



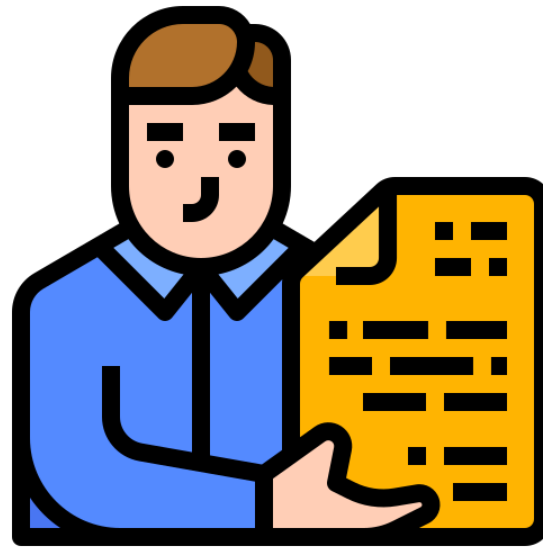
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## Lecture 3

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# The Process of Incorporation and the Distinct Legal Personality of commercial partnerships

# — Company Registration



# Formation formalities

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In the case of businesses operating in **highly specialized sectors**, the need for expert professional advice is essential.

Some **highly specialized sectors** are further subject to tight and detailed regulation, and a license to operate in these sectors will not be granted unless certain conditions are satisfied.

The Registry will also **require KYC documents**



# Beneficial ownership in commercial partnerships

Every company shall obtain and at all times hold adequate, accurate and up-to-date information in respect of its beneficial owners.

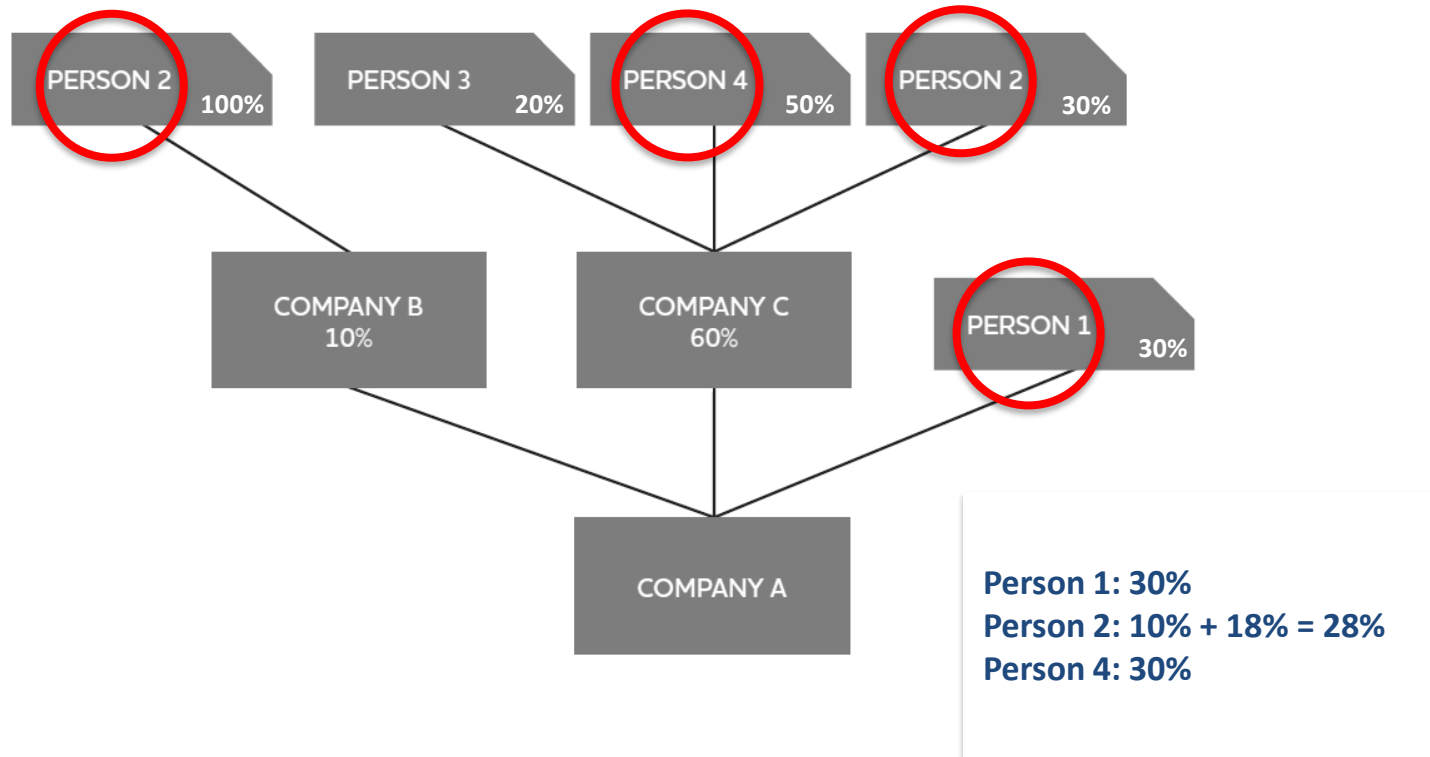
A **beneficial owner** is any natural person or persons who ultimately own or control the commercial partnership/company, or the natural person or persons on whose behalf a transaction or activity is being conducted (this could also be a body corporate or a body of persons) through direct or indirect ownership of more than 25% of the shares or more than 25% of the voting rights or ownership interests in that body corporate or body of persons, including through bearer share holdings, or through control via other means, other than a company that is listed on a regulated market which is subject to disclosure requirements consistent with EU law or equivalent international standards which ensure adequate transparency of ownership information.

**After having exhausted all possible means and provided there are no grounds of suspicion, no beneficial owner has been identified**, subject persons shall consider the natural person or persons who hold the position of senior managing official or officials to be the beneficial owners, and shall keep a record of the actions taken to identify the beneficial owner.

# BO forms submission

Name of form	Timeframe
BO1	To be submitted with company incorporation
BO2	To be submitted within 14 days from the change being reflected in the internal register of the company – in practice, with the filings of other corporate forms, e.g. share transfers
BO3	This should have been submitted by all companies in the first year
BO – Annual Confirmation	Upon each anniversary from its date of registration
BO – Change in SMO	Within 14 days after the date on which the change is recorded with the company
BO – Change in Details of BO/SMO	In the eventuality of such changes occurring

# BO examples – Example 1

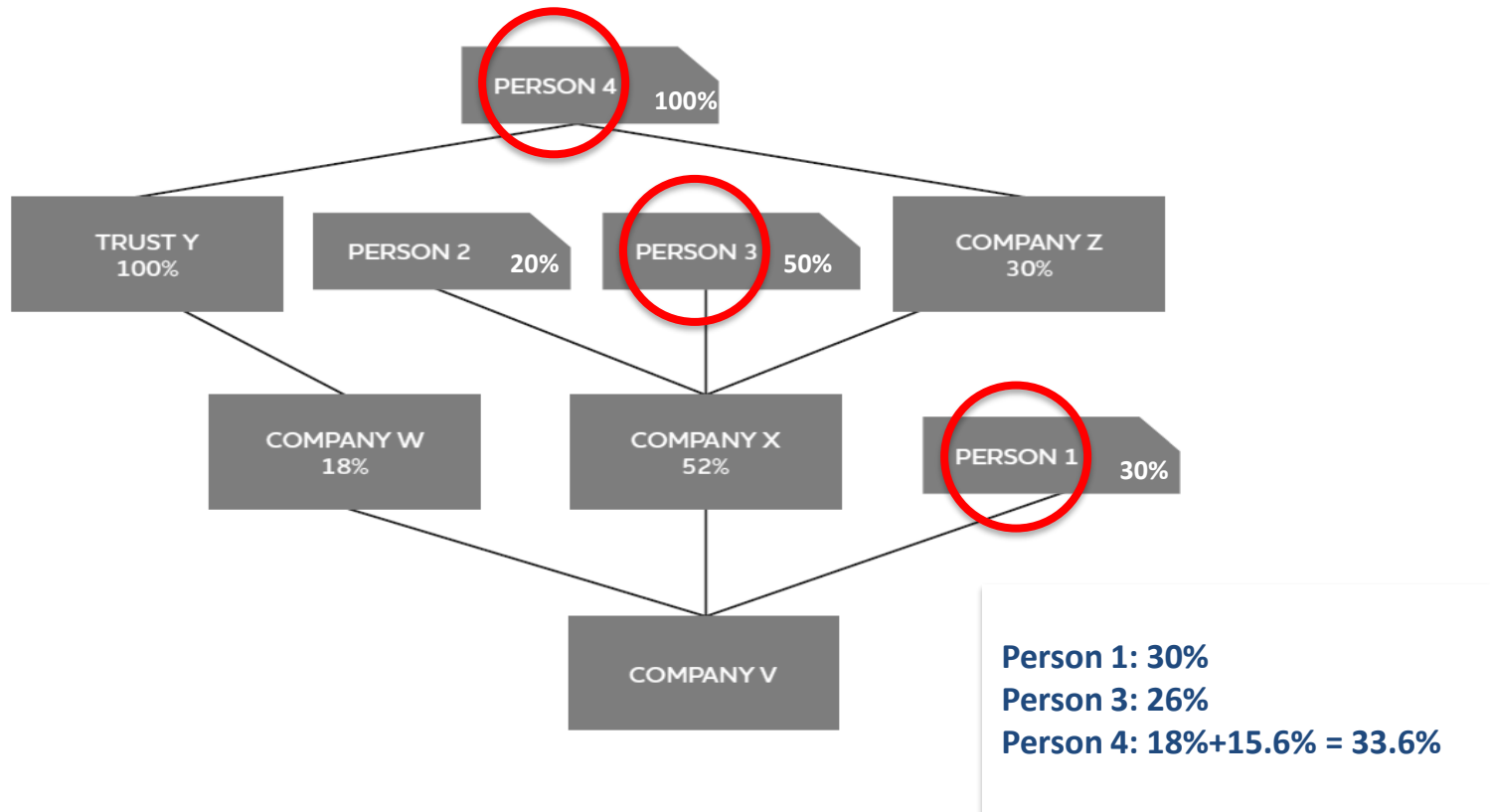


# BO examples – Example 1

**Key take away:** It is important to establish and figure out the customer's entire corporate structure to be in a position to understand whether an individual features within an ownership structure through more than 1 entity. In such cases, all holdings of that same individual are to be assessed since, through the different holdings within the structure he may hold a sufficient % of shareholding that would make him a BO.



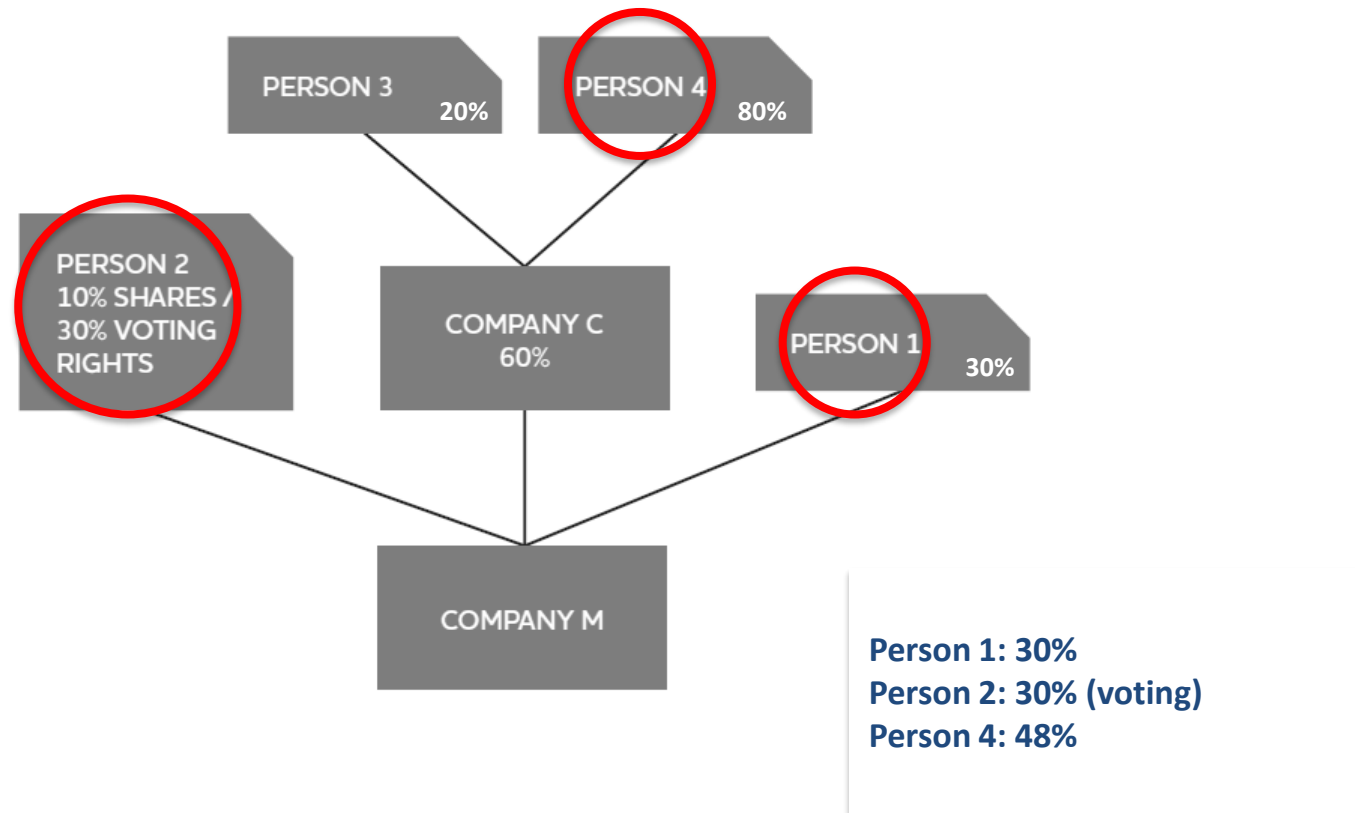
# BO examples – Example 2



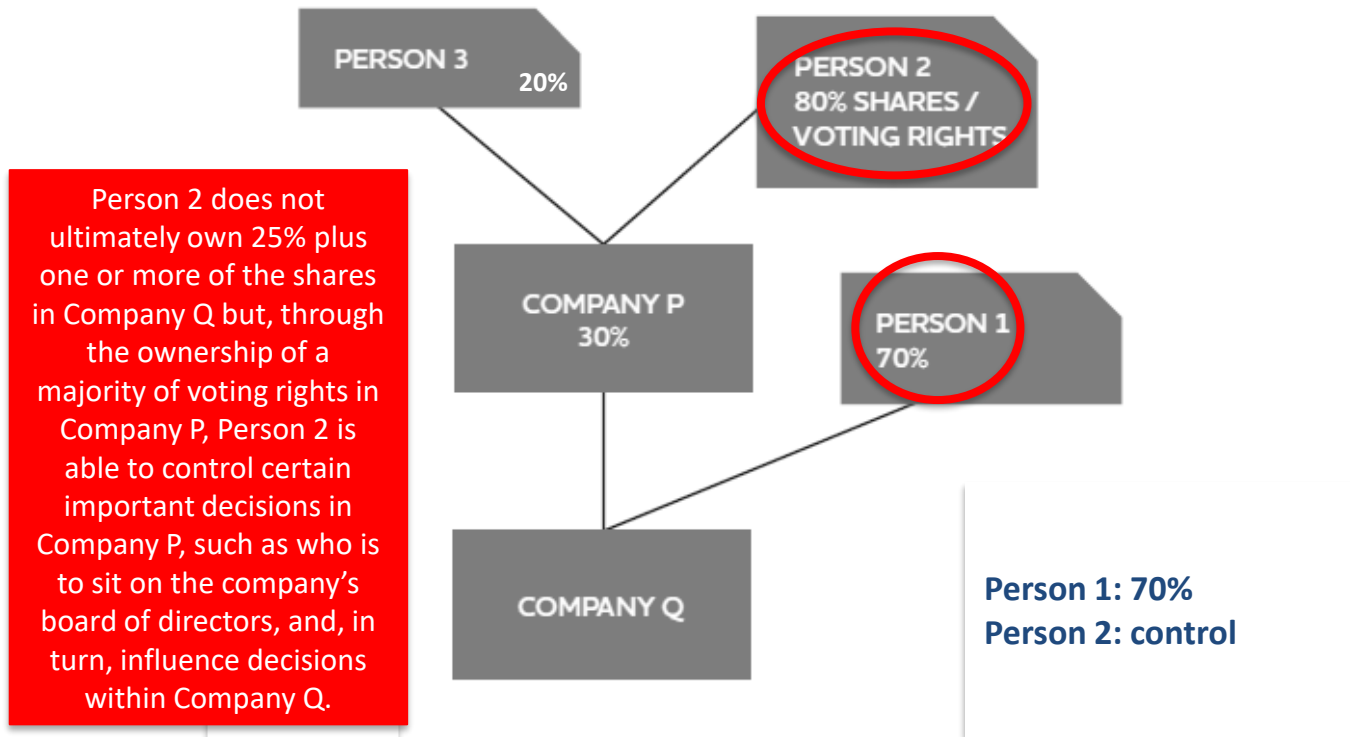
# BO examples – Example 2

**Key take away:** Whenever the shares of a body corporate (the customer) are held in trust, and that trust is administered by a corporate trustee, subject persons are not expected to identify and verify the BO(s) of that corporate trustee. The requirement is to identify and verify the identity of the BO of the customer's entity, i.e. the body corporate, and not the trustee administering the trust which holds the shares in that body corporate.

# BO examples – Example 3



# BO examples – Example 4

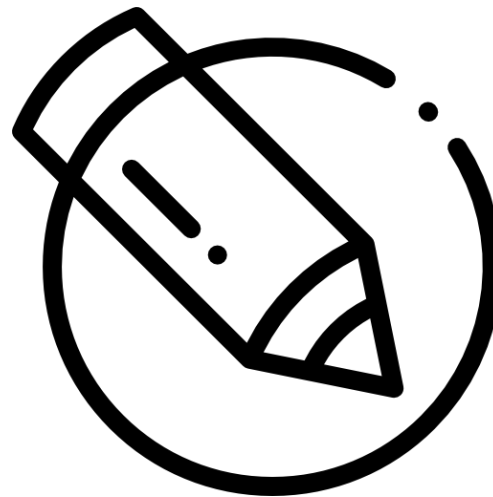


# Reservation of the company name

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It is highly recommended that a practitioner, when entrusted with the formation of a company, reserves the proposed name.

However, the Registrar, in certain instance, will **not** reserve the name.



# Licensing of companies

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Companies which are to operate in particular sectors will also need to apply for and be **granted a license or authorization under the applicable laws and regulations.**

**However, this is not a prerequisite to the formation of the company.**



# Registration fees and online registration

**Fees** are usually paid to the MBR or MFSA – usually with the delivery of the M&As



**Online registration** also became possible as from 2004, however, it has not been used as much as had been anticipated.

# Effects of registration

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Registration is official once the Registrar issues a **Certificate of Registration**. At this point, the company comes into existence and is authorized to commence business.

Once registration is effected, the company will have a legal personality **distinct** from that of its member or members. This will subsist until the name of the company is struck off the register.





# — Company Incorporation



# Incorporation

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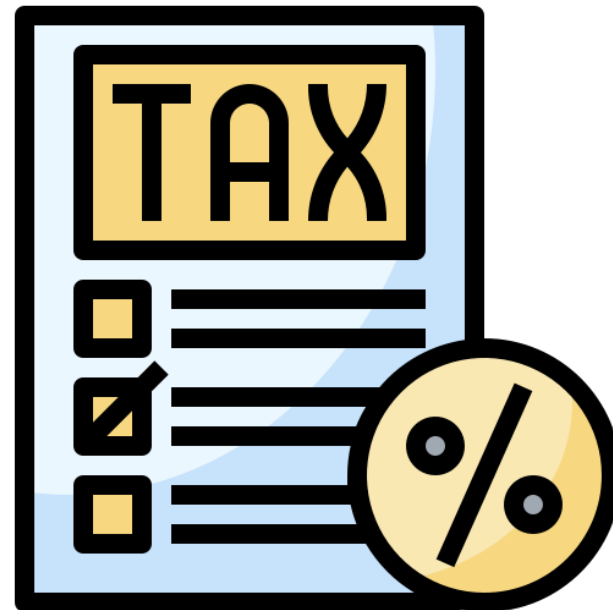
The term incorporation means that an entity has been created in its own right and is thus known as a “corporation”, and is therefore separated in law from its owners.



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Upon inception, a company must pay corporate tax. It must file its own tax returns and must account for tax on a basis that is **separate** from that of its members.

If a company carries on an economic activity, it will be liable to collect and pay VAT to the state.



# — Distinct Legal Personality



# Article 4 of the Companies Act

*“A commercial partnership has a legal personality distinct from that of its member or members, and such legal personality shall continue until the name of the commercial partnership is struck off the register, whereupon the commercial partnership shall cease to exist.”*

# Personality endowed by statute law

The most common form of juridical person which is given juridical personality **upon registration is the limited liability company (whether private or public).**

# Juridical personality upon registration

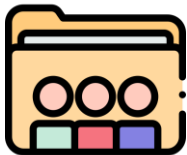
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A company can hold property



A company can guarantee its obligations by hypothecating or pledging its property

It can contract and commit delicts and quasi-delicts



A company may hold shares in another company

# The will of the juridical person

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The will of the juridical person becomes relevant in determining:

- (i) Whether a company has entering into any contract capable of creating or transferring **real rights** over its property;
- (ii) Whether a company has entered into any contract creating **personal rights** over its property;
- (iii) Whether a company is in the control or possession of some particular property; and
- (iv) Whether a company has carried out some other act which is ascribed juridical effect by law



# Assets and liabilities

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A juridical person is **capable of acquiring assets and undertaking liabilities**, and such assets and liabilities will be the company's and not the members.

# Anthony Bugeja vs Carmelo Agius et. (1991)

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## Facts:

Court of Appeal declared that a civil partnership or association is, under Maltese law, a subject of law, capable of acquiring rights and undertaking obligations.

## Decision:

The Court stated that the responsibility of the constituent members for the acts of the juridical person is, as a rule, unlimited.

*The statement made by the Court appears to be inconsistent with fundamental attributes of juridical personality and is too far-reaching in its potential effect to have been made without thorough analysis of the issue or at least reference to doctrine or decided cases.*

# Consequences of Distinct Personality

1. The members should **not** be responsible for the obligations of the partnership



2. The partnership has its own assets and liabilities distinct from the partners



3. Set-off may not be pleaded



4. The partners/members appear in a representative capacity



5. The death of a partner brings about a number of situations



# Consequences of Distinct Personality

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6. Bankruptcy of an individual partner does not necessarily cause the bankruptcy of the partnership



7. A partner who has no part in the management cannot dispose of assets nor bind the partnership in favour of third parties



6. A partnership and its partners can be creditors and debtors of each other



7. During the existence of the partnership, the creditors of the partner have no rights over the assets of the partnership



# Consequences of Distinct Personality

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10. The separate creditors of the partners have no ranking on the estate of the partnership



11. The juridical person may enter into contractual relations with third parties in its own



12. The juridical person may sue and be sued in its own name



# Emanuel Dalli et vs Data Systems Company Limited (First Hall, Civil Court – 2002)



## Facts:

The plaintiffs leased premises to the defendant company under an agreement that expressly prohibited sub-letting. The plaintiffs claimed that the lease agreement had been breached as the premises had been sub-let.

The plaintiffs argued that during the course of the tenancy a change in shareholding of the company had taken place and that the premises were being managed by the person who had bought the shares in the company.

The defendant company pleaded that it continued to be the tenant despite the change in its shareholding and management.

# Emanuel Dalli et vs Data Systems Company Limited (First Hall, Civil Court – 2002)



## Decision:

The Court found that the business continued to be operated by the company. The change in shareholding and management made no difference. The tenant remained the same. No sub-letting had therefore been effected.

(In lease agreements containing a prohibition of sub-letting, the lessor would be well-advised to insist on the inclusion of a clause providing that any transfer of shares within the tenant company is to be considered as a sub-letting).

# Victor Balzan noe vs Kevin Sammut et. (First Hall, Civil Court – 2003)



## **Facts:**

The plaintiff lessor alleged that the defendant lessees had, in violation of an express prohibition of sub-letting and assignment in the lease agreement, sub-let the premises and/or assigned the lease to a third party (which was a company belonging to the defendants).

## **Decision:**

The Civil Court found that there was no evidence of sub-letting or assignment to this company. But the Court did not stop there.

It however went on to note that there is no sub-letting when a tenant transfers the lease to a company that belongs to him as long as his personal interest continues in the business and the premises wherefrom the business is carried out and such person remains in control of the business.



# Luisa Pedroni Blasina vs Sara Tea Blasina (First Hall, Civil Court – 2015)



## Facts:

The plaintiff had formed a company jointly with her husband. The company had then purchased property in Marsaxlokk.

Following her husband's death she filed proceedings, in her own name, against the defendant for eviction from the property.

The defendant pleaded that the plaintiff was not the owner of the property and therefore had no *locus standi* to file the proceedings.

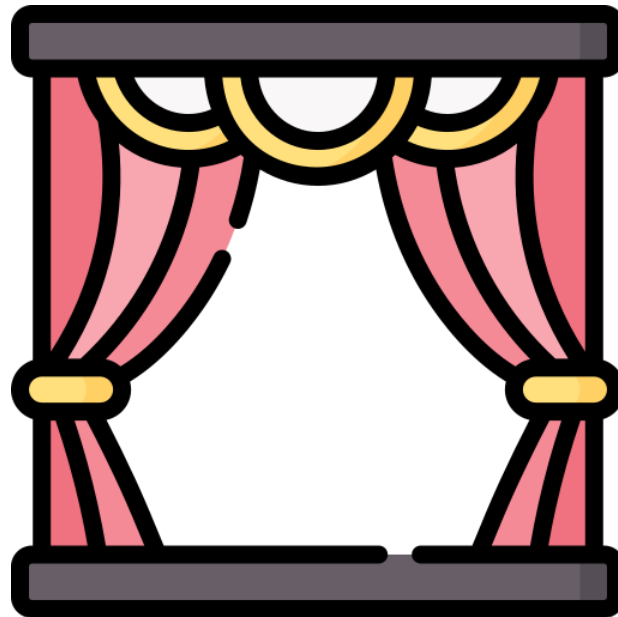
# Luisa Pedroni Blasina vs Sara Tea Blasina (First Hall, Civil Court – 2015)



## **Decision:**

The Court stated that there was a clear distinction between the company and its shareholder, even if the shareholder held the majority of shares. The Court held that the plaintiff did not have the required direct and personal interest to demand eviction.

# The Lifting of the Corporate Veil



# Lifting of the Corporate Veil

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Situations may arise whereby the separate legal status of a company may be disregarded. This is referred to as the 'lifting of the corporate veil'.

This refers to that process, by which the courts and the legislature introduce inroads into the doctrine of separate juridical personality, either by looking beyond the principle, setting it aside or ignoring it completely.

Such inroads may be **statutory** or **judicial**.



Company



VEIL



Shareholders

# Statutory inroads

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1. Where the number of members in a company falls below **2**
2. Fraudulent and wrongful trading
3. Group of Companies
4. Other forms including:
  - i. Premature trading;
  - ii. Misstatements in prospectus;
  - iii. Unlawful distributions; and
  - iv. The restriction on the reuse of Company names

# Judicial inroads

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1. Agency
2. Fraud or Improper Conduct
3. Facades concealing the True Facts
4. Single Economic Unit
5. Interests of Justice

# Fraud or Improper Conduct

## Enriquez et. vs Dr Farrugia et. (1995)



### **Facts:**

The plaintiffs were the tenants of a house, and Dr. Farrugia wanted to buy the house from the owners, in order to build a block of apartments.

Dr. Farrugia managed to convince the tenants to vacate the premises by promising to give them one of the apartments. On the deed of sale, Dr. Farrugia did not appear in his own name, but on behalf of the second defendant - a company, which was owned by Dr. Farrugia, his wife and children. When the apartments were completed, the plaintiffs never received the apartment they were promised.

Dr. Farrugia argued that he could not perform his obligation as the apartments were not owned by him but by the company.

# Fraud or Improper Conduct

## Enriquez et. vs Dr Farrugia et. (1995)



### Decision:

However, the Court stated that although the defendant and the company which he had set up were two separate legal personalities; the corporate veil had to be lifted when bad faith was evident.

Such bad faith was evident as the company was the true beneficiary and the '*lunga manus u strument privat*' of the defendant.



# Conclusion

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The statutory inroads to the principle of separate juridical personality are generally clear and unambiguous. The same cannot be said of the judicial inroads.





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