FINANCIAL LAW COMMITTEE

ACCELERATION OF A DEBT OBLIGATION PURSUANT TO AN EXPRESS CONTRACTUAL CLAUSE

A LEGAL PAPER PREPARED BY THE FINANCIAL LAW COMMITTEE

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I. INTRODUCTION AND SCOPE OF WORK

The objective of this paper prepared by the Financial Law Committee[1] is to provide a brief overview of the current Maltese legislative status on the loss of benefit of time of a debt obligation pursuant to an express clause in a contract. In particular, this paper seeks some answers to the following question: *in the case of a contract setting out a debt obligation and expressly stipulating the loss of benefit of time upon the occurrence of a condition, does the actual loss of benefit of time occur ipso jure upon the happening of the condition or would such an occurrence need to be judicially declared by a court of law*? To use terminology often encountered in contracts drafted following English law tradition: *can the acceleration of a debt due under a contract to pay by instalments occur without the need of judicial intervention, provided such acceleration is expressly set out in the contract*?

Perhaps the best way to elucidate the problem at hand is to take a fact situation often troubling a Maltese Court:

- a notarial deed is in place whereby a debtor owes money to a creditor (whether under a contract of loan, overdraft or under a constitution of a debt), but the debtor's obligation to pay is subject to payment by regular instalments over a certain period of time.

- on the happening of certain conditions as outlined in a contract (commonly, referred to as events of default, with one of the main conditions usually being a failure to pay on time by the debtor), the creditor sends a judicial intimation to the debtor that the latter has now lost the benefit of time under the public deed and that the full amount is now due.

- the creditor seeks to issue executive warrants against the debtor on the basis of the underlying executive title being a debt which is certain, liquid and due (under Article 253(b) of the Code of Organisation and Civil Procedure) (the "**COCP**").

- the debtor contests this and the Court needs to determine whether the loss of benefit of time occurred *ipso jure* and consequently the debt constituted by the public deed is an executive title or whether the executive warrant needed to be preceded by a prior court judgement declaring the loss of the benefit of time and the underlying amount due.

One of the first issues to determine in this regard is whether the condition upon which the loss of benefit of time is premised may be classified as an express resolutive condition or another type of contractual clause? A resolutive condition is defined in Art. 1066 of our Civil Code as one which, on being accomplished, operates the dissolution of the obligation, and replaces things in the same state as though the obligation had never been contracted. In addition, the Civil Code provides that if the event provided for by the condition happens, the creditor shall be bound to restore that which he may have received. It is clear that, in the context of an obligation to pay which is accelerated due to the happening of an event of default, the parties do not revert to the *status quo ante*. In practice, the

[1] The Financial Law Committee is a sub-committee of the Chamber of Advocates set up in April 2012 and currently composed of Dr. Conrad Portanier as Chairperson, Dr. Joseph Ghio as Secretary and Dr. Laragh Cassar and Prof. Andrew Muscat as members. The terms of reference of the Financial Law Committee include the identification of legal uncertainties and the promotion of legislative development as these relate to the Maltese financial services sector.

intended effect of such an event of default is that the obligation to pay becomes due in full immediately. Consequently, in this context, should one be speaking of express resolutive conditions at all?

Conversely, should we be referring to the sections of our Civil Code dealing with 'Of Obligations with a Limited Time' (Art. 1070 *et seq.*) when Article 1070 sets out that a time may be established either by fixing a certain specified day, or by reference to an event which will certainly happen, although on an uncertain day? The loss of benefit of time which is dependent upon an uncertain condition does not fit in this scenario as it will not certainly happen.

This paper also addresses the issue as to whether an overdraft facility set out in a deed published before a notary public may ever be deemed to be an executive title under the COCP. The paper puts forward the case for certain legislative amendments in regard to overdrafts, in particular by adding overdraft facilities published by means of a notarial deed to the list of executive titles.

This report endeavours to clarify the taxonomy of these legal concepts and to determine whether any legislative intervention is required in this regard. It is submitted that this is of significant importance to the wider commercial and financial services sector in Malta. Clarity and certainty in the enforcement of creditors' rights are essential to the proper functioning of the local commercial and financial services industry, in particular to ensure their continued growth. This report does not take into account the additional protections afforded to consumers pursuant to, *inter alia*, the Consumer Affairs Act (Cap 378 of the Laws of Malta) and related subsidiary legislation and accordingly, does not seek to amend any added protection which consumer legislation provides.

There are numerous judgements dealing with the loss of benefit of time and in no way does this paper attempt to provide an exhaustive list of such judgements. It does, however, seek to identify key judgements in this sector which are repeatedly quoted in Maltese judgements and to throw light on some fundamental civilian law principles.

II. SELECTED KEY LEGAL ISSUES

The Committee has examined what various foreign authors had to say about the differences which exist between resolutive conditions (express and tacit)[2], the *patto commissorio*, the loss of the benefit of time and the concept described by some authors as the '*termine risolutivo*'.

In substance the findings of the Committee may be set out below in bullet form as follows:

- the authors concur that one must distinguish between a condition in a contract and a contract limited with time (or a contract with a term). It is generally held that the distinction between a

[2] The operation of resolutive conditions in the context of contracts of works (*locatio operis*) (see Article 1640 of the Civil Code), contracts of lease (see Articles 1569 & 1576A of the Civil Code) and contacts of emphyteusis are excluded from the scope of this paper. Nor have we examined the operation of resolutive conditions or the loss of benefit of time when these are governed by special laws, such as the in the conext of a close-out netting provision under the Set-Off and Netting on Insolvency Act (Cap. 459 of the Laws of Malta).

time-limit (a 'term') and a condition is that the occurrence of a 'delay' is certain whereas that of a 'condition' is uncertain. [3]

- a resolutive condition is one which, on being accomplished, operates the dissolution of the obligation and replaces things in the same state as though the obligation had never been contracted (*ex tunc*). Retroactivity was sometimes considered by scholars from legal systems inspired by the Justianian's Digest as a distinctive feature of a 'condition', which makes it different from a 'term'. However, retroactivity seems to be no longer a distinctive feature of most legal systems and many jurisdictions have put aside the retroactivity rule for conditions such that the resolution of a contract operates only *ex nunc*.[4] Malta's Civil Code still applies the rule of retroactivity of conditions.

- in the case of an agreement subject to an express resolutive condition, such agreement shall, upon the accomplishment of the condition, be dissolved *ipso jure*, and it shall not be lawful for the court to grant any time to the defendant.[5]

- in the case of an agreement subject to an implied resolutive condition, the agreement shall not be dissolved *ipso jure*, and it shall be lawful for the court, according to circumstances, to grant a reasonable time to the defendant. [6]

- a resolutive condition is in all cases implied in bilateral agreements in the event of one of the contracting parties failing to fulfil his engagement (this is commonly known as the *patto commissorio*). Baudry-Lacantinerie – in his 'Trattato Teorico-Pratico di Diritto Civile', 'Delle Obbligazioni', Vol. II, describes the *patto commissorio* as "*la clausola con cui le parti convengono, che il contratto resti annullato, ove 'l una o 'l altra di esse non soddisfi la sua*

[3] See 'Position Paper on Conditions' submitted to Unidroit in 2007 by Professor Benedicte Fauvarque-Cosson.

[4] See 'The new Provisions on Conditions in the Unidroit Principles 2010' by Benedicte Fauvarque-Cosson.

[5] See Article 1067 of the Civil Code.

[6] See Article 1068 of the Civil Code. Laurent in his work 'Principii di Diritto Civile', Volume XVII, page 110 *et seq*. states the following in relation to resolutive conditions: "*E` questa la differenza essenziale che intercede fra la condizione espressa e la tacita: la prima ha luogo per volonta` delle parti; la seconda risulta dalla sentenza del giudice. Da qui consegue che, nella ipotesi della risoluzione espressa, il giudice, per regola, non interviene. E` il contratto che ha, precedentemente, pronunziata la risoluzione pel sopraggiungere di un determinate evento: verificandosi la condizione, il contratto e` risolto. Non vi ha nulla da domandare, e quindi nessuna azione da intentare. Quando sorge contestazione sul punto di sapere se realmente la condizione si e` adempiuta nel modo stipulato dalle parti, la disputa deve, naturalmente, essere portata avanti ai tribunali, ma l'unica, questione che il giudice dovra` risolvere e` quella di fatto. Egli non pronunziera` la risoluzione, ma si limitera` a dichiarare che, essendosi verificata la condizione, il contratto e` risolto per volonta` delle parti. Non occorre neppure che il magistrato faccia questa dichiarazione, bastando sia dimostrato che la condizione e` adempiuta: da questo momento la volonta` delle parti riceve esecuzione e il contratto e` risolto. A maggior ragione non puo` il giudice decidere che il contratto non sara` risolto quantunque si sia verificata la condizione risolutiva.*" However, one should also note the Maltese judgement given in **Commte. Fedele Grima *versus* Francesco Le Brun, Corte Civile di sua Maesta`, 16 novembre 1870, per Onor. Dr. Lorenzo Xuereb**. This is one of the earliest judgements on express resolutive conditions (in the context of a donation) which determined that only a Court judgement can declare that a contract has been terminated on the basis of an express resolutive condition, even though, in terms of the clear wording of the Civil Code, the Court did not have the power to grant any benefit of time in order to give the defaulting party the chance to remedy the situation: "*Che sebbene second il ditto art. 773 quando la condizione risolutiva e` espressa, il contratto, verificata la condizione, si scioglie ipso jure, a differenza del caso, in cui la condizione fosse sottintesa ed in cui la risoluzione non succede ipso jure, pure tra gli effetti dell'una e dell'altra condizione in sostanza non vi sarebbe altra differenza, che nel primo caso la Corte non puo` accordare alcuna dilazione, nel mentre che nell' altro caso puo` accordare una moderata dilazione, **in modo che tanto nell' uno che nell'altro caso**, come evidentemente dimostrano i termini dei menzionati articoli, **e` necessario che la risoluzione sia giudizialmente domandata – e quindi dalla Corte dichiarata**." [our emphasis]. **Grima vs. Le Brun** was also quoted with authority by the Court of Appeal in **Francis Abela et vs Karl Bonello noe, Court of Appeal, 31 May, 2002.** The Financial Law Committee is of the view that Grima vs. Le Brun wrongly applied the provisions of the Civil Code.

obbligazione ... il patto commissorio non e` che una condizione risolutiva con caratteri speciali." He further describes the tacit *patto commissorio* as "*una condizione risolutiva, sotto intesa nei contratti sinallagmatici, per il caso in cui una delle parti manchi alla sua obbligazione.....*". Although Maltese law does not refer to the term '*patto commissorio*' by name, the latter concept is found in Article 1068 (and arguably 1069) of the Civil Code and Article 117 of the Commercial Code dealing with bilateral agreements.

- as a general rule, in commercial contracts, the implied resolutive condition produces the dissolution of the contract *ipso jure*, and it shall not be lawful for the court to grant to the defendant a time for clearing the delay.

- most foreign authors and Maltese judgements categorise a contract of *mutuum* as either a unilateral contract or an imperfect bilateral contract. Consequently, the implied *patto commissorio* under Article 1068 of the Civil Code (and Article 117 of the Commercial Code) does not apply to unilateral contracts such as loans.[7]

- Article 1070 of the Civil Code provides that an obligation limited by time may be established either by fixing a certain specified day or by reference to an event which will certainly happen, although on an uncertain day. However, an event of default in a debt obligation is hardly ever a certain event. Does our law contemplate an obligation with a limited time by reference to an event which is uncertain (such as in the case of typical events of default under a loan agreement)?

- in the Financial Law Committee's view, the fundamental legal issues to be determined in relation to a debt obligation are as follows:

    - whether a clause expressly contemplating the loss of benefit of time on the occurrence of a condition is to be deemed to be a resolutive condition or merely an obligation limited by time?

    - if such a condition is deemed to be an express resolutive condition, then how are we to apply the principle of retroactivity of conditions?[8] If, on the other hand, it is an obligation with a limited time, how are we to reconcile the fact that obligations with a term need to be by reference to an event which will certainly happen, although on an uncertain day?

[7] See for instance **Rev. Camilleri et vs Dr. Fenech et, Civil Court First Hall, 28 October 1895, per Onor. G. Pullicino**

[8] Laurent suggests (see 'Principii di Diritto Civile', Volume XVII, page 100 *et seq*.) that not all contracts can be subject to a resolutive condition. Since a resolutive condition operates to place the parties in the same state as though the obligation had never been contracted, this presupposes that the contract in question is one which can be reversed: "*Cio` suppone che le cose possono essere ripristinate, cioe` che la rislouzione, come la concepisce la legge, sia possibilie. La risoluzione e` possibile quando i contratti si perfezionano immediatamente e definitivamente nel momento in cui si formano; cosi` acade della vendita, della donazione, della permute. L'effetto di questi contratti consiste in un fatto giuridico, la traslazione della proprieta`; questo fatto puo` essere annullato con tutte le conseguenze dal verificarsi della condizione risolutiva.... Diversamente accade dei contratti che si perfezionano successivamente, come la locazione .... Non e` questa una risoluzione; e` impossibilie che l'affitto sia risolto come se non fosse intervenuto contratto alcuno .... esse vogliono soltanto por fine alla locazione, e` semplicemente un termine il quale fa cessare il contratto; ma la locazione e` esistita, ha prodotto i suoi effetti e questi non vengono risoluti."* The current Italian Civil Code clarifies this aspect by stating that in the case of '*contratti ad esecuzione continuata o periodica*', the resolutive condition does not have retroactive effect (but operates only *ex nunc*). Further, Article 1183 of the French Civil Code (which is similar to Malta's Article 1066) also contemplates the retroactive application of conditions, but it appears that there are many exceptions to the retroactivity rule in the French legal system – see further below.

- due to this legal conundrum, the Committee has noted that particular amendments have been made in more recent civil law codes to the original principles on conditions as found in the Code Napoleon. These amendments either disapply retroactivity or they allow parties to contract out of it in certain instances.[9] At this stage, no proposals for amendments are being put forward in this regard. Applying a dose of common sense to the principle of retroactivity of resolutive conditions, it is clear that retroactivity cannot apply in all instances. The effect of a resolutive condition on some contracts (for instance in contracts of loans, contracts of letting etc.) clearly operates only going forward from the moment of the occurrence of the resolutive condition (*ex nunc*) and not retroactively.

- the Committee found the answer to this legal conundrum in the works of Laurent, Principii di Diritto Civile, Volume XVII, pg. 145 (who based himself on the works of Pothier): "*La dottrina ammette ancora un* ***termine risolutivo*** *il quale presenta qualche analogia colla condizione di cui porta il nome. Si intende con cio` un avvenimento* ***incerto*** *stabilito da una delle parti come limite alla durata della propria obbligazione. Il verificarsi di questo evento resolve l'obbligazione nel senso che essa rimane estinta;* ***ma l'estinzione non ha luogo retroattivamente****; l'obbligazione e` risolta solo per l'avvenire. Ecco la differenza essenziale fra il termine risolutivo e la condizione risolutiva. Donde consegue che a questa clausola debbono applicarsi i principi che regolano il termine e non quelli che governano la condizione. L'obbligazione esiste e produce tutti i suoi effetti in modo irrevocabile finche` non sopraggiunge il termine risolutivo, di guise che il debitore deve eseguire il proprio impegno del passato, come se l'obbligazione fosse pura e semplice, e se il termine risolutivo si verifica, il debitore non puo` piu` ripetere quanto ha pagato, e deve eziandio corrispondere quello che non ha ancora soddisfatto. Si tratta di un' obbligazione a termine: il termine mette fine all'obbligazione; salvo che, in luogo d'essere certo, come d'ordinario accade, il termine dipende da un evento incerto e futuro*." Consequently, the Financial Law Committee is of the view that although Malta's Civil Code does not expressly contemplate the concept of a '*termine risolutivo'*, the said legal concept is accepted by continental legal doctrine even in the absence of an express Civil Code clause to this effect. The same argument should apply in Malta. In this vein, the proposals for a reform of the French Civil Code have suggested the introduction of a third type of condition – the 'extinctive condition' which subjects the extinction of the obligation to a future, uncertain event and which has effect only for the future.[10] Although arguably the provisions in the Civil Code may be tweaked to cater for such a legal concept, as has been happening in a number of Continental jurisdictions, the Financial Law Committee is of the view that current continental legal doctrine sufficiently clarifies the interpretation of the Civil Code. The Financial Law Committee concludes in this regard that the concept of the *termine risolutivo* resolves the issue as to how to classify from a civilian law point of view a clause expressly contemplating the loss of benefit of time on the occurrence of a condition.

[9] In particular, the 1942 Italian Civil Code has modified certain concepts when compared to the Italian Civil Code of 1865. See also the *Avant-Projet de reforme` du droit des obligations et de la prescription* (also known as the "**Catala Project**") – available in French and English at http://www.henricapitant.org

[10] See the *Avant-Projet de reforme` du droit des obligations et de la prescription* (also known as the "**Catala Project**") – available in French and English at http://www.henricapitant.org

- The next legal issue to determine is whether the occurrence of the *termine risolutivo* (or in other words the loss of the benefit of time expressly agreed to by the parties) occurs *ipso jure* on the occurrence of the condition or whether a judicial declaration is required?

- Maltese judgements have distinguished between two types of clauses catering for an express loss of benefit of time:

    (a) a simple clause which contemplates the loss of benefit of time without attaching a condition to such a loss;

    (b) the loss of benefit of time which is dependent on the occurrence of a condition.

- whereas it seems to be generally accepted that in the former case no judicial declaration is ever needed, in the latter event when the loss of benefit of time depends on a condition (this is the most typical scenario), many Maltese judgements have determined that a creditor *has an interest* ("*interessa al creditore*") to file a Court action for the declaration that a condition has occurred, but there is no obligation to do so and this is taken into consideration for the purpose of determining the liability of the creditor to pay for the extra costs incurred by resorting to a judicial procedure. Nevertheless, there is another string of Maltese judgements which have held that <u>it is necessary</u> (rather than a creditor having an interest) for a creditor to obtain a judicial declaration declaring that a debtor has lost the benefit of time owing to the occurrence of a condition.

- a large number of Maltese judgements dealing with this aspect related to the specific issue as to whether a notarial contract is in respect of a debt which is certain, liquidated and due for it to classify as an executive title for the purposes of the COCP (see Article 253(b)). If the amount due under a contract of loan needs to be certain, liquid and due for it to classify as an executive title, then one has to determine whether any conditional benefit of time granted to a debtor can be lost *ipso jure* without the need of a Court declaration or whether a Court declaration is needed in all cases. The Financial Law Committee is recommending a legislative amendment to provide further certainty in this area.

- finally, another related procedural issue of practical significance is the meaning of Article 258(c) of the COCP which provides that where a period of three years has expired since the day on which an executive title mentioned in article 253(b) "*could have been enforced*", the enforcement may only be proceeded with upon a demand to be made by an application filed before the competent court. In **Bank of Valletta p.l.c. vs. Mallia Borg Co. et, Prim'Awla Qorti Civili, 29 January 2009, per Onor. Raymond Pace** (following other previous judgements) it was held that the three years under Articler 258(c) of the COCP start lapsing from the date of the public deed and not from the date of the judicial intimation under Article 256(2) of the COCP. The Court quoted previous judgements as follows: "*jekk tali terminu ta' tliet snin jigi kkalkolat wara n-notifika ta' ittra ufficjali jkun effettivament ifisser li l-kreditur ikun arbitru ta' principju ta' ordni pubbliku fis-sens li huwa jiddeciedi meta l-istess titolu jista' jigi esegwit, haga li ma hijiex koncepibbli .... b'dan ghalhekk li t-terminu ta' tliet snin indikat fl-artikolu 258(c) tal-Kap. 12 jibda ghalhekk jiddekorri mid-data tal-kuntratt pubbliku, ghaliex minn dik id-data l-istess titolu "seta' gie esegwit".* The Financial Law Committee respectfully submits that this reasoning appears specious and stultifies the *raison d'etre* of Article 253(b) which tries to limit the number of law-suits when a public deed is in respect of

a debt which is certain, liquid and due. Consequently, the Financial Law Committee is suggesting a legislative amendment to clarify this matter.

III. MALTESE LEADING JUDGEMENTS ON THE SUBJECT-MATTER

Below is a synopsis of some of the leading Maltese judgements on the matter:

(i) Nicosia *nomine versus* Farrell, Corte di Commercio, 15 dicembre 1898, per Onor. P. De Bono (Kollezz. XVI, III, 103)

In an early judgement on the subject, Judge P. De Bono held that when the loss of benefit of time is expressly stated in a contract, a creditor need not obtain a judicial declaration confirming such loss of benefit of time. However, when the loss of benefit of time depends upon a condition, a creditor *has an interest* ("*interessa al creditore*") to file a Court action for the declaration that a condition has occurred.

"*Attesocche`, sebbene sia vero che, quando la decadenza dal beneficio del termine e` espresso, il creditore puo` procedure alla esecuzione del titolo, senza far precedere la condanna giudiziale del debitore ....; tuttavia, allorche` quella decadenza dipende da una condizione, come nel caso dipendeva dalla mora nel pagamento di due rate mensili, interessa [our emphasis] al creditore che sia accertata la verificazione della condizione, prima che egli proceda alla esecuzione del titolo stesso.*"

In this vein, one should also see **Giuseppe D'Emmanuele vs Carmelo Zahra**, Qorti tal-Kummerc, 10 Marzu, 1953, per Onor. Dr. T. Gouder which affirmed **Nicosia vs. Farrell** and elaborated *obiter* that[11] if the loss of benefit of time is not expressly agreed to in the contract of loan, a judicial acknowledgement is always required. If such loss is expressly agreed to, but is subject to a condition, the creditor has an interest in ascertaining the verification of such condition before enforcing his title, in which case, however, the creditor may demand the enforcement of the contract for the whole amount of the loan subject to the prior declaration on the loss of the benefit of time. Thus in such case the creditor should not demand that the borrower be condemned to pay such sum. If the creditor demands such order of payment, he is to bear the extra costs incurred in this demand:

"*... f'dan il-kaz id-dekadenza mill-beneficcju tat-terminu mhix espressa, u allura kienet necessarja l-kundanna gudizzjali tad-debitur; u anki kieku d-dekadenza kienet espressa, billi fil-kaz prezenti d-dekadenza tiddependi minn kundizzjoni, il-kreditur ghandu interess li tigi accertata l-verifikazzjoni tal-kondizzjoni qabel ma jipprocedi ghall-ezekuzzjoni tat-titolu (Nicosia vs. Farrell); f'liema kaz, pero`, hu jista' jitlob li tigi ordnata l-ezekuzzjoni tal-kuntratt ghall-ammont intier, prevja d-dikjarazzjoni tad-dekadenza, u mhux il-kundanna tal-konvenut ghall-hlas ta' dak l-ammont; u ghalhekk anki hawn il-kreditur ghandu jbati l-ispejjez zejda li bil-procedura tieghu jkun ikkaguna inutilment."*

In 1943, however, a seemingly unintended error in translation from Italian to Maltese in a seminal judgement led the way for a number of Court judgements pronouncing that a Court declaration was always needed whenever the loss of benefit of time was dependent on a condition:

[11] English translation taken from 'The Word of the Court', Vol. 7, Philip Farrugia Randon

(ii) Giulia Warren *versus* Carmela Inguanez, Qorti tal-Kummerc, 2 Frar 1943, per Onor. Dr. S. Schembri (Kollezz. XXXI, III, 249)

This judgment is of particular interest because it refers to the previous **Nicosia *nomine versus* Farrell** judgement but then, through a seemingly unintended error in translation, does not state that a creditor may have an interest to obtain a judicial declaration, but wrongly quotes the previous judgement as having established that '*hija necessarja l-awtorizzazzjoni gudizzjali*".

"*Illi meta d-dekadenza mill-beneficcju taz-zmien hija espressa, il-kreditur jista' jipprocedi ghall-ezekuzzjoni tat-titolu minghajr ma jitlob l-awtorizzazzjoni tal-Qorti ghal dina l-ezekuzzjoni; imma meta d-dekadenza tiddependi minn kundizzjoni, bhal kaz prezenti, li tiddependi mill-mora fil-pagament ta' rati ta' hlas li kellhom jithallsu, hija necessarja (our emphasis) l-awtorizzazzjoni gudizzjali ghall-ezekuzzjoni tal-kuntratt jew titolu iehor, anki meta ma jkunux ghaddew tliet snin mid-data ta' l-iskadenza jew mid-data ta' l-att (sentenza ta' dina l-Qorti tal-15 ta' Dicembru 1898, "Nicosia vs. Farrell).*

This error in translation was clearly picked up in ***Calcedonio Ciantar vs. Francis Grech et*** (Appell Civili, 21 Mejju, 1965):

(iii) Calcedonio Ciantar versus Francis Grech et (Appell Civili, 21 Mejju, 1965)

This judgement of the Court of Civil Appeal presided over by Prof. Sir Anthony Mamo is a particularly interesting judgement as it highlights the inconsistencies of the judicial approaches and also spells outs clearly that some of these inconsistencies have arisen due to the error in translation in **Warren vs. Inguanez**:

"*A propozitu taz-zewg sentenzi citati mill-ewwel Onorabbli Qorti din il-Qorti tixtieq l-ewwelnett tirrileva **fl- interess tal-precizzjoni**, illi hemm differenza, probabilment mhux voluta, bejniethom, li jista' jkollha konsegwenzi jekk ma tigix avvertita. Is-sentenza Vol. XXXI, III 249 [... Warren vs. Inguanez...] tidher manifestament li giet ibbazata fuq is- sentenza Vol. XVI, III, 103 [... Nicosia vs. Farrell ...] citata fiha: izda mentri f'din l-ahhar sentenza kien jinghad, fil-parti ghal issa rilevanti, illi 'allorche (la decadenza dal beneficio del termine) dipende da una condizione, come nel caso dipendeva dalla mora nel pagamento di due rate mensili, **interessa al creditore che sia accertata la verificazione** della condizione, prima che egli proceda alla esecuzione del titolo stesso', fis sentenza Vol. XXXI intqal - kif issa wkoll intqal fis-sentenza appellata –illi 'meta d-dekadenza tiddependi minn kondizzjoni, bhal kaz prezenti, mill – mora fil pagament ta rati ta hlas li kellhom isiru, hija **necessarja l-awtorizzazjoni gudizzjali** ghall-ezekuzzjoni tal –kuntratt..."*

*Fil-fehma tal- Qorti huwa car li altru li wiehed jghid illi l-kreditur ghandu interess li jaccerta gudizzjarjament il-verifikazzjoni tal-kondizzjoni u altru li wiehed jghid illi 'l-awtorizzazzjoni gudizzjali **hi neccessarja'**'. Jekk tigi accettata din it tieni versjoni tar-regola jigri illi, f'kazijiet ta' din ix-xorta, il- kreditur ma jkun jista' qatt jipprocedi ghall-ezekuzzjoni tal- kuntratt jew titolu iehor minghajr il-precedenti awtorizzazzjoni gudizzjali tant illi jekk jipprocedi ghall-ezekuzzjoni minghajr dik il predendenti awtorizzazzjoni jista jigi milqugh bl-eccezzjoni relativa. Fil-fehma ta' din il-Qorti dan ma jidhirx korrett. Dak li hu korrett hu biss li jinghad illi l-krediturі **ghandu interess jew ahjar, jista jkollu interess** li, qabel jipprocedi ghall-ezekuzzjoni, jottjeni dikjarazzjoni gudizzjali tal-verifikazzjoni tal-kondizzjoni.*

*Is-sitwazzjoni ezatta kif taraha din il-Qorti hi dina. Normalment il-principju hu – **u dana hu espressamant affermat fiz-zewg sentenzi fuq imsemmija** – illi, meta d-dekadenza mill-beneficcju tat-*

terminu hi espressa, il-kreditur jista jipprocedi ghall-ezekuzzjoni, minghajr il-kundanna gudizzjali precedenti tad-debitur jew l-awtorizzazzjoni gudizzjali a meno che ma jkunx ghadda z-zmien jew ma jkunx jirrikorru c-cirkostanzi kif kontemplat fl-artikoli 256 u 257 tal-Kodici ta Organizzazzjoni u Proceduri Civili. B'dana kollu l-kreditur jista', qabel jghaddi ghall-ezekuzzjoni, jottjeni dikjarazzjoni gudizzjali illi l-kondizzjoni li minnha tiddependi d-dekadenza vverifikat ruhha. Pero ghall-finijiet ta l-ispejjez ta' domanda simili l-Qorti ghanda dritt tara jekk, fil kaz partikolari, kienx hemm xi ragunijiet li kienu jiggustifikaw il-bzonn ta dikjarazzjoni gudizzjarja precedenti, bhal per ezempju ghaliex id-debitur ikunu ga qanqal kwistjoni dwar il-verifikazzjoni tal-kondizzjoni li minnha tiddependi d-dekadenza. Minghajr xi cirkostanza simili d-domanda gudizjarja da parti tal-kreditur tkun aktarx inutili u tikkaguna lid-debituri spejjez bla bzonn."

This judgement sought to establish once and for all the correct position at law, however, it was not followed by all subsequent judgements:

(iv) <u>Vincent Albert Muscat vs Rudolp Xuereb noe (Bank of Valletta), Court of Appeal, 28 January, 2000</u>

A particularly problematic judgement in this respect was delivered by the Court of Appeal in the year 2000. This case dealt with a public deed published before a Notary Public whereby the debtor constituted himself as a certain, true and liquid debtor in favour of Bank of Valletta for the sum of Lm21,040 representing Lm10,537 principal sum obtained by title of loan and Lm10,473 interest thereon. The public deed stipulated a repayment schedule having regular monthly payments. The parties also agreed that if the debtor fails to pay any monthly instalment, the bank had the right to call upon the debtor to pay by means of a judicial letter and if the debtor fails to pay within one month from service of the judicial letter, the bank had the right to demand payment of the full amount of principal and interest due.

The Court of Appeal in this judgement quoted the *Warren vs Inguanez* judgement (which as noted seemed to have been premised on a wrong translation) and determined that:

'...Una volta l-kreditur ma setax jitlob l-ezekuzzjoni ta' l-obbligazzjoni qabel l-gheluq tat-terminu li f'dan il-kaz kien gie estiz bil-ftehim ta' pagamenti b'rati soggett ta' klawzola ta' dekadenza, kien car li ma setax jinghad li l-kreditu kien ghalaq u li allura kien dovut, qabel ma jkun gie verifikat gudizzjarjament li c-cirkostanzi li pprovokaw id-dekadenza kienu sehhew. F'dan il-kuntest il-frazi "u li ghalaq" kellha tigi bi precizjoni interpretata. Il-ligi ma titkellimx fuq kuntratt dwar dejn cert, likwidu u li jaghlaq imma fuq dejn cert, likwidu u li jkun definittivament ghalaq....

'F'dan is-sens hi wkoll il-gurisprudenza ta' dawn il-Qrati:

"Quando la decadenza dal beneficio del termine e` espressa, il creditore puo` procedure alla esecuzione del titolo, senza far precedere la autorizzazione giudiziale; ma quando la decadenza dipende da una condizione, come per ezempio dalla mora nel pagamento di rate mensili, <u>e` necessaria</u> (our emphasis) la autorizzazione giudiziale all'esecuzione del titolo, anche quando non sono trascorsi tre anni dalla data dello stesso."(quoting Nicosia vs. Farrell and Warren vs. Inguanez!)

'... Il-fatt li l-partijiet fil-kuntratt de quo ikkonvenew illi jekk id-debitur jibqa' inadempjenti, il-Bank kien ikollu d-dritt li jitolbu, permezz ta' ittra ufficjali, li jhallas u f'kaz li jibqa' ma jhallasx fi zmien xahar minn notifika ta' ittra ufficjali, l-bilanc dovut u l-interessi ikun pagabbli a semplici rikjesta bil-miktub, ma kienx jeskludi l-obbligu tal-kreditur illi jitlob il-verifika gudizzjarja tal-fatt ta' dekadenza.'

In a few words, notwithstanding the Court of Appeal pronouncement in **Ciantar vs. Grech**, the Court of Appeal, as differently presided, reverted to the former interpretation that it is only a Court of law which may declare the loss of benefit of time which is dependent on a condition, and used as a basis the same judgements quoted by **Ciantar vs Grech**.

(v) Recoinvest Limited vs Catherine Ripard, Court of Appeal, per Onor. Philip Sciberras, 10th May 2006

It is also interesting to note the Court of Appeal decision in Recoinvest Limited vs. Catherine Ripard, where the Court after evaluating, amongst other cases, both **Ciantar vs. Grech** and **Muscat vs Xuereb** held as follows:

"*Illi minn qari akkurat ta' l-artiklu 1067 tal-Kodici Civili, jidher car il-hsieb tal-legislatur hu li fejn il-kondizzjoni rizoluttiva hija espressa, il-kuntratt jinhall ipso jure. L-esponent pero` japprezza illi l-kwestjoni hija aktar komplessa minn hekk l-aktar minhabba d-divergenza li hemm fost l-awturi stabbiliti li jikkummentaw dwar disposizzjonijiet simili fil-Kodici Civili Taljan kif ukoll mill-gurisprudenza lokali li f'certu sens jirriflettu l-istess veduti divergenti ...*

Illi wara li l-esponent haseb fit-tul fuq dan l-aspett tal-vertenza, huwa tal-fehma illi hija l-volonta` tal-partijiet kontraenti kif riflessa fil-ftehim li ghandha tigi applikata u fin-nuqqas ta' diffikulta` ta' interpretazzjoni, il-konferma ossia d-dikjarazzjoni tal-gudikant mhijiex necessarja biex titwettaq ir-rieda tal-partijiet."

IV. OTHER RELATED MALTESE JUDGEMENTS

It is worth pointing out some other Maltese judgements which could be seen as interpreting other issues relating to the above:

(v) William Warrington noe vs Consiglio Scibberas, Commercial Court, 8 July 1985, per Onor. Joseph D. Camilleri

The Commercial Court in **William Warrington noe vs Consiglio Scibberas**, when determining which contracts could be deemed to be executive titles under Article 253 of the COCP without the need of a judicial declaration, distinguished between loans and overdrafts and established that overdrafts can never be deemed to a contract "*in respect of a debt certain, liquidated and due*":

"*Illi huwa principju rikonoxxut fil-gurisprudenza taghna (ara per ezempju Kollez. Vol XXXI-1-142; XXXI-1-217; u XXXVII-111-841) li meta l-attur ma jaghti ebda raguni valida ghaliex hu jkun ghazel il-prodedura tal-kanonizzazzjoni minflok il-procedura anqas dispendjuza ta' l-esekuzzjoni ta' kuntratt ricevut, minn Nutar Pubbliku li jkun dwar dejn cert, likwidu u li ghalaq u li ma jikkonsistix f'esekuzzjoni ta' fatt (ara artikolu 251(b) tal-Kapitolu 15), allura l-attur ghandu jbati kull spiza zejda li jkun ikkaguna inutilment bil-procedura li ghazel;*

Illi fil-kaz odjern id-difensur ta' l-attur irrileva li l-kuntratt in kwistjoni ma kienx wiehed ta' self semplici (mutwu) li fih tithallas effetivament is-somma mislufa jew lil min jissellef direttament jew lil terz b'delega ta' min jissellef. Huwa sostna li l-kuntratt in kwistjoni huwa semplicement ghotja ta'

facilita ta' kreditu fejn m'hemmx it-'traditio' ta' flus u jekk il-konvenut, ghall-grazzja ta' l-argument ma juzax din il- facilita, huwa ma jkollu jaghti xejn lill-attur nonostante il-kuntratt ...

*.... meta l-kuntratt in kwistjoni mhux wiehed ta' self izda semplicement ghotja ta' facilita` ta' kreditu – kuntratt li fid-duttrina jissejjah '**apertura di credito**' – allura dak il-kuntratt ma ghandux ir-rekwiziti kollha elenkati fl-artikolu 251(b) tal-Kodici ta' Organizzazzjoni u Procedura Civili, cjoe` li jkun dwar dejn 'cert, likwidu u li ghalaq' u li ghalhekk ma jistax '**marte proprio**' jitqies li hu titolu ezekuttiv*."[12]

(vi) Fl-atti tal-mandat ta' sekwestru ezekuttiv 1355/05 mahrug fl-1 ta' Settembru, 2005 fl-ismijiet Raymond Zammit et vs Carmelo sive Charles Bonello et, Prim'Awla tal-Qorti Civili, 3 ta' Novemberu 2005, per Onor. Tonio Mallia

In this decree, it was held that when the term of a loan (*mutuum*) has lapsed, such a loan will constitute an executive title for the purposes of the COCP.

"*Il-kuntratt jispecifika car l-ammont ta' dejn, u l-ammont tal-kreditu (rizultanti minn self) hu cert, likwidu u dovut, peress li skadew il-hames snin koncessi lid-debituri ghall-hlas. Ma hux mehtieg li l-kuntratt ikun wiehed ta' kostituzzjoni ta' debitu biex ikollu n-natura ta' titolu ezekuttiv; la darba s-somma tad-dejn tirrizulta cara u certa, l-kuntratt igawdi minn dik il-kwalita`. Il-fatt li saru xi pagamenti akkont ma jtellfux min-natura tal-kuntratt. Il-kuntratt stess jikkontempla r-rifussjoni tad-dejn b'pagamenti mensili, u dawn il-hlasijiet ma jtellfux il-kuntratt milli jibqa' jitqies bhala titolu ezekuttiv.*

*Hu veru li, f'kuntratt ta' overdraft, gie deciz li l-kuntratt relattiv mhux titolu ezekuttiv (ara "**Warrington noe vs Sciberras**", deciza mill-Onorabbli Qorti tal-Kummerc fit-8 ta' Lulju, 1985, u "**Borg noe vs Fenech et noe**", deciza minn din il-Qorti fl-14 ta' Novemberu, 2002), pero` dan hu hekk peress li f'kuntratt ta' dan it-tip, id-dejn ma jkunx stabbilit; il-klijent jinghata l-fakulta` li joverdrawja l-account tieghu sa certu limitu, izda ma jfissirx li hu awtomatikament isir debitur ta' dik is-somma. L-ammont tad-debitu jkun jiddependi mill-uzu li l-klijent jaghmel ta' dak il-kont, u, ghalhekk, ikun hemm htiega ta' proceduri gudizzjarji biex l-istess jigi determinat. F'kaz ta' self, min-naha l-ohra, is-somma tad-debitu hu determinat fil-kuntratt, u d-debitur isir debitur tas-somma indikata mal-iffirmar tal-kuntratt. **Darba li jkun skada t-terminu koncess ghall-hlas, il-kreditu jitqies li "ghalaq"** [our emphasis], u l-hlas ta' kull somma bilancjali tista' tintalab bil-procedura uzata mill-kreditur f'dan il-kaz (aktar u aktar meta d-debituri mhux qed jallegaw li ghamlu xi pagamenti ohra li ma gewx ikkunsidrati mill-kredituri u mhumiex qed jilmentaw mill-imghaxijiet mitluba – ara "**Lombard Bank Malta plc vs Eurimpex Ltd. noe**", deciza minn din il-Qorti fis-27 ta' Frar, 2004).*"

(vii) Doris Conchin vs HSBC Bank Malta p.l.c. et, 23 November 2010, Prim' Awla Qorti Civili, per Onor. Mark Chetcuti

This case related to the constitution of a debt by means of a public deed where the principal debtor and the surety acknowledged a debt which was certain, liquid and payable on demand by means of a simple request in writing. Nevertheless, and subject to the former overriding condition, the bank, by way of tolerance, granted some time for the repayment of the underlying debt. In such circumstances, the Court held that following the service of the notice on the debtor / surety, the debt became immediately payable and consequently the public deed was deemed to be in respect of a debt which

[12] In this regard, see also **Cecil Busuttil noe vs Dennis Baldacchino noe et**, Commercial Court, 29 January 1980, per Onor. G. Schembri

was certain, liquid and due and constituted an executive title under the provisions of Article 253 of the COCP. The Court drew a fundamental distinction between obligations with the benefit of time and on-demand obligations where time was granted merely on tolerance.

In the words of the judgement:

"*Dan ifisser illi d-diskrezzjoni ta' hlas li setghet inghatat kienet biss fl-isfond ta' fakolta` diskrezzjonali intiza qua tolleranza da parti tal-bank fil-konfront tad-debitur u garanti minghajr ebda rabta li setghet iggib fix-xejn id-dritt maqbul bejn il-partijiet illi l-patt vinkolanti suprem bejn il-partijiet kien id-dritt ta' hlas immedjat lill-bank malli d-debitur jew garanti jintalbu jhallsu d-debitu bil-mod miftiehem..... F'dan il-kuntratt mertu ta' din l-azzjoni ma hemmx dilazzjoni ta' hlas, ma hemmx termini, anzi l-hlas kellu jsir dejjem wara li ssir talba bil-miktub. Il-koncessjoni ta' hlasijiet rateali jekk saru kienet biss turija ta' buona volonta` tal-bank li setghet twaqqafha meta trid, kienu jsiru jew le, l-hlasijiet rateali."*

(viii) Anthony Abela et vs Ronald Cordina et (Lombard Bank – Villa Madama Case) 24 February, 2011, Prim' Awla, Qorti Civili, per Onor. Raymond C. Pace[13]

In this judgement, whilst the Court referred, with approval, to the judgement delivered in **Calcedonio Ciantar vs Francis Grech**, it held that a judicial declaration will be necessary whenever the underlying amount is being disputed by the parties:

"*Illi ghalhekk wiehed jista' jikkonkludi li normalment jekk it-terminu ta' dekadenza huwa espress wiehed ma ghandux bzonn jirrikorri ghall-procedimenti gudizzjarji biex id-debitur jigi kkunsidrat jew il-kreditur ikun awtorizzat jipprocedi. Izda jekk hemm xi cirkostanzi partikolari li jindikaw li hemm bzonn ta' konferma mill-Qorti imbaghad dan il-principju ma jibqax jghodd u l-kreditur ikollu jghaddi mill-proceduri gudizzjarji opportuni.*

"*Illi fil-kawza "**Vincent Albert Muscat vs Rudolph Xuereb nomine**" kien qed jigi kkontestat l-ammont u ghalhekk kien necessarju li jsiru proceduri permezz ta' citazzjoni, u din hija wahda mic-cirkostanzi imsemmija fil-kawza "**Calcedonio Ciantar vs. Francis Grech et**" fejn il-procedimenti gudizzjarji isiru necessarji.*[14]"

V. THE SPECIAL CASE OF OVERDRAFTS

This paper also seeks to make some specific recommendations in relation to overdrafts, both insofar as concerns special summary proceedings (Article 167 of the COCP) and also whether overdrafts should constitute executive titles under Article 253 of the COCP.

Article 167, COCP – Special Summary Prceedings

As can be denoted from the above, the Courts have held that overdrafts can never be deemed to a contract "*in respect of a debt certain, liquidated and due*" and thus do not constitute executive titles under Article 253 of the COCP. In this regard, however, creditors may technically resort to the use of

[13] See also **Charles Sant Fournier noe vs Joseph Degiorgio et, Commercial Court, 24 April 1945, per S. Schembri.**

[14] It is respectfully submitted that the **Ciantar vs. Grech** case did not say that judicial proceedings would be necessary in such instances but that a creditor may have an interest in filing proceedings.

special summary proceedings under Article 167 of the COCP in order to enforce amounts due under overdraft facilities. Special summary proceedings may, *inter alia,* be used "*for the recovery of a debt, certain, liquidated and due, not consisting in the performance of an act*". The evident difference between Article 253 and Article 167 of the COCP is that, whilst in the case of Article 253 it is the contract that must be in respect of a debt certain, liquidated and due, under Article 167 it suffices that the debt is certain, liquidated and due. Just like any debt arising from a normal trading invoice may be enforced through special summary proceedings, it is submitted that a debt would be certain, liquid and due even under an overdraft or similar credit facility. Nevertheless, there is no unanimity of opinion in legal circles on this specific point, probably because of the tendency to confuse this issue with the that arising under Article 253 of the COCP dealing with executive titles. Accordingly, for the sake of certainty some legislative clarifications are being sought for in this respect. In addition, the legal considerations being made above vis-à-vis court pronunciations potentially being required in order to accelerate a debt (following an event of default) may still apply within the context of special summary proceedings and overdraft facilities which are not published by notarial act (albeit potentially to a lesser extent given that in many cases an overdraft is structured as an 'on demand' facility). It is therefore being proposed that the considerations and suggestions being made by the Financial Law Committee in relation to the *ipso jure* loss of benefit of time ought to be extended to the enforcement of overdraft facilities through the special summary proceedings.

The addition of Overdrafts to the list of Executive Titles under Article 253, COCP

The Financial Law Committee is of the view that there is no underlying policy reason why Article 253 should make this artificial distinction between loan agreements and other type of credit facilities for the purpose of determining what constitutes an executive title. It is submitted that Article 253 should also be extended to overdraft facilities which are published by a notarial deed.

The intermittent withdrawals and credits by the debtor of the overdraft account should not render such a debt any less certain. Indeed, whether pursuant to an overdraft facility or a term loan facility or other forms of facilities, the creditor would still be required to enforce on the balance outstanding after taking into account payments made by the debtor. The provision of an overdraft or other credit facility through the publication of a notarial deed should provide sufficient certainty as to the maximum amount of principal sum that may become due by the debtor. In addition, in the case of overdrafts and such facilities, we should not depart from the proposed principle that judicial pronunciation ought not be required for the debt to be certain, liquidated and due if the acceleration provisions of the facility agreement so permit.

The extension of Article 253 of the COCP to overdraft and other credit facilities is already reflected in the provisions related to mortgages and their nature of executive titles under the Merchant Shipping Act, Cap 234 of the Laws of Malta.

Other recommendations also being made by the Financial Law Committee refer to the collection of expenses and interest in enforcing executive titles under Article 253(b). It was felt that legislative intervention is required to clarify that any expenses and interest ought to be equally recoverable through the same process used to recover the principal amount as an executive title.[15] In the case of special summary proceedings, it was felt that Maltese procedural law was sufficiently clear that such proceedings could also include expenses and interest due.

[15] Whether clarification as to expenses and interest was required for other heads of Article 253, such as bills of exchange and promissory notes, was beyond the scope of this paper.

VI. CONCLUSIONS

The dichotomy of judicial interpretations leads to uncertainty and it is the view of the Financial Law Committee that this matter should be laid to rest legislatively. In suggesting legislative proposals, the Committee sought to strike a balance between the need to keep the amendments to a minimum and the desire to achieve legal predictability. In addition, the Committee was driven by the need to create a fairer balance between creditors' and debtors' rights generally and also by the need to safeguard the lenders' right to a faster enforcement process. It is pointed out that whenever any credit facility is granted to a consumer under Maltese law, the whole raft of European and Maltese consumer law comes into operation to protect such a consumer from any possible abusive behaviour from the lender. The Financial Law Committee does not, as stated, seek to reduce in any manner the added protection afforded by consumer legislation. Such consumer legislation will be applicable as an added stratum on general law.

The legislative proposals seek to address the following legal points:

- for the purposes of Article 167 of the COCP (Special Summary Proceedings):
    - a contract is to be deemed to be in respect of a debt certain, liquid and due even when the loss of benefit of time of a debtor results from the fulfilment of an an express condition;
    - it is being clarified that special summary proceedings will also apply where the debt arises under an account current or overdraft or other credit facility.
- for the purposes of Article 253 of the COCP (Executive Titles):
    - contracts received before a notary public in Malta, or before any other public officer authorised to receive the same, where the contract is in respect of a debt due under an account current or overdraft or other credit facility should be added to the list of executive titles;
    - a contract is to be deemed to be in respect of a debt certain, liquid and due even when the loss of benefit of time of a debtor results from the fulfilment of an an express condition;
    - the debt includes the expenses, if any, incurred for its preservation and enforcement and the interest accruing on that debt, provided in respect of the latter that the contract clearly stipulates that interest has been agreed upon between the parties;
- the three year rule under Article 258 should start running not from the date of the public deed, but from the lapse of at least two days from the service of an intimation for payment made by means of a judicial act in terms of Article 256(2) of the COCP.

ANNEX 1

PROPOSED AMENDMENTS TO THE CODE OF ORGANISATION AND CIVIL PROCEDURE (CAP. 12)

1. A new Article 167A to be added

"For the purposes of article 167, a debt shall be deemed to be certain, liquid and due even where:

(i) the loss of benefit of time by a debtor results from the fulfilment of an express condition. In such circumstances, there shall be no need of any prior authorisation or confirmation by a competent court that such condition has been fulfilled; or

(ii)the debt arises under an account current or overdraft or other credit facility."

2. Article 253(b) to be deleted and replaced by the following:

"(b) contracts received before a notary public in Malta, or before any other public officer authorised to receive the same where:

(i) the contract is in respect of a debt certain, liquidated and due, and not consisting in the performance of an act; or

(ii) the contract is in respect of a debt due under an account current or overdraft or other credit facility;"

3. A new Article 254 to be added:

"*For the purposes of article 253(b):*

(i) a debt shall be deemed to be certain, liquid and due even where the loss of benefit of time by a debtor results from the fulfilment of an express condition. In such circumstances, there shall be no need of any prior authorisation or confirmation by a competent court that such condition has been fulfilled; and

(ii) a debt shall include the expenses, if any, incurred for its preservation and enforcement and the interest accruing on that debt, provided in respect of the latter that the contract clearly stipulates that interest has been agreed upon between the parties."

4. Article 258(c) to be amended as follows (*amendments in italics*)

"Where: ...

(c) a period of three years has expired since the day on which according to law an executive title mentioned in paragraphs (b) and (e) of article 253, ... could have been enforced,

the enforcement may only be proceeded with upon a demand to be made by an application filed before the competent court. The applicant shall also confirm on oath the nature of the debt or claim sought to be enforced, and that the debt or part thereof is still due. *In the case of an executive title mentioned in paragraph (b) of article 253, such executive title shall be deemed to be capable of being enforced for the purposes of this sub-article after the lapse of at least two days from the service of an intimation for payment made by means of a judicial act in terms of Article 256(2) of this Code."*