary or a legal procurator shall, unless the contrary is proved, be deemed to be genuine if in the attestation it is declared by the advocate or notary or legal procurator that such signature or mark was subscribed or set in his presence and, where the person cannot sign his name, in the presence of two witnesses whose signature appears on the act, and that he has personally ascertained the identity of the persons setting such signature or mark.

Cap. 16.

(3) For the purposes of article 1233(1)(g) of the [Civil Code](#), any signature or mark attested by a parish priest in the manner provided in sub-article (2) shall also, unless the contrary is proved, be deemed to be genuine.

**Sub 1** - If a paper is produced against me and I sign that paper, I am bound to declare whether the signature is my own or not under oath, that is my signature or not under oath. What if I say nothing? In that case it is considered as your writing or your signature, it shall be his own. Two ways to choose, yes this is my signature or my writing - it will be taken as mine.

**Sub 2** - any signature or mark - deemed genuine if such signature or mark - and where a person can not sign his name, in presence of 2 witnesses. It may be your signature, it may be a mark- your signature as a lawyer or notary and you indicate the ID CARD No of the persons - you should say this sign of the cross was made in my presence - and also in the presence of 2 witnesses who are mrs so and so and mr so and so. Not a waste of time.

**Sub 3** - know it but quintano not interested in it - when you have a private writing on a promise of marriage - in quintanos days it was common to have an engagement party before the wedding, but no one did a private writing during the ceremony a wish that they say i am promising so and so - never happened even in the past quintano's days so this does not bear much relevance.

**Anthony Pace vs. Frances sive Franca Camilleri, Court of Magistrates, Superior Jurisdiction, 26th March 2009.**

Illi hwa persuna lletterata u la jaf jikteb u lanqas jaqra;

Illi fis-17 ta' Settembru 1991, l-attur ġie mgieghel mill- konvenuta b'manegġi qarrieqa u ngannevoli sabiex jagħtiha mandat ġenerali favur tagħha biex teħodlu hsieb hwejġu (kopja tal-prokura annessa u markata A);

Illi dan il-mandat ma sarx fil-forma preskritta mill-liġi tassattivament għal min ma jafx jiffirma ismu u mingħajr ma saret id-debita dikjarazzjoni u awtentikazzjoni tal- marka tiegħu bi ksar tal-artikolu 634(2) tal-Kap. 12 tal- Liġijiet ta' Malta, u għalhekk huwa null;

Illi l-attur irriżultalu li l-konvenuta kienet għamlet użu minn din il-prokura biex iddisponiet minn proprjeta' tiegħu kemm taħt titolu oneruż kif ukoll b'titolu gratuitu, u minn dawn it-trasferimenti favur terzi l-attur mhux biss baqa' ma ngħata ebda tagħrif dwar il-bejgħ u trasferimenti oħra li kienu jsiru ta' hwejġu, iżda baqa' sal-lum, ma rċevix sehmu mir-rikavat tal-bejgħ ta' din il-proprjeta' mingħand il-konvenuta, u approprijat ruhha b'mod indebitu minn dawn il-flus l-istess konvenuta;

Illi rriżulta wkoll lill-attur li mill-flus li huwa kellu depożitati f'kontijiet u depożiti oħra fil-banek lokali, l-konvenuta kienet tiġbed regolarment flus mill-kontijiet tiegħu kif ser jirriżulta dettaljatament fil-kors tal-kawża, u kienet b'mod abbużiv tapproprija ruhha minn dawn il-flus tal-attur;

Illi meta wara ż-żmien ir-relazzjonijiet bejn il-partijiet ma baqghux tajbin daqs qabel, l-aktar minhabba nuqqas ta' rispettt u trattament xejn tajjeb li kien jara minghand il- konvenuta u l-familja tagħha, l-attur sar jaf minn riċerka li qabbad lil min jagħmillu bit-trasferimenti kollha tal- proprjeta' tiegħu li kienu saru mill-konvenuta favur terzi u li minnhom baqa' qatt ma rċieva s-sehem tiegħu fi flus, u sar jaf ukoll minn tagħrif li ngħata mill-Banek li mill-kontijiet tiegħu tal-bank kienu ngabru wkoll somom relattivament kbar ta' flus, u għalhekk kien kostrett irrevokalha l-prokura permezz ta' ittra ufficċjali tal-31 ta' Awwissu 2004, liema ittra gġib in-numru 579/2004 (kopja tal-ittra annessa u markata B);

Illi minkejja li l-attur talab diversi drabi lill-konvenuta tagħtih rendikont skond il-liġi tat-trasferimenti li kienet għamlet ta' hwejġu u tgħaddilu r-rikavat tal-bejgħ, kif ukoll ta' flus li kienet għibditlu mill-banek, u dan saħansitra wkoll permezz ta' diversi interpellazzjonijiet bil-miktub (korrispondenza annessa u markata minn C sa K), hija baqgħet tirrifjuta u b'mod persistenti li tagħtih dan ir- rendikont u milli tgħaddilu l-flus.

Talab li din il-Qorti joghġobha:

(i) Tiddikjara li l-prokura li kienet saret mill-attur lill-konvenuta fis-17 ta' Settembru 1991, ma saritx fil-forma preskritta mill-liġi għal min ma jafx jiffirma ismu, u mingħajr ma saret id-debita dikjarazzjoni u awtentikazzjoni tal-marka tiegħu salib bi ksur tal-artiklu 634(2) tal-kap. 12 tal-liġijiet ta' Malta, u għalhekk nulla;

(ii) Tiddikjara wkoll nulli u bla effett l-attijiet kollha li jirriżultaw fil-kors ta' din il-kawża li saru mill- konvenuta permezz ta' din il-prokura kemm fejn din il- prokura giet użata abbużivament biex permezz tagħha l- konvenuta iddisponiet minn hwejġ l-attur favur terzi kif ukoll fejn din il-prokura kienet giet użata abbużivament biex il-konvenuta għibdet u nkassat somom ta' flus mill- kontijiet li l-attur għandu fil-banek lokali;

(iii) Tordna lill-konvenuta tagħti rendikont skond il-liġi ta' dak kollu li hija għamlet u ta' dak kollu li hija rċeviet bil-prokura li wżat u dan ai termini tal-artikolu 1857 tal-Kap. 16 tal-Liġijiet ta' Malta, f'terminu perentorju li jiġi lilha prefiss minn dina l-Qorti;

Taht il-liġi tagħna kawża tista' tiġi dikjarata nulla jekk ikun hemm xi waħda miċ-ċirkostanzi elenkati fis-sub-artikolu (1) ta' l-artikolu 789 tal-kap. 12. Fil-każ tagħna, il- konvenuta tikkontendi illi huwa applikabbli il-paragrafu (c) ta' dan is-subartikolu, u ċioe' "jekk fl-att ikun hemm vjolazzjoni tal-forma meħtieġa mil-liġi, ukoll jekk mhux taht piena ta' nullita', kemm-il darba dik il- vjolazzjoni tkun għebet, lill-parti li titlob in-nullita', preġudizzju illi ma jistax jissewwa xort'ohra hlief billi l-att jiġi annullat;" u dan għaliex ma giex osservat l- artikolu 156(1) (a) tal-kap. 12 li jirrikjedi li r-rikors għuramentat għandu jkun "fih tifsira ċara u sewwa ta' l- ogġett u r-raġuni tat-talba."

Infatti kif sewwa tindika l-konvenuta fin-nota ta' l- Osservazzjonijiet tagħha, fil-każ in eżami, l-attur qiegħhed fl-istess nifs jitlob li prokura magħmula permezz ta' skrittura privata a favur tal-konvenuta tiġi dikjarata nulla minhabba nuqqas ta' xi formalita' rikjesta mil-liġi, u li l-konvenuta tagħtih rendikont tal-mandat tagħha ai termini ta' l-artikolu 1875 tal-kap. 16, li proprju jirregola l-mandat.

Il-kontradittorjeta' f'dawn iż-żewġ talbiet hija evidenti; jekk ma kienx hemm mandat validu kif qed isostni l-attur, ma seta' lanqas kien hemm ebda obbligu ta' rendikont, impost fuq il-mandatarju bil-liġi, sakemm ma jiġix speċifikament eżentat. Madankollu l-attur għazel li jippersisti b'dawn iż- żewġ talbiet konfligġenti, għalkemm kellu kull opportunita' li jsalva din il-kawża, billi, kif għamel fir-rigward tat-tieni talba, jċedi wkoll xi waħda minn dawn iż-żewġ talbiet l- oħra wkoll. Fis-sitwazzjoni preżenti l-attur għab lil din il- Qorti u lill-konvenut f'pożizzjoni li ma jistgħux ikunu jafu sewwa sew xi jrid, u ċioe' jekk hux li l-prokura in kwistjoni tiġi dikjarata nulla, inkella li l-konvenuta tiġi ordnata tagħtih rendikont, haġa li tista' ssir biss a bażi ta' prokura valida.

F'tali ċirkostanzi din il-Qorti taqbel mal-konvenuta li l- kawża kif proposta mill-attur, minkejja t-talba li giet ċeduta, xorta waħda fiha nuqqas ta' osservazzjoni ta' dak mahsub fil-parafraġu (c) tas-subinċiż (1) ta' l-artikolu 156 tal-Kap. 12, billi mhux talli fir-rikors ġuramentat ta' l-attur ma hemmx tifsir ċar u sewwa ta' l-oġġett u r-raġuni tat- talba, imma talli l-premessi u t-talbiet huma kontradittorji għal xulxin, haġa li ma tistax tisewwa mod ieħor hlief billi jiġu annullati dawn l-atti.

Għal dawn il-motivi tiddeċidi dwar l-ewwel eċċezzjoni ta' natura preliminari tal-konvenuta billi tilqa' l-istess eċċezzjoni, tiddikjara din il-kawża nulla a tenor ta' l- artikolu 789(1)(c) tal-Kap. 12, minhabba kontradittorjeta' fid-diversi talbiet, u tillibera lill-konvenuta mill-osservanza tal-ġudizzju. Jibqgħu pero' salvi u impreġudikati kwalunkwe azzjonijiet oħra spettanti lill-attur f'dan ir- rigward.

**Guzeppa Portelli Vs Beligna Portelli, Court of Magistrates, Superior Jurisdiction, 1st March 2011**

Permezz ta' din il-kawza l-attrici qeghda tikkontesta l- validita ta' skrittura datata 25 ta' Gunju 1978 in kwantu ssostni li l-firma taghha u ta' Maria Muscat u Maria Portelli huma falsifikati, kif ukoll li ma gietx iffirmata mill-werrieta kollha ta' Angelo Portelli. L-iskrittura taqra hekk:-

“Ahna li hawn taht iffirmati Karmelu Portelli, Maria mart Karmelu Muscat, Guzeppa Portelli xebba, Pietra mart Salvu Muscat, Antonia mart il-mejjet Ganni Portelli u ulied il-mejtin Anglu Portelli u Grezzju nee Said imwioldin u joqghodu n-Nadur Ghawdex nawtorizzaw lil huna Emmanuele Portelli li joqghod Nr. 3, Old Windmill Street, Nadur Ghawdex sabiex idawwar il-post li qieghed 13, Ghajn Qasab Street, Nadur u r-raba li hemm mieghu msejjah ix-Xaghri ta' Wied Bin-Gemma li kien fuq il-mejjet missierna Anglu Portelli.”.

Skrittura li l-original taghha qeghda fil-Monasteru tal- Ursolini u li jidher li nstabet fl-1 ta' April 2008 wara ricerka li ghamel Patri Gorg Aquilina.

Permezz ta' risposta guramentata prezentata fil-25 ta' Novembru 2008 (fol. 10), il-konvenuti eccepew:-

1. In linea preliminari l-esponenti jeccepixxu ill dan ir- rikors huwa null u bla effett stante illi l-attrici Guzeppa Portelli ma ghandhiex il-kapacita' mentali u fizika rikjesti mil-Ligi sabiex wiehed jkun jista' jahlef Rikors Guramentat u fil-fatt hija stess ma tafx li ghamlet kawza.

Eccezzjoni ta' illegittimita tal-attrici.

Il-konvenuti jsostnu li l-attrici m'ghandix il-kapacita mentali u fizika sabiex tipprezenta kawza. Fl-ewwel lok is- sottomissjonijiet li ghamlu l-konvenuti dwar l-interess guridiku<sup>4</sup>, m'humiex f'lokhom. L-eccezzjoni ta' illegittimita tal-attrici m'ghandhiex x'taqsam mal-interess guridiku, izda jekk il-parti fil-kawza ghandix locus standi judicio. L- Artikolu 781(b) tal-Kap. 12 jipprovdi li “M'humiex kapaci joqghodu f'kawza bhala atturi jew konvenuti:

(a) omissis

(b) il-persuni furjuzi jew mohhom marid u kull persuna ohra li ma jkollhiex l-ezercizzju jew l-amministrazzjoni libera tal-jeddijiet li fuqhom tkun il- kawza, hlief fil-persuna ta' dak li skond il-ligi jkollu f'idejh dik l-amministrazzjoni, jew ta' kuratur ad litem.”.

Jekk eccezzjoni simili tintlaqa' twassal ghan-nullita' tal- atti<sup>5</sup>. Eccezzjoni li tista' tigi sanata bil-hatra, mill-qorti li tkun qeghda tisma' l-kawza, ta' kuratur ad litem wara rikors li jsir minn kull min ikollu interess (Artikolu 783 tal- Kap. 12).

Il-perit mediku kkonkluda: “Ms Guzeppa Portelli has some inability to register new information that is probably compromised further when she is anxious. Otherwise I did not find evidence of

other abnormalities in her cognitive state.”. Meta xehed in eskussjoni spjega li l-attrici tbaghati minn “poor short term memory, tinsa l-affarijiet malajr. Dan kawza tal-eta’ avvanzata li ghandha. Dan jista’ jkun l-ewwel pass ghall-izvilupp ta’ dementia.” (fol. 36), u “Ghalija l-attrici qieghda fi stat border line fis-sens illi ma hijiex mentalment perfetta, pero lanqas qieghda f’kundizzjoni li jiena nikklassifikaha bhala fi stat ta’ dementia severa. Dan ma huwiex kaz fil-fehma tieghi illi kieku jimmerita l-interdizzjoni tal-attrici.”. M’hemmx dubju li minhabba l-eta avvanzata u l-istat ta’ sahha, xi hadd irid jassisti lill-attrici fl-amministrazzjoni ta’ gidha. Ma jfissirx li ghaliex l-attrici hi debboli allura m’ghandix dritt li jigu salvagwardati l-jeddijiet taghha. Huma l-konjugi Piscopo li qeghdin jiehu hsieb l-interessi tal-attrici. Fil-fatt ghas- seduti kien jidher Paul Piscopo u mill-atti jirrizulta wkoll li kien qieghed jipprezenti atti gudizzjarji ghall-attrici. Mill- provi ma rrizultax li l-attrici qeghda tbat minn mard tal- mohh. Lanqas ma jirrizulta li hemm digriet tal-qorti volontarja li ordna l-inabilitazzjoni jew interdizzjoni taghha, u li kien iwassal sabiex l-attrici tigi svestita mill-esercizzju jew l-amministrazzjoni libera tal-jeddijiet li fuqhom tkun il-kawza. Il-fatt li ghandha bzonn l-ghajjnuna ta’ haddiehor sabiex thares l-interessi taghha, ma jfissirx li m’hijiex kapaci li toqghod f’kawza. Hu veru li fis-seduta tat-2 ta’ Settembru 2009 xehedet li “Pero’ jiena ma nafx li ghandi l- kawzi l-qorti. Jiena ma nafx li ghamilt kawzi l-qorti biex inzomm il-post. Nerga’ nirrepeti pero’, il-post jiena rridu. Il- post tieghi. Hadd ma zammni milli mmur fih.” (fol. 66). Madankollu hu veru wkoll li l-attrici ghamlitha cara li trid izzomm il-post u li lill-perit mediku kienet qaltlu li hemm kawza dwar il-fond.

### **Eccezzjoni li l-azzjoni tal-attrici hi preskritta skond l- Artikolu 2143 tal-Kodici Civili.**

Permezz tat-tielet eccezzjoni l-konvenuti jsostnu li l- azzjoni tal-atturi hi preskritta skond l-Artikolu 2143 tal- Kodici Civili li jipprovdi:-

“L-azzjonijiet kollha, reali, personali, jew misti jaqghu bil- preskrizzjoni egħluq tletin sena, u ebda opposizzjoni għall- preskrizzjoni ma tista’ ssir minhabba n-nuqqas ta’ titolu jew ta’ bona fidi.”.

Skond l-Artikolu 2137 tal-Kodici Civili, il-preskrizzjoni tibda tiddekorri minn dak in-nhar li l-azzjoni tista’ tigi ezercitata. L-iskrittura ghandha d-data tal-25 ta’ Gunju 1978 filwaqt li l-kawza giet prezentata fis-27 ta’ Ottubru 2008.

Għar-ragunijiet li jissemew iktar ‘il quddiem, l-attrici ma kenitx taf b’din l-iskrittura. Għalhekk il-preskrizzjoni ma setatx bdiet tiddekorri qabel din l-iskrittura giet prezentata fil-kors tas-smiegh tal-provi fil-kawza 127/2007.

F’dik il-kawza l-iskrittura in kwistjoni, jew ahjar kopja taghha, giet prezentata minn Raymond Bonnici, Property Manager tal-Kurja6. Fl-Artikolu 634 u 635 tal-Kap. 12 insibu r-regoli dwar firem u sinjali b’salib flok firem, u x’jigri meta tigi kontesta firma. Meta l-attrici xehedet fit-12 ta’ Novembru 2008 iddikjarat li l-firma Giuseppa Portelli li hemm fl-iskrittura tal-25 ta’ Gunju

1978 m'hijiex taghha u wara qalet "... ma nahsibx li hija tieghi." (fol. 49). L-attrici ma kellix ghalfejn toqghod taghmel kawza sabiex tikkontesta li l-firma Guzeppa Portelli saret minnha.

Il-perit gudizzjarju Dr Juliana Scerri Ferrante esprimiet il- fehma li l-firma Guzeppa Portelli li hemm fl-iskrittura oggett tal-kawza, probabilmment giet falsifikata<sup>8</sup>. Waslet ghal din il-konkluzjoni wara li rat il-karta tal-identita tal- attrici numru 65521G u karta ta' identita, iktar antika, bin- numru 174121. Sfortunatament illum l-attrici m'hijiex f'kundizzjoni ta' sahha li tiffirma. M'hemmx dubju li anke mad-daqqa ta' ghajn il-firma tal-attrici fil-karta tal-identita 1741219 hi ghal kollox differenti minn dik li tidher fl- iskrittura tal-25 ta' Gunju 1978. Il-firma fil-karta tal-identita 174121 presumibilmment saret fis-snin sebghin meta tikkunsidra li l-Att dwar il-Karti tal-Identita (Kap. 258) kien dahal fis-sehh fl-1 ta' Gunju 1976. Il-perit gudizzjarju Dr Juliana Scerri Ferrante rat ukoll il-karta tal-identita numru: 65521G li kienet valida mit-22 ta' Frar 2002 sat-30 ta' Settembru 2006. Il-qorti rat kopja ta' dan id-dokument ghalkemm ma giex prezentat mill-attrici man-nota tad-19 ta' Ottubru 2010. Il-firma fuq dan id-dokument tidher ukoll differenti minn dik li hemm fl-iskrittura in kwistjoni, u tvarja wkoll minn dik fuq il-karta tal-identita numru 174121. Ghalkemm hu minnu li idejalment kienu jigu prezentati iktar dokumenti ufficjali bil-firma tal-attrici, pero l-firma Guzeppa Portelli li hemm fl-iskrittura tal-25 ta' Gunju 1978 hi tant differenti minn dik li tidher fil-karta tal-identita 174121, li l-qorti hi moralment konvinta li l-attrici m'hijiex l- awtrici ta' dik il-firma.

Wara li l-qorti qieset ic-cirkostanzi li jissemew hawn fuq, hi tal-fehma li fuq bazi ta' probabilita' l-firma Guzeppa Portelli fuq l-iskrittura tasl-25 ta' Gunju 1978 m'hijiex tal- attrici. F'kull kaz il-qorti qeghda taghmlha cara li din id- decizjoni ma tfissirx li l-posizzjoni ta' Beligna Portelli qeghda tigi pregudikata, kwistjoni li ghad trid tigi determinata fil-kawza l-ohra Guzeppa Portelli vs Direttur Ufficju Kongunt (Rikors numru: 127/2007).

### Modes of proving handwriting - Article 635 of the COCP

→ Third way, although those who have not seen him write are very familiar with his handwriting, with style of handwriting. So they say yes, this must be his handwriting, some have a special way of signing which is very particular. Signature of the president of Malta.

→ fourth - comparison

→ fifth, by appointing experts, Quintano used to appoint experts many times to verify this.

**635.** Where it shall be necessary to ascertain the handwriting of any person by whom a document has been written or signed, such proof may be made -

- (a) by the person who wrote or signed the document acknowledging his own handwriting;
- (b) by means of witnesses who actually saw the person write or sign the document;
- (c) by means of witnesses who, although they have not seen the person write or sign the document, are acquainted with his handwriting;
- (d) by the comparison of handwritings, or by other circumstances or presumptions;
- (e) by means of experts in handwriting, in cases of writings difficult to verify.

**Police vs. Jeremiah Ani, Judge Aaron Bugeja** - The P presented a protection order as evidence (of the accused against the victim). The D appealed that this protection order was an authenticated photocopy and not substantiated by a witness. The Court in the appeal said that this paper was inadmissible due to article 635 COCP. The accused was acquitted from one of the accusations and from the 2 years imprisonment which turned into a fine of 100eu.

### Article 636 of the COCP

- *Quod attestor* = put signature and rubber stamp. True copy of the original.

**636.** (1) Authentic copies of the documents mentioned in articles 627, 628 and in article 629(a), (b), (c) and (e) are admissible as evidence.

(2) Copies shall be deemed to be authentic, when they are made in the form prescribed by law by the officer by whom the original was received or is preserved, or by the person lawfully authorized for the purpose.

## **THE DEMAND FOR THE PRODUCTION OF DOCUMENT**

Not producing my own document but am asking you the D, to produce it *Actio Ad exhibendum* =  
TO SHOW.

**637.** (1) It shall be lawful to demand the production of documents which are in the possession of other persons -

- (a) if such documents are the property of the party demanding the production thereof;
- (b) if such documents belong in common to the party demanding their production and to the party against whom the demand is made;
- (c) if the party demanding the production of the documents, although he is not the owner or a co-owner thereof, shows that he has an interest that such documents be produced by the other party to the suit;
- (d) if the person possessing the documents, not being a party to the suit, does not declare on oath that, independently of any favour for either side, he has special reasons not to produce the documents;
- (e) if the documents are public acts, or acts intended to constitute evidence in the interest of the public in general.

(2) It shall be lawful for the court to order the production only of such part of books or other documents as relate to the matter in issue.

(3) It shall not be lawful to demand the production of any document which is held by a public authority and -

- (a) which is an exempt document under articles 29, 30 or 36(1) or sub-articles (4) or (5) of article 32 of the [Freedom of Information Act](#); or
- (b) the disclosure of which is prohibited by any other law.

(4) Where a demand is made for the production in court of a document held by a public authority, and the public authority is of the view that sub-article (3)(a) applies to that document, the public authority shall reply to the demand as if that demand were a request for disclosure of the document under the [Freedom of Information Act](#); and the provisions of Parts II and IV and of articles 39, 40 and 43 of the Freedom of Information Act shall apply accordingly.

(5) Saving the provisions of article 518 of the [Criminal Code](#) it shall not be lawful to demand the production of any *procès-verbal*,

## **Documentation: Article 628 COCP**

Take care of documentation as it is important more than ever before. An ex student, who is now a lawyer, forgot article 628. Acts of foreign government. I can go to the family court and ask for a divorce from my wife who lives in Nepal.

### Acts of Foreign Governments

*628. The acts of any foreign Government, or of any department of foreign Government, or of foreign courts of justice, or of any foreign establishment, authenticated by the diplomatic or consular representative of the Government of Malta in the country from which they emanate, or by a person serving in a diplomatic, consular or other foreign service of any country which by arrangement with the Government of Malta has undertaken to represent this Government's interests in that country, or by any other competent authority in the country from which they emanate, shall also be admissible as evidence in the same manner as the documents mentioned in the last preceding article.*

### Article 634 - Rules of evidence as to signatures or marks

634.(1) A person against whom any paper apparently signed by him is produced, is bound to declare positively whether the writing or signature is his own or not, and in default of such declaration, such writing or signature shall, until the contrary is proved, be deemed to be his own.

(2) Any signature or mark attested by an advocate, a notary or legal procurator shall, unless the contrary is proved, be deemed to be genuine if in the attestation it is declared by the advocate notary or legal procurator that such signature or mark is subscribed or set in his presence and, where the person cannot sign his name, in the presence of two witnesses whose signature appears on the act, and that he has personally ascertained the identity of the persons setting such signature or mark.

(3) For the purposes of article 1233(1)(g) of the Civil Code, any signature or mark attested by a parish priest in the manner provided in sub-article (2) shall also, unless the contrary is proved, be deemed to be genuine.

*Declaration against interest - i admit that i owe you 10k, that also counts. Can that be used against me? Yes.*

*632.(1) Any declaration made by a party against his interest, or any other writing containing any admission, agreement, or obligation is admissible as evidence.*

*(2) Any writing, whether printed or not, and any inscription, seal, banner, instrument or tool of any art or trade, tally or score, map, sign or mark, which may furnish information, explanation or ground of inference in respect of the facts of the suit, are admissible as evidence.*

**Article 635 - Modes of proving handwriting**

635. Where it shall be necessary to ascertain the handwriting of any person by whom a document has been written or signed, such proof may be made -

- (a) by the person who wrote or signed the document acknowledging his own handwriting;
- (b) by means of witnesses who actually saw the person write or sign the document;
- (c) by means of witnesses who, although they have not seen the person write or sign the document, are acquainted with his handwriting;
- (d) by the comparison of handwritings, or by other circumstances or presumptions;
- (e) by means of experts in handwriting, in cases of writings difficult to verify

632, 634 and 635 IMP FOR EXAM



## **PRODUCTION OF DOCUMENTS OF THE DEMAND FOR THE PRODUCTION OF DOCUMENT**

CAN I be forced to produce a document? Are there circumstances where you can force the other person?

*Article 637 - 637.(1) It shall be lawful to demand the production of documents which are in the possession of other persons -*

*(a) if such documents are the property of the party demanding the production thereof;*

*(b) if such documents belong in common to the party demanding their production and to the party against whom the demand is made;*

*(c) if the party demanding the production of the documents, although he is not the owner or a co-owner thereof, shows that he has an interest that such documents be produced by the other party to the suit;*

*(d) if the person possessing the documents, not being a party to the suit, does not declare on oath that, independently of any favour for either side, he has special reasons not to produce the documents;*

— persons who hold documents and are not a party to the suit - a person who is not involved at all in litigation to produce the documents - can only get rid of this situation if there are reasons why he should refuse them.

*(e) if the documents are public acts, or acts intended to constitute evidence in the interest of the public in general*

### ALL DOCUMENTS FILED IN COURT MUST BE RELEVANT TO THE CAUSE

*(2) It shall be lawful for the court to order the production only of such part of books or other documents as related to the matter in issue.*

*(3) It shall not be lawful to demand the production of any document which is held by a public authority and -*

– CAN NOT BE REPRODUCED IN COURT - endangering public safety of the economy, interest rates, affarijiet delikatissimi.

*(a) which is an exempt document under articles 29, 30 or 36(1) or sub-articles (4) or (5) of article 32 of the Freedom of Information Act; or*

*(b) the disclosure of which is prohibited by any other law*

— can have another law which says no you can not disclose ex income tax act - you can not start assessing people until you take oath of office, and when matter reaches courts of law, you need permission from prime minister for you to speak on this. professional secrecy,v

*(4) Where a demand is made for the production in court of a document held by a public authority, and the public authority is of the view that sub-article (3)(a) applies to that document, the public authority shall reply to the demand as if that demand were a request for disclosure of the document under the Freedom of Information Act; and the provisions of Parts II and IV and of articles 39, 40 and 43 of the Freedom of Information Act shall apply accordingly.*

*(5) Saving the provisions of article 518 of the Criminal Code it shall not be lawful to demand the production of any procès-verbal, record of inquiry, or other document relating to criminal matters, unless such procès-verbal, record of inquiry, or document be deposited in the registry.*

*(6) In this article "public authority" shall have the meaning assigned to it by the Freedom of Information Act*

PROCES VERBAL - what is it?

mag of duty, appoint experts. If any blood is seen on the spot, you appoint an expert in the analysis of blood. Wait for experts to bring you a report and as a mag you have to write a report on what experts have provided.

### **Article 638 COCP**

*638.(1) Any person whose affairs are administered by another person, shall be deemed to be the owner of the books or other documents kept by the administrator in the discharge of his functions. Documents relating to successions, etc. to be deemed common property.*

*(2) Documents relating to any succession, partition, or partnership, or to the affairs of any bankrupt debtor, shall be deemed to be common property. Court to decide as to the interest of party demanding production of documents.*

*(3) It shall rest with the court to decide as to the interest of the party demanding the production, regard being had to the nature of the case and to the nature of the document the production of which is demanded*

*When writing application, rikors, you have to write witnesses you will - and names why you need them*

## **Article 640 COCP**

**640.** Where the demand for the production of documents is made by one contending party against another, it shall be made in the same manner as the demand for a reference to the oath of the opposite party; and where such demand is made against third parties, it shall be made by application or in the subpoena to give evidence as witness.

**641.** In all cases, the party demanding the production of the document must prove that the document is in the possession of the person from whom the production is demanded.

**642.** The production of documents may be demanded at any stage of the cause, so long as evidence may still be adduced

**643.** It shall be lawful for the court to consider the contents of a document to be as averred by the party demanding its production, if the opposite party, notwithstanding the order of the court, refuses to produce such document.

- The court can demand that if the father refuses to take a DNA test, then it concludes that that person is the father if no test is taken.
- Court can come to the conclusion that the other party ghandu ragun jekk l-iehor jitlobni ghall dokument u jien ma ntijulux.

## **OF REFEREES**

referees have to make a technical judgment - I need you as an architect to give dimensions of site A to site B.

- use knowledge of site plans and as an architect to say who is correct about where the dividing line should stand. I can not do that as a judge as I am not an architect by profession.

given references - in everyday terms it is EXPERTS 34 SECTIONS - very important

**Article 658 of Cap. 9** says it is the court which appoints the experts - over here it is possible to have parties agree on a particular expert. If they do not agree, the court decides what expert to appoint.

**Article 644 COCP.** *The proof by means of a referee or referees is ordered on the demand of the parties or one of them, or by the court of its own motion.*

**Article 645 COCP.** *(1) The court shall not appoint a referee solely for the purpose of examining witnesses on oath and taking down their depositions in writing and establishing the relevant facts.*

*(2) In the decree appointing the referee, the court shall -*

*(a) state the object of the reference;*

*(b) fix the day and time when the referee is to conduct an inspection in faciem loci where necessary.*

*(c) give directions for the guidance of the referee in the execution of his task.*

*(3) The court may at any time, at the request of the registrar or on its own motion, order the referee to return the records of the cause that are in his possession, to the registrar there to remain for such time as shall be specified in that order. In case of non-compliance with the court's order, the referee shall without prejudice to any other proceedings which may be instituted against him be guilty of contempt of court*

*(4) The court may order the referee to attend for the hearing of the trial and to put to the witnesses any questions he may deem necessary or relevant to enable him to complete his report.*

*(5) Where affidavits have been filed in the registry of the court, the referee shall be served with a copy of such affidavits before the hearing.*

– A case of a chiropractor who was sued for a wrong treatment and the case all relied on what the expert had to say. The problem was that the court expert said, how do I know what treatment was received by the client on his neck when I have not been provided with an MRI result on how things stood before the treatment. The COA - the chiropractor was declared not at fault for what had happened as the expert, how can I determine who is really responsible when I do not have the state of the neck of the client before the treatment and this could be available through an MRI

before the treatment hence the mri could not be available and hence i can not say the chiropractor was the person who caused the damage.

**646.***(1) Where the parties agree on the submission of a name of a referee, the court shall appoint the referee agreed upon by the parties.*

*(2) Where the parties fail to agree, the court shall appoint a referee of its own choice.*

*(3) No social worker or psychologist who has already provided services to a party to a suit including as an ex parte expert witness according to the provisions of article 563A may be appointed as a referee.*

**Article 647 COCP - No person may have more than two references at the same time- Exception if there are very limited and few people in this field**

**647.***(1) No person may be appointed as a referee in any cause or matter if such person has already two references upon neither of which he has yet filed his final report; and any appointment made in violation of this provision shall be null and void:*

*Provided that the provisions of this article shall not apply -*

*(a) in any cause or matter which requires special technical knowledge if the number of persons possessing such special technical knowledge is very limited; or*

*(b) where the necessity arises of referring to the same referee the consideration of further questions raised in the same cause or matter;*

*(c) to the appointment of additional referees in accordance with the provisions of this Code.*

*In the case provided under paragraph (a),the court shall in the order of reference state the reasons for appointing the person mentioned in the order.Book of references.*

*(2) The registrar shall keep a record of any order of reference made by the court stating the date of the order and the date on which the referee shall have filed his report*

**Article 648 COCP - Challenge of Referees**

**648.***A referee may be challenged by any of the parties on good cause being shown to the court.*

*- A judge can also be challenged but not easy as you have to face him and have other possible situations and cases with him.*

### **Article 653 COCP - challenge of a referee - like a judge, you can challenge a judge**

*653. A referee may be challenged for good cause at any time until he has filed his report, provided the party making the challenge declares upon oath that he was not aware of such cause at the time of the appointment, and that he never appeared before the referee, nor performed any act before him, from the time when he became aware of such cause.*

### **Joseph Chetcuti Bonavita vs. Av. Beppe Fenech Adami, Court of Appeal, Superior 2016**

At Appeal, the P contested that a decree by First Hall, Civil Court denied the plea of expunging the report of additional referees. In this case, a referee was appointed to examine a signature on a document - which was being challenged by D.

A request for the appointment of 2 additional referees was made and accepted by the Court. This appeal to the court decree was made when P found that one particular referee had a “*tebgha fil-karriera u l-personalita’ tieghu li ggieghel lill-atturi jiddubitaw serjament ddwar l-integrita’ tieghu*”.

Hence, the P asked for the expungement of the report of the referees. In the decree it said that the courts knew of his past, but everyone should be given a second chance at life.

The P appealed the decree and attached the judgment in which this referee was found and pleaded “guilty” and accused of falsifying an account and issuing non-authorised vouchers to make a gain.

**R vs. Sussex 1923** - “justice should not only be done but should manifestly and undoubtedly be seen to be done’

Despite many years had passed from conviction, the COA said that “*dan ma jnaqqas xejn mid-dubju li hemm fuq l-integrita’ ta’ dak il-perit u gustament imqajjem mill-atturi*”

### **Article 653COCP**

Since P “*kellhom fiducja ghamja fil-periti mqabba mill-qorti u dan billi huma emmnu illi l-esperti mqabba mill-qorti kienu nies ta’ fiducja*”

For this reason, the Court upheld the appeal and revoked the report of the referee, sending the process back to the First Hall.

This was Dr. Martin Bajada - in 1993 he was found guilty of 10 counts of theft.

Article 654 COCP - 654. *Challenges for any cause existing and known at the time of the appointment of the referee shall be made orally during the hearing; and challenges for any cause supervening after the appointment, or which, although existing previously to the appointment, was unknown, shall be made by an application demanding the appointment of another referee in his stead.*

Article 678 - additional referees - Periti Perizjuzi - can you ask for the appointment of additional referees? - can you ask for the appointment of a referee at the appeal stage?

678.(1) *The additional referees, whatever their number, shall be appointed by the court, unless the parties agree as to the referees to be appointed.*

*(2) The additional referees may be challenged for good cause*

Article 682 - situations where in the appeal court you ask for the court to appoint a referee

682. In an appellate court, no reference may be ordered, except in the following cases:

- (a) where there was no reference made in the court below and no express renunciation of such reference was made;
- (b) where the subject-matter of the reference is, wholly or in part, different from that of the reference made in the court below, or in respect of which there was a renunciation;
- (c) where the directions given to the referee by the court below were, in the opinion of the appellate court, defective or insufficient;
- (d) where the appellate court is of opinion that the report is not so complete as to enable it to decide the cause:

Provided that nothing in this article shall operate so as to bar the appellate court from requiring further elucidations from the referees appointed by the court below

Articles 660 and 661 COCP - Rights and obligations of the referee.

The referee is part of the Court and therefore, you cannot not meet him and give him the info. This will be contempt of Court.

Referees are paid before they take the witness stand and testify. The report is not accessible until the fees are paid.

**Article 670 COCP** - in 1995, it was decided that the Court may decide without the referee's report. Find an exhaustive list. This is because the court referee, if he delays, then the whole case drags on.

**Article 674 COCP** - Periti perizjuri - additional referees.

These are especially important where valuations are concerned. In this case, the court appoints another two referees who amongst them, have to agree.

**Article 677 COCP** - time limits may be imposed, especially since in constitutional references where an appeal has to be filed within 5 days. Made by means of a note within 10 days.

Referees may be examined and cross-examined.

**Calleja vs. Mifsud, 2001** - "Il-Qorti ma kinitx obligata li taccetta r-rapport tekniku bhala prova determinanti u kellha dritt li tiskartah kif settghet tiskarta kull prova ohra" PERO "ma jfissirx illi l-Qorti ma kellhiex thares b'lenti ta' kritika lejn l-opinjoni teknika."

A common example of an expert witness is a civil architect, who is given the role to make a report on a particular structure of a building/residence.

**Joseph Darmanin vs. Joseph Camilleri (1999)** - The Court asked the referee to re-examine the report and to see if this needed to be changed since a new relevant document was submitted by one of the parties. The COCP states that despite the report presented by a referee, appointed by the same court, there is no specific law which says that the result of the report are the final decision. Hence, the court is never bound to adopt the report.

**Article 681 COCP-** court is not bound to adopt the report of the referees against its own conviction.

Appointment of Court referee in front of the Appeals Court. IMPORTANT.

In family law cases sometimes the need arises to appoint an accountant - who bought what and when .... Not the first time that in civil proceedings you have to appoint an expert.

**Article 688 COCP** - court shall repair to the place of inspection - shall be kept by the registrar - in the form of a *proces verbal* - simply a record, do you use it as a mag. In criminal proceedings? Then you compile what they say you interview persons from the family - who were robbed. In the UK alone only 1/3 of the robberies are reported.

*Proces verbal* = another word for a report - if it is one about what we call *actio finium regundorum* - an action about where does my plot start and where does it end? You have to determine the line of property of A and B. The court will appoint an architect to measure the distances and any other thing which architect feels to have a good report. If court is present on site, it may decide to examine witnesses or hear them in court, as regards deposits, -

Sub title 5 - has 1, 2, 3, 4 - only 9 sections about it - fairly logical - you have to see whether to appoint a referee or else go on sight.

**Article 693 COCP-** *Any admission of a fact whether written or verbal, made in or out of court, may be received in evidence against the party who made it.*

- Does Not mean because it is verbal, it has to be ignored. Mandate can be given by word of mouth.

An admission - but sometimes, an extrajudicial admission is no evidence except against the party who made it - evidence against me.

**Article 694 COCP**

*694.(1) An extrajudicial admission is no evidence except against the party who made it. Admission made upon reference to oath of party.*

*(2) An admission made upon a reference to the oath of one of the parties may be received in evidence of a fact even against the other parties to the suit. Part of admission worthy of credit to constitute evidence.*

*(3) In all cases, only such part of an admission as the court may deem worthy of credit shall constitute evidence*

- In the end you have to have a list of witnesses - the D, in order to confirm on oath, the answers to my questions “*id-difensur ghas-subizzjoni*” - do we use the same word in court of mag and the superior court?
- They can put questions -to you - you seem to have different jargon for the court of judges and court of mag - but also, i

Here it means that I can ask questions - unlike criminal proceedings where the accused has a right not to say a word - you have to rely on what you have heard and seen here. You have to decide the case on what evidence the prosecution brings here. I can force you to take the witness stand and ask questions. The exceptions are spouses. But in a collision between 2 people I can force the other driver to take the witness stand and have him answer my questions.

**Article 695 COCP** - about declarations made by the advocate - these can be withdrawn if a lawyer makes some declaration, a note is made in the official record of the courts. One good thing happening now is that the records are written on white paper but what happens in the hall itself, in the records of the case, is just the record of what happens in the hall, printed on blue paper so that it is helpful for the judge and lawyer to have the records.

The lawyer over there might have made some declaration= can he withdraw it? Yes by a note, in any stage of the suit even the appellate court before judgment is given = provided it shall not be proved that - so statements by lawyers themselves and statements by the authority of the party. Statements by advocate alone can be withdrawn.

**Article 695 COCP**- Sub section 2 - we are told that - was there really a special authority of the party? The fact that I presented what the lawyer said, does that mean that I authorised my lawyer to say that. Lawyers do not make too many of these declarations.

**Article 696 COCP**- (1) In the superior courts and in the Court of Magistrates(Gozo) in its superior jurisdiction, a plaintiff who intends to furnish evidence by a reference to the oath of the defendant shall give him notice thereof in the written pleading commencing proceedings.

(2) Where the plaintiff omits to give the defendant such notice as provided in sub-article (1), he shall, at least two days before the day appointed for the hearing of the cause, present a note in the registry in order that the defendant may be informed, by letter of the registrar, that reference to his oath is required.

(3) The letter shall be drawn up by the plaintiff and shall be filed simultaneously with the note.

Can the defendant do the same to P ?Yes, so I replied and in my list of witnesses I said, “rikorrent ghas subizzjoni” you have to say what the witness will talk about. Time in court means money and we have to make sure that time is well spent and that the evidence is relevant. That is why you have to indicate in the list of witnesses you will produce, why you are producing them for.

**Article 698 COCP- BE CAREFUL ATTENTI**

698.(1) If the party, to whose oath reference is required, fails to appear on the day appointed for the trial, the party referring shall, upon the issues being settled, make a declaration to the effect that he intends making such reference and shall present questions and statements which shall be formulated in an affirmative manner as to require an affirmative answer which shall be sealed by the registrar.

(2) If the party to whose oath reference is made fails to appear on the day to which the court adjourns the trial of the cause, without good cause being shown for his non-appearance, the questions shall be deemed to be admitted and accepted.

- You did not appear, i had already written in the sworn application and so i present the questions there and then and the court shall adjourn the case. For the second time, the party who

698 sub 2 - the last 10 words - if you do not appear, the questions shall be deemed to be admitted and accepted. You must give me 10k, you have never paid me, and it is true I sent an official letter and you do not appear a 2nd time, then the questions will be taken as admitted.

In criminal law you have a right to keep your mouth shut.

### **Article 699 COCP**

699.(1) In all courts of civil jurisdiction, the questions shall be made in writing.

(2) The questions shall, during the hearing of the cause, be presented to the court for approval.

If the court feels you have written an appeal but it is just a time wasting exercise, if it feels so, the client will have to pay double the expenses done in civil proceedings not in criminal. In civil proceedings thte hearing may not be necessary at all.

### **Article 700 COCP**

700.(1) The questions shall be clear, concise and numbered, and signed by the advocate or legal procurator, as the case may be, or by the party referring.

(2) In all cases, questions which are superfluous or which the court may deem it fit to reject, may be cancelled or rejected.

### **Article 702 COCP**

702 - we start dealing with these questions - to the other party to the defendant in civil proceedings only but either the court of mag in malta,

702.(1) In the Court of Magistrates (Malta) and in the Court of Magistrates (Gozo) in its inferior jurisdiction, the demand by the plaintiff for the reference to the oath of the defendant shall be made in the notice referred to in article 171

(2) If the reference is required by the defendant, the demand shall be made orally, either before or during the hearing of the cause; and in the former case notice of such demand shall be given to the plaintiff. Non-appearance of party to whose oath reference is required.

(3) If the party to whose oath reference is required fails to appear on the day appointed for the trial -

(a) the questions as taken down by the court shall be deemed to be admitted, unless good cause is shown for his non-appearance, in any case other than cases for ejectment or eviction from immovable property, in which the claim before the court does not exceed the amount of five hundred and eighty-two euro and thirty-four cents (582.34);

(b) the court shall adjourn the trial to a date not later than

Case - where someone decided in COM to put questions to the curator. How can i a maltese lawyer, a curator in representation of someone i have never met or seen, or talked to, how can I answer the questions? You have to use your logic more than anything else.

**Fabio Marinelli vs. B Starters Ltd & Just One Star Ltd, Judge Leonard Caruana**

P initiated proceedings against the 2 Defendants for the debts. D did not reply or appear in Court. P asked the Court to issue questions (Kapitoli) to D based on 698 and 702. D failed to appear.

702 - such absence could construe admissibility of facts. The Court emphasised reference to the oath - a procedural tool with significant implications. Ultimately, the Court ruled in favour of P.

**Article 705 COCP** - *Once the questions are put to the party, you cannot ask new questions but they have to be linked to the original questions.*

**Article 706 COCP** - Lawfully prevented from appearing in Court.

Cap. 122 art. 152 - Court of Appeal composed of 3 judges may go straight to judge the case.

**Referees, curators (see casa pinta case hereunder), and hearsay evidence for the exam.**

**Article 711 COCP** - Can you ask questions to a person who is absent from Malta? Can you ask questions to a curator (appointed because the person is absent from Malta)?

**Article 712 COCP** - You may also ask questions if you fear that the person is going to die or he is going to move to another country.

**Article 713 COCP** - Evidence by reference. Here we have an exception - it is possible to put questions before the appellate Court.

**Article 715 COCP** - Another exception in favour of putting questions even in the appellate Court.

**Article 716 COCP** - Same question can be asked back. Sub-section 2 has a definition of factum proprium.

**Article 717 COCP** - Refusal to answer any question, tigi kkunsidrata kontrik.

**Article 718 COCP** - Retracting questions. **If the person being asked questions states that he will be answering all the questions, you cannot retract them.**

**Article 723 COCP** - Oath in Litem

**Article 724 COCP** - Party admitted to oath in litem to produce list of sums.

**Article 725 COCP** - Shall be accepted

**Article 727 COCP** - there are no judgements about these.