

Principles of Commercial Law

Lecture Title: Introduction to Commercial Law

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Diploma in Law (Malta)



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Preliminary Points

- One of the primary sources of *Maltese Commercial Law* is the *Commercial Code* (Chapter 13 of the *Laws of Malta*).
 - Enacted in the mid-19th century
 - Not the only source of local commercial legislation
- The *Commercial Court*, which heard all cases that dealt with matters falling under the *Commercial Code*, was abolished in 1995
- Act I of 2018 brought about the introduction of the Civil Court (Commercial Section) – which deals with cases specifically pertaining to the matters that fall under the *Companies Act* (Chapter 386 of the *Laws of Malta*)



Definition of Commercial Law

- Article 2 of the Commercial Code
 - *'The commercial law relates to traders and to acts of trade done by any person, even though not a trader'.*
- Two key notions:
 - 1. 'Trader' – (Article 4 of the Commercial Code)
 - 2. 'Acts of Trade' – (Article 5 of the Commercial Code)



History

- Some initial parts of the Maltese Commercial Code were enacted during the first Maltese self-Government between the years 1921 and 1933
- In Common Law countries (ex: England), Commercial Law also covers areas such as general principles of contract and obligations. Under Continental Law systems, such topics would be categorised under Civil Law.
 - In Malta – general principles of contract and obligations form part of our Civil Law and are predominantly regulated by the Maltese Civil Code (Chapter 16 of the Laws of Malta)
- Maltese commercial legislation was largely influenced by the French Commercial Code of 1807
- General Private Law within the Maltese Legal System is predominantly influenced by Continental Law

Private Law

- Vivante (Italian Jurist) defined Commercial Law in the following manner:
 - *'quella parte del diritto privato che ha principalmente per oggetto di regolare i rapporti giuridici che sorgono dal esercizio del commercio'*.
- The above essentially states that Commercial Law is that **part of private law, the principal purpose of which is the regulation of juridical relations which arise from the exercise of trade.**
 - Private Law -> Deals with and governs the relations between individuals
 - Two main branches of Private law:
 - (i) Civil Law; and
 - (ii) Commercial Law



Fundamental Principles of Commercial Law

- Commercial law is founded upon certain crucial principles, which are not found in or have less of an influence in Civil law
- Commercial law established itself as a distinct branch of law since:
 - Civil law was not able to regulate the entire body of commercial relations and activity
 - The nature of such commercial relations and activity were different to those that fell within the scope of Civil law
- Civil law is largely based on Roman law and its principles and therefore trade, which has a dynamic nature, had to be regulated by a body of laws founded on diverse principles to that of **Civil law**



These fundamental principles are the following:

1. Commercial law is based on Credit

- The notion of credit – forms one of the bedrocks of Commercial law

2. The Notion of Limitation of Liability

- The principles of liability under commercial law seem to consist of a more rigid application of the principles of liability as found in the Civil Code, however simultaneously recognizing the possibility of such liability being limited
- For ex; the concept of a Limited Liability Company – where the liability of its members is limited to the amount, if any, unpaid on the shares respectively held by each of them.



3. Based on Good Faith

- Commercial law is predominantly based on the principle of good faith
 - Broadly means *honesty in a person's conduct throughout the duration of the agreement/contract*
 - 2 important concepts:
 - Good faith in relation to contracting parties
 - Good faith in relation to third parties

4. The Simplification of Formalities

- Commercial law tends to simplify various procedural and contractual formalities and requisites



Sources of Commercial Law

- Article 3 of the Commercial Code:
 - *'In commercial matters, the **commercial law** shall apply: Provided that where no provision is made in such law, the **usages of trade** or, in the absence of such usages, the **civil law** shall apply'.*
- This creates a Hierarchy of Sources (order of priority):
 1. Commercial Law
 2. Usages of Trade
 3. Civil Law
- This hierarchy was applied in practice and utilised by Maltese Courts, prior to its introduction into the Commercial Code by Act XXX of 1927

The Hierarchy

- Article 3 (Comm. Code) lays down an order of priority

Commercial law shall apply to the matter at hand, when this is regulated by means of a provision

When Commercial law remains silent -> **Usages of Trade**, which are unwritten rules (e.g. custom), will apply

In the absence of any such usages of trade, the **Civil law** is applied to the matter at hand

Commercial Law

- Commercial law has been defined as a '*collection of rules that governs not only trading activity but all other related economical activity looked at from a positive juridical aspect*' (Notes on Commercial Law by Prof. J.A. Micallef)
- The Commercial Code is one of the **primary sources** of commercial law – but it is not the only source.
- Commercial law is also contained within other pieces of legislation:
 - The Companies Act (Chapter 386 of the Laws of Malta)
 - The Merchant Shipping Act (Chapter 234 of the Laws of Malta)
 - The Civil Code (Chapter 16 of the Laws of Malta)



Usages of Trade

- Usages are *unwritten* laws and rules established through the constant & uniform practice of traders
 - Similar to Custom in relation to matters of trade
 - Originate from contractual arrangements
 - Subsidiary source of Commercial law
- An unwritten rule of law established by constant and uniform practice which is based on the conviction that the unwritten rule is applicable law [Navarrini (Vol I, p. 73, para 45)]
 - Usages of trade are 'laws', despite being unwritten and are in turn, applied and upheld by Maltese Courts

- However usages of trade supersede civil law provisions in commercial matters - This does not apply when the civil law provision is a rule of public policy
 - *“L-Uzu tal-Kummerc ma jistax jmur kontra l-ordni pubbliku” (Av. Dominic Cassar LL.D. noe vs Lawrence Farrugia pro et noe et (529/1988/1 [2002])*
- *Bank of Valletta Limited vs ‘Anna’s Trading Company Limited’ u Raymond u Rosaria mizzewgin Falzon (160/1997/1) [2002]*
 - *“Kif ighid l-art. 3 tal-Kodici tal-Kummerc, f’affarijiet tal-kummerc il-ligi civili tghodd biss fejn ma hemmx uzu tal-kummerc. Fil-kaz ta’ llum il-ligi civili ma tghoddx, ghax hemm uzu tal-kummerc. Huwa minnu li, kif qiegħda tghid is-socjetà attrici, il-ligi civili ma tegħlibx l-uzu tal-kummerc, izda mhux meta l-ligi civili tidisponi dwar materja ta’ ordni pubbliku”*
- *Perit David Psaila u Anna Maria Psaila vs Nicholas Farrugia (194/2019) [2020]*
 - The Court stated the following: *“Dan l-uzu tal-kummerc, [...] għandu jiehu precedenza fuq il-provvedimenti tal-Kodici Civili u sejjer jigi applikat fil-kaz odjern.”*

Requisites for a Usage

- Two elements at play – which emerge from various judgements:
- **1. The Objective Element**
 - Uniform observance of a specific unwritten practice or rule over a period of time (not a fixed period of time)
 - The objective element alone is not enough
 - There is an element of continuity



- 2. The Subjective Element

- The notion and collective belief that a usage must be followed as if it were a written rule of law and that it must be adhered to because there is an 'obligation' to do so.
- Adhered to as if it were a *norma iuridica*
- Whatever is carried out as a means of courtesy or tolerance can never be deemed a usage of trade



- *Gasani v Anastasi* (Vol. XXXII.i.606) [1946]
 - ‘Biex dritt jista’ johrog mill-konswetudini hemm bzonn illi l-uzanza tkun generali’
- *Baldacchino v Pace* (Vol. XXX. iii. 504) [1940]
 - ‘Ir-rekwiziti ta’ l-uzu kummercjali huma l-uniformita’ tieghu ghal zmien twil u l-osservanza tieghu bhala regola ta’ dritt u bil-konvinzjoni li ma jistax jigi vjolat impunement.’
- “The function of usages of trade is that of filling up those gaps which commercial activity constantly produces in positive commercial law and of paving the way for the embodiment in the said laws of new rules which the continuous development of trade renders necessary from time to time”

- Usages of trade can be classified as 'laws'
 - General principles of application and interpretation applicable to written laws – are also applied to usages
- Acting in contravention of a usage -> would constitute an infringement of the law
- Proving a Usage:
 - Usages are proven by means of witnesses, expert opinions, references to previous judgements etc.
 - General rule that the person alleging must prove also applies
- Other considerations:
 - Wrong application of a usage of trade in a Judgement – grounds to demand a retrial (Article 811(e) of the Code of Organisation and Civil Procedure [COCP])

Civil Law

- Ranks last in the Hierarchy – after Usages of Trade
 - Supersedes usages when the civil law rule is a rule of Public Policy
- Civil Law and Commercial Law are the two primary branches of Private Law
- Roman Law – there was no distinction between civil and commercial law
 - This distinction came about during the Middle Ages – it was during this period of time that Commercial Law began to develop
 - Groups of traders known as *universitates mercatorum* created a set of rules that were applied between them –this eventually led to the development of a distinct law applicable to such traders
- A movement began in Italy for the unification of Private Law and to do away with the distinction created through the existence of two separate codes.



- The relationship between Civil and Commercial Law can be defined as one of increasing *mutual complementarity* and *inter-dependence*.
- Which parts of Civil Law fall under Commercial Law?
 - 1. **Civil Law provisions which specifically deal with commercial matters**
 - Ex: Article 1141 Civil Code:
 - “(1) Where the obligation is of a commercial nature, or the law provides that interest is to run ipso jure, interest shall be due as from the day on which the obligation should have been performed.
 - 2. **Civil Law provisions which are specifically referred to in Commercial Laws**
 - Ex: Article 49 Commercial Code:
 - “In the absence of any agreement, law or custom to the contrary, mercantile agency is governed by the provisions contained in Title XVIII of Part II of Book Second of the Civil Code so far as applicable..”

Special Supplementary Rules for Commercial Obligations

- The Commercial Code includes certain supplementary rules to cater specifically for commercial obligations which are different from the general rules in the Civil Code.
- Most relevant supplementary rules:
 - (i) Where the parties have agreed that the verbal agreement should be reduced in writing it is presumed that they desire to subject the validity thereof to the observance of such formality;
 - (ii) In commercial obligations co-debtors are presumed to be jointly and severally liable.



Contracts

- Contracts and the essential principles of contract law comprise the very essence of commercial activity and business
 - For example: Nominate Contracts such as contracts of sale, lease, of works, emphyteusis etc
- The main provisions relating to contracts are found in the Civil Code – an important link between Civil Law and Commercial Law
- Article 960, Civil Code -> *A contract is an agreement or an accord between two or more persons by which an obligation is created, regulated, or dissolved*



- A nominate contract incorporates within it, a baggage of implied terms (e.g. warranty for latent defects in sale)
- In the Civil Code – most rules for nominate contracts are **Supplementary Rules** i.e. they apply unless the parties have decided to derogate from them
 - If supplementary rules do not fill in all the gaps left by the parties the Courts may supply what is missing
- **Mandatory Rules** which are typically there to protect the public interest and which cannot be excluded



Validity of a Contract

- There are 4 essential elements that must be satisfied in order for a contract to be **VALID**:

1. Capacity

2. Causa

3. Consent

4. Object

1. Capacity

- General rule -> all persons are capable of contracting, incapacity is the exception
- Article 967(1), Civil Code: *All persons not being under a legal disability are capable of contracting*
 - Notion of Legal Capacity in relation to minors to be discussed at a later stage

2. Causa

- The 'causa' of a contract links obligations but also controls the purpose behind the obligations
- Article 987: *An obligation without a consideration, or founded on a false or unlawful consideration, shall have no effect*
 - Objective test: the existence or falsity of the causa
 - Subjective test: the unlawfulness of the causa

3. Consent

- Defined as: *the concurrence of identical wills duly formed (willed by both contracting parties) and made known (externally manifested)*
- Consent will NOT be valid if given/extorted by:
 - Error
 - Violence
 - Fraud

4. Object

- Article 982(1): *Every contract has for its **subject matter** a thing which one of the contracting parties binds himself to give, or to do, or not to do.*
- Object can be anything which is: *In commercio, Possible, Lawful and Specified/can be Specified*

Express & Implied Terms in a Contract

- **Express terms** refers to those contractual terms expressly agreed to by the parties and evidenced by the contract entered into between them.
- **Implied Terms (Warranties)**
 - Implied terms arise automatically and therefore need not be specified in the contract.
 - Specific warranties are provided for at law depending on the contract to be entered into:
 - The seller has two principal obligations, namely, to deliver and to warrant the thing sold.
 - Quiet possession of thing sold.



Exceptio non Adimpleti Contractus

- The remedy, which is available only in the case of a contract in which the duties of the parties are concurrent, consists in the refusal by one party to perform his duty unless the other party performs his.
- It is founded on the doctrine of cause; since each obligation is the cause of the other, the non-performance of one justifies the non-performance of the other.
 - The obligation of which the creditor suspends the performance must be correlative to an obligation of the debtor's which arises out of the same legal relationship.
- The remedy will not stand in a situation where the creditor's performance is expected to precede that of the debtor's.





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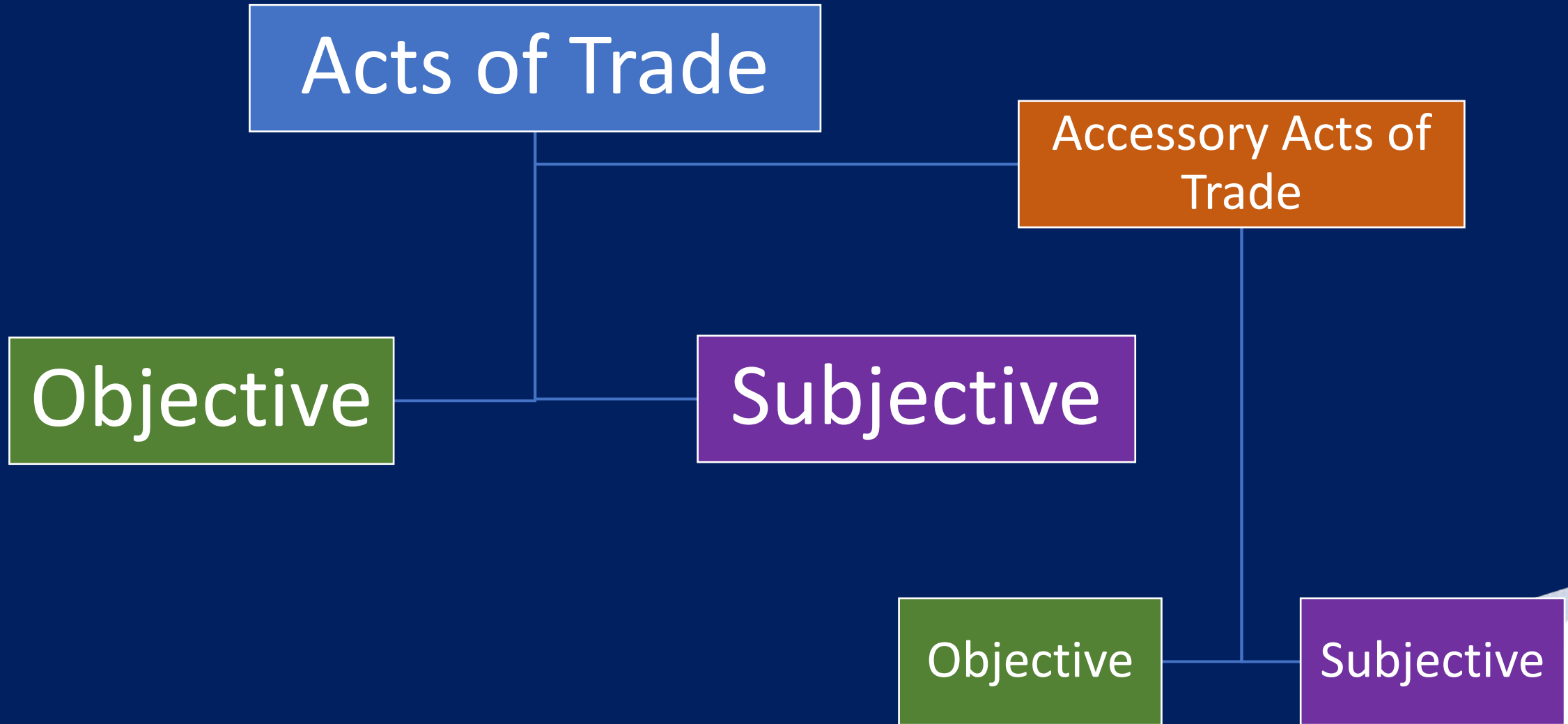


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Being classified as a Trader

- Gives that person certain **rights and benefits**, as well as imposes certain **obligations**, which are not applicable to non-traders
- It is generally the Commercial Law that will be applied to matters involving traders
- Only traders can be declared bankrupt – persons who are non-traders cannot be declared bankrupt
 - Possibility of trader being rehabilitated to trade after being declared bankrupt
 - In commercial matters – this provides a great advantage, which non-traders do not benefit from
- The Court will decide, based on the facts and circumstances, whether a **person** is considered to be a trader or not



Acts of Trade

- Acts of Trade constitute the bedrock of *Maltese Commercial Law* and of the Commercial Code
- Notion of 'Acts of Trade' is not defined within the Commercial Code itself
- How are Acts of Trade dealt with by the Code?
 - Provides a list of various acts which are considered to be Acts of Trade (Objective)
 - Develops a rebuttable presumption (Subjective)
- Divided into **Subjective** and **Objective** Acts of Trade

Objective Acts of Trade

- Articles 5 and 6 of the Commercial Code expressly provide a list of *Objective Acts of Trade*:
- *Article 5: The following are acts of trade:*
 - (a) any purchase of movable effects for the object of re-selling or letting them, whether in their natural state or after being worked or manufactured; any sale or lease of movable effects, in their natural state or after being worked or manufactured, when the purchase thereof has been made with the object of re-selling or letting such effects;
 - (b) any banking transaction;
 - (c) any transaction relating to bills of exchange;

Article 5 ctd.

- *(d) any time-bargain in securities;*
- *(e) any transaction relating to commercial partnerships or to shares in such partnerships;*
- *(f) any transaction relating to vessels and navigation;*
- *(g) any undertaking relating to supplies, manufacture, construction, carriage, insurance, deposits, public entertainment and advertising;*
- *(h) any purchase and any re-sale of immovable property, when made with the object of commercial speculation, and any building enterprise;*
- *(i) any transaction ancillary to or connected with any of the above acts.*



Article 6

- Article 6: *Obligations arising from:*

- *collision of vessels,*
- *assistance or salvage in case of wreck,*
- *stranding or abandonment, from jettison or average*

are likewise commercial matters.



Characteristics of Objective Acts of Trade

- (a) Independent of the person performing said acts of trade
 - Objective acts of trade do not need to be performed by Traders – unlike in the case of subjective acts of trade
- (b) When exercised and performed repeatedly, the status of a ‘Trader’ is conferred onto said person
 - A Trader must necessarily perform acts of trade in order to be deemed as such
 - Objective acts of trade are necessary for a Trader to exist
- (c) The lists of acts of trade that are expressly provided in the law are considered to be *juris et de jure*
 - Once said acts are listed in the law, an irrebuttable presumption is created that they are acts of trade simply due to the fact that the law has stated so.

- (d) The list provided within the law is exhaustive
 - If it doesn't fall within the list provided by law, then it is not an act of trade
- (e) The acts of trade listed within the law should be interpreted widely
 - The purpose of this is to attempt to create a form of 'analogy' by finding acts which are similar in nature to those that are listed
 - *Giorgio Farrugia vs Michelina Piscopo (1956)* – The Court stated that those acts which are socially and economically similar, fall within that particular category. The categories within the list cannot be extended, however each is afforded a wide interpretation.
- (f) Objective Acts of Trade can be Absolute or Relative
 - Absolute – That act is *always* an act of trade [Article 5(c) – 'Any transaction relating to bills of exchange']
 - Relative – That act is dependent on the occurrence of a particular circumstance [Article 5(a) - Does not refer to every purchase of movables but specifically to when there is an intention of re-selling]



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Subjective Acts of Trade

- Article 7 of the Commercial Code states
 - *'Every act of a trader shall be deemed to be an act of trade, unless from the act itself it appears that it is extraneous to trade'*
- Creates an **Rebuttable Presumption** that every act performed by a trader, is an act of trade.
 - Based on the fact that the person performing the act is a Trader – presupposes the existence of the status of a Trader
- Those acts which are only deemed to be acts of trade as a result of them being performed by a Trader and therefore, which are presumed to be connected to the particular trade being exercised by said Trader.

Characteristics of Subjective Acts of Trade

- (a) The person carrying out the act must be a Trader
 - This encompasses the subjective element
 - If the act is not performed by a Trader, then it cannot be a subjective act of trade [Article 7: *'Every act of a trader'*]
- (b) Based on a rebuttable presumption
 - Acts performed by Traders are presumed to be Acts of Trade
 - Rebutting the presumption:
 - *'Unless from the act itself, it appears extraneous to trade'*
 - Therefore – the type of evidence that one can bring is restricted in this case.



- (c) A subjective act of trade cannot be one of the objective acts of trade set out in Article 5 and 6
 - Objective acts of trade are such merely because they fall within Articles 5 and 6 and therefore are not dependent on the existence of a rebuttable presumption.
- (d) Can be an act of whatever nature
 - Article 7 -> 'Every act...'
 - In the past, acts which were linked to matters of tort were considered to not be applicable to trade. This view is no longer accepted today.
- (e) Does not only refer to acts that fall within the trader's particular branch of trade
 - The phrase '*extraneous to trade*' in Article 7 implies that the act must be extraneous to trade in general and not solely extraneous to the particular trade carried out by the Trader.

Rebutting the Presumption

- In order to rebut the presumption – one must prove the following:
 - 1. That the act performed by the Trader is in fact '*extraneous to trade*'
 - Must be extraneous to trade in general and not the trade carried out by that particular person
 - This is done in order to avoid uncertainty
 - 2. The evidence to rebut the presumption must result '*from the act itself*'
 - This is not a simple rebuttable presumption (*iuris tantum*) but a *presunzione mista*
 - Certain acts are extraneous to trade, of their very nature and would not need to be supported by further evidence
 - Other acts are could have a commercial nature – but this would be dependent on particular circumstances

Rebutting the Presumption ctd.

- The key element which has often been stressed by Maltese Courts is whether, from the circumstances surrounding the act, the parties involved were aware or should have been aware that the act in question was in fact extraneous to trade.
- If such circumstances do not indicate that the act was extraneous to trade, then the presumption will not be deemed to have been rebutted and will therefore stand.



Case Law

- *Pio Cremona et vs Kalcedonio Ciantar (1962)*
 - The defendant had engaged the plaintiff to carry out some works in a house in Pieta'.
 - The plaintiff filed a case due to the fact that the defendant had failed to pay him and sought to obtain payment for the work performed.
 - The defendant was a trader and the Court had to determine whether it was apparent *from the act itself*, that the house was for his personal enjoyment or otherwise.
 - The Court concluded that it was for the personal use of the defendant and therefore was deemed **extraneous to trade**.
 - The Court held that *from the act itself*, the plaintiff should have known that the home was for the defendant's personal use.



Accessory Acts of Trade

- **Definition:** An act which is connected with or ancillary to an act of trade (the *principal act*) and whose legal nature and character is dependent upon and derived from said principal act.
- Accessory acts of trade are considered to fall within the remit of both Objective and Subjective acts of trade. This implies that both forms of acts of trade (Objective and Subjective) can be divided into principal acts and accessory acts.
 - Objective: Article 5(i) of the Commercial Code states ‘that *any transaction ancillary to or connected with the above acts*’ are also objective acts of trade.
Ex: a suretyship agreement
 - Subjective: Not expressly set out in the Code – but the same concept as above also applies in terms of subjective acts of trade



Mixed Acts

- These constitute an **act of trade** for one of the involved parties and an **act of a civil nature** for the other party
- Questions arise as to which law is applicable in such cases i.e. does the Commercial or Civil law regulate the act in question?
 - There is nothing expressly stated in the law in relation to the procedure to be adopted
 - The approach taken by Maltese Courts has been to apply Commercial law when the defendant was a trader and to apply Civil law when the defendant was not a trader.

Difference between Acts of Trade and Acts of a Civil Nature

- 1. Applicable Law: Commercial matters (Acts of Trade) are firstly regulated by commercial law, then by usages of trade in the absence of a commercial law provision and finally by the civil law when no usage is applicable.
- 2. Interest:
 - Commercial: Begins to run from the day the obligation should have been performed
 - Civil: Begins to run from the date of notification of a judicial act
 - Set out in Article 1141(1) of the Civil Code
- 3. Commercial law has specific provisions relating to minors intending to exercise acts of trade

- 4. Joint and Several Liability
 - **Commercial Matters** → Co-debtors and sureties are presumed to be joint and severally liable (in solidum)
 - Article 115 of the Commercial Code states the following:
 - (1) In Commercial obligations, co-debtors are, saving any stipulation to the contrary presumed to be jointly and severally liable.
 - (2) the same presumption shall extend to a surety, even if not a trader, who guarantees a commercial obligation.
 - **Civil Matters** → Co-debtors and sureties are not presumed to be joint and severally liable
 - Article 1089 of the Civil Code states that 'Joint and several liability is not presumed. If not declared by law, it must be expressly stipulated'



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