

Principles of Commercial Law

Lecture Title: The Trader

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Diploma in Law (Malta)



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The Trader

- 'Trader' is defined in Article 4 of the Commercial Code:
 - *The term "trader" means any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership*
- A trader could be a:
 - **Physical Person** – A person who, by profession, exercises acts of trade in his own name
 - **Legal Person [Commercial Partnership]** – A commercial partnership acquires the status of a trader once the certificate of registration is issued

- The distinction between traders and non-traders is *historical* – based upon the notion that whoever attains the status of a trader is in possession of certain **rights** and subject to various **obligations**
- Distinguishing between traders and non-traders facilitates the process of determining who is regulated by the provisions and specific rules pertaining to traders and who is not.
- **No formality** necessary in order for a person to become a trader
 - Exception – Commercial partnerships are not deemed to be traders *until* the certificate of registration is issued
 - No registration is required in order for a physical person to become trader



Requirements for becoming a Trader

1. The Exercise of Acts of Trade

- The acts of trade being referred to in Article 5 -> Objective Acts of Trade
- Need to be exercised on a continuous basis and not be merely one off transaction
- There is no minimum amount of acts of trade that have to be performed in order to be deemed a trader
 - This would vary depending on the particular act of trade in question
- The acts of trade in question do not necessarily need to refer to the *same* kind of act of trade



- Intention to exercise acts of trade is not enough, as this must be coupled with the actual carrying out of such acts of trade
- Should be evident that the person performing said acts is assuming a *direct, personal and unlimited liability* for any consequence which may arise, in respect of third parties
- The Trader need not perform and conclude the acts himself/personally
 - There could be an agent concluding on the trader's (principal's) behalf and who would therefore be representing the principal
- The performance of the objective acts of trade must be accompanied by an element of *speculative intention*
 - The purpose of the exercise of acts of trade is to make a profit – *finis mercatorum est lucrum*

2. By Profession

- Article 4 of the Commercial Code states that the exercise of acts of trade must be done *by profession*
 - The Law is making it clear that the consistent exercise of acts of trade alone does not suffice
 - It must amount to said person's **primary and constant source of income**
- In order to be deemed a trader – that person must perform acts of trade in such a way that it becomes his/her **normal and permanent**, although not necessarily his/her only or principal, **occupation**
- Trader = Status



- **Notoriety** is not a requirement in the performance of objective acts of trade
 - Not necessary for a person to acquire the status of a trader
 - **Caruana Galizia**: When a trade is performed publicly, person would still acquire the status of a trader if acts of trade are performed privately and not publicly
- *Victor Borg u martu Doris Borg vs X* [2016]
 - The Court held that the plaintiff was not a ‘trader’, as defined in the Commercial Code, due to the fact that he had abandoned his trade several years ago and had not been carrying out any business over recent years.



3. In his Own Name

- Article 4 of the Commercial Code holds that a trader exercises acts of trade *in his own name*
- A person cannot be deemed a trader unless he/she exercises acts of trade in his/her own name
 - Exception: Unless said person assumes, in respect of third parties, full responsibility of the transactions performed by him
- The trader need not perform the acts personally -> can also be performed through an agent
 - Persons who are auxiliary to the trader -> exercise acts of trade in the name of the principal

- A commercial *agent* does NOT bind himself and is NOT a Trader
- A commission *merchant* binds his own person and is a Trader
 - Article 96 Commercial Code: *A commission merchant is a person who transacts business in his own or under a firm name, for or on behalf of a principal.*
 - The commission merchant is a person who is auxiliary to the trader but who exercises acts of trade in his own name
- ‘In his own name’ refers to the **name by which said person trades**
 - Several writers have however developed different interpretations as to the meaning of ‘in his own name’



- Apart from the **three** main requisites, there is no other specific requirement necessary for a person to become a Trader.
- The determination as to whether or not a person is a Trader is one of **FACT**
 - To be proved by the person alleging it and not by the person denying it-
> *onus probandi incumbit ei qui dicit, non ei qui negat*
- **Professor Caruana Galizia** states that the status of a 'trader' is granted by the law, to those who, by profession, exercise acts of trade in their own name, even if they are more commonly referred to by means of another name, in accordance with the line of trade practiced by them



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Commercial Partnerships

- Article 4 of the Commercial Code: *The term “trader” means any person who, by profession, exercises acts of trade in his own name, and includes any commercial partnership.*
- Commercial Partnerships are regulated by the Companies Act (Chapter 386 of the Laws of Malta)
- Three types of Commercial Partnerships:
 - 1. Partnership *en nom collectif*
 - 2. Partnership *en commandite* or limited partnership
 - 3. Limited Liability Company



- Article 4(2) of the Companies Act:
 - *A commercial partnership other than a company may be formed for the exercise of one or more acts of trade*
- Article 4(4) of the Companies Act:
 - *A commercial partnership has a **legal personality distinct from that of its member or members**, and such legal personality shall continue until the name of the commercial partnership is struck off the register, whereupon the commercial partnership shall cease to exist*



Three types of Commercial Partnerships

1. Partnership *en nom collectif*

- May be formed by two or more partners and operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of all the partners (Article 7 of the Companies Act)
- All the partners in this form of commercial partnership are jointly and severally liable
- If the partnership is not able to honour its obligations, creditors are able to turn onto the partners in order to claim what is due to them.



2. Partnership *en commandite* or Limited Partnership

- Article 51 Companies Act: Operates under a partnership name and has its obligations guaranteed by;
 - the unlimited and joint and several liability of one or more partners, called **general partners**; and
 - the liability, limited to the amount, if any, unpaid on the contribution, of one or more partners, called **limited partners**
- There are TWO types of members:
 1. General Partners
 2. Limited Partners



3. Limited Liability Company

- A company is formed by means of capital divided into shares held by its members. The members' liability is limited to the amount, if any, unpaid on the shares respectively held by each of them (Article 67, Companies Act)
- All the partners are LIMITED partners – their liability is limited to the amount of share capital that they have put into the company
- The term 'Limited Liability' is not referring to the liability of the Company itself, since the Company has unlimited liability but refers to the liability of the Company's members



Limited and Unlimited Liability

- The Commercial Partnership under Maltese Law – has its own **separate legal personality, distinct from that of its member or members**
- Partnership en nom collectif – Unlimited joint and several liability of the partners for the debts of the partnership
- Partnership en commandite:
 - Limited Partners: The liability of the partners is limited to the amount unpaid on their contribution
 - General Partners: Unlimitedly liable for the debts of the partnership
- Limited Liability Company – The liability of the members is limited to the amount, if any, unpaid on the shares respectively held by each of them

Limited and General Partners

- It is important to distinguish between the Partners in a commercial partnership and a Trader.
- Partners in a commercial partnership do NOT attain the status of a Trader but the partnership itself does.
 - A person who falls into bankruptcy is not able to claim bankruptcy in the same way that a Trader does – due to the fact that the status of a trader is accorded to the partnership.
- Writers are generally in complete agreement that Limited Partners do NOT acquire the status of trader



- However debate has arisen as to whether or not General Partners who are unlimitedly liable can be deemed to be traders
 - The Maltese Commercial Code is based on the *French Commercial Code of 1807*, which considered general partners to be traders. The French theory is supported by the bankruptcy provisions included within the French Commercial Code.
 - Main opponent of the French theory is Professor Vivante (a commercial jurist), who took an opposing view and stated that once a partnership *en nom collectif* has a separate juridical personality, then it is the partnership that acquires the status of a trader.



- Some jurists have formulated the view that a partner should be considered to be a trader
- However Article 4 of the Commercial Code is clear in its definition of the term 'Trader' and it is clearly the partnership which is granted the status of a Trader and not the partner.
- **Caruana Galizia** stated that it is generally held that Commercial Partnerships constitute a *juridical persona* – that is capable of acquiring and availing itself of all rights pertaining to traders, as well as being subject to all obligations and sanctions imposed on them by the law.

Declaration of Bankruptcy

- The section on Bankruptcy in the Maltese Commercial Code corresponds to the provisions contained in the French Commercial Code of 1807.
- Under Maltese Law- Bankruptcy provisions are **only applicable to Traders** and not to *non-traders*
- Article 478(2) of the Maltese Commercial Code:
 - *In case of the bankruptcy of a partnership en nom collectif the declaration must contain the name and the place of residence of each of the partners jointly and severally liable.*



- In bankruptcy proceedings, the debtor (the trader) is not faced with a multiplicity of actions from different creditors, but instead collective proceedings are brought
- Through the bankruptcy procedure, the trader may be discharged of his/her previous debts and become **rehabilitated to trade**
- Article 538, Commercial Code:
 - (3) The rehabilitation has the effect of discharging the bankrupt, with respect both to his person and to his after-acquired property, from all debts that could at any time previous to the declaration of bankruptcy have been claimed against him



Amendments to the Bankruptcy Provisions of the Commercial Code

- The Commercial Code (Amendment) Act (Act XXIII of 2022) has updated Part III of the Commercial Code resulting in an overhaul of the rules applicable to a bankrupt trader.
- The Act has not yet come into force and these rules shall come into effect at such time when the Minister responsible for Commerce determines by way of a notice in the government gazette.
- The main aim of the updated provisions is that of implementing Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks, on the discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt (EU Restructuring Directive).



Commercial Code (Amendment) Act, 2022

By virtue of the Amendment Act, the scope of the bankruptcy regime previously available to 'traders' has been widened:

Outgoing regime

'trader'

Prior to the amendments, the bankruptcy provisions could only be availed of by a **trader** as defined in Art. 4 of the Commercial Code.

New regime

'commercial debt'

By virtue of the amendments, the bankruptcy provisions are available to traders and well as **any person, natural or legal, who becomes liable for commercial debts**, whether as principal debtor or otherwise **who is deemed unable to pay their debts**.

State of Bankruptcy

In terms of proposed new **Art. 477 of the Commercial Code**, a trader that is unable to pay his commercial debts shall suspend the payment of all his debts and upon suspension thereof shall be in a state of bankruptcy. Similar to Article 214(5) of the Companies Act, in order to determine whether a trader is unable to pay their debts, the Amendment Act sets out a balance sheet test and a cash flow test.

Art. 477(1) - Balance Sheet Test

Every trader who, **having regard also to his contingent and prospective liabilities**, is unable to pay his commercial debts, shall suspend the payment of all his debts, and shall, upon the suspension thereof, be in a state of bankruptcy.

Art. 477(2) - Cash Flow Test

Without prejudice to the provisions of sub-article (1), **if a commercial debt due by the trader has remained unsatisfied in whole or in part after 24 weeks from the enforcement of an executive title against the trader**, the trader **shall suspend the payment of all his debts and be deemed to be in a state of bankruptcy**.

Filing for Bankruptcy

Any trader unable to pay commercial debts is to suspend the payment of all debts.

The suspension operates to place the trader in a state of bankruptcy, triggering the obligation to file for bankruptcy without undue delay

Creditor/s of the bankrupt trader may request the Court to declare bankruptcy. This is to be made against a security of 10% of the debt owing to the creditor or €1,000 whichever is greater

Within 30 days from the filing / demanding of the declaration of bankruptcy, the Registrar is to call upon the relevant parties to disprove the trader's state of bankruptcy and make submissions on the appointment of the bankruptcy trustee ("BT")

Following the said submissions, the Court will either declare bankruptcy by judgement or dismiss the application as it deems fit.

Any transfer of assets, payment of debts, or act of trade made by a trader in a state of bankruptcy, between the date of the suspension and the date of the judgment declaring bankruptcy, shall, unless the Court rules that the debtor is not in a state of bankruptcy, be null and void.

Effects of a Judgement Declaring Bankruptcy

- The BT publishes a notice of bankruptcy in the Government Gazette and in one or more newspapers;
- The bankrupt's income will automatically devolve on the BT and form part of the bankruptcy estate;
- The bankrupt's debts become payable by the BT out of the bankruptcy estate which the BT holds on trust for the benefit of the bankrupt;
- Stay of execution of claims against the bankrupt and the bankruptcy estate;
- A bankrupt being a natural person will be allowed to carry out work (that is not trading) and receive an allowance;
- There shall be the sale of perishables without delay, with proceeds accruing to the bankruptcy estate, and the sale of non-perishables where the conditions at law are satisfied; and
- Retention of certain property by the bankrupt.

The Bankruptcy Trustee (BT)

The curator has been replaced by the BT who is to be appointed by the Court and is to be duly authorised in terms of the Insolvency Practitioners Act.

Receives moneys intended for the bankrupt

Augments the bankruptcy estate

Continuing the business of the bankrupt where this is authorised by the Court

Organizing creditors of the bankrupt into classes for the purpose of voting on any proposed agreement

Administers the bankruptcy estate held on trust

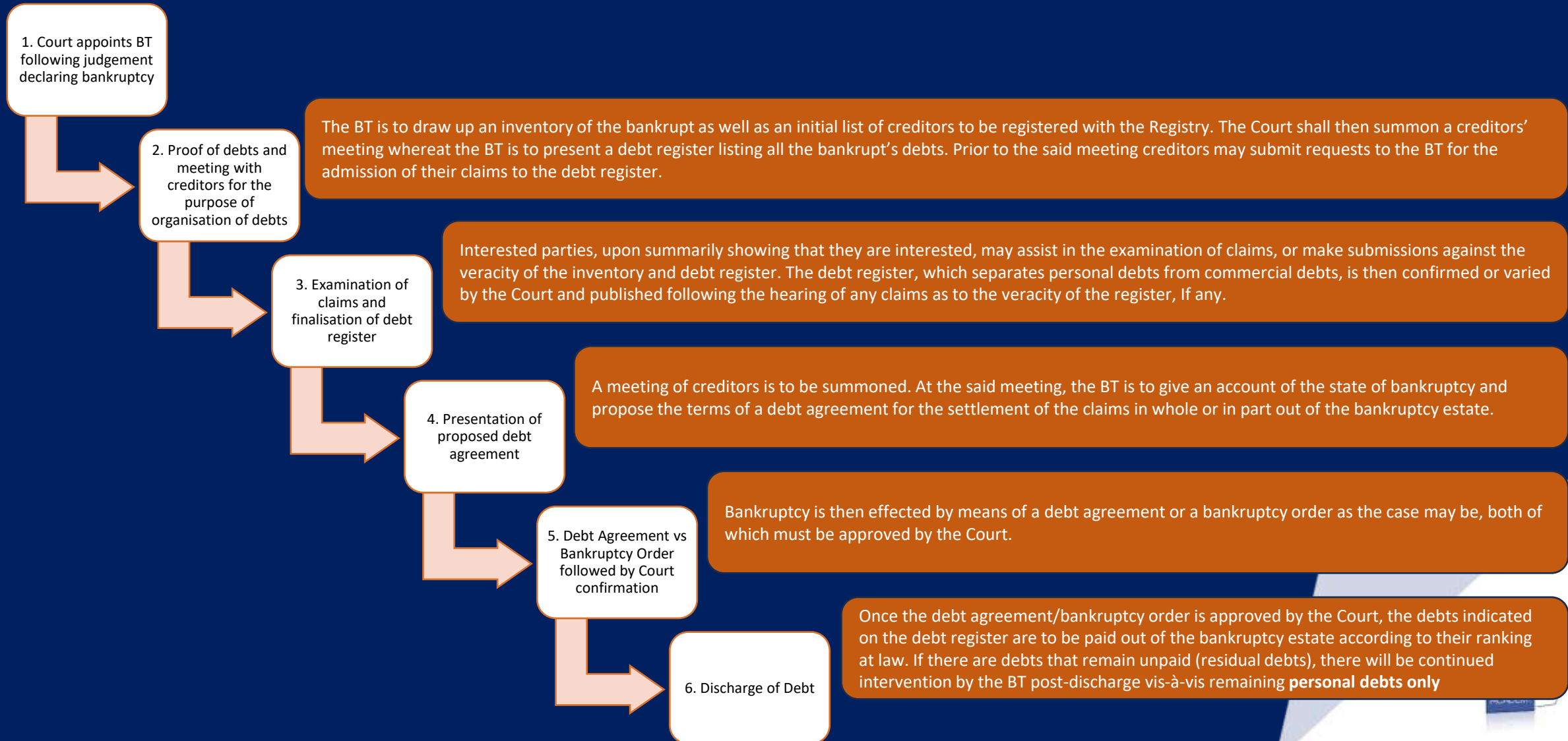
Draw up an inventory comprising the report on the BE to be filed in the Registry

Assesses whether bankruptcy is fraudulent

Making compromises and referring disputes for arbitration, subject to creditor and court approval

Evaluates debts of the bankrupt to prepare the debt register

Bankruptcy Process



Bankruptcy without a Debt Agreement

Bankruptcy is to be effected in the absence of a debt agreement in the following circumstances:

- a) the bankrupt at any time communicates his intention to proceed without a debt agreement, or does not provide his consent to the proposed terms;
 - b) the proposed terms are not confirmed by the creditors and leave has not been granted for the proposal of fresh terms; or
 - c) the proposed terms are not confirmed by the Court.
- In such cases, the BT is to draw up a draft bankruptcy order to be submitted to the Court for confirmation.
 - The bankrupt and the creditors are afforded the right to make submissions and the BT is to present a statement reflecting his evaluation of whether the bankruptcy may be fraudulent, and where relevant, any evidence in support of such statement.
 - The Court will either confirm or vary the bankruptcy order which confirmation renders the order effective and binding and authorises the BT to sell the assets of the bankruptcy estate under the authority of the Court within the time stipulated thereby.



Effects of Confirmation of Debt Agreement/Bankruptcy Order

Natural Person

1. Ipso jure rehabilitated to trade and recovers ownership and possession of all his property, in whole or in part, in accordance with the debt agreement/ bankruptcy order
2. Automatically discharged of all unpaid commercial debts
3. Any remaining personal debts shall be novated to the rehabilitated bankrupt
4. The bankrupt may be required to continue to contribute to the further settlement of commercial debts

Legal Person

1. The name thereof is to be struck off the Malta Business Register
2. All debts shall automatically be discharged
3. Where provided by law, any unpaid debts remaining are transformed into personal liabilities of such other person or persons as contemplated by law or by the constitutive documents of the legal person concerned



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Incompatibility

- According to Professor Caruana Galizia – there are some professions which have been deemed incompatible with the exercise of trade and with attaining the status of a trader
- These may be derived from a piece of legislation, whether directly or indirectly or from other forms of regulations
- Examples: The Broker, Judges and Magistrates, Notaries, etc.

Examples

1. The Broker

- Article 88 Commercial Code:
 - No public broker shall transact any commercial business for his own account, or have any interest therein, either directly or indirectly, in his own name or through the medium of a third party, whether alone or in partnership with others;
 - Nor shall any public broker lend his name for any transaction whatsoever to any person not authorized to exercise the office of a public broker:
 - Provided that two or more public brokers may form a partnership between them for the purpose of brokerage only



- Due to the nature of the business and role of a broker – a broker can never acquire the status of a trader or perform acts of trade in his own name
- The broker acts as a *middleman* between a buyer and a seller and works to facilitate the transaction between both traders
- Therefore the essence of commercial brokerage is not compatible with the requirements necessary to become a trader, due to the rule which prohibits brokers from exercising acts of trader *in their own name*



- The Estate Agent
- In the 1960s – the notion of the ‘Estate Agent’ began to develop and the term was used to *shadow* the concept of a Broker
- Estate Agents are not regulated by the Commercial Code
- They can legally transact business in their own name
- The work of an Estate Agent can be split into two stages:
 - A. The stage prior to the conclusion of the brokerage contract, to which such activity would class as ancillary (a mandate contract)
 - B. The stage after the conclusion of the brokerage contract (a brokerage contract)



- 2. Notaries

- Notaries are not able to exercise acts of trade in their own name
- Article 3 of the Notarial Profession and Notarial Archives Act:
 - (1) No person may practise as a notary if:
 - (a) he holds the warrant of advocate or legal procurator;
 - (b) he is a bank manager;
 - (c) he is an estate agent or similar broker;
 - (d) he is a partner in a commercial partnership or a director or shareholder in a limited liability company whose principal service is estate agency



- **3. Judges and Magistrates**

- It is not lawful for Judges or Magistrates to exercise Acts of Trade in their own name – Set out in Article 16 of the Code of Organisation and Civil Procedure:

- **4. Civil Servants and Police Officers**

- Cannot exercise acts of trade in their own name



Emancipation of Minors to Trade

- Article 8, Commercial Code: *Any person capable of contracting, may trade, unless the law precludes him from carrying on trade*
 - There is a presumption that if a person is able to enter into contracts, then they may automatically become traders
- In order to determine who cannot enter into a contract, reference must be made to several articles of the Civil Code:
 - **Article 966** lists the *capacity of the parties to contract* as an essential condition for the validity of a contract



- **Article 967(1)** states that all persons not being under a legal disability are capable of contracting
- **Article 967(3)** states that the following persons are incapable of contracting in the cases specified by law:
 - (a) **Minors;**
 - (b) Persons interdicted or incapacitated; and
 - (c) Generally, all those to whom the law forbids certain contracts
- Under Maltese law, a person attains majority and is therefore no longer considered to be a minor at the **age of 18**



- **Article 968:** Any contract entered into by a person who...is **under the age of seven years is null**
- **Article 969:**
 - (1) Any obligation entered into by a child **under the age of fourteen years is also null.**
 - (2) Nevertheless, where the child has attained the age of **nine years**, the agreement shall be valid in so far as it relates to the obligations entered into by any other person in his favour.



Persons who have attained the age of 14 but not 18:

A. If they are subject to Parental Authority:

Article 970

- The provisions of the last preceding article (Article 969) shall also apply with regard to any person who has attained the age of fourteen years, but has not attained the age of eighteen years, if such person is **subject to parental authority**, or is provided with a **curator**, saving always any other provision of law relating to marriage.

B. If they are not subject to Parental Authority:

Article 971

- Any minor who has attained the age of fourteen years, and is **not subject to parental authority, nor provided with a curator**, may not alienate or hypothecate his immovable property without the authority of the competent court (subject to the provisions of the Comm. Code) but may however enter into other obligations.



Exception to the rule regarding Minors

- **Article 9, Commercial Code** states the following:
- A minor who has attained the **age of sixteen years**, may trade and shall be deemed to be a major with regard to obligations contracted by him for the purposes of trade, if:
 - (a) he has previously been **authorized** to that effect by the parent to whose authority he is subject, by means of a public deed registered in the Civil Court, First Hall; or, where both parents are dead, interdicted or absent, he has been authorized by the judge of the Civil Court, First Hall; and
 - (b) a summary of the deed of authorization or of the decree aforementioned has been published by means of a notice in the Exchange, in the Government Gazette and in another newspaper.



Requirements for Emancipation

The main requisites for the emancipation of minors - as set out in Article 9, Commercial Code are the following:

1. Attaining the age of 16 years
2. Obtaining the required Authorisation
3. Form and Publicity



This article present two scenarios:

- **1. When the minor is still subject to parental authority and one or both of his/her parents are alive:**
 - The parents would authorise the minor, by means of a public deed, to be emancipated to trade
- **2. When both of his/her parents are dead, interdicted or absent:**
 - The minor himself/herself would file an application in Court asking to be emancipated to trade.
 - The decision rests with the Judge of the First Hall of the Civil Court – if the Judge allows this, a decree emancipating the minor will be officially issued



- A summary of the said deed/decreed would need to be published by means of a notice in the Exchange, the Government Gazette and in a newspaper
- Once the publication of the authorisation deed or decree has taken place -> there is a *juris et de jure* presumption that everyone is now aware that the minor has been emancipated to trade



The Authorisation given to the minor can be of 3 different types:

- **1. General Authorisation** – This allows the minor to trade in general
- **2. Special Authorisation** – This allows the minor to exercise trade in relation to a specific branch of business
- **3. Limited Authorisation** – This form of authorisation would have certain limitations in place – for example: authorized to perform one specific transaction



Powers given to Minors who are Emancipated to Trade

- **Article 10, Commercial Code:**
 - Minors who are traders authorized as aforesaid can, by reason of their trade charge, hypothecate and even alienate their property, without any of the formalities prescribed by the civil law.
- This can only be done in relation to the trade activities of the minor
- If the minor is authorized to trade in accordance with the requisites set out in Article 9 (Comm Code) -> no special authorisation from the First Hall, Civil Court is necessary for the minor to charge, hypothecate or alienate their property



Article 11, Comm. Code states that Article 9 & 10 shall also apply to minors not being traders, with respect to acts declared to be acts of trade

- The fact that a minor has been emancipated to trade, does not automatically make that person a Trader
 - The requisites laid down in Article 4 of the Comm. Code still apply i.e. a person becomes a trader when performing objective acts of trade in his/her own name



Revocation of Authorisation

- **Article 12, Comm. Code** – deals with the revocation of the authorisation given to a minor to trade, by a parent:
 - (1) The authority granted to a minor by the parent vested with parental authority to carry on trade may, at any time, be revoked by the parent exercising such authority by means of a public deed duly served on the minor.
- The deed of revocation must be registered in the First Hall of the Civil Court & published in the Exchange, Government Gazette and another newspaper
- Revocation – will not injuriously affect the rights acquired by a third party



- Key points in terms of the revocation of the authorisation given to a minor to trade:
 - ‘At any time’ – When the minor is subject to parental authority, parents are able to have the authorisation revoked. This is however, only until the minor reaches the age of 18 years.
 - This occurs by means of a public deed – this must be served on the minor (i.e. the minor must be notified of this)
 - Once the authorisation is revoked, there is no remedy or right of appeal available to the minor in order to challenge the revocation.
 - The law speaks of revocation only where the parents have emancipated the minor themselves, that is by deed of authorisation
 - The deed of revocation must be registered in the First Hall, Civil Court and published by means of a notice in the Exchange, Government Gazette and in a newspaper.



Third Parties in relation to the Revocation:

- The public deed by which the revocation is effected, must be brought to the attention of third parties
- Article 12(3) clearly states that:
 - *Such revocation shall in no case injuriously affect the rights acquired by a third party, even in regard to transactions which are still in the course of negotiation.*
- This implies that third parties should not be negatively affected as a result of such revocation



The Effects of Emancipation

- There are 4 main effects of the emancipation of Minors:
- 1. For the purposes of trade, the minor assumes full direct and personal responsibility for all the obligations contracted by him and will have to guarantee that liability with all his property, present and future.
- 2. For the purposes of trade, the minor is deemed to be a major and therefore may:
 - Be Incapacitated or Interdicted
 - Demand rescission of a contract on those grounds upon which a major may do so
 - Be sued or sue in his own name



The Effects of Emancipation ctd.

- 3. A minor that has been duly authorised to trade, may begin to do so but will only acquire the status of a *Trader* if the requirements set out in Article 4 of the Commercial Code are met.
- 4. Minors who are emancipated to trade may charge, hypothecate and alienate their property, in the same way that a person who has attained majority may do so.



Barriers to Trade

- Unfair competition exercised by traders could act as a barrier to trade
- Article 9 of the Competition Act speaks of the prohibition against abuses by undertakings holding a dominant position within Malta
- Examples:
 - By directly or indirectly imposing an excessive or unfair purchase or selling price or other unfair trading conditions
 - By applying dissimilar conditions such as price discrimination, thereby placing any or some of the trading parties at a competitive disadvantage
- International Trade
 - Natural barriers: E.g. physical or cultural, language
 - Tariff barriers – tax imposed by a nation on imported goods





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