The dispute resolution Review

Fifth Edition

Editor

Richard clark

Law Business Research

The Dispute Resolution Review

This article was first published in The Dispute Resolution Review, 5th edition
(published in February 2013 – editor Richard Clark).

The Dispute Resolution Review

Fifth Edition

Editor
Richard Clark

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

MARKETING MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

PUBLISHING ASSISTANT
Lucy Brewer

PRODUCTION COORDINATOR
Lydia Gerges

HEAD OF EDITORIAL PRODUCTION
Adam Myers

CHIEF SUBEDITOR
Jonathan Allen

SUBEDITORS
Anna Andreoli, Charlotte Stretch

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-907606-56-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET BA-HR DA (BA-HR)

ARTHUR COX

ASHTAR ALI & CO, ADVOCATES AND CORPORATE CONSULTANTS

ATTIAS & LEVY

ARZINGER

AZB & PARTNERS

BAKER & MCKENZIE SOUTH AFRICA

BARUN LAW

BEDELL CRISTIN

BIZLINK LAWYERS & CONSULTANTS

BONELLI EREDE PAPPALARDO – STUDIO LEGALE

BREDIN PRAT

BUFETE HERNÁNDEZ ROMO

CAMILLERI PREZIOSI

CRAVATH, SWAINE AND MOORE LLP

CROCI, SILVA Y CAJINA ABOGADOS

DE BRAUW BLACKSTONE WESTBROEK

DITTMAR & INDRENIUS

FONTES TARSO RIBEIRO ADVOGADOS

FULBRIGHT & JAWORSKI LLP IN ASSOCIATION WITH

MOHAMMED AL-GHAMDI LAW FIRM

GATMAYTAN YAP PATACSIL GUTIERREZ & PROTACIO

HENGELER MUELLER

HERGÜNER BILGEN ÖZEKE ATTORNEY PARTNERSHIP

HOMBURGER

HUTABARAT HALIM & REKAN

JUN HE LAW OFFICES

KBH KAANUUN

LANSKY, GANZGER & PARTNER (LGP)

ŁASZCZUK & PARTNERS

LLOREDA CAMACHO & CO

LOYENS & LOEFF

MAPLES AND CALDER

MANNHEIMER SWARTLING

MIYAKE & YAMAZAKI

MOLITOR AVOCATS Á LA COUR

MOTIEKA & AUDZEVIČIUS

OSLER, HOSKIN & HARCOURT LLP

OXFORD & BEAUMONT SOLICITORS

PELLEGRINI & URRUTIA

PINSENT MASONS LLP

PIPER ALDERMAN

PLESNER LAW FIRM

POTAMITISVEKRIS

SCHRECK LAW OFFICES

SLAUGHTER AND MAY

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

SZECSKAY ATTORNEYS AT LAW

TOMAIER LEGAL ADVOKÁTNÍ KANCELÁŘ S.R.O.

TSMP LAW CORPORATION

ȚUCA ZBÂRCEA & ASOCIAȚII

URIA MENENDEZ

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

UTEEM CHAMBERS

YOUNG CONAWAY STARGATT & TAYLOR LLP

CONTENTS

EDITOR'S PREFACE

Richard Clark

Following the success of the first four editions of this work, the fifth edition now extends to some 58 jurisdictions and we are fortunate, once again, to have the benefit of incisive views and commentary from a distinguished legal practitioner in each jurisdiction. Each chapter has been extensively updated to reflect recent events and provide a snapshot of key developments expected in 2013.

As foreshadowed in the preface to the previous editions, the fallout from the credit crunch and the ensuing new world economic order has accelerated the political will for greater international consistency, accountability and solidarity between states. Governments' increasing emphasis on national and cross-border regulation – particularly in the financial sector – has contributed to the proliferation of legislation and, while some regulators have gained more freedom through extra powers and duties, others have disappeared or had their powers limited. This in turn has sparked growth in the number of disputes as regulators and the regulated take their first steps in the new environment in which they find themselves. As is often the case, the challenge facing the practitioner is to keep abreast of the rapidly evolving legal landscape and fashion his or her practice to the needs of his or her client to ensure that he or she remains effective, competitive and highly responsive to client objectives while maintaining quality.

The challenging economic climate of the last few years has also led clients to look increasingly outside the traditional methods of settling disputes and consider more carefully whether the alternative methods outlined in each chapter in this book may offer a more economical solution. This trend is, in part, responsible for the decisions by some governments and non-governmental bodies to invest in new centres for alternative dispute resolution, particularly in emerging markets across Eastern Europe and in the Middle East and Asia.

The past year has once again seen a steady stream of work in the areas of insurance, tax, pensions and regulatory disputes. 2012 saw regulators flex their muscles when they handed out massive fines to a number of global banks in relation to alleged breaches of UN sanctions, manipulation of the LIBOR and EURIBOR rates and money-laundering

offences. The dark clouds hanging over the EU at the time of the last edition have lifted to some degree after the international efforts in 2012 saved the euro from immediate and catastrophic collapse, although the region continues to prepare for a period of uncertainty and challenging circumstances. It is too early to tell what, if any, fundamental changes will occur in the region or to the single currency, but it is clear that the current climate has the potential to change the political and legal landscape across the EU for the foreseeable future and that businesses will be more reliant on their legal advisers than ever before to provide timely, effective and high-quality legal advice to help steer them through the uncertain times ahead.

Richard Clark
Slaughter and May
London
February 2013

Chapter 36

MALTA

Marisa Azzopardi and Kristina Rapa Manché[1]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Various methods of dispute resolution are available in Malta. Disputes in Malta relating to civil and commercial matters are generally resolved through recourse to the courts. There are other methods of dispute resolution available such as those through specialised tribunals or boards set up by the Laws of Malta on arbitration and mediation. With regards to criminal proceedings, these are exclusively determined by the Maltese courts.

i The courts

Maltese courts are divided into two branches, the superior courts and the inferior courts. The superior courts are presided over by judges and are:

a the Constitutional Court;
b the Court of Appeal;
c the Court of Criminal Appeal;
d the Criminal Court; and
e the Civil Court.

The inferior courts are presided over by magistrates and are:

a the Court of Magistrates (Malta) for the Island of Malta; and
b the Court of Magistrates (Gozo) for the Islands of Gozo and Comino in its inferior jurisdiction even though the latter is sometimes endowed with a superior jurisdiction).

The First Hall, Civil Court has a general jurisdiction and determines claims of a civil or commercial nature, matters that relate to voluntary jurisdiction (such as the appointment

1 Marisa Azzopardi is a partner and Kristina Rapa Manché is an associate at Camilleri Preziosi.

of tutors and curators, interdiction adoption), and all causes that are expressly assigned by law to the Court. As regards monetary claims, any claims exceeding €11,646.87 are to be heard by the First Hall, Civil Court. The inferior courts determine claims with a value not exceeding €11,646.87. Claims that, however, deal with the payment of small amounts under €3,494.06 are determined by a specific tribunal, the Small Claims Tribunal.

Appeals from the decisions of these courts may be made to the Court of Appeal. In its superior jurisdiction, the Court of Appeal is composed of three judges. With regards to appeals from judgments handed down by the inferior courts, the Court of Appeal is constituted by only one judge.

Matters of a criminal nature are exclusively determined by the criminal courts.

ii Specialised tribunals

The Laws of Malta also provide for the establishment of specialised tribunals to determine matters of a specific nature relating to a particular law. The aim for the setting up of such tribunals is twofold: to reduce the caseload on the inferior and superior courts and also to have specialised tribunals to hear cases that may be of a technical nature. Proceedings before these tribunals are generally less informal than proceedings before the inferior or superior courts, with the majority of tribunals having the power to regulate their own procedure. Examples of tribunals set up by the Laws of Malta are the Industrial Tribunal (determining employment cases), the Competition and Consumer Appeals Tribunal (which determines appeals from decisions, orders or measures of the Director General (Competition) and the Director General (Consumer Affairs) as provided in the Competition Act and the Consumer Affairs Act), the Financial Services Tribunal (which determines appeals filed in relation to decisions made by the Malta Financial Services Authority) and the Administrative Review Tribunal (which has the power to review administrative acts of public administration of points of law and fact).

II THE YEAR IN REVIEW

Actions *in rem* over vessels or ships are quite common in Malta owing to Malta's large maritime tradition. A recent judgment handed down on 12 June 2012 by the First Hall, Civil Court in the names of *Malta Towage Limited v. Dr Adrian Camilleri pro et noe* held that in relation to an action *in rem* against a vessel, the presence of the vessel in Maltese territorial waters throughout the hearing of the case is required, or at least the presence of a guaranteed deposit of the amount claimed in the lawsuit to be held in court after the vessel is arrested. In this case, the vessel *N/T Fendercare Independence* was arrested by the plaintiff had not been paid for works carried out on the vessel. A deposit and bank guarantee were subsequently filed in court as security by the vessel to clear the vessel from arrest. The Court also ordered the plaintiff to file a guarantee within a specific time in order to proceed with the claim. Since the guarantee was not filed, the vessel was authorised to withdraw the deposited amounts and did this after the vessel had left Maltese territorial waters. The Court noted that for it to have jurisdiction *in rem*, the vessel had to be in Maltese territorial waters, or at least, there had to be a security

guarantee deposited in court. Since this was no longer the case, it dismissed the plaintiff's application.

In another judgment handed down in 2012, relating this time to competition law matters, in the names of *Dr James Muscat Azzopardi pro et noe v. Herbert Azzopardi and Herbies' Jewellery Limited*, the First Hall, Civil Court confirmed that exclusive distribution agreements were not binding upon third parties and that notwithstanding that one trader within the jurisdiction of Malta was granted exclusive distributorship rights for the territory of Malta, such agreement could not prohibit parallel importation and another trader could lawfully buy the same merchandise from another distributor within the EU and market them within the territory of Malta.

III COURT PROCEDURE

i Overview of court procedure

Civil proceedings before the superior courts are generally initiated by a sworn application filed by the claimant in the court registry. The sworn application should clearly state the subject of the claim and the remedy that is being demanded. Once the application is confirmed on oath and filed in the court's registry, this will be served on the defendant, who is given 20 days to file a sworn defence, unless the defendant intends to admit to the claim. Upon the expiration of the 20-day period, the preliminary written procedures are deemed to be closed. If no defence is filed within that time frame, the defendant will be deemed by the court to be contumacious and will not be entitled to defend the claim or bring any evidence before the court.

Once the preliminary written proceedings are closed, a first hearing is held before the court that will proceed to plan in advance the sittings to be held and will direct the parties on what evidence and submissions it expects at each sitting. Evidence will be heard either by the court itself or by judicial assistants appointed by the court for that purpose. Once all parties present their evidence, the court generally orders the parties to present their written submissions and a reply thereto. Once written submissions have been filed, the court will adjourn the case for judgment, although it may provide the possibility for the parties to put forward oral submissions in addition to the written submissions filed.

ii Procedures and time frames

As regards civil proceedings, once preliminary written procedures have been completed, the courts generally hold monthly or bimonthly sittings. It is during this time that evidence will be presented and witnesses examined and cross-examined. With respect to ordinary civil cases brought before the courts, Maltese legislation does not stipulate a time within which a case must be concluded. Accordingly, the time frame really depends on the practices employed by the court and on the system adopted by the particular judge hearing the action. As a general guideline, a civil action would ordinarily take between two and five years.

Maltese procedural law does, however, allow for special summary proceedings where the claim being made by the plaintiff is for the recovery of a debt that is certain, liquidated and due and not consisting in the performance of an act; or for the eviction

of any person from an urban or rural tenement. In such cases the plaintiff may request the court, in the sworn application, to give judgment without proceeding to trial on the basis that the plaintiff believes there is no defence to the action. The court will set a date and time for the defendant to appear before the court. If the defendant fails to appear or fails to prove to the court that he has a defence to the claim, the court will proceed with handing down judgment.

As regards interim measures, the Code of Organisation and Civil Procedure ('the COCP') provides the possibility for a person to request the court to order interim remedies to secure the rights claimed by that person. The interim measures are obtained by the issuing of precautionary warrants. The various precautionary warrants available are the following:

a the warrant of description;
b the warrant of seizure;
c the garnishee order;
d the warrant of prohibitory injunction;
e the warrant of arrest of sea vessels; and
f the warrant of seizure of a commercial going concern.

A demand for the issuance of a precautionary warrant is made by means of an application confirmed on oath by the applicant. Once the precautionary warrant is issued, and in the event that the applicant has not already instituted an action before the courts, the applicant has 20 days to institute legal proceedings. In the event that the applicant fails to do so, the precautionary warrant will be revoked.

Interim remedies may also be requested in the event that a claimant does not institute proceedings before the court but opts to institute arbitration proceedings.

iii Class actions

It is only recently that Maltese legislation has permitted class actions in Malta. On 1 August 2012, the Collective Proceedings Act (Chapter 520 of the Laws of Malta) came into force. This provides for two forms of collective actions to be brought before the courts – group actions (the representative plaintiff instituting the action must have a personal claim that falls within the group of claims in the proposed collective action) and representative actions (where the action is filed by a representative body that does not necessarily have a personal juridical interest to the case, however, serves the function of being a body set up to defend the interests of its members).

In terms of the Collective Proceedings Act, class actions may only be brought with respect to claims that fall under the auspices of three substantive laws: the Consumer Affairs Act, the Product Safety Act and the Competition Act.

As the introduction of class actions in Maltese law is a recent addition to the Maltese legal system, we are not aware of any class actions having been brought yet before the Maltese courts.

As regards any other claims not falling within the branch of consumer, product safety or competition legislation, while class actions cannot be brought, Maltese law does provide for the possibility of the institution of joint actions, often referred to as cumulative actions. In such cases, the law provides for the possibility of two or more

plaintiffs to bring their actions by means of one sworn application, provided that the subject matter of the actions is clearly and specifically stated in respect of each plaintiff. In these cases, however, the actions must be 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. As a general rule, the evidence to be brought in one action is the same to be produced in the other action or actions.

iv Representation in proceedings

There is no specific obligation to be represented by a lawyer before the civil or criminal courts whether a litigant is a natural person or a legal person. It is, however, always recommended that a person be assisted by a lawyer and generally a court will clearly explain this to a person who declares the intention of being self-represented and ask for confirmation of such intentions.

Maltese legislation also provides for legal aid to be granted to any litigant who satisfies the requirements imposed by the law. Legal aid is generally granted to persons who do not possess property (excluding the principal residence or such property that is the subject of the court proceedings) whose net value amounts to or exceeds €6,998.12 and whose yearly income is not more than the national minimum wage.

v Service out of the jurisdiction

The procedure for the service of documents on persons outside the jurisdiction of Malta largely depends on whether such persons are resident in one of the Member States of the European Union.

As regards persons who are resident in one of the Member States of the European Union, excluding Denmark, service of documents relating to civil and commercial matters would take place in accordance with Regulation 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents). In summary, documents filed in court would be forwarded to the Maltese transmitting agency, the Attorney General's Office, which would be in charge of transferring all such documentation to the receiving agency appointed in the particular Member State where the documents are to be served. The receiving agency will then serve the documents in accordance with the method adopted for the service of such documents in that jurisdiction or using a particular method suggested by the Attorney General's Office, unless it is incompatible with the jurisdiction of the receiving agency.

As regards persons who are absent from Malta or not resident within the European Union, the court would, upon a specific request of the plaintiff, appoint a curator to represent the interests of such persons. The curator would be in charge of receiving documents on behalf of such persons and would then be responsible for seeking to notify such persons in the foreign jurisdiction, informing them of the documents that have been filed against them.

The above-mentioned system applies whether or not the party being served is a natural or legal person.

vi Enforcement of foreign judgments

Once again, the procedure for the enforcement of foreign judgments largely depends on whether the judgment emanates from an EU Member State. In the event the judgment that relates to civil or commercial matters is handed down by a court in an EU Member State, in the terms of EC Regulation 44/2001, a Maltese court would recognise that judgment, without looking into its substance, and enforce it without the need for any special procedure The only instances when a judgment will not be recognised are if such recognition is manifestly contrary to Maltese public policy, if the defendant was not served with the document instituting proceedings in the foreign court so as to enable a defence, if the judgment is irreconcilable with a judgment given in a dispute between the same parties in Malta, or if it is irreconcilable with an earlier judgment given in another EU or non-EU country involving the same cause of action and the same parties. To enforce such a judgment, the person seeking to enforce would simply file an application before the First Hall, Civil Court, asking for the judgment to be declared enforceable. A declaration of enforceability issued by the courts may be appealed.

With respect to judgments given by the court of a Member State whose judgments concern an uncontested claim, however, the party seeking to enforce may request the court handing down the judgment to issue a European enforcement order and simply enforce the judgment in Malta without having to request the Maltese courts to declare the judgment enforceable.

As regards judgments emanating from courts or tribunals outside Malta and the EU, judgments would be enforced similarly to judgments delivered in Malta, provided an application is made requesting the court to order enforcement such judgment. The court will not order the enforcement if:

a in the case of judgment by default, the parties were not contumacious according to foreign law;

b the judgment contains any disposition contrary to public policy or to the internal public law of Malta; and

c for any of the reasons under which a person in terms of Maltese law may ask for a new trial of a decided cause (including *inter alia*, where the judgment was obtained by fraud on the part of any of the parties, where judgment was given on any matter not included in the demand, where judgment was given in excess of the demand, where the judgment contains contradictory dispositions or where the judgment contains a wrong application of the law).

Accordingly, in cases where the court is being asked to declare enforceable a judgment emanating from a foreign court situated outside of the EU, the Maltese courts are granted wider powers of scrutiny than those granted to them in terms of Regulation 44/2001.

vii Assistance to foreign courts

Maltese law makes no express provisions for Maltese courts to provide assistance to foreign courts with respect to civil or commercial matters. With respect to criminal matters however, the Criminal Code does provide that Maltese courts would have to provide assistance to foreign courts, particularly in relation to the examination of witnesses in connection with offences that have occurred outside Malta, provided that the court

emanates from a country where there is a treaty or bilateral arrangement in force for such cooperation. The foreign court would have to make a request to the Attorney General for the examination on oath of a particular witness or to search or seize any evidence that may be required. Once the request is received, a magistrate will then hear and record the examination on oath of the witnesses and communicate such examination to the foreign court.

viii Access to court files

As a general rule, all civil proceedings are heard in public and any member of the public can attend any hearing before the court, unless the court otherwise prescribes. As a general rule, the court files that hold all records and documentation relating to proceedings are also made available to the public and any interested person may access the court files from the public registry. The court may, however, order that certain documentation presented in the acts of the proceedings are not made available to the public if it contains confidential information that might cause prejudice to a party to the action, if made public.

In the case of proceedings heard before the Criminal Court, access to the case file will only be granted to the Attorney General, the alleged offender and defence counsel.

As regards proceedings that have been completed, the relevant files would be filed in the court's archives and members of the public may request access to them.

ix Litigation funding

Maltese Law does not contemplate third-party funding. However, it does not prohibit it. Third-party funding is not commonly adopted in Malta.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Conflicts of interest are regulated by the Code of Ethics and Conduct for Advocates ('the Code of Ethics') issued by the Commission for the Administration of Justice. In terms of the Code of Ethics, an advocate must not act, or must decline to act further, where there is a conflict of interests between:

a the advocate and the client or prospective client;
b two existing or prospective clients; or
c an existing client, a prospective client or between prospective clients.

An advocate practising in Malta should not, as a rule, accept instructions to act for two or more clients where there is a conflict or likelihood of a conflict between the interests of those clients, whether the client is a personal client or a client of the firm or association. With regards to firms, when there is a possible or real conflict of interest with a client represented by a partner in the same firm, the advocate should only accept a brief with the consent of his or her client. If, following consent from the client, the partner does accept the brief, Chinese walls would need to be set up within the firm. While there is nothing in statute that regulates Chinese walls, a firm would generally restrict access to

files and documentation and have separate lawyers who work for different clients and who are bound by the Code of Ethics' rules relating to confidentiality.

ii Money laundering, proceeds of crime and funds related to terrorism

In carrying out their work, lawyers are bound by the Protection of Money Laundering and Funding of Terrorism Regulations (Subsidiary Legislation 373.01 of the Laws of Malta) ('the Regulations') when carrying out certain activities defined in the Regulations as 'relevant activities'. Such activities include, *inter alia*, the services of lawyers when they participate, whether acting on behalf of and for their client in any financial or real estate transaction or by assisting in the planning or execution of transactions for their clients concerning:

a the buying and selling of real property or business entities;
b the managing of client money, securities or other assets, unless the activity is undertaken under a licence issued under the provisions of the Investment Services Act;
c the opening or management of bank, savings or securities accounts;
d the organisation of contributions necessary for the creation, operation or management of companies; and
e the creation, operation or management of trusts, companies or similar structures, or when acting as a trust or company service provider.

Prior to accepting an engagement and providing their services, in terms of the Regulations, lawyers are required to carry out a detailed customer due diligence in accordance with the Regulations, keep adequate records and information with respect to the prospective clients, and adopt systems for internal reporting and control, risk assessment and risk management, and compliance management and communications.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

In terms of Article 588 of the COCP, communications between a lawyer and a client are privileged. No advocate or legal procurator without the client's consent may be questioned on such circumstances as may have been stated by the client in professional confidence in reference to a pending cause. This rules also applies to clergymen.

Accountants, medical practitioners, social workers, psychologists or marriage counsellors may not be questioned on circumstances that may have come to their attention in their professional capacity or that have been stated by their client in professional confidence, although the court may order such persons to divulge such privileged information.

In addition to the COCP, the Professional Secrecy Act also provides that certain persons, such as lawyers, doctors, accountants and bankers would be bound by confidentiality, by reason of their calling, profession or office regarding certain information that they become aware of. The law then regulates when such persons may be compelled by law to disclose such information.

The rules of privilege also extend to witnesses who cannot be compelled to answer any questions, the answer to which may subject them to criminal prosecution. Furthermore, it is up to the discretion of the court to determine in each case if a witness is not bound to answer a particular question because the answer might be self-incriminating or where the evidence would be prejudicial to the public interest.

In terms of the Professional Secrecy Act, a person who obtains a secret during the course of employment by the state shall also be deemed to be a depository of a secret and accordingly is bound by the rules of privilege and confidentiality. That secret cannot be divulged unless such person is compelled to do so according to law. As regards the provisions relating to privilege in the regulatory context in the COCP, no witness may be compelled to disclose any information or provide any document belonging to or in possession of any civil, military, naval or air force department of the public service or any other document that would be considered exempt in terms of law. Such documents would include but would not be limited to documents that, if disclosed, would be contrary to public interest and could reasonably cause damage to the security of Malta, the defence of Malta or international relations of Malta, and documents that have been submitted to the Cabinet of Ministers for consideration or that are official records of Cabinet.

Neither the COCP nor the Professional Secrecy Act specifically deals with in-house lawyers, however, on the basis that they are advocates, the rules of privilege would apply to them as well in the same way that they would to private practitioners. In terms of the Code of Ethics for Maltese lawyers, an in-house lawyer is bound by the norms of professional conduct in the same manner as private practitioners. Accordingly, any communications with officers or employees of the company should also be protected by professional secrecy. Having said that, it may be argued that while a private practitioner may not be asked to divulge any communication or advice that he or she has had with a client in a professional capacity, an in-house lawyer who is in the company's employment might be compelled by a court to divulge certain information that he or she has come across in the course of his employment, provided that such information would not be tantamount to legal advice given to the company.

Maltese law does not specifically deal with rules of privilege for foreign lawyers and therefore one must assume that the rules of privilege for foreign lawyers would apply in the same manner as they would for Maltese lawyers.

ii Production of documents

A party may be required to produce any documents in litigation that directly relate to the cause before the court and that are not subject to legal privilege. As a general rule, documents produced in litigation should be originals or certified copies. In theory, any document that is to be presented as evidence must be produced together with the relative written pleadings and cannot and should not be produced thereafter. Courts, however, generally allow the presentation of documents throughout the evidentiary stage of proceedings.

Maltese legislation stipulates that all evidence produced must be relevant to the matter at issue between the parties and the court may request the party tendering the evidence to explain the relevance of the evidence to the case. The court may disallow any

evidence it considers to be irrelevant or superfluous, or which it does not consider to be the best the party can produce.

While there is no specific provision in Maltese law relating to documents stored overseas, the general rule in relation to evidence that is to be presented in court is that the party putting forward the evidence must provide the best evidence possible. In the case of documents, that would effectively mean that if it is not possible to put forward original documents by bringing the originals from overseas, then copies of the documents are to be submitted provided that they would be certified as true copies of the originals by persons who are authorised at law to issue such certification. There are also instances when the witness may confirm on oath that the documentation being presented represents a true copy of the original.

Third parties in possession of relevant documents should be summoned to present such documentation. For companies, in the event that any documents are held by subsidiary or parent companies, because such companies have distinct legal personalities, it is the companies themselves, through their representatives, that should be summoned to present such documents as evidence, unless the litigant is already in possession of such documentation. It is lawful to demand the production of documents that are in possession of third parties only in limited circumstances:

a if the documents are the property of the party demanding their production;

b if the 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 not the owner or co-owner thereof, shows that he or she has an interest that such documents be produced by the other party to the suit;

d if the person in possession of the documents, not being a party to the suit, does not declare on oath that he or she has special reasons not to produce the documents; and

e if the documents are public acts, or acts intended to constitute evidence in the interest of the public in general.

With regards to civil and commercial disputes, Maltese law does not specifically deal with documentation stored electronically. Accordingly, the rules relating to documentary evidence mentioned above as well as issues relating to the relevance of documentary evidence would also apply in the case of documents stored electronically. A court will allow the production of electronic evidence as long as it is relevant to the case.

While there is nothing to cater specifically for oppressive or disproportionate obligations with regards to the production of electronic evidence, a court will at all times monitor whether the production of such electronic evidence is necessary and the measures taken to produce such evidence. If the court deems that the obligations to produce such evidence are disproportionate to the purpose it serves and evidence may be produced in another way, the court may direct that there is no requirement to put forward such evidence.

VI ALTERNATIVES TO LITIGATION

i Arbitration

Arbitration in Malta is regulated by the Arbitration Act (Chapter 387 of the Laws of Malta). The Act incorporates the UNICTRAL Model Law, the Geneva Protocol on Arbitration Clauses, the Geneva Convention on the Execution of Foreign Arbitral Awards, the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. As regards international arbitration, the Arbitration Act provides parties to an international commercial arbitration a degree of flexibility. Parties may choose to exclude the operation of the Model Law and apply their own rules or adopt the procedure laid down in the Arbitration Act for domestic arbitrations.

The Malta Arbitration Centre was set up to provide for the conduct of domestic and international arbitration in Malta and to provide the necessary facilities for arbitrations to be held within Malta.

The Arbitration Act provides for a legal framework that regulates domestic arbitration proceedings. Domestic arbitration proceedings are commenced by the filing of a notice of arbitration with the Malta Arbitration Centre. This procedure is required on pain of nullity. The parties to the arbitration proceedings may then choose the arbitrators to determine the claim and may opt to have a panel composed of a single arbitrator or three arbitrators.

A unique feature of the Maltese Arbitration Act is that it contemplates mandatory arbitration in respect of condominium disputes, certain motor traffic disputes and disputes concerning water and electricity services.

Recourse to arbitration proceedings in Malta is gaining popularity, particularly in matters relating to commercial disputes. This is largely because arbitration is seen to be a faster, more flexible form of dispute resolution.

Appeals from arbitral awards are limited in terms of the Arbitration Act. An appeal before the Court of Appeal may lie on a point of law arising out of a final award made in the proceedings unless the parties have excluded such a right in the arbitration agreement or otherwise in writing, or where the parties had expressly agreed that no reasons are to be given in the award. The Court of Appeal shall only consider the appeal if it is satisfied that:

a the determination of the point of law will substantially affect the rights of one or more of the parties;

b the point of law is one the tribunal was asked to determine or otherwise relied on in the award;

c on the basis of the findings of fact in the award, the decision of the arbitral tribunal on the point of law is prima facie open to serious doubt; and

d the appeal does not appear dilatory or vexatious.

As regards mandatory arbitrations, appeals are allowed on both points of law and fact.

A party to a foreign arbitral award may choose to register the award with the Malta Arbitration Centre for the purposes of enforcement, provided that the applicable fees are paid. Once the award is successfully registered, that award would be enforceable in the same manner as a domestic award and would constitute an executive title and may be enforced in accordance with the rules provided for in the COCP similarly to the enforcement of a judgment handed down by the courts.

The New York Convention applies in Malta and was incorporated into Maltese law under the Arbitration Act. We are not aware of any significant recent decisions under this Convention.

Since arbitration is often seen to be a more flexible and faster form of dispute resolution, we have seen an increased interest in arbitration, particularly in relation to commercial disputes.

As regards mandatory arbitration, the Maltese Constitutional Court has recently, in a judgment handed down in September 2011 in the names of *H Vassallo & Sons Ltd v. Attorney General, Water Services Corporation and Enemalta* declared that mandatory arbitration, as imposed by the Arbitration Act, violated the right to a fair hearing, in terms of Article 39 of the Constitution and the European Convention on Human Rights, Article 6(1).

ii Mediation

Mediation is admissible in disputes involving civil, family, social, commercial and industrial matters. This is, generally, a voluntary private dispute resolution process in which both parties appoint a mediator to help the parties to a dispute reach a negotiated settlement. It must, however, be noted that Maltese law also provides for mandatory mediation in matters relating to family disputes.

The role of the mediator is different to that of an arbitrator or a judge since his role is a proactive one in which the mediator aids the parties to reach an amicable settlement. A mediator has no power to make any decision or award.

The Mediation Centre has been set up by means of the Mediation Act and is responsible for promoting mediation and providing assistance to parties that wish to opt for mediation.

Parties to any dispute before a court may jointly request the court to stay proceedings while they attempt to settle their dispute by mediation. Furthermore, the court may, on its own initiative, stay the proceedings for the duration of the process and direct the parties to try and settle the dispute by mediation.

While mediation is generally a voluntary process, mediation in family cases under Maltese legislation is mandatory, notably in cases dealing with personal separation, access to children, the care and custody of children and maintenance for children or spouses or both. Accordingly mediation is always tried before proceedings are escalated to a court of law. As regards other disputes, not relating to family matters, mediation is not a popular form of dispute resolution.

The judiciary has recently tried to increase the popularity of mediation as a form of dispute resolution. In a speech handed down in October 2011, marking the opening of the court's forensic year, the Maltese Chief Justice put forward proposals for mediation

to be carried out while certain cases were pending appeal before the Court of Appeal. In this manner, there would be the possibility of certain disputes being resolved prior to the appeal being heard.

iii Other forms of alternative dispute resolution

Apart from arbitration and mediation, there are no other forms of alternative dispute resolution that are frequently utilised in the Maltese jurisdiction.

VII OUTLOOK & CONCLUSIONS

The matter relating to the declaration of unconstitutionality of mandatory arbitrations remains unresolved in Malta. Though the Constitutional Court has pronounced mandatory arbitrations to be unconstitutional, and notwithstanding that certain amendments were made to the Arbitration Act (allowing the introduction of an appeal from an award in mandatory arbitration on both points of law and fact), the Act, as amended, does not address all issues raised by the Court. The problem that arises is that if one abides by the terms of the Arbitration Act with respect to mandatory arbitration proceedings and brings a claim through such procedure, the claimant could be faced with a defence that the procedure is unconstitutional.

Appendix 1

ABOUT THE AUTHORS

MARISA AZZOPARDI

Camilleri Preziosi

Dr Marisa Azzopardi has represented several local and international clients from various economic sectors and has been actively involved in litigation and also in various arbitration disputes. The matters she has litigated range from issues relating to shareholder disputes and minority rights to intellectual property, insurance, labour law, property-related disputes and various damages claims. In 2010, she was admitted to partnership and, together with Henri Mizzi, she is the firm's chief litigator and is responsible for litigation in the areas of civil, commercial and corporate law. She is also a lecturer at the University of Malta.

She holds an LLD from the University of Malta and an LLM in corporate and commercial law from the University of London.

KRISTINA RAPA MANCHÉ

Camilleri Preziosi

Kristina joined the firm in 2008 as a trainee, later becoming a junior associate and in 2011 she became an associate. She forms part of the firm's litigation team.

Kristina graduated as a Doctor of Laws at the University of Malta in November 2007 and in 2008 she was awarded an LLM from the University of London (University College London). Kristina's main interests are European Union law, competition law, administrative law and intellectual property law. She has concentrated on these areas in her postgraduate studies at the University of London and, in partial fulfilment of her LLM degree, Kristina submitted a thesis on the competition law aspects of standard setting agreements and exploitative abuses. Kristina has also worked as a parliamentary assistant within the European Parliament in Brussels.

More recently, Kristina has represented different governmental authorities before the Maltese courts in a number of disputes concerning various administrative law and constitutional issues.

CAMILLERI PREZIOSI
Level 3, Valletta Buildings
South Street
Valletta VLT1103
Malta
Tel: +356 2123 8989
Fax: +356 2122 3048
marisa.azzopardi@camilleripreziosi.com
kristina.rapa@camilleripreziosi.com
www.camilleripreziosi.com