Principles of Commercial Law

Lecture Title: Duties of Traders

Diploma in Law (Malta)

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Duties of Traders

- There are a series of sections in the Commercial Code that deal with the duties of traders
- The 3 main duties are the following:
  - 1. Duty of Keeping Trade Books
  - 2. Duty to Publish Marriage Contracts
  - 3. Duty to keep within the Limits of Fair Competition

Duty of Keeping Trade Books

- Trade books are the registers within which Traders are to keep a written and minuted account of their business transactions
  - In the interest of the Traders themselves
  - In the interest of Third Parties
  - In the interest of society in general
- This duty is imposed on both physical and legal persons – the Commercial Code sets out such rules in Articles 13 to 26
- In terms of Commercial Partnerships – the rules pertaining to the keeping of trade books are laid down in the Companies Act
  - Exception to the rule of keeping trade books – Limited Liability Companies

Books to be kept by Traders

- Article 13, Comm Code: Every Trader is bound to keep the following books:
- (a) A waste-book - A Trader must enter every commercial transaction he makes in the waste-book
- (b) A journal - Must show all transactions concluded by the trader day by day together with his debts, credits, endorsement of bills, all that he receives or pays etc
- (c) A cash-book - Must show all the sums received and those paid out by the trader in detail & day by day
- (d) An inventory-book - Trader must make an inventory every year, containing a description & valuation of his whole estate, assets and liabilities and must be closed with a balance and statement indicating profits and losses
- (e) A ledger - Shows an accurate, up-to-date record of all transactions classified as personal and impersonal accounts & provide a true and correct picture of the state of affairs

Waste Book

- This is considered to be a book wherein the trader immediately inputs the particular transaction (i.e. taken down in 'real time')
- It is similar in nature to both the Ledger and Journal – but the entries in both the Ledger and the Journal are not recorded immediately

Journal

- This constitutes a daily account of the transactions and business carried out by the trader – *'must show day by day'*
- Intended to provide a general overview and picture of the trader's business
- The law states that it must also '*show month by month the sums disbursed for household expenses*' – this is found in a separate section of the journal in order to ensure that the trader's personal and business finances are kept separate and distinct

Cash-Book

- The cash-book is where all sums of money received and paid out by the trader are inputted
  - Includes income and expenditure
- Doesn't provide an overall picture of the trader's accounts and transactions – focuses on 'cash'
- Duty to reconcile cash-book with the journal at end of each month

Inventory Book

- This is done annually and is similar to a balance sheet & profit and loss account
- The annual inventory must be copied out '*year by year*' in the inventory book

Ledger

- The Ledger must be able to provide a *'true and correct picture of the state of affairs of the business or trade at any given time'.*
- It is a book of accounts – must provide an accurate and up-to-date record of all the transactions performed by the trader
- The transactions that are entered into the ledger are classified as:
  - Personal accounts; or
  - Impersonal accounts.
- Accounting records of Companies – these are audited by Auditors

Correspondence and Optional Trade Books

- Traders also have a duty to keep all correspondence received by or forwarded to said trader

- Apart from the 5 obligatory books listed in Article 13, there are several *optional* trade books which traders may keep in order to provide more detailed accounts (Article 19, Comm Code)
  - However – no optional trade book may replace an obligatory one

- Prof Caruana Galizia states that the law leaves it up to the trader to utilise any of the optional books, depending on the trader's particular requirements

Formalities

- Certain formalities must be observed in the keeping of trade books, as are prescribed in the Commercial Code

- All books which traders are required to keep, with the exception of the waste-book, shall be:
  - Numbered
  - Kept by order of date
  - Kept without blanks
  - Kept without marginal notes

Formalities ctd.

- If a cancellation needs to be made – it must be done in such a way that the *cancelled words* are left legible
- The legislator is entering into a lot of detail to ensure that there is an element of correctness in the trade books
- Traders are bound to keep their books for a period of 5 years from the date of last entry

Trade books as Evidence

- Trade books are given strong probity value – constitute evidence in terms of the Code of Organisation and Civil Procedure and are considered to be *prima facie* evidence.

- The Court has the power to order the production of all correspondence and all trade books in any action, in order to extract therefrom such parts that are relevant to the issue

- A qualified accountant will be chosen in order to ascertain, *without removing the books* and in the presence of the person producing them – whether the books are in order and abstract relevant entries.

Duty to Publish Marriage Contracts

- The second duty pertaining to the trader deals with his/her marriage contract or deed
- Whenever a trader enters into a marriage contract to regulate the assets of the spouses, this must be noted in an *ad hoc* register.
- Duty to register such contracts is imposed on every notary receiving a marriage contract/any deed varying such contract (when one of the persons is a trader) and must, within 15 days from date of deed/contract, file with the Registrar of Courts in Malta or Gozo, a NOTE containing:
  - (a) the date of the contract or deed & the name of the notary; and
  - (b) the name of the party described as a trader

- The Registrar of Courts will keep an index of such notes in alphabetical order
- Article 30 states that when one of the spouses becomes a trader *after* the marriage, the duty to file the note with the Registrar of Courts of Malta/Gozo devolves onto the spouse who is a trader.
  - Failure to do so renders the trader liable to a penalty
- The Registrar shall publish any demand made for the separation of property between the spouses, any of whom is a trader – in the Government Gazette
- Judgement also published in the Government Gazette and a reference to the judgment will also be entered into the index

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Duty to keep within the limits of Fair Competition

- Competition between traders is one of the key components of a successful market economy
  - All traders have the right to exercise his or her trade freely – however this must be done in such a way that doesn't infringe the equal rights of other traders

- The limits of competition are set out in Articles 32 to 37 of the Commercial Code – introduced by virtue of Act XXX of 1927
  - However the concept of Unfair Competition had previously been recognised by Maltese Courts

Unfair Competition – General Points

- The acts of unfair competition which are found in the law are Exhaustive
  - Article 32A and 32B of the Comm. Code are transposed from Directive 2006/114/EC
  - They are deemed to be *delitti commerciali* and should not be widely interpreted

Unfair Competition – General Points ctd.

- The person must be a trader
  - The articles which set out such duties begin with '*Traders shall not…*'
  - Article 37 makes reference to '*Any trader*' and the '*Injured trader*'
  - Article 32A and 32B were included in the law as acts of unfair competition in order to transpose Directive 2006/114/EC:
    - But the definition of 'trader' in the Commercial Code is narrower than that found in the Directive.

Unfair Competition – General Points ctd.

- There is no requirement for the presence of *dolus* or intent to be proven when it comes to acts of unfair competition
  - All that needs to be proven is a breach of this section of the Commercial Code (i.e. that deals with the limits of competition)
  - Article 37 deals with the applicable penalties and makes reference to '*the malice of the offending party*'

Article 32

- Traders shall not make use of any:
  - Name;
  - Mark; or
  - Distinctive device
- capable of creating confusion with any other name, mark or distinctive device lawfully used by others
  - even though such other name, mark or distinctive device be not registered in terms of the Trademarks Act
- nor may they make use of any firm name or fictitious name capable of misleading others as to the real importance of the firm

- Article 32 speaks of two acts of unfair competition:
  - First Act of Unfair Competition -> The use of a name, mark or distinctive device – lawfully used by others which has the effect of creating confusion
  - Second Act of Unfair Competition -> The use of firm names or fictitious names – which are capable of misleading others as to the real importance of the firm
- We will be delving into the First Act of Unfair Competition

First Act of Unfair Competition

Traders shall not make use of any name, mark or distinctive device capable of creating confusion with any other name, mark or distinctive device lawfully used by others, even though such other name, mark or distinctive device be not registered in terms of the Trademarks Act

- Two components:
  - A. The existence of a name, mark or distinctive device that is lawfully used by others (the plaintiff); and
  - B. The utilising of such name, mark or distinctive device (by the defendant) that is capable of creating confusion with that name, mark or distinctive device that is being lawfully used (by the plaintiff)

Lawfully Used by Others

- This refers to the notion of Prior Use
  - *prior in tempore, potior in iure* – that the law favours those who establish their rights earlier than others

- Implies that in an action for unfair competition, the plaintiff would have been making use of the name, mark or device PRIOR to the defendant's use of such.

- Onus of proof -> plaintiff

- Prior use confers ownership of that name, mark or device onto the person making such use, together with the ability to preclude others from making use of the said name/mark/device

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Case Law

Stephen Petroni noe vs Maria Luisa Montalto noe (First Hall, Civil Court) (2000)

- The plaintiff company, *Phoenix Domestic Appliances Ltd,* brought an action against the defendant company, *Phoenix Company Ltd,* claiming that the defendant company was guilty of unfair competition, in accordance with Article 32 of the Commercial Code, by creating confusion in the mind of the consumer

- The Court affirmed that in order for the plaintiff's action under Article 32 to succeed, it must be proven that the name or mark of the defendant company is the same or similar and that the use of such name or mark is able to create confusion in the minds of the ordinary consumer

- Furthermore, it must also be shown that the competition is taking place within the same sphere of activity and market

- A legal expert held that the fact that both companies have the name 'Phoenix', could lead the ordinary consumer to believe that they were the same company but each with different spheres activity

- The expert added that the name 'Phoenix' is a distinctive one and that the plaintiff company had been operating under that name for around 8 years prior to the defendant beginning to utilise the name 'Phoenix'
    - During that period of time, the plaintiff company sufficiently established itself within the market of domestic appliances and the Maltese consumer immediately associated the name 'Phoenix' with such products
    - The expert therefore concluded that the plaintiff successfully proved the creation of confusion in the minds of consumers
- The Court agreed with the reasoning of the legal expert together with the conclusion reached by him, that the plaintiff's claim was sufficiently proven under Article 32 of the Commercial Code in terms of Unfair Competition

- Eden Leisure Group Ltd v Sign-It Ltd et (05/07/2016)
- Facts: Plaintiff opened an ice rink under the name of Eden Ice Arena, subsequently renamed Eden Arena. The defendant began developing a centre for hosting commercial activities, which was to be named Arena One
- The First Hall of the Civil Court held that the purpose behind Article 32 was to prohibit traders from creating confusion between products of the same nature, in such a manner that it would preclude the customer from making a distinction between the two products.
- The Court added that the names, marks or distinctive devices did not need to be completely identical and that it was sufficient for there to be the *possibility* of the confusion being created in the mind of the consumer

Liqiugas Malta Limited v William Mifsud, Jason Mifsud and Easygas Malta Limited (31/05/2017)

- Plaintiff company claimed that they had obtained footage and had evidence that Easygas was filling up Liquigas cylinders, which would cause confusion to consumers who would believe that the Liquigas cylinders they were purchasing were filled by Liquigas but which were in fact being filled by Easygas.

- They held that this amounted to a breach of Articles 32, 32B and 33 of the Commercial Code

- The Court held that a single gas distributor also filling up the gas cylinders of competitors, led to the creation of confusion in the minds of consumers, which amounted to unfair competition.

Romano Cassar Limited v Joseph Baldacchino ('Flower Arts') (First Hall, Civil Court) (2024)

- Romano Cassar Limited had long operated within Malta's flower market, building a strong commercial reputation through its distinctive product presentation, specifically its cylindrical 'top hat' container for flower bouquets.

- In 2021, Baldacchino, trading as 'Flower Arts', started advertising flower bouquets presented to the public in an identical appearance to that of the Romano Cassar 'tophat' container design, including the same colour schemes.

- As evidence that market confusion was present, the claimant submitted a market research report revealing that consumers associated the unbranded 'top hat' container with the Romano Cassar brand on their own initiative.

- The First Hall of the Civil Court held that the use of the 'top hat' container gave rise to market confusion and amounted to unfair prejudice.

PTK Limited v Aline Barry (Court of Appeal) (2025)

- PTK Limited manufactured jewellery featuring a distinctive crochet style, which it claimed represented a unique element of its brand identity. The Company alleged that the defendant was replicating this style under the name 'Aline's Jewels', giving rise to market confusion and thereby infringing Article 32.

- The claimant referred to the Romano Cassar case in support of its claims, arguing that the original crochet design of the jewellery should be recognised as a trademark. The Court rejected the comparison, stating that in Romano Cassar consumers associated the product with the brand unprompted.

- Article 32 requires an indication of the product's source i.e. the name or mark must itself be capable of distinguishing the origin of the product.

- The First Hall of the Civil Court dismissed the claim of unfair prejudice, stating that crochet jewellery is a longstanding form of craftsmanship practised by multiple employing the same technique, and that no single entity can claim exclusi r its form or design. This decision was subsequently confirmed by the C of A

Protection of Trademarks

- Article 32 offers protection to names, marks and devices against unlawful use, even though *such other name, mark or distinctive device is not registered in terms of the Trademarks Act.*

- This implies that the protection given to a name or mark through Article 32, by virtue of prior use, is independent of whether or not that mark is registered under the Trademarks Act (the 'Act').

    - Therefore – a Trademark that is registered under the Act, benefits from protection under both Article 32 of the Comm. Code and the Act.

    - Even if a mark is not suitable for registration under the Act, it is still afforded the protection offered by Article 32

Protection of Trademarks ctd.

- **Article 6(4) Trademarks Act:**
- (a) *A trademark is not to be registered or, if registered, is **liable to be declared invalid** where, and to the extent that:*
  - The **rights to a non-registered trademark** or to another sign **used in the course of trade**, were **acquired:**
    - **(i) prior** to the date of application for registration of the subsequent trademark, **or**
    - (ii) prior to the **date of the priority** claimed for the application for registration of the subsequent trademark;

  AND

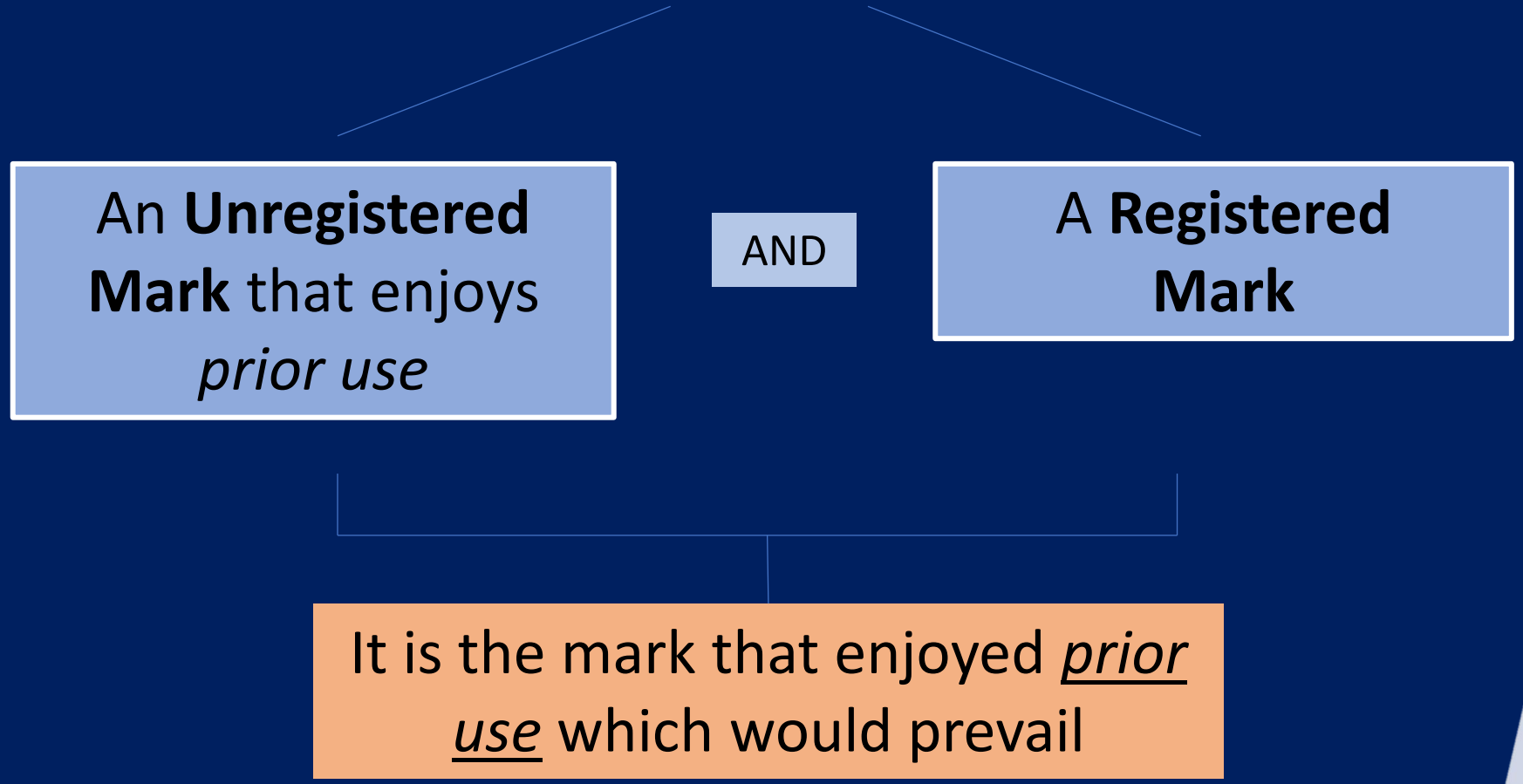
  - The **non-registered trademark or other sign confers on its proprietor right to prohibit the use of the subsequent trademark**

A trademark is not to be registered or, if registered, is liable to be declared invalid where, and to the extent that:

- (b) the use of the trademark may be prohibited by virtue of an earlier right, [...], and protected by means of:
  - (i) copyright;
  - (ii) registered designs;
  - (iii) other rights which the Minister may prescribe by regulation

- **<u>Article 6(5) of the Trademarks Act states that:</u>**
- A Trademark shall **NOT be refused registration** or **declared invalid**
  - Where the proprietor of the earlier trademark or right **CONSENTS to the registration of the later trademark**
- Therefore, if consent is given by the proprietor of an earlier trademark or right, registration would not be refused and the trademark would not be rendered invalid

- Case law has shown that if there is a scenario of competing rights where there is:



- Case: Spiteri v Cachia (2004)
  - Both the plaintiff and the defendant had registered trademarks – the defendant registered his whilst the case was ongoing
  - From the evidence brought forward, the Court concluded:
    - that the plaintiff's use of 'Car Clinic' had begun before that of the defendant's use of 'Leli Car Clinic'; and
    - that the plaintiff had begun trading under that name before the defendant had begun to operate his business.
  - The Court concluded that the plaintiff was *prior in tempore* and that he had a right to bring an action on the grounds of unfair competition under the Commercial Code and therefore found the defendant guilty on the basis of such.

Distinctiveness

- Article 32 makes reference to a '*Distinctive device*'
- Acquired through use in the market
- This element enables consumers to distinguish the products and services of one trader from those of another
- Names or marks that contain general descriptions, do not tend to acquire the element of distinctiveness
  - Non-distinctive names/marks -> take on a *secondary meaning*

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Capable of Creating Confusion

- Article 32: *Traders shall not make use of any name, mark or distinctive device capable of creating confusion*
- The word 'capable' implies that actual confusion need not have already been created, but that there is proof of the possibility of such confusion being created
- This necessitates a comparison between the marks
- Case law has shown that proof of *actual* confusion is not necessary but being able to provide evidence of actual occurrences of confusion could result in a greater chance of having the Court decide in one's favour

- Maltese Courts have developed a number of principles to aid with the comparison of marks:
  - 1. The comparison must be carried out from the average consumer's perspective
  - 2. The main 'idea' behind the mark must be considered
  - 3. The mark must be viewed as a whole and not as separate components
  - 4. To bear in mind that the average consumer does not have perfect recollection and would only remember a particular detail or the overall general impression
  - 5. Marks should be compared as they would be viewed in actual use
  - 6. All circumstances surrounding the trade must be taken into consideration

Case Law

Case: A.M.A Company Limited v Tat-Taljan Company Limited (Court of Appeal) (2017)

- The Plaintiff company was the proprietor of the registered trademark 'Nanna's Ravioli' in relation to frozen goods
- The Plaintiff brought an action against the defendant company for making use of 'Ravioli della Nonna' to sell its competing goods – claiming that this amounted to a breach under Article 32 of the Commercial Code due to a likelihood of confusion.

- The First Hall of the Civil Court held:
  - that the mark utilised by the defendant need not be identical in order for there to be a likelihood of confusion; and
  - that the presence of an overall impression of similarity is sufficient to lead to the likelihood of confusion
- The First Hall concluded that there was sufficient similarity between the two marks to result in a likelihood of confusion and it was irrelevant that the product of the defendant had different packaging to that of the plaintiff
- The Court of Appeal confirmed the decision of the First Hall of the Civil Court

- The Court of Appeal held that in determining whether there is a breach of Article 32, it is the average consumer that is to be considered when identifying whether the use of the name or mark is likely to create confusion.

- In its judgement, the Court quoted Kerly who defined the average consumer for the purposes of a trademark infringement as a person *'who is reasonably informed and reasonably observant and circumspect'* .

Av. Dottor Luigi A. Sansone bhala mandatarju specjali ta' Starbucks Corporation v Strabuono Coffee International Limited (2022)

- The Court decided that the Plaintiff's main mark Starbucks and the Defendant's main mark Strabuono – were visually and conceptually similar and found the Strabuono mark to be identical or similar to the Starbucks mark
  - same circular logo
  - green colouring
  - dominant words placed in same position
  - Descriptions of services of each of the logos (coffee) were the same
  - Both contain character representation in the centre of their logos
  - Words composed of almost identical structures (STARBU and STRABU)
- Court ordered the defendant to cease all use of the words, signs and figures found to be in contravention of the Trademark Regulation

- The Plaintiff also claimed that the Defendant's use of the mark 'Strabuono' amounted to an infringement of Articles 32 to 36 of the Commercial Code
    - The Court held that the plaintiff would need to successfully prove that there exists a likelihood of confusion on the part of the public, including by virtue of an economic connection between both parties.
    - Court concluded that the general impression of the Defendant's mark would remind the public of that of the Plaintiff.
- The Court ordered the Defendant to pay the Plaintiff 2,000EUR in penalties in accordance with Article 37 of the Commercial Code.

Article 32A – Comparative Advertising

- General Rule - Traders shall not engage in any comparative advertising
- The advertising must be objective and factual and not seek to discredit or take any form of unfair advantage
- There are exceptions to the general rule

- However, this Article provides a list of instances when traders are permitted to engage in Comparative Advertising, provided that certain conditions are met such as:
  - That the advertising is not misleading within the meaning of Article 32B
  - The advertising compares goods or services meeting the same needs or intended for the same purpose
  - The advertising does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor
  - The advertising does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, names, other distinguishing marks, goods or services and those of a competitor

Article 32B – Misleading Advertising

- The primary aim of the Misleading and Comparative Advertising Directive (Directive 2006/114/EC) is to 'protect traders'
- Traders shall not engage in any form of misleading advertising
- Definition of Misleading Advertising:
  - (a) It deceives or is likely to deceive the person to whom it is addressed or to whom it reaches; and
  - (b) If by reason of its deceptive nature:
    - (i) it is likely to affect their economic behaviour; or
    - (ii) is likely to injure a competitor of the person whose interests the advertisement seeks to promote

Beer House Limited vs Max Diner Limited (First Hall, Civil Court)(2014)

- The Plaintiff, who was the exclusive distributor of a foreign brand, brought an action against the defendant under Article 32B, claiming that the defendant was advertising said brand on their vans and on their website.
- The foreign company even attempted to stop the defendant from advertising their products, which the Court interpreted to mean that the foreign brand had not, therefore, given their consent for the defendant to advertise its products.
- The Court decided in favour of the plaintiff and found that the defendant had engaged in misleading advertising

False Indication of Origin of Goods

- Article 33 states that *Traders shall not make use of any false indication of origin of the goods:*
  - *Provided that a designation which according to commercial usage is considered as a common designation, shall not be deemed to be a false indication*

- This deals with the false indication that goods or a product was made in a particular country that is known for producing such goods

- Geographical element – Geographical Indications and Designations of Origin

Spreading of News Prejudicial to Other Traders

- Article 34 – *Traders shall not, for the purpose of competition, spread news capable of prejudicing the business or trade carried on by other persons*

- There is no requisite for the news that is spread to be false
  - However – may be relevant with regards to the penalty set under Article 37: '*having regard to the…malice of the offending party and to all other particular circumstances of each case*'

- This would give an unfair advantage to the trader and therefore constitutes a form of Unfair Competition

- The word 'spreading' does not necessarily imply that this must be divulged to multiple people – spreading of news to one person falls under this article

- Article 34 speaks of the capability of creating prejudice, which implies that *actual* prejudice need not be caused
  - *Falzon Sant Manduca v Caruana (Court of Appeal)(1979)*

- The spreading of news must have been carried out for the purposes of competition and must relate to that trader's commercial activity on the relevant market

- The Article continues to state that Traders must not make use of honours, patents, medals, prizes or other distinctions to which they have no claim or which have been obtained for some other branch of business or trade

Further Acts of Unfair Competition

- Article 35: *Traders shall not suborn persons employed in the trade or business carried on by a competitor for the object of knowing or exploiting his customers*
    - Implies that traders are forbidden from bribing employees of competitors in order to obtain key confidential information
- Article 36: *A trader shall not, in the exercise of his trade or business, issue certificates of honesty or competency contrary to the facts as known to him and capable of imposing upon the good faith of others*
    - This could have the effect of misleading consumers

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