

EVIDENCE IN CIVIL LAW – MALTA

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Evidence in Civil Procedure in Malta

1 Fundamental Principles of Civil Procedure

There is a wide array of fundamental and important principles of civil justice. For the outline of this questionnaire the approach developed under the influence of the doctrine of Franz Klein (Austria, Slovenia, Croatia...) was taken into consideration with regard to main principles important for taking evidence. International uniformity on all points is an unattractive goal, but agreement on fundamental values and doctrines is desirable.

Malta's legal system is a synthesis of the various legal cultures which exerted influence on it during long years of colonial rule. Though British rule was officialised in 1814, the British refrained from imposing common law in Malta. The Code de Rohan which had been promulgated in the dying days of the long rule of the Knights of Malta was substituted by a local version of the Code Napoleon in 1852. Other codes were enacted in the same period, most notably the Code of Organization and Civil Procedure, the Criminal Code and the Code of Criminal Procedure. A Maltese legal luminary, Sir Adrian Dingli, was instrumental in the promulgation of these Codes, which though extensively amended over the years, still form the backbone of Maltese legislation. He drew extensively from continental codes, such as those of the Italian city states and of the Two Sicilies. However, the Code of Criminal Procedure departed somehow from the continental models and the accused were given rights which were already prevalent in the United Kingdom and trial by jury was also introduced.

Over the long years of British Colonial Rule, British legal influence came increasingly to bear. Fiscal and company legislation follow closely the British model and since Independence in 1964, UK legislation is often mirrored in legislation enacted by the House of Representatives which is run on rules followed by Westminster. The Maltese Constitution, enacted in 1964, reflects closely British constitutional principles but it also promulgated a bill of fundamental rights which was very much influenced by the European Convention on Human Rights and the Indian Constitution.

The European Convention on Human Rights was subsequently incorporated in domestic legislation in 1987. Since Malta's accession to the European Union in 2004, the *acquis communautaire* and future EU regulations prevail over domestic legislation and E.U. directives have to be incorporated in domestic legislation.

The Maltese judicial system is basically a **two-tier system** comprising a court of first instance presided over by a judge or magistrate, and a court of appeal. The Court of

Appeal in its Superior Jurisdiction is composed of three judges and hears appeals from a court of first instance presided over by a judge. The Court of Appeal in its Inferior Jurisdiction is presided over by a single judge and hears appeals from a court of first instance presided over by a magistrate. There are also various tribunals which deal with specific areas of law and have varying degrees of competence. The majority of appeals from decisions awarded by any of these Tribunals are heard by the Court of Appeal in its Inferior Jurisdiction whereas others are heard by the Court of Appeal in its Superior Jurisdiction.

The Director General (Courts), who is appointed by the Prime Minister, is responsible for the administration of the courts. He or she is assisted by the Registrar, Civil Courts and Tribunals, the Registrar Criminal Courts and Tribunals, the Registrar (Gozo Courts and Tribunals), and the Director (Support Services).

The Director General (Courts) is responsible for the management and administration of the Courts of Justice Division, including the registries, archives and other services, and also heads the Courts of Justice Division. All court executive officers performing duties in the Courts of Justice Division take their instructions from, and are answerable to, the Director General (Courts).

Types of courts – Hierarchy of courts

The Court of Appeal	Second instance Appellate	The Court of Appeal hears appeals from the civil courts in both their superior and inferior jurisdiction. (i) This court hears appeals from the First Hall of the Civil Court and the Civil Court (Family Section). (ii) Appeals from the Court of Magistrates in its civil jurisdiction, the Small Claims Tribunal and the administrative tribunals are also heard by this court.	(i) Composed of three judges. (ii) Composed of one judge.
The Court of Criminal Appeal	Second instance Appellate	This Court in its Superior Jurisdiction hears appeals by persons convicted by the Criminal Court . This Court in its Inferior Jurisdiction hears appeals in respect of cases decided by the Court of Magistrates sitting as a Court of Criminal Judicature .	Composed of three judges Composed of one judge
The Criminal Court	First instance	This court sits as a criminal court and hears criminal cases exceeding the competence of the Court of Magistrates.	Presided over by a judge who sits with a jury of nine persons
The Civil Court: The First Hall of the Civil Court	First instance	The First Hall of the Civil Court hears all cases of a civil and/or a commercial nature exceeding the jurisdiction the Court of Magistrates. In its constitutional jurisdiction, it also hears cases relating to violations of the constitutionally	Presided over by a judge

<p>Civil Court (Voluntary Jurisdiction Section)</p> <p>The Civil Court (Family Section)</p>		<p>protected human rights and fundamental freedoms protected by the European Convention of Human Rights and Fundamental Freedoms.</p> <p>The Civil Court (Voluntary Jurisdiction Section) is a voluntary jurisdiction court and is responsible for the interdiction or incapacitation of persons of unsound mind, the nomination of tutors for same persons, the opening of successions and the confirmation of testamentary executors. It is also a repository for secret wills.</p> <p>This court hears all cases relating to family matters such as marriage annulment, personal separation, divorce, maintenance and custody of children.</p>	<p>Presided over by a judge</p> <p>Presided over by a judge</p>
<p>The Court of Magistrates</p>	<p>First instance</p>	<p>In the civil field, the Court of Magistrates only has an inferior jurisdiction of first instance, in general limited to claims not exceeding € 11,646.87.</p> <p>In the criminal field, the Court has a twofold jurisdiction: as a court of criminal judicature in respect of cases falling within its jurisdiction, and as a court of criminal inquiry in respect of offences falling within the jurisdiction of the Criminal Court.</p> <p>(i) Court of Criminal Judicature – this Court is competent to try all offences punishable by a term of up to 6 months' imprisonment.</p> <p>(ii) Court of Inquiry – this Court conducts the preliminary inquiry in respect of indictable offences and transmits the relevant records to the Attorney General. If there is no objection from the accused, the Attorney General may refer cases punishable with a sentence of up to ten years' imprisonment back to the Court of Magistrates as a Court of Criminal Judicature to hear and decide the case.</p>	<p>Presided over by a magistrate</p>
<p>The Court of Magistrates for Gozo</p>	<p>First instance</p>	<p>In the civil field, the Court of Magistrates for Gozo has a two-fold jurisdiction: an inferior jurisdiction comparable to that exercised by its counterpart court in Malta; and a superior jurisdiction, with the same competence as the First Hall of the Civil Court, excluding its constitutional</p>	<p>Presided over by a magistrate</p>

		jurisdiction, and the Civil Court (Voluntary Jurisdiction Section) in Malta. In the criminal field, the Court of Magistrates for Gozo has the same competence as the Court of Magistrates as a Court of Criminal Inquiry and as a Court of Criminal Judicature in Malta.	
The Juvenile Court	First instance	The Juvenile Court hears charges against, and holds other proceedings relating to, minors under the age of 16 years and may make care orders.	Presided over by a magistrate and two members
Small Claims Tribunal	First instance	The Tribunal summarily decides, on principles of equity and law, money claims of less than € 3,494.06.	Presided over by an adjudicator

1.1 Principle of Free Disposition of the Parties and Officiality Principle

1.1.1 Does Maltese law know the principles by these names and in what extension do they exist in Maltese legal system? How does Maltese law understand autonomy of parties in the process and the limitations of their autonomy?

These names are not used in the Maltese legal system. The autonomy of the parties is guaranteed as a general principle of law. The Code of Organisation and Civil Procedure COCP provides the procedure of how the parties are to draw up their respective claim or defence. It's up to the parties to determine claims and defences in civil proceedings and they are responsible for its conduct.

1.1.2 Shortly explain how the legislation and jurisprudence define the scope of authority of the court to adjudicate the civil case. Do you apply the rule of adjudication in the frames of submitted claims? Is it forbidden to decide extra et ultra petitum?

Articles 23 and 24 of the Code of Organisation and Civil Procedure (COCP) provide that the judgment shall in all cases be delivered in public. The court delivering the judgment shall read out the operative part which is to be included in the concluding part of the judgment. The operative part of the judgment shall include a reference to the claims or pleas which have been decided upon and every declaration intended to be conclusive or binding immediately upon delivery the judge or magistrate shall deposit a signed transcript of the judgment in the records of the case. Any order in regard to any matter pending before the courts shall be given by the court to which such matter appertains, and any application for any such order shall be made to such court exclusively.

The judgment is made on the basis of the claims submitted by the parties. The court can decide on its own motion issues related to procedural matters and jurisdiction.

1.1.3 What is the definition of the principle in Maltese legal system?

There is no definition in either the Maltese Code of Organisation and Civil Procedure (COCP) or legal theory.

1.1.4 To Preclusions (eventual maxim/maxima eventualis). What limitations of introduction of new facts and evidence exist in Maltese legal system?

The introduction of new facts is in the hands of the parties. While the case is being heard and a party is in possession of the case new facts can be introduced. When the party cedes possession either to the other party or to the court, then new facts cannot be introduced unless the party files an application to the court to do so which is then may be accepted by the court.

1.1.5 To what extent is the court bound by the party submissions regarding the means of evidence?

The court can only decide on the evidence submitted by the parties.

1.2 The Adversarial and Inquisitorial Principle

1.2.1 Does Maltese law know the principles by these names and in what correlation do they exist in Maltese legal system? Who in Maltese law is in principle charged to collect evidence materials?

In civil proceedings it is the parties who are responsible to collect evidence. The court has no role on collecting evidence.

1.2.2 What is the definition of the principle in Maltese national system?

There is no definition in the Maltese COCP or anywhere else in Maltese law.

1.2.3 Is the court allowed or empowered to decide to take evidence other than the one submitted by the parties?

No the court has to decide on the evidence submitted by the parties. All evidence must be relevant to the matter in issue between the parties. In all cases the court shall require the best evidence that the party may be able to produce. Best evidence means that the court expects the party to bring up their very best evidence they can produce and the assumption is that the parties do not have any better evidence than that produced in court.

1.2.4 What is the role of a judge in Maltese legal system? The concept of substantive and procedural guidance of proceedings – direction of main hearing as a principle familiar to Maltese legal system? Does in Maltese system the judge prepare the list of references and in which phase of the procedure (in connection with substantive governance)?

1.2.4.2 What are the consequences of the preclusion?

The court does not in any way guide the parties as to what evidence to present. It is the parties responsibilities to choose the best evidence possible as mentioned in the previous reply. The parties face the consequences whether positive or negative of the choices of evidence they make.

The court shall disallow any evidence which it considers to be irrelevant or superfluous, or which it does not consider to be the best which the party can produce. Where evidence tendered by any party is disallowed, it shall be lawful for such party to demand

that the ruling of the court in regard to the disallowing of such evidence be made by a decree; but, where only a question to a witness has been disallowed, the party may demand only that a record thereof be made in the proceedings, in the manner which the court shall, according to circumstances, direct. Where in any cause or matter it is not possible, in consequence of damage to or loss of any court or other document, for any party to such cause or matter to comply with any requirement of this Code relating to the formal production of documents or otherwise, the court may either dispense with such requirement or give such other directions as the circumstances of the case require. Provided that in proceedings before the courts of civil jurisdiction, the parties to the cause shall be bound to assist the registrar in compiling a copy of the court records or other documents which have been damaged or lost and, within such time as the court may establish, they shall provide the registrar with such information and documentation in their possession which will assist the registrar in compiling the court records or other documents damaged or lost in as full a manner as possible.

It shall be lawful for the court to require the party tendering evidence to state the object of the evidence. The burden of proving a fact shall, in all cases, rest on the party alleging it.

1.3 Hearing of Both Parties Principle (audiatur et alter pars) – Contradictory Principle

1.3.1 Does it exist in Maltese legal system?

Both parties must be heard unless the defendant after being notified does not appear.

1.3.2 Explain how far it goes?

The plaintiff must do anything possible to notify the defendant. If the defendant cannot be found he/she can be notified in a public place such as a police station and that's serves for the purpose of notification. The court as such does not help, but the plaintiff makes use of the Court's resources such as bailiffs at a cost to try and find the defendant. It is then up to the defendant to choose to defend himself.

1.3.3 What is the definition of the principle in Maltese legal system?

There is no definition as such both in law and in case-law.

1.3.4 Right to be heard

1.3.4.1 Right to present evidence (submission of evidence, presence in taking of evidence, hearing of the parties) – Explain the basic rights and obligations that parties have?

Civil suits are normally initiated by an application in writing. The application lists the evidence to be produced and the list of witnesses. Hence the evidence is made known to both the court and the other party. The plaintiff will then start presenting them in court during the oral hearings and the other party is given the opportunity to rebut such claims. The party is therefore obliged to inform the parties and present the evidence in a reasonable time.

1.3.4.2 Are there any exceptions to this principle (decisions of the court without the hearing of the opposite party, preclusions)?

There are no exceptions as such.

1.3.4.3 What are the means for party if this right is violated?

The party can apply to the court for redress.

1.3.5 Right to equal treatment (the same decision in the same cases) – Explain what the meaning of this principle is in Maltese system?

The parties have the same opportunity to present evidence they deem fit in court.

1.3.6 What are the sanctions for passivity or absence of the party in the procedure?

means that the Court only examines the plaintiff's evidence and subsequently passes a judgment on such basis only. Of course the Court weighs the plaintiff's evidence on its own merits and rule in favour or against depending on this.

1.4 Principle of Orality – Right to Oral Stage of Procedure, Principle of Written Form

1.4.1 Is in Maltese legal system the right to oral stage of procedure raised to the level of general principles?

The main part of the proceedings is based on oral hearings. The trial is conducted by the oral system hence the oral part is more important than the written part. In fact the written part corresponds to the initial application and the rest take place via the oral pleadings.

1.4.2 What is the definition of the principle in Maltese legal system?

There is no definition in the Maltese COCP on in legal theory.

1.4.3 What is the correlation between the oral and written form of procedural acts?

Refer to 1.4.1.

1.4.4 If the principle of orality is dominant within Maltese legal system, how is it balanced with the principle of written form?

As explained before the entire civil trial is based on the oral part save for the initial application which is written. This applies for all civil cases starting from Small Claims Tribunal going up to the highest courts.

1.4.5 If the principle of written form is dominant within Maltese legal system, how is it balanced with the principle of orality?

Refer to 1.4.1.

1.5 Principle of Directness

1.5.1 Does it exist in Maltese legal system?

This principle does not exist under Maltese civil law as such. When a judge needs to be replaced it is not uncommon for evidence to be heard again unless evidence was taken by a judicial assistant and subscribed in writing to the file of the case which is then re-examined by the next judge. As a result whenever a judge needs to be replaced, a case may drag for years.

1.6 Principle of Public Hearing

1.6.1 Does it exist in Maltese legal system? Explain what does it mean?

Civil trials are held in a public court house where the general public can attend hearings.

1.6.2 What does this principle apply to?

It applies but it is not recognised as a principle as such. Sometimes evidence, if collected by a judicial assistant, is not collected in public. It is only evidence collected in open court that is public.

1.6.3 What is the definition of the principle in Maltese legal system?

There are no definitions as such.

1.6.4 Are there any exceptions to this principle?

If the case merits it, the judge can either on an application by the parties or on his/her own accord decide to hear some evidence in private. Photos are never allowed to be taken in court.

1.7 Principle of Pre-Trial Discovery

1.7.1 Does it exist in Maltese legal system? Explain what does it mean?

This does not exist in the Maltese civil procedure. It only exists in criminal proceedings where the Magistrate's court will have to decide if there is prima facie evidence for a trial to proceed.

1.8 Are there any other general principles in Maltese legal system?

The general principles are those explained above.

2 General Principles of Evidence Taking

2.1 Free Assessment of Evidence

2.1.1 Does it exist in form of fundamental principle in Maltese legal system?

The law of evidence is based mostly on English law. For every legal action, there must be an element of fact and an element of law. It is the duty of the judge to examine all the juridical aspects of the case. The judge is precluded from referring to facts which are known to him but which do not result from the records. Moreover the judge cannot

make use of facts not resulting from the records, although asserted by the parties. As to the ascertainment of the truth of facts asserted, it is up to the parties to produce that evidence which is, in their opinion, necessary. There is no person other than the parties who is in a better position to know what evidence is available.

The principal forms of evidence are testimony, documents, things and facts which the court accepts as evidence of the facts in question, and also admissible hearsay statements (these are the exception as the general rule is that hearsay evidence is inadmissible). Maltese Law on evidence is mainly regulated by Title I of Book Third of the Code of Organisation and Civil Procedure. This title is divided into six sub-titles dealing with Witnesses; Documentary Evidence; Demand for the Production of Documents; Referees; Inspection in *facia loci*; and Proof by Admission or by Reference to the Oath of the other Party. Here one has to immediately point out that the laws on Evidence found in the COCP are not only applicable to cases in front of the Civil Court but also to Criminal Cases. Within the Criminal Code we find many rules relating to evidence, however with regards to the general principles of evidence reference is made therein to the Code of Civil Procedure. Paragraphs (d) and (e) of Article 520 (1) of the Criminal Code states that “Saving any other provisions of this Code, the following provisions of the Code of Organization and Civil Procedure shall, except in so far as it is otherwise provided in this Code, apply to the courts of criminal justice: (d) articles 558 to 662 relating to evidence in general; and (e) articles 627 to 633, and articles 635 to 637 relating to documentary evidence and the production of documents which are in the possession of other persons.”

A Judge has the ultimate discretion and burden to decide on the probity of the evidence brought in front of him. The Judge must be morally convinced of the evidence brought before him. These rules constitute what may be termed the system of evidence and of the moral conviction of the Judge. In this system the moral conviction – the mind – of the Judge is not bound by any rule of law: the Judge is free to allow (or disallow) any evidence tendered by the parties and to value it according to his own conviction.

2.1.2 Explain its meaning and scope?

Evidence in general is the means whereby the truth is established and made known. Juridical evidence is the sum of those means instituted by law whereby the parties show the judge the truth of the facts alleged by one of them and contested by the other, which produce in the mind of the judge, the conviction that a given fact exists or does not exist.

2.1.4 Are courts bound by the party’s dispositions or not?

As explained above, the judge is precluded from referring to facts which are known to him but which do not result from the records.

2.1.5 How does that effect the assessment of evidence?

It is up to the parties to present the right evidence in line with their arguments. The judge is bound by the records of the case and not by any knowledge that may come from a source which is not the records.

2.1.6 Does Maltese legal system provide certain methodological guidance for judge to apply free assessment of evidence?

No but refer to the reply of the next question.

2.1.7 Does Maltese legal system regulate any formal rules for assessment of evidence?

Yes. The cardinal rule that evidence has to be tendered *viva voce* is the partial reason for this answer. Hearsay evidence, i.e. evidence given by a person in relation to what he was told or acquired through a third party, is generally considered to be weaker than any evidence that is given by any person with respect to any information that such witness might have acquired personally. Nevertheless it has to be noted that should this evidence be the best evidence possible, then such evidence, irrespective of the fact that it is considered to be weak is still retained.

It all however depends of the nature of the claim: if for instance the dispute relates to paternity, the findings of a DNA test are considered as being the best possible form of evidence, irrespective of what any number of witnesses may on oath declare.

When considering documents though, one has to remember that certain documents are considered as being privileged documents and no demand may be made for the production of same. Privileged documents are those documents given such privilege by law such as secret wills etc.

The following list demonstrates some documents that are admissible as evidence in themselves, without the necessity of any proof of their authenticity other than that which appears on the face of them until the contrary is proved:

- i. the acts of the Government of Malta, signed by the Minister or by the head of the department from which they emanate;
 - ii. the registers of any department of the Government of Malta;
 - iii. all public acts signed by the competent authorities, and contained in the Government Gazette; the acts of the Government of Malta printed under the authority of the Government and duly published;
 - iv. the acts and registers of the courts of justice and of the ecclesiastical courts, in Malta;
 - v. the certificates issued from the Public Registry Office and the Land Registry;
- the acts of any foreign Government, or of any department of a foreign Government, or of foreign courts of justice, or of any foreign establishment, authenticated by the diplomatic or consular representative of the Government of Malta in the country from which they emanate.

2.1.8 What is the definition of the principle in Maltese legal system?

There is no definition.

2.2 Relevance of Material Truth

2.2.1 Does a principle of material truth exist in Maltese legal system? Explain the scope of the principle.

The main objective of evidence within a court case is to help establish the facts of the case in question. The rules set out in the law so as to regulate evidence are of great

importance as it is the evidence which will win or lose the case. Laymen usually fail to appreciate the importance of procedural rules as this deal with the *modus operandi* of the law rather than the substantive norms. However without these procedural rules justice can never be done. Whereas ‘substantive law’ defines rights, duties and liabilities, ‘adjective law’ establishes the procedure in which the substantive law is applied. Procedural rules regulate the general conduct of litigation and outline the manner in which the parties and the court should conduct themselves in every particular case.

Thus the rules governing procedure and specifically evidence are essential for the best service to justice. It is not sufficient to allege a fact even if such a fact at times may be known to be true by everybody but the important thing is to produce sufficient and satisfactory evidence so as to prove and attest the veracity of such fact or facts. This ensures that justice is always done and seen to be done and ensures that nobody is found guilty without the ‘just’ level of proof. The law of evidence has two main purposes: to establish the rules which determine the admissibility or not of the evidence with regards to the facts in issue; and to lay down the rules as to the manner in which the evidence is to be brought before the court.

It is the judge’s responsibility to ensure that the evidence presented is admissible and he/she has the right to refuse evidence which is judged not to reflect the material truth. The judge can also rule on such evidence if asked by the other party.

2.2.2 What are the limitations, if any, of establishing the material truth in Maltese legal system (protection of secrecy, privacy)?

However one must always keep in mind that the level of proof needed in civil cases and Criminal trials is different. Whereas civil cases are decided on a basis of probability, in Criminal cases the level of proof must be one of ‘beyond reasonable doubt’. This difference is due to the different nature of the two. Whereas within Civil cases what is being sought is rectification of an injustice suffered or an infringed right, within the Criminal sphere what is being sought is punishment for an offence committed. Criminal law deals with freedom and liberty of the accused and so a higher level of proof is needed so as to minimise to the lowest level any possible mishaps which could deprive an innocent person of his liberty.

2.2.3 Are there any limitations in selection of evidence? Which are provisions in Maltese law allowing for determination of the material truth?

The rules governing the admissibility of the evidence and the manner in which the evidence is produced in court are there to ensure that the evidence is true and that it is the best possible evidence. The court will always try to assure that the ‘best evidence’ is tendered in court and what is known as ‘secondary evidence’ will only be accepted if the ‘best evidence’ cannot be procured. Article 558 of the Code of Organization and Civil Procedure states that “in all cases the court shall require the best evidence that the party may be able to produce”.

2.2.4 Does Maltese legal system regulate a limitation of the right to propose new facts and evidence (*ius novorum*)?

No.

2.2.5 What are the standards of material truth?

Article 562 COCP states the general rule that – “Saving any other provision of the law, the burden of proving a fact shall, in all cases, rest on the party alleging it.”

The general rule is that the party making an allegation must prove it. The burden of proving a claim (which is denied) lies on the pursuer who advances or maintains it and, on his failure to do so, the defender is released. If the plaintiff does not manage to prove the truth of the facts alleged by him, the defendant should be discharged not only ab observantia iudicii but from the demand itself. This is the meaning of the rule *actore non probante absolvitur reus*. The same rule applies to the defendant when, in case the plaintiff proves his demand, he asserts facts tending to paralyse the plaintiff’s rights: he is then bound to prove these facts, and it is in this sense that it is said *reus in excipiendo fit actor*.

2.3 Are there any other general principles regarding evidence taking in Maltese legal system?

No.

3 Evidence in General

3.1 Are certain methods of proof stronger than others?

Evidence is a subject which is not easily categorised and divided. The definitions of the various types of evidence may seem ambiguous and in fact most of the writers do not adopt the same classification. A basic distinction between the various forms of evidence will be sought with some basic explanation as to what each commonly signifies. A common classification of evidence is that between ‘direct’ and ‘indirect’. ‘Direct evidence’ is when the evidence consists of testimony which is neither hearsay nor circumstantial. It is evidence which stands on its own and which has the force to.

Independently determine the existence and veracity of an alleged fact. The existence of a given thing or fact is proved either by the actual production of that thing, or by the testimony or declaration of somebody who has personally perceived such thing or fact. Evidence is said to be ‘indirect’ when a fact is proved through the proof of the existence of other facts. This is also known as ‘presumptive evidence’. ‘Circumstantial evidence’ is very similar to indirect as it is that evidence which constitutes evidential facts which infer and prove the existence of a fact in issue.

‘Real evidence’ is the term used to refer to material objects other than documents, which are produced in a court. This is a very strong type of evidence as it needs neither testimony nor inference, apart from the necessary identification or explanation. Such evidence is said to speak for itself. However the term real evidence has been used in English law in three senses and thus it is an ambiguous term. It has been used to signify evidence from things as distinct from persons. It has also been used to refer to material objects produced for the inspection of the Court. This is the most common and accepted meaning. However within this context one has to understand the difference in the meaning of a document when used to signify a record of a transaction and when used in the sense of a thing. Finally the third meaning afforded to ‘real evidence’ is that which refers to the perception by the Court (or its result) as distinct from the facts perceived.

Another important classification is that of primary and secondary evidence. 'Primary evidence' is that evidence which by its own nature does not suggest the existence of better evidence. It is the best or highest kind of evidence which gives the greatest possible certainty to the fact in question. On the other hand, the term 'secondary evidence' implies that the evidence in question suggests that better evidence exists or existed but in the current circumstances such better evidence cannot be brought in front of the court. Such evidence is inferior and is sometimes called 'substitutionary' evidence. The lack of availability of the best evidence leads the court to accept secondary evidence if it is convinced that such 'better evidence' cannot be attained. In these circumstances the court has a level of discretion as to whether to accept or not, and what level of standing to give such secondary evidence. The original of a document would constitute primary evidence whilst a copy of it would be secondary evidence of the contents of the original document. Evidence is said to be 'insufficient' when it has a weak probatory force. The test applied as to determine whether a piece of evidence is sufficient or not is the test of the reasonable man. If in the eyes of the reasonable man it is deemed that the evidence would not be able to decide the matter in favour of the person alleging the fact, then the evidence is considered as insufficient. 'Prima facie' evidence is when the evidence needs further verification and examination. As the name implies, 'prima facie' evidence is that evidence which at face value proves the fact in question but which at the same time is deemed not sufficiently conclusive and which eventually will need to be backed further.

Evidence is said to be 'conclusive' when the situation obliges the court to find a fact without giving the opposite party the opportunity to call witnesses to prove the contrary. The expression 'fresh evidence' is used within the Criminal field and means evidence which at the time of the discharge of the accused, did not exist, or was not known to those who were entitled to prosecute. Thus the emergence of fresh evidence may give rise to fresh proceedings against an individual.

The Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) identifies the following means of proof:

- a. Witnesses;
- b. Documents;
- c. Referees;
- d. The carrying out of an inspection of the place (inspection in faciem loci);
- e. By admission or by reference to the oath of the other party.

3.2 Does any formal rule of evidence exist in Maltese country?

The rational rules governing evidence are the following:

1. A fact in controversy is not deemed to be proved unless the Judge, as a consequence of the evidence tendered, is morally convinced of the truth of the fact.
2. Any means which may show the truth of the fact alleged is evidence, and, as such should be freely allowed.
3. Any evidence should be subjected to counter-evidence in order that truth may derive from the reciprocal control of the parties and from the contrast between the opposing evidence.

3.3 What is, if any, the minimum standard of proof to consider a fact as established?

These rules put great emphasis on the morality and sense of justice of the Judge. A Judge has the ultimate discretion and burden to decide on the probity of the evidence brought in front of him. The Judge must be morally convinced of the evidence brought before him. These rules constitute what may be termed the system of evidence and of the moral conviction of the Judge. In this system the moral conviction – the mind – of the Judge is not bound by any rule of law: the Judge is free to allow (or disallow) any evidence tendered by the parties and to value it according to his own conviction.

Now such a system is to be contrasted with the system of legal evidence, which allows the interference of the law both as to the means of evidence which are admissible and as to the free conviction of the Judge. The law defines – a priori – which conditions of evidence are necessary in order that the Judge may declare himself to be convinced. These rules are considered of cardinal importance, and are a contribution of the Anglo-Saxon system to the Maltese Code of Civil Procedure.

3.4 Means of proof

3.4.1 Are means of evidence provided or listed in the national legal system? Does *numerus clausus* principle apply?

The means of producing evidence is divided into so called evidence properly for example testimony, documents and references. Then there are presumptions by means of which one reaches the supposition of the truth of an unknown fact, derived from known facts. These are therefore inferral of the truth from other known facts. There is no *numerus clausus* principle but all evidence is supposed to fall within these categories.

3.4.2 List means of proof in Maltese legal system (specifically stated in legal acts or found in practice).

The Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) identifies the following means of proof:

- a. Witnesses;
- b. Documents;
- c. Referees;
- d. The carrying out of an inspection of the place (inspection in *faciem loci*);
- e. By admission or by reference to the oath of the other party.

3.4.3 Are certain means of evidence excluded from the possible modes of proof?

As stated evidence must fulfil the conditions referred to above.

3.4.4 Do parties' statements count as evidence? If parties can testify, are there any constraints to their capability of testifying?

Yes, provided that they are taken under oath.

Testimony by a Witness is the most common way of producing evidence in court proceedings. Every party has the right to produce witnesses to give testimony so as to prove or disprove the facts in question. Testimony is the evidence given by a witness in court, and this evidence depends on the truthfulness of the witness in question. Every

witness must take a solemn oath before giving testimony. Witnesses are required to swear “to tell the truth, the whole truth and nothing but the truth”. The form of the oath depends on the individual’s personal religious persuasion. A witness takes an oath on something which is binding to him. The form of the oath is usually according to the custom of those who profess the witness’ faith. In Malta the majority of people are Roman Catholic and thus the majority take the oath by kissing the Holy Cross. However people of different religions are sworn according to the manner most binding on their conscience. For example people of Muslim religion take the oath by kissing the Kuran. Witnesses are specified in the writ by each party so the opposing party may know the witnesses to be used by the other party. In the normal course of civil trials it is the plaintiff who commences to produce his evidence including the production of the witnesses. The witnesses are first questioned by the party who produces them in court but the opposing party will always have the right to counter examine each and every witness produced by the other side. This applies to all parties.

The COCP establishes in Article 563 that “All persons of sound mind, unless there are objections against their competency, shall be admissible as witnesses.” Thus every person is capable of giving evidence, unless he is declared incompetent or is inadmissible by law. Competence refers to whether a person has the ability to be a witness. An incompetent witness can be a person who has a particular quality which impedes him from being able to understand the concept of testimony and the meaning of being under oath. A person who has a severe mental infirmity cannot be sufficiently trustworthy so as to give testimony in court. Competence must be distinguished from compellability. A person can be competent but un-compellable as a witness. The accused cannot be compelled to give testimony in his own trial even though he has the competence to do so. Likewise the husband and wife are competent witnesses but can’t be compelled to disclose any communication made within the married life. The husband and wife may not be compelled to give testimony which may incriminate the accused.

Under Maltese law there is no minimum age needed for a person to be able to testify. Thus any child can give testimony as long as the court is convinced that the child can sufficiently understand the importance to say the truth. As long as a child “understands that it is wrong to give false testimony” then that child can give testimony in a court of law. However most of the time the essential thing which determines whether a child is competent or not is whether that child can give reliable evidence. Children can be much more truthful than adults even if they don’t clearly know the difference between truth and falsehood. For this reason the court may nonetheless proceed to listen to the version of the child. The problem under the Maltese system is that no witness can give testimony if not under oath. Thus if the child clearly does not remotely comprehend the meaning of an oath then it will be difficult for the court to allow the child to give testimony.

The traditional concept of testimony was for the witness to appear in court during the proceedings and give his testimony in open court. Testimony could also be given under oath in sittings held by referees or judicial assistants appointed by the court to hear and conduct parts of the proceedings. Article 577 of the Code of Organization and Civil Procedure establishes that “witnesses shall be examined in open court at the trial of the action and viva voce”. However there are some exceptions to this general rule. The court can order that the testimony is given behind closed doors where it deems this

necessary, such as in cases involving abuse of children. Testimony may in exceptional circumstance be given not in the courtroom such as when the witness is very ill or old and can't be taken to court. The main exception to the 'viva voce' testimony is that of testimony being given by an affidavit. Article 577 (2) also adds that "witnesses may not be assisted or advised by any person". This goes to show the importance that the testimony of a witness is really his version of events or facts. One can immediately see the danger that this rule is not observed when testimony is given by means of affidavit.

Another important rule with regards to witnesses is that during the examination-in-chief leading or suggestive questions may not be put forward unless with special permission of the court. However leading and suggestive questions may be put forward during the Cross-examination. Here again there is a great risk that when an affidavit is being drawn up by a witness, leading and suggestive questions are put forward by the lawyer of the party summoning that witness.

The importance of witnesses is evident from the power of the court to compel a witness to appear in court by means of a warrant of escort or arrest. A witness who fails to appear in court is deemed to be in contempt of court and will be liable for punishment accordingly. All persons of sound mind, unless there are objections against their competency, are admissible as witnesses. Furthermore, whatever may be the age of a witness to be produced, he is admissible as such, provided he understands that it is wrong to give false testimony.

Witnesses are to testify, on oath, in open court during the court hearing and viva voce, i.e. in person and in his own language.. Witnesses are to answer all the questions put to them either during their examination-in-chief or during cross-examination, provided such questions have been approved by the Court.

Considerations to be made to this end:

- i. If a witness is deaf and dumb but able to write, the questions are put to him in writing; and in such case the questions and the answers are publicly read out by the registrar, and afterwards kept in the record of the cause.
- ii. If the witness is deaf and dumb and unable to write, the Court appoints a suitably qualified interpreter to this end.
- iii. If the witness is dumb but not deaf, or vice versa, the Court orders his examination to be conducted in such manner as may appear to it most conducive to ascertain the true testimony of the witness.
- iv. If the Court does not understand the language in which the evidence is given, it appoints a qualified interpreter at the provisional expense of the party producing the witness.

The Court may appoint a judicial assistant to administer oaths, to take the testimony of any person that is produced as witness in said dispute, to take any affidavit on any matter, (including a matter connected with any proceedings taken or intended to be taken before any Court), and to receive documents produced with any testimony, affidavit or declaration.

3.4.5 Who can ask/request for a party testimony?

The parties themselves can choose whom they want to testify.

A particular form needs to be used to this end (known as a subpoena), wherein the witness is to be informed, under pain of nullity, the date and time when he is to testify,

before which Court, the name of the presiding Judge / Magistrate, on what he is expected to testify and what documents, if any, he is to exhibit during the same Court sitting. Any person being present in the court may, upon the oral demand of either of the contending parties, be called to give evidence just as if he had been summoned to attend by means of a subpoena.

In this regard one must also mention that when a person is testifying, the party who called such person to testify may not put to his witness leading or suggestive questions, without special permission of the court. The opposite party has the right to cross-examine a witness and in such cross-examination leading or suggestive questions are allowed. During the cross-examination, a witness may only be questioned on the facts deposed during his testimony, or on matters calculated to impeach his credit. When the party cross-examining desires to prove by the same witness any circumstance not connected with the facts deposed in his testimony, he must, unless the Court, for just cause shall direct otherwise, produce such witness in due time and examine him as his own witness. The Court may, upon a demand made to this effect by the latter party mentioned, order the witness not to leave the Court in order that he may be again called and questioned. This order has the effect of a subpoena.

When both the examination and cross-examination are concluded, no further questions may be put by either of the parties to this witness, but it shall be lawful for the Court, or for the party with the permission of the Court, to ask such questions as arise out of the answers given in the course of the examination or cross-examination. The Court, may, at any stage of the examination or cross-examination, put to the witness such questions as it may deem necessary or expedient.

Article 637 spells out the right of a party to demand production of documents which are not in its possession.

- (a) if such documents are the property of the party demanding the production thereof;
- (b) if such documents belong in common to the party demanding their production and to the party against whom the demand is made;

Here the ground for the right of demanding the production of documents is the right of ownership of the person making the demand for a reference to the oath of the opposite party. Where the demand is made against third parties, it must be made by application or in the subpoena to give evidence as a witness. The demand for the production of documents may be made at any stage of the proceedings as long as evidence may be produced.

Sub-title VI – Of the Proof by Admission or by Reference to the Oath of the Other Party – is an important part of Law of Evidence, which is likely to have been imported into our Code of Procedure from Canon Law. The Reference by Oath, or sub-poena (known in Maltese as subizzjoni) may be defined as the judicial confession provoked by the interrogatory of the adverse party. As a right, it can be availed of by both parties in a cause and at any time before or after the production of other evidence, both in primary and in secondary instance.

The law states that any reference to oath “may be in regard to the whole matter in issue, or to any part thereof, as well as in regard to any particular fact connected with the cause.” In the appellate stage, a reference to oath may be made with regards to facts not included in the interrogatory presented before the first court. The court may however (on demand) order an explanation regarding answers given before the first court.

There are however a number of procedural formalities, which have to be respected, the foremost of which will be dealt with here. First of all, the summoning, in the Superior Courts, must be made in the written pleadings, that is in the libel or answer, if made by the plaintiff or defendant. The summoning must be made in the petition or reply in the case of an appellant or respondent. In summary proceedings the demand by the plaintiff is made in the writ of summons. If the defendant wishes to sub-poena the plaintiff he will make the demand verbally whether before or during the hearing of the suit; if he wants to make the demand before that day, the registrar must notify the plaintiff thereof by means of a notice.

The formalities of the sub-poena itself consist in the questions, called capitoli, which one of the parties puts to the other. Collectively the capitoli form the interrogatory. The questions must be made in writing in front of the Superior Courts and must be approved by the Court, which may exclude any question on the ground of superfluity or for other reasons. In all instances “the questions shall be clear, concise and numbered, and signed by the advocate or legal procurator, as the case may be, or the party referring.”

The written questions must be presented to the Court for its approval during the hearing of the suit before the interrogatory; those made orally are approved or disallowed by the Court as each question is put. All answers must be replied in terms of the questions made. The Court may put, or allow to be put, any question to the party sub-poenaed even though it is not included in the capitoli, provided it is connected with the subject matter thereof or tends to the attainment of a precise answer on such subject matter, and the answers given to such questions must also be noted down as above. The party to whose oath reference is required is obliged by law to answer the questions categorically. However there are instances where the party may defer back questions to the party referring. This takes place in cases of facts proper to the party asking the question –

- (a) when the question concerns a fact to which the party making it was himself a party, or
- (b) a fact of which the said party is aware, whether such party intervenes in the proceedings in his own name or in the name of others.

This right of deferring back a question, instead of answering it, must be exercised at the very moment in which the questions are proposed. It is the duty of the party to whom the questions are put to answer, saving those cases in which he may defer such questions. If the party sub-poena, who is present at the time when the capitoli are proposed, fails to answer or to defer them back, such questions are regarded as proved against him. Similarly if the capitoli are referred back, the party to whom they are deferred is bound to answer, because otherwise they are regarded as proved against him. The law makes provisions for instances where the party to whose evidence is required fails to make an appearance, as well as instances where the oath may be taken prior to the actual hearing.

Such cases will arise if a party referring has reasons to fear that at the time of the hearing of the cause, the other party might be dead or unable, through absence from the country or sickness, to attend the hearing.

In Maltese law reference to the oath of the other party, is simply an ordinary evidence like all others, and it may be made either before or after the other evidence is produced. The party who makes reference to the oath of the other is not bound by the answers

given nor is he precluded from proving, by other means, what he has not managed to prove by subpoena or from disproving whatever may result from the answers received.

3.4.6 Are there any limits to the facts they can testify about?

There are no limits unless expressly prohibited by some form of a special law.

3.4.7 What are the limits?

Not applicable.

3.4.8 Can a party refuse to testify?

No unless there is a danger of self-incrimination.

3.4.9 If a party can refuse to testify, what are the admissible grounds for the refusal?

See above.

3.4.10 Who evaluates the legality of such claim?

The judge evaluates to legality of all claims.

3.4.11 If the refusal to testify is considered unlawful, what are the consequences, if any?

See above.

3.4.12 Are testifying parties under oath?

Yes.

3.4.13 What is the penalty, if any, for perjury?

The parties can either be held in contempt of court or else subjected to perjury charges which lead to fines and imprisonment of up to 2 years.

3.4.14 Are there any rules for evaluating evidence gathered through parties testimony?

See above.

3.5 Is it necessary for certain facts to be proven by formally prescribed type of evidence?

There is no rule as such unless the evidence relates to a clearly specified type of document.

3.6 Can the existence of rights arising out of a cheque or bill of exchange be proven by any other means than presentation of such document?

No.

3.7 A party presents in the proceedings various evidence: witnesses, authenticated documents, private documents and expert opinion.

3.7.1 Will the court consider certain type of such evidence to have greater value than others?

The distinction is made between primary and secondary sources as discussed above and in question 2.

3.7.2 Is this a formal rule or just logical persuasiveness?

This is done for logical persuasiveness.

3.7.3 Are there any means of evidence which can be applied/presented only after the modes of proof required by law become impossible?

No.

3.7.4 In order to prove certain facts, are certain methods of proof obligatory?

No.

3.7.5 Are there certain types/forms of procedure, where the facts can only be proven by a certain method of proof?

No.

3.7.6 Are there certain types/forms of procedure, where the facts are in principle proven by certain method of proof only?

No.

3.8 Is there a duty for parties to produce or deliver evidence? What are the consequences for breach?

There is no such duty. If the parties do not prove their case to the satisfaction of the judge, they risk losing the case. The judge can only base a decision on presented evidence.

3.9 Is there a duty for third persons to deliver evidence? What are the consequences for breach?

No unless summoned as witness. The subpoena is a Court order issued upon the request of a party to a dispute, thus failure to testify leads to contempt of Court. Upon failure to turn up to testify, the Court, in the light of the provisions dealing with contempt of Court, fines the witness and may also order the issuing of a warrant of escort or arrest, to compel such witness to attend for the purpose of giving evidence before it. Nevertheless, the witness has the right to request the Court to revoke the fine imposed after giving sound reasons that lead to his failed appearance.

Witnesses can refuse to give evidence with respect to privileged communications. For instance no advocate or legal procurator without the consent of the client, and no clergyman without the consent of the person making the confession, may be questioned on such circumstances as may have been stated by the client to the advocate or legal procurator in professional confidence in reference to the cause, or as may have come to the knowledge of the clergyman under the seal of confession or loco confessionis.

Also, unless by order of the Court, no accountant, medical practitioner or social worker, psychologist or marriage counsellor may be questioned on such circumstances as may have been stated by the client to the said person in professional confidence or as may have come to his knowledge in his professional capacity. This privilege extends to the interpreter who may have been employed in connection with such confidential communications.

Furthermore no witness may be compelled to disclose any information derived from or relating to any document belonging to or in possession of any civil, military, naval or air force department of the public service and which is an exempt document.

The husband or wife of a party to a suit shall be competent and compellable to give evidence in such suit at the request of any of the parties thereto provided that the husband may not be compelled to disclose any communication made to him by his wife during the marriage or the wife compelled to disclose any communication made to her by her husband during the marriage and that the husband or wife may not be compelled to answer any question tending to incriminate his wife or her husband.

Finally it has to be remembered that it is in the discretion of the Court to determine, in each particular case, when a witness is not bound to answer a particular question on the ground that the answer to such question might tend to expose his own degradation, or when a witness will not be compelled to give evidence as to facts the disclosure of which will be prejudicial to the public interest.

3.10 Explain the value of judicial and administrative decisions as evidence?

These are not considered as evidence as such. Of course a judge may look at past case law for inspiration but is in no way bound to accept evidence or rulings from a previous case. There is no doctrine of precedent.

4 General Rule on the Burden of Proof

4.1 What is the main doctrine behind burden of proof rules in Maltese national legal system?

Burden of Proof under Maltese Law is regulated by The Code of Organisation & Civil Procedure (Chapter 12 of the Laws of Malta). As a general principal, the onus of proof i.e. the burden of proving a fact, rests on the party alleging it. This applies to both plaintiff and defendant. The parties involved in the case are required to substantiate their claims and/or defences by means of evidence. The evidence produced must be the best evidence possible. In the eventuality that the Court believes that the evidence brought in support of any claim / defence, is irrelevant / superfluous / or is not considered as being the best evidence that can be brought forward, the Court, may disallow such evidence.

4.2 What are the proof standards in Maltese legal system?

Proof standards depend on whether they are primary or secondary evidence as it has been discussed in this study. The evidence is evaluated by the Court which has discretion whether to accept it or not.

Under Maltese Procedural Law, an admission, in writing or otherwise, done before the court or someplace else, is admissible as evidence against the person making such admission. An admission made upon a reference to the oath of one of the parties may be

received in evidence of a fact even against the other parties to the suit. In all cases, only such part of an admission as the court may deem worthy of credit shall constitute evidence.

4.3 Are there any rules in Maltese legal system which exempts certain facts from the burden of proof (recognized facts, well known facts)?

Civil and criminal cases have a different measure of proof, whereby in civil cases, the Courts shall determine the proving of a fact on the balance of probabilities. In civil cases, the Courts examine the evidence produced, with a view to determine which fact occurred according to the claim/defence brought forward. In criminal cases, the Courts need to ascertain whether the proof brought forward, beyond reasonable doubt attributes guilt to the person charged or accused. Of course facts that are public knowledge need not be proven. However the extent to which this applies depends on a case by case basis.

4.4 In what extent is the duty to contest specified facts and evidence regulated in Maltese legal system?

When an individual files suit against another, this is to be done by means of a writ of summons. This writ must contain in detail the claims being brought forward by the claimant, a declaration by the same claimant on oath ascertaining the facts alleged, and also a list of witnesses and documents to be brought forward in support of the claims made, identifying in the process the exact scope, bearing and actual use of bringing forward such evidence. The defendant, upon answering to the writ of summons served on him, shall also identify all the evidence that he shall bring forward in support of his position. The same Procedural Code, stipulates that should a witness not be mentioned at this stage, i.e. prior to the actual pleadings before Court, no further evidence can be brought forward, unless authorisation is given by the Court hearing the case.

In the interest of the best administration of justice, the Court may of its own motion, upon for instance, identifying a need to appoint an expert witness to determine a technical issue, appoint a referee to this end. Upon such an appointment, the Court in its decree to this effect, shall state the object of the reference, fix the day and time when the referee is to conduct a physical inspection (where necessary) and give directions for the guidance of the referee in the execution of his task. Although no definite criteria exist as to what can be done and what should be done in the best administration of justice, the Court has a wide discretionary power to call before it any person to testify in the case in dispute and/or to request the production of any document.

4.5 Does Maltese legal system recognize a doctrine of *iura novit curia*?

Maltese civil procedure is based on the English system and hence the meaning of this maxim is not the same as in civil law systems. While no expert witnesses can be brought to explain the local law, it is common for the parties to try and invoke provisions that are applicable to them. It is assumed that the local court knows all the local law even if it is a specialised field.

4.6 If the facts claimed by a party and the proposed evidence are incomplete, is the court obliged to advise the party of this fact?

No the courts are not obliged to advise the parties as it is their responsibility to produce the correct evidence.

4.7 Do the courts have means to induce parties to elaborate on claims and express an opinion on any factual or legal matter?

The Court in the exercise of its authority and function has to consider and apply correctly principles such as: “justice needs not only to be done in a swift and efficient manner but also needs to be seen being done”, and thus must be certain that the evidence is relevant to the case in question and that it is admissible. Furthermore should the Court believe that the evidence in question either is frivolous, or vexatious, or has no link with the dispute before it, or that it is not the best evidence possible or is just being requested purely as a delaying tactic may reject such an application.

4.7.1 Is the court required to provide this information only during hearings or also in writing?

This is usually done during hearings but it can also be given in camera by writing.

4.8 May a court propose to the parties and other participants in a proceeding that they are to submit additional evidence and until which phase of the procedure?

The court can ask for clarifications until the parties are in possession of the case, that is, they have their turn to make arguments and submit evidence. Once they lose possession of the case they may have to ask the judge special permission to submit further evidence or arguments.

4.8.1 If a party does not comply with the court’s request for production of evidence, what are the consequences foreseen in Maltese legal system?

The court decides the case on the basis of the evidence submitted to it and which must be included in the records of the case.

4.9 May a court collect evidence on its own initiative in civil cases?

No.

4.10 If during the presentation of evidence new facts that were previously not raised by parties become known, may a court allow additional submission of the evidence? Explain the condition and in which phase of the procedure is this possible?

If the case has not been closed and the judge is deliberating, then should new evidence emerge the parties can file an application for the court to consider hearing the new evidence.

4.11 Is a party charged with the burden of proof, who is not in possession of the evidence, allowed to ask the court to issue an order, addressed to a third person holding that evidence, to make it available?

In civil cases, this may be possible but it is generally difficult if the third party does not oblige. In criminal cases this is possible.

5 Written Evidence

5.1 What is a concept of a document in Maltese legal system?

The term “document” is derived from “docere” and includes – all that which may throw some light on the matter and consequently it includes not only any written document but also any physical object which may show and explain the facts alleged in the proceedings.

Written documents are in turn divided into (a) public documents, (b) semi-public documents and (c) private documents.

(a) public documents

Public documents are those enumerated in Articles 627 and 628. These are:

- (a) the acts of the Government of Malta, signed by the Minister or by the head of the department from which they emanate, or in his absence, by the deputy, assistant, or other officer next in rank, authorized to sign such acts;
- (b) the registers of any department of the Government of Malta;
- (c) all public acts signed by the competent authorities, and contained in the Government Gazette;
- (d) the acts of the Government of Malta printed under the authority of the Government and duly published;
- (e) the acts and registers of the courts of justice and of the ecclesiastical courts, in Malta;
- (f) the certificates issued from the Public Registry Office and the Land Registry;
- (g) the sea-protest made under the authority of the Civil Court, First Hall;
- (h) the documents mentioned in article 68, in article 95(3), in article 227 and, in so far as it applies article 227, in article 274 of the Merchant Shipping Act, as provided in the said provisions.
- (i) acts of any foreign Government, or of any department of a foreign Government, or of foreign courts of justice, or of any foreign establishment, authenticated by the diplomatic or consular representative of the Government of Malta in the country from which they emanate, or by a person serving in a diplomatic, consular or other foreign service of any country which by arrangement with the Government of Malta has undertaken to represent this Government’s interests in that country, or by any other competent authority in the country from which they emanate, shall also be admissible as evidence in the same manner as the documents mentioned in the last preceding article.

(b) Semi-public documents

Semi-public documents are documents which although issued by private persons, have the same probatory force as public documents provided their authenticity is proved. These are found in Article 629 and include the following:

- (a) the acts and registers of any establishment, or public body, authorized or recognized by law or by the Government;
- (b) the parochial acts and registers relative to births, marriages and deaths, and the dispositions made according to law in the presence of a parish priest;
- (c) the acts and registers of notaries public in Malta;

- (d) the books of traders kept according to law, only with regard to any agreement or other transaction of a commercial nature;
- (e) the books of public brokers kept according to law, with regard to anything which may have taken place between contracting parties in commercial matters;
- (f) the documents mentioned in article 134(3), in article 176(2) and in article 190(6) of the Merchant Shipping Act, as provided in the said provisions.

(c) Private documents

All other writings, containing declarations made by one of the parties against itself or confessions of obligations, or agreements or obligations, are private documents. Acts which were meant to constitute a public or semi-public document but which do not have the necessary requisites to constitute such a document (either through incompetence or incapacity of the officer, or through some other defect of formality) will be admitted as private documents provided they have been signed by the party. Private documents include the trade books or a ship's books when these are not kept according to law – but these are only admissible against the party by whom they are kept.

With regards to documents it is important to note that by means of Act IV of 2002, entitled Legal Procedures (Ratification Of Conventions) Act, Malta has ratified the “The Hague Convention of 1965”. This Convention deals with the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and it was signed at The Hague on the 15th November, 1965. The same act also ratified ‘The Hague Convention of 1965’ which deals with the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and the ‘Lugano Convention of 1988’ which deals with the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

5.1.1 Is a video or audio recording considered to be a document within Maltese legal system?

A video or audio recording are not considered as documents in the meaning discussed above. However According to Articles 622A and 622B of Chap. 12 of the Laws of Malta, the court can allow the recording on tape or video of evidence required from a witness who resides outside of Malta.

5.1.2 What kind of electronic documents are recognized in Maltese legal system?

There are no electronic documents recognised as such. For small fast track proceedings such as small claims, they system allows for filing of scanned documents electronically but as such there are no official electronic documents recognised by the Maltese COCP.

5.1.2.1 What is their probative value?

This is not applicable.

5.1.2.2 Is an electronic version of a document considered to be equivalent to a document in Maltese legal system?

No, for court proceedings electronic documents are not recognised.

5.1.3 What kind of electronic signatures are recognized in Maltese legal system?

These are still not recognised as such.

5.1.4 Are there any other objects equivalent to written evidence recognized within Maltese legal system?

No.

5.2 Are there any documents for which a presumption of correctness exists?

Authentic copies of all public documents, acts and registers of public bodies, parochial acts, as well as acts and registers of notaries public are admissible as evidence – just as if they were the originals. They are presumed to be correct. Copies are said to be authentic when they are drawn up in terms of the law by the officer who had received the original act or by the custodian thereof or by the officer legally authorised for that purpose.

Every written document must be authentic. An authentic document is that “whose author is certainly that person who appears to be so from the document itself.” Provided a public document meets its legal requisites no other evidence of its authenticity is required besides that which it bears on the face of it.

The authenticity of a semi-public document depends on its nature. A parochial act, for instance, must have been drawn up by a parish priest. A trade-book must have been kept by the trader in question.

Private documents can only be said to be authentic when the signature or sign it bears is proved to be the true signature or sign of the person to whom it is attributed. In case of a document written or signed by a third party on behalf of another person it must be shown that the writing or signature is that of the signatory and that he had been charged with drawing up or signing the document by the party to whom it is attributed. Article 634 lays down that “the person against whom any paper apparently signed by him is produced, is bound to declare positively whether the writing or signature is his own or not, and in the absence of such declaration, it shall be held to be his own, saving any evidence to the contrary.”

The authenticity of a private document may also be proved by means of a judicial verification. The following means are admitted by law:

- (a) by the person who wrote or signed the document acknowledging his own handwriting;
- (b) by means of witnesses who actually saw the person write or sign the document;
- (c) by means of witnesses who, although they have not seen the person write or sign the document, are acquainted with his handwriting;
- (d) by the comparison of handwritings, or by other circumstances or presumptions;
- (e) by means of experts in handwriting, in cases of writings difficult to verify.

5.2.1 Which are these documents?

As above.

5.2.2 How can such documents be contested as evidence?

This is not applicable.

5.2.3 Can a judgment be rendered on basis of such documents only?

This is not applicable.

5.2.4 What is the weight of private documents as evidence?

If a public document is not expressly required by law than a private document is sufficient.

5.2.5 Are there different categories of private documents in the perspective of evidence?

No.

5.2.6 What if such documents are contested by the other party?

If the documents are contested by the other party, it is up to the judge to determine if they are acceptable. The judge is usually asked to give an interlocutory decree.

5.3 Does the law draw distinction between the evidential (probative) value of public and private documents?

No.

5.4 How is the written evidence taken – does it need to be read at the hearing?

Written evidence is kept in the case's file and the parties have access to the file. There is no need for it to be heard during a formal hearing.

Historically, the concept of having testimony given in writing by means of affidavits was alien to our law. Since the advent of British rule in Malta, trials and court proceedings were conducted 'viva voce'. The 'viva voce' principle together with the principle that the parties (or at least their representatives) are present at the hearing was of paramount importance. The British did not impose a system of common law and of precedence on the islands since Malta already had a rich legal tradition based on the Continental concepts and laws. However the British, with their great sense of justice and equity, made sure that practices present before their arrival which shed doubt on the fairness of the local judicial process were eliminated. Thus the procedural mode present during the time of the Knights whereby the Judge saw the parties at different times and where the trial was not conducted in public and without the presence of both parties was done away with.

Before the reforms brought about by the British, the proceedings began with an exchange of written pleadings between the advocates. Such pleadings were signed by the judge but he never read them before the parties had concluded the exchange of the written pleadings and the cause was sent for judgement. Before the introduction of the 'Judicial Assistants and Evidence by Affidavit Act', the general rule was that testimony in writing was the exception. Under our law the prevailing rule was that witnesses are to be examined in open Court, 'viva voce', in the presence of the judge and of the parties. The rule was such as our law had the concept that oral deposition is a better guarantee of truthfulness as it enables the court to control the behaviour of the witness and consequently it helps the judge to form an opinion as to the credibility or otherwise of a witness.

The institute of affidavit was officially introduced into the Maltese Civil Procedure by means of the 'Judicial Assistants and Evidence By Affidavit Act'.⁵ This was enacted by means of Act XVIII of 1984 and came into force on the 1st January 1985. The Bill which led to this Act was the first bill to be presented by the legislature of the time. As

the title implies the Act in question had two limbs to it but both these had the same central objective. The legislator is introducing the office of Judicial Assistant and is also introducing the possibility for testimony to be given in the written form – affidavits. Thus the introduction of the institute of affidavit within Maltese law can't be taken in a vacuum and must be seen in context of this effort to introduce a number of novel measures to increase the overall efficiency of our legal system. Thus from the outset one can comment that the major consideration of the government was only at face value an effort to enhance the Justice system of our Courts – as in the real truth what was being sought was a brushing up of the administration of the courts so as to make our Courts more efficient. There is nothing intrinsically wrong in trying to make Court procedure more efficient but in taking this approach there was always the risk that undue pressure on the principles of justice are permitted.

Thus the main purpose of these two novel introductions was to increase the efficiency of the Courts of Justice and to try and speed up court proceedings. The 'Objects and Reasons' of the bill presented in Parliament stated that the scope was to speed procedure in court. Here it was specified that when the word 'court' is used what is meant is the courts which have a civil or commercial jurisdiction including any tribunals or boards which do not have a criminal jurisdiction. The main idea behind this act was to provide for a situation where the evidence is compiled without unnecessary delay and this will pave way for the court to analyse the evidence brought forward and eventually pass to give judgement. Another positive aspect of the Act was to avoid people who are obliged by law to give testimony the hassle to have to attend court on a number of occasions. Many of these are people who do not have a direct interest in the case and who helplessly end up in the middle of a dispute which has no direct relevance to them. In such instances the burden of appearing in court on a number of occasions is even greater.

The word 'affidavit' was defined by Article 2 of the Act as: "a written statement of any party or of a person whose evidence is required in any court, confirmed on oath or by solemn declaration". Under the Act, affidavits could be taken before Judicial Assistants or Commissioner for Oaths. The newly created Judicial Assistants were given the power to administer oaths. Thus a person preparing an affidavit would then proceed to take an oath on such affidavit in front of a judicial assistant. The judicial assistants should act under the direction and control of the Court but they were also given the "power to order the attendance of any person for the purpose of the giving of evidence or the making of an affidavit or a declaration on any such matter".

This type of evidence is not read in open court but the parties have access to it and can make counter questions if need be under cross examination.

5.4.1 How can the court obtain written evidence, if parties are unable to do so?

Refer to the above.

5.4.2 Is there an obligation of the parties to produce evidence?

There is no obligation to present any physical evidence unless the parties are called to the witness stand.

5.4.3 Is it necessary for documents to be produced in their original version?
If possible original or true copies should be presented.

6 Witnesses

6.1 Are witnesses obliged by law to testify?
Yes, they are summoned by the parties.

6.2 Are witnesses in proceedings summoned by court or is it up to the parties to assure the presence of witnesses in court?
Witnesses are chosen by the parties who are then summoned by the court.

6.3 Can a witness refuse her role as a witness?
No, unless they are related to a party such as a parent or child.

6.4.4 Does a privilege against self-incrimination exist in Maltese law and what does it mean?
It exists in criminal law whereby the witness is allowed not to answer questions that may be self-incriminating. In civil law this is more blurred as the evidence given by a witness can make him liable to be sued civilly if some interested parties have an interest.

6.4.6 Are there persons who can refuse to give evidence on basis of their personal status in general or can they refuse to give evidence only for certain cases?
Refer to previous answers under questions 3 and 6. Priests are exempted while some professionals are exempted by their code of ethics of special law regulating their profession.

6.4.7 What kind of secrets are recognized in Maltese law and can affect the taking of evidence?
There is no specific law about this. It depends on the special legislation regulating the particular profession or office.

6.4.8 A CEO (or general manager of juridical person) refuses to testify about certain fact, claiming that it represents a company's business secret. Will the court accept such excuse and under what conditions?
No, a CEO is required to testify.

6.4.9 A state official refuses to testify about certain fact, claiming that it represents a state secret. How will the court proceed?
The witness may be heard in camera i.e. the proceedings are not open to the public but open to the parties.

6.4.10 A journalist refuses to testify about his sources, claiming that this is covered by the privilege of the sources. Will the court accept such excuse?
Journalists are allowed not to uncover their sources but they must testify themselves.

6.4.11 A priest refuses to testify about certain facts, claiming that this is covered by the secrecy of confession. Will the court accept such excuse?

Yes, this is normal practice.

6.4.11.1 Are there principles or values that can out-balance this privilege?

No, this is absolute.

6.4.11.2 Can such excuse be contested by parties?

No.

6.4.12 A medical doctor refuses to testify about certain facts regarding his patient. Will the court accept such excuse?

While not as absolute as in the case of priest, in certain cases this is accepted as well. This depends on the particular special legislation which may exempt that profession from revealing certain confidential information obtained in the course of their duty.

6.4.12.2 Can such excuse be contested by parties?

It is up to the judge to decide.

6.4.13 An attorney at law (advocate) refuses to testify about certain facts regarding his client. Will the court accept such excuse?

The lawyer is ethically bound not to reveal his sources.

6.4.13.2 Can such excuse be contested by parties?

No.

6.4.14 Are there any other legal professions that can rely upon same privilege?

Lawyers and legal procurators are bound by this privilege.

6.4.15 Can a witness be forced to take an oath?

Evidence without oath is not evidence. While the oath is normally a Roman Catholic Bible or the Koran, people who are unbelievers are still required to take a different form of oath and tell the truth. Of course if a witness does not tell the truth or tell only half truth the judge can take an action which can include fines or detention.

6.4.16 Can a witness refuse to testify under oath?

No.

6.4.17 What are the consequences of such refusal?

This is like no evidence is given.

6.4.18 Obtaining evidence from witnesses.

Any party intending to produce a witness in any proceedings before any Court may, together with the writ of summons or the statement of defence, file in the registry of such Court an affidavit taken by such witness before a judicial assistant or any other person authorised by law to administer oaths, and a copy of such affidavit is served on

the other party. Should the other party wish to cross-examine such witness, a note to this end is to be filed in Court, and should the Court accede to such request, then this witness is to physically turn up in Court for this cross-examination.

Declarations made in writing in any place before a magistrate or other person, (whether as dying declarations (in articulo mortis) or not, in the presence of or in the absence of the parties, with or without oath, may be brought forward as evidence.

Where any person whose evidence is required in a pending case, is about to leave Malta, or is so infirm or advanced in years that he might die or become unable to give his evidence before the time when such cause will come up for trial, or is unable to attend the trial, the Court appoints a judicial assistant to proceed to such place and at such time, as may be most convenient for the witness to give testimony. The questions put to the witness, together with his answers thereto, are taken down in writing, and the deposition is signed or marked by the witness himself.

When, a Court is satisfied that the evidence of a person residing abroad is indispensable for the determination of any cause pending before it, the Court makes an order to this effect, (it may also stay the proceedings until such evidence is produced before it), and orders the issuing of the letters of request to this end.

6.4.19 Describe judge's powers and duties in the process of questioning.

The judge is bound to ensure that the questions are reasonable and related and that the witness is answering the questions. The judge can stop any question which is not related or force a witness to comply with the questions.

6.4.20 Describe delivering party's powers and duties in the process of questioning.

The party has the duty to ask the correct questions to the witness. It is the party's responsibility to ask the right questions.

6.4.21 Describe opposing party's powers and duties in the process of questioning.

The opposing party as a right to question the witness after the applicant would have rested the case (cross examination) and to bring in new witnesses in its own right.

6.4.22 Can/must a witness produce written or oral testimony, or both?

Both, refer to answers in Section 3 of this questionnaire.

6.4.23 Are there any limits to the facts they can testify about? Explain those limits.

No, provided that the facts are relevant.

6.4.24 What is the penalty, if any, for the perjury?

Imprisonment from 7 to 24 months.

6.4.25 Are there any rules for evaluating evidence gathered through parties' testimony?

As explained in previous sections.

6.5 Is the cross examination in contradiction with the usual procedural policy of Maltese country?

No, as it has already been explained, cross examination is the rule and parties look forward to be able to cross exam the witnesses presented by the other parties.

7 Taking of Evidence

7.1 Is there a mandatory sequence in which evidence has to be taken?

No.

7.2 Do parties have to bring the evidence in court, or are the witnesses and experts (or other objects) invited or requested by the court?

Parties can bring experts to court at their expense if they think it can contribute to their cause. The court may still opt to appoint its experts.

The term ‘expert evidence’ is a term used to identify the evidence given by technical and highly skilled people who are experts in their profession or sphere of expertise. These are usually called upon to establish a fact which needs the examination and explanation of a trained and skilled eye. The opinion of experts needs to be sought when the subject matter is one in which competency to form an opinion is attained only by specialisation or special study or experience. Such an informed opinion can only be given by an expert in the appropriate field and such expertise must be to the satisfaction of the court. However expert witnesses may be appointed by either of the parties or by the court itself depending on the circumstances of the fact or facts in issue. A simple example of an expert witness is a civil architect who is appointed to give an expert opinion on the structural formation of a building. Such an opinion can have strength in front of a court if given by a person who has studied architecture.

Whether a person is deemed to be an expert depends on whether the court is convinced of the qualification of such a person. Thus the court has discretion on whether to accept a particular qualification accredited to a particular witness as sufficient to make that person an expert in a particular field or area. Article 563A (1) states that: “Where a person is called as a witness, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence only if, in the opinion of the court, he is suitably qualified in the relevant matter.” In sub-article (2) of the same article the law makes it clear that when a witness is not an expert he may not give opinions on any relevant matter unless he is "conveying relevant facts personally perceived by him”. Obviously such opinion will not have the strength of an expert opinion and will be deemed only as facts as personally perceived by the individual witness in question. The production of such expert witnesses does not preclude the court from appointing referees and does not preclude the court's discretion to accept or not the report drawn up by the referees.

7.3 Shall the court determine a deadline when allowing taking of evidence? Shall the order contain instructions?

This may happen but often the parties do not have any time limit unless that have been instructed by the presiding judge to abide with a specific time frame.

7.3.2 What are the consequences regarding the admissibility of evidence if the party does not follow instructions or misses the deadline?

This is rarely applicable. The parties can ask for an extension and the evidence would not be admissible if the judge refuses.

7.3.3 Is the court bound by its decision on evidence, or can it be changed?

It can be changed.

7.3.4 Under what condition can evidence be secured before or during the main hearing?

This depends on the parties and the judge. Evidence can either be given in open court or in front of a judicial assistant nominated by court. The parties can agree that some evidence should be given in open court. Of course the judge's role here is to guide the proceedings and take the necessary decisions.

7.4 Rejection of an application to obtain evidence

7.4.1 What reasons does the national law state for rejection of an application to obtain evidence, if any?

Applications to obtain evidence are not rejected unless it is clear that the evidence is irrelevant.

7.4.2 Shall the court justify refusal?

This rarely happens but if it does happen the court will provide reasons as to the inadmissibility of the evidence.

7.4.3 Shall the court reject an application, if the request was not submitted in time?

It depends what the application is about. For evidence there is usually no time limit unless the parties have declared that they have no more evidence to present. Of course this means that there is the danger that proceedings take a long time, that is, years to conclude. A well-disciplined judge can control this.

7.4.4 What is the last time to submit an application?

As above.

7.4.5 To which extent are the parties obliged to specify the evidence?

The parties need provide the name of the witnesses.

7.4.6 What is the general status of facts established in other proceedings?

This is determined from the court's proceedings. It is up to the judge to accept evidence from other proceedings or requires some of this evidence to be heard again.

7.4.7 If the facts were established in other proceedings as having legal force, can/must the court reject the application to take evidence relating to these facts?

No.

7.5 The Hearing

7.5.1 Is the evidence taken at the hearing? Does the principle of directness apply?
Evidence is either taken at a hearing or by means of an affidavit as explained earlier.

7.5.2 State the person in Maltese national system who can take the evidence
If it is not taken in open court it is taken by a judicial assistant.

7.5.3 Can the evidence be taken before another person?
As above.

7.5.4 What are the conditions to take evidence before another person?
See the info re affidavit.

7.5.5 Are there any circumstances where the evidence can be taken after the hearing has already ended?
In that case another hearing would be needed and the timing is determined by the court. In practice this could be months.

7.5.6 Are there any rules in national law on the order of taking different types of evidence?
No.

7.5.7 Presence and participation of the parties

7.5.7.1 Do the parties have a right to be present when the evidence is being taken?
They do have a right.

7.5.7.2 Do they have an obligation to be present?
There is no obligation. It is up to them if they do not attend.

7.5.8 Does Maltese legal system distinguish between the direct and indirect type of evidence?
Yes, between primary and secondary evidence such as hearsay.

7.5.8.1 Does the recorded testimony of a witness or an expert represent a direct or indirect type of evidence?
As above it depends on its contents, for example whether it is a hearsay or not.

7.5.8.2 Does the testimony of a witness or an expert by video-link (or similar allowed live communication by IT, telephone calls, video calls, etc.) represent a direct or indirect type of evidence?
As above it depends on its contents, for example whether it is a hearsay or not.

7.5.8.3 What sort of technology can be used in Maltese legal system to collect live testimony at the distance? Would it be possible to do it abroad without the cooperation of a local court at the place where the witness is?
Video conferencing is now possible as explained before.

7.6 Witnesses

7.6.1 Shall the court summon the witness or shall the parties bring evidence in the court?

It's a mixture of both. The parties can order the court to summon witnesses.

7.6.2 What procedure shall be followed for summons?

A writ has to be filed in court asking for witness to be notified. Refer to section 3 of this questionnaire.

7.6.3 Is it necessary for the parties to adduce the written statement before the testimony?

No.

7.6.4 Shall the witness swear an oath?

A witness must be under oath administered either by a judge or a judicial assistant.

7.6.6 What's an approach towards preparation of witnesses before the hearing – can/must they be prepared by the councils or the parties? To what extent?

There are no rules on about these. Unofficially witnesses may be prepared but not during the actual giving of evidence.

7.7 Expert witnesses

The term 'expert evidence' is a term used to identify the evidence given by technical and highly skilled people which are experts in their profession or sphere of expertise. These are usually called upon to establish a fact which needs the examination and explanation of a trained and skilled eye. The opinion of experts needs to be sought when the subject matter is one in which competency to form an opinion is attained only by specialisation or special study or experience. Such an informed opinion can only be given by an expert in the appropriate field and such expertise must be to the satisfaction of the court. However expert witnesses may be appointed by either of the parties or by the court itself depending on the circumstances of the fact or facts in issue. A simple example of an expert witness is a civil architect who is appointed to give an expert opinion on the structural formation of a building. Such an opinion can have strength in front of a court if given by a person who has studied architecture.

Whether a person is deemed to be an expert depends on whether the court is convinced of the qualification of such a person. Thus the court has discretion on whether to accept a particular qualification accredited to a particular witness as sufficient to make that person an expert in a particular field or area. Article 563A (1) states that: "Where a person is called as a witness, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence only if, in the opinion of the court, he is suitably qualified in the relevant matter."

In sub-article (2) of the same article the law makes it clear that when a witness is not an expert he may not give opinions on any relevant matter unless he is "conveying relevant facts personally perceived by him". Obviously such opinion will not have the strength of an expert opinion and will be deemed only as facts as personally perceived by the individual witness in question. The production of such expert witnesses does not

preclude the court from appointing referees and does not preclude the court's discretion to accept or not the report drawn up by the referees.

7.7.1 Shall the questions for an expert be given by a judge or by the parties?
Both an ask questions though it is generally the parties.

7.7.2 Is the same procedure being followed when experts or when ordinary witnesses are questioned?
There is no law, generally it is the same procedure.

7.7.3 Describe judge's powers and duties in the process of obtaining evidence from expert.
Refer to the relevant previous answers.

7.7.4 Describe delivering party's powers and duties in the process of obtaining evidence from expert.
Refer to the relevant previous answers.

7.7.5 Describe opposing party's powers and duties in the process of obtaining evidence from expert.
Refer to the relevant previous answers.

7.7.6 Can/must an expert produce written or oral opinion, or both?
Both but it is general an oral opinion. Again the form depends on the party's choice unless directed by the Court.

7.7.7 Are experts selected from a list of registered experts, which is kept by the court or some other institution? Which institution?
No, there is no list through the court can appoint experts at will.

7.7.8 Are there different rules governing the taking of evidence from an expert appointed by the court and an expert appointed by the parties?
No.

7.7.9 Can the parties present private expert report as evidence?
Yes.

7.7.10 Who pays for the expert's expenses? When?
Normally the parties pay during the proceedings.

7.7.11 Do parties have a right to reject one and propose another expert?
Yes, though if it is a Court appointed expert the final say rests with the court.

7.7.12 Is the judge bound by the content of written evidence in general?
No.

7.7.13 How about by the written expert opinions?

No.

8 Costs and Language

8.1 Costs

8.1.1 Which expenses are covered under the term “legal expenses” according to Maltese legal system?

There is no such term. Costs are generally covered by the parties according to what the judge decides. Costs are court and legal expenses related to litigation.

8.1.2 Which party has to pay for expenses resulting from taking of evidence?

This depends on who wins and loose the case. Costs are shared depending on the ration of the legal points won and lost.

8.1.3 Shall the payment for these expenses be made in advance, before the evidence is being taken? Regarding what types of evidence? What are the rules regarding payment of taking evidence ex officio?

It depends. Payment might be made during the proceedings but it would only be determined in the final judgment as to who will carry out the burden. As regards payment of taking evidence ex officio these are normally shared by the parties and then the final burden is determined by the judgment.

8.1.4 What does the compensation for appearance of a witness before a court include?

There are no rules about this. If the witness is abroad then evidence is taken either when the person is present on the island or through video conferencing. Witnesses are not reimbursed.

8.1.5 How are specific amounts of the compensation specified?

This is not applicable.

8.1.6 Which costs, if any, are to be paid by the requesting court, if an expert is appointed in the proceedings?

The professional fees.

8.1.7 Which costs, if any, are to be paid by the requesting court, if an interpreter is appointed in the proceedings?

The professional fees.

8.1.8 Are there any circumstances where the procedural expenses must be paid by the requesting court due to special procedure or technology in accordance with provisions of Regulation 1206/2001?

There are no rules.

8.1.9 Would costs have to be paid in advance, or reimbursed later?

There are no rules, normally they are reimbursed later.

8.2 Language and Translation

8.2.1 Do the courts have to use professional accredited interpreters, or do they rely on the parties or their counsel?

There are no recognised professional accredited interpreters.

8.2.2 Do all the documents used in the proceedings have to be translated into Maltese official language by a sworn interpreter?

There are no sworn translators or interpreters though it is normal to get a certified translation. A certified translation is only used if it to be used by a foreign court or coming from a foreign court. The translation is certified through the Ministry for Foreign Affairs.

8.2.3 Is an interpreter always appointed when a witness is being questioned? What if the witness renounced her right to interpretation?

A witness may ask for an interpreter if needed. While all proceedings are in Maltese, it may be possible to ask the court to allow the use of English in certain circumstances.

8.2.4 Who shall cover costs of the interpretation?

The parties.

8.2.5 Is an interpreter appointed when the requested court is taking evidence directly using VCF?

An interpreter is appointed whenever is needed.

9 Unlawful Evidence

9.1 Is there, in Maltese legal system of civil and commercial litigation, a distinction between “illegally obtained evidence” and “illegal evidence”?

There is no such distinction in Maltese civil procedure. However both civil actions for damages and criminal actions can be taken for illegal acts.

9.2 If there is no legal rule, is there normative solution establishing the illegality of the mean of obtaining evidence?

No.

9.3 If there is a legal concept or definition of “illegal evidence” state the rule and explain it referring:

There is no such legal concept.

9.4 If there is no such legal rule, is there any normative solution establishing the illegality of evidence?

No.

10 Table of Authorities

The Maltese body is the Office of the Attorney General (In Maltese – Uffiċċju tal-Avukat Ġenerali), The Palace, Triq ir-Republika, Valletta, ag@gov.mt, 00 356 2122 5401.

Part II – Synoptical Presentation

1 Synoptic Table

1.3 Functional Comparison

Legal regulation Means of taking evidence	National law	Bilateral treaties	Multilateral treaties	Regulation 1206/2001
Hearing of witnesses by mutual legal assistance (legal aid)	A normal sitting hearing evidence	Nil	Nil	Requests as sent to the Attorney General
Hearing of witnesses by video-conferencing with direct asking of questions	A sitting with video conference facilities	Nil	Nil	A sitting with video conference facilities through the AG contacts
Direct hearing of witnesses by requesting court in requested country	A sitting with video conference facilities	nil	Nil	A sitting with video conference facilities through the AG contacts

Part III – Case Based Part

1. Requesting court asks Maltese court to take evidence by use of video-conference.

1.1 What if the requesting court is from a non-Member State for which no bilateral or multilateral treaty can be applied?

If there is no agreement then this cannot happen.

1.2 What if the requesting court is from Denmark?

International law such as the Hague Convention can be applied.

2. The requested court is taking evidence by hearing of witnesses by use of VCF with the requesting court. The requesting court indicated that they want to ask questions on their own. As in some countries the parties cannot directly address witnesses, can the judge in the requesting country allow the parties to directly address the witnesses in the requested country? Answer this from the perspective of requested country!

The parties can ask questions through their lawyers when it is their turn for cross-examination.

3. How would a judge in Maltese country establish identity of a person who is refusing to show her face on a basis of religious (or similar) customs?

There are no rules and this issue has never arisen. However it is important for the person to be identified and the judge can make sure that the identity of the witness is ascertained.

4. What are the powers/duties of requesting judge to intervene during the hearing by VCF in cases of violation of mandatory rules, public policy/ordre public or discipline in courtroom?

There are no specific rules, but the judge has a right to intervene as in a normal case and can even stop the VCF.

5. What are the powers/duties of requested judge to intervene during the hearing by VCF in cases of violation of mandatory rules, public policy/ordre public or discipline in courtroom?

There are no specific rules, but the judge has a right to intervene as in a normal case and can even stop the VCF.

6. The witness mentions that she has some important documents or objects while testifying. Do the parties have to request such documents (or objects) to be included into evidence or can the judge do it on its own motion or are there any preclusions applicable to such case?

It can be that both the parties or the judge requests them once they were mentioned depending on the circumstances. However normally it is the parties who ask for such requests.

7. A person asks the court to secure evidence for a contemplated judicial proceeding. Is this possible?

No.

7.2 Would it be different if the request comes from a Non-Member State?

This is not possible under Maltese law.

8. A document is sent, but the party is already precluded to do so. However, the judge is now acquainted with it and it is possibly creating a prejudice. What are the consequences in Maltese legal system?

The judge will decide whether such documents remains or not in the case records.

9. Person A calls person B who puts her on speaker phone in presence of person C. Will the testimony of person C be admissible as evidence? Would there be a difference if person C is a legal representative of person B?

This is hearsay evidence as discussed earlier.

9.1 If person B recorded the conversation, would such recording be admissible? Would there be a difference if person C recorded the conversation?

A recording is a recording and does not make a difference who recorded it.

9.2 What would be the consequences of person A's consent to (a) speaker phone mode in presence of person C; (b) recording by person B; or (c) recording by person C?

As above.

10. Person A attaches a stealth recording device or software to person B's cell phone. Would the recordings be admissible as evidence?

This is illegal and breaches data protection. The security services can do it if authorised by law, i.e. the correct procedure is followed.

10.1 Would it make a change if person B's cell phone is registered as belonging to person A?

It depends in whether B knows about it.

10.2 Would it make a change if person B's cell phone is owned by B's employer A? Would it be different if person A explicitly restricted B's use of cell phone to professional use?

As above.

11. Person A steals person B a letter from person X. Can person A use such letter as evidence?

11.1 Would there be a difference if person A just makes a copy of the letter?

11.2 Would there be a difference if person A finds such letter by accident?

11.3 Would there be a difference if person A finds such letter in a garbage bin?

No.

12. What are the consequences of accidental e-mail forwarding as to the admissibility of such correspondence as evidence? Would there be a difference if the forwarded e-mail contained a disclaimer interdicting its use by persons other than its proper addressee.

There are no rules about this.

12.1 Is the addressee of Maltese correspondence able to use it as evidence if it contains a disclaimer banning its use for such purpose?

As above.

13. Person A took a polygraph testing for the purpose of police investigation. Are the results of such testing admissible in a civil case if presented by person A? What if the opposite party in the civil procedure suggests the court to obtain such results from the police or a criminal case?

Criminal evidence is different from civil evidence. A civil trial is different from a criminal trial and there is no criss-cross of evidence from one trial to another.

13.1 Would a self-ordered polygraph test by certified commercial provider be admitted as evidence? Can such certified commercial provider later be summoned to testify as a witness in a civil case about the test?

As above.

13.2 Company A performed routine alcohol test on their employees. Would results be admissible as evidence? Would it be different if performed by an authority for health and safety? Would it be different if performed by third outsourced impartial certified person (e.g. medical personal)? Would it be different if it was a polygraph testing?

If such a routine test is legal depending on the contractual engagements then it is possible and can be used as evidence in any subsequent action.

14. Would recordings of stealth CCTV at the workplace be admissible as evidence? Would it be different if it recorded video and audio? Would it be different if it wasn't stealth?

Yes, admissible if it is installed legally.

14.1 Would the rightful owner of legal CCTV recording be obliged to make it available at the court's request in civil or commercial cases? Would the court be able even to ask for it?

Yes, the court can ask for it.

15. To what extent the personal information collected from social networks can be used as evidence?

There are no rules on this.

16. Are the DNA tests coercively enforceable for family cases within Maltese legal system? What about in other civil and commercial cases?

DNA tests can be used as evidence. The Court may order DNA tests to be carried out.

17. The requested court obtains evidence from a witness by coercive measures not allowed in requesting country. Would evidence be admissible (answer from the perspective of requesting country)? What if the requesting country asks for coercive measures to be applied against a witness that are not allowed in the requested country (answer from the perspective of requested country)?

Procedure should follow the law of the forum. Nevertheless if the coercive measures are not allowed in the requesting state, then it is possible for such evidence not to be included in the records of the case. The requested country should be bound by its procedures.

18. A court in Member State A conducts criminal proceedings. The injured party claims damages on which the court decides within an adhesive procedure. In connection with the amount of property damage it is necessary to examine a witness in a Member State B, where the injured party was employed prior to the occurrence of the damaging event. Does the concept of adhesive procedure exist in Maltese legal system? Can the Regulation 1206/2001 be applied concerning the taking of this evidence? Answer from the perspective of Member State B!

No, it does not exist.

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