INTRODUCTION TO CYPRUS LAW

Andreas Neocleous & Co

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Glafcos Clerides

President, Republic of Cyprus

I write this short foreword in my capacity as a lawyer.

Until 1960, the legal system in Cyprus was closely connected with the legal system of the United Kingdom. Judges, lawyers, and others engaged in the practice of the law were thus provided with an abundance of legal material.

After 1960, the legal system of Cyprus underwent significant new developments natural in every independent state. Some of the aspects were expounded in treatises by Cypriot lawyers, but the small local market for legal texts and the absence of a law faculty in the university discouraged production of a major general legal work to guide practitioners and students of Cypriot law.

It is, therefore, with real pleasure that, as a former legal practitioner myself, I have accepted the invitation to write a foreword to *Introduction to Cyprus Law*.

The book covers almost every area of the law in Cyprus, some of which have never been explored in print before, and I welcome its publication.

I have no doubt that the book will be a most useful companion for all advocates and legal consultants practising in Cyprus, as well as for those who administer our public services — indeed for anyone who is concerned with the application of the law in this country. It also will be a very valuable tool for foreign lawyers, bankers, businessmen, and other professionals who require some understanding of the legal framework of Cyprus, as our country seeks to join the European Union and to play an increasingly important part on the world stage.

Alexandros Markides

Attorney General, Republic of Cyprus

Very little has been written about Cypriot law, and the reason is obvious: the limited audience and the small market make such a project problematic. This legal work is, therefore, particularly welcome, and I am glad to have the opportunity of presenting it both to my colleagues in Cyprus and other countries and to the public at large.

In contrast to its size and population, Cyprus has an extensive legal history. Study of that legal evolution provides an exceptional example for comparative law of the possibilities of harmonious co-existence and sometimes even the blending of legal systems. Starting with the Hellenistic system of city-kingdoms of the island, Cyprus' legal history was affected by neighbouring legal orders, such as those of Egypt, Babylonia, and Assyria.

More permanent influences came in the Roman and Byzantine periods with the introduction of Roman law, its codification and development by Justinian, the second codification and further development during the reign of Leon the Sixth, and the growth of ecclesiastical law. In later periods, first French customary law and then Turkish law and the concepts of Sharia were brought to Cyprus, followed by English law from 1878. At present, two different systems of law, the Anglo-Saxon and the Continental, apply in peaceful co-existence in different spheres.

The fact that the book is written in English is a positive advantage. It demonstrates to the world the legal sophistication of Cyprus, and it contributes to the promotion of Cyprus as an international business centre.

The book has the modest title of *Introduction to Cyprus Law*. In my opinion, having seen it before publication, the book is much more than an introduction. In certain subjects, it goes well beyond a preliminary explanation and can properly be used as a book of reference. Certainly, the large areas of the law which it covers indicate more than a cursory treatment.

The book is divided into 25 chapters. They begin with the legal history to which I have already referred and end with a wholly contemporary subject, the accession of Cyprus to the European Union. In between, there is a description of the framework of the Constitution. This is supported by statutes and cases on administrative law, illustrating the operation of government and the powers of the state, moderated always by the rights of the individual.

The workings of the courts and the advocates who practise in them are fully explained, together with the system of enforcement of judgments at home and abroad. Foreign investment, a vital part of the economy of Cyprus, has been given very comprehensive treatment and is cross-referenced to taxation, trusts and

corporate law. Allied matters of banking, insurance, and bankruptcy and insolvency complete the commercial aspect of the book.

The significance to Cyprus of maritime and admiralty matters has been properly recognised, and the theory and practice of basic and equally important topics of contract law, criminal law, torts, land law, and succession have each been covered in depth. The religious and secular development of family law has been analysed, and modern subjects, such as labour law, intellectual property, franchising, and agency and distribution, have all received due attention. The impact of private international law on so many of the topics which I have already mentioned has not been overlooked. In general, the interaction of the various parts of the law is well documented.

In addition, the book contains comprehensive lists of cases and legislation, with a wide-ranging bibliography and a detailed index.

All in all, I consider this work to be a remarkable product of co-operative industry by its authors and a significant contribution to jurisprudence. I commend it wholeheartedly.

Professor Dennis Campbell

Director, Center for International Legal Studies

The Center for International Legal Studies has operated in Austria since 1976 as a non-profit legal research and publications institute and has been engaged in promoting the exchange of legal information through professional conferences, training programs for law students and law graduates, and conceiving, coordinating, and implementing legal research projects, and organising their publication.

In doing so, the Center for International Legal Studies has worked with more than 5,000 lawyers worldwide and numerous publishing companies, such as Matthew Bender & Company Inc., Kluwer Law International, Oceana, BNA International, Sweet & Maxwell, Lloyds of London Press, Butterworths, and Transnational Publishers. The Center for International Legal Studies also has assembled the financial resources and distribution channels to publish many works under its own name, in concert with Yorkhill Law Publishing.

In the course of its editorial work, the Center for International Legal Studies has cooperated with Andreas Neocleous & Co. on numerous projects. Mr. Neocleous and his colleagues have contributed quality chapters to several of Center for International Legal Studies publications, including European Tax and Investment Service, Guide for Foreign Executives and Personnel, International Agency and Distribution Law, Tax, International Franchising Law, International Execution against Judgment Debtors, International Protection of Foreign Investment, International Business and Investment Guide, International Banking Law and Regulation, International Insurance Law and Regulation, Offshore Trusts, International Securities Law and Regulation, International Financial Services, and International Intellectual Property. These contributions have been of the highest calibre.

Therefore, when Andreas Neocleous approached the Center for International Legal Studies about publishing a book on Cypriot law, there was no hesitation to accept the project, knowing that the product would meet the highest standards.

Although Cyprus is a small country, known for its beauty, cultural history, and tourism, it also has a significant regional economy, a place where the volume of business would generate interest in such a publication and the sales necessary to make the project feasible.

While the present work fits neatly among the Center for International Legal Studies' activities in the area of legal research and publishing, it also stands out for its dedication to presenting an in-depth understanding of the legal environment for international business in a single jurisdiction. The work's 'father', Andreas

Neocleous, has shown initiative and inspiration in gathering a team of excellent authors to compile a wealth of information and present it concisely and systematically.

The Cypriot economy has evolved immensely in the past 25 years. From its origin as a largely agricultural economy, it has fostered a thriving tourism industry and, perhaps more significantly, banking and financial services sectors that offer numerous attractions to international business. This has brought improvements in infrastructure and communal progress, with the prospect of social harmony across the entire Island no longer so remote. These advances have carried Cyprus to the threshold of membership in the European Union.

This, and Cyprus' role as a sophisticated and efficient financial centre, augur the need for a resource on the law of Cyprus, a need that Andreas Neocleous has recognised and answered. The Center for International Legal Studies is honoured to participate in a project of such quality.

Andreas Neocleous

Andreas Neocleous & Co

Such a comprehensive work on Cyprus law of this kind has never been undertaken before in the legal history of Cyprus. This does not mean that it is a trivial composition, but certainly it has not been an easy one.

My colleagues and I have spent much of our free time in recent months in research and writing, thereby depriving our families of a great deal of social life and recreation. It has been a demanding but worthwhile task.

It is not for me to comment on this book except to say that it is the product of considerable effort and hard work by my partners and associates. It is my duty first to express, on their behalf, our gratitude to all our families and loved ones who have tolerated our preoccupation for so long and to whom we dedicate this book.

I also wish to record my thanks to Dennis Campbell of the Center for International Legal Studies, who has turned my long-planned project into reality, to David Bevir who has contributed a *retouche de la langue*, and to Janet Yianni and her colleagues who have processed the text with patience and care. The book is the result of conscientious and effective teamwork by many people at Andreas Neocleous and Co.

We hope that this work will be of use to you. It is not perfect; there are mistakes and gaps for which we seek your indulgence, but it is the first work of its kind, and we undertake to improve it and to correct its deficiencies in a subsequent edition.

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References and Abbreviations

AC	Law Reports, Appeal Cases
AFC	Appeal Family Court
All ER	All England Law Reports
App	Appeal
App Cas	Appeal Cases
Appl	Application
Atk	Atkyn's Reports, Chancery
B & Ald	Barnewall and Alderson's Reports, King's Bench
B & C	Barnewall and Creswell's Reports, King's Bench
Beav	Beavan's Reports, Rolls Court
BIALL	British and Irish Association of Law Librerians
Bos & PNR	Bosanquet and Puller's New Reports, Common Pleas
Burr	Burrow's Reports, King's Bench
CA	Court of Appeal
Car & M	Carrington and Marshman's Reports, Nisi Prius
C & P	Carrington and Payne's Reports, Nisi Prius
CCA	Court of Criminal Appeals
Ch	Law Reports, Chancery Division
Cl & Fin	Clark and Finnelly's Reports, House of Lords
CLR	Cyprus Law Reports
CMLR	Common Market Law Review
CoxCC	E W Cox's Criminal Law Cases
Cr App R	Criminal Appeal Reports
Crim LR	Criminal Law Review
CTC	Cyprus Tax Cases
CTR	Cyprus Tax Reports
D	Division
Dears	Dearsly's Crown Cases Reserved
De G F & J	De Gex, Fisher and Jones's Reports, Chancery
Den	Denison's Crown Cases Reserved
E & B	Ellis and Blackburn's Reports, Queen's Bench

East, PC	East's Pleas of the Crown
EC	European Community
EEC	European Economic Community
EGM	Extraordinary General Meeting
EIB	European Investment Bank
Eq	Equity
EU	European Union
Ex D	Exchequer Division
Exch	Exchequer
FSR	Fleet Street Reports
H & C	Hurlstone and Colman's Reports, Exchequer
H & N	Hurlstone and Norman's Reports, Exchequer
Hag Ecc	Haggard's Ecclesiastical Reports
HL	House of Lords
IBC	International Business Company
IGC	Intergovernmental Conference
ILO	International Labour Organization
IR	Irish Reports
ISPA	Pre-accession Instrument for Structural Policies
JSC	Judgments of the Supreme Court
KB	Law Reports, King's Bench Division
L J Ex Eq	Law Journal, Exchequer in Equity
L Jo	Law Journal Newspapers
LJKB	Law Journal, King's Bench
Ll L Rep	Lloyds List Law Reports
LR	Law Reports
LR Sc & Div	Law Reports, Scottish and Divorce Appeals, House of Lords
LRCP	Law Reports, Common Pleas
LT	Law Times Reports
Moo PCC	Moore's Privy Council Cases
My & Cr	Mylne and Craig's Reports, Chancery
NZLR	New Zealand Law Reports
OECD	Organization for Economic Co-operation and Development
P	Law Reports, Probate, Divorce and Admiralty Division (after 1890)

PC	Privy Council
PD	Law Reports, Probate, Divorce and Admiralty Division (before 1890)
P Wms	Peere Williams' Reports, Chancery and King's Bench
QB	Law Reports, Queen's Bench Division
RPC	Reports of Patent Cases
RSCC	Reports of the Supreme Constitutional Court
SAPARD	Special Accession Programme for Agriculture and Rural Development
SC	Court of Session Cases (Scotland)
SLT	Scots Law Times
Sol Jo	Solicitors' Journal
Stra	Strange's Reports
TAIEX	Technical Assistance Information Exchange Office
TEU	Treaty on European Union (Maastricht)
TLR	The Times Law Reports
TR	Term Reports (Dunford and East)
WCR	Workmen's Compensation Reports
WLR	Weekly Law Reports
WN	Law Reports, Weekly Notes

CHAPTER 1

Legal History

Andreas Neocleous and David Bevir

Introduction

1-1 Cyprus is the third largest island in the Mediterranean Sea, after Sicily and Sardinia. It has an area of 9,251 square kilometres.

Situated at the north eastern corner of the Mediterranean, approximately 69 kilometres from Turkey, 122 kilometres from Syria, and 408 kilometres from Egypt, Cyprus lies on the intersection of the 34th latitudinal and longitudinal parallels.

Its strategic position in relation to the three continents of Europe, Asia, and Africa, with its extensive forests and copper mines, made Cyprus an attractive target for its neighbours and for more-distant foreign powers. The Mycenaeans, Achaeans, Phoenicians, Assyrians, Egyptians, Persians, Alexander the Great, the Romans, Byzantines, Crusaders, Lusignans, Venetians, Turks, and British have all, in turn, exercised control and influence over the island and its inhabitants. The English writer, Robert Byron, said of Cyprus: 'History in this island is almost too profuse. It gives one a sort of mental indigestion'.[1]

However, a man with a heartier appetite, Lawrence Durrell, in an impressionistic account of his life in Cyprus between 1953 and 1956, remarked on 'the confluence of different destinies which touched and illumined the history of one small island in the eastern basin of the Levant, giving it significance and depth of focus'.[2]

Ancient Times

1-2 The first signs of human life have been traced to the 6th millennium BC. The early settlers were crop and livestock farmers, fashioning their tools and weapons out of pebbles from riverbeds. In the earlier years, they lived in a distinctive type of house, known as a *tholos*, built on circular foundations and shaped like a beehive or igloo. From around 3,400 BC, these were gradually replaced by rectangular houses.[3]

The Mycenaeans and Achaeans, who came from Thessaly, Macedonia, and Crete, introduced the Greek language and culture to Cyprus. The influence of the Phoenicians, who came from Syria, and built the city of Kition (near Larnaca) was mainly commercial.

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1 Byron, *The Road to Oxiana* (1937).
2 Durrell, *Bitter Lemons of Cyprus* (1959), at p 20.
3 Press and Information Office, *The Almanac of Cyprus 1994–1995* (1995), at p 16.

For a period of more than 1,000 years from approximately 1250 BC, there were various city-kingdoms in Cyprus which had probably been established as a result of the colonisation of Cyprus by Greeks at the end of the second millennium BC. Most of the kings had Greek names, such as Onasagoras, Eteandros, Pylagoras, and Admytos.

In the famous inscription on the Temple of Rameses III at Medinet Habu in Egypt, eight Cypriot kingdoms have been recognised, namely:

- Salamis;
- Idalion;
- Kition;
- Akamas;
- Marium;
- Kyrenia;
- Soli; and
- Curium.

1-3 However, 'the identifications are uncertain and even the readings which were originally accepted have not been confirmed'.[4]

In another inscription, which was written on the occasion of the rebuilding of the Temple of Nineveh, it is mentioned that 10 kings from Cyprus have contributed to the construction expenses, while the historian Diodoros Siculus mentions that there were nine kingdoms around 350 BC.

The following 10 kingdoms have been identified as in existence in the middle of the 4th century BC:

- Salamis;
- Kerynia (Kyrenia);
- Paphos;
- Marium;
- Soli;
- Amathus;
- Citium (Kition);
- Tamassus;
- Lapithos;[5] and
- Curium.

1-4 These kingdoms which lasted for such a long period were organised in the same way as the ancient Greek city-states. The Assyrians, Egyptians, and Persians, as the foreign conquerors, accepted this organisation and, apart from demanding loyalty taxes and other contributions such as an army and ships, they did not disturb

4 Hill, *A History of Cyprus* (1942), vol 1, at p 49.
5 Hill, *A History of Cyprus* (1942), vol 1, at pp 111–117.

the system. The kings of the Cypriot city-states lost the external freedom which they had acquired during the authority of the Greeks and the Phoenicians, but they maintained their autonomy and freedom in domestic affairs.

Salamis was the greatest kingdom. 'The history of Cyprus from now onwards, for centuries, is mainly the history of Salamis'.[6] The institution of coinage, which had long been familiar in western Asia Minor and the Aegean, was adopted during the reign of Evelthon of Salamis, who acceded in approximately 560 BC and was the most powerful, if not the supreme, ruler of the island. He struck in his own name the first silver money in Cyprus.

Citium was the next most important kingdom. Its coinage began soon after 500 BC. The sequence of its kings, from Baalmelek I (approximately 479– 449 BC) to Pumiathon (361–312 BC), is more certain, thanks to local inscriptions and coins dated by regnal years, than anything else in the Cypriot chronology of this age.

Paphos also must have been important, although it appears rarely in the records, and the numismatic evidence is very inconclusive. It may be that its Cinyrad priest-kings were more concerned with the cult affairs of the chief religious centre in Cyprus than with politics, although there was a Paphian contingent (which did not distinguish itself) in the fleet of Xerxes against Greece in 490 BC.

Amathus appears at the time of the revolt of Onesilus against the Persians as his bitter and powerful enemy.

Soli and Curium fought on the Greek side. Soli was a stronghold of anti-Persian sentiment. The Ionian Revolt against Persia, which began in the winter of 499–498 BC, lasted until the fall of Soli towards the end of the winter of 498–497. Stasanor, the king of Curium, defected to the Persians at the battle of Salamis.

Lapithos, Kerynia, Marium, and Tamassus were evidently of very minor importance.

The indications are that all the city-kingdoms were pure despotisms; the entire power (legislative, executive, and judicial) was concentrated in the hands of the king who, with his police, performed the duties of chief priest, judge, and general in the manner of the Mycenaean kings, enacting, amending, and repealing laws without asking the people. Beside the king were the members of his family, the men called *anaktes*,[7] the women *anassai*, probably meaning princes and princesses. Aristotle's pupil, Clearchus of Soli, in his account of the institution of the *kolakes*, or flatterers, describes the *anaktes* as a kind of magistrate, an *Areopagus*, controlling a highly organised police system. He says that the *kolakes* were part of the apparatus of tyranny, of ancient origin, employed by all the kings in Cyprus; they were of good birth, and no one, except those at the very head of affairs, knew them by sight or how many there were.

6 Hill, *A History of Cyprus* (1942), vol 1, at pp 111–117.

7 The title *anax* was borne by Stasias, son of Stasicrates, king of Soli, in the latter part of the 4th century BC.

In Salamis, which provided the model followed at other courts, the *kolakes* were divided into two families, the Gerginoi and the Promalanges. The Gerginoi acted as spies, mingling with the people in workshops and market places, listening to what was said and reporting daily to the *anaktes*. The Promalanges acted as investigators, making further enquiry when it seemed desirable; thanks to an extremely subtle technique of disguise and manner they were able to pass unrecognised and penetrate the secrets of all suspect persons. These instruments of tyranny were obviously a highly organised form of the tools used in other courts. King Evagoras I seems to have been an exception to the rule, judging men not by what he heard but from his own knowledge.

Idalium (Dali) appears to have enjoyed in the 5th century BC a constitution differing from what is known of other cities in Cyprus. The king and the *polis* seem to have been associated on more or less equal terms, indicating a considerable democratic element; this peculiarity may have been due to Athenian influence. Idalium ceased to exist as an independent kingdom after it fell to Citium in about 450 BC.

The Assyrian domination in the 8th and 7th centuries BC was intended primarily to defend the western borders of Assyria,[8] but it left its mark on Cypriot art. The Assyrians were followed by a century of relative independence and of close relations with Athens, during which Solon, the great statesman and legislator who is considered to be the founder of Athenian democracy, is said to have visited Cyprus and Ionian sculpture influenced the sculpture of Cyprus.[9] The short Egyptian period also had artistic results.

The Persians suppressed a revolution by the Cypriots, who later supported the Greeks at the Battle of Salamis (480 BC). In return, the Greeks undertook to liberate Cyprus from the Persians; the campaign was protracted but, during it, a Greek literary heritage was developed in Cyprus which culminated in the foundation of the school of Stoicism in Athens by the Cypriot stoic philosopher Zenon of Kition (335–265 BC).[10]

Eventually, Alexander the Great destroyed the power of Persia and brought Cyprus under his protection. After his death (323 BC), the island became part of Ptolemaic Egypt and so remained for about 250 years, reaching a new level of culture.

Cyprus became a province of the Roman Empire in 58 BC but briefly returned to Ptolemaic rule, being treated as a valuable chattel by whichever leader happened to be in a position to command it. Julius Caesar is said to have restored Cyprus to the Egyptian crown, but Cleopatra VII drew the revenues and issued coins for the island on which she is represented holding in her arms the infant Ptolemy Caesar, her child by Julius Caesar. Mark Antony presented Cyprus to Cleopatra in 36 BC

8 Panteli, *The Making of Modern Cyprus* (1990), at p 18.
9 Georghiades, *History of Cyprus* (1973).
10 Newman, *A Short History of Cyprus* (1953), at pp 20–30.

when he left her for his disastrous Parthian expedition, and he confirmed his gift on his return in 34 BC from his more successful Armenian campaign. With her death in 30 BC and the murder of Ptolemy Caesar, the island came finally into the hands of Rome and an era of peace and prosperity followed.

Christianity was introduced by St Paul, who visited Cyprus on his first missionary journey in 45 AD with Barnabas and John Mark. The island's Roman Proconsul, Sergius Paulus, was converted to Christianity and Cyprus became the first country in the world to be governed by a Christian.

The Middle Ages

1-5 The transition of Cyprus from the Roman to the Byzantine Empire took place after 330 AD. The Christian religion was integrated with Greek national culture;[11] churches and monasteries such as Stavrovouni and, later, Kykko, Macheras, Chrysorrhoyiatissa, and St Neophytos were built, and the Church of Cyprus was granted *autocephalic* (independent) status. In the Byzantine tradition, the ties between church and state were very close, and Cypriot society was consolidated under the patronage of the Orthodox Church, which has remained a powerful influence in the lives of the Greek Cypriots. In the 7th century, the island was raided by the Arabs. It was re-conquered by the Byzantines in the 10th century and seized from them by Isaac Comnenos in 1185.

In 1191, King Richard I (the Lion Heart) of England, who was sailing to the Holy Land as one of the leaders of the Third Crusade, attacked Cyprus because Comnenos was trying to kidnap his fiancée, Berengaria of Navarre. Within one year, he had captured the island, sold it to the Knights Templar, bought it back from them, and resold it at a profit to Guy de Lusignan. The Lusignan dynasty lasted for almost 300 years, during which Roman Catholicism became the official religion. The Orthodox Church in Cyprus was put under the direct control of the Church of Rome; despite great spiritual and financial oppression, it helped to preserve the Greek language, culture, and Orthodox religion.

Following the capture of the island's main port of Famagusta by the Genoese in 1373 and the invasion by the Moslem Mamelukes of Egypt in 1426, the Venetians assumed the protection of Cyprus in 1469 and its government in 1489. Their sole object was to protect their interests against Egypt and the Turks; the interests of the Cypriots were completely neglected. Trade and culture languished and heavy taxes were imposed to pay for the fortification of the island against the growing Ottoman threat.[12]

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11 Spyridakis, *A Brief History of Cyprus* (1974) at p 46.

12 Evangelides, *The Republic of Cyprus and its Constitution, with Special Regard to the Constitutional Rights* (1996), at p 13.

The Venetians built new walls for Famagusta, strengthened Kyrenia Castle, and began to construct new walls for Nicosia. In the two villages of Lefkara, in the foothills of the Troodos Mountains between Limassol and Larnaca, the production of the elaborate *broderie anglaise*,[13] known as *Lefkaritika*, is said to have been started by Frankish-Venetian noblewomen who came to spend their summers in Cyprus. Leonardo da Vinci is supposed to have admired their craft and bought an altar cloth for the cathedral in Milan when he visited the villages in 1481.[14]

The Turks invaded Cyprus for the first time in 1570. Property was looted and many Christian churches were converted into Muslim mosques, but the Greek Orthodox replaced the Roman Catholic as the official church and thereby regained its dominant position in religious, educational, social, and economic affairs.

The Archbishop was recognised as the Ethnarch or politico-religious leader of his ethnic community until the involvement of the Cypriots in the Greek War of Independence in 1821. Otherwise, the influence of Turkish rule on the character of Cypriot society and the population of the island was generally negative. Foreign trade, which had flourished under the Lusignans but diminished under the Venetians, ceased to exist and the depressed prices of agricultural products caused much hardship and many uprisings. The Turkish rulers took no interest in intellectual or cultural affairs.

Modern Times

1-6 Following the opening of the Suez Canal in 1869, the strategic value of Cyprus increased. In 1878, the United Kingdom persuaded Turkey to cede Cyprus to Great Britain, in return for an undertaking to protect Turkey against the expansionist aims of Russia, with full power to make laws and conventions for the government of the island and for the regulation of its commercial and consular relations and affairs.[15] Great Britain also agreed to make an annual payment to Turkey of £92,000, the 'sum presumed to be the island's annual budget surplus of revenue

13 'English embroidery' is open lace embroidery on white linen or cambric, especially in floral patterns.

14 Brey and Müller (eds), 'Cyprus', *Insight Guides* (1993), at p 175.

15 The Prime Minister of the United Kingdom in 1878 was Benjamin Disraeli, who had been personally responsible in 1875 for borrowing £4 million to enable the British government to buy the shares in the Suez Canal Company which were owned by the Khedive of Egypt. He had visited Cyprus in 1830 on his way to Jerusalem and described it as 'a land famous in all ages but more delightful to me as the residence of Fortunatus than as the rosy realm of Venus [Aphrodite] or the romantic kingdom of the Crusades'. (Fortunatus was the hero of a once-popular 16th century fable, a native of Famagusta who stole a magical hat from the Sultan and could thus transport himself wherever he wished). Disraeli's writings include a novel, *Tancred*, or the *New Crusade*, which was first published in 1847. In it, one of the characters says 'the British want Cyprus and will get it'. Roussou-Sinclair, 'British Colonial Writing on Cyprus', *Cyprus Today*, at p 35.

over expenditure for the previous several years . . . that sum was badly needed for the island's development, or to reduce the heavy burden of taxation'.[16]

In 1914, Great Britain annexed Cyprus after Turkey entered the World War I on the side of Germany. Under the Treaty of Lausanne in 1923, Turkey relinquished all its claims to Cyprus and the island became a Crown Colony in 1925; for the next 30 years, the Turks who had settled there over the previous three centuries and who chose to remain after the declaration of colonial status mingled with the Greek Cypriots and lived in relative harmony with them. Under British rule, roads and hospitals were constructed throughout the island and re-afforestation was started.

The desire of the Greek Cypriots for *enosis* (union with Greece) rose during World War I, but the strategic importance of Cyprus made Great Britain determined to keep it and, in this, they were supported by the island's Turkish minority. The Greek Cypriots' resentment of Britain's refusal to grant *enosis* expressed itself in the riots which began in 1931. Its leaders were arrested and sent into exile, and various controls and limitations were imposed on school teachers, doctors, and lawyers. Those who had been exiled were allowed to return, and the controls were lifted after World War II, when many Cypriots fought and died for Great Britain and the Allied cause.

From 1945, the demand for *enosis* or at least self-determination was renewed. It grew steadily and was raised before the United Nations. The British government responded by re-imposing the controls which it had lifted and offering certain constitutional proposals. The Greek Cypriots rejected them, and the use of force was seen by some as the only way to achieve their aims.

On 1 April 1955, the National Organisation of Cypriot Fighters (EOKA) led by George Grivas (alias Dighenis), a Greek Cypriot and a colonel in the Greek army, declared an armed insurrection against the British, who introduced emergency measures, including detention without trial and the closure of schools. In 1956, Archbishop Makarios, the Greek Cypriot leader, and three others were exiled to the Seychelles for a year. Constitutional proposals submitted by the British were rejected by the Greek Cypriots, and the armed struggle continued, accompanied by demands by the Turkish Cypriots for the partition of Cyprus into Greek and Turkish areas. In 1958, the so-called 'Macmillan plan'[17] proposed a partnership scheme for Cyprus between the two communities on the island and the governments of Great Britain, Greece, and Turkey; it was rejected by Archbishop Makarios and the Greek government but favoured by Turkey.

Hostilities intensified, almost reaching a state of civil war, until, in 1959, an agreement was negotiated in Zurich between Greece and Turkey for the establishment of an

16 Spyridakis, *A Brief History of Cyprus* (1974), at p 167.

17 The plan was named after its architect and the then-Prime Minister of Great Britain, Harold Macmillan.

independent Republic of Cyprus. This agreement was confirmed by the British and the leaders of the Greek Cypriots and Turkish Cypriots. The territorial integrity of Cyprus was guaranteed by Great Britain, Greece, and Turkey.

On 16 August 1960, Cyprus became an independent sovereign republic. The Constitution was signed and put into force on the same day with the following three Treaties:

- The Treaty of Establishment of the Republic of Cyprus between Great Britain, Greece, Turkey, and Cyprus, providing for the retention by Great Britain of two areas of the island as sovereign military bases;
- The Treaty of Guarantee, between the same parties, whereby Great Britain, Greece, and Turkey guaranteed the independence and territorial integrity of the Republic of Cyprus, and any activity likely to promote either the union of Cyprus with another state or the partition of the island was prohibited; and
- The Treaty of Alliance between Greece, Turkey, and Cyprus, which provided for the stationing of Greek and Turkish soldiers on the island.

1-7 Under the Constitution, separate majorities of the Greek and Turkish members of the House of Representatives were required to modify, eg, the tax laws. This procedure prevented the passing of a unitary income tax law from 1961 to 1964; during that time, it was necessary for the Greek Cypriot and the Turkish Cypriot Communal Chambers to pass their own income tax laws; this increased the separation of the two communities.

In 1963, President Makarios made a proposal for revision of 13 points of the Constitution to facilitate the functioning of government and to remove some causes of inter-communal friction. The proposal was rejected by Turkey and, three weeks later, violent disturbances between the Greek and Turkish Cypriots began. The Turkish Cypriots withdrew completely from the administration of the Republic.

In 1964, the jurisdiction of both the Supreme Constitutional Court and the High Court was transferred to a new Supreme Court, and a United Nations Peace-keeping Force (UNFICYP) came to Cyprus. Disturbances broke out again in 1967. Inter-communal talks started in 1968 and continued for the next six years.

On 15 July 1974, the military junta which was then in power in Greece staged a *coup d'etat* in Cyprus to overthrow the President of the Republic, Archbishop Makarios. The coup was eventually unsuccessful, but Turkey used it as an excuse to invade on 20 July 1974 and again on 13 August 1974 to protect the Turkish minority, eventually occupying approximately 37 per cent of the island. Some 200,000 Greek Cypriots were forcibly displaced from their homes in the area seized by the Turks, who brought in large numbers of settlers from Anatolia.

On 13 February 1975, the Turkish Cypriot authorities declared the occupied area to be the 'Turkish Federated State of Cyprus' and, on 15 November 1983, they proclaimed it as the 'Turkish Republic of Northern Cyprus', which has been recognised only by Turkey.

Since 1974, there have been numerous United Nations' resolutions inviting respect for the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus, as well as the withdrawal of all foreign troops, the resumption of inter-communal talks, and the safe return of the refugees. There have been intermittent talks, but no substantial progress has been made.

Legal History

In General

1-8 The turmoil of events has been even more noticeable in the legal history of Cyprus.

> Throughout the ages and in spite of conquests the Cypriot legal system had preserved its own features. During the Byzantine period the law in force in Cyprus was the Byzantine law as contained in the various Byzantine collections of law. Parallel, however, to that, the law of the people, as developed by them, continued to apply as customary law . . . .[18]

City-Kingdoms

1-9 There is not a great deal of background information about the legal system of the kingdoms of Cyprus, apart from the fact that it was based on the Greek legal system, influenced by the eastern legal system of the times, ie, Syria and Egypt.

The legal system of this period consisted of written laws and custom. In respect of the various branches of the law, it is known that murder, treason, deceit, slander, and theft were crimes, for which the punishments were, *inter alia*, death, amputation, exile, imprisonment, fine, and confiscation of property. Commercial law was well-developed; collections of laws, written and customary, regulated both internal and external commerce, and imports and exports because Cyprus was then, as now, an important trading centre.

Information about the civil law is limited, although it is known that the citizens had rights of property in houses and land. The procedural law, as has already been seen, was exercised by the king and controlled by loyal assistants, but little is known about the way in which a trial was conducted or what the rights and obligations of the parties were.[19]

However, it is clear from two very important pieces of evidence, the Bronze Tablet of Idalium and the Tablet of Pyla, that the legal system of the times and the various

18 Tornaritis, *The Legal System of the Republic of Cyprus* (1984), at p 2.
19 Colota, 'Research on State and Legal Institutions of the Ancient Kingdoms of Cyprus', 21 *Cyprus Law Review* (January–March 1988).

legal concepts were substantially developed. The Tablet of Idalium would be considered even today as a perfect, binding legal document.

Assizes

1-10 When the Franks bought Cyprus in 1192, they introduced a feudal system of law which was not codified, but based on customs.

This system was not as developed as the existing law of Cyprus and generally of the occupied peoples because, in all these areas, there was the Greco-Roman customary law as developed by Justinian.

In their efforts to introduce their law, the Crusaders appointed committees to discover what laws were in force. They took what they found, translated it into their language, and put into certain collections feudal law which contained the rules. These collections are called *Assizes*, from the French word *assise*, which means sitting, and contain rules and generally a declaration of the law of the sitting judges.

According to tradition, the drafting of the Jerusalem and Cyprus *Assizes* was made by Godefroy de Bouillon, the first king of the kingdom of Jerusalem. They provided for a *Haute Cour*, a body of barons presided over by the king or his representative which served as their assembly and high court, and a *Basse Cour*, a body essential to the daily life of the majority of the Frankish community in Cyprus, whose authority covered all civil law matters except questions of family law, which were reserved to the ecclesiastical courts; the code and procedure of the *Basse Cour* essentially followed Byzantine law.[20]

The *Assizes* of Jerusalem, in which the law of the kingdoms of Jerusalem and Cyprus is preserved, is a composite work concerning only the *Haute Cour* and consisting of:

- The *Livre du Roi*, compiled between 1197 and 1205;
- The *Livre de forme de plait*, compiled between 1252 and 1257 and especially concerned with procedure; and
- The *Livre de Jean d'Ibelin*,[21] a great work of jurisprudence dating from 1265–1266, which was formally adopted in 1369 as the official authority for the law of Cyprus.[22]

1-11 The *Assizes de la Cour des Bourgeois* seems to have been compiled in Jerusalem between 1229 and 1244. A Greek version was prepared especially for Cyprus.

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20 Emiliandes, *Polyarchy in the Frankish Rule in Cyprus* (1990), at pp 11 and 12.
21 John d'Ibelin, Count of Jaffa and Ascalon, was the most famous name connected with the Assizes.
22 Hill, *A History of Cyprus* (1942), vol 3, at p 1143.

Recent Times

1-12 The Turks brought with them the Ottoman law, but the Greek population was allowed to have their family relations governed by their own law and to have their family cases tried by their own tribunals.[23]

When the British came to Cyprus in 1878, they found a legal system already in place.[24] There was the Imperial Ottoman Penal Code, a comprehensive criminal code whose general arrangement followed that of the French Penal Code and which had been enacted in 1858 and subsequently amended.[25] The *Sheri* Courts (administering Islamic and Ottoman law) and the ecclesiastical courts of the Greek Orthodox Church had supreme authority in family matters, exercising jurisdiction over Muslims and Christians, respectively. The Ottoman Civil Code and the Ottoman Land Code (*Mejelle*) covered most of the land law.

The British left this division intact for family matters and retained the Penal Code (which, with various amendments, remained valid until 1928 when the Criminal Code now in force was introduced) but transferred jurisdiction in all other matters to the civil courts. Soon after their arrival, and probably in 1879, they established *Assize* Courts, District Courts, and a Supreme or High Court. The Supreme Court had jurisdiction over all criminal or civil causes that did not come under the jurisdiction of the Ottoman courts and over child custody and maintenance; dissolution, nullity, and jactitation of marriage remained within the sole jurisdiction of the ecclesiastical courts.

The judicial system was revised in 1882. The power of the *Sheri* Courts was further limited by the transfer of their jurisdiction to the civil courts. Supreme Court jurisdiction over matrimonial causes was transferred to the District Courts and the Supreme Court became the appeal court in such cases. Jurisdiction over the matrimonial causes of the Greek Orthodox population remained with the ecclesiastical courts, except for guardianship and adoption, which were transferred to the civil courts in 1935 and 1956, respectively; this separation was continued and embodied in the 1960 Constitution.[26]

The law which was applied to the cases now coming before the civil courts differed. Ottoman law was applicable in all cases in which the defendants or accused were Ottoman subjects. English law (existing of Common Law, the rules of equity, and statutes in force in England) and Cypriot statute law which altered English law applied in all other cases.

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23 Tornaritis, *The Legal System of the Republic of Cyprus* (1984), at p 4.
24 Demetriadou, 'Legal Discourse and Social History in Cyprus: An Inductive Inquiry, 1878–1982', 4 *Cyprus Law Tribune* (October–December 1989), at pp 127–140.
25 Loizou and Pikis, *Criminal Procedure in Cyprus* (1975), at pp 1–3.
26 Under article 111 of the Constitution, jurisdiction over matters of marriage and divorce was left with the ecclesiastical courts, whether Christian or Muslim.

When Britain annexed Cyprus in 1914, Cypriot residents became British subjects, but Ottoman law continued to be used in some cases because litigants could choose to have their rights determined by Ottoman or English law.

Breach of a dowry contract and breach of promise to marry eventually came under the 1930 Contract Law, not under family law. A dowry agreement was viewed as any other business transaction but as a gift, not as an obligation of parents to their children. In 1935, British Common Law was fully introduced in Cyprus, and its broader principles were applied to these and other cases. Its effect on a culture different from that of Britain, and the move away from local customs as the bases for civil law, combined to create legal conflicts.[27]

When Cyprus became independent in 1960, the Constitution provided that the laws previously applicable should remain in force in the Republic, until repealed or amended by its laws.[28] Some branches of the law had been codified in 1959, eg, the Civil Wrongs Law (Cap 148), the Contract Law (Cap 149), the Criminal Code (Cap 154), the Criminal Procedure Law (Cap 155), and the Sale of Goods Law (Cap 267). The Contract Law and the Sale of Goods Law were based on the Indian pattern; Sir William Holdsworth, a severe critic of codification, remarked that 'these [Anglo–Indian] Codes are one of the most remarkable, and will perhaps be the most lasting, of all the achievements of British rule in India'.[29]

The Criminal Procedure Law is based on English statutes regulating criminal procedure and states that, where no provision is made in the Law or in any other enactment in force for the time being in Cyprus, every court shall, in criminal proceedings, 'apply the law and rules of practice relating to criminal procedure for the time being in force in England'.[30]

The Office of Attorney General, which had existed throughout British rule, was retained by the Constitution, which prescribes his functions as being 'the legal adviser of the Republic with powers exercisable at his discretion, in the public interest, to institute, conduct, take over and continue or discontinue any proceedings for any offence against any person in the Republic'.[31]

The Attorney General is the head of the legal service of the Republic.[32] His retirement age is 68 and, as an independent officer under the Constitution, he can be removed only on grounds similar to those for the removal of a Judge of the Supreme Court. These safeguards are intended to exclude any interference or influence by the executive and to reflect the importance of the independence of the judiciary.

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27 Demetriadou, 'Legal Discourse and Social History in Cyprus: An Inductive Inquiry, 1878–1982', 4 *Cyprus Law Tribune* (October–December 1989), at pp 139–140.

28 Article 188 of the Constitution.

29 Holdsworth, *History of English Law*, vol 11, at p 225.

30 Criminal Procedure Law, Cap 155, s 3.

31 Constitution, art 113.

32 Loucaides, *The Institution of the Attorney General of the Republic of Cyprus*.

The Present

1-13 Modern Cypriot law has its origins in a wide variety of different legal systems which have operated over the years in various civilisations, including those of France, Germany, Greece, Turkey (the Ottoman Codes and Turkish family law), the United States and England, as well as dowry and the undisposable portion. All of them have influenced the development of the Common Law and the administrative law in Cyprus, leading to its present position as a significant international business centre.

There is no law faculty at Cyprus University. The lawyers practising in Cyprus graduate from universities in Greece, the United Kingdom, the United States, France, Russia, Australia, Canada, and South Africa.

The Future and the European Dimension

1-14 By the middle of 2000, it seemed that the only viable political solution to the division of Cyprus which would safeguard the future and security of the two communities in the island and which was likely to command general international acceptance would be a bi-zonal, bi-communal state with a central, federal government.

A formal relationship between the Republic of Cyprus and the European Union (EU) began in 1972 with the signing of an Association Agreement. It provided for the establishment of a customs union, the abolition of all trade barriers, and the adoption of the EU's Common Customs Tariff for imports from third countries.

In 1990, the Republic applied for full membership in the EU. The accession process began in March 1998, and Cyprus completed the screening of the *acquis communautaire*[33] in June 1999. There are now some 5,000 Bills pending in the House of Representatives to harmonise the laws of Cyprus with the laws of the EU. Changes in numerous areas of the legal system are imminent and many of the laws mentioned in this publication will inevitably be amended, repealed, or re-enacted by new laws to be passed during the next few years. These changes will be reflected in the next edition of this publication.

The documents establishing the Accession Partnership between Cyprus and the EU underline the need for the promotion of joint activities between the Greek-Cypriot and Turkish-Cypriot communities. The President of the Republic invited the Turkish-Cypriot community to participate in the accession negotiations but they have consistently declined and, indeed, the authorities in Turkey and the so-called Turkish Republic of Northern Cyprus have opposed the moves by the Republic to join the EU while 'the Cyprus problem' remains unresolved.

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33 The *acquis communautaire* is the collection of EU legislation and practice comprising the treaties, Acts, case law, administration practice, and political declarations, ie, the rights and obligations of the EU system and its institutional framework.

However, at the meeting of the European Council in Helsinki in December 1999, the Council welcomed:

- The launch of proximity talks aiming at a comprehensive settlement of the Cyprus problem;[34] and
- Recent positive developments in Turkey, as well as its intention to continue its reforms towards complying with the so-called political and economic Copenhagen Criteria.[35]

34 The Council emphasised that a political settlement would facilitate the accession of Cyprus to the European Union, adding that if no settlement had been reached by the completion of the accession negotiations, the Council's decision on accession would be made without a political settlement being a precondition, but taking account of all relevant factors.

35 The Council confirmed Turkey as a candidate state designated to join the EU on the basis of the same criteria as applied to all the other candidate states. *European Union News* (Newsletter of the Delegation of the European Commission to Cyprus), April 2000, at p 4.

CHAPTER 2

Constitutional Law

Pavlos Neophytou Kourtellos

Introduction

2-1 The Republic of Cyprus is the child of the Zurich and London Agreements. On 11 February 1959, an agreement was reached in Zurich between Greece and Turkey on a plan for the establishment of a new, independent state. On 19 February 1959, the documents were initialled in London by the Prime Ministers of Great Britain, Greece, and Turkey and the representatives of the Greek Cypriot and Turkish Cypriot communities.

On the basis of the Zurich and London Agreements, a Constitution was drafted by a joint Constitutional Commission in Cyprus, composed of representatives of the two communities and of the Greek and Turkish governments with legal advisers. The structure of the Constitution reflected the Zurich Agreement with various provisions from the 1950 Greek Constitution incorporated and with the provisions of the European Convention on Human Rights in respect of fundamental rights and liberties.

The London and Zurich Agreements comprised three treaties which laid the foundations of the political structure of the new state. These were:

- The Treaty of Guarantee under which Greece, Turkey, and Great Britain undertook to guarantee the independence, territorial integrity, and security of the Republic of Cyprus;[1]
- The Treaty of Alliance between Cyprus, Greece, and Turkey, which provided for the stationing of Greek and Turkish military contingents[2] on Cyprus;[3] and
- The Treaty of Establishment which provided, *inter alia*, for two British sovereign military bases[4] in Cyprus.[5]

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1 These three countries also were given the right of joint or unilateral action to restore the constitutional *status quo* in the event of its disruption. Additionally, Cyprus undertook to prohibit any activity promoting union with another state or the partition of Cyprus.

2 A Greek (ELDYK) and a Turkish (TURDYK) contingent of 950 and 650 persons, respectively.

3 In accordance with the Zurich Agreement, these two treaties were given constitutional force. Constitution, art 181.

4 The Sovereign Base Areas at Episkopi and Dhekelia, comprising about 99 square miles.

5 This treaty, between Great Britain, Greece, Turkey, and Cyprus, was included in the Constitution providing for the establishment of the Republic of Cyprus. The Constitution was signed and put into force on 16 August 1960 when Cyprus was proclaimed an independent and sovereign republic. On 21 September 1960, Cyprus became a member of the United Nations, and on 24 May 1961 a member of the Council of Europe and a member of the Commonwealth.

The Constitutional Structure

The Constitution of the Republic and its Peculiarities

2-2 Due to its historical origin, the Constitution of the Republic of Cyprus is considered to be one of the most peculiar in the 'constitutional world'. The peculiarities derive partly from the fact that the birth of the Republic was the result of an anomalous and violent period, but mostly because of the vital importance of the geo-strategic position of Cyprus, ie, the Cypriots' anti-colonial struggle (1955–1959) against the British, seeking self-determination, and the increasing tension and use of force among the communities plus the geo-strategic interests in the region which must be served and preserved. The right of self-determination was finally denied to the people of Cyprus by the constitutional provisions. The Constitution is therefore a 'granted constitution':

> . . . the constitutional structure of the Republic of Cyprus has not emanated from the free will of its people, who had no opportunity either directly or through their ad hoc elected representatives to express an opinion thereon but has been imposed on them by the Zurich Agreement.[6]

2-3 It also is a 'rigid' Constitution in the sense that, according to the Zurich Agreement, several provisions of that agreement had to be included in the Constitution of the Republic as fundamental, basic articles, not capable of any revision or amendment. The House of Representatives has no power to modify the Constitution in any respect so far as its basic articles are concerned, and any other amendment requires a majority of two-thirds of both the Greek Cypriot and the Turkish Cypriot members of the House. The constitutional structure created by the Zurich Agreement must remain unalterable.

> . . . such provisions are contrary to the accepted principles of public law and the current constitutional practice . . . .[7]

2-4 Moreover, the Treaties were in direct conflict with the basic principles of the United Nations Charter and with the right of every state to full sovereignty and independence. They authorised foreign powers to take such action as would constitute an unprecedented intervention in the domestic affairs of an independent state and violated the internationally accepted principles of democratic government, majority rule, and equality among citizens. The complicated nature of the Constitution of Cyprus was early noted as follows:

> The Constitution of Cyprus is probably the most rigid in the world. It is certainly the most detailed and . . . the most complicated. It is weighed down by checks and balances, procedural and substantive safeguards, guarantees,

6 Tornaritis, *Cyprus and Its Constitutional and Other Legal Problems* (1977), at p 43.
7 Tornaritis, *Cyprus and Its Constitutional and Other Legal Problems* (1977), at p 55.

> and prohibitions. Constitutionalism has run riot in harness with communalism. The Government of the Republic must be carried on but never have the chosen representative of a political majority been set so daunting an obstacle course by the Constitution makers.[8]

2-5 The Constitution provided for under the Agreements divided the people on the basis of ethnic origin, and the Turkish Cypriot minority was given rights far beyond those needed for its protection.

As a result, an equal status was accorded to the Greek community, representing the 80 per cent of the population, with the Turkish community, representing 18 per cent, and the whole constitutional structure was embodied with a separatist 'spirit' to avoid the supremacy of the larger community. Such are the peculiarities of the Constitution of Cyprus. It has been observed that:

> Unique in its tortuous complexity and in the multiplicity of the safeguards that it provides for the principal minority, the Constitution of Cyprus stands alone among the Constitutions of the world. Two nations dwell together under its shadow in uneasy juxtaposition, unsure whether this precariously poised structure is about to fall crashing about their ears.[9]

2-6 It follows from the above that it is not only the manner in which the Constitution was granted but also some of its contents, notably those ruling out amendment, which offend fundamental principles of public law. Moreover, the bewildering array of communal checks and balances was exceptionally difficult to apply.

Amendments

2-7 Paragraph 21 of the Zurich Agreement provides that several provisions of the Agreement had to be included in the Constitution of the Republic as basic articles not subject to any revision or amendment. Article 182 of the Constitution provides that the articles or parts of articles set out in Annex III of the Constitution, having been incorporated from the Zurich Agreement, are the basic articles of the Constitution and cannot in any way be amended, whether by way of variation, addition, or repeal.

The above resulted in the inflexibility of the Constitution which, in the near future, would be the cause of a constitutional crisis.[10]

> . . . they include the whole or part of 48 articles out of 199. If a Cypriot majority experiences an irresistible urge to burst one of these fetters it will risk forcible intervention by a guarantor power; for the Treaty of Guarantee

8 De Smith, *The New Commonwealth and Its Constitutions* (1964), at p 285.
9 De Smith, *The New Commonwealth and Its Constitutions* (1964), at p 296.
10 Reference is to the inter-communal disturbances in 1963 and 1964.

> provides that in the event of a breach of the Treaty the powers shall consult together and that, if concerted action then proves impossible, each of the powers may take individual action to re-establish the state of affairs created by the Treaty. If there were a general desire on the part of Turkish as well as Greek Cypriots to change a basic article, a special procedure involving a participation of the guarantor powers could no doubt be devised to achieve the purpose; but since the basic articles are designed predominantly for the protection of group interests of the Turkish community it is unlikely that their consent to any change will be procured in the foreseeable future except perhaps as part of a bargain whereby they obtain further advantages in another field.[11]

The Bi-Communal Character of the Constitution

2-8 The bi-communal character of the Constitution is established by the first article concerning the presidential election; the President must be a Greek Cypriot elected by the Greek Cypriots and the Vice-President a Turkish Cypriot elected by the Turkish Cypriots, the latter granted the right of a final veto on defence, finance, and political legislation as well as any affecting the Turkish Cypriot minority in the House of Representatives.

Moreover, the second article confirms the recognition that Greek and Turkish Cypriots constitute two separate communities divided as citizens of the Republic on the basis of ethnic origin.

The whole Constitutional structure is based on the existence of only two communities, the Greek and the Turkish Cypriot. According to article 2 of the Constitution:

- The Greek Cypriot community comprises all citizens of the Republic who are of Greek origin and whose mother tongue is Greek or who share the Greek cultural traditions or who are members of the Greek-Orthodox Church;
- The Turkish Cypriot community comprises all citizens of the Republic who are of Turkish origin and whose mother tongue is Turkish or who share the Turkish cultural traditions or who are Muslim; and
- Citizens of the Republic who are not members of either community[12] must, within three months of the date of the coming into operation of the Constitution or within three months of becoming citizens of the Republic, opt to belong to either the Greek or Turkish Cypriot community as individuals but, if they belong to a religious group, must so opt as a religious group and on such option they shall be deemed to be members of such community.[13]

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11 De Smith, *The New Commonwealth and Its Constitutions* (1964), at p 285.
12 Smaller religious groups such as Armenians, Maronites, and Latins.
13 On Independence Day, all the small religious groups of Cyprus opted to belong to the Greek Cypriot community.

2-9 The 1960 Constitution accorded equal status to the Greek and Turkish languages. The official languages of the Republic are Greek and Turkish.[14] All legislative, executive, and administrative acts and documents are to be drafted in both languages, while judicial proceedings are to be conducted and judgments drawn up in the language of the parties.[15]

Although the Republic has its own flag (of neutral design and colour),[16] citizens of the Republic and non-public corporate or unincorporate bodies have the right to fly the Greek or the Turkish flag without any restriction,[17] and the Greek and Turkish communities have the right to celebrate the Greek and the Turkish national holidays, respectively.[18]

Both communities were given the right to maintain a special relationship with Greece and Turkey, including the right to receive subsidies for educational, cultural, athletic, and charitable institutions and to obtain and employ schoolmasters, professors, or clergymen provided by the Greek and Turkish government.[19]

Criton Tornaritis, the first Attorney General of the Republic, observing the structure of the Constitution, wrote:

> The structure provided by the Agreement was based on two main principles. The one consisted in the recognition of the existence of two communities — the Greek and the Turkish — who in spite of their numerical disparity were given equal treatment while the people of Cyprus as a whole and the other racial communities of which it consisted have been conspicuously ignored. The other principle was aiming at assuring the participation of each community in the exercise of the functions or government and at avoiding the supremacy of the larger community (the Greek Cypriot) assuring also a partial administrative autonomy of each Community.[20]

2-10 The bi-communal character of the Constitution was confirmed by the voting system. The Constitution provided for a House of Representatives composed of 35 Greek Cypriots and 15 Turkish Cypriots elected by their own community, respectively. Separate simple majorities of Greek Cypriot and Turkish Cypriot members were required for a range of decisions.[21] All elections were to be conducted on the basis of separate communal electoral lists[22] and separate voting.[23]

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14 Constitution, art 3.
15 Constitution, arts 3 and 18.
16 Constitution, art 4.1.
17 Constitution, art 4.4.
18 Constitution, art 5.
19 Constitution, art 108.
20 Tornaritis, *Cyprus and its Constitutional and Other Legal Problems*, at p 43.
21 Constitution, art 78.2.
22 Constitution, art 63.
23 Constitution, arts 1, 39, 62, 86, 173, and 178.

Furthermore, a Communal Chamber exercising legislative and administrative power on certain restricted communal subjects such as religious affairs, education, and cultural matters and over communal taxes and charges believed to provide for the needs of the bodies and institutions under the control of the Chamber[24] was established for each community.

Separate municipal systems were set up in the five largest towns[25] while, in other localities, special provisions were made for the constitution of municipal organs in accordance, as far as possible, with the principle of proportional representation of the communities. However, for town planning purposes, the establishment of a planning authority comprising seven Greek and three Turkish members was permitted.

The authority's decisions were to be taken by an absolute majority, although no decision could be taken in respect of a Greek or Turkish community without the support of at least four or two, respectively, of the community's members of the authority.[26] The separatist elements permeated the whole constitutional structure.

A disproportionate Turkish Cypriot presence also was fixed in the public service, the police, and the army. In the public service, the Turkish Cypriot community was granted 30 per cent of the posts[27] and in the police and armed forces 30 and 40 per cent, respectively,[28] despite a population ratio of 80:20.

The communal dualism is obvious in the sphere of justice. The highest judicial organs, the Supreme Constitutional Court and the High Court, had to be presided over by neutral presidents — not Cypriot citizens — to maintain the balance between the Greek and Turkish members of the Courts. Moreover, a court trying a case of a person belonging to one community should consist only of judges belonging to that community.

> Such a division is not only detrimental to the course of justice, the very concept of which defies separation, but tends to render the judges communally minded and suspicious of one another. It tends also to shake the confidence of the public in the administration of justice.[29]

As Tornaritis commented:

> If it is put forward that all such dividing elements were adopted for the purpose of safeguarding the minority rights of the Turkish community, the answer would be that other safeguards could be resorted to, such as the Constitutional provisions against discrimination and remedies provided therefor.[30]

24 Constitution, arts 86–90.

25 Constitution, art 173.

26 Constitution, art 176.

27 Constitution, art 123.

28 Constitution, arts 129 and 130.

29 Tornaritis, *Cyprus and Its Constitutional and Other Legal Problems* (1997), at p 63.

30 Tornaritis, *Cyprus and Its Constitutional and Other Legal Problems* (1997), at pp 62 and 63.

2-11 As a result of the Zurich and London Agreements, based on notions aiming at division rather than co-operation and unity, the proper functioning of the state would soon become impossible.

The System of Government

In General

2-12 Article 1 of the Constitution provides that the State of Cyprus is an independent and sovereign republic with a presidential regime, the President being Greek and the Vice-President being Turkish, elected by the Greek and Turkish communities of Cyprus, respectively.

The President of the Republic is the Head of State,[31] elected directly by universal suffrage to a five-year term of office. According to the Constitution, executive power is vested in the President of the Republic which he exercises through a Council of Ministers appointed by him. The President may not convene or dissolve the House of Representatives which alone has such rights; nor may the House of Representatives express any lack of confidence in the government or force any of its members to resign.

However, the system of government of the Republic of Cyprus is rather more complicated in comparison with other similar presidential systems. Power which is normally granted to the President is given by the Constitution to other organs.

For example, in a number of matters, the executive power is exercised jointly by the President and the Vice-President.[32] In addition, article 46 of the Constitution provides that the executive power is not exercised but 'ensured' by the President and the Vice-President. Thus, the main organ of the executive power is the Council of Ministers, and not the President or the Vice-President. The executive powers of the President are not general but are specifically laid down in the Constitution.[33] Although the members of the Council of Ministers are appointed and dismissed by the President and are politically responsible to the President, constitutionally they are not subject to the President. According to article 57 of the Constitution, either the President or the Vice-President of the Republic may veto a decision of the Council of Ministers relating to foreign affairs, defence, or security, but:

> Since it is highly improbable that the President will ever disagree with any important decision of the Council of Ministers these powers are in effect a vice-presidential safeguard for the interests of the Turkish minority . . . .[34]

31 Constitution, arts 36 and 37.
32 Constitution, art 47.
33 Constitution, arts 47, 48, and 49.
34 De Smith, *The New Commonwealth and Its Constitutions* (1964), at p 288.

2-13 Finally, public servants are appointed not by the President but by an independent organ, the Public Service Commission, except certain senior officials and the judges who are appointed by the President.

However, the system of government adopted by the Constitution remains generally presidential because of the existence of two main characteristics, ie, the clear separation of powers and the exercise of the executive power by independent organs not originating from the House of Representatives and therefore not subject to any parliamentary control.

The Separation of Powers

2-14 The doctrine of separation of powers is adopted by the Constitution. Thus, state authority is divided into the three traditional powers. The Constitution assigns each of the three powers to different state organs, ie, an independent and separate judiciary, a powerful executive, and a relatively weak legislature.

However, the division does not lead to an absolute separation of powers. Only the judiciary is genuinely separated from the other two powers, and between the executive and the legislature there is a mutual control.

Although the government is independent of the confidence of the House of Representatives, the latter may exercise pressure on the government by declining to approve the state budget.

On the other hand, the House of Representatives is not initially controlled by the government in the exercise of its legislative power, but the Constitution provides for the promulgation of laws and decisions of the House of Representatives in the *Official Gazette of the Republic* by the President and the Vice-President.[35]

Moreover the President and the Vice-President, separately or jointly, have the right of final veto on any law or decision of the House of Representatives concerning foreign affairs and certain questions of defence and security.[36] Otherwise, the President and the Vice-President have the right to return any law or decision of the House of Representatives to the House for reconsideration.[37]

Legislative powers may be delegated to the Council of Ministers by laws made by the House of Representatives.[38] Above all, the Constitution provides for the judicial control of the constitutionality of legislation and of executive and administrative acts.[39]

35 Constitution, art 52.
36 Constitution, art 50.
37 Constitution, art 51.
38 Constitution, art 54.
39 Constitution, arts 137–147.

Distribution of State Power

The State Organs of the Republic

Executive Power

2-15 According to article 46 of the Constitution, the executive power is ensured by the President and the Vice-President of the Republic. To ensure the executive power, they have a Council of Ministers,[40] composed of seven Greek and three Turkish Cypriot Ministers with the Ministry of Foreign Affairs, Defence, or Finance being entrusted to a Turkish Cypriot.

As the Head of State, the President has the authority to receive the credentials of diplomatic representatives, to sign the credentials of the diplomatic envoys, to confer honours, and to represent the Republic at all official functions.[41] The Vice-President, as Vice-Head of State, is entitled to be present at all official functions.[42] The President has the right to prepare the agenda for, convene, and preside over meetings of the Council of Ministers,[43] with the Vice-President having the right to suggest subjects for inclusion on the agenda, propose the convening of meetings, and to attend them.

As stated above, the President and the Vice-President of the Republic have considerable authority in relation to the legislature and the executive including, jointly or separately, a right of final veto in foreign affairs, defence, and security matters on any law or decision of the House of Representatives[44] and on any decision of the Council of Ministers,[45] and the right to return any law or decision of the House of Representatives for reconsideration.[46]

The President and the Vice-President are required to promulgate a law or decision of the House of Representatives in the *Official Gazette of the Republic* within 15 days of notification unless they choose to exercise their right of veto, their right to return the legislation, or their right to refer it to the Supreme Court for a ruling on its constitutionality.[47] Finally, the President and the Vice-President exercise the prerogative of mercy and the right of remission, commutation, or suspension of any court sentence in respect of members belonging to their respective Communities.[48]

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40 The Constitution of 1960 provides for 10 ministers. The Ministry of Education was created later by the Greek Communal Chamber (Transfer of Exerase) and Ministry of Education ('Necessity') Law 1965 (Law 12 of 1965). This Ministry has been renamed the Ministry of Education and Culture by Law 47 (1) of 1993.

41 Constitution, art 37.

42 Constitution, art 38.

43 Constitution, arts 55 and 56.

44 Constitution, art 50.

45 Constitution, art 57.

46 Constitution, art 51.

47 Constitution, arts 138, 140, and 141.

48 Constitution, art 53.

Although the President is the executive Head of State, his executive powers are 'specifically enumerated'.[49]

Executive power also is jointly exercised by the President and Vice-President in matters exclusively laid down in the Constitution[50] and by the Vice-President independently under article 49. Except for the specific matters allotted to the President and the Vice-President of the Republic, to Ministers individually, and to the Communal Chambers, respectively, executive power is exercised in all respects by the Council of Ministers.

Each member of the Council of Ministers is appointed[51] by the President and the Vice-President to hold office until his appointment is terminated by them.

The President and the Vice-President ensure the exercise of executive power by the Council of Ministers and, although they may participate in meetings of the Council, neither of them has a right to vote. Decisions of the Council of Ministers are taken by majority vote.[52]

Legislative Power

2-16 Under the Constitution, the legislative power of the Republic is exercised by the House of Representatives in all matters except those expressly reserved to the Greek and Turkish Cypriot Communal Chambers which relate to affairs of their own community.[53]

The House of Representatives was to consist of 50 members of whom 35 were to be elected by the Greek and 15 by the Turkish Cypriots[54] for periods of five years.[55] Under a special law, the number of members in the House of Representatives has been increased to 80.[56]

The President of the House of Representatives was to be a Greek Cypriot and the Vice-President a Turkish Cypriot, elected by the Representatives of each community, respectively. In case of the temporary absence or incapacity of the President or the Vice-President of the House, his functions were to be performed by the oldest Representative of the respective community.[57]

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49 Constitution, arts 35, 37, 47, 48, 50–53, and 55–57.

50 Constitution, art 47.

51 The Ministers may be appointed from among members of the House of Representatives (article 46.1), but their membership is relinquished on appointment (article 59.2).

52 De Smith, *The New Commonwealth and Its Constitutions* (1964), at p 288: '. . . if there was a decision on any matter the majority would almost certainly be seven to three . . .'.

53 Constitution, art 61.

54 After the withdrawal of the Turkish Cypriot members in 1963 (see text, below), the House was obliged to function only with the Greek Cypriot Representatives.

55 Constitution, arts 62 and 65.

56 Decision of the House of Representatives, taken according to article 62.1 of the Constitution, number 2060 of 1985.

57 Constitution, art 72.

The laws and decisions of the House of Representatives are passed by a simple majority vote of all the members present. However, in matters concerning the electoral law, any law relating to municipalities, and any law imposing duties or taxes, a separate simple majority of Greek Cypriot and Turkish Cypriot representatives is required.[58]

This last provision was a significant detail since it meant that a Turkish Cypriot negative vote could wreck any of the aforementioned legislation.[59]

The House of Representatives cannot be convened or dissolved by either the President or the Vice-President of the Republic. The self-dissolution of the House of Representatives requires a majority vote, provided that one-third of the majority voters are Turkish Cypriots.[60]

The Maronite, Armenian, and Latin minorities also elect Representatives who attend meetings without a right of participation in the deliberations; they are, however, consulted in matters concerning affairs of their religious groups.

Judicial Power

2-17 The Constitution provides for a separate and independent judiciary which is '. . . vested with very wide powers, especially on constitutional matters and is rightly described as the vertebral column of the whole constitutional mechanism'.[61] Under the Constitution, the following judicial institutions were established:

- The Supreme Constitutional Court,[62] composed of a neutral President[63] and a Greek and Turkish Cypriot judge, all appointed by the President and the Vice-President of the Republic to hold office until they reached the age of 68;[64] and
- The High Court, consisting of two Greek Cypriot judges, one a Turkish Cypriot, and a neutral President.[65]

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58 Constitution, art 78.2.

59 '. . . this last provision has been the stumbling block to the due operation of the Constitution . . .'. Tornaritis, *Cyprus and Its Constitutional and Other Legal Problems* (1997), at p 47.

60 Constitution, art 67.

61 Apostolides, 'Observations on the Constitution of the Republic of Cyprus', *Review of Public and Administrative Law*, vol E (1961), at pp 14 and 15.

62 Constitution, arts 133–151.

63 Article 133.3 of the Constitution provides that 'the neutral judge shall not be a subject or a citizen of the Republic or of Greece or of Turkey or of the United Kingdom . . .'.

64 The Supreme Constitutional Court adjudicated on all matters involving the constitutionality of legislation, conflict of competence of power between organs of the Republic (article 139), and election petitions (article 145).

65 The High Court and the courts subordinate to it exercised all the judicial powers of the Republic except those falling within the jurisdiction of the Supreme Constitutional Court.

2-18 Gradually, the functioning of the Supreme Constitutional Court and the High Court, as provided by the Constitution, became impossible because of the inter-communal troubles in 1963 and the total withdrawal of Turkish Cypriots from the administration of the Republic. The two courts were, therefore, amalgamated to form a new court, the Supreme Court, under the doctrine of necessity.

The Supreme Court is composed of 13 judges, one of whom is the President of the Court. The Supreme Court adjudicates on all matters relating to the constitutionality of legislation referred to it by the President of the Republic or arising in any judicial proceedings, as well as on matters of conflict or contest of power or competence between state organs and questions of interpretation of the Constitution in cases of ambiguity.

The Supreme Court also is the final appellate court in the Republic and has jurisdiction to hear and determine appeals in civil and criminal cases from the other courts. In addition, it is vested exclusively with administrative law revisional jurisdiction in connection with administrative or executive acts, decisions, or omissions.[66]

In its original jurisdiction, the Supreme Court deals exclusively with applications for the issue of orders of *habeas corpus*, *mandamus*, prohibition, *quo warranto*, and *certiorari*; it also exercises original jurisdiction as a Court of Admiralty.

There is a District Court for each district which exercises original criminal and civil jurisdiction. Military, Industrial Disputes, Family, and Rent Control Courts also have been established under the Constitution and other legislation in force.

A Supreme Council of Judicature consisting of the President and judges of the Supreme Court is entrusted with the appointment, promotion, transfer, termination of appointment, and disciplinary control over all judicial officers, other than the judges of the Supreme Court.

Independent Organs

In General

2-19 Under the Constitution, the Law Office of the Republic, the Audit Office, the governor and the deputy-governor of the Central Bank, the Public Service Commission, and the Education Service Commission are independent and do not come under any Ministry.

The Attorney General of the Republic

2-20 The Attorney General and the Deputy Attorney General of the Republic are appointed by the President of the Republic provided that they belong to different

66 Constitution, art 146.

communities.[67] The choice is made from among lawyers of high professional and moral standing. They hold office until the age of 68 years and can only be removed in the same way as a judge of the Supreme Court.[68]

The Attorney General[69] is the head of the Law Office of the Republic, and the Deputy Attorney General, who serves on the same term as the Attorney General, is the deputy head of the Law Office.

The Attorney General, assisted by the Deputy Attorney General, is the legal adviser of the Republic and, in particular, of the President and the Council of Ministers. The Attorney General advises the President of the Republic about the commutation or suspension of sentences of imprisonment.

The Attorney General and his Deputy are the Honorary President and Vice-President of the Cyprus Bar Council and the Chairman and Vice-Chairman of the Legal Board, the Advocates Disciplinary Board, and the Advocates Pension Fund.

The Public Service Commission

2-21 The Public Service Commission is an independent organ of the Republic and its functions are to appoint, confirm, place in the permanent establishment, promote, transfer, retire, and exercise disciplinary control over public officers.[70]

The Commission has a Chairman and four other members, each appointed by the President of the Republic for a six-year term. The Chairman submits an annual report on the work of the Commission during the preceding year to the Council of Ministers.

The Education Service Commission

2-22 The Education Service Commission deals with educators serving in public schools and institutions with the duty of appointing, placing, promoting, transferring, and retiring teachers. It also exercises disciplinary control over them. It has a Chairman and four other members appointed by the Council of Ministers.

The Chairman of the Commission submits an annual report on the work of the Commission during the preceding year to the Council of Ministers.

The Governor and the Deputy Governor of the Central Bank

2-23 The Governor, assisted by his deputy, administers the currency laws of the Republic.[71] They execute the decisions of the Council of Ministers and the provisions

67 Constitution, arts 112–114.

68 Constitution, arts 112 and 133.

69 Loukaides, *Attorney General in Cyprus* (1974).

70 Constitution, art 122.

71 Constitution, art 119.1.

of any law relating to financial policy and have the obligation to consult with and be guided by the advice of the Minister of Finance about the manner of the execution of the policy.[72]

The Governor also has the obligation to submit half-yearly reports on the state of the currency, funds, and securities of the Republic to the President and Vice-President of the Republic, who must cause such reports to be laid before the House of Representatives.[73]

State and Church

2-24 Article 110.1 of the Constitution concerns the relationship between state and church. It particularly declares that the autocephalous Greek Orthodox Church of Cyprus will continue to have the exclusive right of regulating and administering its own internal affairs and property in accordance with the Holy Canons and its Charter in force for the time being, and that the Greek Communal Chamber may not act inconsistently with such right.

Based on this article, the relationship between state and church is one of public law under which the Church is not subject to the state but is self-contained and self-administered as a corporation in the state with its rights derived directly from the Constitution.

Article 110.2 of the Constitution provides that the institution of *Vakf*[74] and the principles and laws relating to *Vakf* are recognised by the Constitution. All matters relating to or in any way affecting the institution or foundation of *Vakf* or *Vakfs* or any *Vakf* properties, including properties belonging to mosques and any other Muslim religious institution, will be governed solely by and under the laws and principles of *Vakfs* and the laws enacted or made by the Turkish Communal Chamber and no legislative, executive, or other act shall contravene, override, or interfere with such laws and principles or the laws of the Turkish Communal Chamber.

The Supremacy of the Constitution

In General

2-25 Article 179.1 of the Constitution provides that the Constitution is the supreme law of the Republic. Paragraph 2 of article 179 provides that no law or decision of the House of Representatives or of either of the Communal Chambers and no act or decision of any organ, authority, or person in the Republic exercising power or any administrative function shall be in any way repugnant to or inconsistent with any of the provisions of the Constitution.

72 Constitution, art 119.4.
73 Constitution, art 119.5.
74 Muslim religious property.

The judgment of the Supreme Court in the case of *Georghiades*[75] reaffirmed the supremacy of the Constitution. In that case, it was held that illegally obtained evidence, though admissible according to the Common Law, was unconstitutional as being in contravention of the articles of the Constitution which safeguard the fundamental right to respect and secrecy of correspondence.

Ordinary laws are not of equal force with each other. Treaties, conventions, or international agreements concluded under a decision of the Council of Ministers[76] and approved by law have, as from their publication in the *Official Gazette of the Republic*, superior force to any municipal law on condition that they are applied by the other party thereto.

> A convention in the legal order of Cyprus, as set out in the Constitution, is of status superior to any other law either prior or consequent. 'Law', when used in relation to the period after the coming into operation of the Constitution means a law of the Republic (article 186.1.) The Constitution under article 179(1) is the supreme law of the Republic and is not, therefore, within the ambit of the definition of 'law'. A convention is inferior to the Constitution and is subject to judicial review in the sense that the Constitutional provisions prevail in case of any inconsistency between them and the provision of the convention. Thus, the hierarchy in our legal order is (a) the Constitution, (b) the conventions, and (c) the ordinary laws. A convention does not *stricto sensu* repeal the municipal law but has only superior force to it in the sense that it has precedence in its application. It retains its nature as part of the international law. Having regard to its nature, however, and its connection with the international obligations of the State, it cannot be amended or repealed by any posterior law contrary to the provisions of the convention or the provisions of the Vienna Convention on the Law of Treaties that was ratified under article 169 by Law 62 of 1976.[77]

The Law Applicable in the Republic

2-26 Apart from the Constitution which is the supreme law and has superior force to any law, the following law is applicable in the Republic:

- The laws made under the Constitution;[78]
- All the laws saved under article 188 of the Constitution, except in so far as other provision has been or shall be made by a law made under the Constitution;[79]
- The Common Law and the doctrines of equity, save in as far as other provision has been or shall be made by any law made or becoming applicable under the Constitution;

75 *The Police v Andreas Georghiades* (1983) 2 CLR 33.

76 Constitution, art 169(2).

77 Stylianides, in *Malachtou v Armefti* (1987) 1 CLR 207, at p 224.

78 Constitution, arts 78 and 82.

79 Law 21 (I) of 1993, concerning the translation of the English text of the laws saved into the two official languages of the Republic, Greek and Turkish.

- The laws and principles of *Vakfs*, referred to in article 110.2 of the Constitution;
- The Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland which were applicable to Cyprus immediately before Independence Day (ie, 16 August 1960), save in so far as other provision has been or will be made by any law made or becoming applicable under the Constitution and in so far as they are not inconsistent with, or contrary to, the Constitution;
- With regard to matrimonial cases of persons belonging to the Greek Orthodox Church or to a religious group, to whom the provisions of article 2(3) of the Constitution will apply, the law of that Church or religious group and of persons belonging to the Turkish community, the Turkish Family (Marriage and Divorce) Law, as may be amended by the law of the Turkish Communal Chamber; and
- International treaties, conventions, and agreements having been approved by law and published in the *Official Gazette of the Republic* have superior force to any municipal law on condition that they are applied by the other party.

Saving of Existing Laws

2-27 Article 188 of the Constitution saves all existing laws in force on 16 August 1960, subject to their modification and adaptation to the provisions of the Constitution. It reads as follows:

> Subject to the provisions of this Constitution and to the following provisions of this article, all laws in force on the date of the coming into operation of this Constitution shall, until amended whether by way of variation, addition or repeal by any law or communal law as the case may be made under this Constitution, continue in force on or after that date, and shall as from that date be construed and applied with such modification as may be necessary to bring them into conformity with this Constitution.
>
> Save where otherwise provided in the transitional provisions of this Constitution, no provision in any such law which is contrary to, or inconsistent with, any provision of this Constitution and no law which under article 78 requires a separate majority[80] shall continue to be in force.
>
> Any court in the Republic applying the provisions of any such law which continues in force under paragraph 1 of this article shall apply them in relation to any such period with such modification as may be necessary to bring them into accord with the provisions of this Constitution including the transitional provisions thereof.

80 Article 78.2 of the Constitution provides that any modification of the electoral law and the adoption of any law relating to the municipalities and of any law imposing duties or taxes requires a separate simple majority of the Representatives elected by the Greek and Turkish Cypriot communities respectively taking part in the vote.

Constitutional and International Law

2-28 Subject to the provisions of articles 50 and 57.3, article 169 of the Constitution, dealing with the rights of veto of the President and the Vice-President of the Republic, provides that:

- Every international agreement with a foreign state or any international organisation relating to commercial matters, economic co-operation (including payments and credits), and *modus vivendi* must be concluded under a decision of the Council of Ministers;
- Every other treaty, convention, or international agreement shall be negotiated and signed under a decision of the Council of Ministers and shall only be operative and binding on the Republic when approved by a law made by the House of Representatives whereupon it will be concluded; and
- Treaties, conventions, and agreements concluded in accordance with the foregoing provisions will have, as from their publication in the *Official Gazette of the Republic*, superior force to any municipal law on condition that they are applied by the other party thereto.[81]

2-29 In the *Malachtou* case,[82] which is the leading judgment in Cyprus examining the effect of ratification of an international instrument of human rights, it was stated as follows:

> . . . Article 169 deals with both the means of ratification of treaties, conventions and international agreements and their effect on internal law. International law does not specify the state authority competent to ratify international agreements. It is a matter of domestic law and the practice of states differs . . . . the Constitution of Cyprus vests the power to ratify in different authorities of the state depending on the subject matter of the treaty, convention or international agreement. International agreements relating to commercial and matters of economic co-operation are ratifiable by the Council of Ministers by virtue of paragraph 2 of article 169, whereas every other treaty, convention or international agreement is subject to ratification by the House of Representatives. Agreements duly ratified in accordance with either paragraph 1 or paragraph 2 have a superior force to municipal law from the date of their publication in the *Official Gazette* on condition that such treaties, conventions and agreements are applied by the other party thereto. It will be noticed that, unlike English law, international agreements duly ratified by the executive acquire, from the date of their publication in the *Official Gazette*, enhanced legal effect in domestic law provided the condition of reciprocity is satisfied . . . .

81 In clear cases, such a condition of reciprocity is excluded.
82 *Malachtou v Armefti* (1987) 1 CLR 207.

Additionally, in the case of *Shipowners Union*, the following was stated:

> . . . a treaty or convention is inferior to the Constitution but . . . is of higher hierarchical legal value than the domestic legislation . . . .[83]

2-30 The efficient application of ratified international conventions is the duty not only of the courts, but also of all authorities of the Republic, including executive, administrative, and legislative.

The Protection of Human Rights

Constitutional Protection

2-31 The human rights provisions in the Constitution of Cyprus are contained in Part II,[84] which is entitled 'Fundamental Rights and Liberties'.

The definition and protection of human rights was provided by the London Agreement and, under the Treaty of Establishment of the Republic of Cyprus,[85] it was agreed to secure to everyone within the jurisdiction of the Republic human rights and fundamental freedoms comparable to those set out in the European Convention for the Protection of Human Rights signed at Rome on 4 November 1950 and its first Protocol.

Thus, the Convention and Protocol have served as the prototypes of the relevant provisions in the Cyprus Constitution. Part II of the Constitution is based on the provisions of the Rome Convention and the United Nations Universal Declaration of Human Rights of 1948.

According to article 28.2 of the Constitution, fundamental rights and liberties are guaranteed not only for the citizens of the Republic but for every person 'without direct or indirect discrimination against the person on the ground of his community, race, religion, language, sex, political, or other convictions, national or social descent, birth, colour, wealth, social, or any ground whatsoever, unless there is express provision in the Constitution'. Such exceptions are provided in the Constitution itself.

Part II of the Constitution sets out a broad range of human rights, including the classic civil and political rights, economic and social rights, and obligations and duties for every person. More specifically, the fundamental rights and liberties included in Part II are the following:

- The right to life and corporal integrity;[86]

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83 *Shipowners Union and Another v The Registrar of Trade Unions and Others* (1988) 3 CLR 457.

84 Constitution, arts 6–35.

85 Constitution, art 5.

86 *Politis v The Republic* (1987) 2 CLR 116. Constitution, art 7. Paragraph 2 of article 7 contains a limitation on the legislature which cannot provide the death sentence except in cases of premeditated murder, high treason, piracy, *jure gentium*, and capital offences under military law.

- The prohibition of torture or inhuman or degrading treatment or punishment;[87]
- The right to a decent existence and to social security;[88]
- The prohibition of slavery or servitude or forced or compulsory labour;[89]
- The right to liberty and security of person;[90]
- The right to public and fair trial[91] and all other rights incidental thereto;[92]
- The right to free movement and residence[93] and the prohibition against banishment;[94]
- The right to respect for the family or private life of every person,[95] his house,[96] and correspondence;[97]
- The right to freedom of thought, conscience, and religion,[98] including the freedom of all religions whose doctrines or rites are not secret (paragraph 2) and the equality of all religions before the law. Paragraph 5 provides that 'proselytism' is prohibited in respect of any religion. Thus, the use of physical or moral compulsion for the purposes of making a person change or preventing him from changing his religion is prohibited;
- The right to freedom of speech and expression;[99]
- The right to education;[100]

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87 *Miliotis v The Republic* (1988) 3 CLR 822. Constitution, art 8.

88 Constitution, art 9.

89 Constitution, art 10.

90 *The Republic v Georghiou* (1991) 1 CLR 887. Constitution, art 11. There are certain limitations on the legislature regarding the instances of deprivation of the liberty of a person which can be enacted by law. No person shall be arrested except in the case of a flagrant (In the case of *Kyriakides v The Republic*, 1 RSCC 66, it was decided that 'flagrant' means an offence in which the commission of the offence and the arrest of the offender should follow each other directly in point of time and sequence.) offence punishable with death or imprisonment save under the authority of a reasoned judicial warrant issued according to the formalities prescribed by the law. Every person arrested must be informed at the time of his arrest in a language which he understands the reasons for his arrest and must be allowed to have the services of a lawyer of his own choice. The person arrested shall, as soon as is practicable after his arrest and in any event not later than 24 hours after the arrest, be brought before a judge, if not earlier released.

91 *Eleftheriou v The Police* (1992) 2 CLR 147.

92 Constitution, arts 12 and 30(2) and (3).

93 Constitution, art 13.

94 Constitution, art 14.

95 *The Police v Yiallouros*, (1992) CLR 147. Constitution, art 15.

96 Constitution, art 16.

97 Constitution, art 17. There may be no interference with the exercise of this right, except in accordance with the law and as is necessary only in the interests of the security of the Republic, the constitutional order, public safety, public order, public health, and public morals, or for the protection of the rights and liberties guaranteed by the Constitution to any person. There may be no entry into any dwelling-house or any search therein except when and as provided by law and on a reasoned judicial warrant or when the entry is made with the express consent of its occupant or for the purpose of rescuing the victims of any offence of violence or of any disaster.

98 Constitution, art 18.

99 Constitution, art 19.

100 Constitution, art 20.

- The freedom of peaceful assembly and association;[101]
- The right to marry and found a family;[102]
- The right to property;[103]
- The freedom from taxation unless imposed by law;[104]
- The right to practice any profession or to carry on any occupation, trade, or business;[105]
- The right to enter into any legal contracts;[106]
- The right to strike;[107]
- The right to equality before the law, the administration, and justice and the prohibition against discrimination;[108]
- The right to address written requests or complaints to any competent public authority;[109] and
- The right to vote.[110]

2-32 In addition to individual rights and liberties, Part II of the Constitution provides for individual duties and obligations, such as the duty to contribute to public burdens[111] and the duty of military service.[112]

International Protection (European Convention on Human Rights and Fundamental Freedoms)

2-33 Cyprus signed the Rome Convention on 16 December 1961 and ratified it by the European Convention for the Protection of Human Rights (Ratification) Law 1962.[113] On 6 October 1962, the instrument of ratification was deposited with the Secretary of the Council of Europe and, as from that date, the Convention came into force in regard to the Council of Europe.[114]

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101 Constitution, art 21.
102 *Demetriou v Demetriou* (1991) 1 CLR 1153. Constitution, art 22.
103 *Sergides v The Republic* (1991) 1 CLR 119. Constitution, art 23.
104 *Nicolaou v The Minister of Commerce* (1988) 3 CLR 1174. Constitution, art 24.
105 *Electrologon (Union) v The Republic* (1988) 3 CLR 1289. Constitution, art 25.
106 *Demetriou v The District Officer of Paphos* (1985) 3 CLR 2530. Constitution, art 26.
107 *Sidiropoulos v The Ship 'Panayia Myrtidiotissa'* (1987) 1 CLR 564. Constitution, art 27.
108 *Psoma v The Police* (1992) 2 CLR 40. Constitution, arts 6 and 28.
109 *Milliotis v The Republic* (1988) 3CLR 822. Constitution, art 29.
110 Constitution, art 31. *Efthymiou v The Republic* (1991) 3 CLR 299.
111 Constitution, art 24.1.
112 Constitution, art 10.3(b).
113 Law 28 of 1962.
114 However, the links with the European Convention on Human Rights go back to the period of the colonial regime; Tornaritis, 'The Operation of the European Convention for the Protection of Human Rights in the Republic of Cyprus', *Cyprus Law Review* (1983), vol 3, at pp 455 and 456.

From the date of publication of Law 28 of 1962 in the *Official Gazette of the Republic* on 24 May 1962, the Convention and its First Protocol[115] became part of the law of the Republic and have superior force to any municipal or other law, but are inferior to the Constitution of the Republic.

Cyprus also recognised the competence of the European Commission of Human Rights to receive individual petitions[116] against the Republic as from 1 January 1989.

It is the legal responsibility of all the state authorities, including executive, administrative, and legislative, to secure the enjoyment of the rights and freedoms within the fields of Part II of the Constitution, of fundamental rights and liberties and the ratified international conventions.

The Application of the Constitution

In General

2-34 As indicated above, the Constitution of Cyprus did not emanate from the free will of its people but was imposed on them by the Zurich Agreement.

> It is, therefore, . . . of the nature of a granted Constitution — *constitution octroyée* — which in the monarchical times of the past centuries the monarch condescended to grant to his people but is not consistent with the new prevailing democratic principles under which the constituent power vests in, and is exercised by, the people . . . .[117]

2-35 The complicated nature of the Constitution with its peculiarities and its separatist elements has already been underlined. An institutionalised communal dualism permeated the whole Constitution. Furthermore, the Constitutional structure created by the Zurich and London Agreements was to remain unalterable and the basic articles of the Constitution could not be amended by any means. As Professor S A de Smith has observed:

> . . . The Constitution of Cyprus is probably the most rigid in the world . . . .
>
> . . . One who was totally ignorant of the realities of politics might well inquire whether the principles underlying the Constitution of Cyprus, and the detailed values that it embodies, had been conceived by a constitutionalist and a mathematician in nightmarish dialogue. They were in fact devised at

115 For the remaining protocols of the Convention, see Evangelides, *The Republic of Cyprus and Its Constitution*, (1996), at pp 395–397.

116 *A Modinos v The Republic of Cyprus*, Application 15070 of 1989; *N Sampson v The Republic of Cyprus*, Application 19774 of 1992.

117 Tornaritis, *Cyprus and Its Constitutional and Other Legal Problems* (1997), at pp 54 and 55.

> international conferences held against a backcloth of bloody civil conflict and overhung in their early stages by the threat of war between Greece and Turkey. The Constitution of 1960 . . . is a tragic and occasionally an almost ludicrous document reflecting the gulf that lies between two communities living in a deeply riven plural society . . . .
>
> To call the Cyprus regime vice-presidential[118] would perhaps be frivolously paradoxical; yet one may obtain a better appreciation of its peculiar character by scrutinising the nature of the office and functions of the Vice-President than by reviewing the other institutions of government . . . . Here, then, one has a glimpse of the communal distrust that permeates the constitutional arrangements. They reflect an absolute refusal by the Turkish minority to submit to a majority decision on any matter that significantly affects their interests, and a corresponding refusal by the Greek majority to countenance the possibility of a Turkish head of government. In any event the latter possibility was assumed by the Turks to be of no account for the immutability of the communal safeguards in the Constitution presupposing that Greeks and Turks will always think, vote and act in terms of communal sentiment . . . .[119]

2-36 It follows from the above that the constitutional provisions were exceptionally difficult to apply and would soon be proved unworkable. Although the people of Cyprus did their best to make the young Republic operate effectively, the difficulties began almost immediately after independence. It was obvious from the early days of the new state that the Constitution was very fragile.

On 18 December 1961, Turkish Cypriot representatives voted against the Income Tax Bill (on which the main direct taxation was based). No income tax law was passed, for neither bill secured a separate majority vote, and this left the state without income tax legislation for more than five years.[120]

> . . . The Turkish members voted against such legislation not because they were holding any opposite view or because it contained any unfavourable discrimination against their community but they used their right of separate voting to compel government to yield to Turkish claims having no connection with any matter on taxation. It is to be noted that the Bills in question had been passed by the Council of Ministers with the concurrence of the Turkish Ministers and the Turkish Vice-President . . . .[121]

2-37 In November 1963, as a result of ethnic polarisation, the whole machinery reached the point of paralysis. Faced with this situation, the President of the

118 The Vice-President of the Republic has, *inter alia*, a right to veto the most important decisions.

119 De Smith, *The New Commonwealth and Its Constitutions* (1964), at p 284.

120 From 31 March 1961 to 2 June 1966 when, by Law 21 of 1966, the Income Tax Law was amended.

121 Tornaritis, *Cyprus and Its Constitutional and Other Legal Problems* (1997), at p 47.

Republic put forward a set of 13 proposed constitutional amendments to enable the smooth functioning of the state and to bring an end to the inter-communal disputes. The 13 points reflected deadlocks that actually occurred and proposed the revision of certain articles of the Constitution whose:

> Negative and separatist nature impeded the smooth functioning of the government, prevented the development of the country and tended to keep Greeks and Turks apart, instead of drawing them together in a spirit of co-operation, friendship and understanding for the well-being of the people of Cyprus as a whole.[122]

2-38 The 13 proposed amendments were as follows:

- The right of veto of the President and Vice-President of the Republic to be abandoned;
- The Vice-President of the Republic to deputise for the President in case of his temporary absence or incapacity to perform his duties;
- The Greek Cypriot President of the House of Representatives and its Turkish Cypriot Vice-President to be elected by the House as a whole;
- The Vice-President of the House of Representatives to deputise for the President of the House in case of his temporary absence or incapacity to perform his duties;
- The constitutional provisions regarding separate majorities for enactment of certain laws by the House of Representatives to be abolished;
- Unified municipalities to be established;
- The administration of justice to be unified;
- The division of security forces into police and *gendarmerie* to be abolished;
- The numerical strength of the security forces and of the defence forces to be determined by law;
- The proportion of the participation of Greek and Turkish Cypriots in the composition of the public services and the forces of the Republic to be modified in proportion to the ratio in the population of Greek Cypriots to Turkish Cypriots;
- The number of members of the Public Service Commission to be reduced from 10 to five;
- All decisions of the Public Service Commission to be taken by a simple majority; and
- The Greek Communal Chambers to be abolished.

2-39 The proposals were rejected by Turkey, pre-empting the response of the Turkish Cypriot community.[123]

Unfortunately, within a few days, on 21 December 1963, violent inter-communal disturbances broke out and all the Turkish Cypriot Ministers, members of the House of Representatives, and public servants refused to exercise the functions

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122 Tornaritis, *Cyprus and Its Constitutional and Other Legal Problems* (1997), at p 67.

123 For the Turkish Cypriot position, see Nedjati, *The Cyprus Question and the Turkish Position in International Law* (1989).

of their respective offices and effectively withdrew from the government. The disturbances continued and, in 1964, the Turkish Air Force bombed Greek Cypriot targets. In some areas, Turkish Cypriots withdrew into enclaves, 'establishing' administrations of their own as a first step towards partition.

Faced with Turkey's threats to invade Cyprus, the government brought the so-called 'Cyprus problem' (ie, the inter-communal troubles between the Greek and Turkish Cypriots) before the United Nations. In March 1964, the United Nations (UN) Security Council adopted Resolution 186 which:

- Called on all member states, in conformity with their obligations under the UN Charter, to refrain from any action or threat of action to worsen the situation in the sovereign Republic of Cyprus or to endanger international peace;
- Asked the government of Cyprus, which had the responsibility for the maintenance and restoration of law and order, to take all additional measures necessary to stop violence and bloodshed in Cyprus; and
- Called on the two communities in Cyprus and their leaders to act with the utmost restraint.

2-40 A UN Peace Keeping Force (UNFICYP) was sent to Cyprus on 27 March 1964. Originally for three months, its mandate has been extended at six-monthly intervals up to the present day. Mediators were appointed by the UN Secretary-General in 1965 to promote a peaceful solution of the Cyprus problem.

In his report of 26 March 1965, Dr Galo Plaza, the UN mediator, stated that a new solution had to be found which should be consistent with the provisions of the United Nations Charter. He concluded, *inter alia*, that the solution should satisfy the wishes of the majority of the population and at the same time provide for the adequate protection of the legitimate rights of all the people. The report was rejected by Turkey as a possible basis for the solution of the problem, and Dr Plaza's mediation efforts came to an end.

The Constitutional Developments after 1963

2-41 After the outbreak of inter-communal violence in 1963 and the withdrawal of Turkish Cypriots from the Constitution, it was then a matter of the continuing life of the paralysed Republic.

> . . . the life of the State and its government could not be wrecked and had to be carried on, and the various organs of the Republic set up under its Constitution and vested expressly with certain competence had a duty to exercise such competence and to govern and no organs can abstain therefrom in as much as the functions and the status of the organ are conferred *intuitu personae* . . . .[124]

124 Tornaritis, *Cyprus and Its Constitutional and Other Legal Problems* (1997), at p 53.

2-42 The Council of Ministers and the House of Representatives continued, therefore, to function in the absence of the Turkish Cypriot members so long as the requisite quorum existed. Decisions were taken in accordance with the constitutional provisions. The Ministers continued to perform their duties according to article 58 of the Constitution and, in case of doubt, they had to refer the matter to the Council of Ministers.

However, huge problems arose. In the field of the judiciary, from July 1963, the Supreme Constitutional Court could not sit because its Turkish Cypriot President had resigned. Similarly, from May 1964, the High Court was condemned to inactivity following the resignation of its President. The Turkish Cypriot District judges also refused to attend to their duties until June 1964, thereafter resuming them on a restricted basis. Under these circumstances, it was essential to enact the Administration of Justice (Miscellaneous Provisions) Law.[125]

> . . . as it was imperative that justice should continue to be administered unhampered by the situation created and it became necessary to make legislative provision in respect of the exercise of the judicial power hitherto exercised by the Supreme Constitutional Court and by the High Court until such time as the people of Cyprus may determine such matters . . . .[126]

2-43 Law 33 of 1964 provided for the exercise of the judicial power of the aforesaid Courts. As a result of the new Law, a new court was established, the Supreme Court, consisting of five or more members not exceeding seven and including all the existing members of the Supreme Constitutional Court and High Court. After the enactment of that Law, the Turkish Cypriot judges returned to their duties and the administration of justice reverted to normal until June 1966, when the Turkish Cypriot judges, including those of the Supreme Court, again refused to work.

The Doctrine of Necessity

2-44 The anomalous circumstances which arose during 1963 already have been considered, especially in relation to the judiciary and the enactment of the Administration of Justice (Miscellaneous Provisions) Law.[127]

That Law was attacked as unconstitutional; however, in the case of *Ibrahim*,[128] the Supreme Court decided that it was justified under the doctrine of necessity in view of the abnormal situation prevailing in Cyprus. The *Ibrahim* case is the leading case on the law of necessity in the Republic of Cyprus. As emphasised by Mr Justice Vassiliades:

> This Court now, in its all-important and responsible function of transforming legal theory into living law applied to the facts of daily life for the preservation

125 Law 33 of 1964.

126 Evangelides, *The Republic of Cyprus and Its Constitution*, at p 80.

127 Law 33 of 1964.

128 *Attorney General of the Republic v Mustafa Ibrahim* (1964) CLR, at p 195.

> of social order is faced with the question whether the legal doctrine of necessity discussed in this judgment should or should not be read in the provision of the written Constitution of the Republic of Cyprus. Our unanimous view, and unhesitating answer to this question, is in the affirmative.[129]

Mr Justice Josephides said:

> . . . In the light of the principles of the law of necessity as applied in other countries and having regard to the provisions of the Constitution of the Republic of Cyprus (including articles 179, 182, and 183), I interpret our Constitution to include the doctrine of necessity in exceptional circumstances which is an implied exception to particular provisions of the Constitution; and this to ensure the very existence of the State. The following pre-requisites must be satisfied before the doctrine may become applicable:
>
> (a) an imperative and inevitable necessity of exceptional circumstances;
>
> (b) no other remedy can apply;
>
> (c) the measure taken must be proportionate to the necessity; and
>
> (d) it must be of a temporary character limited to the duration of the exceptional circumstances.[130]

2-45 The significance of the *Ibrahim* case was enormous and vital for the continuance of the very existence of the Republic of Cyprus itself. In the case:

> . . . the principles for the application of the doctrine were set out, on the basis of which subsequent cases were decided. Since then the above case has become a landmark in the legal history of Cyprus as the doctrine of necessity has empowered the organs of the state with legal authority required to solve legal problems created by the Turkish Cypriots' rebellion against the State which otherwise, if not solved by the application of this doctrine, would have undermined the rule of law in Cyprus.[131]

The Turkish Invasion and Its Effect on the Existence of Cyprus

2-46 After the coup in Cyprus on 15 July 1974, organised by the military junta which then ruled Greece, Turkey invaded Cyprus on 20 July 1974, using the coup as a pretext. Turkey, one of the three guarantor powers under the Treaty of Guarantee, attacked the sovereign Republic of Cyprus, a member of the United Nations, by

129 *Attorney General of the Republic v Mustafa Ibrahim* (1964) CLR, at p 214.
130 *Attorney General of the Republic v Mustafa Ibrahim* (1964) CLR, at pp 264 and 265.
131 Efthymiou, 'The Law of Necessity in Cyprus', *Cyprus Law Review* (1985), vol 3, issue 12, at pp 1951–1956.

land, sea, and air.[132] Turkish troops, in an operation code-named 'Attila', finally occupied 37 per cent of Cyprus's territory, resulting in the displacement of some 200,000 Greek Cypriots. Turkey presented its military invasion as '. . . a peaceful action to eliminate the danger directed against the very existence of the Republic of Cyprus and to restore the independence, territorial integrity, security, and order established by the basic articles of the Constitution . . .', despite the fact that the coup collapsed and democratic government was restored.

Turkey based its right to carry out the 1974 invasion on article IV of the Treaty of Guarantee which reads:

> In the event of a breach of the provisions of the present Treaty, Greece, Turkey, and the United Kingdom undertake to consult together, with a view to making the representations or taking the necessary steps to ensure observance of those provisions.
>
> In so far as common concerted action may prove impossible, each of the three guaranteeing powers reserves the right to take action with the sole aim of re-establishing the state of affairs established by the present Treaty.

2-47 It is certainly not within the scope of the present chapter to deal with this fragile argument, but the proper answer is to be found in the words of the former Attorney General of the Republic, Mr C G Tornaritis:

> . . . aggressive war is considered as a crime in international law, especially as a crime against peace. The ensuing occupation of about 40 per cent of the territory of the Republic and its continuation until today constitutes a continuous aggression in flagrant violation of international law.[133]

The Idea of Federation

2-48 Cyprus was still a British colony when the idea of federation was first put on the table. It was then included in Lord Radcliffe's 'constitutional proposals for Cyprus' in 1956, as an attempt to reach a settlement. The proposals then were rejected by the representatives of Cyprus since they denied Cypriots their legitimate right to self-determination in the shape of that long-desired union (*enosis*) with their motherland, Greece.

A decade later, a similar opinion was expressed by the UN mediator, Dr Galo Plaza:

> To my mind, the objections raised against federation also on economic, social and moral grounds are in themselves serious obstacles to the proposition. It

132 Approximately 40,000 Turkish troops landed on Cyprus. The Greek Cypriot National Guard comprised 10,000 Greek Cypriots, plus 1,000 Greek soldiers of ELDYK.

133 Tornaritis, *Cyprus and Its Constitutional and Other Legal Problems* (1997), at p 87.

> would seem to require a compulsory movement of the people concerned — many thousands on both sides — contrary to all enlightened principles of the present time, including those set forth in the Universal Declaration of Human Rights. The establishment of a federal regime requires a territorial basis and this basis does not exist.

2-49 However, the 1974 Turkish military invasion brought, *de facto*, that territorial basis. Under the threat of partition, the Greek Cypriot side accepted, in the negotiations that followed the Turkish invasion, the two high-level agreements, in February 1977 and May 1979.

These agreements contained the framework of a proposed constitutional solution. By those proposals, the existing unitary state of the Republic of Cyprus would be transformed into a bi-national or bi-communal independent state consisting of two federated states, the Turkish Cypriot and the Greek Cypriot federated states, having full control and autonomy within their respective regions.

The general idea, at least for the Greek Cypriot side, is for a solution which will ensure the well-being of the people of Cyprus as a whole and will preserve the sovereignty, independence, territorial integrity, and non-alignment of the Republic of Cyprus with the pre-requisition that all foreign armed forces will be withdrawn and all the refugees will be able to return to their homes in conditions of safety under the umbrella of the Federal Republic of Cyprus, being the sole subject of international law.

The guidelines[134] agreed as instructions to the representatives in the inter-communal talks as the basis for a future federal solution were the following:

- The goal is an independent, non-aligned, bi-communal, federal republic;
- The territory under the administration of each community should be discussed in the light of economic viability and productivity and land ownership;
- Questions of principles such as freedom of movement, the right of property, and other specific matters are open for discussion, taking into consideration the fundamental basis for a bi-communal federal system and certain practical difficulties which may arise for the Turkish Cypriot community; and
- The powers and functions of the central federal government will be such as to safeguard the unity of the country, having regard to the bi-communal character of the state.

2-50 However, on 15 November 1983, the Turkish Cypriots declared a separate 'state' in the part of Cyprus occupied by Turkish troops which they name the 'Turkish Republic of Northern Cyprus'. The pseudo-state has not been recognised by any other state in the world except Turkey. United Nations Security Council Resolutions 541 (1983) and 550 (1984) condemned the unilateral declaration as illegal and invalid and called for its withdrawal.

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134 Report of the Secretary General S/1233 of 30 April 1977.

Since then, the scenario has become familiar. The Turkish Cypriot side insists on the acceptance of the idea of separate 'sovereignty' for the Turkish Cypriot community and a settlement envisaging a loose confederation, rather than federation, ignoring the fact that all the security council's resolutions have reaffirmed the position that:

> . . . a Cyprus settlement must be based on a state of Cyprus with a single sovereignty and international personality and a single citizenship with its independence and territorial integrity safeguarded.

2-51 In July 2000, another round of talks between the two sides, initiated and supported by the UN, began in Geneva, in an effort to break the deadlock. Unfortunately, there is little hope of success, due essentially to the total lack of political will on the Turkish Cypriot side.

Conclusion

2-52 The Cyprus question has been 'on the stage' for a long time, occupying the UN and other international *fora* for almost 40 years. Peace operations and mediation efforts by the international community have taken place several times without succeeding in the restoration of peace and order in Cyprus.

The law of the Constitution, by its nature, is connected with politics since it regulates and transforms into writing elements of the political sphere. It could be said that the law of the Constitution is simultaneously the law of politics. Thus, it was inevitable to refer to the Cyprus problem which is a political problem as well as a constitutional question.

The Constitution of the Republic of Cyprus has been described as the most complex, most rigid, and most ethnically divisive ever devised and as a recipe for failure. It was said to be a 'constitutional oddity' by UN Mediator Dr G Plaza in 1965.

Was the Constitution of 1960, the 'granted document', the reason, the 'wooden horse', for the tragedy of Cyprus and its people? It is not part of the present chapter which, as an introduction, has a limited range to give the answers.

The Republic of Cyprus still exists and functions on the basis of the Constitution of 16 August 1960, even if that has been qualified by the doctrine of necessity. The critical need for Cyprus is to be reunited under a workable Constitution, and Cyprus is still in search of an acceptable constitutional and political solution.

CHAPTER 3

Administrative Law

Christos Melides

Introduction

Administrative Law

In General

3-1 Administrative law deals with the organisation of, and functions performed by, various administrative agencies of government and other administrative authorities, the limits and restrictions which govern these functions, as well as the extent to which these limits and restrictions may be utilised by a citizen to obtain relief from the courts.[1]

Sources of Administrative Law

3-2 The sources of the administrative law of Cyprus are the following:

- The Constitution of the Republic of Cyprus;
- The legislation (statute law) of the Republic of Cyprus; and
- Judicial precedent (case law).

Historical Background and Law 158 (I) of 1999

3-3 The Republic of Cyprus, after the announcement of its independence, followed English law with the single exemption of the administrative law. Article 146 of the Constitution granted to the Supreme Constitutional Court (and now to the Supreme Court) the jurisdiction of annulment of administrative acts as in Greece and other continental countries.[2]

Article 146 of the Constitution is an enactment largely based on and reproducing the principles to be found in the jurisprudence of the Greek Council of State and in other European administrative courts.[3]

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1 Nedjati, *Cyprus Administrative Law* (1970), at p 3.

2 Tornaritis, *Influence of Greek Law on Contemporary Cypriot Institutions* (1973), at pp 391–400; Clerides, *The Influence of the Greek Law on the Ascent* of *the Administrative Law applied in Cyprus* (1978), at pp 7–10.

3 *Pikis, 'The English Common Law', The Maxims of Equity and Their Application in Cyprus* (1981), at pp 76 and 77; *K Papasavvas v The Republic* (1967) 3 CLR 111, at p 123; *The Republic v Mozoras* (1966) 3 CLR 356; *Frangos v The Republic* (1970) 3 CLR 312.

In 1999, by Law 158 (I) of 1999 (A Law Codifying the General Principles of Administrative Law That Must Govern the Actions of the Administration), the jurisprudence was largely codified and is now in force in the Republic of Cyprus.[4]

Legality of Public Administration

3-4 The decision-making procedure which was followed by Cypriot public authorities until 31 December 1999 was not codified but derived from principles of law developed by legal doctrine and judicial decisions partly incorporated in the Constitution. The principle of the legality of public administration results from the wider principle of the rule of law. It also is based on Articles 46, 47, 48, 49, and 54 of the Constitution (mainly in Article 146). The legality of administration covers constitutionality as well. This is deduced from the supreme position of the Constitution in the hierarchy of legal rules, and also from the fundamental duty of allegiance of the public authorities and servants (and every power) to the Constitution.[5]

The activity of the administration is determined and limited by the law in force in the Republic of Cyprus.[6] The rules of law that determine the limits and extent of the power of the administration are imposed by the Constitution, the laws, and the regulatory acts of the Council of Ministers or of other administrative organs[7] issued under authorisation of a law.[8]

When, after an application, the administrative organ issues an act, it must be based on the legal status applicable at the time of the issue of the act, independently if that was different at the time of the submission of the application. If the administrative organ fails to proceed to the examination of the application, the status in force at the end of the expiration of a reasonable time will be taken into account.[9]

The administrative organ must exercise its competence within a reasonable time in order that its decision will be in agreement with the facts and the law to which

4 Law 158 (I) of 1999, published on 31 December 1999.

5 Constitution, art 35.

6 Law 158 (I) of 1999, s 8(1).

7 Although a comprehensive definition of the words 'organ' and 'authority' has not been judicially formulated in the context of article 146 of the Constitution, in the case of *Celaleddin and Others v The Council of Ministers and Others*, 5 RSCC 102, the majority of the Supreme Court stated that organs or authorities in the sense of article 139 of the Constitution are 'specific juridical creations bearing the features of individual and concrete organic institutions of government and functioning for and on behalf of a primary legal entity, such as the Republic of Cyprus, of which they are organs or authorities in the ordinary meaning of such terms'. It is submitted that the same meaning is attributable to the words 'organ' and 'authority' appearing in the context of article 146.

8 Law 158 (I) of 1999, s 8(2).

9 *The Board for Registration of Architects and Civil Engineers v A Constantinou and Others* (8 October 1990 — Rev App 1066); Law 158 (I) of 1999, s 9.

it refers. The determination of reasonable time depends on the special circumstances existing in each case.[10]

The time limits fixed for the issue of an administrative act are indicative unless expressly described as peremptory. The act cannot lawfully be issued if excessive time has passed from the expiry of the time limit, which substantially affects the legal and factual prerequisites of the issue of the act.[11] The time limit fixed for the submission of an application by a citizen asking for a remedy for his claim is peremptory.[12]

Applications can be submitted by personal delivery, by fax, or by any other electronic medium or by post. When an application is submitted by post, the sending date of the application is deemed to be the day on which, in the usual process of the post office, the application will be received.[13]

Exceeding the time-limit can only be excused for reasons of *force majeure* or if there are special circumstances and the excess time does not prejudice the interests of other citizens.[14] An administrative organ in the exercise of its competence recognises as valid and applies all the acts of other administrative organs provided that they have the external characteristics of valid acts.[15]

The administration, before it takes any measures of administrative coercion for the execution of its acts, shall warn the disobedient citizen of the aforesaid measures. The application of the above measures must not exceed those absolute necessary for the execution of the act.[16] Any measures of direct coercion that are not aimed at the execution of an administrative act can be taken only if:

- There is an urgent and serious necessity concerning the remedy of the common interest;[17] and
- The achievement of the obedience of the citizen is impossible by taking any other coercive measures.[18]

3-5 A cardinal prerequisite for an administrative act to be valid is the lawful existence of the organ issuing it.[19]

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10 *A Koromias v The Republic* (10 March 1993 — Appl 240/92); *Strovolos Municipality v N Vorkas and Others* (25 October 1994 — Rev App 1213); Law 158 (I) of 1999, s 10.

11 *Tingiridou v The Republic* (1987) 3 CLR 1181; *Zenios Closures Ltd v Municipality of Limassol*, Appl 1/92, 29 July 1992; *Case Law of the Greek Council of State* (1929–1959), at p 105; Law 158 (I) of 1999, s 11(1).

12 Law 158 (I) of 1999, s 11(2).

13 Law 158 (I) of 1999, s 11(3).

14 Law 158 (I) of 1999, s 11(4).

15 *Gavriel v The Republic* (1971) 3 CLR 195, at p 202; *Tsangara v The Republic,* Appl 845/89, 15 July 1992; *Case Law of the Greek Council of State* (1929–1959), at pp 157 and 158; Law 158 (I) of 1999, s 12.

16 Law 158 (I) of 1999, s 14(1).

17 Law 158 (I) of 1999, s 14(2)(a).

18 Law 158 (I) of 1999, s 14(2)(b).

19 Kyriakopoulos, *Greek Administrative Law* (1951), vol B, at pp 368–370; Law 158 (I) of 1999, s 15.

A one-member administrative organ on leave of absence can validly issue an act of its competence if, before the issue, it declares the discontinuance of its leave. The acts of a one-member administrative organ on suspension or on leave before its discharge are unlawful.[20]

The administrative organ, when it issues an act, must be competent in subject matter, in place and in time.[21] The competence of an administrative organ is determined by the Constitution, by the law or by a regulatory administrative act issued by authorisation of law.[22]

The illegality of an act issued by an incompetent organ cannot be remedied even if this act is approved at a later stage by the competent organ.[23] When the law entrusts the exercise of a power to a certain organ, this organ cannot delegate in total or in part this power to another organ except where there is a provision of the law allowing the same (*delegatus non potest delegare*).[24]

If an application is submitted to an incompetent administrative organ, the incompetent organ should forward it to the competent one, so informing the applicant.[25] The administrative competence must be exercised by the organ to which it is entrusted by the law.[26]

The mere approval of the recommendations of an inferior organ, without dealing with the solution of the matter by the competent organ, amounts to a failure in the exercise of the jurisdiction of the competent organ.[27]

The adoption of a note or of a proposal submitted by a subordinate official or organ to the competent administrative organ is not a failure in the exercise of jurisdiction if the note or the proposal contains a specific submission and from the totality of the whole administrative act it is clear that the competent organ substantially exercised its decisive jurisdiction.[28]

The power of the superior to exercise control of his subordinate results from the hierarchical relation between them.[29] The hierarchically superior organ can always exercise legitimate control over the acts of its subordinate organ.[30]

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20 Kyriakopoulos, *Greek Administrative Law* (1951), vol B, at p 370; Law 158 (I) of 1999, s 16.

21 Law 158 (I) of 1999, s 17(1).

22 *Constantinides v Cyprus Telecommunication Authority* (1975) 3 CLR 1, at p 8; Law 158 (I) of 1999, s 17(1).

23 *Kalisperas v The Republic*, 3 RSCC, 146, at p 150; Law 158 (I) of 1999, s 17(3).

24 *The Republic v N Meletis* 1991, 3 CLR 433; Law 158 (I) of 1999, s 17(4).

25 *Case Law of the Greek Council of State* (1929–1959), at pp 106 and 107; Law 158 (I) of 1999, s 17(5).

26 Law 158 (I) of 1999, s 17(6).

27 Law 158 (I) of 1999, s 17(7).

28 Law 158 (I) of 1999, s 17(8).

29 Charalambous, *Action and Control of Public Administration* (1995), at p 20; Law 158 (I) of 1999, s 18(1).

30 Charalambous, *Action and Control of Public Administration* (1995), at p 20; Law 158 (I) of 1999, s 18(2).

The legitimacy of control relates to the adherence to the provisions of the law or of the regulatory or administrative acts or the acts derived from the general principles of the administrative law.[31]

The hierarchically superior organ has no power to cancel or amend the acts of its subordinate organ for material reasons, if the law entrusted the exercise of the related jurisdiction exclusively to the subordinate organ.[32]

When the law requires the approval, by a Minister or by the Council of Ministers, of the acts of public legal persons or of the authorities of the local administration, those acts are not valid until the said approval is given.[33]

Administrative Acts

Definition

3-6 An administrative act is a unilateral authoritative pronouncement. It is an act derived from an administrative authority or organ or person. An executive administrative act is an administrative act by means of which the 'will' of the administrative organ concerned has been made known in a given matter, an act which is aimed at producing a legal situation concerning the citizen affected and which entails its execution by administrative means.[34]

The decisions of the disciplinary tribunals are administrative acts subject to the exclusive jurisdiction of the Supreme Court of Cyprus.[35] Law 158 (I) of 1999 describes an administrative act as an individual administrative act by which an administrative organ unilaterally defines what should be in force in a certain case.[36]

Characteristics

3-7 The characteristics of an administrative act are, amongst others, that it is:

- A unilateral act;
- An authoritative act of an organ of public administration;
- An act which relates to the domain of public law;
- An act from which a direct legal effect is derived;
- Not an act of legislation; and
- Not a judicial decision.[37]

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31 Law 158 (I) of 1999, s 18(3).

32 Law 158 (I) of 1999, s 18(4).

33 Law 158 (I) of 1999, s 18(5).

34 Forsthof, *The Administrative Act* (1963), at pp 6 and 11; Dagtoglou, *General Administrative Law* (1997), at p 237; Delicostopoulos, *Admimistrative Law* (1972), vol A, at p 154.

35 Evangelou, *The Law of Disciplinary Proceedings for Public Officers*, at p 7; *Lambrou v The Republic* (1972) 3 CLR 379; *Azinas v The Republic* (1980) 3 CLR 1.

36 Law 158 (I) of 1999, s 2.

37 Nedjati, *Cyprus Administrative Law* (1970), at pp 95–129.

Issue

3-8 The issue of an administrative act is to be made by the expression of the will of the administrative organ.[38] The validity of an administrative act begins on the date on which the will of the administrative organ is notified to the interested person. When the law makes the publication of an administrative act a substantial element of the act, the validity begins on the date of publication.[39]

The administration should inform the interested person, by the written notification of the administrative act, of the remedies he has if he wishes to attack the administrative act. The notification should contain the nature and kind of remedy, the time limit fixed by the Constitution or the law and the competent court or administrative organ to which the interested person could apply.[40]

The legal effects of an administrative act begin when the validity of the act begins, except in the case of a provision to the contrary in the act itself.[41] The validity of the administrative act is postponed to the future when a condition precedent or a time limit is contained in the act. When retrospective effect is given to the act then its validity will cover the past. An administrative act cannot have a retrospective effect unless:

- It is permitted by the law;[42]
- It is issued in compliance with a Supreme Court decision;[43]
- The administrative authority repeats an act annulled for non-substantial reasons and the new act has the same contents as the annulled act and is issued within a reasonable time after the first act and on the same facts and law (it is not possible for an act annulled for infringement of law or for infringement of a general principle of administrative law to have a retrospective effect);[44]
- An administrative act withdraws another act of the administration which is illegal or which infringes a general principle of administrative law;[45]

38 Stasinopoulos, *The Law of Administrative Acts* (1951), at p 360; *Panayides v The Republic* (1972) 3 CLR 467 at p 482; Law 158 (I) of 1999, s 3.

39 Law 158 (I) of 1999, s 4.

40 Law 158 (I) of 1999, s 5.

41 Kyriacopoulos, *Greek Administrative Law* (1961). Vol B, at p 400; Stasinopoulos, *The Law of Administrative Acts*, at p 370; Loucaides, *Subjects on Cyprus Law* (1982), at pp 179–194.

42 *Panayides v The Republic* (1972) 3 CLR 467 at pp 484, 485; *Panayides v The Republic* (1973) 3 CLR 378 at p 385; Law 158 (I) of 1999, s 7(a).

43 Papanicolaides, *The Non-Retrospection of Administrative Acts* (1968), at pp 72 and 73; Law 158 (I) of 1999, s 7(b).

44 *Hadjigeorgiou v The Republic* (1968) 3 CLR 326, at p 352; *The Republic v Mozoras* (1970) 3 CLR 210, at p 220; Law 158 (I) of 1999, s 7(c).

45 Stasinopoulos, *The Law of Administrative Acts* (1951), at p 372; Law 158 (I) of 1999, s 7(d).

- The content of the act is exclusively the ascertainment of a state of facts and the retrospection is effected for the correct enforcement of the law and is not prejudicial to any existing situation;[46] and
- Retrospection is effected to remedy an injustice done to a citizen due to a failure of a necessary step.[47]

3-9 Following French and Greek administrative law, Cypriot administrative law includes in the definition of an administrative act not only decisions addressed to individuals (individual administrative acts) but also regulatory acts, ie, statutory instruments containing legal rules (although not administrative contracts). The differences between these two administrative activities are considerable and numerous. A discussion of the activities will be made below.

It is important to define what is meant by the expression 'administrative act' since an application for annulment is admissible only if it challenges the validity of an administrative act. Applying organisational rather than functional criteria, the Greek Council of State considers as administrative acts only those issued by a central or local government authority. In view of the fact that, in the last three decades, an increasing number of government authorities or self-governing administrative organs have been reorganised into commercial companies with the state as the only shareholder, the Greek court's insistence that only government authorities' decisions can be considered as administrative acts has been criticised as too formalistic.[48]

Contrary to the above, the Cypriot Supreme Court's jurisprudence is steadily directed to the functional criterion as it is explained below.

Formalities

3-10 The administration should abide by the formalities which the law requires for the issue of an administrative act. Infringement of an essential formality renders the act illegal.[49]

The crucial distinction between essential and non-essential formalities is the possibility that non-compliance with them will affect the contents of the act. If the formality affects the outcome of the decision taken, it is deemed essential.[50] If there is an objective inability to follow the procedure provided by the law, the

46 *Tsangarides and Others (No 1) v The Republic* (1975) 3 CLR 1, at pp 9 and 10; Law 158 (I) of 1999, s 7(d).

47 Law 158 (I) of 1999, s 7(e).

48 Dagtoglou, *Administrative Procedural Law* (1994), at pp 380–383.

49 *Ierides v The Repubic* (1980) 3 CLR 165, at p 182; *Eliades v Christofi* (1991) 3 CLR 25; Stasinopoulos, *The Law of Administrative Acts* (1951), at pp 229 and 230; Law 158 (I) of 1999, s 13(1).

50 Law 158 (I) of 1999, s 13(2).

administration can follow an approximate procedure if that offers the same guarantees as the one provided by the law.[51]

Reasoning

3-11 Administrative acts issued after the exercise of discretionary power should be adequately and duly reasoned,[52] especially when the acts:

- Are unfavourable to the citizen;
- Are contrary to the contents of a previous opinion, proposal, suggestion, or statement of a competent organ or to the contents of the administrative file;
- Are contrary to the usual policy or practice of the administrative organ;
- Consist of extraordinary measures; or
- Require reasoning by the law.

3-12 The form and extent of the reasoning required varies according to the matter which the act deals with and to the circumstances that surrounded it.[53] The following administrative acts need no reasoning:

- Acts which were not issued after the exercise of discretionary power;
- Acts by which the request of the applicant was accepted in full or which are generally favourable to the citizen without affecting any third person's legal interest;
- Acts which were issued uniformly in a large number or by a mechanical or electronic medium;
- Acts of general content;
- Acts for which the law expressly provides that no reasoning is needed.[54]

3-13 The reasoning of an administrative act must be clear and not allow any doubt as to what was the real purpose which led the administrative organ to take the relevant decision.[55] The mere mention in a decision of general characterising references which could be applied and have effect in any case or of general clauses of the law which could be applied in any other case is not sufficient reasoning.[56]

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51 *Yiallouros v The Republic* (1986) 3 CLR 677, at p 684; *Makris v The Republic*, Appl 759/86, 28 February 1990; Law 158 (I) of 1999, s 13(3).

52 *Pancyprian Federation of Labour (PEO) v The Board of Cinematograph Films Censors and Another* (1965) 3 CLR 27, at p 37; Dagtoglou, *General Administrative Law* (1997), at pp 277–281.

53 *M Constantinides v Improvement Board of Strovolos*, Appl 216/86 and Others, 30 April 1990.

54 Dagtoglou, *General Adminstrative Law* (1997), at pp 294–300; Law 158 (I) of 1999, s 27.

55 *M Constantinides v The Republic* (1967) 3 CLR 7, at p 13; Law 158 (I) of 1999, s 28(1).

56 *Chr Petrondas v The Republic* (1969) 3 CLR 214, at p 223; *J M C Polytrade v The Republic*, Rev App 900, 16 July 1992; *Case Law of the Greek Council of State* (1929–1959), at p 186; Law 158 (I) of 1999, s 28(2).

An act is deemed to be without reasoning when there is a general and indefinite invocation of the public interest. When there is such an invocation, it should be specified with reference to the particular factual circumstances on which the judgment of the competent administrative organ relied.[57]

Except where there is any different provision in any law, the reasoning of an act can be completed or substituted by the contents of the relevant administrative file or from the totality of the whole administrative act.[58]

In urgent cases, the administration is extraordinarily permitted to reason its act at a later stage, but relying on facts and circumstances which existed before the issue of the act and which can be concluded from the relevant administrative file.[59] Reasoning which is wrong in law does not lead to the annulment of the act if the act could rely on another legal ground.[60]

When the act has multiple or alternative reasoning and one of the reasonings is wrong, the act is subject to annulment, unless the wrong reasoning was auxiliary or secondary to the correct reasoning and thus did not affect the competent administrative organ in the taking of the decision.[61]

Void and Voidable Administrative Acts

3-14 The distinction between void and voidable administrative acts, while known in legal theory, is of no great relevance in the cases of administrative law.

The Supreme Court of Cyprus considers voidability as the rule. There is no statutory list of the instances in which an administrative act is void.

Regulatory Acts

3-15 A regulatory act is an act which sets rules of a legislative nature, general and impersonal, which could be applied to cases indefinitely, whether existing or which may exist in the future.[62]

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57 *D Stephanides and Others v The Republic* (1993) 3 CLR 367; Law 158 (I) of 1999, s 28(3).

58 *The Republic (PSC) v P I Myrtiotis* (1975) 3 CLR 484, at p 488; *Holy Archbishop of Cyprus and Others v The Republic*, Appl 63/82, 5 April 1990; Law 158 (I) of 1999, s 29.

59 *V Tseriotis v Municipality of Nicosia* (1968) 3 CLR 215, at p 223; M Stasinopoulos, *The Law of Administrative Disputes* (1964), at p 228; Law 158 (I) of 1999, s 30.

60 *C Pikis v The Republic* (1967) 3 CLR 562, at pp 574–576; A *Limnatou v The Republic*, Rev App 1014, 26 November 1990; Law 158 (I) of 1999, s 31.

61 *D Kontos v Revisional Licensing Authority*, Appl 180, 22 March 1991; Stasinopoulos, *The Law of Administrative Disputes* (1964), at pp 228 and 229.

62 Charalambous, *Action and Control of Public Administration* (1995), at pp 114 and 115; Law 158 (I) of 1999, s 2.

A regulatory act which was issued without authority granted by any law is invalid. A regulatory act issued *ultra vires* of the enabling law or opposed to any provision of the enabling law or issued without observing every form necessary for its valid issue also is invalid.[63]

An administrative organ cannot delegate to another organ the authority delegated to it by the House of Representatives for the issue of regulatory acts, except in the case where, expressly or impliedly, this power is provided by the law.[64]

Regulatory acts which are issued under delegation of authority cannot have retrospective effect, unless the enabling law expressly permits the same.[65] Regulatory acts are valid from their publication in the *Official Gazette of the Republic*.[66]

Article 146 of the Constitution

Paragraph 1 of Article 146

3-16 Article 146 of the Constitution creates jurisdiction in the Supreme Constitutional Court (now the Supreme Court of Cyprus) in administrative law matters. Paragraph 1 of Article 146 reads as follows:

> The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, act or omission of any organ, authority, or person exercising any executive or administrative authority is contrary to any of the provisions of the Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

3-17 Act or decision means an executive administrative act or decision. The following acts are not executive and cannot be attacked by a recourse:

- Acts of execution;[67]
- Confirmatory acts;[68]

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63 Charalambous, *Action and Control of Public Administration* (1995), at p 118; Interpretation Law, art 29(d), Cap 1 of the Statute Laws of Cyprus; Law 158 (I) of 1999, s 60(1).

64 Hood Phillips, *Constitutional and Administrative Law*, at pp 675 and 676; Charalambous, *Action and Control of the Public Administration* (1995), at p 119; *Allingham v Minister of Agriculture* (1948) 1 All ER 780; Stasinopoulos, *Lectures on Administrative Law* (1957), at pp 109 and 110; Law 158 (I) of 1999, s 60(2).

65 Stasinopoulos, *Lectures on Administrative Law* (1957), at p 253; Basu, *Commentary on the Constitution of India*, vol 1, at p 277; Charalambous, *Action and Control of the Public Administration* (1995), at p 120; Law 158 (I) of 1999, s 60(3).

66 Law 158 (I) of 1999, s 61.

67 Charalambous, *Action and Control of the Administration* (1995), at p 170; *Case Law of Greek Council of State* (1929–1959), at p 240; *Kolokassides v The Republic* (1965) 3 CLR 542, at p 551; *Kyprianou v The Republic* (1986) 3 CLR 2281, at p 2286.

68 Charalambous, *Action and Control of the Administration* (1995), at pp 170–172; *Pieri v The Republic* (1983) 3 CLR 1054, at pp 1061–1064; *Odysseos v The Republic* (1984) 3 CLR 463; *Zivlas v Municipality of Paphos* (1975) 3 CLR 349.

- Preparatory acts;[69]
- Internal acts of the administration;[70] and
- Acts of the government (*actes de gouvernment*).[71]

3-18 The definition of 'act' includes the 'failure' of the administration.[72] There is no failure when the administration refuses or when the administration has no jurisdiction to act. The decision, act, or failure should be derived from an administrative organ, authority, or person and should pertain to the domain of public law. A crucial criterion is the nature and character of the administrative act in order to ascertain if the act pertains to the domain of public law and not to the domain of private law, if the act contains the element of *imperium*, and of the immediate executive effect of the act.[73]

The jurisdiction of the Supreme Court is 'exclusive' and this means that no other or any concurrent jurisdiction can exist for the judicial control of administrative acts, but it is lawful to have, before the recourse, hierarchical control or hierarchical recourse.[74] The reasons for which a person can file a recourse are as follows:[75]

- The act is contrary to the Constitution of the Republic;
- The act is contrary to the law, which means the statute laws of Cyprus, the case law, and the basic principles of administrative law (eg, principles of natural justice, the rule against retrospection of administrative acts, the requirement of full and proper inquiry before the taking of an administrative act or decision, and the requirement of due reasoning);
- The act is in excess of powers; and
- The act is in abuse of powers.

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69 Charalambous, *Action and Control of the Administration* (1995), at pp 166–168; *Case Law of Greek Council of State* (1929–1959), at p 239; *Kemek (Transport) Ltd v The Republic* (1981) 3 CLR 515; *Louca v The Republic*, Appl 171/88 and Others, 9 March 1990; *Papadopoulos v The Republic* (1983) 3 CLR 1423.

70 Charalambous, *Action and Control of the Administration* (1995), at pp 164 and 165; *Case Law of the Greek Council of State* (1929–1959), at p 238; *Republic v Nissiotou* (1985) 3 CLR 1335; *Vorkas and Others v The Republic* (1984) 3 CLR 757, at p 764.

71 Charalambous, *Action and Control of the Administration* (1995), at pp 161–163; Stasinopoulos, *The Law of Administrative Disputes* (1964), at pp 176–180; Delicostopoulos, *Administrative Law* (1972), vol A, at pp 151–154; *Case Law of the Greek Council of State* (1929–1959), at p 231; *Demetriou v the Republic*, 3 RSCC 121, at p 128; *Louka v The President of the Republic* (1983), 3 CLR 783; *Stokkos v The Republic* (1983) 3 CLR 1411.

72 Nedjati, *Cyprus Administrative Law* (1970), at p 95.

73 Angelides, 'Administrative Law — Article 146 of the Constitution', 13 *Cyprus Law Review*, at pp 2115 and 2116; *Ethnikos v KOA* (1984) 3 CLR 831.

74 *Ouzounian v The Republic* (1966) 3 CLR 553.

75 Angelides, 'Administrative Law — Article 146 of the Constitution', 13 *Cyprus Law Review*, at pp 2116–2119.

Paragraph 2 of Article 146

3-19 Paragraph 2 of Article 146 of the Constitution lays down the prerequisites in order to make a recourse and reads as follows:

> Such a recourse may be made by a person whose existing legitimate interest, which he has either as a person, or by virtue of being a member of a community, is adversely and directly affected by such decision or act or omission.

3-20 The requirements of the above paragraph must be satisfied at the time of the filing and hearing of a recourse.[76] The notion of 'interest' is deemed to include a moral interest, not only a pecuniary one.[77] The word 'person' is interpreted as including a legal person and a legal person by his official capacity.[78] 'Community' means the Greek and Turkish Communities as defined in article 2 of the Constitution of the Republic. The 'existing legitimate interest' should be affected to the detriment of the applicant and by an act which is directed at and affects the applicant.[79] An applicant can be a third person if an existing legitimate interest of his is directly affected by the act, ie, a public officer when a colleague of his is promoted instead of him.

The concept of legitimate interest is widening continually in Greece,[80] but not so quickly and consistently in Cypriot jurisprudence. The court can examine the question of the existence of a legitimate interest *ex proprio motu*.[81] If a person accepts an administrative act or decision, he no longer possesses a legitimate interest entitling him to file a recourse against it.[82]

Paragraph 3 of Article 146

3-21 Paragraph 3 of Article 146 of the Constitution reads as follows:

> Such a recourse will be made within seventy-five days of the date when the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse.

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76 *Papasavvas v The Republic* (1967) 3 CLR 111; *Serghidou v The Republic*, Rev App 1738, 27 February 1998.

77 Tsatsos, *Lectures of Administrative Law* (1970), vol B, at pp 248–252; *Olympios v The Republic* (1974) 3 CLR 17; *A Vakana v The Republic* (1987) 3 CLR 316, at pp 319 and 320.

78 *Minister of Finance v Public Service Committee* (1968) 3 CLR 691; Delicostopoulos, *Condition for the Acceptance of the Recourse for Annulment*, at pp 356–358.

79 Angelides, 'Administrative Law — Article 146 of the Constitution', *13 Cyprus Law Review*, at pp 2120 and 2121.

80 Kourousopoulos, *The Role of Administrative Justice in a State under the Rule of Law* (1984), at pp 10 and 11; *Bar Association of Nicosia v The Republic* (1975) 3 CLR 24.

81 Nedjati, *Cyprus Administrative Law*, at pp 167–168; *Kritiotis v Municipality of Paphos* (1986) 3 CLR 322; *Kittou v The Republic* (1994) 3 CLR 42.

82 *Tombolis v Cyprus Telecommunications Authority* (1982) 3 CLR 149.

3-22 If the application has not been filed within the said time limit of 75 days, the recourse should fail as filed out of time.[83] This time limit begins from the time when the act took place. A stay of the above period could be for an act of God or *force majeure*.[84] Knowledge by the citizen is presumed from proper publication in the *Official Gazette*, but the knowledge of the citizen should be full.

In the case of a continuing failure by the administration, the filing of the recourse after the time limit of 75 days is not to be deemed out of time.[85] Paragraphs 4, 5, and 6 of Article 146 of the Constitution will be examined below.

General Principles of Administrative Action

Principle of Equality

3-23 The principle of equality[86] imposes on the administration, in the exercise of its discretionary power, equal or uniform treatment of all the citizens under the same or similar circumstances.[87]

The principle of equal treatment is infringed when the administration decides in one case in a different way from what was decided in the past in another similar case, except where the administration has decided to change the practice of exercising its discretionary power. In the later case, the administration must give special reasoning for its decision to change its practice.[88]

The equal treatment of unequals is as unacceptable as the unequal treatment of equals.[89] An unlawful exercise of its discretionary power by the administration is not an excuse to continue the illegality in other similar cases in the future, because these is no recognised equality in illegality.[90]

In the application of the doctrine of equality between the two sexes, the administration must grant equal chances to both sexes and deviations are permitted only when these are necessary or a reason refers to the need for greater protection of women, especially in matters regarding maternity, marriage, and the family or for reasons relating to pure biological differences.[91]

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83 *Holy See of Kitium v Municipal Council of Limassol*, 1 RSCC, 15.

84 *Yialousa Saving Bank Ltd v The Republic* (1977) 3 CLR 25.

85 Nedjati, *Cyprus Administrative Law* (1970), at pp 177–179.

86 Charalambous, *Action and Control of Public Administration* (1995), at pp 43–51.

87 *A Mikrommatis v The Republic*, 2 RSCC 125, at p 131; *The Republic v N Arakian* (1972) 3 CLR 294, at p 299; Law 158 (I) of 1999, s 38(1).

88 Delicostopoulos, *Administrative Law* (1972), vol A, at pp 119 and 120; *I Iacovides v The Republic* (1966) 3 CLR 212, at p 224: *Case Law of the Greek Council of State* (1929–1959), at p 182; Law 158 (I) of 1999, s 38(2).

89 *Papadopoulos and Others v Revisional Licensing Authority*, Appl 650/89, 29 March 1991; Law 158 (I) of 1999, s 38(3).

90 *P Voyiazianos v The Republic* (1967) 3 CLR 239, at p 243; Law 158 (I) of 1999, s 39.

91 *K Papayianni v Cyprus Industrial Training Authority,* Appl 652/89, 19 June 1992; Law 158 (I) of 1999, s 40.

The doctrine of equality before the law and administration imposes equality of access on the administrative functions and the assurance of equal chances for every citizen to claim an office or position of the state. The right of access to the public functions is a fundamental political right closely connected with the citizen.

Equal access to the public functions imposes the occupation of the relevant positions according to the doctrine of meritocracy. The choice of the candidates should take place in an objective way and with a transparent procedure.[92]

Principle of Natural Justice

3-24 Natural justice has been said to be 'fair play in action'. Every administrative organ which participates in the production of an administrative act should warrant integrity and impartiality. Any person who has a peculiar connection or a relationship by blood or by affinity until the fourth degree or who is in a state of acute hostility with the person related to the case examined or who has an interest in its outcome cannot participate in the production of an administrative act. Participation is allowed only when the administrative act could not otherwise be performed because of the lack of a quorum.[93] The above is known as the first principle of natural justice and is expressed by the Latin phrase *nemo judex in causa sua*.

The second principle of natural justice is expressed by another Latin phrase, *audi alteram partem*. In the case of *R v University of Cambridge*,[94] it was said that the principle began in the Garden of Eden. God did not impose a sentence on Adam before hearing his defence. He called upon him to make his defence. 'Adam', said God, 'where art thou? Hast thou eaten of the tree whereof I commandedst thee that thou shouldst not eat?' The same question was put to Eve.

The right to be heard is granted, except when the law expressly provides differently, to every person who will be affected by an issue of an act or the taking of an administrative measure which is of a disciplinary nature or which has the character of a sanction or which is otherwise of an unfavourable nature.[95]

An administration organ which intends to support its decision to make allegations against a person must give to this person a chance to submit his comments on these allegations. The right to be heard can be exercised either by the citizen in person or by an advocate chosen by the citizen. The hearing of the interested person need

92 Charalambous, *Action and Control of Public Administration* (1995), at pp 49 and 50; Law 158 (I) of 1999, s 41.

93 Charalambous, *Action and Control of Public Administration* (1995), at pp 53–57; *Re Pergamon Press Ltd* (1970) 3 All ER, 535; P *Stavrinides v The Republic*, Appl 575/89, 30 January 1991; De Smith, *Judicial Review of Administrative Action*, at p 276; Law 158 (I) of 1999, s 42.

94 *R v University of Cambridge* (1723) 1 Str 557.

95 Charalambous, *Action and Control of Public Administration* (1995), at pp 57–63; Law 158 (I) of 1999, s 43(1).

not take place orally. It is sufficient, if so requested by the citizen, to submit his comments in writing, except where the law provides the contrary.

The right to be heard is recognised in the case of the exercise of hierarchical recourse, except where the part of the law which provides the hierarchical recourse expressly allows the competent organ not to give the right to be heard. Every person who has the right to be heard is entitled, after his written submission, to receive information about the contents of the relevant administrative file. The competent administrative organ, by a reasoned decision, can refuse the whole or a part of the above application if its satisfaction will injure the public interest or the interest of any third person.[96]

Correct Exercise of Discretionary Powers

3-25 Administrative authorities always have discretionary powers unless the law provides otherwise.[97] The limits of the discretionary powers are drawn by the prohibition of abuse of discretion. In addition to the limits provided in each particular law, there also are general limitations derived from general principles of law or directly from the Constitution. The Supreme Court often speaks of the principles of 'proper or good administration', the priority of public interest, equality, and impartiality of public administration. The principles of proportionality and of legitimate expectation have also been recognised in some of its judgments.

The administrative organ to which the exercise of the discretionary powers has been entrusted by the law is the organ obliged by the law to exercise it.[98] It is not open to the competent administrative organ to be substituted, or to be directed as to the exercise of its discretionary powers, by another organ.[99]

The competent organ is not permitted to decide *a priori* and in a general way its discretionary power for the cases which will arise in the future. However, an administrative organ is not prohibited from exercising its discretionary powers in a certain case on the ground of a general policy or criteria predetermined by the organ for similar cases, if the policy or the criteria agree with the law, or from examining particularly each case which is placed in front of it and especially from examining whether the special circumstances of each particular case justify it.[100]

The competent administrative organ, in the exercise of its discretionary powers, is not prohibited from being guided by circulars or administrative directions of a

96 *Haros v The Republic*, 4 RSCC 39; at p 44; *Petrou v The Republic* (1980) 3 CLR 203, at p 218; *Avraam v Cyprus Port Authority* (1981) 3 CLR 368, at pp 385–388; Law 158 (I) of 1999, s 43(2), (3), (4), (5), and (6).

97 See Judgment 97/1929 of the Greek Council of State and many later judgments of the same court and of the Supreme Court of Cyprus.

98 Stasinopoulos, *The Law of Administrative Acts* (1951), at p 328; Law 158 (I) of 1999, s 44(1).

99 Law 158 (I) of 1999, s 44(2).

100 Wade, *Administrative Law*, at pp 370–375; Law 158 (I) of 1999, s 43(3) and (4).

general character which were issued by hierarchically superior organs and by which the general policy of the government in a certain matter is directed, if these circulars or directions are not in conflict with the law.[101] An administrative organ may exercise its discretionary powers on the basis of procedural formalities and fetters placed by the same, but which are not prohibited by the law.[102]

The administration, in the exercise of its discretionary powers, should make a sufficient inquiry into all the facts relevant to the case. The extent of the inquiry depends on the circumstances of each case. It is for the competent administrative organ to choose the appropriate way of carrying out the inquiry.[103]

If the administration, during the exercise of its discretionary powers, relies on facts and prerequisites which are objectively non-existent or if it fails to take into account material facts, the administration acts under a misconception of fact. If the mistake has affected the decision of the administrative organ, it is substantial and renders the whole act illegal.[104]

The valuation and estimation of documents and other facts, one of which contradicts another, and which are contained in the administrative file and the choice of certain of these by which the opinion of the administration is supported, do not amount to a misconception if the choice was for the administration reasonably unrestricted.[105]

The elements which the administration should take into consideration in the exercise of its discretionary powers must be lawful and relevant to the purpose intended by the law.[106] The pursuit of a purpose obviously repugnant to the purpose of the law and the exceeding of the utmost limits of its discretionary powers constitute an abuse of power.[107]

An act which is issued after the exercise of discretionary powers can contain a condition or proviso, if this is not inconsistent with the purpose of the law. If the condition or proviso contained in an administrative act is illegal, it affects the

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101 *M Sami v The Republic* (1973) 3 CLR 92, at p 99; Law 158 (I) of 1999, s 44(4).

102 Law 158 (I) of 1999, s 44(6).

103 *Photos Photiades & Co v The Republic* (1964) CLR 102, at p 115; *The Republic v Th Pantazis* (1991) 3 CLR 47; *N Smyrnios v The Republic*, Appl 165/90, 8 February 1991; Law 158 (I) of 1999, s 45.

104 Charalambous, *Action and Control of Public Administration* (1995), at pp 80 and 81; *P Avanis v Cyprus Broadcasting Corporation,* Appl 631/91, 22 March 1994; Law 158 (I) of 1999, s 46(1) and (2).

105 *P Pantelouris and Others v Council of Ministers* (1991) 3 CLR 78; Law 158 (I) of 1999, s 46(3).

106 *Case Law of the Greek Council of State* (1929–1959), at pp 187–188; Law 158 (I) of 1999, s 47.

107 Spiliotopoulos, *Text Book of Administrative Law* (1995), vol II, at pp 495–497; Charalambous, *Action and Control of Public Administration*, at pp 73–75; *T Georgiou v Cyprus Electricity Authority and Others* (1965) 3 CLR 177, at pp 188 and 189; Dagtoglou, *General Administrative Law* (1997), at p 175; *O Georghiou v The Republic* (1976) 3 CLR 74, at 83; Law 158 (I) of 1999, s 48.

validity of the whole act and renders it invalid, if it appears that the administrative organ should not have issued the act, if it had known of the illegality of the condition or proviso.[108]

Principles of Proper Administration

3-26 The principles of proper or good administration require the administrative organs, in the exercise of their discretionary powers, to act according to the concept of justice so that the application of the relevant provisions of the law in each particular case avoids harsh and unjust solutions.[109]

The administration is not permitted to act in a way which is inconsistent, contradictory or in bad faith and therefore will deceive or distress the citizen without any reason. The administration is not entitled, invoking its own failure for which the citizen is not guilty, to ignore a situation favourable to the citizen which has lasted for some time and to refuse the benefits and the lawful consequences which have resulted from that situation. The administration is not entitled to subsequently raise incentives provided by the law or set by the administration to induce special behaviour by the citizen. An administrative act may not contradict representations or information, the furnishing of which is provided by the law if these representations and information are lawful.[110]

The administrative organ, in the exercise of its discretionary powers, should take into account and weigh all the direct interests connected with the case. The methods used by the administration in its activities must be proportionate to the purpose and the anticipated interference with the rights of the citizen, excused only to the extent necessary for the protection of the public interest. If the administration has to choose between two lawful solutions, it should prefer the one less harmful to the citizen. Every disciplinary or administrative measure taken by the administration should have an objective connection with the obligation which was infringed by the citizen and should be in a reasonable relation to the purpose anticipated. The consequences of an administrative act which are unfavourable to the citizen should not be disproportionate to the purpose anticipated by the act.[111]

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108 Law 158 (I) of 1999, s 49.

109 Spiliotopoulos, *Text Book of Administrative Law* (1996), vol I, at p 94; Law 158 (I) of 1999, s 50.

110 Dagtoglou, *General Administrative Law* (1997), at pp 181–184; *Tamassos Tobacco Suppliers & Co v The Republic*, Admin Appl 903, 28 February 1992; *E Theofylaktou v The Republic*, Appl 164/89, 31 December 1990; *Jeropoulos v The Republic*, Appl 427/89, 21 November 1990; *The Unistores (Bonded & General) Ltd v Nicosia Municipality,* Appl 506/91, 17 July 1992; Law 158 (I) of 1999, s 51.

111 Charalambous, *Action and Control of Public Administration* (1995), at p 85; Dagtoglou, *General Administrative Law* (1997), at pp 184–186; *Tikkiris v Cyprus Electricity Authority* (1970) 3 CLR 291, at pp 299–301; *V Hadjioannou and Another v The Republic* (1983) 3 CLR 536, at p 587; *Lyonas and Others v The Republic*, Appl 683/88, Appl 703/88, and Appl 706/88, 14 June 1990; Law 158 (I) of 1999, s 52.

It is contrary to principles of the proper and harmonious administration to ask a citizen, after the lapse of a reasonable time, for the refund of any money like salaries or pensions which the administration paid to him unlawfully and which the citizen received in good faith.[112]

The revocation by the administration of an act, though an unlawful one, after the lapse of a reasonable time is an infringement of the principles of proper administration, if in the meantime the act has created rights and generally favourable situations for the citizen. The existence of a reasonable time is determined by the special circumstances of each case. The revocation of an unlawful administrative act is permitted, even though a reasonable time has lapsed, if the act had been issued after a fraudulent or deceptive action of the interested person, or if the interested person was aware of the illegality of the act at the time of its issue, or for reasons of public interest.

A lawful administrative act, although a reasonable time has elapsed from its issue, can also be revoked for reasons of public interest. The revocation of an administrative act is permitted if there has been a change in the facts on which the issue of the act had been supported or which, according to the law, were a prerequisite for its issue. The last two kinds of revocation are valid only for the future and have no retrospective effect. If the revocation of an act is provided and regulated by the law, the above-mentioned principles of revocation are not valid.[113]

Except where the law otherwise provides, the competent organ for the revocation is the organ which issued the act. For the revocation of a lawful act, all the formalities and procedures required for the issue of the same act must be used. This is not necessary for the revocation of an unlawful act, except for the discernment of its illegality. The administrative organ which issued the act can, by a duly reasoned decision, suspend or discontinue its execution if reasons of public interest so require.[114]

Presumption of Regularity

3-27 The presumption of regularity is the name given to the principle which declares that an administrative act is valid, even if it suffers from legal defects, and it remains valid until its express abolition.

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112 *D Christodoulou v The Republic*, Appl 297/89, 18 December 1990; Law 158 (I) of 1999, s 53.

113 Kyriakopoulos, *Greek Administrative Law* (1961), vol B, at pp 410–412; *Moschovakis v Cyprus Broadcasting Corporation* (1988) 3 CLR 750; *N S Pissarides Ltd v The Republic*, Case 493 of 1986, 28 July 1990; *Alexandros Soleas & Son Ltd v The Republic & Another,* Appl 395/92, 8 April 1993; *Yiangou & Another v The Republic* (1976) 3 CLR 101, at p 106; *The Republic v Saranti* (1979) 3 CLR 139, at p 410; *N Georghiou (No 2) v The Republic* (1968) 3 CLR 411, at p 419; *Antoniades & Co v The Republic* (1965) 3 CLR 673, at p 682; Law 158 (I) of 1999, s 54.

114 Law 158 (I) of 1999, ss 55 and 56.

The citizen is entitled to have full confidence in the acts of the administration and the presumption is the expression of the security and certainty of the law.[115]

Administrative Organs

Constitutional Status

3-28 Most executive and administrative power is entrusted to the President and the Vice-President of the Republic. The President and the Vice-President ensure the exercise of executive power by the Council of Ministers.

Central Government and Ministries

3-29 The government, in the sense of administration, is divided into central and local. The central government is divided into ministries.[116] The Constitution provides for 10 Ministries. An eleventh Ministry, the Ministry of Education and Culture, was created by Law 47 (I) of 1993.

Regional Authorities

3-30 Under section 4 of Cap 23 of the Statute Laws of the Republic of Cyprus, government authorities are decentralised. The regional authorities, which are appointed and supervised by the central government, are entrusted with considerable decision-making powers within their regions, which are called districts. The whole country is divided into six districts.[117]

Local Government / Towns and Villages

3-31 According to the principle of decentralisation, and under articles 172–178 of the Constitution, the administration of local affairs belongs to the local government corporations.

Since 1960, local government corporations are divided into town municipalities, village communities, and improvement boards, all of them in the first grade of local government. The state may, by law, create more than one grade of local government.[118]

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115 Artemis, *Article 146 of the Constitution*, at p 38; *Ierides v The Republic* (1980) 3 CLR 165.

116 These are the Ministries of Defence, Agriculture and Natural Resources, Justice, Commerce and Industry, Labour and Social Insurance, Interior, Foreign Affairs, Finance, Communications and Works, and Health.

117 Evangelides, *The Republic of Cyprus and its Constitution with Special Regard to the Constitutional Rights* (1996), at p 64; Cap 23 of the Laws of the Republic of Cyprus; Circular S431 of 1959 of the Administrative Secretary.

118 Cap 240, Cap 243, and Cap 244 of the Statute Laws of Cyprus; Law 111 of 1985; Law 21 of 1961; Tornaritis, *The Concept of Local Government within the Framework of a Unitary State*, at p 11.

Legal Persons in Public Law

3-32 Legal persons in public law are either statutory authorities discharging state functions, such as the Public Service Committee and Educational Service, or professional self-governing organisations, such as architects or medical or other associations. The latter bodies are administratively and financially almost totally autonomous.[119]

Public Corporations

3-33 Public corporations abound in Cyprus. The direction of the general policy and the appointment of officers of most of them are entrusted to the state. Public corporations include the Electricity Authority of Cyprus, the Cyprus Telecommunications Authority, the Cyprus Broadcasting Corporation, and the Ports Authority.

The Supreme Court in its revisional jurisdiction judicially reviews only decisions of bodies belonging to the public administration *stricto sensu*.

Collective Administrative Organs

3-34 A collective administrative organ is lawful when it consists of all the members determined by the law. With an exception when the law so provides, the composition of a collective organ is not lawful if there is a vacant place by reason of the death or resignation of a member.[120] The collective administrative organ shall confer only when it is lawfully composed.

It is not lawfully composed if at its meeting there has been present a person who is not authorised to be present even if he has not participated in the voting, unless he was an official competent to keep a record. The presence at the meeting of a collective administrative organ or a competent official or other persons, in order to provide directions and information or to produce facts, does not amount to an unlawful composition if these persons leave before the deliberations leading to the issue of a decision.

A collective administrative organ will be lawfully in session if all its members have been summoned lawfully and in time, except where the collective organ is in session on fixed dates and at fixed hours. If, between the time when an annulled act was issued and the time of its re-examination, there is no change in the composition of the collective organ which issued the act, the members who participated in the meeting at which the annulled decision was taken should be summoned to the review to take a new decision.

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119 Law 41 of 1962, Cap 250 of the Statute Laws of Cyprus; but see section 17 of Cap 2 of the Statute Laws of Cyprus (Advocates Law).

120 Kyriakopoulos, *Greek Administrative Law* (1961), vol B, at pp 20–24; *M Constantinides v Improvement Board of Strovolos*, Appl 216/86 and Others, 30 April 1990; *Avgerinos Nikitas Ltd v Limassol Municipality*, Appl 1011–1027/91, 18 February 1993; Law 158 (I) of 1999, s 21.

If, between the time when an annulled act was issued and the time of re-examination, some change occurs in the composition of the collective organ which issued the act, all the members of the collective organ should be summoned to participate in the review and the taking of a new decision.[121]

The procedure for discussion and the taking of a decision in a particular matter will be conducted by the same members of the collective organ from the beginning to the end. If the procedure lasts for more than one session and the composition of the organ has been changed after the first session and new members, not present at the first session, participated after the first session, the collective organ cannot decide lawfully in the last session and the whole procedure and discussion must be repeated from the beginning. This action is not required in the case of an absence from a session dealing with preliminary matters only or when the members taking the decision are fully informed regarding all the matters necessary for the taking of the decision.[122]

The collective organ meets lawfully when there is a quorum, ie, if the minimum number of members determined by the law is present. If there is no provision in the law, a quorum exists when the majority of member is present. There is a quorum even if some of the members present do not vote.[123]

A full record must be kept of the meetings of collective organs, which expresses with clarity all the decisions taken. The keeping of a complete record is a duty of every administrative collective organ. In the case of appointments or promotions, it is essential to record the results of the oral examination and any other event concerning the taking of the decision.

The recording of the questions and answers during the oral examination is not required nor is the recording of the intellectual faculties of the members for their estimates of the performance of the candidates. The personal notes of the members relating to the performance of the candidates in the oral examination, if any, will be delivered by the members immediately after the end of the meeting to fill a vacancy and shall constitute part of the relevant file.[124]

If not determined otherwise by the law, the decisions of a collective organ will be taken by a simple majority and, in case of equality of votes, the vote of the president

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121 Kyriakopoulos, *Greek Administrative Law* (1961), vol B, at pp 20–21; *M Constantinides v Improvement Board of Strovolos*, Appl 216/86 and Others, 30 April 1990; *Avgerinos Nikitas Ltd v Limassol Municipality*, Appl 1011–1027/91, 18 February 1993; Law 158 (I) of 1999, s 20.

122 *The Republic v El Koulia* 1991 (3) CLR 370; Law 158 (I) of 1999, s 22.

123 Dagtoglou, *General Administrative Law* (1997), at pp 474 and 475; *Ph Photiades v Cyprus Theatre Organisation*, Appl 83/89 and Others, 16 June 1990; Law 158 (I) of 1999, s 23.

124 *Zenios Closures Ltd v Limassol Municipality*, Appl 1/92, 29 May 1992; *Ph Ektorides v The Republic*, Administrative Appeal 689, 15 March 1990; *M Constantinides v The Republic*, Appl 862/91, 12 June 1992; Law 158 (I) of 1999, s 24.

shall prevail. If there is no provision in the law for the computation of a majority, the present members and the members under no disability will be taken into account. If there is no provision in the law, the voting is not secret. When the decisions of a collective organ are taken by a majority and it is not otherwise expressly provided by the law, the dissenting opinion need not be reasoned. However, the dissenters can ask that the reasons for their opinion will be expressed in the record.[125]

Administrative Justice

Supreme Court of Cyprus

3-35 The competent court for the hearing of administrative disputes was the Supreme Constitutional Court. The Supreme Constitutional Court consisted of three members, a Greek, a Turk, and a neutral president.[126]

The divisive conduct of the Turkish minority led to the adoption of an enactment to enable the functions of the Supreme Constitutional Court and the High Court of Cyprus to continue. Law 33 of 1964[127] provided that the Supreme Court of Cyprus should continue the jurisdiction both of the Supreme Constitutional Court and of the High Court. In a case in 1964,[128] the Supreme Court decided that the Law is constitutional and is in conformity by virtue of the generally accepted doctrine of necessity.

Application for Annulment

3-36 Remedies before the Supreme Court are the application for annulment of an administrative decision (individual administrative act) and the appeal (revisional appeal) against a judgment of a single judge of the Supreme Court.

The application for annulment is the only remedy in the first instance before the Supreme Court of Cyprus. This remedy is patterned on the model of the Greek Council of State and the French *recours pour exces de pouvoir*, and may challenge both administrative action and inaction. In the latter case, what is challenged is the implied decision of refusal which is to be inferred after a certain time (three months) from the silence on the matter.[129] The application for annulment is admissible on the condition that:

- It relates to an individual administrative act;
- A formal complaint has been dismissed *expressis verbis*;

125 Dagtoglou, *General Administrative Law* (1997), at p 475; Law 158 (I) of 1999, s 25.

126 Constitution, Part IX, arts 133–151.

127 Law 33 of 1964 was enacted on 9 July 1964.

128 *The Attorney General of the Republic v M Ibrahim and Others* (1964) CLR 195.

129 Dagtoglou, *Constitutional and Administrative Law*, at pp 42 and 43; Tachos, *Greek Administrative Law*, at pp 533–537.

- In a case of unlawful failure to act, the authority concerned has been called upon to act and the complaint has been left unanswered for at least three months;
- The proceedings have been instituted within 75 days of the notification of the act to the citizen, or of its publication if the law provides for it or, in the absence thereof, of the day on which the act came to the knowledge of the applicant or, in case of failure to act, of the expiry of the three-month period after the authority had been called upon to act; and
- The applicant was either the addressee of the contested administrative act, or a person whose legal interests were affected by it or by the failure to take it.[130]

3-37 The application for annulment may assert lack of competence, infringement of an essential procedural requirement, substantive violation of the law, or abuse of discretionary power. If one of these grounds is substantiated, the application is well-founded. The application for annulment has no suspensive effect, but the Supreme Court may order suspension, if it considers that circumstances invoked by the applicant so require.[131]

A judgment for the applicant declares the contested decision to be null and void *erga omnes*. The dismissal of the petition is valid only for the petitioner but does not bar other persons from challenging the same act.

Whether favourable or not, a judgment has the force of *res judicata* but the courts and administrative authorities are only bound by annulling judgments. If the judgment declares a failure to act to be unlawful, the administrative authorities are obliged to take the measures called for by the judgment or to refrain from any action declared to be unlawful. A violation of this obligation may lead to sanctions against the responsible person.[132] After a revocatory decision of the Supreme Court, the administrative act disappears and the administration is compelled to restore the situation to the *status quo ante*.

At the re-examination, the administration is bound, on the principle of *stare decisis*, by the judicial decision and by the ascertainment by the Court of the existence of certain legal and factual situations at the time of the issue of the act which supported the reasons for the decision.

The legally binding force of human rights manifests itself in their judicial protection.[133] Cypriot courts have the power to review the constitutionality of laws, as

130 Dagtoglou, *Constitutional and Administrative Law*, at pp 42 and 43; *POED v Registrar of Trade Unions* (1982) 3 CLR 177; *Angelides and Others v The Republic* (1982) 3 CLR 774, at p 778.

131 Tsatsos, *The Recourse for Annulment before the Council of State,* at pp 423–425; *Frangos and Others v The Republic* (1982)3 CLR 53; *Orologas v The Republic* (1981) 3 CLR 631.

132 Angelides, 'Administrative Law — Article 146 of the Constitution', 13 *Cyprus Law Review*, at pp 2126–2128; *Nissiotou v The Republic* (1983) 3 CLR 1483; *Nishiotou v The Republic* (1983) 3 CLR 1498; *The Republic v Nissiotou* (1985) 3 CLR 1335.

133 Pikis, 'The English Common Law', *The Maxims of Equity and Their Application in Cyprus* (1981), at p 86; Özgür, *Understanding Human Rights* (1991).

well as the constitutionality and legality of secondary legislation. Legal rules and individual administrative acts issued by administrative authorities may be annulled by the Supreme Court on the ground of violation of law. Violation of law also includes the infringement of articles of the Constitution.

Acts of the House of Representatives may not be challenged directly, but their unconstitutionality may be asserted before the courts and may lead to their non-application. Judges are not required to obey provisions enacted in abolition of the Constitution. Even in an ordinary case, the courts are obligated not to apply the contents of a provision which are contrary to the Constitution. Cypriot law does not recognise a general duty to refer the question of constitutionality to the Supreme Court. The Supreme Court has no monopoly to declare a law unconstitutional. The Supreme Court, under other constitutional provisions, is empowered to adjudicate disputes on the substantive constitutionality or the meaning of the provisions of a formal law.

Procedure

3-38 According to the powers provided by article 135 of the Constitution, the Supreme Constitutional Court issued procedural rules[134] in 1961 and replaced them in 1962.[135] These rules regulate the procedure of the Supreme Court in its revisional jurisdiction.

The procedure begins with the filing of the application for annulment in which is contained the petition for remedy, the legal grounds of the application, and the facts supporting the claim. The application should be served on the respondent person, organ, or authority. The respondent is obliged to file an opposition and then the case will be fixed for directions in front of a single judge. Sometimes, another litigant, the interested party, is added to the case. The interested party is the person in favour of whom the *sub judice* decision was taken.

Cypriot legal procedure belongs to the system known as adversarial but in its revisional jurisdiction the Supreme Court follows the inquisitorial system in order to control the *sub judice* administrative decision independently of the participation of the litigants.

There is an appeal as of right from the decision of the single trial judge. It proceeds before five or more judges who approach the matter as a complete re-examination of the case, with due regard to the issues raised by the parties on appeal, or to the extent that they have been left undetermined by the trial judge.[136]

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134 Procedural Rule 1 of 28 April 1961 (Rules of the Supreme Constitutional Court).

135 Procedural Rule 2 of 21 April 1962 (Rules of the Supreme Constitutional Court).

136 Loizou, *Administrative Law — Judicial Control of the Government*, at p 42; *Papaleontiou v The Republic* (1986) 3 CLR 1238.

According to paragraph 4 of article 146 of the Constitution, the Supreme Court, in the exercise of its revisional jurisdiction, may decide to:

- Validate the decision, act, or failure, in whole or in part;
- Declare the decision or act, in whole or in part, as null and void and without any legal effect; or
- Declare the failure, in whole or in part, null and void and that everything omitted should have been executed.

3-39 The case ceases after the death of the applicant or the disappearance of its subject matter.

Hierarchical Control and Hierarchical Recourse

3-40 The hierarchical relationship between superior and inferior authorities leads to the controlling power of the former over the latter and is called hierarchical control. All administrative organs are subject to this control with the exception of the President, the Vice-President, and the Ministers as well as the independent officials of the Republic and the committees which are not incorporated in the organical hierarchy.

The hierarchical control encompasses the lawfulness of the inferior's conduct which is the control of legality and may also extend to the advisability of such conduct which is the control of advisability. The delineation of the scope of control is not always easy in practice.

Right to Petition the Authorities

3-41 Control may be initiated by exercising the general right to petition public authorities in accordance with article 29 of the Constitution. Beyond the provisions of article 29 of the Constitution, the right to petition the authorities:

- Is provided for every person who stays in the Republic, whether a physical or legal person, a citizen, or a foreigner;
- Covers the submission of a complaint or claim that the administration should proceed with an administrative act or withdraw or amend an act already issued or prevent or restore a moral or pecuniary damage; and
- Does not cover a claim for supply of information, except where the same is provided by the law.

3-42 The right to petition the authorities is not infringed if the administration fails to answer an application or complaint if it has given a reasonable answer in the past to the same application or complaint, except where in a new application or complaint there is an invocation of new facts or amendment of the circumstances which existed when the first answer was given. If the petition seeks the withdrawal or amendment of an act already issued and for the attack on which the law provides the filing of a hierarchical recourse, the administrative organ to which the petition is directed does not examine it but informs the petitioner accordingly. The petition

must be addressed to the competent authority. If the petition has been addressed to an incompetent authority, it does not examine it, but conveys the same to the competent authority.[137]

The duty of the competent authority continues to exist even though in the same matter a recourse to the Supreme Court has been filed under article 146 of the Constitution.[138]

The duty to answer within 30 days exists when the taking of a decision within this time limit is possible, taking into account all the circumstances of the particular case. In all cases, the administration should give information in writing about the progress of the case within the above time limit. After the lapse of three months from the date of the submission of the petition, the interested person is entitled to consider the failure of the competent authority to answer him as a refusal to satisfy his petition, and he can attack this failure in the Supreme Court. In this case the interested person cannot simultaneously attack the refusal to satisfy and the failure to answer unless by this failure he has suffered damage.[139]

Every person affected by an act, or who is entitled to use an act, can ask in writing for a complete copy of it. The competent administrative authority can reasonably refuse the whole or a part of the request if its satisfaction will injure the interest of the service or the interest of any third person.[140]

Remedy under Article 146(6) of the Constitution and Correlation with Article 172 of the Constitution

3-43 Paragraph 6 of Article 146 of the Constitution provides that any person aggrieved by any decision or act declared to be void under paragraph 4 of Article 146 of the Constitution or by any omission declared thereunder that it ought not to have been made will be entitled, if his claim is not met to his satisfaction by the authority or person concerned, to institute legal proceedings in a court for the recovery of damages or for the grant of another remedy, to recover just and equitable damages to be assessed by the court, or to be granted such other just and equitable remedy as the court is empowered to grant. The court that has the jurisdiction to hear a case asking for damages or other remedy as above is a District

137 Dagtoglou, *General Administrative Law* (1997), at pp 491 and 492; Charalambous, *Action and Control of Public Administration* (1995), at pp 37–41; *The Republic v Nissiotou* (1985) 3 CLR 1335, at p 1347; *E Loizou v The Republic*, Appl 22/90, 28 July 1992; *Kyriakou v Cyprus Broadcasting Corporation* (1965) 3 CLR 482, at pp 494 and 495; Law 158 (I) of 1999, s 33.

138 Law 158 (I) of 1999, s 34.

139 *G Roussos Trading Co Ltd v District Officer of Paphos and Others*, Appl 399/80, 30 December 1989; Law 158 (I) of 1999, ss 35 and 36.

140 Law 158 (I) of 1999, s 37.

Court and not the Supreme Court. In the assessment of the damages, the culpability, if any, on the part of the citizen should be taken into account.[141]

In correlation with article 146(6) of the Constitution is article 172 of the Constitution, which provides that the Republic will be liable for any wrongful act or omission causing damage arising in the exercise or purported exercise of the duties of officers or authorities in the Republic.[142]

Tax Tribunal

3-44 Law 80 (I) of 1999[143] established the Tax Tribunal in order to examine and pronounce on the decisions of the Director of Inland Revenue if a citizen affected by the Director's decision is of the opinion that there is injustice in his case. The application provided by this law is a kind of hierarchical recourse and there is a time limit of 45 days from the relevant notice of the Director for the filing of the application.

The Tax Tribunal is obliged to issue its decision within one year from the submission of the application. It can pronounce the *sub judice* decision as null and void, or amend it, or issue a new decision, or refer the case to the Director with instructions to proceed with certain actions. A citizen who is not satisfied with the decision of the Tribunal can file a recourse under article 146 of the Constitution in the Supreme Court.

The Ombudsman

3-45 The Ombudsman[144] is the most popular method of non-judicial control of the administration. The institution is of Swedish origin and in Greek is named *Epitropos Dioikiseos*.

His task is to examine the complaints of citizens who allege that they have suffered injustice from the acts of the administration and, where he decides that a complaint is just, the Ombudsman reports on and suggests ways to redress the injustice. The activities of the Ombudsman do not replace the jurisdiction of the administrative court but are supplementary to it.

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141 Tornaritis, *The Liability of the Republic of Cyprus for Injurious Acts or Omissions of Its Servants or Authorities*, at p 8; Artemis, *Article 146 of the Constitution*, at p 24; Loizou, *Administrative Law — Judicial Control of the Government*, at pp 29 and 30; *Central Bank of Cyprus v Theodorides* (1993)) 1 CLR 420.

142 Nedjati, *Cyprus Administrative Law* (1970), at pp 265 and 266; *Ph Kyriakides v The Republic* 1 RSCC 66, at p 74; *The Attorney General v A Marcoullides and Another* (1966) 1 CLR 242, at pp 254 and 255.

143 Law 80 (I) is a law for the approval and collection of taxes (enacted in January 1999).

144 Charalambous, *Action and Control of Public Administration* (1995), at pp 193–215.

In Cyprus, provision for the institution was made in 1972,[145] but it actually came into force only in 1991 by a new law[146] which adopted the new realities that had intervened in Cyprus and in the world.

On the application of a citizen, the Ombudsman examines any activity of any administrative or government officer, authority or organ, including a municipal one.[147] After the examination of each case, the Ombudsman submits a written report to the competent authority, with a copy to the complainant. If he makes a submission or suggestion which is not followed by the authority, the Ombudsman can submit a report to the Council of Ministers and to the House of Representatives, referring the whole case to them.

European Convention

3-46 Cyprus ratified the European Convention for Protection of Human Rights and Fundamental Freedoms on 6 October 1962. It recognises the jurisdiction of the European Court of Human Rights and the right of individual petition under Article 34 of the Convention.

European Union

3-47 The procedure for the accession of Cyprus to the European Union (EU) began on 30 March 1998.

Jurgen Schwarze states that the law of the EU consists mainly of rules of administrative law which have emerged from the domain of law governing the administration of economy. To this extent, the EU, which has already been described by the European Court of Justice as a community based on law, may more precisely be characterised as a Community based on administrative law.[148]

For these reasons, administrative law (including Cypriot administrative law) now has a new weight and significance because the law is spreading beyond national frontiers.

145 Law 107 of 1972.
146 Law 3 of 1991.
147 Law 101 (I) of 1995.
148 Schwarze, *European Administrative Law*; Loizou, *Administrative Law — Judicial Control of the Government*, at p 31.

CHAPTER 4

Judicial System and Court Procedure

Sotiris Pittas and Evelina Koudounari

Introduction

4-1 Cyprus has been an independent and sovereign republic with a presidential system of government since 1960, when it gained its independence.[1] Until that time, it had been a British colony. The Cypriot legal system followed English law until 1960. Since then, it has been closely modelled on its English counterpart.

Cyprus has adopted the Anglo-Saxon legal system, which allows most English cases to be cited in Cypriot courts. Under certain conditions, the cases are treated as binding, but in most instances they are used as guidelines.[2]

The Cypriot Constitution is the supreme law of Cyprus, and it prevails over any other legislation which is inconsistent with or prohibited by its terms.

The structure of the new state born in August 1960 was based on the separation of powers. The legislative power rests in the House of Representatives; the executive power is exercised by the President of Cyprus and the Council of Ministers, and the judicial power is vested principally in the Supreme Court of Cyprus and its subordinate courts as established under Part X of the Constitution.

Although Cyprus essentially maintained its system based on the Common Law as followed in the English-speaking world, article 146 of the Constitution introduced into Cyprus a new conception compatible with the continental systems and similar to the administrative jurisdictions exercised by such courts as the French *Conseil d'Etat*.

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1 Pikis, 'The Judges and Their Mission', *Cyprus Law Review* (1992), vol 10, at p 5693; Nicolatos, 'Legal Framework', *Cyprus Law Review* (1992), vol 10, at p 5737; Papaphilipppou, 'The Courts of Justice (Amendment) Law of 1983', *Cyprus Law Review*, (1983), vol 4, at p 812; Nicolatos, 'Interlocutory Injunctions', *Cyprus Law Review* (1994), vol 2, at p 151; Constantinides, 'The Power of the Cyprus Courts to Issue Interlocutory Injunctions', *Cyprus Law Review* (1994), vol 1, at p 7; Ladas, 'The Judge and the Law of Equity', *Cyprus Law Review* (1990), vol 1, at p 496.

2 *Katina Hajitheodosiou v Petros Koulia and Another* (1970) 1 CLR 310; *Constantinides and Another v Pitsillos and Another* (1980) 2 JSC 279.

Another innovation made to the system of law as applied in Cyprus until its independence was the introduction of a written Constitution. Article 179 of the Constitution declared the Constitution to be the supreme law of Cyprus. The courts of Cyprus were vested with the power to proclaim legislation enacted by the House of Representatives or legislation continuing in force after independence as unconstitutional and void, as well as with the power to construe and modify legislation continuing in force after independence in such a way as to bring it into conformity with the Constitution. In exercising this jurisdiction, the Supreme Court has drawn extensively on United States judicial precedents, the principles of which, with the necessary modification, have been applied.

Cyprus is divided into six districts. The Turkish invasion of 1974, which left some 37 per cent of the northern part of the island under Turkish occupation, did little to interrupt the unparalleled period of growth, prosperity, and commercial expansion which followed independence. Indeed, although the Cyprus problem has not yet been solved, the rule of law and political stability are guaranteed by the efficient functioning of democratic institutions and by dynamic economic development.

An Association Agreement was signed in 1972 between Cyprus and the European Union (EU), which provided for the abolition of all barriers to trade and the establishment of a customs union in two stages; the first was completed in 1997, and the second is to be completed by 2003, by which time the free and unrestricted movement of industrial and agricultural products between the member states of the EU and Cyprus, the abolition of all quantitative restrictions, and the Common Customs Tariff will be fully effective. In July 1990, Cyprus applied for full membership of the EU; the accession process began in March 1998, and Cyprus is now completely occupied in harmonising its laws with the *acquis communautaire*.

Court Structure

In General

4-2 There are two tiers of courts[3] in Cyprus, ie, the Supreme Court and the subordinate courts.

The Supreme Court

4-3 The Administration of Justice (Miscellaneous Provisions) Law 1964,[4] as amended, merged the Supreme Constitutional Court and the High Court set up under the

3 Michaelides, 'Cyprus Legislation Concerning the Courts', *Cyprus Law Review* (1983), vol 3, at p 540; Nicolatos, 'Structure and Operation of the Legal Framework in Cyprus', *Cyprus Law Tribune* (1993), vol 3, at p 349.

4 Law 33 of 1964.

Constitution into one court, called the Supreme Court.[5] The Supreme Court consists of 13 members, one of whom is the President. The President of the Supreme Court is *primus inter pares* with no second or casting vote.

The Supreme Court exercises both original and appellate civil and criminal jurisdictions. It is vested with authority as:

- The Supreme Constitutional Court;
- An Administrative Court;
- An Admiralty Court;
- An Appellate Court; and
- A court with exclusive jurisdiction to issue prerogative writs (eg, *habeas corpus*, *mandamus*, prohibition, *quo warranto*, and *certiorari*).

4-4 No special leave to file an appeal is required. The Supreme Court, in its appellate jurisdiction, is not bound by any determination on a question of fact made by the trial court, and it has power to review all the evidence, draw its own inferences, hear or receive further evidence, and give any judgment or make any order which the circumstances of the case may justify, including an order for re-trial.[6]

The Subordinate Courts

In General

4-5 The subordinate courts[7] are inferior courts. There are six types of subordinate courts in Cyprus.

District Courts

4-6 The five District Courts exercise civil and criminal jurisdiction. In their civil jurisdiction, they can entertain any action whose cause arose within the district where the court is situated or in which the defendant or one of the defendants in

5 The Cyprus Constitution was not the expression of the sovereign will of the people of Cyprus and it was based on the *sine qua non* assumption of co-operation in government of both Greek and Turkish Cypriots. The seeds of division sown by the Constitution in all the functions of the state machinery led to the sad events of December 1963, described as the 'recent events' in the preamble to the Administration of Justice (Miscellaneous Provisions) Law of 1964, which resulted in a radical change in the constitution of the courts of Cyprus which had to be justified under 'the law of necessity'; *Attorney General of Cyprus v Ibrahim and Others* (1964) CLR 195.

6 *Petrou v Petrou* (1978) 1 CLR 257; *Vasilico Cement v Stavrou* (1978) 1 CLR 389; *Kika v Lazarou* (1979) 1 CLR 670; *Kyriacou v Mata* (1982) 1 CLR 932; *Kyriacou v Kortas* (1981) 1 CLR 551; *Papadopoulos v Stavrou* (1982) 1 CLR 321; *Meshiou v Eleftheriou* (1982) 1 CLR 486; *Kyriacou v C D Hay* (1978) 1 CLR 100; *Pavlidou v Yerolemou* (1982) 1 CLR 912.

7 Nicolatos, 'The Legal Framework', *Cyprus Law Review* (1992), vol 10, at p 5737.

the action resides. They also can entertain any claim which has not been specifically assigned to the jurisdiction of the Family Courts, Labour Courts, or Rent Control Courts or to the original jurisdiction of the Supreme Court.

The District Courts in their criminal jurisdiction can adjudicate on any criminal offence committed within their districts, which has not been specifically assigned to the jurisdiction of the Assize Courts.

The District Court has jurisdiction to try offences summarily whenever the punishment provided by the law does not exceed three years' imprisonment and in certain other cases with the consent of the Attorney-General, where the punishment provided by the law does not exceed seven years; however, in the latter case, the power of the trial court is limited to a punishment not exceeding three years' imprisonment.

Assize Courts

4-7 Assize Courts are vested with unlimited jurisdiction to try all criminal offences and to impose punishment provided by the law. There are three Assize Courts, these being:

- One for the district of Nicosia;
- One for the districts of Larnaca and Famagusta; and
- One for the districts of Limassol and Paphos.

Family Courts

4-8 Each district has its own Family Court, which has jurisdiction in all family matters including divorces, custody disputes, property provisions, and all other matters ancillary thereto.[8]

Labour Courts

4-9 There is one Labour Court, which is situated in Nicosia, the capital of Cyprus. It has jurisdiction in claims concerning disputes between employers and employees.

Rent Control Courts

4-10 There are three Rent Control Courts, one for the district of Nicosia, one for the districts of Larnaca and Famagusta, and one for the districts of Limassol and Paphos. These courts have jurisdiction in claims concerning evictions, rent adjustments, and any other matter ancillary thereto which arise in relation to rented premises in the district situated within the area specified by the Rent Control Law.

8 The Turkish Family Courts Law, Cap 338, regulates the establishment and operation of the Turkish Family Courts, which have jurisdiction in all family matters concerning the Turkish Cypriot community.

Military Courts

4-11 There is one Military Court, which was established by the enactment of the Military Criminal Code of 1964.[9]

The Military Court exercises criminal jurisdiction over the members of the National Guard in accordance with the Military Criminal Code and Procedure.

Lack of Third-Tier Jurisdiction

4-12 Until Cyprus became an independent state, there was, under the Judicial Committee Rules 1925, an appeal from a decision of the Supreme Court in its appellate jurisdiction to the Judicial Committee of the Privy Council in England. This right ceased to exist on independence. The High Court of Justice which was set up under Part X of the Constitution was the highest appellate court of Cyprus. The merger of the Supreme Constitutional Court and the High Court into one court, called the Supreme Court, which was implemented by Law 33 of 1964 has vested, *inter alia*, the appellate jurisdiction of the High Court in the Supreme Court.

The unfortunate absence of a third-tier jurisdiction has created obstacles in the smooth development of Cypriot case law and has recently triggered discussions about the necessity to establish such a jurisdiction.

The Judiciary

The Appointment of Judges

4-13 The President of the Supreme Court is appointed by the President of Cyprus from the ranks of the members of the Supreme Court.

The judges of the Supreme Court are appointed by the President of Cyprus from the ranks of the Presidents of the District Courts or the Assize Courts or from the legal profession.

The judges of the subordinate courts are appointed by the Supreme Court from the ranks of lawyers in private practice or from members of the Attorney-General's office provided that they have a minimum of five years of practice.

Independence and Tenure of the Judiciary

4-14 The principle of judicial independence is maintained seriously in Cyprus and is secured by the Constitution.[10]

The doctrine of the separation of powers precludes any intervention by the legislature or the executive in the administration of any judicial office. The

9 Law 40/1964.
10 Constitution, art 1.

independence of the judiciary in Cyprus is strongly reinforced by the security of tenure afforded to judges.

According to the Constitution, Supreme Court judges must retire by the age of 68. District judges must retire at the age of 60.[11]

Experience of Litigation

4-15 The majority of Cypriot judges have experience as advocates or litigation lawyers due to the fact that the hearings before the Cypriot courts are conducted orally.

The Legal Profession

In General

4-16 The Cypriot legal profession is not divided into barristers and solicitors like the English profession.[12] It is a fused profession, ie, a person who is admitted to the Bar is allowed to practise both as an advocate and as a solicitor. In practice, however, many lawyers tend to specialise, either in litigation or in non-contentious work. To be eligible for admission to the Cyprus Bar, applicants must possess a law degree from a recognised university which meets the specified requirements and must have satisfactorily completed:

- A period of one year as a pupil advocate in a Cypriot law firm; and
- The practical law exams conducted by the Board of Legal Education.

4-17 In 1999, there were more than 1,500 lawyers practising in approximately 750 law firms in Cyprus. Law firms range from one-man general practices to firms of two or three lawyers (the majority). There are a dozen firms of approximately 10 lawyers and two firms of more than 20 lawyers.

Confidentiality and Conflict of Interest

4-18 Lawyers owe a duty of confidentiality to their clients. Consequently, a lawyer must not disclose documents or talk about a client's case to anyone outside the lawyer's firm without the client's prior instructions. This duty is buttressed by the fact that documents and information in the hands of a lawyer are protected by legal professional privilege.

Where there is a conflict of interest between an existing client and a prospective client or between two existing clients, the lawyer should refuse to act for one or both parties.

11 Constitution, art 33.
12 Advocates Law, Cap 2.

Legal Fees

4-19 Contingency fees are prohibited in Cyprus. For contentious matters, a lawyer may make a written agreement with his client fixing the amount and mode of payment for the whole or any part of his costs and disbursements. Where there is such an agreement, the costs are not subject to taxation.

Where fees for contentious matters are not fixed by agreement, they are controlled by the Rules of Court. If a client is dissatisfied with the bill rendered by his lawyer, he must apply to the Registrar of the Court for taxation of the bill.

In exercising his discretion in taxing a bill, the Registrar is required to take into account all relevant circumstances, and in particular:

- The complexity of the matter and the difficulty or novelty of the questions involved;
- The skill, specialised knowledge, and responsibility required and the time and labour consumed by the lawyer;
- The number and importance of the documents prepared or perused;
- The urgency and importance of the matter to the client; and
- The amount or value of money or property involved.

4-20 Most lawyers have, at any point in time, a particular charging rate which is uniformly applied to all clients. That rate will be higher for an able and experienced lawyer than for a lawyer who has recently commenced practice. The rates charged by each individual lawyer are a matter for that lawyer and for negotiation with the client. The Cyprus Bar Council Rules provide for a minimum charging rate for extrajudicial work, which is CYP 35 per hour at present.[13]

The professional bodies governing the affairs of lawyers, in particular the Bar Association and disciplinary bodies which operate in the area, keep a watchful eye on the fees charged by lawyers and, in the event of a complaint about overcharging, will investigate the matter. In appropriate cases, this can lead to a direction that fees and costs be repaid and to other disciplinary action.

The costs of litigation may be recoverable from the other party. The normal rule is that a successful litigant is awarded an order for costs to be paid by an unsuccessful litigant.[14] This rule may not be applied in part or in whole, if the conduct of the successful litigant is regarded by the court as deserving of the censure of disentitlement to costs. A successful party in a complex commercial case can expect to recover only 50 to 70 per cent of its actual legal costs in connection with the action.

The court will direct the costs to be assessed by the Registrar of the Court. Court fees comprise part of the disbursements which are included in legal costs.

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13 Rules of 1985, regulating the minimum legal fees of lawyers handling non-litigious matters.
14 *Kyriacou v Leontiou* (1987) 1 CLR 420; *Hadjimarkou v Hardjiotis* (1983) 1 CLR 222.

Sources of Law

4-21 The sources of law[15] in Cyprus may be classified as written and unwritten law. The written law consists of:

- The Constitution;
- Statutes enacted by the House of Representatives;
- Subsidiary legislation; and
- The English enactments which were specifically adopted when Cyprus became an independent republic.

4-22 The unwritten law of Cyprus consists of judicial precedents. Under the Common Law doctrine of *stare decisis*, Cypriot courts are bound to follow decisions of courts of higher level.

The legal rule which must be applied is the *ratio decidendi*, or the legal principle, on which the previous decision was founded. The ratio of a case is distinguishable from *obiter dicta*, which are statements on principles of law made in the course of a decision, but on which the decision does not depend.

Being a Common Law jurisdiction and having codified important areas of substantive law, Cyprus applies English Common Law principles where there is no Cypriot legislation in force.[16]

Jurisdiction of Cypriot Courts

Actions In Personam

4-23 The Supreme Court and the subordinate courts (subject to their own jurisdictional limitations) have jurisdiction to hear and try any action *in personam* where the defendant is served with a writ or other originating process in the manner prescribed by the Rules of Court or where the defendant submits to the jurisdiction of the court.

The service of the writ or other originating process not only notifies the defendant of the action brought against him but also establishes the jurisdiction of the Cypriot courts over the defendant.

Leave of the court is needed before service can be effected on defendants who are not resident in Cyprus. The grounds for an application for leave to serve the Notice of the Writ of Summons outside the jurisdiction are set out in the Rules of Court.[17]

15 Iakovides, 'Introduction to Cyprus Law', *Cyprus Law Review* (1988) vol 6, at p 3745.
16 The Courts of Justice Law 14 of 1960, s 29.
17 Order 6 of the Civil Procedure Rules, Cap 12.

An outline of the main grounds on which a plaintiff may obtain leave for service out of the jurisdiction is set out below:

- The whole subject matter of the action is immovable property of any kind situated in Cyprus;
- Any act, deed, will, contract, obligation, or liability affecting immovable property of any kind situated in Cyprus is sought to be construed, rectified, set aside, or enforced in the action;
- Relief is sought against a person domiciled or ordinarily resident in Cyprus;
- The action is for the administration of the movable property of any deceased person who at the time of his death was domiciled in Cyprus, or for the execution (as to property situated in Cyprus) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Cyprus;
- The action is one brought to enforce, rescind, dissolve, annul, or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract made in Cyprus, or is made by or through an agent trading or residing in Cyprus on behalf of a principal trading or residing outside Cyprus, or is one brought in respect of a breach committed in Cyprus of a contract wherever made, even though such breach was preceded or accompanied by a breach outside Cyprus which rendered impossible the performance of the part of the contract which ought to have been performed in Cyprus;
- The action is founded on a civil wrong committed in Cyprus;
- An injunction is sought as to something to be done in Cyprus, or a nuisance in Cyprus is sought to be prevented or removed, whether damages are or are not sought in respect thereof; or
- A person outside Cyprus is a necessary or proper party to an action properly brought against some other person duly served in Cyprus.

4-24 Where the court grants leave to serve the writ outside the jurisdiction, it may be served in one of the following ways:

- By double registered letter or by hand via a private local bailiff or a local lawyer; and
- Through the mechanism (diplomatic channels) stated in the Bilateral Agreement executed between Cyprus and the country involved, if such an agreement exists.

4-25 The Common Law recognises submission to the jurisdiction, *inter alia*, by:

- The defendant, through express agreement that disputes in a transaction be referred to a particular jurisdiction;
- The defendant, through instructing a lawyer to accept service in that jurisdiction;
- The defendant, through an appearance in the proceedings in the jurisdiction to contest its merits;
- Seeking interlocutory relief consistent only with an intention to contest the merits of the proceedings and by counterclaiming in the action; and
- An action brought by a foreign plaintiff in the jurisdiction.

4-26 The principles of *forum non conveniens* are applied in Cyprus, which has built up an extensive body of case law[18] on this issue. In Cyprus, the courts begin with the assumption that, *prima facie*, the plaintiff is entitled to invoke the jurisdiction of the court selected for litigation, whether against a local or foreign defendant.

The onus rests on the party seeking a stay of proceedings to demonstrate that the forum selected is clearly inappropriate.

Where the parties have specified that a foreign court is to have exclusive jurisdiction over any dispute in an agreement, in the absence of a demonstration of strong grounds to the contrary, the Cypriot courts will decide jurisdiction on the ground that the local forum is inappropriate.

The courts in Cyprus consider a wide range of factors in determining whether a claim relevant to *forum non conveniens* should be upheld. These include the following:

- Domicile of parties;
- Place of business;
- Location of disputed transactions;
- Existence of legitimate juridical advantage to the plaintiff (such as a more favourable limitation period, advantageous ancillary remedies, or the existence of assets);
- Whether the applicable law is the local law;
- Location of evidence;
- Convenience and expense of trial as between the forum and the foreign court;
- Significance of the degree to which the applicable foreign law differs from the law of the forum;
- Whether the stay of the local proceedings is being sought for factual reasons;
- Which country has the closest connection to the facts of the case; and
- Existence of a time bar inapplicable in the local forum and the existence of prejudice to the plaintiff in the prosecution of his claim in the foreign court due to cultural, racial, political, or other similar reasons.

Action In Rem

4-27 The essence of the action *in rem* is, as its name suggests, an action against a thing (usually a vessel). The claimant in an action *in rem* seeks to arrest the vessel or other property (ie, a cargo) and to have it detained until his claim has been adjudicated on or until security by bail or otherwise has been given.

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18 *Phassouri Plantations v Adriatica* (1985) 1 CLR 290; *The Cyprus Potato Marketing v Gobelfred* (1991) 1 CLR 91; *Phassouri Plantations v Adriatica* (1983) 1 CLR 949; *Altobequi v M/V Nada* (1985) 1 CLR 543; *The Cyprus Potato Marketing v Primlaks*, Adm Action Number 93/89; *Mourtzinos v Global Cruises SA*, Civil Appeal Number 7859, 23 October 1992; *Socratous v Sofocleous*, Civil Appeal Number 9287, 18 December 1995; *The Ship Gloriana* (1982) 1 CLR 409; *Anagnostou v Ship Holgor* I (1981) 1 CLR 461; *Providba v Photiades* (1965) 1 CLR 58; *Achellec Electronics v Rostok* (1992) 1 CLR 442; *Shehata v Elias*, Civil Appeal Number 8316, 22 June 1995.

In an action *in rem* (ie, a vessel or cargo), service of the writ on the *res* is absolutely necessary as the foundation of the courts' jurisdiction *in rem*. There are two advantages in proceeding with an action *in rem*, namely:

- The plaintiff obtains security by arresting the *res*; and
- The presence of the *res* within the jurisdiction of the courts establishes the jurisdiction of the courts over the *res*, as well as over its foreign owners if they decide to appear to defend their property.

4-28 If the owners of the *res* do not appear to defend their property, the action will continue *in rem*, and the owners of the property will not be held liable *in personam* for any balance of the judgment issued against the *res* which remains unsatisfied. If the owners of the *res* appear to defend their property, the action proceeds as a hybrid, being both *in rem* and *in personam*, even though the *res* may have been released by the court.

Judgment obtained in an action *in rem* does not preclude a party from a subsequent action *in personam* in respect of the same claim, unless the proceeds of sale of the *res* are sufficient to cover the judgment debt.

Limitation of Actions

4-29 In Cyprus, all claims and rights of recourse to the courts are subject to extinction by statutory time-barring. Depending on the nature of the claims, there are various prescription periods.

Since 1964, there has been a suspension of all time-bars in respect of actions instituted on or after 21 December 1963 due to the enactment of the Law of Suspension of Limitation of Actions 57 of 1964. The wording of the Law covers statutes only, and any agreement entered into by the parties as to time limits is enforceable.[19]

Pre-Trial Procedure

Sources of Procedural Law

Statutory Sources

4-30 The primary source of law governing procedure in the civil courts is the Civil Procedure Rules.[20]

The Civil Procedure Rules are divided into 65 Orders, each divided into a number of Rules. They are amended from time to time to take account of legislative and practice changes.

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19 However, see the Law of 1992, amending the Motor Vehicles (Third Party Insurance) Law, which introduced a limitation period of two years for all traffic accident claims.

20 Civil Procedure Rules, Cap 12.

Judicial Sources

4-31 Although the Civil Procedure Rules are of considerable length, very often they state the principles to be applied to the various procedures available in general terms, leaving detailed principles to be worked out by the courts on a case-by-case basis.

In addition, the judges of the Supreme Court lay down, from time to time, practice statements and practice directions.

Old English Rules

4-32 The courts often refer to the old English Rules of Civil Procedure (the Annual Practice of 1958), which were applicable in England just before Cyprus gained its independence in 1960, for guidance as to the meaning of the provisions of the Cypriot Civil Procedure Rules.

Furthermore, English cases decided on the interpretation of the old English Rules of Procedure which existed before 1960 are of guidance to Cypriot judges in interpreting and applying the Cypriot Civil Procedure Rules.

Inherent Jurisdiction of the Courts

4-33 The courts have inherent jurisdiction to control their procedure to ensure that their proceedings are not used to achieve injustice.

Commencement of an Action

In General

4-34 Civil proceedings are commenced in all Cypriot courts with the issue or filing of an originating process which states the nature and extent of the claim made or the remedy or relief sought.

The forms of an originating process are the writ of summons, the application for originating summons, and the petition.

Writ of Summons

4-35 Writs are used for commencing almost all Common Law actions. There are two prescribed forms of writ, namely:

- The form for a writ with a general endorsement;[21] and
- The form for a writ with a special endorsement.[22]

4-36 The specially endorsed writ of summons has the claimant's first pleadings included in it, and the generally endorsed writ has only a concise statement of the nature of the claim made and the relief sought.

21 Order 2, Rule 1.
22 Order 2, Rule 6.

Rule 6(4) of Order 2 provides that the following claims must be brought by a writ with a general endorsement:

- Libel;
- Slander;
- Malicious prosecution;
- False imprisonment;
- Seduction or breach of promise of marriage; and
- Fraud.

4-37 Where the claim is for a debt or a liquidated demand only, the writ must state that, if the amount claimed and fixed costs (which must be stated in the writ) are paid within the time limited for filing an appearance in the action, further proceedings will be stayed. If the plaintiff is resident outside Cyprus (which means outside the territories stated in the Exchange Control Law), then the amount claimed and the fixed costs must be deposited with the court.

A writ is issued when it is sealed by the court. Time stops running for limitation purposes on the date of issue, which also marks the beginning of the period of validity of the writ for the purpose of service.

Originating Summonses

4-38 Originating summonses[23] are issued to invoke the court's jurisdiction in proceedings in which the principal question is one of construction of a law, deed, will, contract, or other document or some other question of law or which are unlikely to raise any substantial dispute of fact.

The title should generally contain only the names of the parties who are described as plaintiffs and defendants except in proceedings relating to the administration of the estate of a deceased person, where the proceedings should be entitled 'In the estate of (name) deceased', and in proceedings relating to the construction of documents where the document to be construed should be mentioned in the title.

The body of the summons must include a statement of the questions on which the plaintiff seeks the court's determination of the relief or remedy claimed. Issue of originating summonses follows the procedure for issuing writs and takes effect on sealing.

Petitions

4-39 Typical examples of petitions are those for bankruptcy of individuals and winding-up of companies.

23 Order 55 of the Civil Procedure Rules. See also section 52 of the Administration of Estates Law, Cap 189, and Charities Rules, Cap 59.

Petitions are instituted in the matter of the law which gives the court the power to entertain the proceedings. Like a pleading, the body of a petition states, usually in several numbered paragraphs, the grounds on which the petitioner claims to be entitled to an order from the court. It then includes a concise statement of the relief or remedy claimed.

Parties

4-40 As the remedies granted by the courts are generally only effective as between the parties,[24] it is important to take care to join the right parties in the action. Although it is possible to correct most mistakes by amendment at a later stage, the passing of a limitation period may prevent this and in any event avoidable amendments will be penalised in costs and may weaken the credibility of the case at trial.

Persons under disability (minors and mental patients) must sue through a next friend and be sued through a guardian *ad litem*.

Trustees, executors, and administrators should act jointly, and they should be named in any proceedings as defendants if they will not consent to act as plaintiffs.

Generally, causes of action other than for defamation survive a plaintiff's death. Where a party dies or becomes bankrupt in the course of proceedings, the personal representatives of the deceased or trustee in bankruptcy may be ordered to be made parties to the action.

The liability of partners is in general joint and several. They may sue and be sued, either in their individual names or in the name of their firm.

When a winding-up order has been made or a provisional liquidator appointed, no proceedings will be continued against the company or its property except by the leave of the court and subject to such terms as the court may impose.

Unincorporated associations have no separate legal personality and cannot be parties to proceedings in their own right. Where proceedings are necessary there are two main options. These are to bring:

- Proceedings in the name of or against an individual member or members; or
- Representative proceedings.

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24 Order 9 of the Civil Procedure Rules. See also, *inter alia*, *Letco Company Ltd and Another v Socrates Eliades and Others*, Civil Appeal Number 7268; *Markidou v Kiliaris* (1983) 1 CLR 392, 406; *Spyropoulos v Transavia* (1979) 1 CLR 421, 423; *William & Glyn's Bank v The Ship Maria* (1983) 1 CLR 106; *Pitria Shipping v Gregoriou* (1982) 1 CLR 358; *Klonopoulos v Niriis Shipping* (1977) 1 CLR 278; *Hadjievangelou v Dorami* (1978) 1 CLR 545; *The Heirs of Theodoras Panagi v The Administrators of the Estate Stylianou G Mandrioti* (1963) 1 CLR 167; *Midland Export v E Philippou Ltd* (1987) JSC 167; *Chrysostomou v Halkousi* (1978) 1 CLR 267.

Pleadings

In General

4-41 The pre-trial definition of the issues between the litigants takes place by the exchange of pleadings. The plaintiff files his Statement of Claim (if the writ of summons has been generally endorsed) within 14 days from the date of the filing of the memorandum of appearance by the defendant. The defendant files his defence within 14 days from the date of the filing of the statement of claim. The plaintiff has the right to file a reply to the defence, if he considers it necessary, within seven days from the filing of the defence. Further pleadings are rarely used and, to engage in further pleadings, the leave of the court is required.

Pleadings should be confined to statements of material facts in summary form. Law and legal conclusions should not be pleaded. The primary function of pleading is to define the matters in issue which are to be decided by the court. At the trial, the parties are not entitled to canvass issues not raised in the pleadings. Pleadings may be amended by a party with the leave of the court. Amendments will usually be allowed by the court if the other party does not thereby suffer prejudice which cannot be cured by an order for costs.

Principal Rules of Pleadings

4-42 The basic principles of the system of pleadings[25] are that every pleading must state:

- Material facts only;
- All the material facts relied on;
- Material facts, but not the evidence by which they are to be proved;
- Material facts and not law; and
- Material facts in a summary form.

Statement of Claim

4-43 The primary function of a statement of claim is to plead the essential facts establishing the plaintiff's cause of action. In addition, particulars[26] must be given of any of the following matters, if alleged:

- Misrepresentation;
- Fraud, fraudulent intention, or malice;
- Breach of trust;
- Wilful default;
- Undue influence;

25 Order 19, Rule 4 of the Civil Procedure Rules.

26 *Panayiotou v Solomou* (1979) 1 CLR 779; *Matsangos v Oromare Developments Ltd* (1985) 1 JSC 228; *Rodosthenous v Varvia* (1985) 1 JSC 235; *Kyriacou v Licences General Co Ltd* (1969) 1 CLR 505.

- Negligence;
- Special damages; or
- Exemplary damages.

Defence

4-44 All the allegations in the statement of claim are deemed to be admitted by the defendant unless they are expressly traversed by being denied or not admitted.

It is common practice to deny or not admit each allegation in a numbered paragraph or to do so with identified exceptions.

Counterclaim

4-45 A defendant with a cause of action against the plaintiff can raise it either by bringing a separate action or by counterclaiming in the same action.

A counterclaim must comply with the rules relating to the statement of claim.

Reply

4-46 If there is no reply, there is an implied joinder of issue on the defence but not on any counterclaim. A reply may be used to narrow the issues by making admissions or to assert an affirmative case in answer to the defence. However, the reply cannot make any allegations inconsistent with the statement of claim.

Use of Pleadings at Trial

4-47 As part of the purpose of pleadings is to define the issues in the action, the parties are quite justified in omitting to prove matters which could be relevant to the case for the other side but have not been pleaded.[27]

Indeed, strictly evidence on matters that have not been pleaded should not be adduced, and the judge must not give judgment relying on issues that are not pleaded. If it appears that the pleadings do not adequately plead the case for either or both parties, it is usually possible for the pleadings to be amended even during the trial.

Amendment

4-48 The underlying principle is that all amendments[28] made should be necessary to ensure that the real question in dispute between the parties is determined, provided such amendments can be made without causing injustice to any other party.

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27 *Homeros Th Courtis and Others v Panos K Iasonides* (1970) 1 CLR 180.

28 Order 25 of the Civil Procedure Rules; *Domna v Athinaida* (1990) 1 CLR 934; *Nicolaides v Yerolemi* (1980) 1 CLR 14; *Sait Electronics v Ship Dominique*, Adm Action Number 165/88, 17 February 1992; *Astor Manufacturing & Exporting Co and Others v A & G Leventis & Company* (1993) 1 CLR 726; *Phiniotis v Greenmar Navigation Ltd* (1989) 1 CLR 33; *Vasiliades v Petrolina Ltd*, Civil Appeal Number 8132, 20 January 1994; *Periktioni v Stylianou* (1992) 1 CLR 704; *Saba v TMP*, Civil Appeal Number 88236, 31 May 1994.

Amendments are allowed with the leave of the court. Usually, leave is granted as a matter of right but on terms as to the payment of the costs occasioned by the amendment. However, there are problems in making an application to amend as late as during the hearing of the case or after the expiry of any limitation period.

It is a general rule that no action will be defeated by reason of the mis-joinder or non-joinder of a party, and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter. The court, of course, has a discretion whether to allow an amendment and has the power to make an order on terms. It is usual to order the party seeking the order to pay the costs of and occasioned by the amendment.

Striking Out

4-49 Striking out is the procedure for attacking pleadings and originating processes on the ground that they are not correctly formulated. A successful striking out application may result in an action being dismissed, a pleading being struck out, and a judgment being entered or it may result in the offending part of a pleading being struck out.

The grounds[29] for striking out are the following:

- No reasonable cause of action or defence;
- Scandalous, frivolous, or vexatious proceedings;
- Prejudice, embarrassment, or delay in the fair trial of the action; and
- Abuse of process.

4-50 A cause of action or defence with some prospects of success will not be struck out, provided the pleadings raise some question fit to be tried; it does not matter that the case is weak or is unlikely to succeed.

Applications to strike out should normally be made promptly and within the time for delivering the next pleading.

Preliminary Issues

4-51 As a general rule, it is in the interests of the parties and the administration of justice that all issues arising in a dispute are tried at the same time. However, particularly in complex actions, costs and time can sometimes be saved if decisive

29 Order 19, Rule 26, and Order 27, Rule 3, of the Civil Procedure Rules; *In re Pelmako Developments* (1991) 1 CLR 246; *Savva v Petrou* (1983) 1 JSC 286; *Ghorayeb v Nektrans* (1981) 1 JSC 88, *Koundouros v Hadjinicola* (1978) 2 JSC 227; *William & Glyn's Bank v The Ship* Maria (1984) 1 CLR 82; *Fasili and Others v Sun Boat* (1984) 1 CLR 679; *Southfields Industrial v M/V Adriatica* (1989) 1 CLR 301.

or potentially decisive issues can be identified and tried before or separately from the main trial. There are three types of order that can be made, these being for:

- Trial of a preliminary issue on a point of law;
- Separate trial of preliminary issues or questions of fact; and
- Separate trials of liability and *quantum*.

Particulars

4-52 Pleadings define the issues in general form. Particulars[30] limit the issues to be tried and define the scope of the evidence to be adduced on those issues. The details furnished by way of particulars assist to ensure that the parties are not taken by surprise at the trial.

Particulars are sought by way of request and, in case of default, the requesting party can file an application to the court seeking an order for delivery.

The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, and without surprises and incidentally to save costs.

The object of particulars is to 'open up' the case of the opposite party and to compel him to reveal as much as possible what is going to be proved at the trial.

The application should first be made by letter; otherwise, the court may refuse to order particulars to be served. The court will not make an order for particulars which it is satisfied that the party cannot give; nor will particulars be exacted where it would be oppressive or unreasonable to make such an order, as where the information is not in the possession of a party or could only be obtained with great difficulty or expense or exhaustive inquiry.

To prevent a request for particulars of the statement of claim being used as an instrument of delay, an order for particulars will not be made before service of the defence unless in the opinion of the court the order is necessary or desirable to enable the defendant to plead or for some other special reason.

Service

4-53 The plaintiff is required to serve the originating process on the defendant personally or by substituted service (eg, post or advertisement).

Appearance

4-54 Before a defendant can respond to the claim, he must enter an appearance. An appearance prevents the plaintiff from obtaining a judgment in default of appearance. The form of appearance and the time for entering it are prescribed by the Rules of Court.

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30 *Alte Maritime v Kmeid* (1982) 2 JSC 226; *Panayiotou v Solomou* (1979) 1 CLR 779; *Cyprus Airways Ltd v Savva (1)* (1992) 1 CLR 1; *Vector Onega AG v The Ship Girvas*, Adm Action Number 121/97, 15 May 1999.

If the defendant wishes to contest the jurisdiction of the court or the validity of service he must file a conditional appearance. An appearance entered by mistake can be withdrawn.[31]

Third-Party Proceedings and Contribution Notices

4-55 Where, in addition to defending an action, a defendant wishes to make a claim of his own, he may counterclaim or crossclaim against third parties by way of a third-party notice or contribution notice.

A counterclaim is in effect an action in its own right with its own pleadings. Third-party and contribution notices enable defendants to bring claims against parties external to the original pleadings.

Consolidation

4-56 Closely connected actions may be ordered to be consolidated.[32] This means that they will continue and be tried as if they were a single action. The circumstances in which this may be convenient are where:

- There are common questions of law or fact;
- The rights of relief claimed are in respect of or arise out of the same transaction or series of transactions; and
- For some other reason, it is desirable to issue a consolidation order.

4-57 Consolidation is most likely where there is a large overlap between the cases in hand. If the order is made, one of the actions will be nominated as the leading action and consequential directions will be given for the future conduct of the other actions.

Affidavits

4-58 An affidavit is a sworn, written statement by a witness. Affidavits are usually prepared by a lawyer based on information provided by the witness. Their purpose is to place witnesses' evidence before the court in a convenient form. An affirmation is the equivalent of an affidavit where the witness affirms the evidence rather than swearing to it.

Affidavits may be used in support of all interlocutory applications in writ actions, in proceedings commenced by originating summons or petitions.

Affidavits must be expressed in the first person and be divided into consecutive, numbered paragraphs.

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31 *Demetriou v Lloyd's Underwriters* (1982) 1 CLR 711; *Paschalis v The Ship Tania Maria* (1977) 1 CLR 145; *Middle East Accounting v Comarine* (1982) 1 CLR 382.

32 Order 14 of the Civil Procedure Rules; *Hadjiathanasiou v Parperidis* (1976) 1 JSC 118; *Antoniadies v Economides* (1977) 1 JSC 103.

Affidavits which are to be used at the hearing of the merits may contain only facts which the deponent can prove from his or her own knowledge. In interlocutory proceedings, affidavits may contain a statement of information or belief, provided the sources and grounds of such information and belief are stated.

Any document or thing used in conjunction with an affidavit must be made an exhibit to it. Affidavits may be sworn, *inter alia*, before the Registrars of the Courts, as well as before a Cypriot Consul.[33]

Discovery

4-59 The purpose of discovery[34] is to make available to the parties all documents relating to matters in issue. Subject to claims for privilege and admissibility, each party is able to use such documents to support its case.

A claim for privilege may be made if the documents are confidential communications between lawyer and client for the purposes of litigation. Documents that tend to self-incriminate and privileged documents cannot be inspected.

Taking Evidence Abroad

4-60 There is no jurisdiction to force non-resident parties or witnesses to give evidence before Cypriot courts. However, Cyprus has entered into various bilateral agreements with a number of countries whereby a mechanism for obtaining evidence abroad exists.[35]

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33 Order 39, Rule 17, of the Civil Procedure Rules.

34 Order 28 of the Civil Procedure Rules; *Buden & Fried v Kritikos* (1987) 1 JSC 37; *Nissho IWAI Corporation and Others v Lizard Shipping Company Ltd* (1991) 1 CLR 31; *National Bank of Greece SA v Mitsides* (1962) CLR 40.

35 Cyprus is bound by the following bilateral treaties regulating, *inter alia*, the mechanism for taking evidence abroad: Agreement between the Republic of Cyprus and the German Democratic Republic on Legal Assistance in Civil and Criminal Matters, Law 5 of 1984; Agreement between the Republic of Cyprus and the Czechoslovak Socialist Republic on Legal Assistance in Civil and Criminal Matters, Law 68 of 1982; Agreement between the Republic of Cyprus and the Hungarian People's Republic on Legal Assistance in Civil and Criminal Matters, Law 7 of 1983; Agreement between the Republic of Cyprus and the Republic of Greece on Legal Assistance in Civil, Commercial, Family and Criminal Matters, Law 55 of 1985; Agreement between the Republic of Cyprus and the People's Republic of Bulgaria on Legal Assistance in Civil and Criminal Matters, Law 18 of 1984; Agreement between the Republic of Cyprus and the Syrian Arab Republic on Legal Assistance in Civil and Criminal Matters, Law 160 of 1984; Agreement between the Republic of Cyprus and the Union of Soviet Socialist Republics on Legal Assistance in Civil and Criminal Matters, Law 172 of 1986; Agreement between the Republic of Cyprus and the Socialist Federal Republic of Yugoslavia on Legal Assistance in Civil and Criminal Matters, Law 179 of 1986; Agreement between the Republic of Cyprus and the People's Republic of China on Legal Assistance in Civil and Criminal Matters, Law 19 (III) of 1995; Agreement between the Republic of Cyprus and the Republic of Poland on Legal Assistance in Civil and Criminal Matters, Law 10 (III) of 1997 (this agreement was signed on 8 November 1996, and it is awaiting ratification by the House of Representatives).

A letter of request is addressed to the competent authority requesting that a commission for the taking of evidence abroad be issued.

Security for Costs

4-61 Security[36] is designed to ensure that a successful defendant is not left in the position of being unable to recover costs from an unsuccessful plaintiff. An order for security for costs may be made against a plaintiff (corporate or natural) who is not domiciled in Cyprus, if that plaintiff does not have sufficient assets within the jurisdiction to satisfy any order that may be made against him to pay the defendant's costs.

The court has a discretion to make such an order. A foreign defendant's counter-claims may be regarded as actions in respect of which an order for security for costs should be made. If an order for security for costs is not satisfied within the time directed by the court, the action may be dismissed. The amount of security that will be ordered will correspond to the costs likely to be incurred in the defence of the action.

Judgment in Default

4-62 A judgment in default may be entered in cases where the defendant chooses not to defend on the merits. Although such a judgment binds the defendant and may be enforced in the normal way if not complied with by the defendant, it does not always give rise to an estoppel *per rem judicata*, and it may be set aside[37] if there is an arguable defence on the merits.

A judgment in default can be divided into the following classes:

- A judgment in default of appearance; and
- A judgment in default of pleadings.

Summary Judgments

4-63 Summary judgment[38] is the procedure whereby a plaintiff can apply for a judgment against a defendant usually shortly after serving a statement of claim

36 Order 18 of the Civil Procedure Rules; *Hasikos v Charalambides* (1990) 1 CLR 389; *Kazamias v Romaika Keramourgia* (1990) 1 CLR 752; *Stavrinides v Ceskovenska* (1972) 1 CLR 130.

37 *Karydas Taxi Co Ltd v Komodikis* (1975) 1 CLR 321; *Acropol Shipping Co Ltd and Others v Rossis* (1976) 1 CLR 38; *Nemitsas Industries Ltd v S & S Maritime Lines Ltd and Others* (1976) 1 CLR 302; *Constandinides v Makriyiorghou and Another* (1978) 1 CLR 585; *Papastratis v Petrides* (1979) 1 CLR 231; *M & M Transport v Eteria Astikon Leoforion* (1981) 1 CLR 605; *Odysseos v Pieris Estates and Others* (1982) 1 CLR 557; *Cyprus Sulphur v Pararlama Ltd* (1990) 1 CLR 1051.

38 *Karydas Taxi Co Ltd v Komodikis* (1975) 1 CLR 321; *Acropol Shipping Co Ltd and Others v Rossis* (1976) 1 CLR 38; *Nemitsas Industries Ltd v S & S Maritime Lines Ltd and Others* (1976) 1 CLR 302; *Constandinides v Makriyiorghou and another* (1978) 1 CLR 585; *Papastratis v Petrides* (1979) 1 CLR 231; *M & M Transport v Eteria Astikon Leoforion* (1981) 1 CLR 605; *Odysseos v Pieris Estates and Others* (1982) 1 CLR 557; *Cyprus Sulphur v Pararlama Ltd* (1990) 1 CLR 1051.

without proving the case at trial. The policy behind the procedure is to prevent delay in cases where there is no defence.

The application can be made as soon as the plaintiff serves a specially endorsed writ on the defendant and the defendant files a memorandum of appearance.

The application for summary judgment is made by summons returnable before the judge and is supported by an affidavit verifying the facts of the claim and deposing to a belief that there is no defence.

The hearing of the application for summary judgment is conducted on the basis of the affidavit evidence, but the parties are entitled to apply for the cross-examination of the deponent(s) of the affidavit(s) filed in support of the application and opposition. There are five types of order available to the court, namely:

- Judgment for the plaintiff;
- Judgment for the plaintiff, subject to a stay of execution pending the trial of a counterclaim;
- Conditional leave to defend;
- Unconditional leave to defend; and
- Dismissal of the application.

Directions

4-64 Directions are given with a view to securing the just expectations and economical disposal of actions.

They are one of the means by which the courts exercise some measure of control over the preparations made by the parties for trial.

Interlocutory Relief

4-65 An application for interlocutory relief[39] is generally made by summons, and all parties are afforded an opportunity to make submissions. However, in particularly urgent circumstances, an application for interlocutory relief may be made *ex parte*, ie, without notice to the person against whom relief is sought (eg, Mareva injunctions and Anton Piller orders).

The application for interlocutory relief should be filed after the writ is issued and supported by an affidavit or affidavits establishing that:

- The applicant has a *prima facie* case;

39 *Karydas Taxi Co Ltd v Komodikis* (1975) 1 CLR 321; *Acropol Shipping Co Ltd and Others v Rossis* (1976) 1 CLR 38; *Nemitsas Industries Ltd v S & S Maritime Lines Ltd and Others* (1976) 1 CLR 302; *Constandinides v Makriyiorghou and Another* (1978) 1 CLR 585; *Papastratis v Petrides* (1979) 1 CLR 231; *M & M Transport v Eteria Astikon Leoforion* (1981) 1 CLR 605; *Odysseos v Pieris Estates and Others* (1982) 1 CLR 557; *Cyprus Sulphur v Pararlama Ltd* (1990) 1 CLR 1051.

- There is a possibility that a judgment will be issued in favour of the applicant on the merits;
- If the order is not made, there is a great risk that any judgment issued in favour of the applicant will not be satisfied; and
- On the balance of convenience, the court should issue the requested order in favour of the applicant.

4-66 Two preliminary issues should be noted as regards applications for interlocutory relief. Injunctive relief will generally be granted only on the condition that the applicant lodges a counter-security to indemnify the respondent against all losses sustained due to the injunction in case the court finds that the injunction issued was unreasonable or was issued *mala fides*.

In *ex parte* applications, the applicant must disclose to the court all material facts including those which are adverse to the applicant's case. Failure to comply with the aforesaid duty will result in the automatic discharge of the injunction.

The affidavit in support of an *inter partes* or an *ex parte* application must contain a clear and concise statement of the following matters:

- The facts giving rise to the cause of action against the respondent;
- The facts giving rise to the claim for injunctive relief; and
- The precise relief claimed.

In addition, an affidavit on an *ex parte* application must state:

- The facts relied on to justify the application being made *ex parte*;
- Details of any notice given to the respondent and/or the reasons for not giving evidence;
- Any answer asserted (or likely to be asserted) by the respondent to either the substantive claim or the interlocutory relief; and
- Any fact known to the applicant which might lead the court to refuse interlocutory relief.

4-67 A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the respondent arising out of an invasion, actual or threatened, by him of a legal or equitable right of the applicant, for the enforcement of which the respondent is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.

If damages in the measure recoverable at Common Law would be an adequate remedy and the respondent would be in a financial position to pay them, no interlocutory injunction would normally be granted. Damages will be inadequate if:

- The respondent is unlikely to be able to pay the sum likely to be awarded by the court;
- The wrong is irreparable;
- The damage is non-pecuniary (ie, libel or nuisance);

- There is no available market; or
- They will be difficult to assess.

4-68 Most injunction cases are determined on the balance of convenience or the risk of doing an injustice to one side or the other. The extent to which the disadvantages to each party would be incapable of being compensated in damages is always a significant factor in assessing where the balance of convenience lies.

In considering the balance of convenience, if the facts appear to be evenly balanced the courts may consider it prudent to take such measures as are calculated to preserve the *status quo*. The *status quo* is the state of affairs before the respondent started the conduct complained of, unless there has been unreasonable delay, when it is the state of affairs immediately before the application.

An apparently unreasonable delay may be excused if sufficiently explained by the applicant. Cypriot courts do not have jurisdiction to issue injunctions having extraterritorial effect.

The following equitable defences and bars to relief may be raised on an application for an interlocutory injunction:

- Acquiescence;[40]
- Delay or laches;
- Hardship; and
- Clean hands.[41]

4-69 The court will not, and ought not to, make an order which it cannot enforce. An injunction will be refused if its effect is to enforce an agreement for personal services.

Discharge

4-70 Grounds for the discharge or variation of an injunction include the following:

- Material non-disclosure if the injunction was granted *ex parte*;[42]
- The statement of claim is inconsistent with the *ex parte* affidavit;
- The facts do not justify *ex parte* relief;
- The applicant's failure to comply with the undertakings incorporated in the order;
- The order has an oppressive effect;

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40 Acquiescence arises where the applicant's conduct (usually inactivity) induces the respondent to act on the belief that the applicant consents to the respondent's activity.

41 The 'clean hands' doctrine provides that inequitable conduct by the applicant may be a bar to equitable relief.

42 *Caspi Shipping v The Vessel Sapphire Seas*, Adm Action Number 121/96) *Demstar Ltd v Zim Israel Navigation Ltd*, Adm Action Number 157/90, 30 May 1996; *Amathus Navigation v Concort Express* (1993) 1 CLR 1030; *Stavros Hotel v Christoforou*, Civil Appeal Number 8181, 23 March 1995.

- There is unreasonable interference with rights of innocent third parties;
- There is lack of jurisdiction of the court to issue such an order;[43]
- There is material change in the circumstances; and
- There is a failure to prosecute the substantive claim with due speed.[44]

Breach of Injunction

4-71 Breach of an injunction[45] is a contempt of court punishable with imprisonment or sequestration. Contempt must be proved beyond reasonable doubt.

Clearly, the person against whom the order was made will be in contempt if he acts in breach of an injunction after having notice of it.

A non-party who aids and abets the respondent in breaching the terms of the injunction or who acts with the intention of impeding the administration of justice also will be in contempt.

Mareva Injunctions

4-72 A Mareva injunction[46] is an interlocutory order restraining a defendant, usually until trial or further order, from removing his assets out of the jurisdiction.

The purpose of the Mareva injunction is to prevent the injustice of the defendant's assets being hidden so as to deprive the plaintiff of the fruits of any judgment that may be obtained. It is a relief *in personam*, which simply prohibits certain acts in relation to the assets frozen.

The jurisdiction to grant Mareva injunctions derives from section 32 of Law 14 of 1960. Section 32 enables the courts to grant interlocutory injunctions on such terms and conditions as the courts think just where it appears just and convenient to do so. The requirements laid down by the courts for granting a Mareva injunction are:

- A cause of action justiciable in Cyprus;
- A good, arguable case;
- The defendant's possession of assets within the jurisdiction; and
- A real risk that the defendant may dissipate those assets before judgment can be enforced.

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43 *Barclays Bank v Stavros Hotel*, Civil Appeal Number 10/94, 20 May 1994.
44 *Vuitton v Dermosak*, Civil Appeal Number 7950, 22 December 1992.
45 *Photiou v Hadjiforados* (1988) 1 CLR 384; *Mavrommatis and Others v Cyprus Hotels* (1967) CLR 266; *Smith v Paphos Stone Estates* (1989) 1 CLR 499.
46 Mareva injunctions take their name from the English case of *Mareva Compania Naviera SA v International Bank Carriers SA* (1980) 1 All ER 213, the legal principles of which were adopted in Cyprus in the case of *Nemitas Industries Ltd v S & S Maritime Lines Ltd and Others* (1976) 1 CLR 302.

4-73 Cypriot courts do not have jurisdiction to issue Mareva injunctions with extraterritorial effect or to issue so-called worldwide Mareva injunctions.[47]

In its discretion, the court can refuse a Mareva injunction, even if the usual requirements are made out. The application for a Mareva injunction is made *ex parte*.

Anton Piller Orders

4-74 An Anton Piller order[48] is a bundle of interlocutory orders designed to enable a plaintiff to secure the preservation of relevant evidence which might be otherwise destroyed or concealed by the defendant. The order is both injunctive and mandatory in nature; it requires the defendant to give permission for a search to be made on the defendant's premises and provides that specified documents and materials may be inspected and taken away.

The application is made *ex parte* because secrecy is essential. The requirements laid down by the courts for granting Anton Piller orders are:

- There must be an extremely strong *prima facie* case on the merits;
- The defendant's activities must be proved to result in very serious potential or actual harm to the plaintiff's interests;
- There must be clear evidence that incriminating documents or materials are in the defendant's possession; and
- There must be a real possibility that such items may be destroyed before any inter-partes application can be made.

The Trial

4-75 The trial system in Cyprus is adversarial. Common Law rules of evidence, modified by various statutes, apply. Hearsay evidence is not admissible. Usually, the plaintiff (the party who has the burden of proof) presents his case first, by calling his witnesses, and the defendant will follow. The witnesses will give their evidence in chief orally; they will then be cross-examined by the other side's lawyer and re-examined by their own lawyer.

The evidence of a witness not conversant with the Greek language may be given through an interpreter.

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47 *Standard Steamship v Tabco* (1983) 3 JSC 504; *Amp Holdings Ltd v Kitalides*, Civil Appeal Number 9033, 17 November 1994.

48 Anton Piller orders take their name from the English case of *Anton Piller KG v Manufacturing Processes Ltd* (1976) Ch 55. In Cyprus, judges are very reluctant to issue such a draconian order, save in exceptional cases and provided that the applicant does not seek evidence on which to base his action (*In re Pelekanos and Others* (1989) 1 CLR 467). In civil law, the Anton Piller order has its equivalent in the French interlocutory remedy of *saisie-contrefaçon*.

Expert evidence may be given in the course of the case for a party. Expert evidence may include evidence of any foreign law that is applicable. If no such evidence is given, the foreign law is deemed to be the same as the Cypriot law.

At the conclusion of the evidence the parties, through their lawyers, have the opportunity to address the court on the facts and evidence and to make submissions in regard to the judgment that the court should give in the matter.

The addresses of the lawyers for the parties are, in principle, oral, but there is an increasing tendency for the parties to offer written submissions. It is usual for the argument to be addressed first by the party who closes his evidence last, followed by the other party.

All trials, save where the court orders otherwise, are held in open court, to which all members of the public have access. Trials in default of appearance are dealt with on a summary basis.

Evidence

In General

4-76 Evidence[49] is information which may be presented to a court in order that it may decide on the probability of some fact asserted before it, ie, information by which facts tend to be proved or disproved. Under Cyprus law, the facts open to proof or disproof are facts in issue, relevant facts, and collateral facts.

Facts in issue in civil proceedings should be identifiable from the pleadings, the whole point of which is to set out the parties' allegations, admissions, and denials so that before the trial everyone knows exactly what essential matters are left in dispute and therefore open to proof or disproof. A fact which is formally admitted ceases to be in issue; evidence to prove such a fact is neither required nor allowed. In civil cases formal admissions can be made in a number of ways, for example, by the pleadings or default thereof, in answer to a notice to admit facts, or by agreement between the parties before or at the trial.

Relevant facts are those from which it is possible to infer the existence or non-existence of a fact in issue. Evidence of such facts is often referred to as 'circumstantial evidence'. There are three types of collateral facts, namely:

- Facts affecting the credibility of a witness or the weight of evidence;
- Facts affecting the competence of a witness; and
- Preliminary facts to be proved as a condition precedent to the admissibility of certain kinds of evidence.

49 Cacoyannis, *Evidence*; Eliades, *The Law of Evidence*.

Types of Evidence

In General

4-77 The types of evidence by which facts are open to proof or disproof are known collectively as judicial evidence. The types of judicial evidence are as follows:

- Oral testimony;
- Documentary evidence; and
- Real evidence.

Oral Evidence

4-78 Oral evidence is evidence which is given by witnesses usually on oath or affirmation. Each party to an action will normally call witnesses to support with their evidence the truth of the allegations contained in the pleadings. The function of a witness is to inform the court of the facts as he actually perceived them; he must, as far as possible, avoid stating his opinion.

By way of exception to this general rule, expert witnesses are entitled and bound to give their opinions. Expert witnesses are people like doctors and engineers who have specialised knowledge which the ordinary person does not possess, and it is often necessary for the court to seek their guidance in disputes involving technical issues.

Witnesses may give evidence about what they have heard just as they may give evidence about what they have seen; but this proposition is subject to a very important exception. 'Hearsay' evidence is, in general, where it is desired to prove the truth of some disputed fact, evidence of what was said by some person not called as a witness, or of what was stated in some document executed by such a person, and it will not be admitted. The rule against hearsay is usually cast in the following terms: any statement other than one made by a witness while giving testimony in the proceedings in question is inadmissible as evidence of the facts stated.[50]

The reason for this rule is said to be that, if such evidence were admitted, there would be no way of testing its veracity because the speaker or the writer of the document was not necessarily on oath when he made it and there is no way of testing the credibility of a person who is not present for cross-examination.

The 'hearsay' rule is subject to numerous statutory exceptions which arise from the obvious necessity of allowing some reported statements to be given in evidence. Thus, for example, statements made by parties to an action or by their agents which are against their interests may be given in evidence as admissions because there is every reason to suppose that when a person makes a statement which is against his interests it will be true. A large category of 'declarations of deceased people' are

50 *Lefkaritis Bros v Hadjiconstantinou* (1987) 1 CLR 43.

also permitted to be given in evidence, eg, declarations made by deceased persons in the 'course of duty' and statements by persons since deceased.

It must be stated that the 'hearsay' rule only operates where the evidence in question is sought to be admitted as proof of the truth of the facts stated. There is no objection to its introduction for any other purpose provided that it is otherwise relevant, eg, to prove the fact that a debated statement was made.

Documentary Evidence

4-79 Documentary evidence[51] is evidence which is contained in documents. Documents fall into two categories, ie, 'public' documents and 'private' documents. Public documents consist of documents made for public reference such as maps and public registers. Private documents are documents made for private purposes.

All private documents, as a general rule, must be proved before their contents may be given in evidence; they must be shown to be genuine. Private documents must usually be produced in the original by the maker of the document if it is attested; an attesting witness or even a person who merely saw it executed may testify as to the authenticity of the writing or signature. This is an example of what is called 'the best evidence rule', which insists that proof must always be made by the best means available.

'Secondary' evidence (ie, something other than the production of the original) of a document either in the form of a copy or even in the form of oral evidence as to the contents may be admissible where it can be shown that for some reason the original is not available, eg, where it can be proved to have been lost.

Real Evidence

4-80 Real evidence[52] is afforded by the inspection of physical objects by the court.

Burden of Proof

4-81 In civil proceedings, the party who raised an issue bears the burden of proving the facts in issue. The standard of proof in civil proceedings is proof on a balance of probabilities.

In criminal proceedings, the general rule is that the burden of proof lies on the prosecution and is a proof beyond reasonable doubt. Where the burden of proof lies on the accused, the standard of proof in criminal proceedings is proof on a balance of probabilities. No evidence is required to establish the following facts:

- Formal admissions;

51 *Aphrodite Matches Co v Ioannides Ltd* (1983) 1 CLR 553.
52 *Teklima v A P Lanitis* (1987) 1 CLR 614; *Ioannides v Kyriacou* (1988) 1 CLR 639.

- Judicial notice; and
- Presumptions (presumptions of law and of fact).

Privilege

4-82 A party is entitled to claim privilege in certain instances and he may refuse to answer questions or to produce documents sought by the other party during discovery. There are three forms of privilege, namely:

- Privilege which attaches to communications made 'without prejudice';
- Privilege against self-incrimination; and
- Legal professional privilege.

4-83 A party entitled to claim privilege may waive it. Legal professional privilege covers confidential communications between the client and the legal adviser, the purpose of which was to request or provide legal advice.

Production and Admission of Evidence

4-84 The production and admission of evidence is regulated by the Law of Evidence of 1946,[53] which incorporated the rules of evidence applicable in England before 5 November 1914 with some minor amendments which had been effected since then.

There are some moves in the office of the Attorney General of Cyprus to amend the law of evidence to bring it into line with the existing law of evidence in England.[54] A bill also is pending before the Legal Affairs Committee of the House of Representatives for the enactment of a new Evidence Law.

Judgment

4-85 Judgments are usually reserved and, therefore, are often delivered in writing. They are accompanied by reasons in support of the decision which has been reached by the court. The reasons will specify the findings of fact and the relevant principles of law and state how the law was applied to the facts to arrive at the court's judgment.

In a monetary judgment involving a contract, it is usual for the court to award interest as provided for in the contract up to the date of judgment. Otherwise, interest from the date of judgment is given in accordance with the relevant legislation. The normal rule is that a successful litigant is awarded an order for costs to be paid by an unsuccessful litigant.

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53 Law of Evidence of 1946, Cap 9.

54 Stavrinakis, 'Codification and Revision of Law of Evidence', *Cyprus Law Tribune* (1993), vol 1, at p 125.

Appeals

4-86 An appeal is an application to a superior court to reconsider a determination by a lower court. Strict time limits exist for the lodging of an appeal. A notice of appeal against a judgment on the merits must be filed within 42 days from the date of the judgment.

An appeal against an interlocutory judgment or decision must be filed within 14 days from the date of the judgment or decision.

Enforcement of Domestic Judgments

4-87 A litigant who obtains a judgment does not thereby automatically obtain the remedy sought in the proceedings. The courts have powers to enforce compliance by parties who fail to obey judgments and orders made against them. Domestic judgments can be enforced by:

- Writ of movables;
- Garnishee proceedings;
- Registration of a charging order over the immovable property of the judgment debtor or over his chattels (eg, shares);
- Writ of delivery of the goods ordered to be delivered to the judgment creditor;
- Writ of possession of the land ordered to be delivered to the judgment creditor;
- Committal for breach of an order or undertaking;[55]
- Writ of sequestration; and
- Bankruptcy proceedings against the judgment debtor.

Enforcement of Domestic Arbitration Awards

4-88 In Cyprus, all matters relating to arbitration are governed by the provisions of the Arbitration Law.[56] In order for a dispute to be referred to arbitration, the agreement between the parties to an action must contain an arbitration clause. Section 8 of the Arbitration Law empowers the court to stay any legal proceedings commenced in any court if any party to an arbitration agreement, or any person claiming through or under him, commences legal proceedings in any court against any other party to the arbitration agreement.

This power is, however, discretionary, and the court will not exercise it if it is satisfied that there are good and sufficient reasons why the matter should not be

55 Committal for breach means that the person in breach is sent to prison for a period of time. Alternatively, the court has the power to impose a fine or confiscate a security lodged.

56 Arbitration Law, Cap 4.

referred to arbitration in accordance with the arbitration agreement. The arbitration court is a private tribunal of the parties' own choice.

The arbitration award can be enforced by registration and recognition as a court judgment. This can be effected by an application by summons filed by the judgment creditor with the Registry of the Court of the District where the judgment debtor has his residence.

The judgment debtor can oppose the registration and enforcement of the arbitration award by raising limited grounds of defence concerning the validity of the award. As soon as the arbitration award is finally registered and recognised as a court judgment, it can be executed by the same methods as the court judgments.

Enforcement of Foreign Judgments and Arbitration Awards

4-89 The enforcement of foreign judgments and arbitration awards in Cyprus is dealt with in Chapter 5.

CHAPTER 5

Enforcement of Foreign Judgments and Arbitration Awards

Andreas Neocleous and Sotiris Pittas

Introduction

5-1 Cyprus has adopted the Anglo-Saxon legal system, which allows most English cases to be cited in Cypriot courts. Under certain conditions, the cases are treated as binding but, in most instances, they are used as guidelines. Being a Common Law jurisdiction and having codified important areas of substantive law, Cyprus applies English Common Law principles where there is no Cypriot legislation in force.

The Cypriot government does not have a formal policy towards the recognition and enforcement in Cyprus of foreign judgments. The question of whether a foreign judgment will be recognised and enforced in Cyprus is determined solely by the criteria set out in the relevant legislation (if applicable to the judgment in question) and by the principles of Common Law if the judgment lies outside the ambit of the legislation.

The prevailing attitude of the Cypriot courts, in general, is to assist in the enforcement of foreign judgments, provided that the following requirements are met:

- The foreign judgment has been issued by a court which has jurisdiction in accordance with the Cypriot rules in the conflict of laws;
- The enforcement of the foreign judgment will not injure Cypriot public policy;
- The foreign judgment has been made on merit and not according to procedure;
- The foreign judgment has not been obtained by fraud; and
- The proceedings which led to the issue of the foreign judgment were not contrary to natural justice.

5-2 There is no unified system in Cyprus for the enforcement of foreign judgments. A judgment of a court of a foreign country has no direct operation in Cyprus, but it may be enforceable by action or counterclaim at Common Law or under statute, or it may be recognised as a defence to an action or as conclusive of an issue in an action.

A foreign judgment may be enforceable under statute by the process of registration. On the other hand, a judgment creditor seeking to enforce a foreign judgment in Cyprus at Common Law cannot do so by direct execution of judgment; he must bring an action on the foreign judgment.

Enforcement at Common Law

In General

5-3 A judgment creditor seeking to enforce a foreign judgment in Cyprus at Common Law must bring an action on the foreign judgment. As soon as he files the action (a specially endorsed writ), he can apply for summary judgment under Order 18 of the Civil Procedure Rules on the ground that the defendant has no defence to the claim and, if his application is successful, the defendant will not be allowed to defend. Alternatively, the judgment creditor, instead of filing an action on the foreign judgment, may file an action relying on the facts which created the cause of action on which the foreign judgment was issued.

It was decided, however, by the Supreme Court[1] that, if the foreign judgment is capable of registration, it cannot be enforced by a Common Law action on the judgment.

Procedure for Enforcement

5-4 The action on the judgment commences with a writ, which may either be generally endorsed with a statement of the nature of the claim or, more usually, will have a statement of the plaintiff's claim endorsed on it.[2]

The statement of claim will set out details of the judgment sought to be enforced and will usually include a plea that the court has jurisdiction over the defendant. The writ will claim the amount of the judgment debt or the equivalent in Cyprus pounds at the time of payment.[3] In the case of a defendant resident outside the jurisdiction, the court has the power to give leave to issue the writ and order service of the claim outside the jurisdiction.

Summary Judgment

5-5 A defendant is obliged to acknowledge service of the writ within 14 days from the date of service (in the case of a writ served within Cyprus) by filing a Memorandum of Appearance. In the event that the defendant gives notice of intention to defend and subject to a statement of claim having been served, the

1 *A Constantinou v Ekdotiki Eteria Demokritos Ltd and Another*, Civil Appeal Number 8578, 23 February 1996.

2 If the writ is not so endorsed, the statement of claim must be served 14 days after the defendant has acknowledged service of the writ or such longer time as the court may allow.

3 The statement of claim also may include a claim for interest. If the foreign judgment makes no provision for interest, the judgment creditor is entitled to claim the legal interest of eight per cent *per annum* on the judgment debt since the date of filing of the writ of summons.

plaintiff may then apply for summary judgment under Order 18 of the Civil Procedure Rules on the ground that the defendant has no arguable defence to the claim.

The application is made by summons supported by an affidavit sworn by or on behalf of the plaintiff. The affidavit must:

- Verify the facts on which the claim or the part of the claim to which the application relates is based; and
- Contain a statement of the deponent's belief that there is no defence to the claim or the part thereof in respect of which the application is made.

5-6 The application, a copy of the supporting affidavit, and any exhibits attached thereto must be served on the defendant.

At the first hearing of the application, the defendant has the right to object to the application and the court will direct him to file his written opposition and will set the application for hearing.

It is necessary for the defendant to demonstrate that he should be given leave to defend the proceedings. This evidence is almost always given by affidavit in which the defendant must satisfy the court that there is an issue or a question in dispute which should be tried or that, for some other reason, there ought to be a trial.

The particular defences likely to be raised are either that the foreign court did not have jurisdiction over the defendant or that the foreign judgment was obtained by fraud.

An allegation that a foreign judgment was obtained by fraud is sufficient to entitle the defendant to leave to defend unless it is obvious that the allegation of fraud is frivolous.

If the defendant raises an arguable defence, the court will give him leave to defend the action. In the case of a defence which the court regards as 'shadowy' or lacking in substance, the court may make the grant of leave to defend subject to conditions (often, the payment into court of all the whole sum claimed). If the court finds that there is no triable issue, it will give judgment for the plaintiff.

The defendant may appeal to the Supreme Court as of right against an order refusing leave to defend and both the defendant and plaintiff may appeal as of right against an order granting conditional leave to defend.

Trial of the Action

5-7 In the event that leave to defend is given, the court will give directions for the trial of the action.

There will be an exchange of pleadings. The defendant will serve a defence, and the plaintiff will then reply to the defence.

Enforcement under Statute

In General

5-8 Generally, Cyprus follows the adversarial system of Anglo-Saxon Common Law. The supreme law of the land is the Constitution of 1960, within the boundaries of which both civil and criminal justice are dispensed. In brief, the Constitution, which established Cyprus as an independent state, reproduced the provisions of the European Convention on Human Rights and Fundamental Freedoms.[4]

Many aspects of the litigation process, including procedural matters, are similar, if not identical, to the provisions pertaining in England. The Courts of Justice Law of 1960 is the basic legislation under which, in accordance with the Constitution, the structural system of the courts was founded. According to section 29 of the 1960 Law,[5] each court, in its civil jurisdiction, must apply the Constitution and the laws enacted thereunder, including all laws which have continued to be in force under article 188 of the Constitution referred to below, the Common Law, and the principles of equity, as well as all laws of the United Kingdom and Northern Ireland which were in force in Cyprus immediately before the date of independence, unless they are repugnant to the Constitution or any law made thereunder.[6]

Article 188 of the Constitution provides that all laws in force as at the date of commencement of the Constitution will remain in force but will be construed and applied with such modification as may be necessary to bring them into conformity with the Constitution. A foreign judgment may be enforceable in Cyprus under statute by a process of direct registration. The statutory system, if applicable and successfully employed, will result in practically all foreign judgments being treated as judgments of the Cypriot courts. These, unlike the Common Law foreign judgments, will have direct operation in Cyprus.

Article 169 of the Constitution provides that conventions or treaties relating to commercial matters, economic cooperation, and *modus vivendi* that Cyprus may ratify will, on the basis of reciprocity, have superior force over domestic law.

Legislation Regulating Registration of United Kingdom Judgments

5-9 The registration of judgments obtained in the United Kingdom is governed by the Foreign Judgments (Reciprocal Enforcement) Law[7] (and the rules made thereunder by means of an Order in Council under section 3). The Law is modelled on

4 See also Chapter 2.
5 Courts of Justice Law 1960, s 29(1), providing that each court, in exercising its civil and criminal jurisdiction, shall apply the Common Law and the principles of equity.
6 Constitution of Cyprus, art 188(1), providing that '. . . each law which as at the date of the commencement of the Constitution is in force shall continue to be in force after that date until it is amended or abolished by any law enacted according to the Constitution'.
7 Foreign Judgments (Reciprocal Enforcement) Law, 1935, Cap 10.

the corresponding English statute, the Foreign Judgments (Reciprocal Enforcement) Rules,[8] and the Maintenance Orders (Facilities for Enforcement) Law of 1921.

In effect, the Foreign Judgments (Reciprocal Enforcement) Law of 1935 is applicable only to judgments obtained in England and Wales, Scotland, and Northern Ireland, and the 1921 Law applies to maintenance orders issued by the courts in England and Wales.

Bilateral Treaties

5-10 Cyprus is bound by the following bilateral treaties,[9] relating to the recognition and enforcement of foreign judgments:

- Agreement between the Republic of Cyprus and the German Democratic Republic on Legal Assistance in Civil and Criminal Matters;[10]
- Agreement between the Republic of Cyprus and the Czechoslovak Socialist Republic on Legal Assistance in Civil and Criminal Matters;[11]
- Agreement between the Republic of Cyprus and the Hungarian People's Republic on Legal Assistance in Civil and Criminal Matters;[12]
- Agreement between the Republic of Cyprus and the Republic of Greece on Legal Assistance in Civil, Commercial, Family, and Criminal Matters;[13]
- Agreement between the Republic of Cyprus and the People's Republic of Bulgaria on Legal Assistance in Civil and Criminal Matters;[14]
- Agreement between the Republic of Cyprus and the Syrian Arab Republic on Legal Assistance in Civil and Criminal Matters;[15]
- Agreement between the Republic of Cyprus and the Union of Soviet Socialist Republics on Legal Assistance in Civil and Criminal Matters;[16]
- Agreement between the Republic of Cyprus and the Socialist Federal Republic of Yugoslavia on Legal Assistance in Civil and Criminal Matters;[17]
- Agreement between the Republic of Cyprus and the People's Republic of China on Legal Assistance in Civil and Criminal Matters;[18] and

8 Foreign Judgments (Reciprocal Enforcement) Rules, Cap 16.

9 Mavrommatis 'Succession of States in respect of Treaties and the practice followed by Cyprus', *Cyprus Law Tribune* (1990), vol 1, at p 117.

10 Law 5 of 1984. After the unification of the two German states, the fate of this agreement is uncertain, as the Federal Republic of Germany has yet to ratify it.

11 Law 68 of 1982.

12 Law 7 of 1983.

13 Law 55 of 1985.

14 Law 18 of 1984.

15 Law 160 of 1984.

16 Law 172 of 1986. After the dissolution of the Union of Soviet Socialist Republics, the agreement was ratified by the Russian Federation, Ukraine, and Belarus.

17 Law 179 of 1986. Since the dissolution of the Socialist Federal Republic of Yugoslavia, only Serbia and Montenegro have ratified the agreement.

18 Law 19 (III) of 1995.

- Agreement between the Republic of Cyprus and the Republic of Poland on Legal Assistance in Civil and Criminal Matters.[19]

Multilateral Treaties

5-11 Cyprus is a signatory to the following multilateral conventions relating to the recognition and enforcement of foreign judgments:

- The Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol thereto;[20]
- The Convention on the Recovery Abroad of Maintenance (Ratification);[21]
- The European Convention on the Recognition and Enforcement of Decisions concerning the Custody and/or Restoration of Custody of Children;[22]
- The European Convention on the Recognition and Enforcement of Foreign Arbitral Awards;[23] and
- The European Convention on the Recognition and Enforcement on Certain International Aspects of Bankruptcy.[24]

Registration

5-12 An application for registration of a foreign judgment may be made if:

- The judgment is final and conclusive between the parties;
- There is a sum of money payable under it which is not for tax or a similar charge or in respect of a fine or penalty;
- The application is made within six years of the judgment being given or an appeal adjudged;
- The judgment is unsatisfied, at least in part; and
- The judgment is capable of execution in the original foreign court.

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19 Law 10 (III) of 1997.

20 Law 11 of 1976. Article 21 of the Convention states that decisions rendered in one contracting state will not be recognised or enforced in another contracting state, in accordance with the provisions of the Convention, unless the two states, being parties to the Convention, have concluded a supplementary agreement to this effect. Despite the fact that Cyprus ratified the Convention on 12 March 1976, the Cypriot government has not entered into a supplementary agreement with any contracting state to the Convention and, consequently, the Convention cannot be utilised as a system for the registration of foreign judgments. See *Sea-Land Service Inc v Jaguar Lints Limited* (1993), 1 CLR 1, where it was held that the Convention could not be utilised for the registration and enforcement in Cyprus of a judgment issued by the Dutch courts due to the lack of any supplementary agreement between the two states.

21 Law 50 of 1978.

22 Law 36 of 1996.

23 Law 84 of 1979.

24 Law 36 (III) of 1993. Contracting States to this Convention are the member states of the Council of Europe and, until now, no rules have been passed to govern its procedural enforcement.

5-13 A foreign judgment will be deemed to be final and conclusive even though an appeal may be pending against it or it is subject to such an appeal.

Procedure for Registration

5-14 A judgment creditor may petition *ex parte* the court within a time limit of six years from the date of the judgment or the decision on appeal and have it registered in the District Court either where the debtor resides or where any property to which the judgment relates is situated. There are certain prerequisites which must be fulfilled before the judgment can be registered and these include:

- Filing an affidavit in support of the application; and
- Exhibiting a certified copy of the judgment issued by the original court, authenticated by its seal, together with a Greek translation certified as correct either by a diplomatic or consular agent or by a sworn translator or by any person so authorised.

5-15 If the judgment was rendered by default, the originals or certified true copies of the documents are required to establish that the summons was duly served on the defaulting party. The allegations required to be shown in the affidavit in support of an application to register a foreign judgment are to the effect that:

- The applicant is entitled to enforce the judgment;
- As the case may require, either at the date of the application the judgment has not been satisfied or, if the judgment has been satisfied in part, an amount remains outstanding;
- At the date of the application, the judgment can be enforced by execution in the country of the original court; and
- If the judgment was registered, that registration would not be or be liable to be set aside under the statute.

5-16 The amount of interest, if any, which under the law of the country of the original court has become due under the judgment up to the time of registration also must be shown. Where the sum payable under the judgment is expressed in a currency other than the currency of Cyprus, the affidavit must also state the amount which the sum represents in the currency of Cyprus, calculated at the rate of exchange prevailing at the date of the judgment. There must be exhibited to the affidavit:

- The judgment or a verified, certified, or otherwise duly authenticated copy, together with such other documents as may be required to show that, according to the law of the state in which it has been given, the judgment is enforceable and has been served;

- In the case of a judgment in default, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or with an equivalent document;[25]
- A translation into Greek, certified by a notary public or a person qualified for the purpose in one of the contracting states, or authenticated by an affidavit; and
- Such other evidence as may be required, having regard to the provisions of the Order in Council extending the law to the country of the original court.

5-17 Where the necessary documents are not provided, the court may fix a time for production or accept equivalent documents or dispense with production. A copy of the foreign judgment will be deemed to be a true copy (unless the contrary is proved) if it is duly authenticated, ie, it bears the seal of the court or is certified as a true copy by a judge or officer of the court.

Once the prerequisites are satisfied, the court may give leave to register the judgment in Cyprus where the order is drawn up and on which a period is stated allowing the judgment debtor to apply to have the registration set aside. The order must contain a period of notification, and execution of the judgment may not be issued until after the expiration of that period.

The order need not be served on the debtor, but notice in writing of the registration (disclosing full particulars and informing him of his right to have the registration set aside) must be served on him by the same method of service as used for a writ of summons.

Application to Set Aside Registration

5-18 The judgment debtor, within the period stated in the order issued *ex parte* by the court, may proceed to file an application to have the registration set aside in the following cases:

- The foreign judgment is not a judgment within the meaning of the Foreign Judgments Law or the original judgment was registered in contravention of the Law;
- The original court had no jurisdiction;
- The judgment debtor as defendant in the original court did not receive notice of the proceedings to enable him to defend and did not appear;
- The original judgment was obtained by fraud;

25 A foreign judgment granted by default is not treated differently from any other kind of judgment so long as an affidavit of proper service is provided and the defendant has had the opportunity to defend.

- The enforcement of the original judgment would be contrary to Cypriot public policy; or
- The rights under the original judgment are not vested in the person applying for registration.[26]

5-19 The registering court must set aside the registration if one of the aforesaid prerequisites of the law is met. In the following cases, the registering court has discretion whether or not to set aside the registration:

- If it is satisfied that, prior to the date of the original judgment, the matter in dispute in the original court was finally and conclusively determined by a court having jurisdiction in the matter; or
- An appeal is pending or could be brought, in which case the judgment debtor could be given a specified time to have the appeal heard.[27]

Recognition as a Defence

5-20 Apart from the enforcement of a foreign judgment by a plaintiff, the situation may arise where a defendant to an action in Cyprus claims that a foreign court has previously determined the plaintiff's claim adversely and that the foreign judgment should be recognised.

The defendant in such a situation will argue that the judgment of the foreign court should be recognised as a defence to the plaintiff's claim which has been determined by the foreign judgment. This defence is based on the doctrine of estoppel *per rem judicatam*. There are two ways in which this estoppel may arise in Cyprus law.[28]

The first is a 'cause-of-action' estoppel, ie, a judgment which negated the plaintiff's cause of action. There also is a second, broader form of estoppel, generally known as an 'issue estoppel'. To create an issue estoppel the following requirements must be satisfied:

- The judgment relied on must be issued by a court of competent jurisdiction, and must be final, conclusive, and on the merits;
- The parties in the earlier action relied on as creating the estoppel, and those in the later action in which that estoppel is raised, must be the same; and
- The issue in the later action must be the same issue as that decided by the judgment in the earlier action.

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26 Foreign Judgments (Reciprocal Enforcement) Law, 1935, Cap 10, s 6.
27 The discretion of the registering court in this case is exercised with caution.
28 *Williams & Glyn's Bank Ltd v The Ship Maria*, Adm Action Number 59/82 of 28 February 1992; *Demetriou v Hilides and Others* (1980) 1 JSC 211; *Theori v Maroulla Djoni* (1984) 1 CLR 296.

5-21 A claim for issue estoppel arising out of foreign proceedings will be recognised by the Cypriot courts if, after careful consideration of the material before the foreign court, there appears to have been a full contestation and a clear decision on the issue.

Other Aspects

Jurisdiction

5-22 The original court will be deemed to have had jurisdiction if:

- In an action *in personam*, the judgment debtor (a) submitted to the jurisdiction voluntarily, other than for the purpose of protecting or obtaining the release of the property seized or threatened to be seized, (b) was the plaintiff in, or counterclaimed in, the proceedings in the original court, (c) had agreed to submit to the jurisdiction of the original court, (d) was resident, or as a company had its principal place of business in the original country, or (e) had an office or place of business in the original country and the original proceedings were in respect of a transaction effected by that office or place;
- In a judgment given in an action of which the subject matter was immovable property or in an action *in rem* of which the subject matter was immovable property, the property in question was, at the time of the proceedings in the original court, situated in the country of that court; or
- In a judgment given in any action other than those stated above, the jurisdiction of that court is recognised by Cypriot law.

The original court will not be deemed to have had jurisdiction if:

- The subject matter of the proceedings was immovable property in another jurisdiction outside the country of the original court; or
- The filing of the proceedings in the original court was in breach of an agreement to resolve that dispute other than by a court action in that jurisdiction, except where the judgment debtor (a) submitted to the jurisdiction voluntarily, other than for the purpose of protecting or obtaining the release of the property seized or threatened to be seized, (b) was the plaintiff in, or counterclaimed in, the proceedings in the original court, (c) had agreed to submit to the jurisdiction of the original court, or where the jurisdiction of that court is recognised by Cypriot law; or
- The judgment debtor was by the rules of public international law entitled to immunity from the jurisdiction of the original court and did not submit to that jurisdiction.

Fraud

5-23 A judgment of a foreign court obtained by fraud, either on the part of the court or on the part of the party seeking to enforce it, will not be recognised in a Cypriot court. The foreign judgment cannot be enforced by an action or counterclaim at Common Law or under statute or be recognised as a defence to an action or as conclusive of an issue in an action.

This principle gives more scope to the judgment debtor to re-open allegations of fraud than would be the case if the debtor was merely seeking to set aside a judgment of a Cypriot court. A Cypriot judgment may be set aside on the grounds of fraud only if the plaintiff could put forward fresh evidence which can be produced with reasonable diligence and which is such that, if it is put forward at the trial, it will probably cause a different conclusion to be reached.

Natural Justice — Due Process

5-24 It is necessary that the foreign court proceedings conform to the foreign procedural law. Moreover, they should in any event respect the basic principles of due process as reflected in the Cypriot procedural law. One of the requisites of due process is that the foreign court proceedings should be understood by the defendant.

If the defendant is unable to understand the language used by the court, he must be informed through the translation of documents and the use of an interpreter. The due process requirement is most crucial for foreign default judgments. The Cypriot judge will always examine whether the defaulting party has been duly summoned to appear. The defendant should have been aware of the claims filed against him and have had full opportunity to be heard and defend himself.

The enforcement of a foreign judgment may be impeached if the proceedings in which the judgment is obtained were opposed to natural justice. Thus, if the foreign court failed to adhere to the *audi alteram partem* rule by refusing to hear the defendant, any resulting judgment might be successfully set aside in Cyprus.[29]

Public Policy

5-25 A foreign judgment is impeachable on the grounds that its recognition or enforcement would be contrary to Cypriot public policy. There is no legislative provision in Cyprus which defines the concept of public policy.

It must be defined, however, as meaning the totality of values, perceptions, and ideas on which the ethical, financial, and political order which regulates Cypriot society is based from time to time.[30]

Ancillary Relief and Execution Injunctive Relief

5-26 This section is intended to demonstrate how these remedies may be operated for the benefit of a person seeking recognition by statutory rather than Common Law methods of recognition although, needless to say, they are remedies of potentially general application.

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29 *Ahapittas v Roc-Chik Ltd* (1968) 1 CLR 1; *Hassidoff v Sandi and Others* (1970) 1 CLR 220.

30 *Pilavachi & Co. Ltd v International Chemical Co Ltd* (1965) 1 CLR 97; *Isaia, Diomedes v Ktimatiki Eteria Kleanthis Englezos Ltd* (1974) 11 JSC 1114.

If the case is appropriate for injunctive relief because it is believed that the only available assets of the judgment debtor are at risk of dissipation, an injunction may be sought simultaneously with or after the application to register the judgment.

When the judgment debtor is a Cypriot national or a local Cypriot company, an injunction can be obtained only against their immovable property and not against its movables, save in the case that the specific asset or chattel is the subject of the foreign proceedings.

In the case of foreign nationals or of international Cypriot companies (which are fully controlled and managed by foreign nationals), injunctive relief can be obtained against any asset they have within the jurisdiction of the Cypriot courts. The Cypriot courts do not have jurisdiction to issue injunctions with extra-territorial effects.[31]

An injunction according to section 30 of the Merchant Shipping (Registration of Ships, Sales, and Mortgages) Law, 1963[32] cannot be obtained against a Cypriot shipping company blocking and/or mortgaging and/or deleting its vessel from the Cyprus Ship Registry if the judgment creditor does not have an interest in the vessel himself and he is a mere creditor.[33]

Execution

5-27 All the methods of execution of Cypriot court judgments are available. The most usual ones are the following:

- Writ of *fieri facias*;
- Garnishee proceedings;
- Charging order;
- Appointment of receiver;
- Order of committal; and
- Order of sequestration.

5-28 In addition, the judgment debtor may be summoned to be examined as to the whereabouts of his assets and existence of debts. In the case of a corporate body, an officer may be summoned. It is not unusual for winding-up orders in respect of companies and bankruptcy in the case of individuals to follow after a writ of *fieri facias* returns unexecuted on the ground of lack of movable assets. The filing of an appeal does not prevent the execution of a judgment.

The domestic judgment is regarded as final for execution purposes, even when an appeal is pending, unless a special order for a stay of execution is made by the court. It should be observed that appeals can be made only on a point of law and generally

31 Courts of Justice Law, Law 14 of 1960, s 32; *Pastella Marine Co. Ltd v National Iranian Tanker Co Ltd* (1987) 1 CLR 583.
32 Law 45 of 1963.
33 *Pastella Marine Co Ltd v National Iranian Tanker Co Ltd* (1987) 1 CLR 583.

will concern the right of the foreign court to exercise jurisdiction on the question of whether the foreign court has complied with the requirements of registration. No leave to appeal is required, and either the plaintiff or the defendant may appeal as of right.

Interest

5-29 Once registered, the judgment takes effect as a judgment of a Cypriot court.

The order for registration will include interest due under the law of the foreign country as at the date of registration and interest also will accrue under Cypriot law at the current rate of eight per cent *per annum*.[34]

Legal Costs

5-30 Costs are normally awarded to the successful party. Such an award will be subject to taxation by the court's taxing master who is the Registrar of the registering court.

The claimant's itemised bill of costs is presented to the Registrar who, after hearing the arguments of both sides, taxes the costs. Current practice indicates that 60 to 70 per cent of the costs claimed are awarded. The court fees are set by regulations and are as follows:

- Filing the petition to register the judgment, CY £3.50;
- Swearing the supporting affidavit, CY £1; and
- Each exhibit, CY £0.10.

5-31 In litigious matters, the minimum charges (which are comparatively low by international standards) are determined by the Rules of the Supreme Court and they are usually observed by the legal profession. In straightforward cases, law firms will apply those charges but, in cases of complexity, they may charge on an hourly basis (CY £50 to CY £150 per hour) or on the basis of a special retainer. A Cypriot lawyer is not permitted to enter into a contingency fee agreement.

Arbitration Awards

In General

5-32 Arbitration awards[35] are enforceable on the basis of the Cypriot Law on International Arbitration[36] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of the United Nations of 1958 (the New York

34 Law 102 (1) of 1996.
35 P L Cacoyannis & Co and Andreas Neocleous & Co, *Cyprus: An Ideal Centre for International Commercial Arbitrations*.
36 Law 101 of 1979.

Convention).[37] As a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Cyprus is bound to enforce awards made in foreign states which are contracting parties to that Convention.[38]

The most important aspect of the Cypriot Law on International Arbitration is the fact that the intervention of the courts is minimised. Only in those instances specifically mentioned by the Law are the courts entitled to intervene. Prior to the delivery of the award:

- The court will appoint an arbitrator/s if one of the parties or the party-appointed arbitrators fail to do so;
- If the tribunal dismisses a challenge against an arbitrator, the court will deal with the challenge;
- The court will decide on the termination of an arbitrator's mandate if he fails to discharge his duties or is guilty of undue delay in doing so; and
- The court may review a ruling of the tribunal that it has jurisdiction to deal with the matter.

5-33 After delivery of the award, the court may set aside an award or refuse recognition or enforcement on the grounds of:

- Incapacity of the parties;
- Invalidity of the arbitration agreement;
- Lack of proper notice or denial of a party's right to present his case;
- Lack of jurisdiction of the tribunal;
- Defective composition of the tribunal;
- The subject matter of the dispute not being capable of settlement by arbitration under the law of Cyprus; and
- The award is contrary to the public order of Cyprus.

5-34 It was decided by the Supreme Court[39] that an arbitration award obtained in England and made a judgment in the High Court of Justice in England does not come within the definition of a 'judgment' in section 2 of the Foreign Judgments

37 Law 84 of 1979.

38 The signatories are the following states: Algeria, Antigua and Barbuda, Argentina, Australia, Austria, Bahrain, Belgium, Benin, Botswana, Bulgaria, Burkina Faso, Byelorussia, Cameroon, Canada, Chile, China, Columbia, Costa Rica, Carba, Cyprus, Czech Republic, Democratic Kampuchea, Denmark, Djibona, Dominica, Ecuador, Egypt, Finland, France, Germany, Ghana, Greece, Guatemala, Haiti, Holy See, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kenya, Kuwait, Lesotho, Luxembourg, Madagascar, Mexico, Monaco, Morocco, The Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Peru, The Philippines, Poland, Republic of Korea, Romania, Russia, San Marino, Singapore, Slovak Republic, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukrainian SSR, United Kingdom, United Republic of Tanzania, United States, Uruguay, and Yugoslavia.

39 *Madina Maritime SA v S Ch Jeropoulos & Co Ltd* (1984) 1 CLR 841.

(Reciprocal Enforcement) Law and cannot be registered in Cyprus.[40] Such arbitration awards will be registered and enforced in Cyprus according to the relevant law.

Procedure for Enforcement

5-35 The enforcement of a foreign arbitration award can be effected by the filing of an application by summons by the judgment creditor, requesting the recognition and the enforcement of the award.

The application must be served on the debtor and must be supported by an affidavit with the following documents stated in article IV of the New York Convention attached:

- A duly authenticated original award or a duly certified copy thereof; and
- The original agreement referred to in article II of the Convention or a duly certified copy thereof.

5-36 If the award or agreement is not drafted in the Greek language (which is one of the official languages of Cyprus), the applicant judgment creditor must produce, together with the documents stated above, a translation of it into Greek which must be certified by an official or sworn translator or by a diplomatic or consular agent.

The summons must be served on the judgment debtor who has the right to appear at the first hearing of the application and to oppose the registration of the award. If the judgment debtor opposes the registration of the award, the court will direct him to file his written opposition stating the grounds for non-registration of the award.

The grounds for attacking the validity of an award are stated in article V of the Convention and are the following:

- The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted,

40 Foreign Judgments (Reciprocal Enforcement) Law, 1935,Cap 10, s 2, provides that 'judgment means a judgment or order given or made by a court in civil proceedings or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to any injured party'.

that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made.

5-37 There also are procedural grounds concerning the requirements of the Convention for the presentation of the original or authenticated documents (together with a certified translation), as stated in article IV of the Convention.

There also is the possibility for the judgment creditor to apply for an injunction freezing the assets of the judgment debtor which are within the jurisdiction of the Cypriot courts pending the final determination of the application for registration of the award. The injunction can be applied for by an *ex parte* application at the date of the filing of the application for registration of the award.

Execution

5-38 All the methods of execution of Cypriot court judgments are available. The methods stated above apply, *mutatis mutandis*, to the execution of foreign arbitration awards, provided that the courts accept their recognition.

CHAPTER 6

Law on Foreign Investment

Andreas Neocleous

Introduction

In General

6-1 Cyprus has a declared policy of encouraging foreign investment which is reflected in various laws, regulations, international conventions, and treaties to be examined in this chapter.

Foreign investment includes investment by non-residents in any of the following three forms:

- Direct investment within Cyprus, ie, participation in an industrial or tourist project;
- Shipping activities through a locally registered company wholly or partly owned by non-residents; and
- Business activities carried on entirely outside Cyprus through a locally registered international business company, branch, or partnership wholly owned by non-residents.[1]

6-2 A number of substantial concessions and incentives coupled with Cyprus' strategic geographic location, excellent commercial infrastructure, political stability, and European-level standard of living are among the factors which have contributed towards the development of Cyprus as an important international business centre. In fact, Cyprus, mostly due to its strategic location, has played an important role as an international or regional business centre throughout history.[2]

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1 Previously known as 'offshore company', 'offshore branch', or 'offshore partnership', but now 'international business company', 'international business branch', or 'international business partnership'. Circular of the Central Bank of Cyprus, EC/D/1/01, 7 January 1999.

2 In his book, *British Cyprus*, W Hepworth Dixon aptly summarises the situation as follows: 'A race advancing on the East must start with Cyprus. Alexander, Richard, and St Louis took that line. A race advancing on the West must start with Cyprus. Sargon, Ptolemy, Cyrus, and Haroun-al-Rashid took this line. When Egypt and Syria were of first-rate value to the West, Cyprus was of first-rate value to the West. Genoa and Venice, struggling for the trade of India, fought for Cyprus and enjoyed supremacy in the land by turns. After a new route by sea was found to India, Egypt, and Syria declined in value to the Western nations. Cyprus was then forgotten, but the opening of the Suez Canal has restored Cyprus to her ancient pride of place'.

The encouragement of foreign participation in Cyprus' economy is a policy which is strongly endorsed by all official bodies and authorities, as well as by the Cypriot people themselves. This open and liberal approach has successfully generated a growing awareness among foreign corporations and individuals of the unique advantages of using Cyprus as a business base.[3]

The fact that Cyprus is a booming international business centre also is due in no small part to Cyprus' system of administration and its European tradition. Since the introduction of the first incentives in 1975, the Central Bank has issued more than 40,000 permits for the registration of International Business Companies (IBCs) in Cyprus.[4] To a large extent, the administration system and European tradition were inherited from the British, who controlled Cyprus before it became an independent, sovereign republic in 1960.

The Turkish invasion of 1974, which left approximately 37 per cent of the northern part of Cyprus under Turkish occupation, did little to interrupt the unparalleled period of growth, prosperity, and commercial expansion which followed independence. However, due to the authorities' expansionary economic policy and the initiative and enterprising spirit of the private sector, social and political security continue to form the cornerstone of Cypriot society. Indeed, although the Cyprus problem has not yet been resolved, the rule of law and political stability in Cyprus are guaranteed by the efficient functioning of democratic institutions and by dynamic economic development.

Today, the authorities are demonstrating more clearly than ever before that they are seriously committed to refining and expanding the legislation and regulations in terms of which foreign involvement in Cyprus' economy is secured. Therefore, an extremely favourable environment for all forms of inward business activity and international foreign investment has been created to ensure that they enjoy an infrastructure which has the maximum potential for success and growth.[5]

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3 Saunders and Andreas Neocleous, *Cyprus International Tax Planning* (2nd ed, 1990); Demetriades, *Cyprus International Tax Planning* (1980); Tornaritis, 'Notes on the Law of Cyprus relating to Offshore Operations, Shipping Operations, and Shipping Companies, Foreign Investments in Cyprus and Transit Trade', *Cyprus Law Review* (July–September 1984); Saunders, 'Cyprus', *International Tax Systems and Planning Techniques*; Chrysostomides, *The Taxation of Companies in Europe* (Cyprus Cap) (1979); The Economist Intelligence Unit, *Cyprus-Malta Country Report*, (1st quarter, 1999); Central Bank of Cyprus, *Cyprus — A Guide for International Business Companies* (2nd ed, 1999); Investments Committee of the Institute of Certified Public Accountants of Cyprus, *Offshore Business in Cyprus*, *Offshore*, *Shipping*, *and Foreign* (September 1993); *Business Guide to Cyprus* (3rd ed); Chrysanthou and Christoforou, *Cyprus Offshore Opportunities and International Tax Planning* (April 1999); Andreas Neocleous & Co, *International Business and Investment Guide* (Cyprus chapter) (1998).

4 Central Bank of Cyprus, *Cyprus — A Guide for International Business Companies* (1999).

5 See recent Circulars of the Central Bank of Cyprus and the speech of the Minister of Finance at the annual general meeting of the Cyprus International Business Association (CIBA) on 12 April 2000.

Cyprus compares extremely favourably with similar jurisdictions because of the numerous advantages which it offers. Many of these advantages are inherent in Cyprus' geographical position, while others have been tailored to suit the demands of foreign investors and international entities. The result is a most attractive package of incentives which covers every facet of business life.

Prominent among these incentives are straightforward registration procedures, constructive administrative measures, an impressive range of double-taxation treaties, and favourable tax and other benefits. However, the authorities have successfully maintained a balance so that the creation of a favourable commercial environment has not disturbed the impeccable reputation enjoyed by all international businesses in Cyprus. Clearly, the fact that Cyprus is a low-tax jurisdiction and not a tax haven is material and ensures that these businesses do not attract the suspicion of foreign revenue or tax authorities.[6]

The tremendous growth in the number of foreigners participating in the Cypriot economy is ample testimony to the enormous appeal which Cyprus has to international investors. Certainly, there are few locations which are able to offer the same extensive and wide-ranging incentives that are offered in Cyprus with warmth, hospitality, and pride.

Stability

6-3 Although located in the often volatile Eastern Mediterranean area, Cyprus is a centre of democracy and stability where businessmen from all nations are able to conduct their affairs in a harmonious and friendly environment.

The rule of law is a well-entrenched principle which is endorsed by free elections and a European-style parliamentary system. In addition, the authorities' desire to assist foreign businesses is strengthened by the friendly and enterprising spirit of the Cypriot people themselves.

Geographical Location

6-4 Cyprus is privileged to enjoy what is possibly one of the most strategic geographical locations in the world. Cyprus is situated at the crossroads of Europe, Asia, and Africa and forms a gateway to the oil-rich Arab states and the rest of the Middle East. It is, therefore, a convenient springboard for business activities in any of the trade centres located in these areas.

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6 *International Offshore & Financial Centres Handbook 1999-2000* (1999); *International Offshore & Financial Centres Handbook* (1994); Grundy, *Offshore Business Centres: A World Survey* (7th ed, 1997); Ginsberg, *International Tax Planning — Offshore Finance Centres and the European Community* (1994).

In addition, Cyprus shares the same time zone as other major centres in the area and is within easy travelling distance of the rest of Europe and the Middle East. The international airports at Larnaca and Paphos offer daily flights to all major destinations in these areas.

Taxation

6-5 All Cyprus international business entities may take advantage of the many tax benefits which the authorities have designed specifically to provide maximum profit potential. Chief among these benefits are the low tax rate of 4.25 per cent applicable to the net profits earned by IBCs, and the total tax exemption for international partnerships. Foreign personnel enjoy equally favourable tax rates. In addition, tax incentives have been introduced to attract foreign investment in respect of certain local companies and projects.

The Council of Ministers of Cyprus has made a commitment to the Organisation for Economic Co-operation and Development (OECD) to eliminate harmful tax practices by 2005.

This decision, which is in line with EU accession negotiations and the efforts of Cyprus to harmonise its legislation with the *acquis communautaire* and the Code of Conduct, might have a serious impact on the number of IBCs which are registered in Cyprus. On the other hand, the gradual abolition of the various tax advantages, if accompanied by a re-design of the whole international business sector and by the introduction of new ideas and methods, might lead to further prosperity and expansion.

In other words, the clearing of the name of Cyprus as a tax haven or as an area of unfair competition for other EU member states and the improvement of the standard of its services will enable it to attract quality business, international or regional, which will be more beneficial to Cyprus and its people.

Double-Taxation Treaties

6-6 Cyprus has concluded double-taxation agreements with more than 40 countries which provide important tax advantages. Cyprus' double-taxation treaties with the Central and Eastern European countries, China, and India contain no anti-avoidance provisions and IBCs may, therefore, be used beneficially as holding, licensing, and finance investment vehicles in those countries. Of the treaties now in force, only Belgium, Canada, Denmark, France, Germany, Sweden, the United Kingdom, and the United States contain 'limitation of benefits' articles.[7]

7 'Limitation of benefits' articles exclude certain categories of persons or entities or sources of income which enjoy a preferential tax treatment, such as the IBCs, from having the benefits of the treaty.

With the exception of Canada and the United States, which exclude IBCs from all the provisions of the relevant treaties, in all other treaties, Cyprus international business companies, albeit denied the reduced rates of withholding taxes, may still claim the benefit of other treaty provisions, such as the permanent establishment clause or tax sparing credits. The 'limitation of benefits' article contained in the above treaties only affects the flow of income from those countries to Cyprus and not income flows from Cyprus to other countries.

Respectability

6-7 While the policy of the authorities has been in favour of assisting and promoting all business sectors in Cyprus, this has not operated to affect adversely their respectability or good standing in the eyes of the international business community. The framework of control placed on most business activities serves to boost the reputation of all Cyprus-based entities while also allowing them to operate in an environment which is as free from onerous bureaucratic restrictions as possible.

In many sectors, no specific legislation has been passed to give international business entities special advantages or benefits. For this reason, IBCs, international banking units (IBUs), international captive insurance companies (ICIs), and international trusts are subject to the same laws and regulations as those pertaining to their local counterparts and so there can be no suggestion that they operate in accordance with inferior standards or in an unprofessional manner.[8]

Registration Procedures

6-8 The procedure for the incorporation of a Cypriot legal entity can be completed within a period of two weeks at the most and enables the legal entity to start business forthwith. Applications for registration of captive insurance companies, international banking units, and shipping companies, as well as all other forms of international business entities, are favourably considered.

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8 The Cypriot authorities are quite protective over Cyprus' fine reputation as an international business centre and would take any measure to prevent unfair practices which may harm the country's reputation and accountability. Therefore, in relation to foreign direct or indirect (offshore) investment, it is essential that the potential shareholders of the entity concerned be known to the Central Bank of Cyprus and that they submit thereto satisfactory bank references from their home countries. In this way, the Central Bank is capable of identifying undesirable persons who are usually either credit unworthy or of dubious character and conduct. Furthermore, and to prevent the use of the Cypriot market as a vehicle for money laundering, it is required that any foreign investment carried out in Cyprus be financed through normal banking channels. Money emanating from an unidentified source would not be acceptable in financing projects in Cyprus.

In certain instances, these companies also may be exempt from many of the regulations applying to their local onshore counterparts, although not to an extent which will endanger their respectability.

Commercial Infrastructure

6-9 The commercial infrastructure of Cyprus is well developed. It offers a civilized and respectable environment in which pleasant working and accommodation conditions are combined with low operational costs and living expenses.

Not only are there many well-qualified lawyers who are experienced in company law and tax planning, but also a number of international accounting firms are represented in Cyprus, as well as many engineering, insurance, and trust and ship management companies. Furthermore, there is an ample supply of university graduates who are available to work in all sectors of the economy.

The English legal system, practice, and procedures which Cyprus acquired during the period of British rule are firmly embodied in the fabric of almost every commercial sector. As these procedures are widely used in most English-speaking countries and certainly in the majority of former British colonies, they are usually readily understood by foreigners who have registered Cypriot international companies or are engaged in international tax planning exercises in Cyprus. Although the official languages of Cyprus are Greek and Turkish, English is spoken by the majority of the population. It also is a language which is taught extensively in schools, and it is widely used in commerce, industry, and administration.

Telecommunications in Cyprus are of a very high standard, and Cyprus prides itself as one of the most developed countries in the world as regards its telecommunications infrastructure. The incumbent operator's telephone network is 100 per cent digitalised. In addition, as part of its commitment to developing Cyprus as a prime location for e-commerce and Internet-based activities, the Cyprus Telecommunications Authority (CYTA) is investing heavily in the further upgrading of Cyprus' telecommunications capabilities.

A public Asynchronous Transfer Mode Network for broadband telecommunications offering high-speed data, picture, and voice transmission will be available from 2000. CYTA also continues with the installation of the Synchronous Digital Hierarchy Network and is set to offer Asynchronous Digital Subscriber Lines for high-speed Internet access in the near future. These technological developments are conducive to positioning Cyprus as a leading high-tech centre for low-cost (online) business.

Cyprus is served by two international airports situated near Larnaca and Paphos. They handle approximately 360 scheduled flights operated each week by 33 international airlines, as well as flights operated by 28 charter airlines. Cyprus is rapidly becoming a major international transit station for commercial air transportation with excellent conditions in the entire region. Seaborne traffic is served by the two multi-purpose ports of Limassol and Larnaca which are being

used increasingly as regional warehouse, distribution, and container transhipment centres. Approximately 100 shipping lines include Cyprus in their regular schedules to and from six continents. More than 5,500 ships, totalling 15 million net registered tons, call at Cypriot ports every year.

International Relations

6-10 The fostering and promotion of good international relations with neighbouring states and countries further abroad is an express policy of Cyprus, and every effort is made to ensure that good relations are maintained with all international organisations. Cyprus maintains extensive diplomatic relations and is a member of the United Nations, the Council of Europe, the Commonwealth, the World Bank, the International Monetary Fund, and the Non-Aligned Group. It also is a signatory to various international conventions and bilateral cooperation agreements.[9]

An association agreement was signed in 1972 between Cyprus and the European Union (EU), which provided for the abolition of all barriers to trade and the establishment of a customs union in two stages; the first was completed in 1997, and the second is due to be completed by 2003, by which time the free and unrestricted movement of industrial and agricultural products between the member states of the EU and Cyprus, the abolition of all quantitative restrictions, and the Common Customs Tariff will be fully effective. In July 1990, Cyprus applied for full membership of the EU; the accession process began in March 1998 and Cyprus hopes to complete it by 2003.

Exchange Control

6-11 Cypriot international business entities are all exempt from the prevailing exchange control regulations due to their non-resident classification.

Accordingly, Cyprus is an ideal location for the maintenance, transfer, and conversion of funds which are facilitated by the excellent telecommunication and efficient international banking services.

Confidentiality

6-12 Confidentiality in all business transactions is an element which the Cypriot authorities have perfected in respect of the activities of nearly all commercial sectors. Laws and procedures governing financial and business conduct have been specifically drafted to ensure that this element is carefully protected and maintained. Thus, the registration of Cypriot international business entities can be effected through the appointment of nominees to hold shares on behalf of the beneficial owners, whose identity remains secret.

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9 See Index to the Treaties and Their Status (Republic of Cyprus, 1986); Second Revised Supplement to the Index to the Treaties and Their Status (Republic of Cyprus, 1992).

The identity of the beneficial owners need only be disclosed to the Central Bank of Cyprus, which holds this information in the strictest confidence. Privacy of the constitution and membership of trusts as well as their transactions and activities is secured through an absence of registration or reporting requirements, and even the identity of a settlor may be protected if required.[10] In Cyprus, the safeguarding of the confidentiality of a bank's customers and their transactions is a cornerstone of banking policy.

Access to International Markets

6-13 Cyprus-based entities have been increasingly expanding into international markets. There are already numerous multinational companies operating in Cyprus, and Cypriot businesses maintain good links with markets abroad.[11]

Naturally, the elements of respectability and confidentiality assist in foreign expansion, and this is supported by Cyprus' international relations.

Low Costs

6-14 The incorporation costs of all Cypriot entities are quite reasonable when compared with those of other jurisdictions. In addition, all other administrative and official fees and levies are moderate. While office and living accommodation is both plentiful and of a high standard, it is not expensive.[12] The overheads of all businesses can, therefore, usually be kept at a conservatively low figure.

Protection of Foreign Investment

In General

6-15 Foreign investors should feel safe as they are offered adequate legal protection for their investment in Cyprus. Their safety comprises the protection

10 Prevention and suppression of Money Laundering Activities Law, Law 61 (I) of 1996, as amended by Law 25 (I) of 1997 and Law 41 (I) of 1998.

11 The Council of Ministers, in exercising the powers vested in it by virtue of section 9(3) of the Aliens and Immigration Law (Cap 105, as amended), issued an order allowing citizens of the following countries to enter Cyprus for a maximum period of three months as visitors without a visa: Andorra, Australia, Austria, Bahrain, Belgium, Bolivia, Brazil, Brunei, Cameroon, Canada, Czech Republic, Columbia, Costa Rica, Croatia, Denmark, Ecuador, El Salvador, Estonia, Finland, France, Germany, Greece, Guana Islands, Guatemala, Guyana, Holland, Hungary, Iceland, Ireland, Italy, Jamaica, Kenya, Kuwait, Latvia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Maldives, Malta, Mauritius, Namibia, New Guinea, New Zealand, Norway, Papua, Poland, Portugal, Qatar, Romania, Russia, Seychelles, Sierra Leone, Singapore, Slovakia, Spain, Sri Lanka, Switzerland, Tanzania, Uganda, United Kingdom, United Arab Emirates, United States, Vatican, Yugoslavia, Zambia, and Zimbabwe. *Government Gazette*, Number 3339, 23 July 1999, PI 168/99.

12 According to the Prices and Earnings around the World Survey of the Union Bank of Switzerland (UBS), Cyprus is among the least expensive jurisdictions.

of International Investment Law,[13] the protection afforded by the Constitution of Cyprus, and generally Cypriot domestic law and the protection of the multilateral and bilateral treaties of Cyprus.[14]

International Investment Law

6-16 International investment law[15] is an old branch of international law, and its objective is to protect the life and property of the international entrepreneurs who carry on business activities outside the territorial borders of their countries. International investment law has developed during the 20th century into a system which tends to protect aliens wherever they come from and irrespective of the existence of any treaty protection or other relationship between their home country and the host country.

Most importantly, international investment law aims to create a regulatory framework for the integration and globalisation of the world economy. Cyprus, being an international business centre, has adopted and embodied[16] all generally accepted concepts and principles of international investment law.

The Constitution of Cyprus

In General

6-17 The Constitution of Cyprus contains provisions for the protection of the human rights of all persons[17] without distinguishing citizens from non-citizens, or residents from non-residents.

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13 'Although aliens on entering the territory of another state fall at once within the territorial sovereignty of the state they enter, nevertheless, they continue to be under the protection of their home state. By a universally recognised rule of customary international law, every state has a right of protection of his citizens to which there is a corresponding duty of every other state to treat foreigners on its territory in accordance with certain rules and principles. As a consequence of such principles an alien, who possesses a nationality, cannot be outlawed in foreign countries but must be afforded protection for his person and property. The home state of such alien has, by its right of protection, claim on the state which allows him to enter its territory that such protection should be afforded to him and that the alien should be afforded equality before the law with the nationals of the receiving state as far as safety of person and property is concerned.' Tornaritis, 'The Legal Position of Aliens in Cyprus', *Cyprus Law Tribune*, (Issue 3, 1970).

14 Andreas Neocleous, 'Cyprus', *International Protection of Foreign Investment*.

15 Waelde, 'International Law of Foreign Investments: Towards Regulation By Multilateral Treaties', *International Business Lawyer* (Issue 1, 1999).

16 By being a signatory to almost all international treaties and conventions. Index to the Treaties and Their Status (Republic of Cyprus 1986) and Second Revised Supplement to Index to the Treaties and Their Status (Republic of Cyprus, 1997).

17 Part II of the Constitution: Fundamental Rights and Liberties, articles 6–35.

Of particular importance are the provisions referring to the treatment, the right to petition and the right to property which will be examined below.[18]

Standard of Treatment

6-18 In General. There is no discrimination under the law between foreign and national investors.[19]

Both may expect fair and equitable treatment with regard to their investments,[20] equivalent to those offered to the most favoured nation. Foreign investors are offered continuous protection and security in Cyprus.

As a natural result of the aforementioned, unjustified discriminatory measures which could hinder the management of any activities related to investments located in Cyprus are strictly forbidden.[21]

6-19 Regulations. As already established, all persons are equal under the law in Cyprus. The protection and security afforded by Cyprus, as well as all rights and freedoms enjoyed by Cypriots, also are afforded to and enjoyed by foreigners[22] as long as they are in Cyprus or are under the jurisdiction of Cyprus.

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18 'By a universally recognised rule of customary international law, every state has a right of protection of its citizens to which there is a corresponding duty on every other state to treat foreigners on its territory in accordance with certain rules and principles. As a consequence of such principles, an alien who possesses a nationality cannot be outlawed in foreign countries but must be afforded protection for his person and property. The home state of such an alien has, by its right of protection, a claim on the state which allows him to enter its territory that such protection should be afforded to him and that the alien should be afforded equality before the law with the nationals of the receiving state as far as safety of person and property is concerned.' Tornaritis, 'The Legal Position of Aliens in Cyprus', *Cyprus Law Tribune*, (Issue 3-4, 1970).

19 Under general international law, fair and reasonable discrimination between aliens and nationals is almost inevitable and is not prohibited. Discrimination of some kind may be justified by special circumstances, but unfair fiscal discrimination against aliens is prohibited. In conventional international law, there are multilateral and bilateral agreements which include non-discrimination and in various forms most-favoured-nation clauses. Van Raad, *Non-Discrimination in International Tax Law* (1986).

20 Article 28 of the Constitution of Cyprus provides: '1. All persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby'. Tornaritis, 'The Right of Equality of Treatment and Absence of Discrimination', *Cyprus Law Tribune* (Issue 3-4, 1997).

21 Article 28 of the Constitution reads: '2. Every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his community, race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in this Constitution'. Nedjati, *Human Rights and Fundamental Freedoms* (1972); Evangelides, *The Republic of Cyprus and its Constitution with Special Regard to the Constitutional Rights* (1996), at p 293.

22 Article 2 of Cap 105, as amended by Law 2 of 1972 — foreigners or 'aliens' are persons who are not native Cypriots. *Spartacos Estate v Republic* (1978) 3 CLR 365.

Likewise, all investors are treated the same in Cyprus, irrespective of their nationalities.[23] However, investors from EU member states are entitled to more advantages in respect of their imported goods.

In Cyprus, there are duties imposed on imported goods but, under the Customs Union Agreement between Cyprus and the EU which came into force in 1988, imports from EU member states are entitled to reduced import duties. The aim, under the Agreement, is the abolition of duties by the year 2003.

6-20 Transfer of Funds. Net revenues realised from investments carried out in Cyprus by foreigners may be transferred abroad, after obtaining permission from the Central Bank, which is usually readily given, in any convertible currency.[24]

The above also applies to transfers of funds for the payment of debts and for the use of patents, know-how, brand names, or for the discharge of any other contractual obligations.

Expatriate employees who work and live in Cyprus also are permitted to transfer their salaries and wages abroad, after discharge of their tax liabilities.

Losses accrued on investments situated in Cyprus due to non-commercial reasons may be compensated if the said investments are insured according to the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention), to which Cyprus is a signatory.[25] In such a situation, the Agency is responsible for the payment of compensation in accordance with the contract of guarantee between the Agency and the investor concerned and subject to the policies adopted by the Agency's Board of Directors.

6-21 Re-Investment of Funds. A foreign investor wishing to re-invest income generated from his investment in Cyprus requires fresh permission from the Central Bank of Cyprus in respect of his new investment.

The fact that the investor has already had an investment in Cyprus does not entitle him to an automatic authorisation for his new investment. However, this fact would be taken into consideration.

6-22 Unfair Business Practices. The Central Bank of Cyprus and the Cypriot authorities generally are very conscious of the reputation of Cyprus as an international business centre and they take any measure to prevent unfair business practices which might harm that reputation.

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23 Constitution, art 32.

24 The term 'net revenues' includes capital and capital appreciation, profits, interest, and dividends.

25 The Convention was signed on 11 October 1985 and published in the *Official Gazette* 975.vii.i.

Consequently, foreigner investors are expected to produce satisfactory bank references from home countries, as well as copies of passports and CVs. Moreover, any foreign investment should emanate from identified sources and be made through normal banking channels.

6-23 Double-Taxation Treaties. In addition, Cyprus has signed double-taxation treaties with more than 40 countries. One of the main objectives is the exchange of information and the preservation of the respectability of Cyprus as an international business centre, not as a centre for tax avoidance or money laundering.

Right to Petition

6-24 Any violation by an administrative authority of a person's fundamental right entitles such person to request that authority to remedy the situation. The authority then has a period of 30 days during which it must give a prompt answer to the request.[26]

Furthermore, such person has free access to any competent court in Cyprus, as well as to the European Court and Commission on Human Rights.[27]

Right to Property

6-25 The right to property,[28] ie, the right to acquire, own, possess, enjoy, or dispose of any movable or immovable property, is guaranteed under article 23 of the Constitution, which corresponds to article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[29]

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26 The right to petition the authorities is guaranteed by article 29 of the Constitution, which reads as follows: '1. Every person has the right individually or jointly with others to address written requests or complaints to any competent public authority and to have them attended to and decided expeditiously; an immediate notice of any such decision taken, duly reasoned, shall be given to the person making the request or complaint and in any event within a period not exceeding thirty days. 2. Where any interested person is aggrieved by any such decision or where no such decision is notified to such person within the period specified in paragraph 1 of this article, such person may have recourse to a competent court in the matter of such request or complaint'.

27 Constitution, art 30; European Convention on Human Rights, art 25, whose application is recognised by Cyprus.

28 Nedjati, *Human Rights and Fundamental Freedoms* (1972); Tornaritis, 'Notes on the Law of Cyprus Relating to Offshore Operations, Shipping Operations, and Shipping Companies, Foreign Investments in Cyprus and Transit Trade', *Cyprus Law Review* (July–September 1984). Evangelides, *The Republic of Cyprus and Its Constitution with Special Regard to the Constitutional Rights* (1996).

29 Law 39 of 1962.

Article 23 of the Constitution provides as follows:

> 1. Every person, alone or jointly with others, has the right to acquire, own, possess, enjoy, or dispose of any movable or immovable property and has the right to respect for such right.
>
> The right of Cyprus to underground water, minerals, and antiquities is reserved.
>
> 2. No deprivation or restriction or limitations of any such right shall be made except as provided in this article.
>
> 3. Restrictions or limitations which are absolutely necessary in the interest of safety or the public health or the public morals or the town and country planning or the development and utilization of any property to the promotion of the public benefit or for the protection of the rights of others may be imposed by law on the exercise of such right.
>
> Just compensation shall be promptly paid for any such restrictions or limitations which materially decrease the economic value of such property; such compensation to be determined in case of disagreement by a civil court.

6-26 The right of property is not defined in the Constitution, but it was decided by the Supreme Constitutional Court that it is not a right *in abstracto*, but a right defined and regulated by the civil law.[30]

Therefore, foreigners who own property in Cyprus can equally enjoy all rights attached to property which are available to the citizens of Cyprus and can rest assured that their property rights are absolutely protected.

Any movable or immovable property or any rights thereon may be compulsorily acquired by the Republic or by the Communal Chamber as may be provided by law and only subject to certain provisions.[31]

It is clear from those provisions that the acquiring authority cannot be any private person, but only the state or a public authority to which the right of acquisition was expressly granted by law, and the property acquired shall be utilised for the

30 *Evlogimenos v The Republic*, 2 RSCCP 142.

31 Article 23(4) reads as follows: 'Any movable or immovable property or any right over or interest in any such property may be compulsorily acquired by the Republic or by a municipal corporation or by a Communal Chamber for the educational, religious, charitable, or sporting institutions, bodies or establishments within its competence and only from the persons belonging to its respective Community or by a public corporation or a public utility body on which such right has been conferred by law, and only (a) for a purpose which is to the public benefit and shall be specially provided by a general law for compulsory acquisition which shall be enacted within a year from the date of the coming into operation of this Constitution; and (b) when such purpose is established by a decision of the acquiring authority and made under the provisions of such law stating clearly the reasons for such acquisition; and (c) on the payment in cash and in advance of a just and equitable compensation to be determined in case of disagreement by a civil court . . .'.

purpose for which it has been acquired. If, within three years from the acquisition, such purpose is not attained, the property shall be offered by the acquiring authority to the former owner at the same price at which it was acquired.[32]

The details and the procedures to be followed are laid down in the Compulsory Acquisition Laws.[33]

The Constitution of Cyprus does not contain any provision authorising nationalisation like the constitutions of some other countries, although paragraph 3 of article 25 does not preclude it.[34]

It follows that property cannot be compulsory acquired from one person to be given to another person.[35]

The Prohibition of Confiscatory Taxation

6-27 Although there is no criteria to establish what constitutes confiscatory taxation, it is taken to mean that taxation must not operate as disguised confiscation or expropriation.

As was mentioned above, confiscation and expropriation is not permitted in Cyprus. Moreover, Cyprus is a signatory to MIGA, which provides for insurance cover against the risk of confiscatory taxation.

The Doctrine of Abuse of Rights

6-28 The doctrine of abuse of rights has not yet been adopted by international investment law, although it exists in various national legal systems. A classic

32 Article 23(5) reads as follows: 'Any immovable property or any right over or interest in any such property compulsorily acquired shall only be used for the purpose for which it has been acquired. If within three years of the acquisition such purpose has not been attained, the acquiring authority shall, immediately after the expiration of the said period of three years, offer the property at the price it has been acquired to the person from whom it has been acquired. Such person shall be entitled within three months of the receipt of such offer to signify his acceptance or non-acceptance of the offer, and if he signifies acceptance, such property shall be returned to him immediately after his returning such price within a further period of three months from such acceptance'.

33 Law 15 of 1962, as amended.

34 Subject to the exception of compulsory acquisition, expropriation has never been the policy of the Cypriot government and is not expected to be contemplated in the future. It is prohibited by the Constitution, which is based on respect for human rights, including the right to property. Confiscation of property as a punishment is absolutely prohibited by the Constitution. Tornaritis, *Expectation and Nationalisation of Private Property under the Laws of Cyprus* (1970) at p 20; Nedjati, *Human Rights and Fundamental Freedoms* (1972).

35 *A contrario* from paragraph 6 of article 23 of the Constitution, which reads as follows: 'In the event of agricultural reform, lands shall be distributed only to persons belonging to the same Community as the owner from which such land has been compulsorily acquired'.

example of an abuse of rights is where the state uses its exchange control regulations to secure a tax claim from an alien where the Revenue authorities of that state have failed to secure that claim through their normal channels.[36]

The doctrine of abuse of rights is strongly embodied in the legal system of Cyprus, and article 146 of the Constitution of Cyprus reads as follows:

> 1. The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

6-29 A decision, act, or omission which is made in excess or abuse of powers is subject to revision by the Supreme Court of Cyprus. Abuse of power exists where the power was exercised for an improper purpose and does not necessarily imply bad faith on the part of the administration.[37]

There is a plethora of cases where decisions, acts, or omissions of the administration were declared null and void for the reason that they were made in excess or abuse of powers.[38]

International Conventions Prohibiting Discrimination

6-30 In addition to the constitutional protection, certain international conventions which have been ratified by Cyprus also safeguard the human rights of the aliens in Cyprus.[39] The most important conventions[40] are:

- The European Convention on Human Rights;[41]
- The Convention on the Elimination of all Forms of Racial Discrimination;[42]
- The Convention on Discrimination (Employment and Professions);[43] and
- The Convention against Discrimination in Education.[44]

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36 Mann, *The Legal Aspects of Money* (1992), at p 472.

37 Nedjati, *Cyprus Administrative Law* (1970).

38 *The Republic v L Georghiades* (1972) 3 CLR 594; *Harithea Nicolaide v The Republic*, Petition Number 701/89, Judgment of 19 May 1990.

39 International conventions which have been ratified by Cyprus are, under article 169(3) of the Constitution, superior to any domestic law.

40 For a full list of the conventions, see Index to the Treaties and Their Status (Cyprus, 1986); Second Revised Supplement to the Index to the Treaties and Their Status (Cyprus, 1997).

41 Ratified by Law 39 of 1962. For more details on the ratification of all protocols of the European Convention on Human Rights, see Evangelides, *The Republic of Cyprus and Its Constitution with Special Regard to the Constitutional Rights* (1996).

42 Ratified by Law 12 of 1967.

43 Ratified by Law 3 of 1968.

44 Ratified by Law 18 of 1970.

Multilateral Treaties

In General

6-31 Cyprus is a signatory to two multilateral treaties relating to foreign investment, ie, the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.[45]

The Convention Establishing the Multilateral Investment Guarantee Agency

6-32 In General. The Multilateral Investment Guarantee Agency (MIGA or 'the Agency') is a member of the World Bank Group. It was established in 1988 for the purpose of enhancing capital and foreign investment in developing member countries. The Agency provides guarantees for investments against possible non-commercial risks.

It, therefore, plays the role of mediator between developing member countries who need to import foreign investments and potential investors who need assurance that their investment will be profitable and not spoilt for non-commercial reasons.

6-33 Eligible Investor. An eligible investor under the MIGA Convention may be either a physical person or a legal entity who is a national of a member country other than the country in whose territory the investment is situated (the 'host country'). For legal entities to be classified as eligible for insurance by the Agency, they must be engaged in commercial businesses. Legal entities are considered to be nationals of a member country if any of the following situations apply:

- The entity has its seat in a member country; or
- The majority of the entity's shares belong to nationals of one or more member countries.

6-34 Where an investor has more than one nationality, of which one is the nationality of a member country, the investor is eligible for insurance. However, this rule does not apply if the investor's nationality is that of the host country.

6-35 Eligible Investment. The term 'eligible investment' includes:

- Certain forms of direct investment as determined by the Board of Directors of the Agency from time to time; and
- Equity interests, including medium-term and long-term loans made or guaranteed by shareholders of companies carrying out investments.

6-36 Other forms of medium-term and long-term investment also may be classified by the Board of Directors as eligible for insurance, provided that such classification

45 Ratified by Law 64 of 1966.

has been voted for by a special majority. A special majority means an affirmative vote of not less than two-thirds of the total voting power, representing not less than 55 per cent of the subscribed shares of the capital stock of the Agency. However, loans other than those above may not be considered eligible investments unless they are connected to investments covered or eligible to be covered by the Agency.

The Agency Convention requires that applications for investments to be guaranteed by the Agency be registered at the Agency before such investments are implemented; otherwise, the investments cannot be covered. Nevertheless, agreements which have already been implemented may still seek coverage when:

- A transfer of foreign exchange is made to modernise, expand, or develop the existing investment; and
- The earnings from the existing investment, which otherwise could be transferred abroad, are re-invested in the investment.

In addition, the Agency also requires assurance that:

- The investment concerned is economically sound and contributes effectively to the development of the host country;
- The investment complies with the laws and regulations of the host country;
- The investment is consistent with the declared development objectives and priorities of the host country; and
- The investment conditions in the host country are satisfactory and that fair and equitable treatment and legal protection for investments are available therein.

6-37 Insurable Risk. The Agency Convention sets out the following as non-commercial risks against which the Agency may guarantee eligible investments carried out by eligible investors. It should be noted, however, that only non-commercial risks may be covered by the Agency and, for this purpose, devaluation or depreciation of currency are not considered to be non-commercial risks.

The insurable risks are not limited to the following, although other types of risk require the approval of the Agency's Board of Directors by a special majority. In any event, however, the Agency will not cover losses accrued due to an action or omission by the host government occurring by agreement with the investor, or as a result of the behaviour of the investor. The Agency also will not cover losses accrued due to an event before the registration of the investment for guarantee.

6-38 *Currency Transfer.* This type of risk includes any restrictions imposed by the host country to prevent the income of the investment from being transferred abroad in a convertible currency acceptable to the eligible investor. This risk also includes undue delays on such transfers.

6-39 *Expropriation and Similar Measures.* This type of risk includes any measures leading to the investor being deprived of the ownership, control, or management of, or benefit from, his investment. The exception to this type of risk

is any non-discriminatory measure commonly taken by governments to regulate the economic activity in their territories.

6-40 *Breach of Contract*. When the host country breaches a contract with an investor, the investor may resort to the usual legal proceedings, such as litigation or arbitration, to recover his losses which have resulted from such breach of contract. If, for some reason, the investor cannot resort to the usual legal proceedings, or a decision on the dispute is not made within a reasonable period of time or if such decision is made within a reasonable period of time but is unenforceable, this risk is covered by the Agency.

6-41 *War and Civil Disturbance*. This type of risk includes any kind of military action or state of national emergency such as war, armed conflict, revolution, or other similar event.

6-42 Subrogation. Once the Agency has paid or agreed to pay compensation to the holder of a guarantee, the Agency is immediately subrogated to the rights of that guarantee holder. Thus, the Agency will be entitled to exercise the investor's rights, including the right to invoke claims in connection with the guaranteed investment.

Further details of the terms and conditions of subrogation are usually found in the contract of guarantee. In any event, the rights transferred from the guarantee holder to the Agency will be recognised by the member countries of the Convention.

6-43 Reinsurance. Investments guaranteed by a regional investment guarantee agency may be reinsured by the Agency, provided that the majority of the share capital of the said agency is held by member countries. Naturally, only guarantees against losses resulting from non-commercial risks may be reinsured by the Agency. Conditions of eligibility with regard to the investor and the investment must be complied with to enable the guaranteed investment to be reinsured by the Agency. Nevertheless, investments which have already been implemented can still be reinsured by the Agency.

The maximum contingent liability to be undertaken by the Agency is usually determined by the Board of Directors from time to time. For investments which have been completed not less than 12 months prior to registration for reinsurance, the maximum amount of contingent liability to be assumed will normally not exceed 10 per cent of the Agency's aggregate amount of contingent liability.

Contracts of reinsurance determine the rights and obligations of the Agency and the reinsured agency, taking into account the rules and regulations issued by the Board of Directors from time to time. When approving a contract for reinsuring an investment which has already been made, the Board of Directors takes into consideration whether:

- The reinsurance will contribute to minimising the risks anticipated in connection with the investment;

- The Agency will receive premiums commensurate with the risk guaranteed; and
- The reinsured entity is committed to promoting new investment in developing member countries.

6-44 Either the Agency or the reinsured entity will have, as far as possible, the right to subrogation and arbitration as if the Agency was the primary insurer. Once the host country has approved reinsurance by the Agency, subrogation becomes effective. Contracts of reinsurance usually contain provisions requiring that:

- All administrative remedies available under the laws of the host country be exhausted by the guarantee holder before any payment is made by the Agency; and
- The previous requirement be contained in the agreement between the guarantee holder and the reinsured entity.

6-45 When the Agency is the primary guarantor of the investment concerned, it may seek reinsurance, in whole or in part, with an appropriate reinsurance entity.

6-46 Co-Insurance. The Agency is willing to co-operate with private insurers in insuring investments against losses accrued as a result of non-commercial risks on conditions similar to those applied by it if it were the sole insurer. Co-insurance arrangements in which the Agency is engaged also may include provisions for reinsurance by the Agency.

6-47 Premiums. Rates of premiums, fees, and other charges applicable to each type of risk are periodically established and reviewed by the Agency.

Settlement of Investment Disputes

6-48 In General. Disputes arising in connection with investments carried out in Cyprus may be settled either through legal proceedings in Cyprus or through reference to arbitration or conciliation. Disputing parties wishing to refer their dispute to arbitration have the following three options:

- Reference to arbitration under the Cypriot Arbitration Law;[46]
- Reference to arbitration under the Cypriot Law on International Commercial Arbitration;[47] and
- Referral to the International Centre for Settlement of Investment Disputes (the 'Centre') for arbitration or conciliation pursuant to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[48]

46 Arbitration Law, Cap 4.
47 Law 101 of 1987.
48 Ratified by Law 64 of 1966.

6-49 Cyprus Arbitration Law. According to the Arbitration Law,[49] a dispute may be submitted to arbitration where both disputing parties have previously or at the time agreed thereon in writing. Such agreement will determine the number and identity of the arbitrators and, in the absence of such agreement, there will be one arbitrator.

If the parties fail to agree on the appointment of the arbitrator(s), the District Court having jurisdiction over the dispute may make the necessary appointment(s) at the request of either party.

The rules of law applicable to the dispute concerned are the Cypriot Civil Procedure Rules, which will apply *mutatis mutandis* to arbitration proceedings under the Arbitration Law.[50]

The arbitral award reached by the arbitrators is binding on both parties and will be enforced in Cyprus in the same manner as if it were a judgment.[51] If such an award includes payment of money by either party, the payable amount will bear interest from the date of the award.[52]

The Arbitration Law is applicable to domestic arbitration and is sometimes described as not suitable for international arbitration. Although domestic arbitration is applicable to disputes arising from foreign investment in Cyprus, the disputing parties may find that their dispute has an international nature and may seek international arbitration. In such cases, the Law on International Commercial Arbitration may be appropriate.[53]

6-50 The Cypriot Law on International Commercial Arbitration. Cyprus, a well-established business and shipping centre, has attempted to establish itself as a popular venue for international arbitration. Consequently, Cyprus has adopted the United Nations Convention on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, with only minor amendments, being the second country to do so after Canada.[54]

The basic advantage that the Cypriot Law on International Commercial Arbitration has over the Cypriot Arbitration Law is that the former does not provide for extensive court intervention during the arbitration proceedings except in limited cases, thus preventing the parties in dispute from resorting to court intervention as a way to delay proceedings.

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49 The Arbitration Law is based on and is similar to the United Kingdom Arbitration Act of 1950.

50 Arbitration Law, Cap 4, s 30.

51 Arbitration Law, Cap 4, s 21.

52 Arbitration Law, Cap 4, s 22.

53 P L Cacoyannis & Co and Andreas Neocleous & Co, *Cyprus, an Ideal Centre for International Commercial Arbitrations* (1991).

54 Law 101 of 1987.

The International Commercial Arbitration Law is only applicable to commercial disputes and disputes of an international nature.[55] This means a dispute arising between two parties who have their places of business in different states. Therefore, the International Commercial Arbitration Law does not automatically apply to foreign investments carried out in Cyprus. However, according to section 2(c), a dispute may be considered international if '... the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country'.

Hence, if the parties in dispute agree to refer their dispute, which arose from a foreign investment situated in Cyprus, to arbitration under the Cypriot International Commercial Arbitration Law, the Law would be applicable.

Unless the parties in dispute agree otherwise, the members of the arbitral tribunal will be three. The parties also may agree on the procedure for appointing the arbitrator(s). If they fail to reach an agreement in this regard, each party will appoint an arbitrator and the appointed arbitrators will appoint the third one. In case the appointment of arbitrators cannot be made according to the described procedure, the competent District Court will make the necessary appointments at the request of either party.[56]

The applicable rules of law are those of the state chosen by the parties. The chosen rules of law will exclude the rules of conflict of laws unless the contrary is expressed by the parties. If the parties fail to designate the applicable legal system in their arbitration agreement, the tribunal will apply the law determined by the conflict of laws rules which it deems applicable. The tribunal also may decide the dispute *ex aequo et bono* or as *amiable compositeur* if it is authorised to do so by the parties.[57]

An arbitral award rendered by a tribunal which is constituted under the Cypriot Law on International Commercial Arbitration is enforceable in Cyprus.

Cyprus also is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[58] according to which Cyprus is bound to enforce awards made in foreign states. Whether such foreign states will enforce awards made in Cyprus depends on whether these states are included in the list of signatories to the New York Convention.

6-51 The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. Cyprus has been a signatory to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

55 Law 101 of 1987, s 3(1), reads: 'This Law shall apply exclusively to international commercial arbitration subject to any bilateral or multilateral agreement in force in Cyprus'.
56 Law 101 of 1987, s 11.
57 Law 101 of 1987, s 28.
58 Law 101 of 1987, ss 35 and 36, incorporating the main provisions of the Convention.

('the Convention') since 1966.[59] For the purposes of the Convention, the term 'state' includes any constituent subdivision or agency of that state. The term 'national' includes natural and legal persons.

6-52 *Purpose of the Convention*. The Convention was established to:

- Promote international co-operation for economic development and private international investment in the contracting states; and
- Provide facilities for international conciliation or arbitration to which contracting states and nationals of other contracting states may submit investment disputes if they so wish.

6-53 *Jurisdiction*. The Centre has jurisdiction over any dispute arising from an investment carried out by a national of a contracting state in the territory of another contracting state, provided that both parties in dispute submit their written consent to the Centre.

6-54 *Conciliation*. Once the disputing parties have agreed to submit their dispute to conciliation at the Centre, a conciliation commission is constituted as soon as possible. The commission will consist of one or any uneven number of conciliators. Where the commission consists of more than one conciliator, the parties have the right to appoint an equal number of conciliators and must agree on one more to act as president of the commission.

If the parties fail to agree on the number of conciliators or their appointments, the number will be three and the chairman of the Centre will make the appointments at the request of either party. The duty of the commission is basically to clarify the issues in dispute between the parties and to recommend, as far as possible, mutually acceptable terms for the settlement of the dispute.

6-55 *Arbitration*. The parties may wish to refer their dispute to arbitration at the Centre. In such a case, an arbitration tribunal will be constituted on the registration of a request to refer the dispute to arbitration.

The arbitration tribunal will consist of one or any uneven number of arbitrators as the parties may agree. Where the tribunal consists of more than one arbitrator, an equal number of arbitrators will be appointed by each party and both parties shall agree on an additional arbitrator to be the president of the tribunal. If the parties fail to agree on the number of arbitrators, or to appoint the arbitrator(s), at the request of either party, the chairman of the Centre will make the necessary appointments of the arbitration tribunal, which will consist of three arbitrators.

The decision of the tribunal will be based on the rules of law agreed by the parties or, in the absence of such agreement, on the rules of law (including the rules of

59 Law 64 of 1966.

conflict of laws) of the contracting state party to the dispute. The appropriate rules of international law also may be applied and, if the parties agree, the tribunal may decide the dispute *ex aequo et bono*.[60]

The tribunal will reach its decision on the dispute in question by a majority vote, and the award made will be binding on both parties. The contracting states must recognise the award of the tribunal as binding. Where a disputing party wishes to enforce in Cyprus an arbitration award made according to the Convention, such party may seek recognition and enforcement thereof by submitting the award to the District Court of Nicosia. The laws of Cyprus concerning the enforcement of foreign judgments will apply to the execution of such an award. In addition, as a signatory to the New York Convention, Cyprus is bound to enforce all foreign arbitral awards including those made by the Centre.

Parties in dispute who do not wish to refer their dispute to arbitration may resort to the competent District Court to resolve the matter according to the internal laws of Cyprus.

Bilateral Treaties

6-56 Cyprus is a signatory to bilateral treaties for the promotion and reciprocal protection of investments with the following countries:

- Armenia;[61]
- Belarus;[62]
- Belgium;[63]
- Bulgaria;[64]
- Egypt;[65]
- Greece;[66]
- Hungary;[67]
- Israel;[68]
- Luxembourg;[69]

60 Law 64 of 1966, s 42.

61 Armenia signed on 18 January 1995. Published in the *Official Gazette* 1995, S VII.

62 Belarus signed 29 May 1998. Published in the *Official Gazette* 1998, S VII.

63 Belgium — The Belgo–Luxemburg Economic Union signed 26 February 1991. Published in the *Official Gazette* 1991, S VII.

64 Bulgaria signed on 12 December 1987. Published in the *Official Gazette* 1988, S VII19.

65 Egypt signed 21 October 1998. Published in the *Official Gazette* 1998, S VII.

66 Greece signed 30 March 1992. Published in the *Official Gazette* 1992, S VII193.

67 Hungary signed 24 May 1998. Published in the *Official Gazette* 1989, S VII231.

68 Israel signed on 13 October 1998. Published in the *Official Gazette* 1998, S VII.

69 Luxembourg — The Belgo–Luxemburg Economic Union signed 26 February 1991. Published in the *Official Gazette* 1991, S VII.

- Poland;[70]
- Romania;[71]
- Russia;[72]
- Seychelles;[73] and
- United States.[74]

6-57 The above countries, in addition to Cyprus, will be referred to as 'the contracting states'.[75]

The bilateral treaties deal with all issues relating to investments carried out by nationals of one contracting state in another contracting state. They guarantee protection for such investments and provide regulations for settling any dispute which may arise therefrom.

However, the treatment provided for investors from other contracting states investing in Cyprus is the same treatment which would be offered by Cyprus to investors from any country. In fact, the Constitution and the applicable laws of Cyprus may, in some cases, provide more protection for foreign investors than the bilateral treaties. Consequently, the reason for Cyprus signing such treaties could be a psychological one, indicating its encouragement of such investments, or to guarantee Cypriot citizens full protection for their investments abroad.

Purpose of the Treaties

6-58 The treaties are, to a large extent, similar. Their purpose can be extracted from their preambles and are to:

- Strengthen the economic cooperation between Cyprus and the other contracting states by creating favourable conditions for investment by nationals of any of the contracting states in the territory of another to their reciprocal benefit on a long-term basis;
- Create and maintain a stable framework to stimulate investment and the maximum effective utilisation of the economic resources of the contracting states;

70 Poland signed 4 June 1992. Published in the *Official Gazette* 1992, S VII.

71 Romania signed on 26 July 1991. Published in the *Official Gazette* 1992, S VII239.

72 Russia signed on 11 April 1997. Published in the *Official Gazette* 1997, S VII.

73 Seychelles signed 28 May 1998. Published in the *Official Gazette* 1998, S VII.

74 The treaty with the United States was not published in the *Official Gazette*, but it can be found in Ministry of Foreign Affairs File Number 956/69, 487 United Nations Treaties Series 283.

75 Cyprus also is negotiating a number of other bilateral treaties for the promotion and reciprocal protection of investments with many other countries, including Albania, Algeria, Austria, Brazil, China, Cuba, Czech Republic, Estonia, Finland, Germany, Georgia, India, Italy, Jordan, Kenya, Latvia, Lebanon, Lithuania, Libya, Malta, Morocco, Moldavia, Portugal, Spain, Slovak Republic, Slovenia, Switzerland, Thailand, and Ukraine.

- Stimulate initiatives in the field of foreign investment between Cyprus and the other contracting states which are expected to increase the prosperity of those states; and
- Contribute to the development of mutually beneficial trade and economic, scientific and technical co-operation between Cyprus and the other contracting states.

Definitions

6-59 Under the bilateral treaties, the term 'investment' is given a broad definition. It is generally defined to comprise every kind of asset connected with direct or indirect participation in companies, associations, and joint ventures, whether the participation is taken in cash, in kind, or in services. More particularly, although not exclusively, the term includes:

- Movable and immovable property, as well as any property rights in respect of every kind of asset, such as mortgages, liens, pledges, and similar rights;
- Rights derived from bonds, shares, corporate rights, and any other kind of shareholding, including minority or indirect shareholdings, in companies constituted in the territory of a contracting state;
- Title to money, goodwill, and other assets and to any performance having an economic value; and
- Rights in the field of intellectual property, industrial property, technical processes, trade names, and know-how.

6-60 This definition may be more or less detailed in one treaty than in another, but the substance is similar in all the treaties. However, the treaties with Egypt and Romania add re-invested returns as a form of investment, and the treaties with Belarus, Belgium, Israel, Luxembourg, and Greece add the following or similar terms: 'Business concessions conferred by law or under contract, including concessions to explore, develop, extract, or exploit natural resources'.

The bilateral treaties agree that a change in the form in which the investment has been made does not affect its classification as an investment, provided that such change does not contradict the laws, regulations, and permissions of the relevant contracting state.

They further agree and expressly state, except in the treaties with Belgium, Luxembourg and Russia, which do not include such a provision, that the term 'investment', as previously defined, applies only to investments which comply with the laws and regulations of, and any written permits that may be required by, the contracting state in whose territory those investments have been made. Therefore, investments which do not comply with this provision are not covered by those treaties and cannot benefit from their protection and other advantages.

Corporate Nationality and Protection of Shareholders

6-61 The term 'investor', as defined in the bilateral treaties, includes both physical persons and legal entities. From a Cypriot perspective, the term 'investor' means any:

- Natural person having the citizenship of Cyprus in accordance with its law; and
- Legal entity incorporated in compliance with the laws of Cyprus and having its seat in Cyprus.

6-62 An investor, whether a natural person or a legal entity, is considered to be a national of Cyprus if he falls within the two categories stated above and, hence, such investor should be entitled to the protection offered to Cypriot investors in the host country by means of the bilateral treaty signed with Cyprus. Equally, a foreign investor who is considered a national of a country engaged in a bilateral treaty with Cyprus according to the laws of that country is entitled to all the rights of the said bilateral treaty.

Standard of Treatment

6-63 Cyprus ensures fair and equitable treatment for the investments of investors who are citizens of any country having a bilateral treaty with Cyprus for the promotion and protection of foreign investments.

Consequently, investments covered by the bilateral treaties are guaranteed continuous protection and security in Cyprus in addition to the guarantee of enjoyment of the most-favoured-nation treatment. In other words, the protection and security offered to those investments may in no case be less than are offered to investments of a third state. However, the privileges provided pursuant to the bilateral treaties do not extend to cover the privileges resulting from:

- Treaties establishing an economic or customs union, free trade area, or regional economic organisation to which Cyprus is a contracting party; or
- Treaties for the avoidance of double taxation or any other treaties in the field of taxation.

Repatriation of Profits

6-64 Subject to the laws and regulations of Cyprus, investors of the other contracting states, in respect of their investment, may freely transfer the following money abroad:

- Return on capital;
- Income earned from the investment including profits, interest, dividends, and royalties;
- Amounts necessary for the repayment of loans, royalties, and other payments due to the use of licence rights and commercial, administrative, and technical assistance;
- Proceeds of sale or liquidation of the investment whether partly or in whole; and

- Earnings of nationals of the other contracting states who work in Cyprus in connection with foreign investments.

6-65 The transfers are allowed in a freely convertible currency without delay at the exchange rates applicable for the time being.

Nationalisation and Compensation

6-66 Although nationalisation is prohibited by the Constitution of Cyprus, Cyprus has committed itself in the various bilateral treaties to which it is a signatory to restrict to the largest extent the practice of such activity. Thus, the bilateral treaties include provisions preventing the nationalisation of investments in the share capital in which there is participation by nationals of other contracting states. However, the provisions recognise that activities of nationalisation may be practised by the host state under exceptional circumstances which require additional measures of security to be taken to protect the national interest. In such cases, nationalisation may take place, provided that:

- Such measures shall be taken in accordance with the procedure established by law;
- Such measures are not to be discriminatory or contrary to specific commitments; and
- Effective and adequate compensation is paid to the investor who has suffered from such measures.

6-67 Compensation paid as a result of nationalisation of investments should equal the actual value of the investments on the day before nationalisation. The amount must be paid in the currency of the contracting state of which the investor is a national or in any other convertible currency without undue delay. Delays are subject to payments of interest to the investor suffering nationalisation of his investment at the commercial rate for the time being. The treaties with Hungary and Bulgaria impose stricter restrictions on nationalisation and they contain more guarantees for compensation.

The former treaty imposes a time limit of three months within which compensation must be paid. The latter expressly determines that ownership of the nationalised investment cannot be transferred to the nationalising authority before due compensation is paid. In addition, under the latter treaty, as well as under the bilateral treaties with Greece and Israel, the legality of the administrative and legal procedure of nationalisation may be checked at the request of the investor concerned.

The amount of the compensation should be determined in accordance with the laws and regulations of the state in whose territory the nationalised investment was made. Certain treaties, however, such as the treaty with Romania, require that this amount be determined by applying recognised principles of accounting or, when such principles cannot be provided, by applying equitable principles.

The treaties with Israel and Romania give the investor concerned the right to request a reassessment of the amount of compensation determined by a tribunal, or any other competent authority, within the jurisdiction of the contracting state which nationalised the investment.

The treaties with Belarus, Bulgaria, Egypt, and the Seychelles contain detailed provisions for the settlement of disputes, involving submission to an arbitral tribunal whose decision is to be final and binding. Under the treaty with Israel, disputes are to be subject to negotiations between the parties; if they are not settled within six months, the investor may submit the dispute to either a competent court of the contracting state in whose territory the investment was made or the International Centre for the Settlement of Investment Disputes, the Arbitral Tribunal of the International Chamber of Commerce in Paris, or an *ad hoc* arbitral tribunal. The issues concerning the arbitration process are similar to those when a dispute arises between contracting states.

Compensation for Destruction during War and National Emergency

6-68 Under the bilateral treaties, where investors of one of the contracting states suffers losses in the territory of another contracting state due to war or other armed conflict, a state of national emergency, a revolution, or other similar event, the latter state is obliged to indemnify the investors according to the standard of treatment it would provide for investors of any third country.

The amount indemnified is to be freely transferable from the latter state in any convertible currency.

Protection of Commitments

6-69 Cyprus and all the other contracting states are committed to the provisions of the bilateral treaties by virtue of the treaties themselves. Where a dispute arises between contracting states in relation to the provisions of any of those treaties, it should be settled by negotiations carried out through diplomatic channels.

If a dispute cannot be resolved through negotiation, it is agreed that it should be referred to an *ad hoc* arbitral tribunal. The arbitral tribunal will consist of two members, one appointed by each of the parties in dispute. The members will then appoint a national of a third country who will act as chairman of the tribunal.

The treaties set time limits for the appointment of the members and the chairman and, if the time limits are not met, the parties may agree on new time limits. Alternatively, at the request of any of the parties in dispute, the President of the International Court of Justice or the Secretary General of the United Nations, according to the relevant treaty, will make the necessary appointments.

Once the tribunal is established, it will make its decision based on the provisions of the relevant treaty and other treaties existing between the parties and on the principles of international law. The decision will be made by a majority vote and

is binding on both parties. All procedures relating to the arbitration process will be decided by the tribunal.

Each party in dispute will bear the costs relating to the activities of the member representing it. The costs of the activities of the chairman and other costs relating to the arbitration process shall be borne by both parties equally.

The treaties with Belgium and Luxembourg require that a dispute between the contracting states which cannot be settled by negotiations through diplomatic channels be referred to a joint commission before its reference to arbitration. The commission should convene on the request of either of the parties in dispute and should consist of representatives of both parties. If the joint commission fails to settle the dispute in question, it should be referred to an arbitral tribunal, as described above.

Settlement of Investment Disputes

6-70 Any investment dispute arising between an investor of a contracting state and the contracting state in whose territory the investment was made should be settled amicably as far as possible. Should the dispute not be solved amicably, at the request of the investor, it may be referred to one of the following according to the relevant treaty:

- A competent court or arbitral tribunal of the contracting state having territorial jurisdiction;
- An International *ad hoc* Arbitration Court in accordance with the Arbitration Rules of the United Nations Convention on International Trade Law (UNCITRAL);
- The Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm;
- The Arbitral Tribunal of the International Chamber of Commerce in Paris; or
- The International Centre for the Settlement of Investment Disputes, where both contracting parties are members of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States.[76]

6-71 However, according to the treaties with Egypt and Poland, the application of the relevant measures stated above is restricted to disputes arising from nationalisation of investments.

Subrogation

6-72 According to the bilateral treaties with Egypt, Israel, and Romania, if a contracting state pays a guarantee to one of its national investors in respect of an investment carried out in the territory of another contracting state, the latter

76 Law 64 of 1966.

contracting state must recognise such payment. The former contracting state under this treaty is thus a guarantor.

The treaties with Belgium and Luxembourg extend the definition of the term 'guarantor' to public institutions in any of the contracting states making the payments described above.

In both treaties, the contracting state in whose territory the investment is situated must also recognise that the guarantor is subrogated as insurer to the rights of the indemnified investor. Hence, both contracting states recognise in such a case that:

- The guarantor is entitled to exercise the rights of the indemnified investor in respect of the investment concerned, including the right to invoke claims, to transfer funds abroad, and to seek arbitration;[77] and
- The other contracting state will have the right to invoke against the guarantor all the obligations of the indemnified investor determined by law or contract, including payments of taxes and fees.

6-73 Under the bilateral treaties with Armenia, Egypt, and Poland, the term 'guarantor' has a broader definition to include:

- Either of the contracting states;
- Any governmental or semi-governmental institution of the contracting states;
- Any other public institution of the contracting states whose acceptability as a guarantor the states have mutually agreed in advance; and
- Any multilateral institution which is mutually acceptable to the contracting states and of which both states are members by virtue of a relevant international convention.

6-74 According to these treaties, compensation paid by the guarantor to the indemnified investor will not affect the investor's right to take arbitration proceedings prescribed by the relevant treaty. Internationally recognised accounting principles should be followed in determining the amount of compensation paid by the guarantor.

The treaties with Armenia and Poland contain further provisions regarding disputes arising between the guarantor and the other contracting state. The method of settling such disputes under these treaties depends on the identity of the guarantor as follows:

- Where the guarantor is either of the contracting states or a governmental or semi-governmental institution of either of the contracting states, the dispute is deemed to be one arising between the contracting states;[78]

77 However, the rights of the indemnified investor which may be exercised by the guarantor are limited to those covered by the contract of guarantee. Any additional rights will have to be exercised by the investor himself.

78 Hence, the provisions for the settlement of disputes between the contracting states included in the relevant treaty apply.

- Where the guarantor is a public institution of either of the contracting states, the dispute will be referred to arbitration in accordance with the provisions on arbitration included in the relevant treaty; and
- Where the guarantor is a multilateral institution, the dispute shall be settled under the principles of international law and the relevant rules provided by the convention establishing the aforementioned institution.

6-75 The bilateral treaties with Bulgaria, Greece, Hungary, and Russia do not include provisions for subrogation.

Agreement Relating to Investment Guaranties with the United States

6-76 Nationals of the United States are provided with further protection for their investments in Cyprus due to the bilateral agreement between the two countries in relation to investment guaranties.

Under the agreement, investments situated in Cyprus and owned by American nationals may be guaranteed by the government of the United States. In such cases, if the government of the United States makes a payment in United States dollars to any of its nationals, Cyprus will recognise such a payment and the subrogation of that country, as a result, to any claim or cause of action which the investor concerned had against that country in connection with his investment.

Double-Taxation Treaties

In General

6-77 An extremely favourable environment for all forms of international business activity and foreign investment in Cyprus has been specifically structured to ensure that they enjoy an infrastructure which has the maximum potential for success and growth. Cyprus is considered to be a low-tax jurisdiction offering tax incentives and not a low-tax jurisdiction or tax haven.[79]

In contrast to many countries commonly used for 'offshore' structures, Cyprus has concluded double-taxation treaties with most of the Western European countries and with almost all Central Eastern European countries. Cyprus also has concluded treaties with almost all the large nations who have economic power, such as: United States, Canada, United Kingdom, Germany, France, Italy, Russia, India, and China.

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79 Spitz and Clarke, *Offshore Services*, where Cyprus is included and examined in Part D under the category of high-tax jurisdictions offering tax incentives. Saunders, *International Tax Systems and Planning Techniques*; Saunders and Andreas Neocleous, *Cyprus International Tax Planning* (2nd ed, 1991); Andreas Neocleous, 'Cyprus', *International Taxation of Low-Tax Transactions*.

The impressive number of the double-taxation treaties of Cyprus, combined with the low taxation of 'offshore' entities, and the nil withholding tax rates on dividends, interest, and royalties paid by such entities has contributed substantially to the establishment of Cyprus as an international business centre and as a jurisdiction which offers real possibilities for international tax planning. The purpose of these treaties is the avoidance of double taxation of income earned in any of the treaty countries.[80]

This is usually achieved through the allowance of a tax credit against the tax levied on the taxpayer by his country of residence or through tax exemption in one contracting state of the income taxed in the other contracting state. Normally, the result is that the taxpayer pays no more than the higher of the two rates.[81]

Cyprus has double-taxation treaties with the following countries:

- Austria;
- Belarus;
- Belgium;
- Bulgaria (until 31 December 2000);[82]
- Canada;
- China;
- Czech Republic;
- Denmark;
- Egypt;
- France;
- Germany;

80 Qureshi (ed), *The Public International Law on Taxation* (1994), at p 369: 'Double taxation occurs when the flow of goods/services, capital/income and/or people straddles different fiscal jurisdictions, thus resulting in the imposition of tax more than once. There is some debate regarding an all-embracing definition of double taxation. International juridical double taxation is the phenomenon that results from the imposition by two or more states of taxes, generally of a similar kind, on the same taxpayer, in relation to the same subject matter, and for the same period. This is the generally accepted definition of the problem, as enunciated by the OECD and the UN. However, this definition of double taxation does not appear to take into account fully international economic double taxation. Economic double taxation occurs when the same subject matter is subject to taxation by different states during the same period, but the identity of the taxpayer is different. International double taxation (in its wider juridical and economic sense) can occur in terms of all types of taxes — both direct taxes and indirect taxes'. Baker, *Double Taxation Agreements and International Tax Law* (1991); Vogel, *Double Taxation Conventions* (1991); Demetriades, *Cyprus Double Tax and Other Treaties* (1989); Davies, *Principles of International Double Taxation Relief* (1985); Demetriades, *Cyprus International Tax Planning* (1980); Panagiotis Neocleous (dissertation), *Double Tax Treaties and Low Tax Jurisdictions with Special Emphasis on Cyprus* (1992).

81 Qureshi (ed), *The Public International Law on Taxation* (1994), at p 370; van Weeghel, *The Improper Use of Tax Treaties* (1998).

82 On 31 May 2000, Bulgaria terminated the double-taxation treaty with Cyprus and announced that a new agreement must be negotiated.

- Greece;
- Hungary;
- India;
- Ireland;
- Italy;
- Kuwait;
- Malta;
- Mauritius (published, but not ratified);
- Norway;
- Poland;
- Romania;
- Russia;[83]
- Slovak Republic;
- South Africa;
- Sweden;
- Syria;
- Thailand (as from 1 January 2001);
- United Kingdom;
- United States;
- USSR and CIS Republics;[84] and
- Yugoslavia (former).

6-78 New tax treaties with Singapore and the new Yugoslavia have either been initialled and await signature or have been signed and await ratification or publication.

Treaties with Algeria, the Baltic states (Estonia, Latvia, and Lithuania), Bangladesh, Finland, Indonesia, Israel, Kazakhstan, Malaysia, Netherlands, Portugal, Qatar, Seychelles, Spain, Sri Lanka, and Vietnam are under negotiation, while the treaties with Armenia, Czech Republic, Denmark, Georgia, Ireland, Moldavia, Norway, Slovakia, and Ukraine are being renegotiated.[85]

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83 The new treaty with Russia was signed on 5 December 1998 and was approved by the Council of Ministers of Cyprus on 10 December 1998 and by the Russian Duma on 25 June 1999. The provisions of the treaty will be effective only for taxable years and periods beginning on or after 1 January 2000. The new treaty follows the Organisation for Economic Development and Co-operation (OECD) Model and, in reality, will have only limited effect on the attractiveness of Cyprus as an international business centre. An international business company receiving dividends from Russia will not pay tax in Cyprus due to the fact that the Cypriot tax of 4.25 per cent is less than the deductible Russian tax. In other words, Cyprus tax authorities lose revenue in favour of the Russian tax authorities.

84 This is the old treaty of 1983, which is still in force with certain CIS Republics, excluding Belarus and Russia which have concluded a new tax treaty, Kazakhstan, and Turkmenistan as from 1 January 2000.

85 *Cyprus Offshore Report*, Issue 2/0023 (March 2000).

All the double-taxation treaties that Cyprus has entered into are drafted on the basis of the Organisation for Economic Development and Co-operation (OECD) Model Treaty.[86] As with all double-taxation treaties, the primary objectives are to:

- Clarify and determine the taxing rights of each contracting state;
- Reduce or avoid the impact of international juridical double taxation; and
- Introduce anti-avoidance provisions and mechanisms to prevent tax evasion.

6-79 Cyprus is perhaps the best example of a 'low-tax jurisdiction offering tax incentives' or, as it is better defined, a 'treaty haven'[87] since it combines a tax incentives regime with an extensive network of double-taxation treaties and only a few anti-treaty shopping provisions. Of all the treaties now in force, only the treaties with Canada, Denmark, Germany, France, United Kingdom, and United States have some anti-avoidance provisions. Even so, these countries, with the exception of Canada and the United States, provide tax-sparing credits[88] to international business companies and permit certain treaty benefits other than withholding tax reductions or exemptions.

Organisation of Economic Co-Operation and Development Model Treaty

In General

6-80 The Fiscal Committee of the OECD drafted a Model Double Tax Convention in 1946, which was redrafted in 1963 and substantially revised in 1977.[89] When negotiating double-taxation treaties on income and capital, Cyprus, like other developed countries, has followed the standard provisions of the OECD Model Treaty as much as possible, changing them of course to reflect the different tax systems of Cyprus and its treaty partners and the particular economic needs of each country.

In this chapter, the provisions of the OECD Model Treaty will be set out article by article. Under the articles, the way in which the treaties of Cyprus deviate from

86 Usually, the double-tax treaties are based either on the OECD or on the United Nations (UN) Model. The OECD Model Convention better suits the interests of the developed countries with an orientation towards the fiscal rights of the 'residence' state. The UN Model is more compatible with the interests of the developing state with an orientation towards the source state's jurisdiction.

87 *A contrario* to 'tax haven'. The definition 'treaty haven' was first used in the article published in the *News Bulletin of International Fiscal Services* (spring 1993). Other 'treaty havens' are Malta, Madeira, Canada, United Kingdom, and Labuan.

88 'Tax sparing credits' is a term used to describe the notional crediting of foreign taxes which would otherwise be levied were it not for the provisions of a tax holiday or a relevant tax treaty, where, for example, approved loans or royalties may attract lower withholding taxes than would otherwise be the case. *News Bulletin of International Fiscal Services* (summer 1993).

89 In September 1992, a new model was published which is largely based on the 1977 OECD Model with insignificant changes.

these standard provisions will be described with emphasis on specific advantages and provisions which various Cyprus double-taxation treaties have and which make this jurisdiction attractive for specific types of entities or businesses.

General Articles

> Article I — Personal scope: This Convention shall apply to persons who are residents of one or both of the contracting states.
>
> Article 2 — Taxes covered: 1. This Convention shall apply to taxes on income and on capital imposed on behalf of a contracting state or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.
>
> 2. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amount of wages or salaries paid by enterprises, as well as taxes on capital appreciation.
>
> 3. The existing taxes to which the Convention shall apply are in particular;
>
> (a) (in state A) . . .
>
> (b) (in state B) . . .
>
> 4. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. At the end of each year, the competent authorities of the contracting states shall notify each other of changes which have been made in their respective taxation laws.
>
> Article 3 — General definitions: I. For the purposes of this Convention, unless the context otherwise requires;
>
> (a) the term 'person' includes an individual, a company and any other body of persons;
>
> (b) the term 'company' means any body corporate or any entity which is treated as a body corporate for tax purposes;
>
> (c) the terms 'enterprise of a contracting state' and 'enterprise of the other contracting state' mean respectively an enterprise carried on by a resident of a contracting state and an enterprise carried on by a resident of the other contracting state;
>
> (d) the term 'international traffic' means any transport by a ship or aircraft operated by an enterprise which has its place of effective management in a contracting state, except where the ship or aircraft is operated solely between places in the other contracting state;

(e) the term 'competent authority' means;

(i) (in state A) . . .

(ii) (in state B) . . .

2. As regards the application of the Convention by a contracting state, any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the law of that state concerning the taxes to which the Convention applies.

6-81 The scope of article 1 limits the treaty to persons (individuals or companies) who are residents of one or both of the contracting states. Cypriot international business companies which are managed and controlled in Cyprus[90] may benefit from the double-taxation treaties of Cyprus in the same way as any other Cypriot company. This, however, may be subject to the inclusion of a limitation of benefits provision as explained below. This is not a standard OECD Model article, and it is discussed separately.

In contrast, a foreign company which has its place of business in Cyprus and all of its business activities abroad may be tax exempt in Cyprus if its business activities are conducted totally outside Cyprus, if it conducts no business whatsoever with Cypriot residents, if no Cypriot residents have any interest in the overseas company, and if the company is not managed and controlled in Cyprus. However, if it is not managed and controlled in Cyprus, as will be seen under article 4(l) and as provided for under Cypriot domestic law, the company cannot be considered resident in Cyprus and is not able to benefit from any of the double-taxation treaty provisions.

The domestic criteria for 'residents' must be studied for each country to determine whether they would be considered resident in that country. For example, the criterion of management and control is not a deciding factor for the residence of a United States corporation.

Under the 'taxes covered' article (article 2), it is important that the taxes covered comprise all the taxes which may be levied on parties to a double-taxation treaty, eg, if net worth tax, petroleum revenue tax, or local trade tax were introduced and affected the parties to a double-taxation treaty, these taxes may not be covered and no relief would be given in respect of double taxation.

For the purposes of the 'non-discrimination' article (article 24) and the 'exchange of information' article (article 26) of the Model, taxes of every kind imposed at national, state, or local level may be taken into account. The double-taxation treaties to which Cyprus is a party include these articles.

90 A company is 'managed and controlled' in Cyprus if the majority of the directors reside in Cyprus, if the meetings of the Board of Directors are held in Cyprus, and if the major decisions are taken there. Demetriades, *Cyprus Double Tax and Other Treaties* (1989), at p 107.

The 'general definitions' article (article 3) defines the terms 'person', 'company', 'enterprise of a contracting state', 'international traffic', and 'competent authority'. Some of the double-taxation treaties of Cyprus also include a definition of the word 'national', eg, the Cyprus–United Kingdom double-taxation treaty, and define the territory of Cyprus and that of its treaty partner.

The term 'national' under the Cyprus–United Kingdom double-taxation treaty means a citizen or incorporated body and, in this connection, it is interesting to note that, unlike most other treaty provisions, the 'non-discrimination' article (article 25) of the Cyprus–United Kingdom treaty is based on the nationality of the taxpayer and not his residence; therefore, a United Kingdom-domiciled individual residing in Saudi Arabia, for example, would be in a position to invoke the 'non-discrimination' article of the Cyprus–United Kingdom double-taxation treaty if he believed that the Cypriot tax administration was unfairly discriminating against him *vis-à-vis* a Cypriot national. The 'non-discrimination' article (article 7) of the Cyprus–United States double-taxation treaty is similar in its scope, affording citizens of the United States and Cyprus equivalent protection.

Residence

> Article 4 — Residence: 1. For the purposes of this Convention, the term 'resident of a contracting state' means any person who, under the laws of that state, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. However, this term does not include any person who is liable to tax in that state in respect only of income from sources in that state or capital situated therein.
>
> 2. Where by reason of the provisions of paragraph 1 an individual is a resident of both contracting states, his status shall be determined as follows:
>
> (a) he shall be deemed to be a resident of the state in which he has a permanent home available to him; if he has a permanent home available to him in both states, he shall be deemed to be a resident of the state with which his personal and economic relations are closer (centre of vital interests);
>
> (b) if the state in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either state, he shall be deemed to be a resident of the state in which he has an habitual abode;
>
> (c) if he has an habitual abode in both states or in neither of them, he shall be deemed to be a resident of the state of which he is a national;
>
> (d) if he is a national of both states or of neither of them, the competent authorities of the contracting states shall settle the question by mutual agreement.

> 3. Where by reason of the provisions of paragraph l a person other than an individual is a resident of both contracting states, it shall be deemed to be a resident of the state in which the place of effective management is situated.

6-82 The 1963 OECD Model Treaty did not specify that residence does not extend to persons who are only liable to tax in another country in respect of income from sources within that country, but the later version and many of the treaties of Cyprus include the provision as described above.

As far as individuals are concerned, article 4(2) is commonly described as the 'tie-breaker' clause, which stipulates the procedure to be adopted in determining the residence status of an individual, starting with whether the individual has a permanent home available to him in just one state, where his personal and economic relations are, where he has his habitual abode, of which state he is a national and, finally, by mutual agreement between the competent authorities of the two states.[91]

However, it must be clearly understood that article 4(2) is only important where both states consider that an individual is resident in each country, for example, by reason of length of stay within the country in a tax year. Even then, the article is only relevant as far as it relates to items of income and capital expressly mentioned in the various provisions of the double-taxation treaty; it does not exonerate an individual from having to comply with laws relating to residents of a particular country, such as reporting requirements, even though for the purposes of the double-taxation treaty the individual may be considered to be resident elsewhere.

For companies, the overriding criterion, if a company is managed and controlled in two places, is where its place of effective management is situated. It is important if a Cypriot company is to benefit from the provisions of an applicable double-taxation treaty that its management is not purely nominal in Cyprus through the provision of two Cypriot resident directors while decisions are taken elsewhere.

Equally, however, the residence article extends the treaty to those companies incorporated outside either treaty country if management and control is exercised in Cyprus or in the treaty partner. This may enable non-Cypriot incorporated companies to claim treaty protection if, for example, they open a branch activity in Cyprus and transfer effective management and control of the company to Cyprus.[92]

The definition of residence in article 4 of the new Cyprus tax treaty with Russia is in line with the OECD Model, but it adds to the applicable list of criteria for the taxation of a resident 'the place of registration'. It is understood that this arose because business enterprises in Russia are under an obligation to register with the Russian tax authorities. However, the question is what the implications will be

91 Baker, *Double Taxation Agreements and International Tax Law* (1991).
92 Davies, *Principles of International Double Taxation Relief* (1985); Demetriades, *Cyprus Double Tax and Other Treaties* (1989).

under Russian tax law if a permanent establishment which is registered with the Russian tax authorities and thus qualifies as a resident under the tax treaty seeks to avail itself of protection.

Permanent Establishment

Article 5 — Permanent establishment

1. For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term 'permanent establishment' includes especially:

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop; and

(f) a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources.

3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than 12 months.

4. Notwithstanding the preceding provisions of this article, the term permanent establishment shall be deemed not to include:

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or for collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person — other than an agent of an independent status to whom paragraph 6 applies — is acting on behalf of an enterprise and has, and habitually exercises, in a contracting state an authority to conclude contracts in the name of the enterprise that enterprise shall be deemed to have a permanent establishment in that state in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provision of that paragraph.

6. An enterprise shall not be deemed to have a permanent establishment in a contracting state merely because it carries on business in that state through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

7. The fact that a company which is a resident of a contracting state controls or is controlled by a company which is a resident of the other contracting state, or which carries on business in that other state (whether through a permanent establishment or otherwise), shall not itself constitute either company a permanent establishment of the other.[93]

6-83 This definition, therefore, contains the following conditions:

- The existence of a 'place of business', ie, a facility such as premises or, in certain instances, machinery or equipment;

93 'At the centre of virtually all tax treaties currently in force is the concept "permanent establishment". The term must be understood to describe that degree of economic penetration which, according to the agreement of treaty partners, justifies a nation in treating a foreign person for income tax purposes in the same manner as domestic persons are treated. When a treaty governs the tax relations between the foreigner's country of residence and the country which is his host, "permanent establishment" supplants the taxing nexus of the domestic tax law of the host country. When he acquires a "permanent establishment", the nation of his residence yields taxing jurisdiction to the nation in which he has acquired a permanent establishment — by granting him either tax exemption or tax credits with respect to income earned in the host country. Moreover, the foreigner must file tax returns in the local language and comply with local tax laws — typically far more fastidiously than any of the locals comply with them.' Huston and Williams, *Permanent Establishments — A Planning Primer* (1993), at p 1.

- The place of business must be 'fixed', ie, it must be established at a distinct place with a certain degree of permanence; and
- The carrying on of the business of the enterprise through this fixed place of business.[94]

6-84 At the corporate level, article 5 and the 'business profits' article are perhaps the most important and commonly used. The specific exclusions in the permanent establishment article of each Cypriot double-taxation treaty must be carefully considered. For example, sub-paragraph 5 excludes an independent agent or broker acting in the ordinary course of his business from creating a permanent establishment. Under sub-paragraph 7, the fact that one company owns another will not of itself create a permanent establishment in the other country.

Under the Model Treaty, therefore, a Cypriot company could conduct certain activities itself within the treaty country which would not attract local tax, or it might create a subsidiary company which conducts limited activities on a management fee basis so that local tax is payable only on such fees rather than on the overall profit achieved by the Cypriot parent company.

Many of the double-taxation treaties have limitations of benefits articles which prevent certain provisions of the treaties applying to IBCs, or ones where a major part of the income of the Cypriot companies is paid to non-residents (see below). However, even these limitation articles do not usually affect the relevance of the 'permanent establishment' and the 'business profits' articles, so that IBCs may still be afforded the protection of Cyprus' double-taxation treaties in connection with limited activities (or the appointment of agents) in the United Kingdom, the United States, France, and other treaty countries.

Most of Cyprus' double-taxation treaties follow the OECD Model article 5 (3), in terms of which a building site or a construction or an installation project constitutes a permanent establishment only if it lasts for more than 12 months. The treaty with Austria extends this period to 24 months with Bulgaria to 18 months, and the treaties with Canada, Czech Republic, Denmark, Egypt, Germany, Italy, Malta, Slovak Republic, Sweden, United Kingdom, and United States reduce it to six months. The treaties with Greece and Ireland, although following the OECD Model, contain no time limit and, therefore, building and construction projects constitute permanent establishments on the day of commencement.[95]

94 This means usually that persons who, in one way or another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the state in which the fixed place is situated.

95 Chrysanthou and Christoforou, *Cyprus Offshore Opportunities and International Tax Planning* (April 1999).

Real Estate

> Article 6 — income from immovable property
>
> 1. Income derived by a resident of a contracting state from immovable property (including income from agriculture or forestry) situated in the other contracting state may be taxed in that other state.
>
> 2. The term 'immovable property' shall have the meaning which it has under the law of the contracting state in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.
>
> 3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.
>
> 4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of independent personal services.

6-85 Article 6 provides that income arising from immovable property[96] will be taxed wherever the land or other property is situated. Virtually all double-taxation treaties maintain the rights of a country to impose taxation on real estate income, and it is necessary to carefully consider the method of financing real estate acquisitions to extract income in the form of interest charges which may be payable gross,[97] rather than rental income subject to full local taxation. Capital gains achieved on the sale of real estate will not generally fall within this article, but under article 13 of the Model Treaty.

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96 According to article 2 of the Immovable Property (Tenure, Registration and Valuation) Law of Cyprus, Cap 224, 'immovable property' includes: land, buildings and other erections, structures or fixtures affixed to any land or to any building or other erection or structure; trees, vines and any other thing whatsoever planted or growing on any land and any produce thereof before severance; springs, wells, water and water rights whether held together with, or independently of, any land; privileges, liberties, easements and any other rights and advantages whatsoever appertaining or reputed to appertain to any land or to any building or other erection or structure; and an undivided share in any property hereinbefore set out.

97 Model Treaty, art 11.

Business Profits

Article 7 — Business profits

1. The profits of an enterprise of a contracting state shall be taxable only in that state unless the enterprise carries on business in the other contracting state through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other state but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a contracting state carries on business in the other contracting state through a permanent establishment situated therein, there shall in each contracting state be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the state in which the permanent establishment is situated or elsewhere.

4. In so far as it has been customary in a contracting state to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that contracting state from determining the profits to be taxed by such apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income which are dealt with separately in other articles of this Convention, the provisions of those articles shall not be affected by the provisions of this article.

Article 7, in combination with article 5, prevents a liability to tax unless a company has a permanent establishment in the other country and is actually carrying on

business in the other country through that permanent establishment. Both these conditions must be satisfied before tax may be levied.

The 'business profits' article exists in all Cyprus double-taxation treaties. It is interesting to note that the limitation of benefits clause may not necessarily apply to this article, so that protection from taxation in a treaty country for an IBC may be guaranteed (except possibly for the Cyprus–United States double-taxation treaty).

It also should be noted that sub-paragraph 5 of article 7 permits a purchasing office to be opened in a treaty country without creating a permanent establishment; thus, a Cypriot IBC operating in the United Kingdom, France, Italy, or Germany, for example, but restricting its activities solely to the purchase of goods or merchandise, will create the commercial presence required without attracting local tax liabilities on profits generated from the subsequent sale of such goods. Similar provisions apply in Cyprus' treaties with the Eastern European countries, which may prove invaluable as trade with Eastern Europe increases.

Shipping

> Article 8 — Shipping, inland waterways transport and air transport: 1. Profits from the operation of ships or aircraft in international traffic shall be taxable only in the contracting state in which the place of effective management of the enterprise is situated.
>
> 2. Profits from the operation of boats engaged in inland waterways transport shall be taxable only in the contracting state in which the place of effective management of the enterprise is situated.
>
> 3. If the place of effective management of a shipping enterprise or of an inland waterways transport enterprise is aboard a ship or boat, it shall be deemed to be situated in the contracting state in which the home harbour of the ship or boat is situated, or if there is no such home harbour, in the contracting state of which the operator of the ship or boat is a resident.
>
> 4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

6-86 Shipping, inland waterways transport, and air transport profits may be exempt from tax in a treaty country unless residence can be deemed to be in that treaty country. In view of the benefits to be derived from establishing shipping companies in Cyprus, it is important to ensure that the profits derived from these companies are not subject to tax elsewhere, and double-taxation treaties can preserve that requirement.

The favourable tax treatment in Cyprus of shipping activities, without discrimination as to whether the persons benefited are residents or non-residents of Cyprus, constitutes another major factor for successful tax planning through Cypriot

double-taxation treaties. Preservation of tax advantages for such companies and crew on board Cyprus ships is a major target in the negotiation of new treaties and re-negotiation of existing ones.

The benefits afforded to personnel on board ships, and the reputation of Cyprus in the shipping industry, has resulted in a number of crew employer companies being based in Cyprus. Such companies are taxed on only 4.25 per cent of net profits derived from employing such personnel, while the personnel themselves obtain significant tax benefits. It is important that the tax benefits afforded to ship management companies and employees are not threatened by the imposition of a foreign tax burden, and double-taxation treaties may ensure that such a threat is avoided.

Associated Enterprises

> Article 9 — Associated enterprises
>
> 1. Where:
>
> (a) an enterprise of a contracting state participates directly or indirectly in the management, control or capital of an enterprise of the other contracting state, or
>
> (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a contracting state and an enterprise of the other contracting state,
>
> and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, any profits which would, but for these conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.
>
> 2. Where a contracting state includes in the profits of an enterprise of that state — and taxes accordingly — profits on which an enterprise of the other contracting state has been charged to tax in that other state and the profits so included are profits which would have accrued to the enterprise of the first-mentioned state if the conditions made between the two enterprises had been those which would have been made between independent enterprises, that other state shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the contracting state shall if necessary consult each other.

6-87 Article 9 is concerned with the well-known issue of transfer pricing and arm's-length adjustments. It provides that, where there are dealings between associated parent and subsidiary companies under common control, the taxing

authorities of a contracting state may for the purpose of calculating tax liabilities re-write the accounts of the enterprises if as a result of the special relations between the enterprises the accounts do not show the true taxable profits arising in that state.[98]

The 'associated enterprise' article is an anti-avoidance article to ensure that profits are not shifted from an enterprise in one state to one in the other state. Under the Cyprus–United Kingdom treaty, which is based on the 1963 OECD Model Treaty, there is no clause requiring an automatic adjustment to be made in the tax liability of, for example, a Cypriot resident company if the United Kingdom tax administration considers that excessive payments have been made from the United Kingdom and should be disallowed. In this particular treaty, reliance would have to be placed on the mutual agreement procedure.[99] In Cyprus' later treaties, automatic adjustments are incorporated within the 'associated enterprises' article.

Dividends, Interest, and Royalties

Dividends

> Article 10 — Dividends
>
> 1. Dividends paid by a company which is a resident of a contracting state to a resident of the other contracting state may be taxed in that other state.
>
> 2. However, such dividends also may be taxed in the contracting state of which the company paying the dividends is a resident and according to the laws of that state, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed:
>
> (a) Five per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;
>
> (b) Fifteen per cent of the gross amount of the dividends in all other cases.
>
> The competent authorities of the contracting states shall by mutual agreement settle the mode of application of these limitations.
>
> This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

98 Baker, *Double Taxation Agreements and International Tax Law* (1991).
99 Model Treaty, art 25.

3. The term 'dividends' as used in this article means income from shares, 'jouissance' shares or 'jouissance' rights, mining shares, founders' shares or other rights, but not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the state of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a contracting state, carries on business in the other contracting state of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other state independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of article 7 or article 14, as the case may be, shall apply.

5. Where a company which is a resident of a contracting state derives profits or income from the other contracting state that other state may not impose any tax on the dividends paid by the company, except in so far as such dividends are paid to a resident of that other state or in so far as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other state, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other state.

6-88 All tax treaties include articles which:

- Clarify whether a country has the right to tax income with a source in that country; and
- Reduce or abolish the standard withholding taxes that are levied on the payment of such income to treaty residents.

6-89 Table A,[100] below, contains a summary of the rates of withholding tax on dividends, interests, and royalties on payments from companies resident in treaty countries to Cypriot residents. The rates specified are those provided in the treaty. If, however, domestic law provides for lower rates or for complete exemption, then treaty rates do not apply.

100 Tables A and B were contributed by Savvas Savvides, Chartered Accountant, to whom thanks and acknowledgement are made.

Table A

Country	Dividends	Interest	Royalties
Austria	10%	nil	nil
Belarus	10% (24)	5%	5%
Belgium	10% (1)	10% (26)	nil
Bulgaria	nil	nil	nil
Canada	15%	15% (7)	10% (12)
China	10%	10%	10%
Czech Republic	10%	10% (7)	5% (8)
Denmark	10% (1)	10% (7)	nil
Egypt	15%	15%	10%
France	10% (2)	10% (7)	nil (10)
Germany	15% (3)	10% (7)	nil (10)
Greece	25%	10%	nil (9)
Hungary	5% (4)	10% (7)	nil
India	10% (17)	10%	15% (24)
Ireland	nil	nil	nil (9)
Italy	15%	10%	nil
Kuwait	10%	10% (7)	5% (8)
Malta	15% (18)	10%	10%
Mauritius	nil	nil	nil
Norway	5% (5)	nil (15)	nil
Poland	10%	10%	5%
Romania	10%	10%	5% (8)
Russia	5% (25)	nil	nil
Slovak Republic	10%	10% (7)	5% (8)
South Africa	nil	nil	nil
Syria	15% (15)	10%	15% (16)
Sweden	5% (4)	10% (7)	nil
Thailand	10%	15% (28)	15% (29)
United Kingdom	15% (6)	10%	nil (10)
United States	5% (13)	10% (7)	nil
USSR and CIS Republics	nil	nil	nil
Yugoslavia	10%	10%	10%

6-90 Table B, below, contains a summary of rates of withholding tax on dividends, interests, and royalties on payment from Cyprus to residents of treaty countries. Payments made by Cyprus resident international business companies are not subject to any withholding tax. Furthermore, dividends paid by a Cyprus resident company to a non-resident company may be paid without withholding any tax provided that the paying company is satisfied that the recipient company is incorporated abroad or its management and control is situated abroad.

Table B

Country	Dividends	Interest	Royalties
Austria	10%	nil	nil
Belarus	10% (24)	5%	5%
Belgium	10% (1)	10 % (26)	nil
Bulgaria	nil	nil	nil
Canada	15%	15% (7)	10% (12)
China	10%	10%	10%
Czech Republic	10%	10% (7)	5% (8)
Denmark	10% (1)	10% (7)	nil
Egypt	15%	15%	10%
France	10% (2)	10% (7)	nil (10)
Germany	15% (3)	10% (7)	nil (10)
Greece	25%	10%	nil (9)
Hungary	5% (4)	10% (7)	nil
India	10% (17)	10%	15% (23)
Ireland	nil	nil	nil (9)
Italy	15%	10%	nil
Kuwait	10%	10% (7)	5% (8)
Malta	15%	10%	10%
Mauritius	nil	nil	nil
Norway	nil	20% (27)	nil
Poland	10%	10%	5%
Romania	10%	10%	5% (8)
Russia	5% (25)	nil	nil
Slovak Republic	10%	10% (7)	5% (8)
South Africa	nil	nil	nil
Syria	15%	10%	15% (16)
Sweden	5% (4)	10% (7)	nil
Thailand	10%	15% (28)	15% (29)
United Kingdom	nil	10%	nil (10)

United States	nil	10% (7)	nil
USSR and CIS Republics	nil	nil	nil
Yugoslavia	10%	10%	10%
All other countries	10% (14)	10% (27)	10% (11)

Notes to Tables A and B

1. Ten per cent if recipient is a company with at least 25 per cent direct share interest. Fifteen per cent in all other cases.
2. Ten per cent if recipient is a company with at least 10 per cent direct share interest. Fifteen per cent in all other cases. If recipient is an international business company, domestic rate applies.
3. Ten per cent if recipient is a company with at least 25 per cent direct share interest. Twenty-seven per cent if recipient is a company with more than 25 per cent direct or indirect share interest as long as the German corporation tax on distributed profits is lower than that on undistributed profits and the difference between the two rates is 15 per cent or more. Fifteen per cent in all other cases.
4. Five per cent if recipient is a company (other than a partnership) with at least 25 per cent direct share interest. Fifteen per cent in all other cases.
5. Nil if received by a company which controls, directly or indirectly, not less than 50 per cent of the voting power.
6. United Kingdom has an imputation system and so dividends are paid net of underlying income tax. A resident of Cyprus, other than a company which, either alone or together with one or more associated companies, controls, directly or indirectly, at least 10 per cent of the voting power, is entitled to a tax credit in respect of the dividend. Where a resident of Cyprus is entitled to a tax credit, tax also may be charged on the aggregate of the cash dividend and the tax credit at a rate not exceeding 15 per cent. In this case any excess tax credit is repayable. Where the recipient is not entitled to a tax credit, the cash dividend is exempt from any tax.
7. Subject to certain exemptions.
8. Nil if royalties are on literary, artistic, or scientific work, including cinematographic films and films or tapes for television or radio broadcasting.
9. Five per cent on cinematographic films not including television films.
10. Five per cent on cinematographic films including films and video tapes for television.
11. Five per cent on cinematographic films.
12. Nil if royalties are copyright and other literary, dramatic, musical, or artistic work, not including film or videotape royalties.

13. Five per cent if recipient is a company with at least 10 per cent direct share interest for all the prior taxable year and for the current taxable year up to the date of payment and less than 25 per cent of the income from interest or dividend. If recipient is an international business company domestic rate applies; 15 per cent in all other cases.

14. (a) Companies: nil,
(b) Other persons: 20 per cent.

15. Nil if recipient is a company with at least 25 per cent direct share interest.

16. Ten per cent if royalties are on literary, artistic, or scientific work, including cinematographic films and film or tapes for television or radio broadcasting.

17. Ten per cent if recipient is a company with at least 10 per cent direct share interest; 15 per cent in all other cases.

18. Malta has an imputation system and, thus, dividends are paid net of underlying tax.

19. In the case of Canada, France, United Kingdom, and United States, the withholding tax shown below do not apply if the recipient is a Cyprus resident international business company. In such cases, the domestic law of the source country applies.

20. The rates specified are those provided in the treaty. If, however, domestic law provides for lower rates or for complete exemption, treaty rates do not apply.

21. Payments made by Cyprus resident international business companies are not subject to any withholding tax.

22. With the exception of Kazakhstan and Turkmenistan, the rest of the members of the Commonwealth of Independent States (CIS) have recognised the double-taxation treaty between Cyprus and the ex-Soviet Union as applicable between them and Cyprus. Belarus and Russia have concluded new treaties. Armenia, Georgia, Kazakhstan, Moldova, and Ukraine are negotiating with Cyprus for new treaties.

23. Technical fees are subject to 10 per cent withholding tax.

24. Ten per cent if recipient is the beneficial owner holding at least 25 per cent of the share capital; five per cent if the beneficial owner of the dividends has invested in the share capital of the paying company not less than ECU 200,000; 15 per cent in all other cases.

25. Five per cent if the beneficial owner has directly invested in the capital of the paying company not less than the equivalent of US $100,000; 10 per cent in all other cases.

26. Interest is exempt (a) if paid to the other contracting state, a political subdivision or a local authority, the National Bank of that state or any institution the capital of which is wholly owned by that state or the political subdivisions or local authorities of that state, and (b) if it is interest on deposits not represented by bearer instruments by a banking enterprise.

27. Twenty per cent on the first CY £40,000 and 25 per cent on amounts in excess CY £40,000 on annual payments.
28. Ten per cent if the interest is paid (a) to a financial institution (including an insurance company), (b) in connection with the sale on credit of an industrial, commercial or scientific equipment, and (c) in connection with the sale on credit of any merchandise by one enterprise to another enterprise. Nil if paid to the government of the other contracting state (including the Central Bank and other specified institutions).
29. Fifteen per cent on patents, trade marks, designs or models, plans, secret formulae, or process; 10 per cent on industrial, commercial or scientific equipment or for information concerning industrial, commercial, or scientific experience; five per cent on copyrights.

6-91 Cyprus, with its extensive network of treaties in conjunction with its own tax advantages for IBCs, may be considered a suitable place for the establishment of a holding company, depending of course from which countries dividends are expected to be received and to which country they are to be paid.

As far as dividend structuring is concerned, IBCs also may be useful as conduit vehicles if the treaty partner does not have a treaty with the country in which the investment is made, or where the treaty is not as beneficial as Cyprus' treaty with that country. For example, Cyprus–United States companies would benefit from using a Cypriot company for investment in Russia, and for investments in certain other European countries with which the United States has not entered into double-taxation arrangements.

With reference to Cyprus' connections with Eastern European countries, Cyprus has treaties with Belarus, Bulgaria, Czech Republic, Hungary, Poland, Romania, Russia, the CIS Republics (excluding Kazakhstan and Turkmenistan), Slovak Republic, and (former) Yugoslavia. These treaties are invaluable since they are the only treaties with a country like Cyprus which offer such important tax advantages to international business and ship-owning companies. These companies therefore become ideal vehicles to receive income from, or undertake business activities in, the Eastern European countries and, moreover, there are no provisions limiting the benefits of such treaties as exist with other countries (see text, below).

There also are some exemptions from tax for individuals resident in Cyprus and performing work and activities in these Eastern European countries; in this respect, of particular importance are exemptions provided in the USSR and CIS Republics treaties.

Interest

Article 11 — Interest

1. Interest arising in a contracting state and paid to a resident of the other contracting state may be taxed in that other state.

2. However, such interest also may be taxed in the contracting state in which it arises and according to the laws of that state, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent of the gross amount of the interest. The competent authorities of the contracting state shall by mutual agreement settle the mode of application of this limitation.

3. The term 'interest' as used in this article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this article.

4. The provisions of paragraph 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a contracting state, carries on business in the other contracting state in which the interest arises, through a permanent establishment situated therein, or performs in that other state independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of article 7 or article 14, as the case may be, shall apply.

5. Interest shall be deemed to arise in a contracting state when the payer is that state itself, a political subdivision, a local authority or a resident of that state. Where, however, the person paying the interest, whether he is a resident of a contracting state or not, has in a contracting state a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, such interest shall be deemed to arise in the state in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed on by the payer and the beneficial owner in the absence of such relationship, the provisions of this article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each contracting state, due regard being had to the other provisions of this Convention.

6-92 Financing group structures also may be beneficially arranged through a Cypriot intermediary finance company in respect of countries with which Cyprus has negotiated more beneficial tax treaties than the ultimate lender (see Tables A and B, above, for withholding tax rates).

Royalties

Article 12 — Royalties

1. Royalties arising in a contracting state and paid to a resident of the other contracting state shall be taxable only in that other state if such resident is the beneficial owner of the royalties.

2. The term 'royalties', as used in this article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial, or scientific experience.

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a contracting state, carries on business in the other contracting state in which the royalties arise, through a permanent establishment situated therein, or performs in that other state independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of article 7 or article 14, as the case may be, shall apply.

4. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed on by the payer and the beneficial owner in the absence of such relationship, the provisions of this article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each contracting state, due regard being had to the other provisions of this Convention.

6-93 Many countries entirely exempt royalties payable to Cypriot companies from withholding tax; among these are France, Ireland, Italy, Germany, and United Kingdom. Subject to the limitation of benefit provisions, it can be very tax effective to use a Cypriot company as the licensor of rights to companies within the above countries.

The spread of royalty income that needs to remain in Cyprus may be limited to, eg, 10 per cent and, although royalties emanating from Cyprus are normally subject to tax, if the rights are not exercised within Cyprus, the royalties may be paid tax-free to the non-resident head licensor. By having the spread taxed at standard Cypriot tax rates, the limitation of benefits article may not apply.

Capital Gains

> Article 13 — Capital gains
>
> 1. Gains derived by a resident of a contracting state from the alienation of immovable property referred to in article 6 and situated in the other contracting state may be taxed in that other state.
>
> 2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a contracting state has in the other contracting state or of movable property pertaining to a fixed base available to a resident of a contracting state in the other contracting state for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other state.
>
> 3. Gains from the alienation of ships or aircraft operated in international traffic, boats engaged in inland waterways transport, or movable property pertaining to the operation of such ships, aircraft, or boats, shall be taxable only in the contracting state in which the place of effective management of the enterprise is situated.
>
> 4. Gains from the alienation of any property other than that referred to in paragraphs l, 2, and 3, shall be taxable only in the contracting state of which the alienator is a resident.

6-94 Article 13 is included in all Cyprus double-taxation treaties, except that with the United Kingdom. In that treaty, there is no capital gains tax article which specifically allows capital gains arising from the sale of assets to be taxed in the country where the assets are situated. This is probably because neither Cyprus nor the United Kingdom extends the taxation of capital gains on the sale of real estate or shares in domestic companies to non-residents but, should the United Kingdom, for example, wish to introduce capital gains tax on the sale of real estate or United Kingdom company shares by non-residents, the treaty with Cyprus would prohibit the imposition of such tax.

In the remaining treaties entered into by Cyprus, capital gains on the sale of shares in companies resident in a treaty country would normally be subject to tax only in the country of residence of the alienator. However, where the company whose shares are being sold owns primarily real estate, some countries, eg, Canada, may nevertheless impose local taxation on the sale of the shares in such companies, and this right will be preserved within the relevant double-taxation treaty.

The new tax treaty with Russia follows the general rule and provides that gains from the alienation of property are only taxable in the state of which the alienator is a resident; to this rule there are the exceptions of article 13(1) for immovable property and article 13(2) for the property of a permanent establishment of a fixed base. Article 13(3), unlike the other two exceptions to the general rule, grants the

exclusive right to tax gains from the alienation of ships, aircraft, and related property to the state where the alienator is a resident.[101]

Personal Services

Independent Personal Services

> Article 14 — Independent personal services
>
> 1. Income derived by a resident of a contracting state in respect of professional services or other activities of an independent character shall be taxable only in that state unless he has a fixed base regularly available to him in the other contracting state for the purpose of performing his activities. If he has such a fixed base, the income may be taxed in the other state but only so much of it as is attributable to that fixed base.
>
> 2. The term 'professional services' includes especially independent scientific, literary, artistic, educational, or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists, and accountants.

6-95 Article 14 is similar to the 'business profits' article, stating that income from independent personal services will only be taxable if the individual has a fixed place available to him in the treaty country, and again only the amount that may be attributable to that fixed base[102] can be taxed.

Dependent Personal Services

> Article 15 — Dependent personal services
>
> 1. Subject to the provisions of articles 16, 18, and 19, salaries, wages and other similar remuneration derived by a resident of a contracting state in respect of an employment shall be taxable only in that state unless the employment is exercised in the other contracting state. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other state.
>
> 2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a contracting state in respect of an employment exercised in the other contracting state shall be taxable only in the first-mentioned state if:
>
> (a) the recipient is present in the other state for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned, and

101 This is in line with the taxation of income from the operation of ships, aircraft, and vehicles in international transport.

102 Unlike 'permanent establishment', which has an extensive definition in article 5, 'fixed base' is not defined, save in paragraph 4 of the Commentary, which states that it would cover, for instance, a physician's consulting room or the office of an architect or a lawyer.

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other state, and

(c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other state.

3. Notwithstanding the preceding provisions of this article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the contracting state in which the place of effective management of the enterprise is situated.

6-96 Article 15(1) establishes the general rule for the taxation of income from employment (other than pensions), ie, that such income is taxable in the state where the employment is actually exercised.

Article 15, however, does not prevent the country in which the individual is resident from taxing income earned in the treaty country but merely permits the treaty country to impose tax if the individual is present there for more than 183 days and in accordance with the other provisions above. As described elsewhere, individuals may benefit from the special concessions given by Cyprus so that Cypriot taxation is effectively limited to a maximum of four per cent. Article 15 becomes very important, therefore, to ensure liability in Cyprus at low rates of taxation, with exemption in the treaty country where such income is subject to a foreign tax based on worldwide income, eg, Norway.

Directors' Fees

Article 16 — Directors' fees

Directors' fees and other similar payments derived by a resident of a contracting state in his capacity as a member of the board of directors of a company which is resident of the other contracting state may be taxed in that other state.

6-97 Article 16 is expressed to override the general rule for the taxation of remuneration for the dependent personal services in article 15.[103]

103 Article 16 applies to fees received by the taxpayer as a member of the board of directors. It does not apply to fees or any other remuneration received in any other capacity. Saunders, *Principles of Tax Planning* (2nd ed, 1980).

Artists and Athletes

Article 17 — Artists and athletes

1. Notwithstanding the provisions of articles 14 and 15, income derived by a resident of a contracting state as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as an athlete from his personal activities as such exercised in the other contracting state, may be taxed in that other state.

2. Where income in respect of personal activities exercised by an entertainer or an athlete in his capacity as such accrues not to the entertainer or athlete himself, but to another person that income may, notwithstanding the provisions of articles 7, 14, and 15, be taxed in the contracting state in which the activities of the entertainer or athlete are exercised.

6-98 Paragraph 2 of the OECD Model article 17 is an article added to the 1963 Model Convention, thereby eliminating various tax avoidance techniques by artists and athletes. The importance of article 17 in Cyprus' treaties lies in the case of foreign artists and athletes being employed by a Cypriot international business company for performances outside Cyprus and, more particularly, in treaty countries.

From an analysis of the respective provisions of Cyprus' double-taxation treaties, it appears that in the case of certain countries, the income of individuals resident in Cyprus is not taxable in such countries when performing there.

Pensions

Article 18 — Pensions

Subject to the provisions of paragraph 2 of article 19, pensions and other similar remuneration paid to a resident of a contracting state in consideration of past employment shall be taxable only in that state.

6-99 Persons retiring to Cyprus may have, in addition to other tax advantages which exist in Cyprus, the possibility of availing themselves of Cyprus' treaties to obtain reduced tax on pensions received from abroad and on foreign investment income (including royalties), and this both in Cyprus and in the respective treaty country.

Government Service

Article 19 — Government service

1. (a) Remuneration, other than a pension, paid by a contracting state or a political subdivision or a local authority thereof to an individual in respect of services rendered to that state or subdivision or authority shall be taxable only in that state.

(b) However, such remuneration shall be taxable only in the other contracting state if the services are rendered in that state and the individual is a resident of that state who:

(i) is a national of that state, or

(ii) did not become a resident of that state solely for the purpose of rendering the services.

2. (a) Any pension paid by, or out of funds created by, a contracting state or a political subdivision or a local authority thereof to an individual in respect of services rendered to that state or subdivision or authority shall be taxable only in that state.

(b) However, such pension shall be taxable only in the other contracting state if the individual is a resident of, and a national of that state.

3. The provisions of articles l5, 16, and l8 shall apply to remuneration and pensions in respect of services rendered in connection with a business carried on by a contracting state or a political subdivision or a local authority thereof.

Students

Article 20 — Students

Payments which a student or business apprentice who is, or was immediately before visiting a contracting state, a resident of the other contracting state and who is present in the first-mentioned state solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that state, provided that such payments arise from sources outside that state.

6-100 The rule established in article 20 concerns certain payments received by students or business apprentices for the purpose of their maintenance, evaluation, or training. All such payments received from sources outside the state in which the student or business apprentice concerned is studying will be exempted from tax in that state.

Other Income

Article 21 — Other income

1. Items of income of a resident of a contracting state, wherever arising, not dealt with in the foregoing articles of this Convention shall be taxable only in that state.

2. The provisions of paragraph 1 shall not apply to income other than income from immovable property as defined in paragraph 2 of article 6, if the recipient

of such income, being a resident of a contracting state, carries on business in the other contracting state through a permanent establishment situated therein or performs in that other state independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of article 7 or article 14, as the case may be, shall apply.

6-101 Article 21 provides a general rule relating to income not dealt with in the foregoing articles, and it should be carefully noted. If an item of income is not expressly mentioned in the preceding double-taxation treaty articles, tax on it may only be levied by the country in which the recipient is resident; without the limitation of relief article, this could mean that, even though income may not be subject to tax at source in the other country, it is still exempt from tax in that country.[104] It should be noted that the Protocol to the Cyprus–United Kingdom treaty, concluded in 1980, excludes income paid out of trusts from article 21.

Capital

Article 22 — Capital

1. Capital represented by immovable property referred to in article 6, owned by a resident of a contracting state, and situated in the other contracting state, may be taxed in that other state.

2. Capital represented by movable property forming part of the business property of a permanent establishment which an enterprise of a contracting state has in the other contracting state or by movable property pertaining to a fixed base available to a resident of a contracting state in the other contracting state for the purpose of performing independent personal services, may be taxed in that other state.

3. Capital represented by ships and aircraft operated in international traffic and by boats engaged in inland waterways transport, and by movable property pertaining to the operation of such ships, aircraft, and boats, shall be taxable only in the contracting state in which the place of effective management of the enterprise is situated.

4. All other elements of capital of a resident of a contracting state shall be taxable only in that state.

104 The scope of article 21 is not confined to income arising in a contracting state; it also extends to income from other states.

Prevention of Double Taxation

Exemption Method

Article 23A — Exemption method

1. Where a resident of a contracting state derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other contracting state, the first-mentioned state shall, subject to the provisions of paragraphs 2 and 3, exempt such income or capital from tax.

2. Where a resident of a contracting state derives items of income which, in accordance with the provisions of articles 10 and 11, may be taxed in the other contracting state, the first-mentioned state shall allow as a deduction from the tax on the income of that resident an amount equal to the tax paid in that other state. Such deduction shall not, however, exceed that part of the tax, as computed before the deduction is given, which is attributable to such items of income derived from that other state.

3. Where in accordance with any provision of the Convention income derived or capital owned by a resident of a contracting state is exempt from tax in that state, such state may nevertheless, in calculating the amount of tax and the remaining income or capital of such resident, take into account the exempted income or capital.

Credit Method

Article 23B — Credit method

1. Where a resident of a contracting state derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other contracting state, the first-mentioned state shall allow:

(a) as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in that state;

(b) as a deduction from the tax on the capital of that resident, an amount equal to the capital tax paid in that other state.

Such deduction in either case shall not, however, exceed that part of the income tax or capital tax, as computed before the deduction is given, which is attributable, as the case may be, to the income or the capital which may be taxed in that other state.

2. Where in accordance with any provision of the Convention income derived or capital owned by a resident of a contracting state is exempt from tax in that state, such state may nevertheless, in calculating the amount of tax on the remaining income or capital of such resident, take into account the exempted income or capital.

6-102 Article 23 is one of the most important articles, and it deals with the actual mechanics of the operation of double-taxation treaties.[105]

One of the basic objectives of a double-taxation treaty is to prevent income being taxed in two countries, and it is article 23 which provides for the method by which such double taxation is avoided. Normally, one of two methods is adopted, the exemption method or the credit method.[106] The Cyprus–United Kingdom treaty contains the standard credit clauses, and it should be noted in article 25(5) of that treaty that the definition of Cypriot tax payable includes tax which would have been payable but for certain exemptions or reductions of tax granted in accordance with the Cypriot tax laws as itemised.

Cypriot companies receiving income from abroad in the form of dividends are normally allowed to credit foreign taxes against Cypriot tax due on such income if the income emanates from a treaty country, but its treaty partner may allow the exemption method in respect of dividend income received from Cyprus, for example, Canada, Czech Republic, and Germany (for dividends from a 25 per cent-plus holding in a Cypriot company). Some countries, such as Norway and Czech Republic, allow exemption with progression for certain income, meaning that the income is brought into charge for the purposes of calculating the graduated rate of tax due in Norway and Czech Republic, but the income is exempt from liability at this tax rate.

The new tax treaty with Russia provides that double taxation is eliminated by giving a credit of the tax withheld in the other state against the tax payable in the country of the recipient of the income. However, the tax credit cannot exceed the amount of the tax payable in the country of residence of the recipient. In the case of Cyprus, in respect of dividend income from Russia, in addition to the Russian withholding tax, tax credit is given for the underlying tax on the profits out of which the dividends are paid.

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105 According to the Commentary, article 23 deals with so-called juridical double taxation, where the same income or capital is taxable in the hands of the same person by more than one state. This case must be distinguished from so-called economic double-taxation, ie, where two different persons are taxable in respect of the same income or capital. If two states wish to solve problems of economic double taxation, they must do so in bilateral negotiations.

106 Demetriades, *Cyprus Double Tax and Other Treaties* (1989), at pp 1 and 3: 'Exemption method: The reference in the book in the case of some of the Treaties that, for elimination of double taxation, the exemption method is basically applied, means that in such cases of contracting states does not tax at all certain types of income if the Treaty provides that such income "may be taxed" in the other contracting state, even if, in fact, it is not so taxed in the latter state. The use of the exemption method is advantageous for individuals or companies who would have otherwise been taxable in Cyprus but for tax incentives, because the use of the above method in the other contracting state would result in no tax in such other state as well. Tax credit: The provision in Tax Treaties for avoidance of double taxation, by virtue of which tax paid in one contracting country is credited against and, therefore, deducted from the tax payable in the other country'.

Moreover, tax paid in Cyprus on income or capital which also is taxable in Russia is deducted from tax payable in Russia on the same income or capital. In Russia, the credit method has been adopted as the method of choice to eliminate double taxation. Article 23(3) contains tax-sparing credit provisions which allow for a credit to be granted in Cyprus in respect of Russian taxes which Russia could have imposed but which the Russian taxpayer has been spared due to the incentive legislation.

Special Provisions

Non-Discrimination

Article 24 — Non-discrimination

1. Nationals of a contracting state shall not be subjected in the other contracting state to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other state in the same circumstances are or may be subjected. This provision shall, notwithstanding the provisions of article 1, also apply to persons who are not residents of one or both of the contracting states.

2. The term 'nationals' means:

(a) all individuals possessing the nationality of a contracting state;

(b) all legal persons, partnerships, and associations deriving their status as such from the laws in force in a contracting state.

3. Stateless persons who are residents of a contracting state shall not be subjected in either contracting state to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of the state concerned in the same circumstances are or may be subjected.

4. The taxation on a permanent establishment which an enterprise of a contracting state has in the other contracting state shall not be less favourably levied in that other state than the taxation levied on enterprises of that other state carrying on the same activities. This provision shall not be construed as obliging a contracting state to grant to residents of the other contracting state any personal allowances, reliefs, and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

5. Except where the provisions of paragraph 1 of article 9, paragraph 6 of article 11, or paragraph 4 of article 12 apply, interest, royalties, and other disbursements paid by an enterprise of a contracting state to a resident of the

> other contracting state shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned state. Similarly, any debts of an enterprise of a contracting state to a resident of the other contracting state shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned state.
>
> 6. Enterprises of a contracting state, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other contracting state, shall not be subjected in the first-mentioned state to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned state are or may be subjected.
>
> 7. The provisions of this article shall, notwithstanding the provisions of article 2, apply to taxes of every kind and description.

6-103 Article 24 is designed to prevent one treaty country from imposing discriminatory taxation on the nationals or businesses of the other treaty country. As such, the application and objectives of the article are fairly limited; it is not designed to give more favourable treatment to nationals of the other treaty country nor is the article aimed at preventing other forms of discriminatory taxation, provided such discrimination is not based on nationality.

While the benefits of a double-taxation treaty are generally reserved for residents of the treaty countries, the non-discrimination article in contrast applies to nationals, wherever resident.[107]

Article 24 basically prevents treaty residents from being treated in a more unfair way in the other state than local residents would be. If the Cyprus–France double-taxation treaty did not contain a specific provision in article 10(7), allowing the French to tax the profits of a French branch of a Cypriot company at a rate of tax of 10 per cent in addition to the standard corporate tax rate, the non-discrimination article could prevent such taxation.

It should be noted that, unlike most other treaty provisions, the non-discrimination article is based on the citizenship or nationality of the taxpayer, not his residence as defined in article 4. It also is worth noting that the typical 'non-discrimination' article applies not only to the taxes covered by the treaty, but taxes of every kind imposed in the particular country.

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107 The historical origin of the non-discrimination article in modern double-taxation treaties is to be found in the 'equal treatment' or 'national treatment' clause in the treaties of Friendship, Commerce, and Navigation dating from the 17th century, the earliest being between Great Britain and Portugal (1654), Denmark (1660), and Spain (1667).

Mutual Agreement Procedure

Article 25 — Mutual agreement procedure

1. Where a person considers that the actions of one or both of the contracting states result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those states, present his case to the competent authority of the contracting state of which he is a resident or, if his case comes under paragraph 1 of article 24, to that of the contracting state of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other contracting state, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the contracting states.

3. The competent authorities of the contracting states shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They also may consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the contracting states may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When it seems advisable to reach agreement to have an oral exchange of opinions, such exchange may take place through a commission consisting of representatives of the competent authorities of the contracting states.

6-104 Article 25 provides the basis on which disputes between taxpayers and the Revenue Authority may be settled. In the definitions clause of the treaty, a competent authority would be defined, in the case of Cyprus, as the Minister of Finance or his authorised representative. The treaty partner would also have a competent authority to arrive at, for example, an allocation of profits where there is a dispute as to the amount of profits that should be taxed in each country.

Exchange of Information

Article 26 — Exchange of information

1. The competent authorities of the contracting states shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the contracting states concerning taxes covered by

> the Convention in so far as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by article 1. Any information received by a contracting state shall be treated as secret in the same manner as information obtained under the domestic laws of that state and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
>
> 2. In no case shall the provisions of paragraph 1 be construed so as to impose on a contracting state the obligation:
>
> (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other contracting state;
>
> (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other contracting state;
>
> (c) to supply information which would disclose any trade, business, industrial, commercial, or professional secret or trade process or information, the disclosure of which would be contrary to public policy (*ordre publique*).

6-105 The 'exchange of information' article permits controlled information exchange between the tax administrations of the contracting states. This information is normally given on request, automatically, or spontaneously.[108]

However, it is generally the case that the information exchanged can only be in respect of taxes covered by the agreement. In addition, exchange is possible only where it is necessary to:

- Secure the correct application of the provisions of the agreement; or
- Secure the correct application of the domestic laws of either contracting state.

Diplomatic Agents and Consular Officers

> Article 27 — Diplomatic agents and consular officers
>
> Nothing in this Convention shall affect the fiscal privileges of diplomatic agents or consular officers under the general rules of international law or under the provisions of special agreements.

108 The Organisation for Economic Co-operation and Development prepared a standard form for exchange of information and the *Ad Hoc* Group of Experts on International Co-operation in tax matters of the United Nations issued guidelines for international cooperation against tax evasion, including guidelines on exchange of information.

Territorial Extension

Article 28 — Territorial extension

1. This Convention may be extended, either in its entirety or with any necessary modifications (to any part of the territory of (state A) or of (state B) which is specifically excluded from the application of the Convention to any state or territory for whose international relations (state A) or (state B) is responsible, which imposes taxes substantially similar in character to those to which the Convention applies. Any such extension shall take effect from such date and subject to such modifications and conditions, including conditions as to termination, as may be specified and agreed between the contracting states in notes to be exchanged through diplomatic channels or in any other manner in accordance with their constitutional procedures.

2. Unless otherwise agreed by both contracting states, the termination of the Convention by one of them under article 30 shall also terminate, in the manner provided for in that article, the application of the Convention (to any part of the territory of (state A) or of (state B) to any state or territory to which it has been extended under this article.

Final Provisions

Entry into Force

Article 29 — Entry into force

1. This Convention shall be ratified and the instruments of ratification shall be exchanged at . . . as soon as possible.

2. The Convention shall enter into force on the exchange of instruments of ratification and its provisions shall have effect:

(a) (in state A): . . .

(b) (in state B): . . .

Termination

Article 30 — Termination

This Convention shall remain in force until terminated by a contracting state. Either contracting state may terminate the Convention, through diplomatic channels, by giving notice of termination at least six months before the end of any calendar year after the year . . . In such event, the Convention shall cease to have effect:

(a) (in state A): . . .

(b) (in state B): . . .

Specific Provisions Included in Cyprus Double-Taxation Treaties

Limitation of Benefits

6-106 The 1980 Protocol to the Cyprus–United Kingdom treaty brought in a new article 24a (excluded persons), which prevents tax credits on dividends and reduced rates of withholding tax on interest and royalties from applying to companies entitled to special tax benefits under sections 8(w) and 28A of the Cyprus Income Tax Laws of 1961, as amended. In view of the importance of this exclusion, sections 8(w) and 28A are reproduced below.

> Section 8(w)
>
> There shall be exempt from tax 90 per centum of the profits or dividends, imported into the Republic, of any business carried on outside the Republic by a Cypriot residing in Cyprus or by a company which is controlled by Cypriots having an interest of not less than 15 per centum in such business.
>
> Section 28A
>
> 1. In the case of a company incorporated in Cyprus, as well as in the case of a company registered under section 347 of the Companies Law and having the management and control of its business in Cyprus, the shares of which belong directly or indirectly exclusively to aliens, and which derives income from sources outside the Republic,
>
> (a) from the carrying on of any business the object of which lies outside the Republic; or
>
> (b) from the investment of capital in bonds, shares, debentures, or loans of any nature; or
>
> (c) from any royalties; or
>
> (d) from immovable property.
>
> Tax is imposed on the chargeable income, after deducting any tax which is payable outside the Republic, at rates of tax equal to one-tenth of the rates set out in paragraph 2 of the Second Schedule, and the provisions of sections 42 and 43 do not apply.
>
> 2. For the purposes of paragraph (b) of sub-section (1), the income from the investment of capital is deemed to emanate from sources outside the Republic if, notwithstanding the place of investment and the parties to the relevant agreement, such capital is used for activities outside the Republic.
>
> 3. In the case of a dividend which emanated directly or indirectly from the income referred to in sub-section (1), no tax is imposed in addition to the amount deducted by the company by virtue of section 35, and no amount of tax is returned by virtue of section 38 of the Assessment and Collection of Taxes Law.

> 4. The provisions of this section shall be in force for a period of ten years from the coming into operation of Law 15 of 1977.
>
> Provided that the Council of Ministers may, after the lapse of ten years, by its decision published in the *Official Gazette* of Cyprus, prolong such provisions for any further period.

6-107 It may be noted that Cypriot companies which are not exclusively owned by non-residents and which do not, therefore, have international business company status are not prevented from enjoying the benefits under the Cyprus–United Kingdom double-taxation treaty. Moreover, the limitations of benefits article only applies to the dividend, interest, and royalty articles and not to the other very important provisions of the Cyprus–United Kingdom double-taxation treaty, including the permanent establishment and business profits articles, the shipping and air transport articles, and the personal services articles.

Many of the double-taxation treaties entered into by Cyprus contain similar limitation of benefits clauses (referred to below as excluded persons clauses) and, because the provisions of a treaty may be totally inapplicable in view of this clause, each treaty is examined in turn, as follows:

- Austria — There is no excluded persons clause.
- Belarus — There is no excluded persons clause.
- Belgium — Article 29(3) states that the provisions on withholding taxes on dividends, interest, and royalties do not apply to persons entitled to special income tax benefits under income tax law provisions, sections 5(2)(c)(I), 8(w) and (y), and 28A.
- Bulgaria — There is no excluded persons clause.
- Canada — Article 29(3) states that the entire double-taxation treaty does not apply to companies entitled to any special tax benefit under sections 8(w) and 28A of the new Tax Laws 1961–1977 or any substantially similar law subsequently introduced. This is a very sweeping provision but, again, this does not affect onshore companies which are fully taxed, but under Cypriot unilateral law may be allowed to receive certain types of income, eg, capital gains, without being subject to Cypriot tax; such companies may still benefit from the treaty.[109]
- China — There is no excluded persons clause.
- Czech Republic — There is no excluded persons clause.

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109 For example, under Canadian tax law, the sale of shares in a Canadian subsidiary or other private corporation is considered a disposition of taxable Canadian property and is therefore subject to capital gains taxation in Canada. However, article 13(5) states that, provided the underlying assets of the Canadian company are not real estate, a Cypriot resident company will not be subject to Canadian tax on the sale of shares. In this way, the double-taxation treaty may still be useful without invoking either Canadian or Cypriot taxation, and the 'limitation of relief' article (article 22), relating to remittances, also is not relevant.

- Denmark — There is no excluded persons provision.
- Egypt — There is no excluded persons provision.
- France — Article 13 of the Cyprus–France treaty includes an excluded persons provision which restricts the application of the dividend, interest, and royalty articles (articles 10, 11, and 12) to companies in which non-residents do not have directly or indirectly a substantial interest, and to companies which do not have, by virtue of special measures, a tax rate levied which is substantially lower than the rate which is usually imposed on the profits of the companies of that country. Again, article 13 only relates to the dividend, interest, and royalty withholding taxes and not the remaining articles in the treaty, such as article 24 on capital which prevents French tax being imposed on the capital of a Cypriot resident if the property is not real estate or allocated to a permanent establishment.
- Germany — There is no excluded persons provision as such but, where Cypriot international business companies are owned by German residents, instead of the exemption method provided under the elimination of the double-taxation article (article 23) of the Cyprus–Germany treaty, the 1974 Protocol to the treaty provides that the credit method of that article should be adopted. In fact, there is a requirement under the Protocol for the German recipient to prove that the Cypriot company earns its profits from business activities within Cyprus, which excludes the possibility of using Cypriot international business companies. Nevertheless, all the remaining articles of the treaty are relevant, and Table A, above, shows that the dividend withholding tax for holdings of less than 25 per cent is reduced to 15 per cent, the interest withholding tax is reduced to 10 per cent, and the royalty withholding tax is reduced to zero per cent with the exception of cinematograph and television film royalties.
- Greece — There is no excluded persons provision.
- Hungary — There is no excluded persons provision.
- India — There is no excluded persons provision.
- Ireland — There is no excluded persons provision.
- Italy — There is no excluded persons provision.
- Kuwait — There is no excluded persons provision.
- Malta — There is no excluded persons provision.
- Mauritius — There is no excluded persons provision.
- Norway — There is no excluded persons provision.
- Poland — There is no excluded persons provision.
- Romania — There is no excluded persons provision.
- Russia — There is no excluded persons provision.
- Slovak Republic — There is no excluded persons provision.
- South Africa — There is no excluded persons provision.
- Syria — There is no excluded persons provision.
- Sweden — There is no excluded persons provision.
- Thailand — There is no excluded persons provision.
- United Kingdom — See above.

- United States — Article 26 of the Cyprus–United States treaty contains a 'limitation on benefits' article which is very comprehensive and which restricts relief from taxation under the double-taxation treaty to Cypriot companies which are more than 75 per cent beneficially owned, directly or indirectly, by one or more Cypriot residents, and to companies whose income is not used in substantial part, directly or indirectly, to meet liabilities to non-residents of either country. The use of various Cypriot conduit companies receiving income from the United States and paying out such income to third parties is therefore restricted, although article 26(2) states that the limitation article does not apply if the principal purpose of the structure is not to obtain benefits under the tax treaty.
- The old USSR treaty, which is still in force with most CIS countries — There is no excluded persons clause.

Indirect Investment

In General

6-108 For Cyprus, as well as for many other developing countries, foreign investment, whether direct, indirect, or in or through Cyprus, means importation of financial capital and human resources as well as technology, know-how, expertise, and capital and, therefore, is greatly encouraged. The following part of this Cap deals with indirect investment, ie, 'international business activities'.[110]

Definition of 'International Business'

6-109 In terms of the existing provisions of the Income Tax Laws,[111] a company must comply with the two following requirements to enjoy international status:

- Its shares must belong directly or indirectly exclusively to non-Cypriots; and
- Its income must be derived from non-Cypriot-based sources.

110 The Council of Ministers, in exercising its powers under the proviso of section 28A(4) of the Income Tax Laws 1961–1998, decided to extend the operation of section 28A for a further period of five years beginning on 1 January 2007. This means that the tax legislation covering international business activities will operate until 31 December 2011 (*Government Gazette*, Number 3319, 16 April 1999, Supp IV, 34).

111 Article 28A reads as follows: '(1) In the case of a company incorporated in Cyprus, as well as in the case of a company registered under section 347 of the Companies Law and having the management and control of its business in Cyprus, the shares of which belong, directly or indirectly, exclusively to aliens and which derives income from sources outside the Republic, from the carrying on of any business the object of which lies outside the Republic; or from the investment of capital in bonds, shares, debentures or loans of any nature; or from any royalties; or from immovable property, tax is imposed on the chargeable income, after deducting any tax which is payable outside the Republic, at the rate of 4.25 *per centum* and the provisions of sections 42 and 43 do not apply'.

6-110 In other words, an international business entity, whether a company, a partnership, or a branch of an overseas company, must be wholly owned by foreigners and must be exclusively engaged in business activities carried on outside Cyprus.[112]

Today, international business entities in Cyprus can operate in the following legal forms, each of which is discussed in further detail below:

- Limited company;
- Branch of an overseas company; and
- Partnership.

6-111 The numerous tax advantages enjoyed by international business companies are critical to their profit potential, and it is of the utmost importance to ensure that their international business status is not jeopardised by conducting prohibited local business unintentionally. The result would be catastrophic for many reasons, not least because corporate tax would jump from 4.25 per cent of net profit to the 20 per cent (or 25 per cent, as the case may be) rate paid by local companies. If the international status of a proposed business transaction is doubtful, it is recommended that the authorities be consulted before taking action.

The following are examples of local activities in which international business entities may safely engage:

- Managing the affairs of the company, including employing staff and buying or leasing business or residential premises;
- Dealing with and executing orders and payments in respect of foreign goods or customers, including arranging orders for local goods by foreign customers, provided this is done through a local exporter;
- Drawing and designing plans and programmes in respect of construction activities taking place abroad;
- Editing and printing publications for distribution abroad;
- Engaging in the activities of international banking units or captive insurance companies;
- Acting as ships' agents or managers, provided that no local shipping work is undertaken; and
- Investing in shares of companies quoted on the Cyprus Stock Exchange.[113]

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112 In view of the European Union accession negotiations and particularly the European Union Code of Conduct and the Organisation for Economic Co-operation and Development Report on Harmful Tax Competition, Cyprus should consider re-designing the concept of international business entities. Andreas Neocleous & Co, 'Cyprus Offshore Regime', *International Financial Law Review* (July 1998).

113 International business companies investing in shares of quoted companies not only maintain their international status but, in addition, they enjoy tax exemption on dividend income from Cyprus Stock Exchange quoted companies or on profit made from the disposal of such shares; and like any other local investor, a 30 per cent deduction for tax purposes of the cost of the acquisition in the shares of first issue of Cyprus Stock Exchange quoted companies under certain conditions.

Legal Requirements for International Business Limited Companies

6-112 International business limited companies are by far the most popular legal entities.[114]

The legal requirements for the registration of a limited company in Cyprus are based on the Companies Law, Cap 113, which is almost identical to the United Kingdom Companies Act of 1948.

The registration procedure for such a company is similar to that applicable to a local limited company except that the prior approval of the Central Bank is required. As in the case of any other international business entity, there are certain requirements which must be satisfied before such approval is granted, namely:

- Confidential bank or other references for the shareholders must be sent to the Central Bank;[115] and
- All the shares in the company must belong, directly or indirectly, to foreigners.[116]

6-113 The minimum paid-up capital of CY £1,000 for international business companies without a fully fledged office in Cyprus and CY £10,000 for those that will employ expatriate staff or enjoy duty-free benefits in Cyprus. International business companies intending to render insurance, banking, financial, or trustee services to the public at large are subject to additional capital and other requirements. International business companies may express their authorised capital in foreign currency provided it exceeds the equivalent of CY £100,000 in the case of private companies and CY £500,000 in the case of public companies.

The approval of the Central Bank is readily granted, but the following conditions are usually imposed:

- The objects of the company must be confined solely to business outside Cyprus;
- All local expenses of the company must be covered from funds imported from external sources; and
- The company may not obtain finance from local sources.[117]

6-114 The company must undertake to submit to the Central Bank its annual accounts as at the end of its financial year, duly certified by accountants practising

114 Tornaritis, 'Notes on the Law of Cyprus Relating to Offshore Operations, Shipping Operations, and Shipping Companies, Foreign Investments in Cyprus and Transit Trade', *Cyprus Law Review* (July–September 1984).

115 The following wording is usually considered to be satisfactory for an individual: 'We would like to confirm that Mr/Mrs/Ms/Dr . . . has held a properly conducted account with us for many years and we consider him to be respectable, trustworthy, and good for normal business engagements' and, in the case of a company, 'We hereby confirm that (name of company) is well known to us and that its shareholders and directors have been known to us as clients for many years. We consider them to be respectable, trustworthy and good for normal business engagements'.

116 However, residents can act as nominees for foreigners where anonymity is desired.

117 International banking units (IBUs) are not considered to be local sources.

in Cyprus and authorised by the Minister of Finance. The accounts also should bear a confirmation from the auditors that the company did not carry out any transactions with residents other than local payments for administrative purposes.

Before initiating the incorporation procedure, it is advisable to ascertain that the proposed name of the company is acceptable to the Registrar of Companies. This will avoid complications if the proposed name is either not suitable or is already being used by another company. On applying to the Registrar for approval of a name, it is recommended that two or three possible names be submitted to avoid unnecessary delays. Applicants should bear in mind that a name is not likely to be authorised if it:

- Is similar to the name of an existing company;
- Is considered misleading or confusing;
- Implies links with royalty; or
- Includes the word 'Imperial', 'National', 'Corporation', 'Commonwealth', or 'Co-operative'.[118]

6-115 Where a subsidiary company proposes to adopt the name of its parent company, the latter must furnish its written consent for the use of its name.[119] Once the approval of the Central Bank has been obtained, the next step is the registration of the company. For a company to be registered,[120] the following documents and information must be filed with the Registrar of Companies:

- The memorandum and articles of association;[121]
- A list of the directors and the secretary's name;[122] and

118 'The Central Bank will not approve, under the Exchange Control Law, names containing undesirable words such as Asset Management/Manager, Assurance, Bank/Banking, Broker(s)/Brokerage, Capital Credit, Currency(ies), Custodian(s)/Custody, Dealer(s) /Dealing, Deposit(s), Derivative(s), Exchange, Fiduciary(ies), Finance/Financial, Fund(s), Future(s), Insurance, Investment(s), Lending/Loan(s)/Lender(s), Option(s), Pension(s), Portfolio(s), Reserves, Savings, Security(ies), Stock, Trust/Trustee(s), except where the company will offer financial services to the public at large.' Central Bank Letter to the Registrar of Companies (23 September 1999).

119 The wording of the consent to be similar to the following: 'We the undersigned (name of company) with registration number . . . hereby confirm that we have no objection to the registration of a Limited Liability Company with the name . . .'.

120 By virtue of the Companies (Amendment) Law of 2000, Law 2(1) of 2000, it is now possible to register a private limited-liability company with only one shareholder.

121 The memorandum must state, among other things, the company's name and objects and the number and the value of the shares authorised to be issued. The articles of association generally govern the company's internal procedures and functions.

122 A minimum of one director is required but there is no maximum. Although there is no necessity to have local directors, this is advisable especially where the provisions of a double-taxation treaty are to be utilised, and it is important to show that the company is effectively managed and controlled from Cyprus and that all company decisions are taken in Cyprus. In addition, for practical reasons, it is recommended that the secretary is a Cyprus resident.

- The address of the company's registered office, which will be the place at which all official notices are served.

6-116 To avoid delays, the company is usually registered through nominees pending receipt of the bank references for the beneficial shareholders and the permission of the Central Bank. Certain procedures are available to protect the anonymity of shareholders where this is desired. However, the Central Bank will require full disclosure of the true identity of shareholders, although this information will be treated as strictly confidential.

Once all the required documents have been lodged with the Registrar of Companies and he has satisfied himself that they are in order, he will issue a Certificate of Incorporation. The formation and registration procedures, including printing of all official stationery and opening the necessary bank accounts can usually be completed within a period of 14 days, whereupon the company can start operating immediately. In the event that a company is urgently required, there exists a special accelerated incorporation procedure at an extra cost whereby all relevant procedures are completed within a maximum time of two days.

Incorporation costs are reasonable, and this assists in keeping corporate overheads as low as possible. Total formation costs for a company with an authorised share capital of CY £5,000, including lawyers' and accountants' fees, stamp duty, printing and stationery costs, and other miscellaneous expenses, are likely to be as low as CY £1,250. Stamp duty is paid on a sliding scale, and it is calculated on the amount of the authorised share capital.[123]

Fixed annual running expenses in respect of directors' and secretarial fees, registered office fees, trustee company fees, and other miscellaneous expenses are extremely competitive and range between CY £500 and CY £2,000, depending on the type of services required and the nature of operations.

Types of International Business Companies

In General

6-117 Apart from international banking units, international captive insurance companies, and shipping companies, which are discussed below, other types of international companies that can be registered in Cyprus are the following, although the list is not exhaustive.

Construction and Engineering Companies

6-118 Construction and engineering companies are used extensively for construction operations in the Middle Eastern and CIS countries, and they are particularly popular with Dutch, British, American, Greek, and Yugoslavian interests.

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123 CY £125 for the first CY £10,000, plus £.30 for each £100 or part thereof.

Cyprus not only affords a greater degree of stability than most other Middle Eastern states but, by sensible use of the double-taxation treaties, maximum profit potential is ensured.

Employment Companies

6-119 Employment companies can be established with their main object as the provision or recruitment of labour for contract or other work carried on outside Cyprus.

This can be particularly advantageous to nationals of countries whose own tax laws provide that, wherever tax is paid in another country, their salaries can be remitted to their home countries without payment of any further local income tax. Belgian, Australian, Austrian, and French residents all fall within this category.

Headquarter Companies

6-120 Headquarter companies are often used by multinational companies wishing to have centralised regional management control.

Cyprus has become a popular base for centralising the activities of American, European, and Far Eastern multinational entities, and it is attractive to companies incorporated in distant tax haven states but having interests in the Gulf, Middle Eastern, and Central and East European regions.

Invoicing Companies

6-121 Invoicing companies may be used for the re-invoicing of materials, goods, and services from any country and to any destination. Administration is relatively easy as all that is required is an office base with a competent manager to arrange transactions.

Trade and transit depot activities may be facilitated by use of a bonded warehouse, and the Cyprus Chamber of Commerce is always available to assist with the issue of the necessary certificates.

General Trading Companies

6-122 General trading companies represent the majority of all international business entities incorporated in Cyprus.

Such companies may be used for transit trade activities. Again, the Cyprus Chamber of Commerce will help with the issue or legalisation of any required certificates of origin.

Trust Companies

6-123 Trust companies may be used for managing trust funds held outside Cyprus or for the administration of pension funds. There is no fixed minimum capital requirement.

Holding and Investment Companies

6-124 Holding and investment companies provide for centralisation of a group's investments through a central overseas company whose management has the expertise to monitor and manage subsidiary companies in other countries. With effective tax planning, they may be beneficially used in other countries with which Cyprus has concluded double-taxation treaties.

Such companies are mostly used to hold participation in joint ventures particularly in Central European, Eastern European, and Middle Eastern countries, North Africa, China, and India so that dividend withholding taxes are reduced to a minimum and excess foreign tax credits are avoided and are not, therefore, lost to the group. Moreover, overseas dividends may be trapped by such companies and utilised for re-investment in further subsidiaries without the ultimate parent incurring domestic tax liabilities.

Shipping and Ship Management Companies

6-125 The shipping industry in Cyprus is growing steadily, and this kind of company is therefore becoming popular together with crew management companies.

German, Dutch, Greek, Scandinavian, British, Japanese, and Russian companies are particularly prominent in this field.

Finance Companies

6-126 Finance companies are particularly active in financing joint ventures or other acquisitions in countries with which Cyprus either has a double-taxation treaty or where either no, or very low, withholding tax is levied.

They also are used to reduce subsidiaries' taxable profits by means of interest charges made on loans receivable or to on-lend funds to entities within the same group or to non-related third parties at arm's length. Entities from Denmark, Ireland, Germany, Greece, Britain, The Netherlands, the United States, and Australia are particularly active in this area.

Printing and Publishing Companies

6-127 The low cost of local printing and an extensive telecommunications system are just two of the factors which make Cyprus an ideal location for this type of company.

Printing and typesetting of publications and books locally is permitted provided that they are distributed abroad. This type of entity is being increasingly used by American and Middle Eastern interests.

Royalty Companies

6-128 Cyprus' domestic tax system and laws, coupled with the network of double-taxation treaties, provide many opportunities for effective tax planning involving the crossborder routing of royalties, which is the usual income derived from the transfer or exploitation of intellectual and industrial property rights. A Cypriot intermediary royalty or licensing company can centralise a group's control over the intellectual property rights of its member companies and can cause the reduction or avoidance of foreign taxation on royalty income by receiving tax-deductible royalty payments from high tax countries subject to nil or reduced royalty withholding tax rates through applicable double-taxation treaties.

There is no Cypriot withholding tax on the payment of royalties by international business companies to any non-resident and, according to Cypriot Revenue practice, only a 10 per cent spread of the total royalties receivable will be taxable at the 4.25 per cent rate applicable to Cyprus international business companies.

Real Estate Companies

6-129 Real estate companies are used both for dealing in property and for investment purposes, and they can benefit greatly from the effective application of the relevant double-taxation treaty.

Middle Eastern, Danish, Swedish, French, and British interests are particularly active in this sphere.

Internet and E-Commerce Companies

6-130 The advent of the computer age, and in particular the Internet, has created a radical change in how business is done. An increasing number of companies are employing the capabilities of the web to increase their sales and reduce their overall costs, thus maximising their profitability. There is a growing number of companies who choose to host their e-commerce site or venture in Cyprus to take advantage of the beneficial tax regime, excellent telecommunications infrastructure, and intellectual property protection laws.

Electronic commerce business companies cannot only operate from Cyprus with minimum tax charges, but also take advantage of Cyprus' wide network of double-taxation treaties which may be extremely useful in the context of the internet server as a permanent establishment.[124]

124 Cyprus is in the process of organising 'high-tech parks' to attract such companies and generally high-tech companies to establish a base in Cyprus.

International Business Branches

6-131 Under the Companies Law, Cap 113, foreign companies may register a branch in Cyprus, provided that the approval of the Central Bank is obtained. Such approval is readily granted following receipt of satisfactory bank references for the foreign company. Once permission has been obtained, the following documents translated into Greek must be filed with the Registrar of Companies:

- Certified copy of the memorandum and articles of association, or the charter or other instrument defining the constitution of the company;
- Particulars of the directors and secretary of the company; and
- Name and address of at least one person resident in Cyprus who is authorised to accept service of notices on behalf of the company.[125]

6-132 For a branch to obtain international status and take advantage of the attendant benefits, it must comply with the following requirements:

- The shares in the company must belong, either directly or indirectly, to foreigners; and
- The business of both the company and the branch must be carried on outside the territory of Cyprus.

6-133 There is a distinct difference between international branches which have their management and control located in Cyprus and those which operate as brass-plate entities due to location of their management and control abroad. Although both are able to enjoy the usual benefits available to international entities, it is crucially important to distinguish the two as they are subject to entirely different tax rates and may even be subject to varying tax treatment in their home countries.

When the management and control of the activities of an international branch are located outside Cyprus, its net profits will be totally exempt from Cypriot tax. However, where the management and control of the branch are based in Cyprus, tax will be levied on its net profits at a rate of 4.25 per cent. Experience has shown that it is this tax element, when combined with the tax provisions in the country of origin, which determines whether it is advisable to locate branch management and control in Cyprus or not.

The registration costs of international business branches are relatively low and are likely to be in the region of CY £1,000, inclusive of the professional fees, stamp duty, and other miscellaneous expenses.

125 Company Law, Cap 113, ss 347 *et seq*.

International Business Partnerships

6-134 The international business partnership entity[126] is less popular for international operations although, in some cases, it may have certain tax advantages and uses, especially for American interests.

Partnerships are governed by the Partnership and Business Names Law, Cap 116, which is similar to the equivalent English law. As in the case of limited companies or branches, the registration of an international partnership follows a procedure similar to that for a local partnership. As with all other international legal entities, the prior consent of the Central Bank is required, and such approval will be granted on receipt of satisfactory bank references for the partners.

Once the Central Bank has given its permission, the partnership will have to apply to be registered with the Registrar of Companies. The procedures for registration have been designed to make this process as simple as possible, and it is effected by submission of the required return which must be written in Greek and must set out, *inter alia*, the following information:

- The name of the partnership;
- The objects of the partnership;
- The proposed duration of the partnership;
- The names and addresses of contemplated partners; and
- The extent to which partners are authorised to bind the partnership.

6-135 When a non-resident partner intends to work in Cyprus, he is required to apply to the Department of Immigration for a work permit. This must be deposited with the Registrar before registration. Unregistered partnerships are not recognised by law and may be subject to penalties. After registration, the Registrar must be informed of any subsequent changes in the constitution of the partnership.

In Cyprus, a distinction is drawn between two types of partnerships, ie, general partnerships and limited partnerships. In general partnerships, all partners have unlimited liability. In limited partnerships, some of the partners have unlimited liability, while the liability of the others is limited to the extent to which they have contributed to partnership capital.

The procedures for the formation of a partnership are relatively straightforward and, consequently, registration can be effected quickly. All formalities, including the opening of bank accounts, printing of stationery, and finalisation of other miscellaneous matters, can usually be completed within one week. The Registrar of Companies will ensure that the required Certificate of Registration is issued without delay. All the registration costs of an international business partnership,

126 Tornaritis, 'Notes on the Law of Cyprus Relating to Offshore Operations, Shipping Operations and Shipping Companies, Foreign Investments in Cyprus and Transit Trade', *Cyprus Law Review* (July–September 1984).

inclusive of professional fees, stamp duties, and other miscellaneous expenses, are in the region of CY £750.

International business partnerships enjoy all the benefits available to other international business entities. However, the partnership profits are not taxable in Cyprus either in the hands of the partners or the partnership.

Tax and Other Incentives for International Business Entities

Exemption or Reduced Income Tax Rates for International Business Entities

6-136 International business entities are subject to payment of minimal corporate income tax, as follows:

- International companies, irrespective of where management and control is exercised, are taxed at 4.25 per cent;[127]
- International branches whose management and control is based in Cyprus are taxed at 4.25 per cent, but pay no tax when management and control is located abroad;
- Partnerships, irrespective of where management and control is exercised, pay no income tax; and
- There is no withholding tax payable on the dividends of international entities.

6-137 Interest earned on foreign capital which is imported into Cyprus and deposited with any bank operating in Cyprus is tax exempt.[128]

Reduced Income Tax Rates for Foreign Investment Income

6-138 Foreign investment income remitted to Cyprus by foreign citizens or Cypriots previously resident abroad is tax exempt up to £2,000 *per annum*. Any amount in excess thereof is taxed at a rate of 5 per cent.

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127 'The Law of Cyprus does not distinguish between international and local companies and there is no definition of an international business company. The Income Tax Laws simply refer to companies that are taxed at the rate of 4.25 per cent if they are owned exclusively by non-residents and if they generate their income from activities outside Cyprus. If these two conditions co-exist, there is a legal presumption that the company is entitled to enjoy the concession of the lower tax rate of 4.25 per cent instead of the normal rate of 20 per cent. A similar tax concession also is available to the residents (individuals or companies) of Cyprus who generate their income from sources outside Cyprus. However, in this case the legal presumption does not exist and the Cypriots who are claiming the applicability of the lower tax rate have the onus to prove that their income emanates from sources outside Cyprus.' Andreas Neocleous, 'The Offshore Regime and Cyprus' Accession to the European Union', *Cyprus Business Guide* (1999).

128 If the investment is considered to contribute to the economic development of Cyprus, the Minister of Finance may exempt from tax interest earned on borrowed foreign capital invested in Cyprus.

Exemption from Estate Duty

6-139 Property in Cyprus will be exempt from payment of estate duty if it belonged to a person who was domiciled in Cyprus at the date of his death provided it was purchased with foreign capital imported into Cyprus and the deceased was permanently resident in a foreign country at any time before death.[129]

Exemption from Capital Gains Tax

6-140 No gain accrues to international business companies from the disposal of immovable property outside Cyprus. Capital gains tax is imposed on an indexed basis, only on gains on immovable property, or shares in companies deriving value from immovable property in Cyprus.

The tax is levied at the rate of 20 per cent on the proceeds less the cost of acquisition as adjusted by reference to the monthly retail price index.

Exemption from Stamp Duty

6-141 The documents and transactions of all international business entities are exempt from payment of stamp duty.[130]

Exemption from Value-Added Tax

6-142 Transactions effected by Cypriot international business companies are by definition outside Cyprus and therefore do not come within the ambit of value-added tax legislation.

Consequently, international business entities have neither to register for value-added tax purposes nor to charge value-added tax when supplying goods or services. However, they must pay value-added tax on their local expenditure except on their telephone bills.

Exemption from Exchange Control

6-143 International business entities, their foreign shareholders, and their foreign employees are permitted to maintain freely convertible foreign currency bank accounts in any currency in Cyprus and abroad.

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129 By Law 74(I) of 8 June 2000, the estate duty, otherwise known as inheritance tax, was abolished retrospectively from 1 January 2000.

130 The employment contracts of the expatriate personnel of international business companies, as well as the contracts of lease of offices, are not subject to stamp duty. Circular of Central Bank of Cyprus (14 January 1998).

International business entities maintaining an office in Cyprus and their expatriate employees are obliged to open a local disbursement current account (LDCA) with a local bank out of which payments to residents and living expenses in Cyprus are to be made.

Exemption from Social Insurance Contributions

6-144 International business entities and their foreign employees are fully exempt from payment of social insurance contributions. However, such contributions are payable in respect of local employees.

Duty-Free Facilities

6-145 Duty-free facilities are extended to international business entities and their expatriate personnel under item 0.1.18 of the Fourth Schedule to the Customs and Excise Duties Law, 1978. In accordance with the Law, duty-free relief is granted, on request, in respect of the following items:

- Motor vehicles, eg, saloon cars, sports cars, and station wagons;
- Office equipment of a durable nature (eg, computers, telefax machines, and photocopiers), but not of a consumable nature; and
- Household effects of a durable nature (eg, television sets, video recorders, and washing machines), but expressly excluding air-conditioning equipment and furniture.

6-146 Relief from duty is granted only in respect of reasonable quantities of office and household equipment. An international business enterprise may acquire a duty-free car provided that it is necessary for business purposes or is to be allocated to a full-time member of its expatriate personnel who is eligible for a duty-free car but has not yet acquired one.[131]

Financial Reporting and Auditing Requirements

6-147 The Central Bank of Cyprus exercises a supervisory role in respect of all international business entities and ensures that they comply with the terms on which they were granted permission to operate from Cyprus. To facilitate the carrying out of this function and to assist international business entities in regulating their

131 Entitled to relief are international business companies (a term which applies not only to companies but also to partnerships, individuals, and unincorporated associations), which are engaged exclusively in activities outside Cyprus and which maintain continuously a proper office in distinct premises (ie, not part of living accommodation) equipped with normal office facilities and full-time personnel, for use as an office; and their full-time expatriate personnel, consisting of foreigners entitled to live and work in Cyprus under a temporary residence permit issued for that purpose. Expatriates earning an annual salary of CY £12,000 may initially be approved for eligibility and, to continue to be eligible, their expenditure in Cyprus should not be less than CY £12,000 *per annum*.

affairs in a proper and efficient fashion, accounts audited by independent Cypriot auditors must be submitted to the Central Bank.

All Cypriot companies, whether local or international, are required to maintain accurate books of accounts which should reflect the true and correct position of their affairs, as well as give sufficient clarification of their activities. In particular, correct and proper records should be kept to reflect all:

- Money received and disbursed, together with details of the related transactions;
- Sales and purchases of stock by the company; and
- Company assets and liabilities.

6-148 In addition, the Cypriot Company Law, which is closely modelled on its English counterpart, requires that company accounts must include:

- A directors' report, which should accompany the balance sheet and be submitted to the shareholders' annual general meeting;
- An auditor's report, containing certain prescribed statutory information;
- A profit-and-loss account compiled by the company's directors and containing prescribed information on the company's present financial standing and its transactions during the preceding 12-month period; and
- A balance sheet, reflecting company assets and liabilities and containing certain other information prescribed by law.

6-149 Furthermore, all companies with a share capital are required to submit an annual return to the Registrar of Companies. In the case of companies which have shareholders and other bodies corporate, the annual return must be accompanied by the audited financial statements of the company translated into the Greek language. It must contain information such as the company's registered address, a summary of shares issued for cash and non-cash considerations, shares discounted, forfeited, or surrendered, the amount of any company mortgages, a list of the company's members, and details of the company's directors and secretary.

Cyprus-registered branches of foreign companies are not legally bound to compile full separate branch accounts but, when taxed in Cyprus, are obliged to do so for income tax purposes. They also must submit accounts of the main company, translated into Greek, to the Registrar of Companies. Partnerships are exempt from any requirement to prepare audited accounts, but they are legally bound to keep proper books of account which must be available for scrutiny by individual partners. However, in all cases, an independent auditor must be appointed to confirm to the Central Bank of Cyprus and to other authorities that no local business was carried out and that all local expenses were covered from external sources.

Residence and Work Permits

6-150 The expatriate directors, executives, and managers of all international business entities are able to obtain residence and work permits fairly easily and

without delay.[132] Provided that no suitably qualified Cypriots are available, administrative, clerical, and non-executive expatriate employees also may secure such permits without difficulty.

Residence and work permits are usually received within one month of application. Thereafter, the expatriate employee, and each member of his family holding a separate passport, should report to their local police immigration department, where they will each be issued with an Alien Registration Certificate.

Residence and work permits are usually issued for an initial period of two years, but they will be readily extended for additional three-year periods subject to the general conduct of the business of the company. Eligible expatriate employees, accompanied by their family, may obtain a second duty-free car for the use of their family, provided that the expenditure in Cyprus of the expatriate justifies the use of such second car. For the time being, where the annual salary of the expatriate is less than CY £20,000, this concession is not normally allowed.[133]

International Banking Units

In General

6-151 Cyprus is emerging as an international banking centre.[134] A substantial number of foreign banks have been granted licences to set up international banking units and conduct international banking activities from Cyprus.[135]

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132 Directives of the Central Bank on the Issue and Renewal of Temporary Residence and Employment (TRE) Permits of 1996, revised in February 1999.

133 Customs & Excise Circular of 17 November 1998, regarding the terms and conditions imposed by the Department on the duty-free facilities for international business companies and their expatriate personnel.

134 Saunders and Andreas Neocleous, *Cyprus International Tax Planning* (2nd ed, 1991).

135 As at June 2000, the international banking units in Cyprus were Allied Business Bank SAL; Arab Jordan Investment Bank SA; Banca Roma de Comert Exterior (Bancorex) SA; Banca de Credit Cooperatist BankCoop SA (Bankcoop); Bank of Beirut and the Arab Countries SAL; Banque de l'Europe Meridionale SA; Banque Europeene pour le Moyen – Orient SAL; Banque du Liban et D'Otre-Mer SAL; Banque Nationale de Paris Internationentale SA; Banque SBA SA; Barclays Bank Plc; Beogradska Banka dd; Byblos Bank SAL; Commercial Bank of Greece SA; Credit Libanais SAL; Federal Bank of the Middle East Ltd; First Private Bank Ltd; USBC Investment Bank Cyprus Ltd; Industrial Commercial Avto VAZbank; Joint-Stock Commercial Bank for Agriculture, Industry and Construction 'Agropromstroybank'; Joint Stock Bank 'Inkombank'; Joint Stock Commercial Bank 'Menatep'; Jordan National Bank Plc; Karic Banka dd; Kreditna Banka Beograd dd; Lebanon and Gulf Bank SAL; Russian Commercial Bank (Cyprus) Ltd; Société Generale Cyprus Ltd; Vojvodjanska Banka AD; Credit Suisse First Boston (Cyprus) Ltd; Republic National Bank of New York (Cyprus) Ltd; Safra Republic (Cyprus) Ltd; Banque Saradar SAL; Joint Stock Commercial Bank Tokobank; Joint Stock Bank 'Kubanbank'; Joint Stock Bank 'Toribank'; Trade and Savings Bank Plc 'TS Bank'; Swiss Bank Corporation; and United Overseas Bank.

It is the stated policy of the Central Bank of Cyprus to encourage the establishment of IBUs (preferably branches, as opposed to locally incorporated subsidiaries or associated companies), and the authorities are determined to attract reputable banks with an established track record of growth and profitable operation to participate in international banking activities in Cyprus. The government has shown that it is willing to interpret existing legislation as liberally as possible and even to introduce new legislation where necessary to enable IBUs to operate effectively while still adhering to sound banking principles.

IBUs, whether branches of foreign banks or locally incorporated legal entities, must be licensed under the provisions of the Banking Law, 1997.[136] As a rule, only branches or subsidiaries of banks enjoying a good reputation internationally, and established in countries where there are adequate banking supervision and lenders of last resort facilities, will be considered as eligible for a licence.

Where an IBU is a subsidiary of a foreign bank, the parent bank is expected to provide an appropriate letter of comfort. They are expected to operate as fully-staffed units and not merely as 'brass-plate' operations.

Except with special permission from the Central Bank, IBUs must operate wholly on an international basis, and all their dealings must be with non-residents and denominated in currencies other than Cyprus pound.

All IBUs are exempt from most of the monetary policy and credit regulations applicable to local banks, such as the minimum reserve requirement, adherence to maximum interest rates, and restrictions on the holding of foreign assets or investments in shares and immovable property. Ratios such as liquidity and capital to risk assets are applicable only to locally incorporated IBUs, but all IBUs are required to supply to the Central Bank such information about their activities as might be requested, to satisfy the Central Bank of their ability to meet their obligations as they fall due and of their adherence generally to sound banking practices.

IBUs must pay an annual fee of US $15,000 to the Central Bank as reimbursement to the latter of the cost of its supervisory function. IBUs must submit to the Central Bank a letter of authorisation, which enables the latter to exchange information with the applicant bank's home banking supervisory authorities.

Taxation

6-152 If an IBU takes the form of a local branch of a foreign bank with management and control exercised outside Cyprus, no Cyprus tax will be payable; if management and control is exercised in Cyprus, tax is payable at a reduced rate of 4.25 per cent. If the IBU takes the form of a Cyprus incorporated subsidiary of a foreign bank, it is liable to the reduced rate of 4.25 per cent on its net income as

136 Banking Law 1997, Law 66 (1)/97.

are all other international business companies. From a tax planning point of view, IBUs may be of interest to financial companies in countries which either do not tax at all, or tax in full, active income (and banking is considered to be such an income) emanating from foreign branches.

A Cyprus IBU may engage in financing joint venture activities in countries with which Cyprus has entered into a double-taxation agreement. This would result in significant tax savings as the interest article of the relevant treaty would serve to eliminate or reduce the withholding tax on outgoing interest payments. Assuming that the IBU can claim the benefit of such double-taxation treaties, the net result would be that tax exposure is minimised or eliminated.

Under section 10(1) of the Income Tax Law, any interest earned on foreign money capital imported into Cyprus and deposited with a bank operating in Cyprus is completely exempt from Cypriot income tax. Any interest earned by international business companies placing funds with any local bank or IBU or ABU operating in Cyprus is considered as being interest earned on foreign money capital and, therefore, no tax is payable thereon.[137]

Other Advantages

6-153 All other benefits available to international business entities in Cyprus, such as duty-free concessions and exchange control exemption, also apply to IBUs and their expatriate employees.

In addition, the following advantages arising, *inter alia*, out of Cyprus' geographical position might be particularly useful to IBUs:

- The possibility of attracting international businesses relating to or connected with neighbouring Middle Eastern and other countries;
- The possibility of servicing the transit trade now using Cyprus ports en route to the Middle East and Africa;
- The possibility of specialising in shipping and aviation finance;
- The possibility of attracting business from the thriving international community on Cyprus and expatriates, as well as from international companies which maintain their international or regional headquarters in Cyprus;
- The possibility of providing finance and related financial services such as leasing, asset finance, and project finance to neighbouring countries, CIS, China, India, and South Africa, with whom Cyprus has concluded double-taxation treaties; and
- The possibility of playing a role in the reconstruction of Lebanon and Palestine.

137 This exemption did not apply to interest on deposits with international banking units or administered banking units because the Commissioner of Income Tax did not consider them as operating within Cyprus. Following, however, representations made by the Central Bank of Cyprus, the Minister of Finance decided that the provisions of section 10 should apply to all banks which are licensed to operate in or from within Cyprus.

Administered Banking Units

6-154 Applicant banks which meet the Central Bank's eligibility rules[138] also may be allowed to establish themselves as administered banking units. ABUs are required to carry on banking business in their own name, but their day-to-day administration should be carried out, on their behalf, by another bank (the 'administering bank'), which must be already licensed by the Central Bank to operate in or from within Cyprus. They must submit to the Central Bank a Letter of Authorisation in the same way as IBUs.

ABUs must enter into a written management agreement with an administering bank, and they must pay an annual fee of US $10,000 to the Central Bank.

Bank Representative Offices

6-155 Bank representative offices are not considered to be businesses as defined in the Banking Business (Temporary Restrictions) Law, Cap 124, and they do not need a licence from the Minister of Finance although, as non-residents, they need exchange control permission and should register their names with the Registrar of Companies. In granting its permission, the Central Bank of Cyprus requires the office to observe the following conditions:

- No banking business may be carried on;
- The office must be used exclusively to facilitate contact between the bank represented and the rest of the world;
- The Central Bank may at any time request information about the activities of the office; and
- All expenses must be covered from external sources.

6-156 As with IBUs, only foreign banks enjoying a good reputation internationally and formed in countries where there is adequate banking supervision, including the facility of lending of last resort, will be authorised to establish bank representative offices in Cyprus.

International Financial Services Companies

6-157 An international financial services company (IFC)[139] is an international branch of an overseas company registered in Cyprus or an international company incorporated in Cyprus or an international partnership registered in Cyprus whose main object is to provide international financial services.

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138 Central Bank of Cyprus, *A Guide to Prospective Applicant Banks on the Establishment of International Banking Units*, *Administered Banking Units*, *International Representative Offices* (October 1999).

139 Central Bank of Cyprus, *A Guide to Prospective Applicants on the Establishment of Offshore Financial Services Companies* (September 1997).

The term 'financial services' is widely defined, and it means dealing in investments, managing investments, providing investment advice, and establishing and operating collective investment schemes, while the term 'investment' means shares, debentures, government and public securities, warrants, certificates representing securities, units in collective investment schemes, options, futures, and contracts for differences.

The provision of international financial services from within Cyprus requires the prior authorisation of the Central Bank. A person, whether natural or legal, submitting an application to the Central Bank for the establishment of an IFC, must be a 'fit and proper person' in the opinion of the Central Bank to be involved in the provision of such services. The 'fitness and properness' of a person is determined by means of detailed questionnaires to be completed by all applicants and by personal interviews with the applicants by officials of the Central Bank.

Applicants also should have soundly based and considered reasons for wishing to provide international financial services from within Cyprus. Depending on the form that the IFC will take and the nature of the international financial services to be provided by it, letters of comfort and guarantee, extracts from minutes, and audited annual financial statements must be provided by the applicant to the Central Bank, in support of an IFC's operations from within Cyprus. The Central Bank policy provides that:

- The shares of IFCs must be registered in the names of beneficial shareholders and not on nominee shareholders. The reason for this is to provide transparency as to the real ownership of IFCs, which offer financial services to the public at large;[140] and
- IFCs must have a physical presence, in the form of a full-fledged administrative office in Cyprus where up-to-date books and records are maintained at all times, including clients'/investors' files and underlying vouchers, and when at least one employee, fully acquainted with the financial services provided by the IFC and able to respond to Central Bank enquiries on an *ad hoc* basis or during on-site examinations, is stationed.

6-158 IFCs are currently widely used in dealing with the Russian securities market as well as the emerging markets of China and India. IFCs are subject to the normal international corporate tax rate of 4.25 per cent, and they enjoy all the other incentives and benefits available to international entities.

140 This will facilitate the divulgence of information by the Central Bank of Cyprus should the need arise, regarding the names of shareholders of IFCs, to overseas regulatory authorities.

International Trustee Services Companies

6-159 A corporate entity or partnership which intends to offer international trustee services to the public at large on a professional basis must obtain the prior authorisation of the Central Bank of Cyprus, under the Exchange Control Law.[141]

To obtain such authorisation, an application must be submitted to the Central Bank, containing the following information:

- A statement setting out the nature and scale of the intended trust business and the proposed arrangements for its operations;
- Completion by the applicant of certain detailed questionnaires about the applicant's professional expertise and current business affairs; and
- A letter of authorisation from the principal beneficial shareholders of the applicant, in the case of a legal person, enabling the Central Bank to seek and exchange information from and with third parties in general, as well as banking, supervisory, or financial regulation authorities, on the content and purpose of the application.

6-160 The grant of a trust licence is at the discretion of the Central Bank, which does not apply any rigid criteria for the purposes of processing each application but rather deals with it on its merits. Successful applicants are issued with a licence incorporating a number of conditions, the most common of which are that the trustee company must submit annually to the Central Bank the number of trusts and total value of assets under trust administration and that the trustee company shall not act as a trustee of a collective investment scheme without the prior approval of the Central Bank.

International Public Companies

6-161 International public companies (IPCs) may be registered in Cyprus, provided that such companies are:

- Associated with or form part of a collective investment scheme; and
- The promoter is a first-class name in the international financial sector.

6-162 International public companies in Cyprus will, therefore, be permitted to issue and transfer their shares freely without the prior approval of the Central Bank, provided that, within a specified period of time, such shares become quoted and thereafter remain listed on a recognised Stock Exchange. In addition, like ordinary international companies, IPCs will be expected to:

- Belong exclusively, directly or indirectly, to foreigners;

141 Central Bank of Cyprus, *A Guide to Prospective Applicants on the Establishment of International Trustee Services Companies* (October 1999).

- Realise their objects outside Cyprus, with the exception of their management, control, or administration; and
- Cover all their financial requirements from external sources.

6-163 The Registrar of Companies has confirmed that IPCs may be registered with their capital denominated in foreign currency if it exceeds a certain minimum, now US $1 million.

In view of the investment possibilities that exist in countries such as the CIS, China, and India, with which Cyprus has concluded double-taxation treaties, the use of a Cyprus IPC managed by a promoter in an established financial market, being either single tier or two-tiered, can have significant advantages and reduce the overall tax burden imposed on the foreign investor, institutional or otherwise.[142]

International Collective Investment Schemes

In General

6-164 The International Collective Investment Schemes Law[143] was enacted in May 1999.[144]

Its intention is to create a legal and regulatory system which balances adequate investor protection against the necessary freedom to manage the underlying investments. Cyprus should become an important participant in the business of mutual funds and an attractive place for investors in the European Union, Japan, and the United States.

Definition and Structures Available

6-165 A Cypriot international collective investment scheme (a 'scheme') is defined as a scheme in the form of an international fixed-capital company, an international variable-capital company, an international unit trust scheme, or an international investment limited partnership whose sole purpose is the collective investment of funds of unitholders. The schemes can only be established and operated by non-residents of Cyprus, and no permanent residents of Cyprus may hold units in a scheme.

The combination of relevant Cyprus laws allows funds to be structured in a flexible manner, eg, as umbrella funds, master or feeder funds, single or multi-class funds, limited life or duration funds, or funds of funds.

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142 International public companies may now list their shares on the Cyprus Stock Exchange.

143 Law 47 (1)/99; Law 63 (I) of 2000.

144 Central Bank of Cyprus, *A Guide to Prospective Applicants on the Obtaining Recognition as an International Collective Investment Scheme* (1999). Elias Neocleous, 'International Collective Investment Schemes', *Fund Management*, *International Financial Law Review Supplement* (October 1999).

Regulatory Framework

6-166 The Central Bank of Cyprus is the regulatory and supervisory authority of Schemes. It has stated that it wishes to create a user-friendly framework. Schemes will be authorised by the Central Bank if they meet the following criteria:

- The directors and promoters must be considered by the Central Bank to be competent and suitable in respect of matter related to such schemes;
- The managers and trustees must act independently of one another and must have sufficient financial and operational resources and skill to conduct their business efficiently. Their officers must be persons of integrity, with an appropriate level of knowledge and experience;
- Only licensed banking and bank institutions may act as trustees of schemes;
- The managers and trustees of a Scheme must have a place of business in Cyprus unless the Central Bank decides otherwise; and
- An applicant must submit to the Central Bank for approval documents and information relating to the Scheme, including its proposed constituent documents, offering circular, and third-party service providers' agreements.

6-167 The Law distinguishes among schemes designed to be marketed on a retail basis to the public at large, schemes designed to be marketed solely to experienced and professional investors, and private schemes whose number of unitholders is limited to 100 and which impose restrictions on the transferability of units.

The restrictions to be imposed by the Central Bank will reflect the different standards of investment protection which should be provided by each category.

Confidentiality

6-168 Any information relating to a scheme, its business, promoters, trustees, or managers which is acquired by the Central Bank for the purpose of exercising its regulatory and supervisory authority is to be held in confidence and not released to any person except by court order.

No officer, employee, manager, or trustee of a scheme may disclose or use for his own benefit any information relating to the affairs of a scheme unless he is obliged by law to do so, eg, where the scheme is declared bankrupt or is in the process of being wound up.

Managers and Trustees

6-169 The previous consent of the Central Bank is required for the replacement of a manager or trustee of a scheme, any substantial change in the ownership or shareholding structure, any new appointment of a director, and any delegation of duties to a third party.

The Central Bank has the discretionary power to remove or replace a manager or trustee. A manager of a scheme is liable to its unitholders for any loss suffered by them

as a result of the manager's improper performance of its duties, regardless of the fact that it may have entrusted some or all of the assets in its safekeeping to a third party.

Taxation

6-170 Amendments to the Cypriot Tax Laws, 1961–1988, were introduced in May 1999 with the enactment of Law 50 (I)/99, providing for an advantageous tax treatment of Schemes as follows:

- Schemes will be generally liable to income tax in Cyprus at the rate of 4.25 per cent, subject to the exemption set out below;
- Ninety per cent of profits or gains realised by schemes through the disposal or sale of securities held by them will be exempt from taxation;[145]
- The income generated by managers and trustees through the provision of services to schemes is exempt from any tax; and
- There is no withholding tax applicable to or payable by a scheme or its shareholders, unitholders, or partners.

6-171 Cyprus' wide network of double-taxation treaties adds considerably to the competitive position of schemes over other jurisdictions. This is because the use of double-taxation treaties can reduce the burden of withholding tax in the country of source of dividend and interest income and, in a few cases, eliminate source country capital gains tax. As schemes are subject to tax in Cyprus, they may therefore remain eligible for benefits under those double-taxation treaties (particularly with Central and Eastern European countries and other emerging markets) which do not contain specific anti-avoidance or limitation of benefits provisions.

International Insurance Companies

6-172 To obtain international status,[146] an insurance company must comply with the following requirements:

- Its shares must belong, directly or indirectly, exclusively to aliens; and
- Its income must be derived from sources abroad, ie, it must be exclusively engaged in business carried on outside Cyprus.

6-173 The registration procedure for an international insurance company is similar to that applicable in the case of a local insurance company, except that the prior approval of the Central Bank of Cyprus is required. Approval will be granted

145 This effectively means that Schemes will suffer taxation at the rate of 0.425 per cent on gains realised on the sale of securities. Other types of income, such as dividends or interest, will be taxed at the rate of 4.25 per cent subject to applicable credit relief provided by any of Cyprus' double-taxation treaties that would reduce or eliminate Cypriot tax.

146 Colota and Glykis (Andreas Neocleous & Co), 'Cyprus', *International Insurance Law and Regulation*.

if the Central Bank of Cyprus received satisfactory bank references for each shareholder. Approval is usually subject to the following conditions:

- The objects of the company must be confined solely to business outside Cyprus;
- All local expenses of the company must be covered from funds to be imported from external sources;
- The company may not obtain finance from local sources; and
- The company must undertake to submit to the Central Bank of Cyprus its annual accounts as at the end of its financial year.

6-174 Where the beneficial owners desire to remain anonymous, this is secured by effecting registration through nominees. The Central Bank of Cyprus and the Superintendent of Insurance will insist on disclosure of the true identities of the ultimate beneficiaries, but this information will be treated with the utmost confidentiality. Section 3(2) of the Insurance Companies Law[147] provides that a company formed and registered under the Companies Law and which carried on insurance business of a class specified in section 3(1) in any part of the world other than Cyprus will be deemed to be a company carrying on such business within Cyprus for purposes of the Insurance Company Law.

Therefore, an international insurance company, after having been registered with the Registrar of Companies and having obtained the Central Bank's permission, must apply to the Superintendent of Insurance for a licence. A licence will be issued if the following requirements are met:

- The company must have a paid-up share capital of not less than CY £200,000;
- The company's solvency margin is not such that the company may be deemed to be unable to pay its debts;
- The class of insurance business in respect of which the application is made must be conducted in accordance with sound insurance principles;
- The company is reinsured or has made arrangement for its reinsurance by another insurance or reinsurance company in respect of policies issued or to be re-issued;
- The name of the company is not identical to that of an existing licensee or of a company which was lawfully carrying on insurance business in Cyprus at the commencement of the Law; and
- The company complies with the provisions of section 9 of the Insurance Companies Law, which provides that the Superintendent shall not grant a licence to a company if any director, controller, manager or any principal of the company does not satisfy such standards or requirements as may be prescribed.[148]

147 Law 72 of 1984, as amended.
148 Law 72 of 1984, as amended, s 8.

6-175 According to section 17 of the Insurance Companies Law, every insurance company must provide:

- A guarantee supplied by either the parent company or one of its affiliates or a bank guarantee issued on the strength of the company's invested capital;
- A business plan setting out the company's operations for the first three years, including information relating to the administrative structure of the company's head office as well as its branches, and the approximate number of agents and/or intermediaries to be appointed and the applicable average commission;[149]
- A specification pursuant to section 3(1) of the Insurance Companies Law setting out the classes of insurance business which the company proposes to conduct; and
- Specimen policy contracts which the company will be adopting in its business.

6-176 Cyprus international insurance companies are, by definition, owned by foreigners and conduct insurance activities outside Cyprus. They enjoy all the advantages of international business companies and are taxed at the rate of 4.25 per cent on their net profits.

International Captive Insurance Companies

6-177 A captive insurance company[150] has been defined as a limited company which is formed as a wholly owned insurance subsidiary of an organisation not in the insurance business and which has as its primary function the insuring of some of the exposures and risks of its parent's affiliates. A captive also may be formed by a group of individuals or companies where they have in common the insuring of the same risk.

It also is possible for a captive to operate as a reinsurer,[151] with the result that a conventional insurer may insure part of the risk while the captive reinsures the balance. Captives also are formed to insure a specific risk of the parent where cover is either not available from conventional insurers or where cover is available but is prohibitively expensive. There are various types of captive insurance companies. The following are the more important categories of captives:

- The pure or open market captive, underwriting only the risks of the parent company or its subsidiaries;

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149 Such information as would normally be contained in a revenue accounts also should be included.

150 Saunders and Neocleous, *Cyprus International Tax Planning* (2nd ed), ch 8; Colota and Antonis Glykis (Andreas Neocleous & Co), 'Cyprus', *International Insurance Law and Regulation*; Finney, 'A Tax and Financial Analysis', *Captive Insurance* (1980); Bawcutt, *Captive Insurance Companies Establishment*, *Operation*, *and Management* (1982).

151 According to a legal opinion of the Attorney General of Cyprus, the Insurance Companies Law (Law 72 of 1984, as amended) is applicable to all companies which undertake re-insurance business.

- The multiple parent captive, being owned by a number of companies and insuring the risks of all parents in the group;
- The domestic[152] or international captive, being a captive formed in the country of domicile of the parent;
- The industry captive, being a multiple captive formed by parent companies operating in the same industry for the purpose of insuring risks common to them all; and
- The protection and indemnity club, representing a specific category of captives which are generally formed by ship owners for the purpose of self-insuring risks related to their ships and shipping activities.[153]

6-178 For the registration of an international captive insurance company, the permission of the Central Bank of Cyprus is required. Like all other international business entities, a Cyprus international captive is requested to submit copies of its balance sheet, profit-and-loss account, and confidential annual statement to the Central Bank of Cyprus within six months of the end of each financial year. These accounts should have been audited and certified by an authorised accountant practising within Cyprus, but not an officer or servant of the captive.

The aim is to present a true and fair picture of the captive's financial affairs so that the Central Bank of Cyprus can satisfy itself that the captive is complying with the conditions under which it was originally given permission to operate. As international captives fall within a specific category of their own, however, they enjoy the benefit of exemption[154] from disclosing certain information relating to the following:

- Movements and classes of provisions and reserves;
- Assessment of assets, liabilities, income, and expenditure; and
- Sources of provision for payment of income tax.

6-179 Where the international captive opens an administrative office in Cyprus, the captive and its expatriate personnel will be required to open individual local disbursement current accounts with authorised dealers (onshore banks) for meeting their payments to residents of Cyprus. The international captive insurance companies may apply their own specific accounting policies with certain regulated parameters. While there are no strictly binding auditing practices, the following are those more generally utilised:

- The annual basis of accounting is generally used so that accepted claims and net reinsurance recoveries for any given financial year are set off against gross premiums paid and reinsurance ceded;

152 The domestic captive insurance company may suffer the disadvantage of being subject to heavy taxation and high capitalisation.

153 Protection and indemnity clubs are registered as companies limited by guarantee, but they take the form of mutual insurance association, with their operations conducted by contracted management companies.

154 These are in addition to the other benefits enjoyed by all captives, such as minimum share capital, and there is no requirement for reinsurance treaties.

- In terms of the annual accounting method, unearned premiums are generally calculated either on a monthly *pro rata* basis or on the '24ths' method;
- Expenses relating to the issue of insurance policies, such as commissions and brokerage fees, are reflected on the balance sheet as deductions against unearned premiums, and they are deferred where appropriate; and
- In arriving at an assessment of the total cost of claims, consideration also is given to claims incurred but not reported.

6-180 To present a correct and complete picture of the captive's financial status and to assist the Central Bank of Cyprus in verifying that the captive has conducted itself within its permitted scope of activities, it is suggested that the following items be dealt with in the profit-and-loss account:

- Underwriting results, in respect of transfers to or from the respective underwriting revenue accounts;
- Investment income on shareholders' funds;
- Management expenses not already charged to the respective underwriting revenue accounts;
- Taxation of both general and life insurance profits;
- Dividends to shareholders; and
- Balance of unappropriated profits added to retain profits and reserves.

6-181 There is no statutory method for calculating underwriting profits and losses as reflected in both the shareholders' accounts and in documentation submitted to the superintendent of Insurance. The Republic of Cyprus international captive, therefore, is free to select its own method of calculating underwriting results, and auditing policies may vary from one captive to other. However, it is recommended that the same accounting principles be applied in determining the underwriting profits and losses contained in both the shareholders' accounts and other official documentation.[155]

International Trusts

6-182 In 1992, a bill providing for formation and administration of international trusts was enacted.[156] The Law accords wit the proclaimed government policy to enhance further the attractions of Cyprus as an international trust jurisdiction and the range of facilities offered to private and international investors.

Shipping Companies

6-183 As stated earlier, shipping activities constitute a separate form of foreign investment made by non-residents in Cyprus. This type of foreign investment and

155 Saunders and Andreas Neocleous, *Cyprus International Tax Planning* (2nd ed), ch 8.
156 Law 69 of 1992.

generally the role of Cyprus as an international or regional maritime centre are described and analysed in the Admiralty and Maritime chapter.

Direct Foreign Investment

In General

6-184 It is not surprising that a small country like Cyprus would attempt to protect its economy from undisciplined or abusive practices in foreign investments at the onset of their introduction to the Cypriot market, and this protection was initially adopted by the government.[157] However, having established itself as a reputable international business centre in the Middle East, Cyprus adopted a new policy aiming at the gradual liberalisation of foreign investment. The association agreement made in 1972 with the European Economic Community and the application by Cyprus in 1990 for full membership of the EU have played a supportive role in the pursuit of the current policy.

Under the current policy on foreign direct investment adopted by the Central Bank of Cyprus, most sectors of the economy have been totally liberalised, and foreign participation therein is allowed up to 100 per cent. Other sectors also have been made less strict.

Investors from EU member states receive preferential treatment during the continuous liberalisation of foreign investment in Cyprus. The liberalisation of the sectors relating to national and public security is not contemplated in the future.

Policy

6-185 The Central Bank is the competent authority responsible for approving or rejecting proposed foreign investment in Cyprus.[158] Its prior permission for any such investment is essential and is usually easy to obtain, subject to the following four prerequisites, ie, that the foreign investment:

- May not harm national security;
- May not threaten the environment;
- May not harm the economy; and
- Must be of an adequate amount.[159]

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157 The policy regulating foreign investment which was in force before the Decision of the Council of Ministers of 6 November 1986.

158 No investment can be made in Cyprus by non-residents (Cypriots or foreigners) without the permission of the Central Bank of Cyprus, which is granted under the provisions of the Exchange Control Law, Cap 199. Tornaritis, 'Notes on the Law of Cyprus Relating to Offshore Operations, Shipping Operations, and Shipping Companies, Foreign Investments in Cyprus and Transit Trade', *Cyprus Law Review* (July–September 1984).

159 Circular of the Central Bank of Cyprus of February 1997.

6-186 The decision of the Central Bank is subject to review by the Supreme Court on application.[160]

The latest policy on foreign direct investment in Cyprus was announced by the Central Bank of Cyprus in January 2000.[161] With immediate effect, all the existing restrictions relating to the minimum level of investment and the maximum allowable percentage of participation were abolished for investors in any enterprise in Cyprus who are resident citizens of the member states of the EU; the term 'citizens' means individuals or corporate bodies. Other limitations imposed by law or regulation, eg, on the acquisition of immovable property, remain in force.

So far as portfolio investment is concerned, investors who are resident citizens (as previously defined) of EU member states may now also acquire up to 100 per cent of the share capital of any Cypriot company which is listed on the Cyprus Stock Exchange unless that company is a bank. In the banking sector, the maximum equity participation remains at 50 per cent, in line with the policy announced by the Central Bank in July 1999.

If sizeable portfolio investments made after January 2000 are liquidated, the Central Bank reserves the right to require any capital gain to be transferred abroad gradually, to mitigate any possible negative effects on the balance of payments and foreign exchange reserves in Cyprus.

Investment Sectors

In General

6-187 Direct investment by foreigners who are not resident citizens of EU member states continues to be governed by the policy of the Central Bank of Cyprus which was approved by the Council of Ministers on 5 February 1997[162] and which provides for full participation in certain sectors and limited participation in others.

This policy, which is described below, sets out the percentage of permissible foreign participation and indicative minimum amounts of investment, depending on the sector in which the proposed investment is contemplated. The sectors of investment are divided into the following categories, as follows:

- Primary sector;
- Secondary sector;
- Tertiary sector;
- Activities of specific treatment;

160 Constitution, art 146.

161 Circular of the Central Bank of Cyprus on Exchange Control Liberalisation of 12 January 2000.

162 *Cyprus Offshore Report* (March 1997), Issue 2/97-2; Andreas Neocleous & Co, 'Foreign Direct Investment Policy, and Liberalisation of Foreign Investments', *International Financial Law Review* (February 1997 and April 1997).

- Public companies whose shares are quoted on the Cyprus Stock Exchange; and
- Excluded activities.

Primary Sector

6-188 The primary sector includes investments relating to agriculture, animal husbandry, fishing, and forestry.

Applications with regard to this type of investment are examined by the Central Bank of Cyprus in consultation with the Ministry of Agriculture, Natural Resources, and Environment.

Secondary Sector

6-189 Foreign participation of up to 100 per cent is most welcome in the manufacturing sector, as well as in bonded factories and industrial units in the Free Zone.

Tertiary Sector

6-190 The tertiary sector includes all types of foreign investment in the field of services. These services are divided into two categories as follows:

- Services for which the minimum level of investment required is CY £50,000;[163] and
- Services for which the minimum level of investment required is CY £100,000.[164]

Activities of Specific Treatment

6-191 This category includes all cases for which the maximum level of foreign participation is either predetermined by the Central Bank or is decided on the merits of each case.

Public Companies Whose Shares Are Quoted on the Cyprus Stock Exchange

6-192 Foreigners are welcome to participate up to 49 per cent in existing Cypriot public companies (excluding the banking sector), but Cypriot non-residents are not subject to such a limitation.

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163 These services include business, communication, recreational, cultural, touristic, and sporting services. Applications by foreigners to invest in these services are assessed by the Central Bank and permits are notified to the appropriate Ministry.

164 These services include communications services, construction, educational, environmental, transport, certain business and recreational services, and cultural and sporting services. Applications for these investments are assessed and approved by the Central Bank of Cyprus and permits are notified to the appropriate Ministry.

Excluded Activities

6-193 The current policy regarding foreign investment includes a section entitled 'Saturated Activities'.[165] These are activities which are reserved for nationals of Cyprus, and they include:

- Real estate development;
- Tertiary education; and
- Offices for the servicing of foreign airlines at airports.

6-194 Foreign participation in the provision of public utility services covered by specific legislation also is prohibited.[166] Such services include:

- Production and distribution of electricity;
- Telecommunications services;
- Postal services;
- Agricultural insurance; and
- Television and radio stations.

New Industrial Policy

6-195 In June 1999, the government approved a new industrial policy. The need for a new policy had been recognised by the Ministry of Commerce, Industry, and Tourism because the manufacturing sector of the economy, whose share of the gross domestic product had fallen from 18 per cent in 1982 to less than 11.5 per cent in 1997, was facing certain problems relating to its competitiveness, both in the local market and in its export effort. The causes of these problems included:

- The drastic reduction of tariff protection due to the participation of Cyprus in the World Trade Organisation, to the Customs Union Agreement with the EU, and to the progress of Cyprus towards accession to the EU;
- The low productivity of the sector; and
- The lack of a skilled labour force.

6-196 The attraction of capital-intensive foreign investment is expected to form one of the main items of the new industrial policy over the next few years, in addition to the provision of assistance for existing hi-tech industries and the

165 The new policy of January 2000 provides as follows: 'Direct investment — all restrictions concerning the maximum allowable percentage of foreign participation as well as the minimum level of foreign investment in any enterprise in Cyprus are abolished, provided that the foreign investors are citizens of European Union member states. The new Central Bank policy does not touch on limitations applicable under the laws or regulations. Such limitations, for example, apply to the acquisition of immovable property'. These exclusions form part of the existing policy and are not imposed by any law or legislation. Consequently, in the opinion of the author, they are abolished for foreign investors who are citizens of European Union member states.

166 Within the policy for harmonisation with the EU *acquis communautaire*, save national security, all other activities will be privatised and open to foreign participation.

attraction and development of new ones, as well as help for and the reconstruction of traditional Cypriot industry. The government also expects the private sector to play an important part in the new policy.

The Ministry of Commerce, Industry, and Tourism will commission a detailed study with a view to the introduction of 'business incubators' in Cyprus. Thus far, the basic particulars of these incubators have been identified as follows:

- A business incubator is a means by which the necessary support is given to new investors to develop and commercialise their innovative ideas, while at the same time helping to create and organise a new enterprise which will use the new products.
- External investors are often deterred by the risks involved in the initial stages of enterprises in the hi-tech field and, consequently, many excellent ideas are left unexploited. An incubator aims to help new investors in the early stages to realise, develop, and trade their innovations.
- The areas of responsibility for the operation of an incubator remain to be defined, but they will generally be to establish a policy relating to the sectors where incubators will be involved, approve the various procedures, supervise the development of an incubator and the progress of new enterprises, and terminate the stay in the incubator of any enterprise which fails to fulfil its obligations.[167]
- Applications for admission to the incubator programme should include a research and development plan, based on an innovative technological idea, which intends to develop a product preferably with an export orientation.
- Individuals or small groups will be able to participate in the incubator programme provided that they submit a complete operational plan which satisfies the pre-defined selection criteria. Applications involving the participation of non-Cypriot inventors also may be considered.
- An enterprise will stay in the incubator for a maximum of two years, unless the authorities approve an extension.
- An individual or group admitted to the incubator will be obliged to form a limited liability company in which 50 per cent of the shares will be given to the inventor(s), 25 per cent of the shares will go to the associate(s) of the inventor(s) who will deposit 25 per cent of the capital,[168] and the remaining 25 per cent of the shares will go to the incubator. To enter the incubator, the inventor or associate must participate in the sponsorship with at least CY £10,000.

167 The incubator will offer the following services: (a) assistance in determining whether the idea can be implemented from the technological and commercial points of view; (b) assistance in designing the plan for research and development; (c) secretarial and accounting support; (d) scientific and consulting support; (e) assistance in finding appropriate finance; (f) provision of office and laboratory space, furnished, equipped, and serviced with the latest technology; and (g) access to databases and a transfer of technology network.

168 The inventor(s) will have the right to deposit this sum and acquire the shares. The deposit will be made gradually and in conjunction with the use of the government subsidy.

- The incubator will finance the company with a grant of up to CY £100,000. If the company starts to operate commercially after it leaves the incubator, it will have to repay 20 per cent of the total grant without interest within 10 years. The incubator will release funds according to six-monthly budgets and reports of the progress of the company.
- The company should, within two years of the date of signing its contract with the incubator, deliver a commercial product. At the end of the period, the company will withdraw from the incubator. The incubated enterprise will have to pay symbolic amounts for the use of the incubator services and must return the facilities in the same state as they were when it first occupied them.

Regulation of Admission

In General

6-197 Regulations on the admission of foreign investment into Cyprus are divided into:

- Those imposing restrictions on foreign investment; and
- Those offering incentives for foreign investment.

Restrictions on Foreign Investment

6-198 Exchange Control. The rules of exchange control with regard to investments in Cyprus which include foreign participation do not distinguish between Cypriots and foreigners but between residents and non-residents. They are embodied in the Exchange Control Law,[169] and all powers ensuring the proper implementation thereof are vested in the Central Bank of Cyprus. Therefore, the prior permission of the Central Bank, as mentioned before, is essential for any such investment to be carried out in Cyprus. For the Central Bank to grant permission, sufficient financial arrangements must be made to cover the expenses likely to be incurred by the investment. In addition, the share capital of the legal entity concerned should be commensurate with its proposed activities.

Loans required to finance projects which include foreign participation must be secured from local and external sources in proportion to local and foreign participation, respectively. Furthermore, the Central Bank must approve the terms on which loans from external sources were granted. By requiring foreigners to obtain loans from external sources, the Central Bank aims at increasing the local reserves of foreign exchange. The prior permission of the Central Bank also is essential for the following transactions:

- Repatriation of capital (including capital appreciation), profits, dividends, and interest generated from direct investments;

169 Exchange Control Law, Cap 199.

- Transfers of equity among non-residents; and
- Royalties and other payments for the use of patents, know-how, and brand names.

Permission is usually readily granted.[170]

6-199 Labour. Companies carrying out investment in Cyprus with the participation of non-residents are considered to be local companies and are treated as such. Thus, employees and staff working for these companies are expected to be residents of Cyprus, especially taking into account that a highly educated workforce of great professional calibre is available in Cyprus. However, there are exceptions in limited cases where no suitably qualified Cypriot personnel are available to fill the required positions in certain companies. The Immigration Officer at the Ministry of the Interior needs to be satisfied that foreign investors have genuinely sought local staff for those positions before seeking foreign employees, to grant permission to employ foreigners. Therefore, employers should first consult with the District Labour Office and advertise such positions in the local press and, when no suitably qualified Cypriots can be found for the positions in question, foreign employees may be hired.[171]

In addition, there are certain administrative procedures which need to be followed by both the company and the potential foreign employee before the Immigration Officer grants permission. Once these procedures are satisfied, the foreign employee is granted a Temporary Residence and Employment (TRE) permit, which is valid for two years. TRE permits are renewable for three subsequent years, provided that the foreign employee and the employer have been of good conduct during the previous two years and have not been in breach of any of the regulations and requirements of the governmental bodies concerned.

6-200 Local Collaboration. Any local collaboration to support local companies or individuals in their productivity, marketing, sales, or know-how is, although not a requirement for foreign investments, a factor seriously considered by the Central Bank of Cyprus.

The standard application form, which must be completed by the potential foreign investor and presented to the Central Bank for approval, contains a section specifically for information regarding auxiliary services from local industries.

6-201 Local Equity and Capitalisation Requirements. As mentioned above, the policy of February 1997 sets out the percentage of permissible foreign participation, as well as the indicative minimum amount of investment in each of the sectors:

- In the primary sector, the percentage of permissible foreign participation is up to 49 per cent and the indicative minimum amount of investment is CY £100,000;

170 Central Bank of Cyprus, *Cyprus: A Centre for International Business* (6th ed, 1997).
171 Central Bank of Cyprus, *Issue and Renewal of Temporary Residence and Employment (TRE) Permits* (15 May 1997).

- In the secondary sector, foreign participation of up to 100 per cent is allowed;[172] and
- In the tertiary sector are included all types of foreign investment in the field of services.

6-202 The Central Bank also has the discretion to assess and approve applications which do not meet the minimum level of investment required and in which foreign participation does not exceed 24 per cent. Permits granted are then notified to the appropriate Ministry. However, there are several exceptions to this general policy of the Central Bank.

For restaurants and other recreational centres, foreign participation is allowed up to 49 per cent provided that:

- The minimum level of investment is CY £125,000;
- The foreign investor's contribution to the project exceeds CY £60,000; and
- The proposed investment contributes to the upgrading and diversification of the tourist product, especially leisure centres.

6-203 Applications are assessed and approved by the Central Bank and the permits are notified to the Ministry of Commerce, Industry and Tourism and Cyprus Tourism Organisation. For applications where the amount of investment is over CY £750,000, the Central Bank consults with the Ministry of Commerce, Industry, and Tourism.

In regard to agents representing imported goods and services, up to 49 per cent foreign participation is permitted. The indicative minimum level of investment is CY £50,000. Applications are assessed and approved by the Central Bank and permits are notified to the relevant Ministry.

For wholesale and retail trade, foreign participation of up to 100 per cent is permitted. If the percentage of foreign participation is below 49 per cent and the amount of investment is lower than CY £750,000, the applications are assessed and approved by the Central Bank and permits are notified to the Ministry of Commerce, Industry, and Tourism.

If the percentage of foreign investment exceeds 49 per cent or the amount of investment is more than CY £750,000 (irrespective of the level of foreign participation), the Central Bank consults with the Ministry of Commerce, Industry, and Tourism. Applications for projects with foreign participation higher than 49 per cent are rejected outright by the Central Bank if the amount of investment is less than CY £300,000.

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172 If the extent of foreign participation does not exceed 49 per cent and the amount of investment is less than CY £750,000, the Central Bank approves the investment and notifies the Ministry of Commerce, Industry and Tourism. If the extent of foreign participation exceeds 49 per cent or the amount of investment is over CY £750,000, the Central Bank consults with the Ministry of Commerce, Industry, and Tourism.

As to activities of specific treatment, the maximum allowable level of foreign participation in certain activities is predetermined by the Central Bank whereas, in other activities, this level is decided after taking into account the particular characteristics of each individual case.

Those activities for which the maximum permissible level of foreign participation is predetermined include:

- Banks — Foreign participation in the shares of banks quoted on the Cyprus Stock Exchange may not exceed 50 per cent. The participation of each non-resident individual or corporation is limited to 0.5 per cent. Exceptions to the general rule may be made at the discretion of the Central Bank.
- Tourist projects — According to the tourist policy currently in force, foreign participation in existing and new hotels and other tourist establishments (eg, hotel apartments and villas) is limited generally to 30 per cent and exceptionally to 49 per cent. Foreign participation in auxiliary tourist projects (eg golf courses, marinas, and theme parks) is unlimited, but the land on which these developments take place must remain under Cypriot ownership and be leased to the development company on a long-term basis.
  The Central Bank will take into account whether the foreign participation will serve Cyprus' tourist policy and improve the viability of the project concerned; the skills and experience of the prospective foreign investor in the organisation, administration, and promotion of the project; the contribution of the project to the diversification of the tourist market, the opening of new tourist markets with emphasis on attracting tourists with high per capita spending, the promotion of winter tourism or the promotion of tourism in areas needing reanimation; the cost of the project; and the location of the project and the capabilities and needs of the area concerned for tourism development.
- Cypriot tourist and travel agencies — The maximum level of foreign participation in this sector is 49 per cent. In addition, the following requirements must be satisfied before contemplating the Central Bank's permission: (a) the foreign investor's contribution must not be less than CY £150,000; (b) evidence that the foreign investor has sufficient experience as a tour operator must be provided; (c) an assessment should be made of the importance of the tour operator concerned, according to the number of tourists attracted to Cyprus and other competing countries, the possibility of expanding the tour operator's business in Cyprus, and the possibility of increasing the tourist flow to Cyprus; (d) the participation of foreign investors may be allowed only in licensed domestic tourist agencies which have been operating successfully for at least seven years; and (e) the aim of the local enterprise must be restricted to the activities of a tourist agent.

6-204 Those activities in which the maximum permissible level of foreign participation is decided after taking into account the particular characteristics of each case include:

- Establishment of new banks;

- Establishment of new insurance companies, participation in existing ones, or representation of such companies in Cyprus;
- Publication of newspapers and magazines;
- Establishment of new airline companies for the transportation of passengers and cargo and the trading or maintenance of aircraft and spare parts, provided that arrangements for such establishments are covered by the provisions of bilateral airline agreements; and
- Any other activity where there is doubt as to which category or sector it belongs.

6-205 In regard to public companies whose shares are quoted on the Cyprus Stock Exchange, the permissible participation of non-resident foreigners in the share capital of existing Cypriot public companies, except companies in the banking sector, is up to 49 per cent.

The maximum shareholding by a non-resident individual or corporation is restricted to five per cent of a company's issued capital. Applications for a higher percentage, or where the new purchase results in more than a five per cent holding, are considered by the Central Bank.

Non-resident foreigners may be allowed to hold higher percentages in new public companies. This is decided after consultations between the Central Bank and the Ministry of Finance.

6-206 Applications by Cypriot Non-Residents. Non-resident Cypriots (physical persons only) may participate fully or partly in investments carried out in Cyprus regardless of the level of investment, but the following restrictions apply:

- Income derived from investments made in sectors restricted to nationals of Cyprus may not be repatriated, and such income includes profits, dividends, and capital;
- Nine per cent of the issued capital of public companies may be owned by non-resident Cypriots collectively. This percentage may be increased to 15 per cent if there is no demand for such shares by non-resident foreigners;[173] and
- Restrictions applicable to foreign participation in tourist projects do not apply to participation by Cypriot non-residents, but repatriation of capital or income derived from these investments is not allowed.[174]

6-207 Commensurability. The authorised, issued, and paid-up share capital of a company intending to undertake an investment in Cyprus must be commensurate with the total cost of the project concerned. Thus, adequate cash contributions should be made by the investors in the form of equity capital prior to any loan

173 Individually, non-resident Cypriots may not own more than 0.5 per cent of any one company's issued capital.

174 These restrictions are subject to the tourist policy set out by the Cyprus Tourism Organisation from time to time.

request either from local or foreign sources.[175] These financing arrangements must be approved in advance of the materialisation of the project.

The issued and paid-up capital is considered to be adequate if it covers 30 per cent of the costs likely to be incurred in the materialisation of the proposed investment. The reason for this prerequisite is to avoid insufficient capitalisation which may lead to the export of funds, which could otherwise be taxable, from the country. This means that, when the capital is not adequate to cover the investment expenses, these expenses will have to be covered by loans imported from abroad. Since the interest payable on these loans is tax deductible and the amounts required therefore may be freely transferred abroad, inadequate capital will lead to the reduction of the taxable income derived from the investment and to the export of funds abroad.

6-208 Environmental Damage. Any project which may harm the natural environment of Cyprus will be rejected outright by the Central Bank of Cyprus.

6-209 Export Targets. There are no requirements by the Central Bank of Cyprus with regard to export targets to approve a foreign investment. All regulations with regard to exports or export licences have been abolished.

Safeguards and Incentives for Foreign Investment

6-210 In General. Cyprus provides several incentives for foreign investment. The existence or non-existence of safeguards and incentives can have an impact on investment decisions. The investment can be made in another country if in the first country there is inadequate legal protection of foreign investments and if that country does not offer any fiscal and other facilities to foreign investors.[176] These safeguards and incentives can be divided into four main categories, as follows:

- Safeguards relating to the protection of the foreign investment and proprietary rights afforded by the International Investment Law;[177]

175 Contribution of inadequate capital is known as 'thin capitalisation': '. . . buzz word of modern international tax parlance, referring to the equity capital of companies which is small (or thin) in relation to its total capitalisation by way of loans and other debt instruments. Interest on such loans and debt instruments may be restricted if the tax administration attacks the company under the thin capitalisation rules on the basis that there is inadequate equity to debt, and that part of the debt should therefore be more properly treated as equity'. Saunders, *International Tax Systems and Planning Techniques*.

176 Qureshi, *The Public International Law of Taxation* (1994); Waelde, 'International Law of Foreign investment: Towards Regulation by Multilateral Treaties', *International Business Lawyer*, Issue 1 (1999).

177 These comprise the requirement of non-discrimination, the prohibition of confiscatory taxation, the standard of treatment of foreign investors, and the doctrine of abuse of rights.

- Safeguards and incentives relating to the protection of foreign investment afforded by the Constitution and the domestic law of Cyprus;
- Fiscal incentives;[178] and
- Non-fiscal incentives.[179]

6-211 Fiscal Incentives — Corporations and Foreign Investment Income. Corporations[180] are taxed on their net income, which is the income resulting from the deduction of all expenses incurred, at the rate of 20 per cent where chargeable net income does not exceed CY £40,000, and at the rate of 25 per cent for chargeable net income in excess of this amount.

Tax losses may be carried forward for up to five years from the year in which they occur. It should be noted, however, that taxes imposed on profits earned from operations carried out in a double-taxation treaty country by that country may be used as a foreign tax credit to avoid double taxation. In the absence of a double-taxation treaty between Cyprus and such country, Cyprus provides unilateral relief.

Auxiliary tourist projects (such as golf courses, marinas, camping sites, theme parks, and health clubs) are exempt from income tax on their profits for a period of 10 years from the commencement of the project provided that:

- The creation, extension, or conversion of the project began after 1 July 1997; and
- The total cost of the project is at least CY £500,000 excluding the price of the land.

6-212 However, losses suffered from these projects cannot be carried forward or offset against other profits.

Foreigners residing in Cyprus and deriving income from a foreign investment established while the beneficial owner was outside Cyprus are exempt from tax on

178 Cyprus is a high-tax jurisdiction which offers numerous tax incentives for foreign investors.

179 Various facilities, such as work permits, bonded factories, bonded warehouses, and free zone facilities have already been mentioned.

180 'Article 32 of the Constitution deals specifically with aliens. Under article 32, "Nothing in this Part contained shall preclude the Republic from regulating by law any matter relating to aliens in accordance with International Law". No such law has been passed since the Republic except probably the Income Tax (Foreign Persons) Law 1961 which, although appearing as making special provisions for the aliens, was not intended for such purpose. The circumstances which led to its enactment are well known and were mainly due to the refusal of the Turkish members of the House of Representatives to pass a general Income Tax Law. There are, however, certain laws which were in force in the Colony of Cyprus and, being saved under article 188 of the Constitution, continue to be in force now in Cyprus. However, all such Laws and other enactments must be used and applied subject to the constitutional provisions and especially the requirement of their compliance to the rules of International Law. As already explained, no such law which does not afford protection to the person or property of an alien can be valid under the rules of customary international law.' Tornaritis, 'The Legal Position of Aliens in Cyprus', *Cyprus Law Tribune*, Issue 4.

their income when the income does not exceed CY £2,000 *per annum*. Income in excess of this amount is taxed at the rate of five per cent. These tax rates also apply to pensions received from abroad. Expenditure incurred on scientific research or on the acquisition of patent and patent rights is deducted from the chargeable income.

6-213 *Income Tax on Foreign Capital Interest*. The interest earned on foreign capital imported into Cyprus and deposited in a bank operating in Cyprus is exempt from any income tax.

6-214 *Withholding Tax on Dividends, Interest, and Royalties*. Dividends are subject to withholding tax at the rate of 20 per cent. However, withholding tax on dividends paid by resident companies to companies abroad is refundable on application to the Ministry of Finance.[181] Shareholders who are physical persons and who receive dividends may use the tax withheld as a tax credit against their own tax liability.

Interest remittances to non-residents are subject to withholding tax at the rate of 25 per cent, and they can be credited against the recipient's own tax liability. Interest exempt from income tax by law is not subject to withholding tax. Income earned by non-residents from royalties is taxed at the rate of 10 per cent.

The rates of withholding tax imposed on income earned from dividends, interest, and royalties may be reduced where there is a double-taxation treaty between Cyprus and the non-resident's country of residence. In some cases, withholding tax is totally eliminated or zero-rated.

6-215 *Estate Duty*. Cypriot property will be exempt from payment of estate duty if it belonged to a person who was domiciled in Cyprus at the date of his death, provided that it was purchased with foreign capital imported into the Republic and the deceased was permanently resident in a foreign country at any time prior to his death.

6-216 *Investment Allowance*. Investments are granted an allowance during the year in which they are made. The allowance is granted on new or imported used plant and machinery and on specific buildings. Investment allowances are granted at the following rates:

- New plant and machinery used in production by manufacturing, mining, and farming businesses, 20 per cent;
- New plant and machinery used in production by manufacturing joint ventures, 40 per cent;
- New robots, computers, or computer programmes, 40 per cent;
- Tourist villages, 25 per cent;
- Auxiliary tourist projects, 25 per cent; and

181 *Holderbank Financiere Glarus AG v The Government of Cyprus*, (1997) CLR 41.

- New three-star to five-star hotels or extension or improvement of existing hotels in Nicosia, 25 per cent.[182]

6-217 *Depreciation Allowance*. A depreciation allowance is granted for investments carried out in Cyprus at the following rates:

- Freehold industrial property (excluding the price of land), four per cent;
- Freehold non-industrial property (excluding the price of land), three per cent;
- Furniture, fixtures, and fittings, 10 per cent;
- Office equipment, 10 per cent;
- Plant and machinery, 10 per cent;
- Computers, 20 per cent; and
- Motor vehicles, 20 per cent.

6-218 *Tax-Free Interest on Loans*. Interest payable by an investor as a result of a loan obtained in connection with an investment carried out in Cyprus is deductible from the taxable income of the entity concerned.

Furthermore, if it is considered to contribute to the economic development of Cyprus, the Minister of Finance may exempt interest earned on borrowed foreign capital invested in Cyprus from tax.

6-219 *Remittance of Profits*. Remittance of profits, dividends, and interest arising from an investment carried out in Cyprus, in addition to the capital thereof including capital appreciation outside Cyprus, requires the permission of the Central Bank. However, permission in such cases is readily granted.

6-220 Non-Fiscal Incentives. Foreign investment, like Cypriot investment, may take advantage of the various facilities which have been developed to promote productivity in Cyprus. These facilities include, *inter alia*, the Industrial Free Zone of Larnaca, bonded factories, and bonded warehouses.

6-221 *The Industrial Free Zone of Larnaca*. The Industrial Free Zone of Larnaca was established and operates under the provisions of the Free Zones Law.[183] The Industrial Free Zone enables foreign investors to make use of the location of Cyprus as a manufacturing and distribution centre and enjoy at the same time certain advantages.

It is situated near the international airport in Larnaca and within easy access of the Limassol port, which is the main seaport of Cyprus. The Zone provides serviced

182 'Manufacturing joint ventures' require the participation of at least three manufacturing enterprises which carry on business independently and co-operate to design products or to organise and stage exhibitions. 'Auxiliary tourist project' refers to golf courses, marinas, camping sites, theme parks, and health clubs only. Central Bank of Cyprus, *Taxation and Tax Incentives* (2 June 1997).

183 The Free Zones Law of 1975 and the Free Zones Customs Regulations of 1981.

factory sites which can be leased on a long-term basis to export-oriented industries at reasonably low rents. In addition to the incentives mentioned above, foreign investors who have established an industry in the Free Zone enjoy the following:

- Minimum customs control;
- Zero customs duties on the import of plant machinery and raw materials;
- Personal income tax rates for expatriate employees reduced to 50 per cent of the normal rates; and
- Reduced tax rates on income from dividends earned by foreign investors.

6-222 *Bonded Factories*. Foreign investors also may establish and operate bonded factories in areas other than the Industrial Free Zone of Larnaca if they so desire for reasons of proximity to other related industries, or to the larger Limassol port or the labour markets.

6-223 *Bonded Warehouses*. Apart from the Free Trade Zones which have been established near the port area of Limassol and Larnaca and which the foreign investors may use, they also may establish and operate their own bonded warehouse.

Private bonded warehouses may be of particular use for goods in transit only although, in some cases, simple processing operations such as breaking bulk, sorting, and repacking are permissible. Goods stored in the bonded warehouses, whether imported ones liable to import duties or Cyprus-produced goods chargeable with excise duty, may be re-exported or exported without payment of duties.

Acquisition of Immovable Property by Non-Residents

6-224 According to the law, foreigners purchasing immovable property in Cyprus, apart from following the general rules which regulate such transactions, are obliged to adhere to special formalities and are faced with certain restrictions, which are aimed at the proper control of foreign investments,[184] the protection of foreign investors, and the implementation of the Exchange Control Restriction Law.

By law, the term foreigner (alien) is defined as any person not being a citizen of Cyprus and includes a local company controlled by non-residents (international business), a foreign company, and a trust in favour of a foreigner.[185] It does not include:

- Non-resident Cypriots; or

184 Most of these restrictions will have to be abandoned for the citizens of the European Union member states after the accession of Cyprus to the European Union. Decision Number 307/1287 of the European Court of Justice, regarding similar restrictions existing in Greek law; Ronides, 'Purchase of Property in Greece by Aliens', *Cyprus Law Tribune*, Issue 3 (1991).

185 ' "Trust in favour of a foreigner" means any kind of trust of which the beneficiary or one of the existing beneficiaries is a foreigner and includes any expressed or implied contract or agreement, written or oral, under which a foreigner will not be the absolute owner but will have ownership for the benefit of another or where ownership will be held for his benefit.'

- Foreign wives of citizens of Cyprus not living apart from their husbands under a decree of a competent court.

6-225 The term 'acquisition of immovable property' includes:

- A lease of immovable property for a period exceeding 33 years;
- The acquisition of shares in a company which is duly registered as a legal entity in Cyprus or in the Sovereign Base Areas and which (in either case) has acquired immovable property in Cyprus or the Sovereign Base Areas, taking into account that, if any shares in the company belong mainly to foreigners, the company is considered as 'controlled by non-residents'; and
- The formation of a trust in favour of a foreigner which involves, wholly or partly, the leasing of immovable property falling within the provisions of the first paragraph, above, or a shareholding in a company falling within the provisions of the second paragraph, above.

6-226 Under the Acquisition of Immovable Property (Aliens) Law,[186] no foreigner can acquire immovable property without the prior permission of the Council of Ministers.[187] Normally, permission is granted to *bona fide* foreigners to acquire a flat or a house or a piece of land not exceeding three donums (approximately 4,000 square metres) for the erection of only one house for use as a residence only by the purchaser and his family.

Permission also is granted for the purchase of land to be used for the erection of offices or buildings or the purchase of existing buildings or a building under construction for business purposes.[188]

Members of the family of an original purchaser also may acquire their own properties, provided that they are completely independent of the purchaser, both financially and residentially, such as married children having their own families and business. Permission is granted for personal use, not for letting or commercial use. This rule is relaxed for international companies, which are permitted to acquire business premises, as well as houses or flats as residences for their members or directors.

British subjects classified as 'British Residents' according to Annex T to the Treaty of Establishment of Cyprus, may freely trade in land in Cyprus without the permit of the Council of Ministers. This privilege was granted to some British subjects who were residents at the time of the establishment of Cyprus; it is recorded in their passports and it is extended to their spouses and descendants.

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186 Acquisition of Immovable Property (Aliens) Law, Cap 109.

187 By Decree 218/99, the Council of Ministers has assigned to the District Officers its power under section 3 of the Law to grant permission to aliens to acquire immovable property. *Government Gazette* (8 October 1999), Supp III (I) PI 218/99.

188 Regulations made under the Acquisition of Immovable Property (Aliens) Law, Cap 109, as amended, *Government Gazette*, Number 3137 (28 March 1997).

Although it may take up to 12 months for the Council of Ministers permit to be obtained, purchasers are in the meantime entitled to occupy their premises.

After the permit has been granted and the property is registered in the name of the foreigner, no further restriction is imposed on him, and he may sell or dispose of it by will or other instrument. Moreover, the legal heir is not required to obtain a permit to have the property registered in his name. Once the Council of Ministers approval has been obtained, an application should be submitted to the Exchange Officer of the Central Bank of Cyprus, who will furnish a certificate verifying that the purchase consideration was paid in hard currency.

This certificate is required in the event of a subsequent sale if permission is sought to export the proceeds of sale from Cyprus.

A prospective purchaser should always, before entering into a contract for the purchase of immovable property, conduct a search at the Land Registry to make sure that the property to be purchased is free from any encumbrances, charges, or burdens. No such burdens may affect the right of specific performance after the contract has been deposited with the Land Registry.

The transfer of immovable property can be effected once permission to acquire has been granted and the Central Bank has certified the import of foreign funds. Transfer fees are payable by the purchaser on the sale price or, under certain circumstances, on the current market value.[189]

Foreigners also are entitled to borrow money for the purchase of immovable property on mortgaging such property to the bank from which they borrow the money.

Investment Abroad by Cypriots

Resident Citizens

6-227 Since January 2000, resident citizens of Cyprus may engage in direct (only) investment[190] outside Cyprus without restriction, either on the sector of investment or on the amount to be invested.

The transfer of capital abroad can be effected as soon as the Central Bank is satisfied that this is a genuine direct investment which does not involve a portfolio investment, such as a purchase of foreign stocks or bonds or a deposit with a foreign bank.

189 Transfer fees, according to the Department of Lands and Surveys (Fees and Charges) Law, Cap 219, as amended, are CY £0 to CY £50,000, three per cent; CY £50,001 to CY £100,000, five per cent; and more than CY £100,001, eight per cent.

190 The term 'direct investment' has been defined by the Central Bank to mean any investment undertaken to create, maintain, or extend a lasting and long-term relationship with an enterprise in another country, and implies participation to a significant degree in, or control of, the management of the enterprise by the investor. A direct investment is considered to have taken place if the equity holding is more than 10 per cent of the share capital of the enterprise concerned. An equity holding of less than 10 per cent is regarded as a portfolio investment.

Where the foreign exchange cost is substantial, the Central Bank reserves the right to take steps to mitigate the impact on the balance of payments. All direct investments must be registered with the Central Bank and the investors must supply such information and statistical data as the Central Bank may require.

Investment Companies

6-228 Since February 2000, public investment companies which are so recognised by, and listed on, the Cyprus Stock Exchange have been allowed by the Central Bank to invest, under certain conditions, in securities which are listed on foreign exchanges approved by the Minister of Finance. The main restrictions are:

- The participation in the foreign security may not exceed five per cent of its capital or five per cent of the value of the portfolio of the investment company, whichever is the lower; and
- The total value of all the holdings of the investment company in foreign securities may not exceed 25 per cent of the value of its portfolio or the sum of CY £5 million, whichever is the lower.[191]

191 The limit of CY £5 million was to be raised to CY £10 million from 1 September 2000.

CHAPTER 7

Law of Taxation

Andreas Neocleous and Marios Kyprianou

Introduction

In General

7-1 Taxation in Cyprus was originally applied under the provisions of Chapter 323 (Cap 323) of the Laws of Cyprus. Income tax was levied on the income from the trade, profession, or emoluments of all persons resident in Cyprus. The law was passed by the United Kingdom colonial government and administered by the Commissioner of Income Tax, appointed by the Governor of Cyprus.

When the Republic of Cyprus came into existence in 1960, although taxation continued to apply, the levy imposed on the Greek and Turkish communities was called 'voluntary contributions'. These contributions were set by a law passed annually by the respective Greek and Turkish Communal Chambers. All other residents of Cyprus continued to be taxed under the provisions of Cap 323, as amended. Since 1966, however, all persons, legal or natural, have been taxed under the provisions of the Income Tax Law.[1]

A new tax may be imposed or an existing one amended only by a law passed in the House of Representatives. The government, through the Ministry of Finance, may introduce new taxes. Individual members of the House or the government may introduce amendments to existing laws.

As a British colony up to 1960, the legal system in Cyprus, including the law on taxation, was based on the British system and, in fact, the tax legislation was more or less a copy of that system. Since independence, however, the tax systems of all the European countries are used as a guide for amendments to existing legislation or for new laws to be introduced.

Major changes to the tax system were the introduction of capital gains tax in 1980 and value-added tax in 1992. Important changes to the Income Tax Law were:

- Article 28A in 1977, introducing tax incentives for foreign investors;
- Amendments made in 1991 by Law 245 of 1990, which introduced corporate tax, withholding tax on dividends as distinct from the income tax paid by the company, and steps to simplify taxation in general; and

1 Law 58 of 1961, as amended; Saunders and Andreas Neocleous, *Cyprus International Tax Planning* (2nd ed, 1991).

- Introduction of Tax Tribunals as from 1 January 2000, to hear appeals against assessments by the Commissioner of Income Tax.

Future Developments

7-2 Although tax harmonisation in Europe appears to be quite remote, if not a chimera, nevertheless this issue in its new form of harmful or unfair tax competition has gained momentum and appears to be at the top of the agenda of most governments and international organisations, eg, the United Nations (UN), Organisation for Economic Co-operation and Development (OECD), Group of Seven, the European Union (EU), the Financial Stability Forum, and the Financial Action Task Force.

Cyprus is determined to become a full member of the EU and, towards this end, it will make all necessary changes in its legislation so as to bring it into harmony with the EU legislation. Some of the features of its existing tax regime will be abolished as being incompatible with the *acquis communautaire*. There is no doubt that the so-called 'international business regime' of Cyprus, which was introduced by articles 28A *et seq* of the amendment of the Income Tax Law in 1977, will be transformed in such a way as to be brought into line with the Code of Conduct of the EU. This transformation or other changes in the existing regime should provide for the abolition of the international business company (IBC) in its present form. There may be only one type of company which can carry on activities inside and outside Cyprus, be owned by Cypriots and by foreigners or by residents and by non-residents, and be taxed with uniformity, eg, 10 per cent, with perhaps certain tax allowances for income generated outside Cyprus.

The response of Cyprus to the OECD report on harmful tax competition was positive.[2] With a very high level commitment, Cyprus pledged itself to implement a timetabled programme of changes to achieve the standards laid down by the OECD.

The Accounting Profession

7-3 The Income Tax Law also provides that any accounts and computations of chargeable income produced to the Commissioner or accompanying any return of income submitted to the Commissioner may not be considered unless they have been prepared by an independent accountant practising in Cyprus, duly authorised by the Minister of Finance to prepare accounts and computations for income tax purposes. In the early days of the Republic, as in the United Kingdom, only qualified chartered accountants, certified accountants, and accountants duly authorised by the government were given authorisation by the Minister of Finance. In the early

2 Thus, together with five other countries (Bermuda, Cayman Islands, Malta, Mauritius, and San Marino), Cyprus avoided being included in the list of 'tax havens' of the world.

1960s, a small number of qualified accountants established the Institute of Certified Public Accountants of Cyprus. Today, the Institute has approximately 1,200 members. Almost all the members of the Institute are qualified chartered accountants or certified accountants of the United Kingdom or certified public accountants of the United States.

Membership in the Institute of Certified Public Accountants of Cyprus does not automatically authorise the member to submit accounts and tax computations to the Income Tax Authorities as there is not yet the necessary legislation. The Institute takes part in discussions with the Minister of Finance on taxation matters, through its Taxation Committee, and advises its members on the application of International Accounting Standards, as well as International Auditing Standards in Cyprus.

Income Tax

In General

Basic Principles

7-4 Income tax is levied on the income of any person accruing in, derived from, or received in Cyprus in any one fiscal year. The term 'person' includes both natural persons and bodies corporate. A fiscal year is the same as the calendar year.

Income tax is charged broadly on the worldwide income of persons domiciled and resident in Cyprus. Non-residents, either citizens of the Republic of Cyprus or aliens, are liable to income tax only on their income arising in Cyprus. Cypriot tax law does not define the terms 'resident' or 'ordinarily resident', but it does define a 'temporary resident' as a person who is in Cyprus for a temporary purpose only, not with any intent to establish his residence in Cyprus for an aggregate of more than six months in a fiscal year.[3] A person is regarded as resident in Cyprus for a given year if he is physically present in the country for a cumulative period of six months in the year.

Ordinary residence is broadly equivalent to habitual residence. If a person is resident in Cyprus year after year, he is ordinarily resident.[4] Foreign legal persons are considered to be residents of Cyprus if they maintain a permanent establishment in Cyprus, ie, an office, branch, or other place of operation, or their control and management is in Cyprus. The only exceptions are international business companies where the Law specifies that 'the income of international business companies will be deemed to be derived from Cyprus, irrespective of the place where control and management of its business is exercised'. Domicile also is not defined in the Law, but citizens of the Republic of Cyprus are considered to be domiciled in Cyprus. Domicile can be either of origin or of choice.

3 KPMG, *Investment in Cyprus* (1999).
4 Andreas Neocleous, 'Cyprus', *International Taxation of Low-Tax Transactions*.

Chargeable Income

7-5 For the purpose of the Law, income is classified as:

- Gains or profits from any trade, business, or profession;
- Income from office or employment;
- Annual value of immovable property used by or on behalf of the owner for the purpose of residence;
- Any dividend or interest;
- Any pension, charge, or annuity;
- Any rents, royalty, premium, or other profit arising from property;
- Any profit from farming; and
- Any annual profit or gain not falling under any of the foregoing paragraphs.

7-6 The distinction between income and capital is important as income is taxed at progressive rates of up to 40 per cent on chargeable income, whereas the rate of capital gains tax is a constant 20 per cent.[5]

To encourage investment and the repatriation of foreign currency from activities or employment abroad, certain types of income are specifically exempt from tax. The main exemptions are:

- Interest derived by individuals from government securities;
- Interest derived by individuals from debentures listed on the Cyprus Stock Exchange, and from banks and co-operative savings banks operating in the Republic, provided that the aggregate amount exempted may not exceed CY £600;
- The first CY £1,200 of dividends received by an individual and dependants from Cypriot companies listed on the Cyprus Stock Exchange;
- Up to 30 per cent of the amount invested by a person in the first issue of shares of a company going public and listed on the Cyprus Stock Exchange, provided the shares are held for at least one year;[6]
- Profits or dividends, for a period of 10 years, derived from the manufacture in Cyprus of high technology products or the operation of auxiliary tourist projects (eg, golf courses);
- Sixty per cent of the profits brought into Cyprus from the rendering of professional services abroad;

5 In *Georgios Pitsiakkos v CIR* (1985) 5 CTC 291, it was held that the profit from the disposal of inherited land was capital gain and taxable at 20 per cent; in *Charitos Stamatiou v CIR* (1991) CTR 24, it was held that, because Mr Stamatiou traded in land, the profit from the disposal of inherited land was trading income and taxable at the then current rates of income tax.

6 The deduction is given in the fiscal year when the investment was made. The deduction, however, cannot exceed 25 per cent of the taxable income. The unrelieved amount can be carried forward four years, provided the shares are still held by the taxpayer.

- Ninety per cent of the profits,[7] after the deduction of any local losses, or dividends brought into Cyprus from any business carried on outside Cyprus by a Cypriot residing in Cyprus or by a company controlled by Cypriots and having an interest of at least 15 per cent in such business;
- The whole amount of foreign currency imported into Cyprus from the rendering of salaried services abroad to private businesses;
- The interest earned on foreign capital imported into Cyprus and deposited in any bank operating in Cyprus; and
- The whole of the dividend income of, as well as the profit from the disposal of shares by, international business companies from investments in companies quoted on the Cyprus Stock Exchange.

7-7 With the exception of income from rents, to ascertain the chargeable income of a person, all expenses and outgoings wholly and exclusively incurred in the production of the income may be deducted from the gross income.[8] The Commissioner of Income Tax may, however, restrict or disallow an expense if it is considered to be excessive in relation to the income and activities of the taxpayer. No expenditure of a personal nature may be deducted, including travelling to and from the place of work or business. In the case of income from rents of a natural person, only a flat deduction of 20 per cent of the gross rents received may be deducted, as well as any interest suffered on a loan secured for the purchase of the property and a three per cent *per annum* depreciation of the property.

Expenditure of a capital nature is not allowed as an immediate deduction against gross income but must be written off over a number of years at rates, known as 'capital allowance', specified by the Income Tax Authorities. The rates of capital allowances range from three to 20 per cent *per annum*. Capital allowances are not allowed for saloon cars. For certain types of capital expenditure, in addition to the capital allowances, an investment allowance of 20 or 40 per cent of the expenditure is deducted from the gross income in the year of acquisition, provided that the expenditure is for new machinery or second-hand imported machinery. This is done to assist certain types of businesses, to encourage the setting up of joint ventures, and to encourage investment in computers and computerised machinery.

Where it is proved that proper accounting records have not been kept by the taxpayer, the Commissioner may refuse to give the capital and investment allowances.[9]

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7 *CIR v HH Furnishings Ltd* (1996) CTR 187. The Commissioner sought to restrict the relief to the taxable profits of the company. The court held that the term 'profits' relates to accounting profits and not taxable profits.

8 Law 7 of 1961, s 11.

9 *Polyxeni Hotel Apartments Ltd v CIR* (1997) CTR 355. The Supreme Court upheld the Commissioner's decision not to allow the capital allowances because the taxpayer had not maintained proper accounting records.

Losses

7-8 Where a person suffers losses in any one fiscal year, and such losses cannot be wholly offset against income from other sources, the amount of unrelieved loss can be carried forward and set off against income of subsequent years, provided that accounts and tax computations for the year in which the loss was suffered are filed with the Income Tax Authorities within six years from the date when they ought to have been filed. Such losses cannot, however, be carried forward for more than five years from the year in which they have been incurred, ie, unrelieved losses in the fiscal year 2000 may be carried forward up to the year 2005. Losses cannot be carried forward if:

- Within a period of three years, there is a change of ownership and substantial change in the nature of business; or
- The activities of a company have become negligible, and before reactivation there has been a change of ownership.

7-9 Law 58 of 1961 defines change of ownership as the acquisition of at least 50 per cent of the ordinary share capital of a company.

International business companies cannot carry forward any losses caused by the payment of overseas tax.[10] There is, however, no right of set-off of losses against income from other sources in the same year for losses suffered from:

- Any business or profession carried on outside Cyprus;
- Farming activities;
- Export of locally manufactured goods; and
- Life insurance companies.

7-10 Under amendments introduced in 1987 and 1989, group relief can be claimed subject to such conditions and procedures as might be prescribed by regulations to be made by the Income Tax Authorities under Law 39 of 1989. By September 2000, the regulations had not been published and, despite a number of appeals to the courts, group relief cannot yet be claimed.[11]

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10 *ExpoGuld Ltd v CIR* (1998) CTR 438. Section 28A1 (1) states that '. . . tax is imposed on the chargeable income, after deducting any tax which is payable outside the Republic . . .'. For the years 1984 to 1990, the company paid tax outside Cyprus, which it claimed against its income. The Commissioner did not allow the claim for the years for which the company had losses, thus reducing the amount of losses carried forward. The Supreme Court ruled that foreign tax can be deducted only for the purpose of assessing the tax payable, and not to create losses. Since the company did not have chargeable income for the said years, the tax suffered abroad could not be deducted.

11 In *CIR v Costas Tymvios Ltd* (1998) CTR 425, *KEO Ltd v CIR* (1998) CTR 358, and *Hawaii Constructions Ltd v CIR* (1998) CTR 425, the Supreme Court ruled that group relief could not be claimed until the regulations, required by the law, were drawn.

Taxation of Individuals

Locals

7-11 Individuals are taxed on the basis of a progressive tax scale on their aggregate net income from all sources, which can be:

- Income from salaried services or from the holding of an office such as a directorship. Tax is charged on emoluments which cover wages, salaries, commissions, bonuses, and certain benefits in kind, whether received in the year of assessment or not;[12]
- Income from a trade, business, profession, or vocation; and
- Income from pensions and investments, including rents.

7-12 The income from all sources of a natural person in any one fiscal year is aggregated and personal allowances and deductions (eg, for spouse or children), as specified by the law, are given to arrive at the taxable income. Tax is levied as follows:

- Taxable income of CY £0–6,000, at nil;
- Taxable income of CY £6,001–9,000, at 20 per cent;
- Taxable income of CY £9,001–12,000, at 30 per cent; and
- Taxable income of CY £12,001 and over, at 40 per cent.

7-13 Any tax already paid on the assessed income either through the PAYE system, temporary assessment, or withholding tax is deducted from the computed tax liability and the balance is payable in accordance with the provisions of the Assessment and Collection of Taxes Law. There are special provisions regarding the taxation of individuals whose income includes income from farming (see text, below).

Aliens

7-14 Special provisions apply to the taxation of aliens working in Cyprus. Where such a person is employed by an international business company or a company operating in the Free Trade Zone, their emoluments are taxed at one-half of normal rates. The emoluments of an alien employee of an international business company who renders his services outside Cyprus are exempt from taxation if such emoluments are paid through a bank account in Cyprus; otherwise, they are liable to tax at rates equal to one-tenth of the above rates.

The pension of any alien, or a repatriated Cypriot, from services rendered outside Cyprus, which is remitted to Cyprus, is exempt from tax for up to CY £2,000 *per annum*

12 For most wage and salary earners, the assessable earnings will coincide with their annual income in the year of assessment. This income is taxed under the Pay-As-You-Earn (PAYE) system whereby tax is deducted at source by the employer and paid to the government. Any under- or over-deductions are adjusted by an assessment issued to the employee.

and thereafter is taxed at a flat rate of five per cent. Income from foreign investments is similarly treated. Neither of these incomes is added to any other income for the purpose of computing his or her tax liability. If any tax has been suffered at source, it is credited against the tax liability in Cyprus, irrespective of whether there is a double tax treaty in force.[13]

Income from Farming

7-15 The following special rules apply to the taxation of income[14] from farming:

- Where the taxpayer's main occupation is farming, a deduction of 30 per cent of the gross income is given provided that such deduction shall not exceed CY £3,000; and
- Where the taxpayer has income from any trade, profession, or employment as well as from farming, and provided the income from farming does not exceed CY £10,000, the income from farming will be taxed separately at the rate of 25 per cent.[15]

Corporate Tax

Local Companies

Tax Rates

7-16 Cypriot-incorporated companies, other than international business companies, are taxed at 20 per cent in respect of profits up to the first CY £40,000 and thereafter at 25 per cent. There are, however, a number of exemptions to the above rates of taxation, given as incentives.

After the introduction of an amendment to the main law by Law 61 (1) of 1998, companies whose shares are listed for the first time on the Cyprus Stock Exchange will be liable to tax at 50 per cent of normal rates. The reduced rates apply for the four years following the fiscal year in which the company's shares were introduced in the Cyprus Stock Exchange. The three conditions attached are that:

- The shares are listed within four years of the amendment coming into operation;

13 Section 43(1) provides that, where the Commissioner is satisfied that income tax has been paid by a resident of Cyprus on income derived from a foreign country with which a double taxation treaty has not been concluded, and such income is subject to taxation in Cyprus, the Commissioner shall grant relief from tax payable in Cyprus in respect of such income, but not exceeding the amount of tax paid in the foreign country.

14 The term 'farming' includes agriculture, animal husbandry, bird breeding, and fishing. It is further provided that the person claiming the relief must reside in a rural area.

15 The taxpayer may elect, every fiscal year, to be taxed either under this method or under the normal method of taxation for individuals. Any loss from farming by such individuals may only be carried forward and offset against similar future profits.

- The listed share capital represents at least 80 per cent of the issued share capital with voting rights; and
- The tax saved would not exceed CY £100,000 for every year of assessment.

7-17 The above provisions do not apply, however, where the newly listed company takes over an already listed company.

To encourage the development of rural bus companies, any part of their taxable income that is deposited in a special account outside the business and is used for the acquisition of new buses is taxed at zero per cent. Any tax already suffered on such income is refundable.

The dividend income of resident companies received from another resident company is neither taxed nor taken into consideration when calculating their chargeable income.

Minimum Tax

7-18 Section 34(2) of the Law provides that companies which claim relief for losses brought forward or from investment allowances claimed are liable to tax, called 'minimum tax', at the rate of 10 per cent on an amount equal to the relief claimed, but not exceeding the amount of profit relieved.

A company, therefore that in any fiscal year has a taxable profit reduced by losses brought forward, will pay tax at 20 per cent or 25 per cent on the profit reduced by the losses as well as tax at 10 per cent on the amount of the profit relieved by the losses brought forward.

International Business Companies and Branches

7-19 International business companies and branches are taxed on their net income, which is computed on the same principle as any other company, at the rate of 4.25 per cent. No other provisions or reliefs as to the rate of tax or minimum tax are applicable to international business companies or branches.

Shipping and Ship Management Companies

7-20 Under the Merchant Shipping (Fees and Taxing Provisions) Law,[16] no income or corporate tax is presently imposed on the income of a ship owner, either natural or legal, arising from the use of a Cypriot-registered vessel in any type of shipping business between Cyprus and foreign ports, other than fishing. This measure was introduced to encourage the registration of ships under the Cypriot flag. It lapses in the year 2002, but the Council of Ministers is empowered to extend the period of the relief as it thinks fit.

16 Law 38 (1) of 1992.

By a recent amendment to the Merchant Shipping (Fees and Taxing Provisions) Law and the Income Tax Law, introduced by Law 73 of 1999, every person, natural or legal, deriving profits from ship management may elect every year to be taxed either under the prevailing income tax laws or at rates equal to 25 per cent of the rates applicable to the calculation of the tonnage tax of vessels under their management which are registered outside Cyprus. The management of Cypriot-registered vessels is not covered by the provisions of this law.

The Income Tax Law provided that profits from ship management services in the hands of an individual were taxed at rates applicable to individuals, in the hands of local companies at the rates of 20 per cent or 25 per cent, and in the hands of international business companies at 4.25 per cent. Under the amendments introduced by Law 73 of 1999, profits from ship management services will be taxed at a flat rate of 4.25 per cent, irrespective of whether they are local or international business companies. It is further provided that:

- Special provisions relating to public companies are not applicable;
- Natural persons may not deduct personal allowances or credits in arriving at their taxable income;
- Profits from ship management services are taxed separately from any other income; and
- Losses suffered may not be offset against profits from other sources in the same fiscal year or carried forward and offset against future profits from any source.

7-21 These amendments were introduced to enhance the favourable tax treatment of Cypriot-registered ship management companies.

Insurance Companies

7-22 The taxation of insurance companies is governed by sections 25 and 26. Section 25 specifies how the profits of insurance companies engaged in general insurance should be computed. The section further provides that:

- Branches in Cyprus of foreign insurance companies may deduct a fair proportion of the Head Office costs, provided that they do not exceed three per cent of the premiums earned in Cyprus, less the reinsurance premiums paid; and
- Losses suffered from these activities may neither be offset against other income other than that derived from life insurance activities nor carried forward and offset against future profits.

7-23 Section 26 specifies how the profits of insurance companies engaged in life insurance should be computed. The section also specifies that:

- The fair proportion of head office expenses that can be deducted may not exceed two per cent of the premiums earned less the reinsurance premiums paid; and
- Losses suffered from these activities may neither be offset against other income nor carried forward.

Taxation of Dividends

7-24 Every company incorporated in Cyprus or whose control and management is in Cyprus is obliged, when paying a dividend, to withhold tax at 20 per cent on the gross dividend paid. The tax withheld must be paid to the authorities and will be treated as tax paid by the recipient of the dividend. The withheld tax will not be considered as forming part of the corporate tax liability of the company on the profits out of which the dividends are paid, to wit:

- Where dividends are paid out of profits which have been subjected to 'minimum tax', tax is withheld at 16.67 per cent on the gross dividend;[17] and
- The normal rate is 20 per cent on the gross dividend, after the deduction of the tax at 16.67 per cent.

7-25 Dividends paid by a Cypriot resident company to a non-resident company are not subject to withholding tax, provided that prior approval has been obtained from the Commissioner of Income Tax. If such approval has not been obtained, tax is withheld in accordance with the provisions of the double-taxation treaty, where applicable, or at 20 per cent. Where, for any reason, tax has been withheld, the non-resident recipient is entitled to its refund, provided that an application is made within six years of receiving the dividend.

A resident company paying a dividend from profits which arise from dividends received from another resident company is entitled to a refund of the tax suffered, in proportion to the dividend paid. Although the law speaks of 'the right to refund', in practice, there is a set-off.

To encourage the registration of ships in Cyprus, dividends paid by a Cypriot-resident ship owning company, whose vessel is registered in Cyprus, are not subject to withholding tax. There is no withholding tax on any dividends paid by any international business company.

Double-Taxation Relief

7-26 Cyprus has entered into a number of treaties for the avoidance of double taxation. Tax payable in respect of any income arising in a treaty country is allowed against tax payable in respect of that income in Cyprus, provided that:

- The person claiming the relief against tax for any year of assessment is a resident of Cyprus for that year; and

17 This tax should not be considered as having been withheld on behalf of the shareholder and cannot be offset or refunded. It is in fact an additional tax on the distributed profits with the net effect that the company is taxed at 25 per cent on the distributed profits. Example: Profits out of which dividend is to be paid = 1,000; 10 per cent minimum tax = 100; tax paid = 100; subject to withholding tax at 16.67 per cent on the net of 900 = 150; Remaining profit = 750; resulting total tax = 250 (ie, 25 per cent tax on the profits to be distributed).

- The credit may not exceed the tax payable on that income, which is calculated by charging the income to tax at a rate ascertained by dividing the tax chargeable in accordance with the provisions of the Law on the total income of the person by the amount of his total income.[18]

7-27 In any event, the tax credit may not exceed the total tax paid by the claimant for that year of assessment. In computing the foreign income to be taken into consideration, the amount received in Cyprus must be grossed up by the foreign tax deducted directly or indirectly. A taxpayer may elect not to have the foreign tax credited in any one tax year. Where, however, the credit will be claimed, this must be done not later than six years after the end of the year of assessment.

Value-Added Tax

In General

7-28 The government has wished to harmonise its relations with the then-European Economic Community since the early 1960s. This led to the signing of an Association Agreement in 1972. One of the provisions of the Agreement was the gradual abolition of customs duties. As a result, the government of Cyprus considered ways of replacing the loss of revenue from the abolition of customs duties.

One of the ways considered was the introduction of value-added tax. The first attempt to introduce value-added tax was in 1979, but it was abandoned for political reasons. A second, successful, attempt was made in 1989 with the introduction of a bill in the House of Representatives, which was passed as a law in 1990, called the Value-Added Tax Law.[19] The Law came into force on 1 July 1992. Various amendments to the basic law have been introduced since that time.[20]

18 For example, a person has income chargeable to tax under the provisions of the Law of CY £1,000 and tax thereon of CY £100. Dividing the tax payable (CY £100) by the total income (CY £1,000) produces the rate to be applied to the foreign income to calculate the tax payable on that income.

19 Law 246 of 1990.

20 To harmonise value-added tax legislation with European Union Directives, the House of Representatives passed a new Value-Added Tax Law, Law 95 (I) of 2000, on 22 June 2000. The date of commencement of the Law, or sections thereof, has not yet been announced by the Council of Ministers. Some of the major changes to be introduced are that (a) the threshold of registration will be reduced to CY £9,000; (b) the right not to register for value-added tax if a person's sales or services are zero-rated will be abolished; (c) international business companies may register on a voluntary basis to be able to claim value-added tax suffered; (d) value-added tax on bad debts may be reclaimed after 12 months from the date on which the debt was written off; and the (e) penalty for failure to file a return within the specified period will be a fixed CY £30 and not CY £30 per month or part thereof.

Application

7-29 Value-added tax is payable whenever there is:

- A supply of goods or services in Cyprus by a value-added tax-registered person, natural or legal, within the activities or the promotion of the activities of his business. The definition of 'supply of goods or services' includes all types of supply (eg, retail and wholesale), but does not include anything that is not done in exchange for money or money's worth;
- An import of goods to Cyprus; and
- A notional provision in Cyprus of services received from abroad.

7-30 Supplies of goods and services that come within the scope of the Law are divided into two categories, namely:

- Taxable supplies which are taxed at the various applicable rates; and
- Exempt supplies which include, *inter alia*, rents and financial, postal, medical, and social services.

Obligation to Register

7-31 Registration for value-added tax can be either obligatory or voluntary. A person is obliged to register for value-added tax if:

- During any tax period the turnover exceeded CY £3,000;[21]
- The total turnover of the current quarter and the preceding three quarters exceeds CY £12,000; or
- At any time, the turnover for the next 12 months is expected to exceed CY £12,000 *per annum*.

7-32 Any person who is not obliged to register may, however, apply to the Commissioner of value-added tax for voluntary registration. In such cases, the person must remain registered for a period of at least three years.

A person must apply for registration within 30 days from the time when the obligation arises; otherwise, a penalty of CY £50 is imposed for every month, or part thereof, that he fails to register. In addition, the Commissioner will impose penalties and interest.[22]

International business companies do not come under the scope of the Law, and they are exempt from registration for value-added tax purposes.

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21 There is no obligation to register if the level of CY £3,000 was exceeded due to exceptional circumstances. A tax period is a calendar quarter.

22 In *Costas Gavrielides & Sons v Com VAT* (1996) CTR 217, the Supreme Court upheld the Commissioner's decision to impose tax, interest, and penalties from the date the company should have registered for value-added tax.

Obligation to Deregister

7-33 A registered person is obliged to notify the Commissioner to deregister on the occurrence of one of the following:

- Termination of trading;
- Termination of intent to trade in taxable goods or services; or
- Fall in turnover to below the level of CY £12,000.

7-34 A person must apply for deregistration within 30 days from the time when the obligation arises; otherwise, a penalty of CY £50 is imposed for every month, or part thereof, that he fails to de-register. Where a person who provides or intends to provide taxable sales or services satisfies the Commissioner that all or the majority of the sales or services will be zero-rated, that person may apply for exemption from registration.

Place of Taxable Event

7-35 The supply of goods is considered to take place in Cyprus if the goods are traded in Cyprus, or imported to Cyprus from abroad, in which case value-added tax becomes payable at the point of importation. Exports are considered as traded in Cyprus but are zero-rated.

The supply of services is considered to take place in Cyprus if the person providing the services has a business or permanent establishment in Cyprus, or is an ordinary resident of Cyprus.

Tax Point

7-36 The tax point at which value-added tax is chargeable arises when goods are delivered or made available to the buyer or when the rendering of a service has been completed. However, a tax point arises before the aforementioned events where:

- An invoice has been raised and delivered, in which case the tax point is the date of the invoice; or
- A payment has been made before the taxable event, in which case an invoice must be raised within 14 days of receipt of funds, or within four months if an application is made to and approved by the Commissioner of value-added tax.[23]

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23 Pre-payments made do not, however, give rise to a tax point unless made for a specific order. In *G & L Calibers v Com VAT* (1995) CTR 141, the appellant received a prepayment prior to the passing of the Value-Added Tax Law in 1992 against future orders. The Supreme Court upheld the Commissioner's decision that because the prepayment was made not against a specific order, the tax point arose when the goods were delivered and not when the prepayment was made. In the absence of precedents in Cyprus, reference was made to De Voil, *Value Added Tax*, where, on page A652, it is stated that '[a] payment does not, therefore, create a point if it is made (a) in respect of goods which have not yet been ordered . . .'.

Rates of Value-Added Tax

7-37 Rates of tax presently applicable are:

- Zero rate — This relates mainly to air and sea transport of passengers, supply of medical items and services, and the supply of children's clothing and shoes. Appendix II of the Law gives a detailed list of zero-rated items.
- Five per cent rate — This is applicable only to hotels, and establishments of a similar nature, as well as to establishments in the catering business. From 1 July 2000, these businesses must pay a levy of three per cent to the Cyprus Tourism Organisation. To minimise the effect on the prices charged by these establishments, the reduced rate of five per cent was introduced which will be levied on accommodation by hotels and similar establishments and on the supply of food and drinks by any establishment in the course of catering. The term food and drinks does not include wine, beer, and spirits, which must be taxed at the standard rate.
- Standard rate — The standard rate is 10 per cent.[24] This rate is applicable to all supplies of goods and services, unless they are exempt by the law or zero-rated.

7-38 Value-added tax is charged at the applicable rate on the value of the goods sold or services rendered. Value is considered to be as follows:

- Where the consideration is money, the amount which, when the value-added tax is added, will equal the consideration;
- Where there is no consideration, the open market value;
- In cases of self-supply, the cost of the goods;
- For periods of stay in a hotel exceeding four weeks, any other services provided, so long as such services equal at least 20 per cent of the charge for the stay after the four weeks;
- For door-to-door sales, the open market retail price;
- For transactions between related parties, or not at arm's length, the open market price;
- For imported goods, the total of CIF cost, import duties, and other related costs; and
- For services received from abroad by a taxable person, the notional value of the deemed services provided by the taxable person is the same as the value of the services received.

Submission of Return and Settlement of Tax

7-39 Every fiscal year is divided, for value-added tax purposes, into four quarters, ending on 31 March, 30 June, 30 September, and 31 December. Each registered person must, within 40 days of the end of the quarter, file his value-added tax return and settle the value-added tax payable.

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24 When value-added tax was introduced in 1992, the standard rate was five per cent. From 1 October 1993, the rate was increased to eight per cent and, from 1 July 2000, to 10 per cent. The rate will gradually be increased to 15 per cent to harmonise with European Union Directives.

Failure to do so attracts a penalty of CY £30 for every month, or part thereof, that he fails to submit the return, as well as a penalty of 10 per cent of the tax payable. Interest at nine per cent *per annum* also is payable from the due date of payment to the date paid.

Calculation of Value-Added Tax Payable or Refundable

7-40 The value-added tax payable is the net difference between the output tax (value-added tax charged on income) and the input tax (value-added tax suffered) for the quarter. Value-added tax suffered on the following is not, however, deductible:

- Acquisition of, and work carried out on, immovable property;
- Entertainment expenses;
- Housing, subsistence, and moving expenses of personnel or representatives;
- Acquisition of, and expenses relating to, saloon cars, cars for private use with a seating capacity of up to eight passengers, and craft and aircraft used for pleasure or sport;
- Private use of taxable goods or services;
- Costs relating to exempt outputs; and
- Purchase and import of tobacco products and spirits other than for trading purposes.

7-41 Where the net value-added tax is refundable, this is carried forward and offset against future value-added tax liabilities. Value-added tax is refunded only if it:

- Has been paid in error on the importation of goods;
- Cannot be offset by the end of the following year;
- Arises from costs relating to zero-rated transactions;
- Relates to the acquisition of fixed assets; and
- Is at the expiration of three years from the period in which the credit arose.

Accounting Records

7-42 Every registered person must maintain proper accounting records and, if required, make them available to a value-added tax inspector for examination. Such records must give details of all outputs and inputs for the period. The books of account must include a value-added tax account which must show how the net value-added tax per period is calculated.

To comply with the provisions of the law, invoices and other documents from which such accounting books are maintained must give full details of the name and address of the registered person issuing the invoice, as well as of the recipient of the goods or services, the value-added tax registration number of the registered person, the date of issue of the invoice, the tax point date if different, and details of the goods or services provided. If the invoices do not comply with the law, the value-added tax Commissioner may not allow the value-added tax suffered to be reclaimed.

If, after examining the accounting records of a registered person, the Commissioner is of the opinion that proper accounting records have not been kept, he may assess the registered person to the best of his judgment based on the information available.[25]

Appeals

7-43 A registered person may appeal against any decision of the Commissioner to:

- The Commissioner of value-added tax;
- The Minister of Finance within 60 days of receiving the Commissioner's decision, provided the outstanding debt is paid or a corresponding guarantee is given; and
- The Supreme Court within 75 days of the issue of an administrative act by the Commissioner or receiving the decision of the Minister of Finance.

Special Cases

Farmers

7-44 Farming does not come within the scope of this law as regards the sale of farm products and the provision of farming services. The term 'farming' includes activities relating to forestry, fishing, and the breeding of livestock.

Tour Operators

7-45 The services rendered by tour operators are considered as being rendered in Cyprus and subject to value-added tax.[26]

The price quoted for the tour must be inclusive of value-added tax. Value-added tax suffered on services received by the operator is not reclaimable, but it must be incorporated in the price of the tour.

Capital Gains Tax

In General

7-46 The late 1970s saw an unprecedented demand for land for use in tourism and housing. This caused a sharp increase in the price of land and also in the profits made from the sale of such land. These profits could not be considered as trading profits, some of the land having been held for years and considered of no commercial value, and as such it could not be taxed under the provisions of the existing Income Tax Laws. Capital gains tax was introduced in 1980 to enable the government to tax such profits.

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25 *Dionysos Bros Leathers Co Ltd v Com VAT* (1998) CTR 368.

26 *Princessa Marissa Company Ltd v Com VAT* (1995) CTR 157. The company owned the ferry boat Princessa Marissa, which sailed between Cyprus and the neighbouring countries for tours to the Holy Lands and Egypt. The services rendered by the company were held to be package tours and subject to the special case provisions of the law, ie, taxed at the standard rate and not as sea transport of passengers, which is zero rated.

General Provisions

7-47 The taxation of capital gains is governed by the Capital Gains Tax Law.[27] Capital gains tax is imposed on the gains accruing to any person (natural or legal) from a disposal of property which does not fall within the provisions of the Income Tax Law. For the purpose of the Capital Gains Tax Law, property means:

- In the case of a person residing or ordinarily residing in Cyprus, any immovable property wherever situated as well as shares in companies whose assets include immovable property; and
- In the case of a person not residing or ordinarily residing in Cyprus, any immovable property wherever situated in Cyprus or shares in companies registered in Cyprus whose assets include immovable property.

7-48 Whether a gain is subject to capital gains tax or income tax is a matter of fact. Where property is purchased with the ultimate aim of selling it at a profit, it will be taxed under the provisions of the Income Tax Law because this is considered to be a trading activity. Even if a person acquires property and gives it to the spouse by way of gift, for example, subsequent disposal by the spouse might be taxed under the Income Tax Law if the intention is considered to be trading. On the other hand, if a person acquires wealth throughout life which is then passed on to the spouse and/or children, subsequent disposal by them would be subject to capital gains tax. The intention and period of holding the property is, therefore, of paramount importance.

Capital gains tax is imposed at the rate of 20 per cent on the gain made, which is the difference between the selling price and the cost, as adjusted for inflation. Cost is considered to be the cost of acquisition (including transfer fee), plus cost of additions, selling costs, and any loan interest suffered for the acquisition of property. Adjustment for inflation is given on the cost of acquisition and additions but not on the transfer fees or on interest paid to finance the acquisition of the property. In the case of property constructed by the taxpayer, the adjustment for inflation is given from the time progress payments are settled, and not from the completion of the property.

If immovable property was acquired before 1 January 1980, cost is considered to be the value at 1 January 1980 as assessed by the Land Registry Department.

Where the disposed property was acquired through inheritance or gift, cost will be the original cost to the donor or the value at 1 January 1980, whichever came later. Inheritance tax paid in Cyprus on the property cannot be added to cost.[28]

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27 Law 52 of 1980, as amended.

28 In *Christis Phylactou v CIR* (1988) 7 CTC 102, it was held that estate duty paid on inherited land did not 'constitute expenditure wholly and exclusively incurred in acquiring the gain'.

Exceptions

Individuals

7-49 The following lifetime exceptions are given:

- Gains up to CY £10,000 made by a natural person are exempt from tax (the exemption is not given to legal persons);[29]
- Gains up to CY £15,000 from the disposal of agricultural land by a person whose main occupation is farming;[30]
- Gains up to CY £50,000 from the disposal of a dwelling house, provided that the house was the main residence of the taxpayer for a total period of not less than five years; the period of five years does not need to be continuous;[31] and
- Gains made by aliens residing in Cyprus or by an international business company from the disposal of property abroad.[32]

7-50 No one person is entitled to all of the first three exceptions, only to the highest. For example, a person making a gain on the disposal of shares in a private company as well as on the disposal of his dwelling house would not be entitled to both the CY £10,000 and the CY £50,000 exemptions, but only to the latter, being the higher of the two.

General

7-51 Gains made from the disposal of shares of companies traded in the Cyprus Stock Exchange are exempt from taxation.

Losses

7-52 Capital losses can be offset against gains of the same year. Any unrelieved losses can be carried forward and offset against gains in future years. Losses cannot be claimed on buildings on which capital allowances were claimed to the extent that such losses are less than the claimed capital allowances.

Assessment, Collection of Tax, and Penalties

7-53 Within one month of the disposal of the property, the taxpayer is obliged to notify the tax authorities and pay the tax. If the taxpayer fails to do so, the

29 In *T M Economidou & Sons Ltd v CIR*, it was ruled that it was not unconstitutional for this exception not to be given to legal persons.

30 Whether the occupation of a person is farming is a matter of fact. A person making his living out of farming would be considered to have the occupation of farming. A tax consultant, however, who makes his living as a tax consultant but also owns a farm would not be considered to have the occupation of farming.

31 For the second and subsequent disposals, the period of occupation must be not less than 10 years.

32 Gains from disposal of property in Cyprus are, however, taxable.

Commissioner may raise an assessment at any time without time limit. The Commissioner also may raise a supplementary assessment within three months from the statutory submission of the return, and the payment of the tax.

The tax must be paid within the period specified by the assessment but definitely before the transfer of title in the case of disposal of immovable property. The Land Registry Department refuses to register a transfer of title unless evidence is produced that the tax has been paid.

Delay in paying the tax within the specified period attracts interest at nine per cent *per annum*. Failure to file a declaration of disposal may attract a fine of up to CY £500. Fraudulent declarations may attract a fine equal to the sum of CY £1,000 and three times the amount of tax, or imprisonment of up to 12 months, or both.

Immovable Property Tax

7-54 Under the Immovable Property Tax Law,[33] all persons, natural and legal, are obliged to pay the tax annually at the prescribed rates on all the immovable property in Cyprus registered in their name. The definition 'immovable property' relates to land and buildings, trees and plantations, rivers, wells, and all rights relating to land and buildings. Tax is levied on the value of the immovable property at the following rates:

- Value of CY £0–100,000, at nil;
- Value of CY £100,001–250,000, at 2.0 per thousand;
- Value of CY £250,001–500,000, at 3.0 per thousand; and
- Value over CY £500,000, at 3.5 per thousand.

7-55 The value of the property on which the tax is paid is:

- The value at 1 January 1980, as assessed by the Land Registry Department, if the property was acquired before 1 January 1980;[34] and
- The purchase price if acquired after 1 January 1980.

7-56 Every owner of immovable property must file with the Income Tax Authorities a return of all immovable property registered in their name and pay the tax calculated thereon on or before 30 September of the fiscal year. The Income Tax

33 Law 24 of 1980, as amended.

34 Section 6 of the Law states that '. . . the value of the immovable property will be deemed to be the price which it would, in the opinion of the Director, fetch if sold in the open market on the 1st January 1980'. The section further provides that where the Land Registry Department has carried out a valuation '. . . the Director must take this valuation into account in determining the value of the property as at 1st January 1980 . . .'. In *ETKO Ltd v CIR* (1997) CTR 281 and *Katia Galatariotou Ltd v CIR* (1997) CTR 316, the Supreme Court found that the Commissioner was wrong in considering that the Land Registry valuation was binding but should only have taken these valuations into consideration when determining the value at 1 January 1980.

Authorities will issue annually an assessment based on the return. Where there are additions to, disposals of, or alterations to the property, the owner is obliged to file a supplementary return before 30 September, notifying the authorities of the changes. A supplementary return also must be filed if it comes to the notice of the owner that he omitted to include a property in the original return or that the value was wrong.

The Commissioner of Income Tax may revise the value of the property declared as at 1 January 1980 on a return, within two years of the date of payment of the tax if, in his opinion, the property was undervalued. At the same time, if the value is proved to be excessive through the sale of the property, or a similar property, at a lower price in the open market, the Commissioner may revise the assessment downwards, based on the new information available. Where a property owner has not filed a return, the Commissioner may raise an assessment at any time.

To discourage property owners from submitting low returns, where the value of the property in the return differs by more than 25 per cent from the value on which the tax is eventually levied, there is a 10 per cent penalty on the difference between the tax paid under the return and the tax as finally assessed.

No tax is levied on immovable property owned by the government, local authorities, the Church, foreign countries, or on farmland. For farmland to be exempt, it must be owned by a natural person whose business is farming and/or animal breeding and who lives in the vicinity of the farm.[35]

Any tax not paid by the specified date will attract interest at nine per cent *per annum*. Penalties vary from a CY £500 fine for failing to file a return to a CY £1,000 fine or imprisonment for up to three years or both, plus settlement of the unpaid tax with a penalty equal to twice the tax, for fraudulent declarations.

Estate Duty

In General

7-57 Estate duty was levied under the Estate Duty Law[36] on the estate of any person dying between 1 December 1942 and 31 December 1999, subject to the exceptions specified by the law. By Law 74 (I) of 2000, estate duty was abolished as from 1 January 2000.[37]

'Estate' means all property, settled or not, which passes on the death of a person domiciled in Cyprus, except property acquired in Cyprus after 1 January 1976 from

35 In *Bogos Eramian v CIR* (1995) CTR 139, the Supreme Court found against the appellant on both grounds in that his main occupation was not farming and he was not living in the vicinity of the farm.

36 Law 67 of 1962, as amended.

37 Law 74 (I) is a recent enactment, but this section has been retained because it applies to all estates of persons who die before 1 January 2000.

remittances from abroad, provided the deceased, at any time prior to his death, was resident abroad. In the case of a deceased person who was not domiciled in Cyprus, 'estate' means all property in Cyprus, settled or not, which passes on death.

The law does not define 'domicile', and this must be derived from the Cypriot Wills and Succession Law. The generally acceptable definition is the country to which an individual, when absent, intends to return. Domicile can be 'of origin' or 'of choice'.[38]

Property Deemed to Pass on Death

7-58 Property deemed to pass on death consists of:

- Property which the deceased possessed on death or, if not belonging to the deceased, of which the deceased was competent to dispose at his death;
- Property in which the deceased, or any other person, had an interest ceasing on the death of the deceased;
- Property which was subject to an annuity or other periodical payment limited to cease on the death of the deceased;
- Gifts *inter vivos* made by the deceased within three years before death, except for outright gifts made to the state or local authority for religious, charitable, cultural, or other public purposes or a gift up to CY £50,000 to any religious or charitable institution;[39]
- Gifts, whenever made, of which *bona fide* possession and enjoyment has not been assumed by the donee;
- Property to which the deceased was originally absolutely entitled, but which he has caused to be transferred to or vested in himself and any other person jointly so that the beneficial interest passes or accrues to the other person by survivorship;
- Property passing under a conditional settlement whereby all or part of the interest in the property is reserved to the deceased until the date of death, or where the deceased had the right of reversion; and
- Money received under a life policy made by the deceased on his life but for the benefit of a donee.

7-59 Property includes movable and immovable property possessed by the deceased at the time of death but, where the deceased was not domiciled in Cyprus, it does

38 In *William Schwarts as administrator of the estate of the late Alice Ivy Durdey v CIR* (1995) CTR 148/1, the court upheld the Commissioner's opinion that Alice Ivy Durdey, having lived and worked in Cyprus, was domiciled in Cyprus by choice.

39 In addition, exemption is given to any gifts, other than the aforementioned, made for religious, charitable, or public purposes within one year prior to death. Also exempt are gifts made in consideration of marriage, if such gifts have been made in pursuance and in execution of a valid contract. Under an amendment made by Law 3 of 1976, relief is granted for gifts made within the three-year period preceding death (see exemptions and reliefs below).

not include shares in a Cypriot-registered company owning and using a Cypriot-registered vessel. Also excluded are deposits in any bank as well as the shares in an international business company held by a person not domiciled in Cyprus.

Excluded from property deemed to pass on death are:

- Small gifts considered by the Commissioner of Income Tax to be part of the normal expenditure of the deceased, and to have been reasonable having regard to the income of the deceased, or to the circumstances under which the gift was made, or which in the case of the donee do not exceed, in the aggregate, CY £100;
- Property held in trust;[40]
- Property settled by a person with a life interest for himself and thereafter for any other person is not deemed to pass on the death of the future beneficiary while the original donor is alive;
- Property sold by the deceased for full consideration;[41] and
- Settled property, where an interest under the settlement fails or determines by reason of the death of the person on whom the property was settled before it became an interest in possession, and subsequent limitations under the settlement continue to subsist.

Exemptions and Reliefs

7-60 Exemptions and reliefs are given by the Law as follows:

- A single annuity not exceeding CY £25 purchased or provided by the deceased for himself or some other person;
- Clothing and footwear of the deceased;
- Objects of national interest given or bequeathed to the State or a religious body, school, university, or public library in Cyprus, as well as to any municipal corporation, village authority, or development board;
- A gratuity payable to the legal representative of an officer of the state or on the pension or gratuity paid by the state to the widow or child of a deceased officer of the Republic; and
- Property on which estate duty has been paid and which passed from one spouse to another by way of a will or other disposition (unless the surviving spouse was, at the time of his death, competent to dispose of the property).

7-61 Where estate duty has been paid on any property consisting of immovable property or a business (not carried on by a company) or an interest in such property or business passing on the death of a person, and within five years from the payment

40 If the trust was set up by the deceased, it must have been made more than three years before the death, and to the exclusion of the deceased.

41 Where the property was not sold for full consideration, the value of the consideration is allowed as a deduction from the value of the property.

of that duty estate duty becomes payable again on the same property or part thereof due to the death of the beneficiary, the duty payable on the second death is reduced as follows:

- Where the second death occurs within one year, by 50 per cent;
- Where the second death occurs within two years, by 40 per cent;
- Where the second death occurs within three years, by 30 per cent;
- Where the second death occurs within four years, by 20 per cent; and
- Where the second death occurs within five years, by 10 per cent.

7-62 Where the value of the property on the occurrence of the second death exceeds the value on which duty was paid on the first death, the higher value will be taken into consideration when calculating the duty to which the reduction will be applied.

Amendments to the Law introduced in 1976 and 1996 ensure that:

- Where property the subject of a gift made over two years before the death is deemed to be property passing on death, the rate of estate duty payable will be reduced by 50 per cent; and
- Where the Commissioner is satisfied that duty is payable on property reverting to the parents on the death of a child and that the property was acquired by the deceased by way of a gift from the parents, such duty will be waived.

7-63 Where any person dies from wounds inflicted or an accident sustained or disease contracted within three years before death while on active service or on service which in the opinion of the Council of Ministers is of a warlike nature, the Council of Ministers may remit or repay all or part of the estate duty leviable or paid in respect of property passing to his widow or children or to his parents, brothers or sisters, and their descendants. The amount of duty to be remitted or repaid must not exceed (a) the whole of the duty if the property passing does not exceed CY £25,000 and (b) where the estate exceeds CY £25,000, the whole of the duty on the first CY £25,000 and 50 per cent of the duty payable on the balance of the estate.

If any of the aforementioned property becomes chargeable to estate duty due to the death of the beneficiary, the Council of Ministers may remit or repay any duty payable or paid, and the property will not be included in the estate for the purpose of calculating the estate duty.

Value of Property

7-64 The value of property for estate duty purposes is the price which, in the opinion of the Commissioner, the property would fetch if sold in the open market at the time of death. In the case of gifts, if the value at the date of death is considered higher than at the date of the gift, the value of the property will be considered to be the price which, in the opinion of the Council of Ministers, the property would fetch if sold in the open market at the time of the gift.

Where the property to be valued is an undivided share in any immovable property, the proportionate value of the property is reduced by 10 per cent. If the property to be valued is a benefit arising from the termination of an interest on the death of the deceased, the value of the property will be:

- If the interest extended to the whole income of the property, the value of the property; and
- If the interest extended to part of the income of the property, the proportion.

Value of Estate

7-65 All the property forming part of the estate of the deceased will be aggregated so as to form one estate, including property deemed to pass on death. Property on which no estate duty is payable is, however, not aggregated for the purpose of determining the value of the estate. No property will be aggregated more than once, nor is estate duty in respect of property passing on death levied more than once on the same death.

To arrive at the value of the estate on which estate duty will be levied, the following deductions are allowed:

- Reasonable funeral expenses, provided that no allowance will be made for funeral expenses incurred outside Cyprus, except out of property situated outside Cyprus on the value of which estate duty is payable;[42]
- Debts due from the deceased which were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit;[43]
- Immovable property of the deceased that has been used immediately before death by the deceased or his family, exclusively for private residence, up to a total value of CY £150,000;[44]
- In relation to the surviving spouse, CY £75,000;
- In relation to each surviving child who is under the age of 21 at the date of death, or being over the age of 21 is physically or mentally handicapped, CY £150,000;
- In relation to each surviving child over the age of 21, CY £75,000;

42 If it is proved to the satisfaction of the Commissioner that the cost of the funeral abroad exceeds the deceased's property abroad, any such excess may be deducted from the value of the estate.

43 However, no debts to relatives may be deducted unless proved to be *bona fide* debts. Debts due to non-residents also are not deductible unless contracted to be paid in Cyprus or charged on property situated in Cyprus. Such debts may, however, be deducted out of property situated outside Cyprus on which estate duty is payable. Debts that are reimbursable from another estate or person are similarly not deductible, unless such reimbursement cannot be found.

44 Where the property exceeds the aforementioned value, only the excess will be subject to estate duty.

- In relation to surviving children of a predeceased child who would have attained the age of 21 at the date of death of the deceased, CY £150,000 for every child; and
- In relation to surviving children of a predeceased child who would have attained the age of 21 at the date of death of the deceased, CY £75,000 for every predeceased child.

Amount of Estate Duty Payable

7-66 The amount of estate duty payable is calculated as follows:

- Value of estate in the amount of CY £0–20,000, nil;
- Value of estate in the amount of CY £20,001–25,000, 10 per cent;
- Value of estate in the amount of CY £25,001–35,000, 13 per cent;
- Value of estate in the amount of CY £35,001–55,000, 15 per cent;
- Value of estate in the amount of CY £55,001–80,000, 17 per cent;
- Value of estate in the amount of CY £80,001–105,000, 20 per cent;
- Value of estate in the amount of CY £105,001–150,000, 23 per cent;
- Value of estate over CY £150,000, 30 per cent.

The following amounts can be deducted from the estate duty calculated in accordance with the above table:

- Any stamp duty or other duty or fee paid on or in respect of any instrument by which any property chargeable with estate duty is transferred or given, provided that the amount deducted may not exceed the estate duty payable on that property; and
- For any property situated abroad on which estate duty has been paid abroad, an amount which will be the lesser of the estate duty suffered abroad or the amount of estate duty payable in Cyprus on that property.

Liability for Payment of Estate Duty

7-67 The executor of the deceased is liable to pay the estate duty in respect of all property of which the deceased died possessed or of which the deceased was competent to dispose at his death. He is not liable for any duty in excess of the assets which he has received as executor or might, but for his own neglect or default, have received. In all other cases, the person to whom the property passes or is deemed to pass is liable for the payment of estate duty.

Estate duty payable by an executor will be a first charge on all the property of which the deceased died possessed or of which the deceased was competent to dispose at his death. Estate duty payable by any other person in respect of any property inherited will be a first charge on that inherited property. Such charge may be enforced against any such property for the recovery of estate duty, provided that:

- It may not extend to any property sold to a *bona fide* purchaser for valuable consideration without notice;

- It may not rank in priority over any lease, mortgage, or other encumbrance effected or created *bona fide* for value by an instrument duly made prior to the date of death; and
- No charge for estate duty is deemed to be created on any property situated outside Cyprus.

7-68 No shares registered in the name of a deceased person may be transferred and no money deposited with any banking or other financial institution for the credit of a deceased person may be withdrawn by a person entitled to effect such transfer or withdrawal without the production of an appropriate certificate authorising such transfer or withdrawal.

A person authorised or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, raise money with the consent of a District Court judge by the sale or mortgage of that property or any part thereof.

Estate duty paid by an executor, which he is required to pay, is apportioned among the several persons beneficially interested in the property of the deceased in proportion to the value of their interest, unless otherwise directed by the will of the deceased. On payment of the estate duty, a certificate to that effect or a certificate of release can be issued by the Commissioner.

Returns and Assessments

7-69 A declaration of property in the prescribed form, containing a full and true statement of particulars relating to the estate of the deceased including the value thereof, must be delivered to the Commissioner within six months of the date of death.

The declaration is delivered by the executor of the deceased or, in cases where the executor is not liable to pay the estate duty in respect of any property passing on the death of a deceased, by the person so liable to pay the duty. The executor must in appropriate cases deliver to the Commissioner a certified copy of the will, if any, of the deceased.

The period of six months may, at the discretion of the Commissioner, be extended. A further declaration may be submitted at any time if it comes to the notice of any executor or other person liable to pay estate duty that in a declaration already submitted there is an error in that:

- Property liable to estate duty has been omitted therefrom;
- Property liable to estate duty has been undervalued therein; or
- A deduction has been claimed which is not authorised by the law.

7-70 In addition to the executor or other person liable to pay the estate duty, the Commissioner has power to give notice in writing to any other person requiring him to furnish particulars of the affairs of the deceased.

The Commissioner also has authority to request that, in addition to the submission of a declaration, any deeds, plans, instruments, books, or accounts also are submitted

whether by the executor or any other person liable to pay the estate duty or any person to whom a notice has been given.

The Commissioner may at any time, and irrespective of whether a declaration of property has been delivered, assess the estate duty payable and issue to the person or persons he considers liable to pay, a notice of such assessment together with a statement showing particulars of the commissioner's valuation of the estate.

Additional assessments may be made by the Commissioner in cases of under-assessment within three years of the original assessment. There is no time limit if the underassessment is due to fraud or wilful evasion or is brought to his notice by an executor or other taxable person.

The Law stipulates the procedure for the filing of written notices of objection to the assessment within 30 days of such assessment, the submission of evidence in support of such objection, and the determination of the objection with final recourse against the assessment to the Supreme Court.

Payment of Estate Duty

7-71 Estate duty is payable in the manner and on the date to be stipulated in the notice of assessment and must be paid irrespective of a pending recourse against assessment, unless the Commissioner otherwise directs. Simple interest at the rate of nine per cent *per annum* is charged on unpaid duty from 18 months after the date of death and any sum payable by way of interest and estate duty is first apportioned to interest.

Payment of the estate duty may in appropriate cases be made by instalments, provided that the Commissioner is satisfied that the estate of the deceased consists wholly or mainly of immovable property and that the movable property of the estate available for the payment of the duty is not sufficient. The maximum period for payment by instalments is 10 half-yearly instalments, with each one payable within 28 days from the date when it falls due.

According to section 46A of the Law, the Council of Ministers may remit the whole or part of the estate duty payable in relation to property, the value of which has been substantially reduced due to the 1974 Turkish invasion of Cyprus and the occupation of the northern 36 per cent of Cyprus since then.

At the same time, payment of estate duty in respect of property situate in the occupied areas is suspended for as long as the Commissioner may approve or is paid by instalments as arranged with the Commissioner. No interest is charged on the duty payable in such cases.

Where any estate duty is unpaid, the Commissioner may issue through a District Court a 'collection certificate', containing particulars of such duty, the name and address of the person by whom it is payable, and a schedule of property by the sale of which the duty may be recovered. The District Court may, without further process, issue its warrant for the sale of such property or a sufficient part thereof in the same manner as if it were to be sold by order of a competent court for the

payment of a judgment debt, and the proceeds of such sale will be applied in the payment of the estate duty due; any surplus after deducting costs and charges is repaid to the person in default.

The Commissioner is granted authority to attach in the hands of third parties any money due from any such third party to the executor for or on account of the estate of the deceased. The Commissioner also may recover unpaid estate duty from a surviving partner of the deceased with whom at the time of his death the deceased was engaged in a partnership carrying on business in Cyprus.

The procedure for the recovery of unpaid estate duty is in addition to and not in substitution for any other powers which the government has under general legal procedures to recover the sums due. If, at any time within three years of the date of issue of a notice of assessment, a claim is made to the Commissioner and it is proved to his satisfaction that estate duty has been overpaid, it will be lawful for him to refund the overpayment provided that:

- The period of three years may be extended by the Commissioner if the executor was prevented from claiming any refund of estate duty within the period of three years for any debt due from the deceased which may be allowed as a deduction, by reason of any proceedings at law; and
- No refund of estate duty is possible on any ground which has been or could have been raised by way of appeal.

Penalties

7-72 As stated, interest at nine per cent *per annum* is payable on unpaid estate duty from the expiration of 18 months from the date of death.

At the same time, a number of criminal offences are created by the Estate Duty Law, for failure to deliver a declaration of property as required, for non-compliance with other notices that may be served by the Commissioner on any person, or for incorrect statements made. Before a prosecution in respect of any offence under the Estate Duty Law can be commenced, the written sanction of the Attorney General must first be obtained.

Administration

7-73 The administration of the Estate Duty Law is entrusted to the Director of Inland Revenue, who is appointed as the Commissioner of Estate Duty; he should do all such acts as he may deem necessary or expedient for the purpose of carrying into effect the provisions of the Law.

The Director of the Department of Inland Revenue may authorise any other officer of his department to act as Assistant Commissioner of Estate Duty and delegate to him all or any of his powers in respect of the administration of the Law.

Assessment and Collection of Taxes

In General

7-74 The assessment and collection of taxes is governed by the Assessment and Collection of Taxes Law,[45] and it is administered by the Director of Inland Revenue.

Filing of Returns

7-75 Section 5 of the Law requires every person, natural or legal, and partnerships that have a taxable income to file an Income Tax Return. Taxable income is the net income from all sources in a fiscal year, after taking away all exemptions, deductions, and credit allowed by the Law. Since the Law speaks of taxable income, natural persons whose income after deductions is below CY £6,000 (the present level below which no tax is charged) are not obliged to file a return.

The Income Tax Return must be filed by 30 April following the relevant fiscal year. In the case of companies and natural persons who also must submit financial statements, the deadline for filing the Return is extended to 31 December.

Every natural person also is obliged to file every five years with the Income Tax Authorities a capital statement, giving details of his personal and business assets and liabilities situated anywhere in the world. The statement also must include the assets and liabilities of the taxpayer's dependants, ie, an unmarried child under the age of 18 or over 18 if still maintained by the parents, as well as those of his spouse if they are not taxpayers themselves.

The Income Tax Returns and capital statements must be in a form approved by the Director of Inland Revenue. Since the form of the capital statement has not yet been approved, the requirement to file such a statement is not enforced. Other returns that must be filed are:

- An employer's return which must be filed by 30 April of the following year, giving details of the employees, their earnings, and deductions suffered;
- A return of payments made to sub-contractors; and
- Returns by trustees.

7-76 Failure to file a return by the specified date will attract a penalty of five per cent of the tax payable.

Assessment of Tax

Temporary Assessment

7-77 Every taxpayer who has taxable income other than from employment must file by 1 August of the current fiscal year a temporary assessment. By this assessment,

45 Law 4 of 1978, as amended.

the taxpayer declares the estimated taxable income for the current fiscal year. The tax payable on this estimate must be settled by three equal instalments, on 1 August, 30 September, and 31 December.

A taxpayer has the right to submit a revised assessment at any time before the end of the fiscal year if the original assessment filed is considered to have been under or over estimated. Failure to submit the temporary assessment will cause the Director of Inland Revenue to issue one based on the income declared for the previous years. There is no right of appeal against temporary assessments raised by the Director.

To discourage submission of nil or low temporary assessments, there is a penalty payable if the difference between the final tax liability and that of the temporary assessment is more than 25 per cent. The penalty is 10 per cent of the difference in the tax.

In the case of life insurance companies, a temporary tax assessment must be submitted at 1.5 per cent of gross premiums at the end of each quarter of each year of assessment. Tax is payable on 30 April, 31 August, and 31 December. Where the tax is not paid on the due dates, interest is charged at nine per cent *per annum*, with an additional charge of one per cent for every month of delay after a period of two months, provided that the additional charge does not exceed 11 per cent of the amount due.

Self-Assessment

7-78 The self-assessment method applies only to legal persons. The net tax payable in accordance with the company's tax return may be paid by self-assessment at the same time as the submission of the return.

Assessment

7-79 The Director of Inland Revenue will raise an initial assessment based on the accounts and computations submitted by the taxpayer with the return. When the accounts are examined in detail, the Director may issue a revised assessment if he has reason not to accept the figures submitted.

Appeals

7-80 If the taxpayer does not agree with the assessment raised by the Director, he has the right to appeal. The law entitles the taxpayer to appeal as follows:

- By lodging an appeal with the Commissioner, not later than the end of the month following that in which the assessment was raised;
- If not satisfied with the outcome, by appealing to the Tax Tribunal within 45 days of the date of the Commissioner's decision;

- To the Supreme Court, if he is not satisfied with the decision of the Tribunal;[46] and
- The final determination is to the Supreme Court in its appellate jurisdiction, where the appeal must be lodged within 42 days of the original decision of the Supreme Court. The decision of the Supreme Court in its appellate jurisdiction is final.

Collection and Refund of Tax

7-81 The balance of any tax payable must be settled by 1 August following the fiscal year; otherwise, interest will be charged on the amount due.

Any overpayment of tax is refunded with interest, presently at nine per cent *per annum*, from 1 January following the fiscal year for which the tax was paid. Where, however, the taxpayer did not file the tax return within the specified period, interest runs from three months after the submission of the return. No tax will be refunded if the taxpayer fails to file an income tax return within six years from the relevant fiscal year.[47]

The Director of Inland Revenue is empowered to deduct from the refundable amount any amount due from the taxpayer before making the refund.

Interest and Penalties

7-82 Any tax payable that is not settled by the due date will attract interest at five per cent *per annum* if settled within six months of the due date or nine per cent *per annum* if settled later. Interest is accrued on a monthly basis.

A penalty of five per cent of the tax payable is imposed where the taxpayer unjustifiably[48] omits to submit a return. Where the taxpayer, however, is given incorrect advice, late submission of the return is not considered an 'unjustifiable omission'.[49]

Tax Tribunals

In General

7-83 Up to the end of 1999, any taxpayer who did not agree with the tax assessed had the right to appeal to the Commissioner of Income Tax who raised the

46 The application must be made within 75 days; otherwise, it will not be heard by the court. In appeals to the Supreme Court, the onus of proof is on the taxpayer. Constitution, art 146.

47 In *Maria Angelidou v CIR* (1985) 5 CTC 273, the Supreme Court upheld the Commissioner's decision not to refund tax withheld on dividends as the claimant failed to file her returns within six years from the due date.

48 *S Koulendro Constructions Ltd v CIR* (1998) CTR 389. Accounts were submitted with one year's delay from the due date of submission. No explanation was given for the delay. The Supreme Court ruled that there was 'unjustifiable omission'.

49 *Adamos Kalogirou v CIR* (1986) 6 CTC 143.

assessment. If the outcome of the appeal was not an agreement between the taxpayer and the Commissioner, the Commissioner would raise an assessment to the best of his judgment. Any taxpayer who did not agree with the Commissioner's final assessment had recourse to the courts. Since, however, the courts would not examine the subject matter of the difference but only whether the right procedures were followed, the recourse available to the taxpayer was considered unfair.

A debate for a fairer procedure existed since 1987 with various proposals being made, both by the government of the day and by members of the House of Representatives, to change the law. By the passing of the Assessment and Collection of Taxes (Amendment) Law,[50] Tax Tribunals were established to hear appeals by taxpayers against final assessments raised by the Commissioner. The Law came into operation as from 2 January 2000.

The Tax Tribunal hears appeals relating to Income Tax, Capital Gains Tax, and Immovable Property Tax. The Tribunal will not examine appeals relating to value-added tax as these are examined by the Minister of Finance.

Appeals

7-84 The provisions of the Law are:

Whereas the Commissioner did not previously have any time limits, he must now request all documents and information from the taxpayer, within 12 months for all appeals made after 2 January 2000 and 24 months for appeals made before 2 January 2000. The Commissioner may call for examination of the taxpayer or any other person or ask for additional documents within three years from receiving the documents.

For new appeals, the Commissioner must reach a decision within 36 months of the date of the appeal or of the date that the documents and information were handed to the Commissioner. For existing appeals, the time limit is within 36 months, from 2 January 2000 if all necessary documents and information is already in the hands of the Commissioner or from the date they are given to the Commissioner if that is after 2 January 2000. If the Commissioner fails to come to a decision within the specified period, he must accept the taxpayer's declaration.

An appeal to the Tax Tribunal must be lodged within 45 days of receiving, by registered post, the Commissioner's decision. The period can be extended if the Tribunal is satisfied that the delay was unavoidable. The Tribunal will not hear any appeals unless the undisputed tax is paid or guarantees are given for the payment of the tax if the Tribunal is of the opinion that the taxpayer would not be in a position to pay the final tax liability.

50 Law 80 (I) of 1999.

The Tribunal must request the Commissioner to provide whatever documents are necessary within three months. At the actual hearing, neither party can produce any documents or evidence which was not presented at the appeal to the Commissioner, unless it was not possible to do so at the time. On examination of the appeal, the Tribunal must come to one of the following decisions:

- Reject or uphold, either in full or in part, the Commissioner's ruling;
- Amend the Commissioner's ruling;
- Issue a new ruling; or
- Return the appeal to the Commissioner with instructions to carry out specific actions.

7-85 The Tribunal must come to a decision not later than 12 months from the filing of the appeal. If the Commissioner is obliged to issue a new assessment, this must be done within six months of the Tribunal's decision.

If the taxpayer is not satisfied with the decision of the Tribunal, he may file a recourse with the Supreme Court in accordance with article 146 of the Constitution, namely within 75 days of receiving notice of the Tribunal's decision. In accordance with Regulations issued by the Council of Ministers under the provisions of the Law, the Tax Tribunal will:

- Consist of a Chairman and eight members, none of whom may be practising accountants, tax advisers, or lawyers;
- Be appointed by the Council of Ministers on the recommendation of the Minister of Finance;
- Serve for a period of four years, which can be extended for a further similar period; and
- Consist of members who must be of a high professional standard with at least four years' knowledge or experience in law, taxation, economics, or accountancy.

7-86 The administration of the Tribunal will be carried at by its Chairman, aided by civil servants.

Special Defence Contribution

In General

7-87 Due to the invasion and occupation of the northern part of Cyprus, in 1985, the government introduced a defence levy, the proceeds of which are used only for the defence of the country.

Basic Principles

7-88 The defence levy is imposed under the Special Contribution for the Defence of the Republic Law.[51] on:

- Salaries, income of the self-employed,[52] pensions, and directors' fees, at two per cent; and
- Dividends, interest, rent, and profits, at three per cent.

7-89 The defence levy is deducted at source from salaries, pensions, dividends and interest. An equal amount of defence levy is contributed by the employer on salaries paid. The defence levy on rents and profits is paid immediately after 30 June and 31 December of every year. The defence levy is not a tax; nor is it an allowable cost for tax purposes.

51 Law 59 of 1985.

52 Self-employed persons pay the defence levy every quarter on their deemed emoluments for Social Security purposes. The amount paid is offset against the levy payable on their profits.

CHAPTER 8

Maritime and Admiralty Law

Panayiotis Neocleous

Maritime Law

In General

8-1 When Cyprus gained independence in 1960, it heralded a new era of prosperity which witnessed an upsurge in the economy and modernisation of the business and commercial sectors. Consequently, the role of Cyprus as a shipping centre increased enormously and was stimulated by greater exports, a growth in international business activities, and the aggressive expansion of the Cypriot economy.[1]

External factors, such as the growing importance of Arab oil in the world economy, the reopening of the Suez Canal, and the enhanced importance of the Middle East as a prosperous financial region, have contributed to the establishment of Cyprus as a strategic and vital world shipping location.

The year 1963 saw the introduction of the most advanced shipping legislation in Cyprus, legislation that was modelled closely on its British counterpart. The way was paved for the Cypriot flag to become a well-respected and esteemed maritime flag.

The extension and diversification of all possible avenues of shipping activity in recent years is largely attributable to Cyprus' excellent shipping infrastructure. All services, public and private, required by ship owners and investors are not only well represented and organised, but work to the highest international standards. Competent and reputable shipping agents, efficient clearing and forwarding agents, and qualified travel agents, shiphandlers, freight forwarders, and other shipping-oriented businesses are available.

Ship management companies are prominent and, along with companies engaged in chartering, crewing, ship broking, ship surveying, marine insurance, and salvaging, are able to offer first-class services to customers worldwide.

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1 Demetriades, *Cyprus International Tax Planning* (1980); Tornaritis, 'Notes on the Law of Cyprus relating to Offshore Operations, Shipping Operations and Shipping Companies, Foreign Investments in Cyprus and Transit Trade', *Cyprus Law Review* (July–September 1984); Newns and Parrington, *Double Taxation Relief for Shipping* (1988); Saunders and Andreas Neocleous, 'Cyprus', *International Tax Planning* (2nd ed, 1990); Coopers & Lybrand, *Cyprus—The Way for Businessmen and Investors* (1994); *Baltic and International Maritime Council Review* (1996); KPMG Metaxas Loizides Syrimis, *Investment in Cyprus* (1999).

Membership in numerous organisations enables Cyprus to maintain strong and friendly links with almost all foreign countries. Consequently, ships flying the Cypriot flag are welcome in ports around the world.

Registration of Ships under the Cypriot Flag — General Principles

8-2 Section 5 of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law,[2] as amended, provides that a:

> ship shall not be deemed to be a Cypriot ship unless more than one half of the shares of the ship are owned:
>
> (a) by a Cypriot;
>
> (b) by a corporation established and operating under and in accordance with the Laws of the Republic and having its registered office in the Republic; or
>
> (c) if specially authorised by a decision of the Council of Ministers, by a corporation incorporated outside the Republic in which the controlling interest is vested in Cypriot.

8-3 Every Cypriot ship, unless exempted from registration, must be registered under the Law and, if it is not so registered, it may be detained by the port or consular authorities of Cyprus until the master of the ship produces the certificate of registration of the ship.[3] The following ships are exempted from registration under the Law:

- Ships not exceeding 15 tons burden employed solely in navigation on the coast of Cyprus or of the Sovereign Base Areas; and
- Ships not having a whole or fixed deck and employed solely in fishing, lightering or trading coastwise on the shore of Cyprus or of the Sovereign Base Areas or within such a radius therefrom as may be prescribed.[4]

8-4 On 11 January 1999,[5] the government amended its policy on the registration criteria of ships. In drafting this new policy, several factors were taken into consideration, such as the results of the *acquis* screening with the European Commission in the course of the accession negotiations of Cyprus with the European Union (EU). The new criteria can be summarised as follows:

- Ships of any size and type having an age not exceeding 15 years, except fishing vessels, may be registered in the Cyprus Register of Ships as long as they comply with the provisions contained in the merchant shipping legislation and the circulars of the Department of Merchant Shipping;

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2 Law 45 of 1963.
3 Law 45 of 1963, s 6(1), as amended by Law 14 of 1982, s 2(a), and Law 45 of 1963, s 6(4), as amended by Law 32 of 1965, s 2(b).
4 Law 45 of 1963, s 6(2), as amended by Law 32 of 1965, s 3(a).
5 EE 23/99.

- Ships over 15 years of age, and fishing vessels, may be registered in the Cyprus Register of Ships under certain additional conditions which must be fulfilled concurrently with the submission of the application for registration and must be complied with at all times while the ship remains registered irrespective of any subsequent transfer of ownership;
- Ships over 15 but not exceeding 17 years of age may be registered provided that they undergo a special inspection which is completed with satisfactory results;
- Ships over 17 but not exceeding 20 years of age may be registered, provided that they undergo a special inspection which is completed with satisfactory results and they are operated by a ship management company certified for compliance with the ISM Code; and
- Ships over 20 but not exceeding 23 years of age may be registered, provided that they undergo a special inspection which is completed with satisfactory results and are subject to subsequent annual special inspections and they are operated by a Cypriot ship management company certified for compliance with the ISM Code.

8-5 In addition to the above general criteria, there are special rules regarding the age limits for passenger ships,[6] which are as follows:

- Passenger ships over 15 but not exceeding 25 years of age may be registered, provided that they undergo a special inspection which is completed with satisfactory results and are subject to subsequent annual special inspections and, if they are engaged in a service which includes at least two calls per month at a Cypriot port for a period of at least six months, at least 25 per cent of its crew are Cypriot, unless confirmation is given by the Limassol District Labour Office that no Cypriot seamen are available and at least one Cypriot student or graduate of a Marine Officer's School, if available, is engaged for sea-going training for a period of up to six months;
- Passenger ships over 25 years of age may be registered provided that they undergo a special inspection which is completed with satisfactory results and are subject to subsequent annual special inspections, they are operated by a Cypriot ship management company certified for compliance with the ISM Code and, if they are engaged in a service which includes at least two calls per month at a Cypriot port for a period of at least six months, at least 25 per cent of its crew are Cypriot, unless confirmation is given by the Limassol District Labour Office that no Cypriot seamen are available, and at least one Cypriot student or graduate of a Marine Officer's School, if available, is engaged for sea training for a period of up to six months.

8-6 Under the new policy, a fishing vessel is defined as a vessel which is used commercially for catching fish or other living resources of the sea, and a fish factory vessel is defined as a vessel which is used exclusively for processing fish or other

6 For the purposes of the new policy, a passenger ship is that which carries more than 12 passengers on international voyages and includes barges with or without self-propulsion and any other structure used to accommodate persons at sea.

living resources of the sea. Regarding the age registration requirements for fishing and fish factory vessels, the new policy provides as follows.

Ships over 24 metres in length and not exceeding 20 years of age may be registered in the Cyprus Register of Ships, provided that:

- At least 51 per cent of the shares of the ship-owning company or the bare boat charterer, as the case may be, belong beneficially to a Cypriot citizen, at least 50 per cent of the directors of such a company are Cypriot citizens, and the ship's management and operations are directed and controlled from within Cyprus;[7]
- They comply and are surveyed and furnished with a certificate of compliance with the applicable provisions of the Protocol of 1993 to the International Convention for the Safety of Fishing Vessels, 1977;[8]
- They undergo a special inspection which must be completed with satisfactory results; and
- The owners of fishing vessels submit, as a condition of their registration, a declaration stating that they will abide at all times by the prevailing government policy in respect of fishing, particularly as regards the preservation of protected species and the prohibition of the use of certain fishing equipment, and adhere strictly to the relevant International Fisheries Agreements and Conventions.[9]

8-7 Ships less than 24 metres in length of any age and ships over 24 metres in length exceeding 20 years of age may be registered, provided that:

- At least 75 per cent of the shares of the ship-owning company or the bare boat charterer, as the case may be, belong beneficially to Cypriot citizens, at least 75 per cent of the directors of such a company are Cypriot citizens, and its management and operations are directed and controlled from within Cyprus;
- They undergo a special inspection which must be completed with satisfactory results; and
- The owners of fishing vessels submit, as a condition of their registration, a declaration stating that they will abide at all times by the prevailing government policy in respect of fishing, particularly as regards the preservation of protected

7 This requirement does not apply to fishing vessels which apply simultaneously for parallel out registration and will not be engaged in fishing operations whilst under the Cypriot flag, and to fish factory vessels.

8 Torremolinos Protocol. In addition, ships which land their catch in Cyprus or in any member state of the European Union must comply with the requirement of the European Communities Council Directive 97/70/EC and should be provided with a certificate issued in accordance with article 6 of the Directive.

9 In addition, they should submit confirmation from the Department of Fisheries of the Ministry of Agriculture, Natural Resources and the Environment that they were accepted for registration in the fishing vessel register and thus are eligible to obtain a fishing licence therefrom. It should be borne in mind that the engagement of a ship flying the Cypriot flag in fishing activities without a fishing licence constitutes a breach of the conditions for its registration and warrants its deletion from the Cyprus Register of Ships.

species and the prohibition of the use of certain fishing equipment, and adhere strictly to the relevant International Fisheries Agreements and Conventions.[10]

Procedure on Registration

In General

8-8 Registration under the Cypriot flag is effected in two stages.[11] The first stage is called 'provisional registration' and the second and final stage is termed 'permanent registration'.

Provisional Registration

8-9 Provisional registration can be effected by a Cypriot Consul abroad at a Cypriot Consulate to be chosen by the owners of the ship. Provisional registration is valid for a period of six months but may be extended for a further period of three months. A mortgage may be registered against a ship simultaneously with and/or subsequently to the provisional registration, and it is considered as duly registered and validly existing as from the date and time of its acceptance by a Cypriot Consul.

An application is made in duplicate addressed to the Department of Merchant Shipping for the provisional registration of a ship, supported by the following documents:

- A true copy of the memorandum and articles of association of the ship-owning company;
- A true copy of the certificate of incorporation of the ship-owning company;
- A true copy of the certificate of registered office of the ship-owning company;
- A true copy of the certificate of directors and secretary of the ship-owning company;
- A true copy of the shareholders' certificate of the ship-owning company;
- In the case of a newly built ship, a builder's certificate duly executed and, in the case of a second-hand ship, a bill of sale duly executed and certified by the seller;
- Corporate resolutions of the purchaser,[12] resolving to purchase the ship, as well as a power of attorney duly executed and certified by the company in favour of the person who will attend to all registration formalities at the Cypriot Consulate;

10 In addition, they should submit confirmation from the Department of Fisheries of the Ministry of Agriculture, Natural Resources, and the Environment that they were accepted for registration in the fishing vessels register and thus are eligible to obtain a fishing licence therefrom. It should be borne in mind that the engagement of a ship flying the Cypriot flag in fishing activities without a fishing licence constitutes a breach of the conditions for its registration and warrants its deletion from the Cyprus Register of Ships.

11 In the event that the ship is in or can come to a Cypriot port, it can be permanently registered without the requirement of being provisionally registered first.

12 This applies where the ship is purchased by a company.

- A declaration of ownership[13]and appointment of managing owner or ship's husband,[14] signed and certified;
- Confirmation by an internationally recognised accounting authority[15] that a contract has been entered into for the purpose of settling all the accounts of the ship with the telecommunication authorities of different countries;
- Confirmation from the Classification Society[16] of the ship to the effect that the ship is in class;
- Confirmation from the previous registry of the ship that at the time of application the ship is free from any registered liens and encumbrances; and
- An application for a licence to install or work a wireless telegraphy and/or telephony station on board the ship.[17]

8-10 As soon as provisional registration is complete the Registrar of Cyprus Ships will enter in the Register of Ships the following particulars:

- The name of the ship and the name of the port to which she belongs;
- The particulars in respect of the ship's origin as stated in the declaration of ownership; and
- The name and description of the ship's registered owner.[18]

8-11 The provisional registration ceases automatically to have any effect either on the expiry of the six-month period, or nine months as the case may be, or on the ship's arrival at a Cypriot port.

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13 Form MS3.

14 Form MS10.

15 The Radio Traffic Accounting Authorities recognised by the government of the Republic of Cyprus are Sait Communications SA, Azores Radio Communications Services Ltd, Telaccount Overseas Ltd, Satlink (Maritime Services) Ltd, Cyprus Telecommunications Authority, Unicom Management Services (Cyprus) Ltd, Debeg GmbH Funkverkehrs Abrechnung, De Te Mobil Deutsche Telecom Mobilnet GmbH, DH INTERCOM, A/S RSTA, International Radio Traffic Services Ltd, ANO. Group PLC, Peninsular Electronics Ltd, The Marconi International Marine Co Ltd, ABB Nera Ltd, OTE SA, Hellenic Company Settlement Accounts Radiocommunications, Hellenic Radioservices Ltd, Navisat ERS Co Ltd, J Finos Co, Piraeus Maritime Telecommunications Services SA Maritel, Kyoritsu Radio Services Co Ltd, Latvian Shipping Company, Radio-Holland Communications BV, Singapore Telecom, V/O Morviazputnik, and Radio Holland-USA BV.

16 The Classification Societies recognised by the government of the Republic of Cyprus are the American Bureau of Shipping, Bureau Veritas, China Classification Society, Cyprus Bureau of Shipping, Det Norske Veritas Classification A/S, Germanischer Lloyd, Hellenic Register of Shipping, Lloyd's Register of Shipping, Korea Register of Shipping, Nippon Kaiji Kyokai, Polski Rejestr Statkow, Maritime Register of Shipping, Registro Italiano Navale, and Registrul Naval Roman.

17 Form MS34.

18 Law 45 of 1963, s 12.

Permanent Registration

8-12 The permanent registration of a provisionally registered ship must be completed within six months (or nine months, provided that a three-month extension of the validity of the provisional registration has been granted) of the date of her provisional registration. It should be borne in mind that it is not necessary for the ship to be physically present in a Cypriot port at the time of permanent registration.

The following additional documents must support the application for permanent registration which is filed with the Registrar of Cyprus Ships:

- Original deletion certificate from the previous registry of the ship;
- The certificate of survey[19] and the international tonnage certificate;[20] and
- The ship's carving and marking note.[21]

8-13 Permanent registration under the Cypriot flag is complete once the Registrar of Cyprus Ships, on receipt of the Carving and Marking Note, issues the Certificate of Registration.[22]

The registration of the ship constitutes *prima facie* evidence as to the ownership of the ship but that evidence is not conclusive. However, a *bona fide* buyer who receives a duly executed and certified bill of sale by or on behalf of the previous registered owner of the ship will obtain a good title if he is a purchaser for value and does not have notice that the registered owner is not the true owner of the ship. Any dispute as to the ownership of a Cypriot-registered ship will be resolved by proceedings before the Admiralty Courts of Cyprus.

Parallel Registration

8-14 In General. 'Parallel registration' is the registration of a ship in the register of a country for a certain period of time and under specified legal prerequisite conditions whilst the ship remains registered in the register of another country.[23]

'Bareboat chartering' is the chartering by virtue of which the charterer, for an agreed period of time, acquires full control and possession of the ship, has the nautical control and management of the ship, appoints and dismisses the master and the

19 Form MS1.

20 Form MS12. These certificates can be prepared either by a surveyor of the Classification Society of the ship or by one of the surveyors of the government of the Republic of Cyprus who are stationed in the major ports of the world.

21 Form MS32. This is issued by the Registrar of Cyprus Ships and contains the particulars which have to be carved on the ship, ie, the name of the ship, the port of registry, the registered tonnage, and the official number. The carving and marking note must be signed either by a surveyor of the Classification Society of the ship or by a surveyor of the government of the Republic of Cyprus.

22 Law 45 of 1963, s 15.

23 Law 45 of 1963, s 23A, as introduced by Law 57 of 1986, s 2, and repealed and substituted by Law 64 of 1987, s 2, and amended by Law 28 (I) of 1995.

crew of the ship and, generally, so long as the chartering continues, is substituted in all respects for the ship owner, save that he has no right to sell or mortgage the ship.[24]

8-15 Parallel In Registration. The parallel in registration in the Register of Cyprus Ships of a ship registered in a foreign register will be allowed if the ship is bareboat chartered by a Cypriot or by a corporation which is qualified to own a Cyprus ship under section 5 of Law 45 of 1963, so long as certain prerequisite conditions specified below are met.

The parallel in registration in the Cyprus Register must be effected by the registration of the foreign ship in the Special Book of Parallel Registration kept with the Registrar of Cyprus Ships and for a period of time which the Minister of Communication and Works approves. An application for the parallel in registration of a foreign ship will be approved, provided that it meets the following criteria:

- The law of the country of the foreign registry allows the parallel in registration of the ships registered in its register;
- The following duly certified documents must be submitted to the Registrar together with the application: (a) copy of the charter party, in lieu of the title of ownership and the declaration of ownership; (b) written consent of the ship owner; (c) written consent of the appropriate maritime authorities of the country of the foreign register and a certificate of ownership and mortgages or other encumbrances; (d) written consent of the mortgagees; and (e) all documents required for the permanent registration of a ship under the Cypriot flag.[25]

8-16 No carving and marking note will be issued in respect of ships which are registered in the Special Book of Parallel Registration.[26]

During the period for which the status of parallel in registration is in force, the ship will be furnished by the Registrar with a certificate of parallel in registration in a form similar to the certificate of registration of ships registered in the Cyprus Register of Ships and in which the same particulars in respect of Cyprus ships, as well as the particulars of the ship owner, the charterer, and the foreign registry of the ship, will be recorded.[27] The certificate of parallel in registration will necessarily set out the date of termination of its validity. During the period for which the status of parallel in registration is in force, the ship will fly the flag of Cyprus, and she will not be allowed to use the flag of the foreign registry. Moreover, the name of the ship and the Cypriot port of registry of the ship must be marked on her external parts.

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24 Law 45 of 1963, s 23B, as introduced by Law 57 of 1986, s 2, and repealed and substituted by Law 64 of 1987, s 2, and amended by Law 28 (I) of 1995.

25 Law 45 of 1963, s 23D, as introduced by Law 57 of 1986, s 2, and repealed and substituted by Law 64 of 1987, s 2, and amended by Law 28 (I) of 1995.

26 Law 28 (I) of 1995, s 4.

27 Law 45 of 1963, s 23G, as introduced by Law 57 of 1986, s 2, and repealed and substituted by Law 64 of 1987, s 2, and amended by Law 28 (I) of 1995.

Any transfer of ownership of a ship which is under the status of parallel registration must be effected in accordance with the applicable laws of the foreign register where she is registered. However, any such transfer must be notified to the Registrar of Cyprus Ships in order to be entered into the Special Book of Parallel Registration and a new certificate of parallel registration will be issued.

A mortgage over a ship which is under the status of parallel in registration in the Cyprus Register of Ships can be created only by the ship owner and in accordance with the laws of the foreign registry. Any such mortgages must be notified and recorded in the Special Book of Parallel Registration.

The status of parallel in registration of a ship of a foreign registry will be revoked and thus terminated in the following cases:

- Where the appropriate maritime authorities of the foreign registry revoke their consent for the parallel in registration of the ship in the Cyprus Register of Ships;
- Where there is termination and/or expiry of the bareboat charterparty;
- On the lapse of the period of time for which the Minister of Communications and Works has approved the parallel in registration of the ship in the Cyprus Register of Ships; and
- If there exists any reason for the deletion of the ship which, under the Merchant Laws of Cyprus, applies in the case of ships registered in the Cyprus Register of Ships.

8-17 Parallel Out Registration. A Cypriot ship may be registered parallel out into a foreign registry provided that she is bareboat chartered to a foreign individual or corporation and the law of the country of the foreign registry allows the parallel out registration of ships of another registry.[28] The prior approval and consent of the Minister of Communications and Works will be required for the parallel out registration of a Cypriot ship in a foreign registry.

The following documents must support an application for the parallel out registration of a Cypriot ship in a foreign registry:

- A copy of the charterparty;
- The written consent to the parallel out registration of the charterer;
- The written consent of the appropriate maritime authorities of the country of the foreign registry and a confirmation stating that the law of that country allows the parallel out registration of the Cypriot ship in its register;
- The written consent of the mortgagees, if any; and
- A common declaration by the ship owner and charterer that they undertake to produce to the Registrar of Cyprus Ships, within one month, a certified copy of the foreign certificate of parallel out registration and to notify every alteration which takes place regarding the name and other particulars of the ship, during the period the status of the parallel out registration of the ship in the foreign register is in force.

28 Law 45 of 1963, s 23N(2), as introduced by Law 57 of 1986, s 2, and repealed and substituted by Law 64 of 1987, s 2, and amended by Law 28 (I) of 1995.

8-18 The parallel out registration of a Cyprus ship in a foreign register will be allowed only in cases where the ship is permanently registered. However, as an exception to this general rule the Minister of Communications and Works has an inherent power to approve the parallel out registration of a Cyprus ship which is provisionally registered under such terms and conditions as he may deem reasonable to impose in each particular case.[29]

8-19 Yacht Registration Although Cypriot merchant shipping legislation does not distinguish between the registration procedure for a ship and for a yacht, the procedure is simpler and more straightforward in the latter case.

No confirmation is required from any classification society or an international accounting authority for the provisional registration of a yacht. Moreover, in place of the International Statutory certificates, a certificate of seaworthiness is required only for provisional registration purposes. All other documents required in respect of the provisional and permanent registration of a Cypriot ship are applicable in respect of yacht

Registration of Mortgages on Ships

In General

8-20 Under Cyprus law,[30] 'a registered ship or a share therein may be made a security for a loan or other valuable consideration, and the instrument creating the security (in this Law called the mortgage) will be in the Form B in the Part I of the First Schedule, or as near thereto as circumstances permit, and on the production of such instrument the Registrar shall record it in the Register'.[31] By virtue of Law 45 of 1963, as amended, the mortgage must be in a form prescribed by the Law, and it must be accompanied by a deed of covenant agreed between the parties and dealing with all matters relating to the mortgage. In addition, the Law prescribes[32] that the deed of covenant should include the following information:

- The mode of payment of interest and the repayment of principal;
- The policies of insurance and renewals thereof and application of the insurance policy money;
- The limitations relating to the employment of the ship;
- A definition of the events of default on which statutory or other powers may be exercised;

29 Law 45 of 1963, s 23N(2), as introduced by Law 57 of 1986, s 2, and repealed and substituted by Law 64 of 1987, s 2, and amended by Law 28 (I) of 1995.
30 Law 45 of 1963, s 31(1).
31 Mortgages are recorded in the same register as the one for ships kept by the Registrar of Cyprus Ships.
32 Law 45 of 1963, s 31(2).

- The powers exercisable by the mortgagee, including the power to take possession of the ship, assume her management, and sell the ship by private treaty, provided that (a) no power to take possession of the ship and assume her management or sell her by private treaty may be exercised by a mortgagee unless all shares of the ship are mortgaged; (b) the assumption of the management of the ship by the mortgagee will entitle him to do all acts necessary thereof and any amount collected by the mortgagee during the management and operation of the ship, after deducting all relevant expenses, will be credited to the amount of the mortgage and on the full and final payment of the amount of the mortgage such management shall come to an end; and (c) notice of such assumption of management of the ship will be given to the Registrar of Cyprus Ships; and
- Any other matter ancillary or incidental thereto.

Types and Legal Effect of Ship Mortgages

8-21 Law 45 of 1963, as amended, prescribes two forms of mortgages. One is the mortgage to secure principal sum and interest,[33] and the other is the mortgage to secure an account current.[34] In principle, the first type of mortgage is used when a fixed sum of money is advanced to the mortgagor at an agreed interest and the mortgagee is solely seeking to secure such a sum with interest. However, now, mortgagees avoid this type of mortgage even in cases where there is a straightforward advance of a fixed sum; this is mainly due to the fact that the enforcement of a mortgage usually entails costs and expenses which have the effect of exceeding the fixed sum secured by the mortgage. Therefore, the second type of mortgage is more frequently used (if not in most of the cases) which, in effect, secures all present and future sum payable by the mortgagor to the mortgagee.

Both types of mortgages are recorded by the Registrar of Cyprus Ships in the order in time in which they are produced to him for that purpose, and the Registrar will, by memorandum under his hand, notify of the recording of the mortgage stating the day and hour of that recording.[35]

33 The First Schedule, Part I, Form B(I), of Law 45 of 1963 sets out a specimen form of a mortgage to secure a principal amount and interest. Indeed, modifications can be effected to reflect the particular details of each mortgage but in principle this or a similar format should be deposited with the Registrar of Cyprus Ships.

34 A specimen of this type of mortgage can be found at the First Schedule, Part I, Form B(II), of Law 45 of 1963.

35 In the event that a mortgage is executed outside the Republic of Cyprus, all necessary documents may be deposited with a consular officer of the Republic of Cyprus, who shall, if satisfied that the mortgage appears to be in proper order and duly executed and, on payment of the appropriate fees, notify the Registrar of Cyprus Ships of the deposit of the mortgage giving all necessary particulars. On receipt of such notice by the Registrar of Cyprus Ships, the mortgage will be deemed to have been recorded and the Registrar shall make all entries accordingly. The originals of all documents will be forwarded by the consular authorities located abroad to the Registrar of Cyprus Ships.

The requirements to record the deposit of a mortgage with the Registrar of Cyprus Ships are in addition to the requirement to record, where necessary, any mortgage and/or other document with the Registrar of Cyprus Companies as per the provisions of the Companies Laws of Cyprus.[36]

In the event that there are more than one mortgage registered in respect of the same ship or share, the mortgagees will, notwithstanding any express, implied or constructive notice, be entitled in priority one over the other according to the date at which each mortgage is recorded in the Register and not according to the date that the mortgage documents bear on themselves.[37]

The mortgagee is not deemed under Cypriot Law to be, by reason of the mortgage, as the owner of the mortgaged ship.[38] However, in case the mortgagee is entitled under the deed of covenants to take possession of a ship or in case the mortgagor allows the ship to remain burdened with a maritime lien which in effect impairs the security of the mortgagee, the mortgagee may take possession of the ship and have all the rights and powers of any owner in possession of the ship. It must be borne in mind that a registered mortgage over a ship will not be affected by an act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding that the mortgagor at the commencement of his bankruptcy had the ship in his possession, order, or disposition, and the mortgage will be preferred to any right, claim, or interest therein in respect of the other creditors of the bankrupt or any trustee or assignee on their behalf.[39]

A registered mortgage of a ship or share may be transferred to any person on an instrument prescribed by the Law.[40] On the production of such an instrument, the Registrar of Cyprus Ships records it by entering in the Register the name of the transferee as mortgagee of the ship or share. In addition, by virtue of section 38(1) of Law 45 of 1963, 'where the interest of a mortgagee in a ship or share is transmitted on marriage, death, or bankruptcy, or by any lawful means, other than by a transfer under this Law, the transmission will be authenticated by a declaration of the person to whom the interest is transmitted, containing a statement of the manner in which and the person to whom the property has been transmitted, and will be accompanied by similar evidence as is by this Law required in case of a corresponding transmission of the ownership of a ship or share'.[41]

36 Cap 113, s 90(2(f).

37 Law 45 of 1963, s 33.

38 Law 45 of 1963, s 34.

39 Law 45 of 1963, s 36.

40 As per the contents of Form C, Part I, of the First Schedule of Law 45 of 1963. Such a form is endorsed on the original mortgage deposited with the Registrar of Cyprus Ships on the transfer or assignment of the mortgage.

41 On the receipt of such a declaration by the Registrar of Cyprus Ships, he will enter the name of the person entitled under the transmission in the Register as mortgagee of the ship or share.

Under Cyprioit law, a mortgage may be registered as security for damages not existing at the time of registration and whose amount it is not possible to ascertain at that time. In addition, by virtue of the fact that the deed of covenant is attached to the mortgage and is registered together with it, a subsequent mortgagee or any third party dealing with the ship has the means of inspecting the deed of covenant and, therefore, this can be considered as sufficient notice which binds any subsequent mortgagee or third party. Bearing in mind the above, there can be a danger of future advances remaining unsecured only in those cases where the deed of covenant does not clarify that the first mortgagee is bound under its terms to make such future advances. A mortgage may be registered with the Registrar of Cyprus Ships as security for a bank providing a guarantee of the mortgagor's indebtedness.[42] Furthermore, the existence of a debt is not a prerequisite to the registration of a mortgage. However, the charge must be created as security for an obligation but it may be a future obligation, such as the obligation to repay a loan to be advanced at a future date.

Certificates of Mortgage and Sale

8-22 A registered owner who wishes to dispose a ship by way of a mortgage or sale of the ship or share, in respect of which he is registered, at any place outside of the Republic of Cyprus may do so by applying to the Registrar of Cyprus Ships, and the Registrar will enable him to do so by granting him a certificate of mortgage or a certificate of sale. This application[43] must include the following particulars:

- The name of the person by whom the power stated in the certificate will be exercised and, in the case of a mortgage, the maximum amount of the charge to be created, if it is intended to fix any such maximum, and, in the case of a sale, the minimum price at which the sale is to be made, if it is intended to fix such a minimum;
- The place where the power is to be exercised; and
- The limits of time within which the power may be exercised.[44]

8-23 The following rules must be observed as to certificates of mortgage:

- The power must be exercised in conformity with the directions contained in the certificate;

42 In the 'Cyprus' chapter of *Handbook on Maritime Law* (1983), Efti Psillaki argued that the mortgage form to be used for this type of transaction is the current account form of mortgage which does not usually specify a fixed amount secured by the mortgage. She further explained that the deed of covenant accompanying the mortgage, being part and parcel of the mortgage documentation, may contain any limitations as to the amount or liability secured that the parties between them may wish to agree on.

43 Such particulars will be entered by the Registrar of Cyprus Ships in the Register.

44 A certificate of mortgage or sale will not be granted by the Registrar of Cyprus Ships so as to authorise any mortgage or sale to be effected within Cyprus or by any person not named in the certificate.

- Every mortgage thereunder must be registered by way of endorsement on the certificate by the Registrar of Cyprus Ships or a consular officer of the Republic abroad;
- A mortgage made in good faith thereunder may not be impeached by reason of the person, by whom the power was given, dying before the signing of the mortgage;
- When the certificate contains a specification of the place at which, and a limit of time not exceeding 12 months within which, the power is to be exercised, a mortgage made in good faith to a mortgagee without notice shall not be impeached by reason of the bankruptcy of the person by whom the power was given;
- Every mortgage which is so registered as aforesaid on the certificate will have priority over all mortgages of the ship or shares created subsequently to the date of the entry of the certificate in the Register;
- Subject to the aforesaid rules, every mortgagee whose mortgage is registered on the certificate must have the same rights and powers and be subject to the same liabilities as he would have had and been subject to had the mortgage been registered in the Register instead of the certificate;
- The discharge of any mortgage so registered is by way of endorsement on the certificate by the Registrar of Cyprus Ship or a consular officer of the Republic;[45] and
- On the delivery of any certificate of mortgage to the Registrar, he must, after recording it in the Register in such a manner as to preserve its priority, cancel the certificate and enter the fact of the cancellation in the Register.

8-24 Regarding the certificates of sale the following rules will apply:

- A certificate of sale may not be granted except for the sale of the entire ship;
- The power must be exercised in conformity with the directions contained in the certificate;
- A sale made in good faith thereunder to a purchaser for valuable consideration may not be impeached by reason of the person, by whom the power was given, dying before the making of such a sale;
- When the certificate contains a specification of the place at which, and a limit of time not exceeding 12 months within which, the power is to be exercised, a sale made in good faith to a purchaser for valuable consideration without notice may not be impeached by reason of the bankruptcy of the person by whom the power was given;
- A transfer made to a person qualified to be the owner of a Cypriot ship must be by way of a bill of sale in accordance with Law 45 of 1963;
- If the ship is sold to a person qualified to be the owner of a Cypriot ship, the ship must be registered anew;[46]

45 On the endorsement being made, the interest, if any, which passed to the mortgagee will vest in the same person in whom it would have vested if the mortgage had not been made.

46 However, notice of all mortgages enumerated on the certificate of sale will be entered in the Register.

- Before registration anew, there must be produced to the Registrar of Cyprus Ships the bill of sale, the certificate of sale, and the registration certificate of the ship;
- The Registrar will retain in his possession the certificates of sale and registration. and thereafter must make a memorandum of the sale in the Register whereby the registration of the ship therein will be considered as closed;
- On such registration anew, the description of the ship contained in the original registration certificate may be transferred to the Register without the ship being surveyed, and the declaration to be made by the purchaser will be the same as the one required to be made by an ordinary transferee;
- If the ship is sold to a person who does not qualify to be the owner of a Cypriot ship, the bill of sale (by which the ship is transferred), the certificate of sale, and the registration certificate must be produced to the Registrar of Cyprus Ships or to a consular officer of the Republic, who will retain the certificate of sale and the registration certificate;[47]
- If there is a sale to a person who is not qualified to be the owner of a Cypriot ship and there is a default in the production of the certificates,[48] that person will be considered as having acquired no title to or interest in the ship; and
- If there is no sale in conformity with the certificate of sale, that certificate will be delivered to the Registrar of Cyprus Ships, who will cancel it and enter the fact of the cancellation in the Register.

Enforcement of Mortgages

8-25 As has already been indicated above,[49] a mortgagee has the right to take possession of a ship when the mortgagor is in default in the payment of principal or interest or where the mortgagor allows the ship to remain burdened with a maritime lien which impairs the security, entitling the mortgagee to take possession. Once the mortgagee is in possession he is entitled to all future income of the ship and he may run the ship, but his duty is to run her as a prudent owner would.

Moreover, he will have to give accounts to the owner or to any other interested party entitled thereto, such as a second mortgagee. On full and final payment of all moneys secured under the mortgage,[50] the mortgagee in possession has a duty to redeliver the ship to the owner. In principle, the mortgagee has, in the event of default, the right to take possession of the ship and sell her by an order of an appropriate judicial authority.[51]

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47 Thereafter and having endorsed on the certificates that the ship has been sold to a person who is not qualified to be the owner of a Cypriot ship, the consular officer will forward the certificates to the Registrar of Cyprus Ships. On the receipt of the above documents, the Registrar will make a memorandum of the sale in the Register, and the registration of the ship in the Register will be deemed as closed.

48 The bill of sale, the certificate of sale, and the registration certificate.

49 Ss 34(1) and 34(2) of Law 45 of 1963.

50 Including of course payment of all expenses and costs incurred by the mortgagee in the process of enforcing his rights under the mortgage.

51 The issue of the appropriate court proceedings before the Admiralty Courts of Cyprus will be dealt with in more detail under the second part of this chapter.

Taxation of Shipping Activities

8-26 Cyprus' favourable tax treatment of shipping activities, without discrimination as to whether the persons benefiting are Cypriot residents or non-residents or foreigners, provides a variety of tax planning opportunities, especially through the use of Cyprus double-taxation treaties. Practically in all the double tax treaties of Cyprus it is provided either directly or indirectly that shipping profits are only taxable in the place of residence or of effective management of the enterprise, irrespective of whether or not a permanent establishment exists in the other treaty country.[52] Under Cypriot law, there is a full tax exemption of profits of Cypriot ship owning companies operating their ships under the Cypriot flag and therefore, shipping profits of such companies whose management is exercised from Cyprus are tax free, both in Cyprus and in most of the other treaty countries. In addition, the following tax incentives are available under Cyprus law:

- The profits of a Cypriot shipping company which owns ships registered under the Cyprus flag are not subject to tax;
- Dividends distributed to shareholders of Cypriot ship-owning companies are exempt from tax;
- Profits from the alienation of ships or shares in ships generally and irrespective of the flag of the ship are not subject to tax;
- Capital assets are not subject to tax;
- No estate duty or inheritance tax is levied in the event of the death of a shareholder of a Cypriot ship-owning company;
- No stamp duty is charged on mortgage deeds or other security documents;
- Emoluments of seamen employed on board Cypriot-registered ships are exempt from tax;
- Emoluments of seamen employed by Cypriot international ship management companies on board ships registered in foreign jurisdictions are exempt from tax if such emoluments are paid through a bank operating in Cyprus;[53] and
- Dividends distributed to shareholders of Cypriot international ship management companies are not taxed. In addition to the above tax incentives granted by Cyprus to shipping companies, amendments to the Income Tax Laws of Cyprus have been enacted and these affect the operations of Cypriot ship-management companies. As a result, all income arising out of ship-management operations and activities is now taxed at the flat rate of 4.25 per cent. Prior to the enactment of the amendments and by virtue of the Merchant Shipping (Fees and Taxing Provisions) (Second Amendment) Law,[54] a new tax regime was adopted for ship-management companies which was quite similar to that applicable to

52 This does not apply in the double-taxation treaties with Denmark and France.

53 Otherwise, a tax of 10 per cent of the applicable income tax rates of Cyprus is imposed. If such emoluments are paid in respect of services rendered by seamen on board Cypriot-registered ships, they are totally exempt from any taxation.

54 Law 73(I) of 1999.

ship-owning companies. In effect, every Cypriot-registered ship management company was entitled to opt to be taxed either in accordance with the provisions of the prevailing Income Tax Laws or at rates equal to 25 per cent of the applicable rates for calculating tonnage tax of ships under its management and which are registered outside Cyprus.

8-27 However, the provisions were only applicable to international ship-management companies[55] and not to local ship-management companies.[56] Therefore, and although the same tonnage tax was applicable for both types of ship-management companies, there was a different rate of income tax payable. At present and by virtue of the latest amendments, the distinction between international and local companies has been abolished, and there is only one flat rate applicable in both cases, ie, 4.25 per cent.

The Merchant Shipping (Fees) and Taxing Provisions) Law[57] provides that a Cypriot ship, or a Cypriot ship registered parallel out in a foreign registry and which is managed by a Cypriot ship-management company, is allowed a 30 per cent reduction on the annual tonnage tax payable. In principle, the annual tonnage tax is paid in full, and the owner or the bareboat charterer can apply for the 30 per cent reduction to be refunded to him on applying to the Department of Merchant Shipping.

International Conventions

8-28 Cyprus is a contracting party to the following international conventions for which the International Maritime Organisation[58] performs depositary functions:

- International Convention for the Safety of Life at Sea, 1974, as amended;[59]
- Protocols to the International Convention for the Safety of Life at Sea, 1974, as amended;[60]
- Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended;[61]
- International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978;[62]
- International Convention on Load Lines, 1966;[63]

55 This applies to those ship management companies which are directly and/or beneficially owned by non-residents of Cyprus.

56 This applies to those ship-management companies owned by Cypriot residents.

57 Law 38 (I) of 1992, as amended by Law 63 (I) of 1999.

58 IMO.

59 SOLAS 74, as amended.

60 SOLAS PROT 1978, as amended by SOLAS PROT 1988.

61 COLREG 72, as amended.

62 MARPOL 73/78, as amended.

63 LL 1966.

- Protocol of 1988 relating to the International Convention on Load Lines, 1966;[64]
- International Convention on Tonnage Measurement of Ships, 1969;[65]
- International Convention on Civil Liability for Oil Pollution Damage, 1969;[66]
- Protocols to the International Convention on Civil Liability for Oil Pollution Damage, 1969;[67]
- Special Trade Passenger Ships Agreement, 1971;[68]
- Protocol on Space Requirements for Special Trade Passenger Ships, 1973;[69]
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971;[70]
- Protocols to the International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971;[71]
- International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978, as amended;[72]
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, 1972, as amended;[73]
- Convention on the International Maritime Satellite Organisation (INMARSAT), as amended;[74]
- Operating Agreement on the International Maritime Satellite Organisation (INMARSAT), as amended;[75]
- International Convention on Maritime Search and Rescue;[76] and
- International Convention for Safe Containers, 1972.[77]

8-29 In addition, Cyprus is a contracting party to the International Maritime Labour Conventions for which the International Labour Organisation[78] performs depository functions:

- Convention Fixing the Minimum Age for Admission of Young Persons to Employment as Trimmers or Stokers, 1921;[79]

64 LL PROT 1988.
65 Tonnage 1969.
66 CLC 1969.
67 CLC PROT 1976, CLC PROT 1992.
68 STP 1971.
69 SPACE STP, 1973.
70 FUND 1971.
71 FUND PROT 1976, FUND PROT 1992.
72 STCW 1978, as amended, including 1995 amendments.
73 LDC 1972.
74 INMARSAT C.
75 INMARSAT OA.
76 SAR 1979.
77 CSC 1972.
78 ILO.
79 Convention 15.

- Convention Concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea, 1922;[80]
- Convention Fixing the Minimum Age for the Admission of Children to Employment at Sea, revised 1936;[81]
- Convention Concerning the Repatriation of Seamen, 1926;[82]
- Convention Concerning Crew Accommodation on Board Ships, revised 1949;[83] and
- Convention Concerning Minimum Standards in Merchant Ships, 1976.[84]

Official Fees

In General

8-30 The registration fees are calculated as follows:

For vessels other than passenger ships

Gross Tonnage	Cents
For each unit up to 5,000	10
For each additional unit between 5,001–10,000	8
For each additional unit over 10,000	4

The minimum fee is CY £125 and the maximum fee is CY £3,000

For passenger ships

Gross Tonnage	Cents
For each unit	15

The minimum fee is CY £250

Tonnage Tax

For vessels other than passenger ships, the tonnage tax is calculated as follows:

(Basic Charge plus Gross Tonnage Increment)
* Age Multiplier

80 Convention 16.
81 Convention 58.
82 Convention 23.
83 Convention 92.
84 Convention 147.

The basic charge is CY £100, and the gross tonnage increment is calculated as follows:

Gross Tonnage	Cents
For each unit up to 1,600	26
For each additional unit between 1,601–10,000	16
For each additional unit between 10,001–50,000	6
For each additional unit over 50,000	4

The age multiplier is shown below:

Age *	Ship Rate Multiplier
Up to 10 years	0.75
11–20 years	1.00
Over 20 years	1.30

* This is calculated by taking the year in which the keel was laid and then deducting it from the year of assessment of the tonnage tax.

For passenger ships, the tonnage tax payable is double that payable for other vessels.

The tonnage tax is payable in biannual instalments, on 1 January and 1 July each year, and in advance not later than 31 January and 31 July in each year. Late payment results in the imposition of a five per cent surcharge for the first month in arrears and one per cent for each subsequent month.

In case of deletion of a vessel from the Register of Cyprus Ships, any tonnage paid in advance for the remaining period up to the date on which the next instalment becomes due is refunded.

Reduction of Tonnage Tax

8-31 In General. Section 8 of the Merchant Shipping (Fees and Taxing Provisions) Laws, 1992–1999, provides for the reduction and refund of the tonnage tax in the cases listed below.

8-32 Technical Management and Crewing by Cypriot Companies. If the vessel's technical management and crewing are carried out by Cypriot ship-management companies operating in Cyprus, a 30 per cent reduction of the tonnage tax is allowed, provided the relevant documentary evidence is submitted to the Department of Merchant Shipping in advance of the period for which the reduction is claimed.

8-33 Cypriot Crew Members. If members of the crew of the vessel are Cypriot citizens, a percentage of the tonnage tax paid by that vessel may be refunded for each month they are employed on board the vessel, as follows:

- For vessels other than passenger ships — Officers and cadet officers, 2.5 per cent for each month of actual employment on board; ratings, 1.5 per cent for each month of actual employment on board.
- For passenger ships — The above rates are reduced by 50 per cent.

8-34 The Cypriot seafarers employed must be duly qualified for the post they hold on board. The tonnage tax may be refunded on the application of the owner of the vessel, who should submit relevant documentary evidence attesting the employment of Cypriot citizens on board the vessel.

Laid-Up Ships. If the ship is laid up for a period of more than three consecutive months, the tonnage tax payable is reduced by 75 per cent for the period during which the vessel is laid-up. The maximum reduction or refund of tonnage tax described above cannot exceed 50 per cent of the tonnage tax due.

Fees for the Registration, Transfer, or Transfer of Interest in a Mortgage

8-35 For the registration or transfer of a mortgage or transfer of interest in a mortgage with the Registrar of Ships, the fees payable are calculated as follows:

Gross Tonnage	Cents
For each unit up to 10,000	2
For each additional unit over 10,000	1

The minimum fee is CY £30. No fee is payable for the discharge of mortgages.

Fees for the Transfer of Ships

8-36 For the transfer of a ship to the ownership of another Cypriot company, the fees payable are calculated as follows:

Gross Tonnage	Cents
For each unit up to 10,000	2
For each additional unit over 10,000	1

The minimum fee is CY £30.

Deletion of a Ship from the Register of Cyprus Ships

8-37 No fee is payable for deletion of ships. However, all other statutory fees and taxes due or in arrears at the time of the vessel's deletion should be paid.

Radio Station Fees

Licence to install and operate a wireless telegraphy and/or telephony station on board	CY £10
Renewal of wireless telegraphy/telephony station licence	CY £10

The initial licence is valid for one year from the date of the provisional registration of the vessel under the Cypriot flag. The renewal fee becomes due on the date of expiry of the initial licence.

Other Fees

Examination of an application for the registration of a vessel in the Register of Cyprus Ships	CY £15
Examination of an application for change of the vessel's name	CY £15
Approval of the change of the vessel's name	CY £80
Issue of a provisional certificate of registry or a certificate of registry	CY £10
Granting a ship's carving and marking note	CY £10
Issue a transcript of registry	CY £10

For various other services or for the issue of certain certificates, other minor fees are payable.

Fees and Taxes Payable on Provisional Registration

8-38 The following fees and taxes are payable at the time of the provisional registration of a vessel:

- Registration fees;
- Tonnage tax for six months;
- Fee for obtaining a licence to install and work a wireless telegraphy and/or telephony station; and
- Fee for the issue of the provisional certificate of Cyprus Registry.

8-39 The above fees should be paid not later than the date on which the provisional registration of the vessel will be effected.

Fees and Taxes Payable for the Extension of the Period of Provisional Registration

8-40 For extending the period of the provisional registration of a vessel under the Cyprus flag for a maximum period of three months, the following fees and taxes are payable:

- Half of the registration fees; and
- Tonnage tax for three months.[85]

Fees and Taxes Payable on Permanent Registration

8-41 If the relevant registration fees have been paid at the time of the provisional registration of the vessel and the period of provisional registration has not expired, no other fees and taxes are levied for the permanent registration of a vessel, apart from:

- Fee for the issue of the certificate of the Cyprus Registry; and
- Payment of any other statutory fees and taxes due or in arrears at the time of the permanent registration of the vessel.

8-42 No other fee is payable if the permanent registration takes place before the expiry of the provisional registration period. Otherwise the fees payable on provisional registration are payable anew.

Fees and Taxes Payable Annually

8-43 The following fees and taxes are payable each year:

- Tonnage tax; and
- Fee for the renewal of the licence to install and work a wireless telegraphy and/or telephony station.

Fees and Taxes Payable on Parallel (Bareboat) Registration

8-44 The initial registration fees for the parallel registration of a foreign vessel under the Cypriot flag (parallel in registration) are 20 per cent higher than those applicable to the provisional or permanent registration of the vessel. If the foreign vessel under the Cypriot flag is deleted and thereafter re-registered and the chartering is effected to the benefit of the same charterer prior to the deletion, the re-registration fees are reduced by 50 per cent. There is no increase in the tonnage tax or other dues payable, and the vessel is subject to the same financial obligations as other Cypriot vessels.

A Cypriot vessel registered in parallel in a foreign register (parallel out registration) has the same financial obligations as all other Cypriot vessels, with the exception of the fees for the issue or renewal of the radio licence. If the vessel is deleted from the Cyprus Registry prior to the termination of her status of parallel-out registration, that

85 The above fees should be paid prior to the expiry date of the period of provisional registration.

part of the tonnage tax which is proportional to the period from her deletion until the termination of her status of parallel registration is reimbursed on application.

The financial obligations of vessels (Cypriot and foreign) registered are payable in advance for the entire period of the parallel (bareboat) registration.

Bilateral Agreements

8-45 In order to facilitate the operation of Cypriot ships and thus improve their profitability,[86] Cyprus has concluded bilateral agreements of cooperation in merchant shipping with the following countries:

- Bulgaria;
- China;
- Cuba;
- The Philippines;
- Poland;
- Romania;
- Russia;
- Sri Lanka; and
- Syria.[87]

8-46 The text of the Agreements is very similar, with a few significant differences which will be mentioned below.

In articles 1 and 2 of all the Agreements, the two countries indicate their political will to strengthen their friendly relations and extend their cooperation in the field of merchant shipping 'on the basis of equality, mutual benefit and the principle of freedom of navigation . . . '.

In articles 3 and 4, the two countries agree 'to promote the participation of their vessels, in the transportation of goods between their ports effectively utilising mutually their vessels by supporting measures, as far as possible, for the transportation of goods to and from third countries, to encourage their shipping enterprises to conclude agreements and contracts on technical and commercial matters related to shipping with the relative enterprises of the other Contracting Party'. Further, they agree to 'cooperate for the employment, improvement of conditions of work and for the welfare of their seamen employed on each other's vessels'.

Articles 5, 6, and 7 regulate the treatment and facilities afforded to ships of one contracting party whilst in the territorial waters of the other contracting party. In

86 Andreas Neocleous, 'A Strong Commitment', *Baltic and International Maritime Council Review* (1996), at p 262.

87 The agreements with Algeria and India have been signed and will come into force shortly. Agreements with Egypt, Estonia, Hungary, Iran, Latvia, Lithuania, and Thailand have been initiated and their signature is pending. The existing agreements with the Philippines and Poland have recently been amended.

particular, they stipulate that each contracting party shall render to the vessels, crew, and passengers of the other contracting party the same treatment as rendered to those of the most favoured nation.

Articles 8, 9, 10, and 11 deal with matters relating to seamen. They specify the identity documents of the seamen and regulate the entry and stay of seamen in the territory of the contracting parties. One of the most important articles in all bilateral agreements is the 'employment article', which reads as follows:

> 1. For the safe manning of the merchant vessels registered in their territories, with qualified personnel, ship owners of each Contracting Party may engage qualified nationals of the other Contracting Party. The terms of employment of such nationals on vessels registered in the other Contracting Party's territory shall be approved by the competent authorities of the seamen's country in consultation, where possible, with the national seafarers' unions of associations. In this regard each Contracting Party shall exert its best efforts to ensure that those terms of employment are adhered to.
>
> 2. Any disputes arising out of the respective contracts of employment between a ship owner of the one Contracting Party and a seaman of the other Contracting Party shall be referred for settlement to the jurisdiction of the competent courts or authorities of either Contracting Party.

8-47 The employment article aims, firstly, at offering protection to the seafarers from labour supplying countries employed on Cypriot ships by setting the wages and other approved terms of employment as minimum standards and, secondly, at offering protection to the ship owners against unwarranted stoppages and delays of the ship in a port. On the basis of this article, the Registrar of Cyprus Ships may issue upon request a certificate or a signed statement as to the provisions of a specific bilateral agreement which may be produced either in the court where the case of an unjustified labour claim is heard or in the course of negotiations with the seamen's union.[88]

Subsequent articles of the agreements provide for the establishment of representative offices in the territory of the contracting parties as well as for the taxation and free transfer of the shipping income and profits where there is no double tax treaty between Cyprus and the other contracting party.

88 Case of the Cypriot flag containership *ISS Britannia* in Gothenburg, Sweden, 1988, and the Case of *MV Ippolytos* in New Jersey, United States, 1990.

Certificates of Competency

8-48 Cyprus recognises the certificates of competency of many countries.[89] By virtue of the introduction of the STCW 95, all crew licences must be endorsed by the flag state of the vessels.

Admiralty Law

In General

8-49 The Cypriot legal system was developed on the basis of, and followed, English law from 1878[90] until its independence in 1960. Thereafter and even though new Cypriot laws and regulations were enacted and Cypriot case law was applied, the Cypriot legal system was to a large extent modelled on its English counterpart.[91] Moreover, although the decisions of the English courts do not have a binding effect on the Cypriot courts, they are very persuasive; as it was well stated in 1962, '. . . as a general rule, our Court should as a matter of judicial comity follow decisions of the English Courts of Appeal . . . unless we are convinced that those decisions are wrong'.[92]

On 23 November 1893, by Order in Council, Queen Victoria passed the Cyprus Admiralty Jurisdiction Order of 1893. That Order contains a list of rules which became the Rules of Court of the Supreme Court of Cyprus in its admiralty jurisdiction.[93] Section 19(a) of the Courts of Justice Law[94] provides that 'the High Court shall, in addition to its powers and jurisdiction conferred upon it by the Constitution, have exclusive original jurisdiction as a Court of Admiralty vested with and exercising the same powers and jurisdiction as those vested in or exercised by the High Court of Justice in England in its Admiralty jurisdiction on the day immediately preceding Independence Day'.

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89 Argentina, Australia, Belgium, Bulgaria, Canada, Cape Verde, Chile, Colombia, Croatia, Cuba, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, India, Indonesia, Israel, Italy, Ivory Coast, Japan, Latvia, Lebanon, Liberia, Malaysia, Maldives, Myanmar, The Netherlands, New Zealand, Norway, Pakistan, People's Republic of China, Philippines, Poland, Portugal, Republic of Ireland, Republic of Korea, Romania, Russia, Singapore, Slovak Republic, Spain, Sri Lanka, Sweden, Togo, Turkey, Ukraine, United Kingdom, and United States.

90 The year that Cyprus became a colony of Great Britain.

91 McGuffie, Fugeman, and Gray, *British Shipping Laws* (vol 1, Admiralty Practice) (1964); Hill, Soehring, Hosoi, and Helmer, *Arrest of Ships* (1985); Meeson, *Admiralty Jurisdiction and Practice* (1993); Smith, *Ship Arrest Handbook* (1997); Bundock, *Shipping Law Handbook* (1999); Roscoe, *Admiralty Jurisdiction and Practice* (5th ed); Meeson, *The Practice and Procedure of the Admiralty Court*.

92 *Solomos Stylianou v The Police* (1962) CLR 152, at p 171.

93 It is important to note that the majority of these rules are still applicable today.

94 Law 14 of 1960.

Therefore, the Supreme Court of Cyprus has jurisdiction to handle admiralty matters. A single judge of the Supreme Court of Cyprus tries admiralty cases at first instance and the full bench of that Court acts as an appellate court. The Courts of Justice Law[95] further provides that '[t]he High Court in exercise of the jurisdiction conferred by paragraph (a) of section 19 shall apply . . . the law[96] which was applied by the High Court of Justice in England in the exercise of its Admiralty jurisdiction on the day preceding Independence Day, as may be modified by any law of the Republic'.

However, it should be noted that, by virtue of an amendment to the Courts of Justice Law,[97] 'any admiralty case, irrespective of the amount of the claim, shall be tried by the District Courts of Cyprus, if the subject matter of the action relates to loss of life or personal damage caused as a result of a defect in the vessel or its equipment . . .'. In addition, where the claim is for less than CY £10,000, the District Courts of Cyprus also will adjudicate claims:

- In respect of goods supplied to the vessel for its maintenance;
- For loss or damage to goods carried on board a vessel;
- In respect of the construction, repair, or supply of a vessel;
- For crew wages; and
- In respect of expenses incurred on behalf of the vessel by her captain or any other supplier.

8-50 It should be borne in mind at all material times that the Cyprus Admiralty Jurisdiction Order 1893[98] provides that, 'in all cases not provided by these Rules, the practice of the Admiralty Division of the High Court of Justice in England, so far as the same shall appear to be applicable, shall be followed'.

For the purposes of this chapter, the concept of maritime liens will be analysed before examining how the jurisdiction of the admiralty courts arises and how an arrest of a vessel may be effected.

Maritime Liens

8-51 In *Kamal Hassanein v Hellenic Island and/or Island and Others*,[99] it was held by the Supreme Court of Cyprus that, by virtue of section 29(2)(a) of the Courts of Justice Act, the sources of Cypriot Admiralty law spring from the English Admiralty laws as applied in England before Cyprus became an independent

95 Courts of Justice Law, s 29(2)(a).

96 The law applied by the High Court of Justice in England at that time was the Administration of Justice Act 1956. It should be noted that, although the 1956 Act was amended by England, no similar amendments have been effected to its Cypriot counterpart.

97 Law 136 of 1991, s 22B.

98 Rule 237.

99 *Kamal Hassanein v Hellenic Island and/or Island and Other* (1994) 1 JSC 578.

country.[100] The concept of maritime liens arises under Cypriot law by virtue of section 3(3) of the English Administration of Justice Act 1956.

Although the 1956 Act does not clearly define what a maritime lien is, it has been widely defined as a privileged claim over a vessel or other maritime property in respect of services rendered to, or injury caused by, that vessel or maritime property. Where there is a maritime claim against any vessel or other maritime property, the Admiralty jurisdiction of the Cypriot courts may be invoked by an action *in rem* against the vessel or maritime property. A maritime lien may be so invoked against the vessel or other maritime property even in the hands of a *bona fide* purchaser who knew nothing of the claim. The main categories of claims in respect of which Cypriot law recognises and upholds maritime liens are as follows:

- Bottomry;
- Salvage;
- Wages;
- Master's wages;
- Disbursements and liabilities; and
- Damage done by a ship.

8-52 Under Cypriot law maritime, liens enjoy certain advantages over all other permitted actions *in rem* ('statutory liens'):[101]

- As to the time of creation of the lien;
- In priority; and
- In enforceability of security.

8-53 Under Cypriot law, a maritime lien has a procedural nature and depends on the remedies available in the country where relief is sought (*lex fori*). Cypriot courts, in determining the existence of a maritime lien, will apply Cypriot law, even in cases where, under a different law (eg, the *lex loci contractus*), a maritime lien does exist, whereas none exists under the *lex fori* (ie, under Cypriot law). In an *obiter dictum* in the *Kamal Hassanein case*, Artemis J held that 'it would be more equitable and reasonable to accept the approach of the *Ioannis Daskalelis*.[102] Therefore, in my opinion, the existence of a maritime lien should be considered as having a substantive nature and be decided according to the *lex loci contractus*. If according to the *lex loci contractus* a maritime lien arises, such a maritime lien should be recognised by Cypriot law; however, the rank of priorities of this maritime lien should be decided according to the *lex fori* (Cypriot law)'. However, in this case Artemis J went on to concur with the majority judgment of the Supreme Court of Cyprus and no further emphasis was given to this point.

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100 Therefore, as already stated, it should be clarified from the outset that there are many similarities between English and Cypriot law on the issue of maritime liens.

101 Under Cypriot law, a registered mortgage is a special type of statutory lien.

102 *Ioannis Daskalelis* [1974] 1 Lloyds Rep 174.

According to *ABC Shipbrokers Ltd v Preskott Shipping Co Ltd*,[103] a person who has paid off the privileged claimant (eg, a ship manager paying crew and master's wages) does not stand in the shoes of the privileged claimant in respect of his maritime lien. This person can be considered only as a volunteer who has decided to pay off a debt which constituted a maritime lien on the vessel; however, by his action, he does not acquire any maritime lien and, therefore, has no right *in rem* based upon a maritime lien. In the above case, Boyadjis J further held that 'a person who at the request of the owner of a vessel pays off the crew will stand as a necessaries man and thereby will possess a statutory right of action *in rem* against the vessel in respect of his advances. But necessaries men have no prior equity because a lien for necessaries is a statutory lien and it is not attached to the institution of an action *in rem*'.

Therefore, in principle, a statutory lien does not crystallise into a maritime lien before an action *in rem* is filed in the Cypriot courts.

In *Commercial Bank of the Near East Ltd v the Ship Pegasus III*,[104] the Supreme Court of Cyprus upheld the general principle of English law by deciding that, although master's disbursements give rise to a maritime lien, necessaries create a statutory lien which is enforceable against the vessel only after the institution of an action *in rem*.

It should be noted that, although section 3(3) of the Administration of Justice Act 1956 enables a claimant to arrest a vessel to which a maritime lien is attached, no provisions are contained therein in respect of the arrest of a 'sister vessel'. However, this situation is compensated for by section 3(4) of the 1956 Act, which provides that the admiralty jurisdiction of the High Court may be invoked (whether the claim gives rise to a maritime lien over the vessel or not) by an action *in rem* against '. . . (b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid'. However, it should be pointed out that, in such cases, a person who possesses a maritime lien in respect of the 'other ship' has no higher right or priority than that enjoyed in the circumstances by the holder of a statutory lien.

Priorities

In General

8-54 Cypriot admiralty courts are vested with jurisdiction under section 19 of the Courts of Justice Act 1960, to determine questions of priorities, as the Administration of Justice Act 1956[105] gave the High Court in England, sitting in Admiralty, jurisdiction to determine questions of title to the proceeds of sale of a vessel by an order of the court. This jurisdiction is vested in the court and may be exercised in the first instance by any judge or judges. The payment out after the sale of the vessel is made by an order of the court.[106]

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103 *ABC Shipbrokers Ltd v Preskott Shipping Co Ltd* (1992) 1 JSC 1034.

104 *Commercial Bank of the Near East Ltd v the Ship Pegasus III* (1978) 1 CLR 597.

105 Administration of Justice Act 1956, s 3(7).

106 Administration of Justice (Miscellaneous Provisions) Act 1964 (Law 33 of 1964), s 11(2).

With reference to English law principles,[107] Cypriot courts have defined the essence of a maritime lien as a right which 'travels' with the vessel into whoever's possession it might subsequently pass. Since, in principle, it is the vessel which is liable 'to pay for the wrong it has done', there apply in Cyprus special admiralty procedures governing the issue of a judicial sale of a vessel. What is of particular interest for the purposes of this chapter is the priority of ranking of maritime liens and other claims as against the proceeds of such a judicial sale. Before examining the rules governing the priority of maritime claims, it is important to make the following three observations:

- Under Cypriot law, the buyer of a vessel through a judicial sale acquires a clean title to the vessel;
- The proceeds of a judicial sale of a vessel are not shared equally between all privileged claimants because thorough and detailed rules have been developed for the ranking of each creditor; and
- Cypriot courts always have an inherent discretion to vary the ranking of priorities on the basis of the principles of equity and natural justice.

Marshal Expenses

8-55 Marshal expenses rank first in the list of priorities. The marshal obtains such a high priority because, without the services provided by him (eg, supplies and guarding), it would not be possible for the vessel to remain under the Admiralty court's jurisdiction during the hearing of the trial.

Salvor's Lien

8-56 The salvor maintains such a high position in the ranking of priorities because, without his emergency services, there would be no funds preserved for distribution between the claimants.

Damage Done by a Vessel

8-57 After salvors, come the 'damage done by a vessel' liens. These liens relate to claimants who have suffered physical damage from the vessel in question, eg, a ship-to-ship collision or a vessel colliding with a fixed object.

Master's and Crew's Wages

8-58 Next on the ranking ladder come the claims of the master and crew in respect of unpaid wages. These are contractual liens, and they are founded on the vessel's breach of the contract of employment with the master and crew. It goes without saying that repatriation fees can be included, where appropriate, in a claim for master's and crew's wages.

107 *The Bold Buccleugh* (1851) 7 Moo PC 267.

Bottomry

8-59 This is a contractual lien whose importance has greatly diminished due to the modern, highly sophisticated methods of extending credit.

Determination of Priority between Maritime Liens and Mortgages

8-60 Under Cypriot law, a mortgage is a special type of statutory lien and as such ranks below maritime liens. In *Commercial Bank of the Near East Ltd v the Ship Pegasus III*, the Supreme Court of Cyprus, in examining the question of the priority of a foreign mortgage,[108] held that, although the validity and interpretation of such a foreign mortgage should be determined according to the law of the country in which the mortgage is registered, questions of priority are treated as procedural and should be determined according to the *lex fori* (Cypriot law). The court went on to reconfirm the general principle that maritime liens rank in priority over mortgages.

Determination of Priority between Mortgages and Necessaries

8-61 This particular area of Cypriot law has given rise to a considerable number of court decisions; it is noteworthy, however, that all court decisions incline towards a unified set of rules, in the sense that necessaries rank below mortgages.

In the *Kamal Hassanein* case, the appellant supplied bunkering fuel to the vessel at the port of Alexandria and argued that his claim had priority over that of the mortgagees, who were the interveners in the present case. Under Egyptian law (the law of the country governing the contract for the supply of bunkering fuel), the claim of the appellant constituted a maritime lien and thus ranked above that of the mortgagees. However, the Cypriot courts held that the *lex fori* (Cypriot law) should apply to the facts of this case and, therefore, the appellant's claim did not give rise to a maritime lien; thus, it ranked below the claim of the mortgagees.

In *Pilefs Ltd and Others v Commercial Bank of the Middle East Ltd*,[109] the Supreme Court of Cyprus held that necessaries have no prior claim over mortgagees because a lien for necessaries is a statutory lien and it is not attached until the institution of an action *in rem*.

In this case, the necessaries were supplied to the vessel before the registration of the mortgage. However, the statutory lien did not attach to the vessel until an action was brought, which was long after the mortgage was entered into. It is implied from this case that, should an action *in rem* for necessaries be instituted before the registration of the mortgage, such a claim would rank higher than that of the mortgagee.

108 This involved a Panamanian-registered mortgage.
109 *Pilefs Ltd and Others v Commercial Bank of the Middle East Ltd* (1983) 1 CLR 376.

Cargo Claims

8-62 In *Nordic Bank plc v the Ship Seagull*,[110] it was held that 'cargo claims carry no maritime lien and rank in priority after all mortgage claims'.

A Ship Repairer's Lien – Possessory Liens

8-63 A ship repairer has, under Cypriot law, a possessory lien over the vessel and a general right to proceed *in rem* against the vessel. A possessory lien has priority over a mortgage, even in relation to a mortgage executed before the assumption of possession by the ship repairer. In the instance of a mortgage, the holder of a possessory lien does not take the *res cum onere*. Where, however, possession is given up, the security of the holder of a possessory lien is lost and the mortgage prevails. It should be borne in mind that the essential element of such a possessory lien is actual possession of the vessel until all the possessor's demands have been met or until the vessel is surrendered to the marshal under an order of the court. Thus, a ship repairer who foregoes his possessory lien (by losing physical possession of the vessel) can proceed against the vessel only with an action *in rem*, which will leave him in a much worse position in the order of priorities.

Of particular importance in the area of possessory liens is the case of *Costas Stylianou v Fishing Trawler Narkissos*.[111] In this case, a vessel was sold by public auction and the court was asked to determine the ranking of priorities of four creditors in respect of the proceeds of sale of the vessel. The four creditors were:

- A judgment creditor for unspecified necessaries (the first suitor);
- An execution creditor for necessaries and repairs who at the time kept possession of the vessel through the marshal (the second suitor);
- A judgment creditor entitled to a maritime lien originating in seamen's wages (the third suitor); and
- A judgment creditor in respect of a registered maritime mortgage (the fourth suitor).

8-64 The court held that the claim of the second suitor should rank on the distributable amount for the following reasons:

- The second suitor had a possessory lien over the vessel which he had, at all material times, maintained through the marshal;
- All creditors benefited from the supply of repairs and necessaries to the vessel by the second suitor, which contributed to her safety and maintenance prior to seizure; and
- The amount of the second suitor's claim did not appear to be entirely out of proportion to the value of such repairs and necessaries.

8-65 The court went on to decide that, after the claim of the second suitor, the claim of the third suitor should have priority. Unpaid seamen's wages were a maritime lien which constituted a privileged claim enforceable in the admiralty

110 *Nordic Bank plc v the Ship Seagull* (1989) 1 CLR 420.
111 *Costas Stylianou v Fishing Trawler Narkissos* (1963) 1 CLR 291.

courts of Cyprus, with priority over the claims of a mortgagee and/or unsecured creditors. Finally, as between the claims of the first and fourth suitors, the court held that the claim of the latter should stand in priority to the claim of the former. The first suitor was an unsecured creditor, who extended credit to the vessel, knowing of the mortgage charges.[112]

In principle, Cypriot courts will apply the general rules regarding the ranking of priorities as outlined in the preceding paragraphs. However, it should be borne in mind that these rules are not clear-cut, and the courts are always vested with an inherent discretion to vary them accordingly.

In *Tramp Oil and Marine Ltd v the Ship Pigassios*,[113] it was held that if there are special circumstances on the grounds of equity and natural justice, the order of priorities may be reversed by the court. Reliance for this proposition was based on the relevant statement of the law as appearing in *Halsbury's Laws of England*[114] *which, in so far as it is relevant, read:*

> It would seem that the determination of the priority of liens over one another rests on no rigid application of any rules but on the principles that equity shall be done to the parties in the circumstances of each particular case. However, there is a general order of priority, and there are certain general rules which, in the absence of special circumstances, the court tends to apply.[115]

8-66 In *Commercial Bank of the Near East Ltd v the Ship Pegasus III*, on an application by the marshal for approval of the judicial sale of a vessel at less than the appraised value, the court held that the grounds upon which a court will order that a vessel be sold for a lesser sum are that 'no offers have been received within the time limited for the sale to take place by the marshal's terms of sale, or that only an offer or offers to buy at less than the appraised value have been received within that time, or where, for example, there has been a sudden drop in values since the appraisal so that no offers to buy or no offers at or above the appraised value are likely to be forthcoming'.

In *Nicos Zacharias and Others v the Ship Reiher*,[116] the lawyers for the plaintiff applied to the court for the issue of a writ of attachment in respect of their legal fees which had previously been approved by the court in another action. The court held that legal fees already approved by the court were identical to a court judgment and thus could be executed by a writ of attachment over the proceeds of the sale of the vessel kept by the court.

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112 Such knowledge was proved by the evidence produced to the court.

113 *Tramp Oil and Marine Ltd v the Ship Pigassios* (1989) 1 CLR 46.

114 Halsbury's Laws of England (4th ed), vol 43, para 1142.

115 In spite of this statement, it is important to note that in none of the reported admiralty cases did Cypriot courts apply this principle of varying the order of priorities on the basis of equitable considerations.

116 *Nicos Zacharias and Others v the Ship Reiher* (1994) 1 JSC 567.

Jurisdiction

In General

8-67 A distinction must be made from the outset between jurisdiction over legal or physical persons[117] and jurisdiction over things.[118] Under Common Law, the first category covers all cases where a writ is served upon the defendant, with service being effected whenever the defendant is personally within the jurisdiction of the Cypriot courts.[119]

In the latter case, the action is against the *res* itself, ie, the vessel; the writ in such a case must be served on the vessel itself. Therefore, in an action against the vessel, the physical presence of the vessel within the jurisdictional waters of Cyprus is absolutely essential for the foundations of the court's jurisdiction *in rem*.

In rem Jurisdiction

8-68 An action *in rem* is an action against the vessel itself. 'The foundation of an action *in rem* is the lien resulting from the personal liability of the owners of the *res*.'[120] Therefore, an action *in rem* cannot be brought in respect of a claim for damages for injury caused to the vessel by the malicious act of the master of the defendant's vessel, or for damage done at a time when the ship was in control of third parties by reason of compulsory requisition.

By virtue of section 1(1) of the Administration of Justice Act 1956, the Supreme Court of Cyprus, in its admiralty jurisdiction, has jurisdiction over the following claims:

- To the possession or ownership of a vessel or to the ownership of any share therein;
- Any question arising between the co-owners of a vessel as to the possession, employment, or earnings of that vessel;
- In respect of a mortgage of or charge on a vessel or any share thereof;
- For damage done by a vessel;
- For damage received by a vessel;
- For loss of life or personal injury sustained in consequence of any defect in a vessel in her apparel or equipment, or of a wrongful act, neglect, or default of the owners, charterers, or persons in possession or control of a vessel or of the master or crew thereof or of any other person for whose wrongful acts, neglects, or defaults the owners, charterers, or persons in possession or control of a vessel are responsible, being an act, neglect or default in the navigation or management of the vessel, in the loading, carriage, or discharge of goods on, in, or from the

117 Jurisdiction *in personam*.

118 Jurisdiction *in rem*.

119 It should be noted that a mere temporary presence can suffice.

120 *Halsbury's Laws of England* (4th ed), vol 1, para 310.

vessel or in the embarkation, carriage, or disembarkation of persons on, in or from the vessel;
- For loss or damage to goods carried in a vessel;
- Arising out of any agreement relating to the carriage of goods in a vessel or to the use or hire of a vessel;
- In the nature of salvage (including any claim arising by virtue of the application, by or under section 51 of the Civil Aviation Act 1949, of the law relating to salvage of aircraft and their apparel and cargo);
- In the nature of towage in respect of a vessel or an aircraft;
- In the nature of pilotage in respect of a vessel or an aircraft;
- In respect of goods or materials supplied to a vessel for her operation or maintenance;
- In respect of the construction, repair, or equipment of a vessel or dock charges or dues;
- By a master or member of the crew of a vessel for wages and any claim by or in respect of a master or member of the crew of a vessel for any money or property which, under any of the provisions of the Merchant Shipping Acts 1894–1954, is recoverable as wages in the court or in the manner in which wages may be recovered;
- By a master, shipper, charterer, or agent in respect of disbursements made on account of a vessel;
- Arising out of an act which is or is claimed to be a general average act;
- Arising out of bottomry; and
- For the forfeiture or condemnation of a vessel or of goods which are being or have been carried, or have been attempted to be carried, in a vessel, or for the restoration of a vessel or any such goods after seizure, or for *droits* of admiralty.

8-69 Once a claim falls within the ambit of section 1(1), as described above, section 3[121] of the Act automatically comes into operation. However, it should be noted that, for the admiralty jurisdiction of the Cypriot courts to be triggered, two conditions precedent as to the subject matter of the dispute should be satisfied, namely:

- The subject matter of the claim must fall within the ambit of section 1 of the Administration of Justice Act 1956; and
- The subject matter must give rise to either a maritime lien[122] or a statutory lien.[123]

8-70 Sub-sections (2), (3), and (4) of section 3 make provisions relating to the time when an action *in rem* against the vessel can be invoked and, therefore, the right to arrest a vessel arises. Sub-section (2) enumerates the claims for which an action

121 Section 3 of the Act describes the mode in which admiralty jurisdiction is exercised.

122 Administration of Justice Act 1956, s 3.

123 Administration of Justice Act 1956, s 3(2)(4).

in rem may be brought against the 'ship or property in question'. In effect, an action *in rem* may proceed in respect of the claims set out above[124] against the 'ship or property in question', but no vessel or property other than the vessel or property in question may be arrested. Sub-section (3) preserves the right of a claimant having a maritime lien or other charge on any vessel to invoke the jurisdiction of the court by an action *in rem*.[125]

Finally, sub-section (4) examines the possibility of arresting a vessel other than the vessel directly concerned with the subject matter of the dispute. A claimant is not entitled to arrest more than one vessel belonging to the defendant, although he may issue, as soon as the cause of action arises, a writ *in rem* not only against the offending vessel, but against all other vessels which at the time are in the ownership of the person who would be liable in an action *in personam*.[126] However, a writ naming more than one vessel must be amended, when one vessel has been selected for service of the proceedings, by deleting the names of the other vessels.

In addition, it should be borne in mind that, where there is a maritime lien or other charge on any vessel, aircraft, or other property for the amount claimed, admiralty jurisdiction may be invoked by an action *in rem* against the vessel, aircraft, or property. A maritime lien may be so invoked against a vessel, aircraft, or property even in the hands of an innocent purchaser.[127]

Where, in the exercise of its admiralty jurisdiction, the Supreme Court of Cyprus orders that any vessel be sold, the Supreme Court also has jurisdiction to hear and determine any question as to the title of the proceeds of sale.[128]

In personam Jurisdiction

8-71 The admiralty jurisdiction of the Supreme Court of Cyprus may also be invoked by an action *in personam*.[129] The exercise of such jurisdiction may, however, be restrained by the operation of the rules of court relating to service of proceedings outside the jurisdiction.[130]

What distinguishes an action *in personam* from an action *in rem* is the fact that the former relates to the offence or wrongdoing of the owner, charterer, or other person with authority over the vessel and not to that of the vessel itself. Admiralty

124 Administrative of Justice Act 1956, s 1(1).

125 Under this sub-section, the claim relates only to the *res*, irrespective of the fact that the claimant may have the right to bring an action *in personam* against the owner of the *res*, as well.

126 *The Banco* (1971) P 137.

127 Administration of Justice Act 1956, s 3(3).

128 Administration of Justice Act 1956, s 3(7).

129 This is subject to the important exceptions of claims in respect of collision and other similar cases.

130 Where the defendant is outside the jurisdiction, an action *in personam* may be instituted only where service outside the jurisdiction is permissible.

jurisdiction may be invoked in an action *in personam* by initiating court proceedings against the owner of the vessel or where *in rem* proceedings have begun against the vessel and the owner enters an appearance to defend or lodge bail or other security.[131]

Arrest Proceedings

8-72 In exercising its admiralty jurisdiction, the Supreme Court of Cyprus considers the following factors and principles:

- Administration of Justice Act 1956;
- Cyprus Admiralty Jurisdiction Order 1893;
- Cypriot case law;
- English Rules in force in England in 1960;[132] and
- The Supreme Court's general practice and inherent jurisdiction.

8-73 All admiralty actions, whether *in rem* or *in personam*, are instituted with the issue of a writ of summons. Moreover, it should be clarified from the outset that an action *in rem* can always be combined in the same writ with an action *in personam*.[133]

> Every writ of summons shall set out at its head the name of the Court, the name of every plaintiff and the name of every defendant where the action is *in personam* and, in the case of an action *in rem*, the name of the ship or the nature of the property sought to be affected by the action.[134]

8-74 In the body of the writ, there must be set out the name, place of residence, and occupation of every plaintiff and defendant and a concise statement of the claim made or the relief or remedy sought.[135] A possible change in the ownership of the vessel before the issue of a writ *in rem* will defeat an action *in rem* against the vessel.[136]

In principle, the mere fact that a writ has been issued does not have any material effect until the moment that the vessel is arrested. The issue of the writ gives the claimant a right against the vessel which derives from the cause of action *in rem* and crystallises upon the arrest of the vessel.[137]

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131 *Abdu Ali Altobeiqui v MV Nada G and Another* (1985) 1 CLR 543.

132 *Asimenos and Another v Chrysostomou and Another* (1982) 1 CLR 145; *Sol Ferries Ltd v Naoum Shipping* (1985) 1 CLR 73.

133 *Sekavin v The Ship Platon Ch* (1987) 1 CLR 69.

134 Rule 7.

135 Rule 8.

136 This applies except in the event that there was a prior maritime lien attaching to the vessel.

137 Failure to issue a writ means that the claimant's right will remain dormant.

Rule 16 provides that, in an action *in rem*, the writ of summons may be served upon:

- A ship, or cargo, freight, or other property if the cargo or other property is on board a ship, by attaching an office copy of the writ to a mast or to some other conspicuous part of the ship;
- Cargo, freight, or other property, if the cargo or other property is not on board a ship, by attaching an office copy of the writ to some portion of such cargo or property;
- Freight in the hands of any person, by leaving with him an office copy of the writ; and
- Proceeds in court, by leaving an office copy of the writ with the Registrar of the Court.

8-75 In an action *in rem*, therefore, the writ must be served on the property against which the action is commenced. In an action *in personam*, personal service on the defendant should be effected or on specified representatives of the defendant.[138]

Of particular importance is Rule 22, which provides that '. . . where in an action, whether *in rem* or *in personam*, there is any doubt or difficulty as to the person to be served, or as to the mode of service, the court or judge may order upon whom, or in what manner, service is to be made, or may order notice to be given in lieu of service'.

In actions *in personam*, where the person to be served is outside Cyprus, an application must be made to the Supreme Court of Cyprus for an order for leave to serve the writ of summons or notice of the writ.[139] Rule 24 further provides that the court or judge, before giving leave to serve such writ or notice of the writ, must require evidence that the plaintiff has a good cause of action, that the action is a proper one to be tried in Cyprus, and evidence of the place or country where the defendant is or may probably be found and of his nationality.[140] Although, in actions *in personam*, the court may order that the writ be served outside the jurisdiction, no such service can be allowed against a vessel which is not within the jurisdiction of the court in an action *in rem*.[141]

Moreover, in *Abdu Ali Altobeiqui v MV Nada and Another*,[142] Loizou J held that 'no doubt the jurisdiction of the court under this provision[143] is essentially discretionary and the court may, if it sees fit, decline to allow the service or even the issue of the writ and thus decline to exercise its jurisdiction. Interpretation of rule 24 must, so long as its wording permits, proceed by analogy with and along

138 Rules 18, 19, 20, and 21.

139 Rule 23.

140 The order of the court or judge giving leave to effect service of the writ or notice of the writ must limit the time within which the defendant is to appear.

141 *Armando Nassar v Companhi de Navegacao Lloyd Brasiliero and Another* (1980) 1 CLR 396.

142 *Abdu Ali Altobeiqui v MV Nada and Another* (1985) 1 CLR 543, at p 554.

143 Rule 24.

the same lines as the exercise of discretion under the corresponding provisions in the Ordinary Rules'.

Rule 15 provides that, in an action *in rem*, the writ of summons must be served at least 21 days, and in an action *in personam*, at least 10 days, before the date named in the writ of summons for the appearance of the parties before the Court.

The Supreme Court of Cyprus, in its admiralty jurisdiction, has an inherent power to deal with matters relating to the arrest of property by virtue of rule 50 of the Cyprus Admiralty Jurisdiction Order, which reads as follows:

> In an action *in rem*, any party may at the time of, or at any time after, the issue of the writ of summons, apply to the court or a judge for the issue of a warrant for the arrest of property.

8-76 The party applying for the arrest of property should, before making his application, file with the court an affidavit containing the nature of the claim and stating that the aid of the Court is required. In *Eddy Breidi and Another v the Ship Gloriana and Others*,[144] Demetriades J held that, in deciding whether the Admiralty Court will issue a warrant of arrest, it is not necessary at that stage to go into the merits of the action and decide whether the plaintiff's factual or legal contentions are right or wrong. Moreover, it was held that rule 50 gives an absolute right for the arrest of property once the Admiralty Court is satisfied that:

- There are issues which must be tried between the parties;
- It suffices if it is found that the plaintiff has a right to have those issues tried;[145]
- It is abundantly clear that the plaintiffs has a right to have the issues raised by the oral evidence tried; and
- The plaintiffs were entitled to have the vessel arrested.

8-77 In effect, the Admiralty Court must be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief. Should an application for the arrest of a vessel be successful, the Admiralty Court will require that the plaintiff:

- Lodge a deposit for the expenses which may be incurred by the marshal in connection with the custody and supervision of the vessel whilst under arrest;
- Lodge any other amount of money required by the Registrar if the expenses of the arrest; and
- File a security bond[146] in respect of damages that the defendant vessel might suffer if the arrest proved to be wrongful.[147]

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144 *Eddy Breidi and Another v the Ship Gloriana and Others* (1982) 1 CLR 1.

145 *Rigas v The Ship Baalbeck* (1973) 1 CLR 159.

146 This may be in the form of a bank guarantee, cash at bank, or any other form of security bond which the Admiralty Court might order.

147 This applies except in the case of crew wages.

8-78 Failure to comply with the above requirements will automatically result in the release of the vessel. The order of arrest also must state the exact amount of security that the defendant may file for the release of the vessel.

With respect to an application for the arrest of a vessel relating to wages, the supporting affidavit also must state the nationality of the vessel and that notice of the action has been served upon a consular officer of the state to which the vessel belongs, if there is one resident in Cyprus.[148] In respect of an action for necessaries or for building, equipping, or repairing any vessel, the supporting affidavit must state the nationality of the vessel and that, to the best of the deponent's belief, no owner or part owner of the vessel was domiciled in Cyprus at the time when the necessaries were supplied or the work was done.[149]

The warrant for the arrest of the vessel must be served by the marshal, or his officer, in the manner prescribed by the 1893 Order for the service of a writ of summons in an action *in rem*, and thereupon the property will be deemed to be arrested.[150]

Any person desiring to prevent the arrest of a vessel or the release of a vessel under arrest or the payment of any moneys out of court may cause a caveat against the issue of any warrant of arrest or of any order of release or for the payment of moneys out of court to be entered by the Registrar in a book to be kept by him for that purpose and called the Caveat Book.[151]

Release Proceedings

8-79 Rule 60 provides that 'any party may apply to the court for the release of any property arrested and the court or judge may by order direct the release of such property upon such terms as to security or as to payment of any costs of appraisement or removal or inspection or otherwise as to the court or judge shall seem fit'. The order for release will be served on the marshal, either personally or by leaving it at his office, by the party at whose instance it has been obtained.[152]

Upon service of the order for release and upon payment to the marshal of all fees due to and charges incurred by him in respect of the arrest and custody of the property, the property will be released at once from arrest.[153] It has been held that the power to release property is at the discretion of the court and must be exercised judicially with reference to the principle of law underlying the power to direct arrest, on the one hand, and the realities of the case, on the other hand.[154]

148 Rule 52(a).
149 Rule 52(b).
150 Rule 55.
151 Rule 65.
152 Rule 63.
153 Rule 64.
154 *M Colodetz Limited v Katerina Shipping and Others* (1978) 1 CLR 476.

An order for release may be issued on the application of any party, without notice to any other party, if there is no caveat against the release of the property, and:

- Upon proof of payment into court of the amount claimed, or of the appraised value of the property arrested or, where cargo is arrested for freight only, of the amount of the freight verified by affidavit;
- On the application of the party at whose instance the property has been arrested;
- On a consent in writing being filed and signed by the party at whose instance the property has been arrested; and
- On discontinuance or dismissal of the action in which the property has been arrested.

8-80 In *Eddy Breidi and Another v the Ship Gloriana and Others*,[155] it was held that the party wishing to obtain the release of the property arrested must apply to the court and it is upon him to prove that he is entitled to the release. Moreover, it was held that a party claiming the release of arrested property or the discharge of bail put up for the release of such property can only succeed if he can prove that the plaintiff's claim or the defendant's counterclaim is frivolous or vexatious. The burden of proof lies with the party seeking to have the property released.

The effect of release of a vessel on the provision of adequate bail or security is that the bail or security substitutes and takes the place of the arrested vessel. As a result, a claimant is not entitled to arrest the vessel for a second time in respect of the same cause of action. In *Megas Hadjievangelou (No 2) v Dorami Marine Ltd and Others*,[156] Malachtos J held that, once security has been given in an action *in rem* against a vessel and the vessel has been released on being bailed out, the plaintiff in the action is not entitled for the same claim either to arrest the vessel again or to obtain an order under section 30 of Law 45 of 1963 or to be given double security under any other procedures.[157]

Sale of a Vessel under Arrest

8-81 Rule 74 provides that 'it shall be lawful for the court or judge, either before[158] or after final judgement, on the application of any party and either with or without notice to any other party, by its order to appoint the marshal of the court, or any other person or persons to appraise any property under the arrest of the court, or to sell any such property either with or without appraisement, or to remove or inspect and report on any such property or to discharge any cargo under arrest on board ship'.

155 *Eddy Breidi and Another v the Ship Gloriana and Others* (1982) 1 CLR 1.
156 *Megas Hadjievangelou (No 2) v Dorami Marine Ltd and Others* (1978) 1 CLR 555.
157 *Tokio Marine and Fire Insurance Co Ltd v Fame Shipping Co Ltd* (1976) 10 JSC 1499.
158 *Pendente lite*.

Under this rule, the court will order the sale of a vessel which remains under arrest and against which expenses are accumulating, and which is deteriorating, if in the interests of all parties a speedy sale would appear to be desirable. Typical grounds for an application are that a vessel is costing a disproportionate amount in daily expenses[159] or is deteriorating owing to being under arrest for a long time or that a cargo is perishable.[160] Therefore, the continuing and mounting expenses of arrest and the fact that goods are deteriorating are among the good reasons which a court may consider in ordering the property to be sold *pendente lite*.

In *Greyhound Shipping Corporation v The Ship Platon Ch*,[161] Pikis J held that an order for the auction of a vessel subject to appraisement imports a limitation on the power of the marshal or any other person to sell below the appraised value. However, the court has discretion to authorise the sale of a vessel below the appraised value; in exercising such discretion, the court should consider the likelihood of the vessel being sold at a price equivalent to or higher than the appraised value and, in this respect, the forecast depends on the efficiency with which the abortive auction has been conducted. The court should consider any change in the demand for vessels of the kind under sale, the risk of losing an existing offer, and the expenses of re-auctioning the vessel.

Depending on the directions and orders of the court, a vessel is sold by public auction after an appropriate advertisement has been published in a local or foreign newspaper. In the event that there are no bids at the first auction which are higher than or equal to the appraised value, a second public auction is usually ordered without a reserve price.

Upon the conclusion of the public auction, the *res* is converted into the proceeds of the sale which are in turn deposited with the court in order to pay out the various claimants. The fact that the proceeds of the sale take the place of the *res* is important, especially in relation to those claims which were not instituted against the vessel before the sale. Any subsequent legal proceedings may be commenced *in rem* against such proceeds, as if they were the subject matter of the action *in rem*.

The buyer of a vessel through a public auction acquires a clean title to the vessel, free from all prior maritime liens, mortgages, and other charges and encumbrances.

The last issue to be examined under this heading is the case where there is cargo on board a vessel under arrest which is not itself under arrest. In *Euroexpress Shipping Co SA v The Ship Terra Nova*,[162] it was held that, as regards the question of the discharge of the cargo, the rule is that if an arrested vessel has cargo on board

159 This includes dock dues, ship-keepers, bunkers, and maintenance costs.

160 *Almy Maritime SA v The Cargo on Board the Ship Almyrta* (*1975*) 1 CLR 116; *Euroexpress Shipping v The Ship Terra Nova* (1986) 1 CLR 200. The principles governing the question of orders for sale *pendente lite* of cargo apply equally to similar orders regarding vessels under arrest.

161 *Greyhound Shipping Corporation v The Ship Platon Ch* (1986) 1 CLR 541.

162 *Euroexpress Shipping Co SA v The Ship Terra Nova* (1986) 1 CLR 200.

and an order is made for the sale of the vessel only, the marshal will advise the cargo owners to have the cargo discharged and will give them reasonable time for this to be done. If no steps have been taken within the time allowed, the marshal will apply to the court for directions.

Mareva Injunctions and Injunctions Arising under Section 30 of Law 45 of 1963

8-82 It should be explained that a Mareva injunction should not be equated with an *in rem* right. A Mareva injunction is an equitable remedy and, like any other injunction, operates *in personam* against the defendant. A Mareva injunction merely has the effect of preventing the defendant from making himself 'judgment proof' without actually particularising, identifying, and seizing a specific asset to be used in a proprietary manner to pay off a judgment debt. It does not of itself found jurisdiction as in the case of an admiralty action *in rem*.

The main object of a Mareva injunction is to prevent a defendant from removing outside the jurisdiction or disposing of assets which are situated within the jurisdiction, so as to prohibit satisfaction of a possible judgment or execution order against him.

Section 32(1) of the Courts of Justice Law[163] provides that:

> Subject to any Rules of Court, every court in the exercise of its civil jurisdiction may, by order, grant an injunction (interlocutory, perpetual or mandatory) or appoint a receiver in all cases in which it appears to the court just or convenient so to do notwithstanding that no compensation or other relief is claimed or granted . . . provided that an interlocutory injunction shall not be granted unless the court is satisfied that there is a serious question to be tried at the hearing, that there is a probability that the plaintiff is entitled to relief and that unless an interlocutory injunction is granted it will be difficult or impossible to do complete justice at a later stage.

8-83 In *Nemitsas Industries Ltd v S & S Maritime Lines Ltd*,[164] the court upheld the general principles laid down in the English case of *Mareva Compania Naviera SA v International Bulkcarriers SA*.[165] *In effect, the court held that the principles for granting an interlocutory injunction in Cyprus closely followed the principles formulated in Preston v Luck*.[166] That a party seeking an interlocutory injunction should show that there was a serious question to be tried at the hearing and that on the facts before the court there was a probability that the plaintiff was entitled to relief, rather than the principles stated by the House of Lords in *American Cynamid v Ethicon*.[167]

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163 Law 14 of 1960.

164 *Nemitsas Industries Ltd v S & S Maritime Lines Ltd* (1976)1 CLR 302.

165 Mareva *Compania Naviera S.A v International Bulkcarriers SA* (1975)2 Lloyd's LR 509.

166 Preston v *Luck* (1884) 27 Ch D 497.

167 *American Cynamid v Ethicon* (1975) 1 All ER 504.

Section 30 of the Merchant Shipping (Registration of Ships, Sales, and Mortgages) Law[168] provides that:

> The High Court may, if the Court thinks fit (without prejudice to the exercise of any other power of the Court), on the application of any interested person[169] make an order prohibiting for a time specified any dealing with a ship or any shares therein, and the Court may make the order on any terms or conditions the Court may think just, or may refuse to make the order, or may discharge the order when made, with or without costs, and generally may act in the case as the justice of the case requires, and the Registrar, without being made a party to the proceedings, shall on being served with an official copy thereof obey the same.

168 Law 45 of 1963.
169 An interested person is one with an interest in the vessel herself, not a mere creditor.

CHAPTER 9

Corporate Law

Elias A Neocleous, Kyriacos Georgiades and Markus Zalewski

Company Law

In General

9-1 This section is concerned almost entirely with the law relating to registered companies. These are governed in the main by the Cypriot Companies Law, Chapter 113 of the Laws of Cyprus, as amended ('the Companies Law'), which is almost identical to the United Kingdom's former Companies Act 1948.

'Section' references and 'article' references throughout the text are to the Companies Law and Table A, Part I, of the First Schedule to the Companies Law, respectively, unless otherwise indicated.

Types of Legal Entities

Classification of Companies

9-2 Since a company is a corporation, it is necessary first to examine the nature of a corporation. A corporation is a succession or collection of persons having at law an existence, rights, and duties separate and distinct from those of the persons who are from time to time its members. The distinguishing features of a corporation are:

- It is a *persona* at law, ie, an artificial, not a natural, person; and
- It has perpetual succession, ie, its existence is maintained by its members who may be added to or changed from time to time.

One way of dividing companies under the Companies Law is into:

- Companies limited by shares; and
- Companies limited by guarantee.

9-3 In the case of a company limited by shares, the liability of each member is limited to the nominal value of the shares that he has agreed to take up or, if he has agreed to take up such shares at a premium, ie, at more than their nominal value, to the total amount agreed to be paid for such shares.[1] Once the member

1 Companies Law, ss 3(2)(a) and 204(1)(d).

has paid for his shares, his liability towards the debts or liabilities of the company is fully discharged, although fraud may render a member liable for the debts of the company.[2] It should be noted that this principle of limitation of liability refers to the members, and not to the company, in the sense that the company must pay all debts due from it so long as its assets are sufficient to meet them.

In the case of a company limited by guarantee, which may be registered with or without a share capital, the liability of each member is limited to the amount agreed on in the memorandum of association to be contributed in the event of the company going into liquidation. In the majority of cases, companies of this nature are incorporated as non-profit making organisations under section 20 of the Companies Law.

Public and Private Companies

9-4 In General. Companies which are limited by shares may be subdivided into:

- Public companies; and
- Private companies.

9-5 Attributes of Private Companies. It may be viewed as an anomaly that the Companies Law does not give a precise definition of a public company. However, given that the Companies Law specifically defines a private company, it may readily be concluded that a public company is a corporation which does not constitute a private company.

A private company means a company which by its articles of association specifically:

- Restricts the right to transfer its shares;
- Limits the number of its members to 50, not including persons who are in the employment of the company and persons who, having been formerly in the employment of the company were, while in that employment and have continued after the determination of that employment to be, members of the company;
- Prohibits any invitation to the public to subscribe for its shares or debentures; and
- Prohibits the issue of bearer shares.[3]

9-6 It follows that if any one or more of the above four prerequisites is missing from the articles of association of a company, it cannot be registered as a private company. By the same token, deletion of any one of the prerequisites from the company's articles after incorporation means that it must comply with the requirements of a public company.

2 Companies Law, s 311.
3 Companies Law, s 29.

9-7 Exempt and Non-exempt Companies. Private companies may be further divided into exempt and non-exempt corporations. The conditions which must be fulfilled by a private company to be considered exempt are that:

- No corporate body holds any of its shares or debentures, unless it is itself an exempt private company registered in Cyprus;
- The number of persons holding debentures of the company is not more than 50;
- No corporate body is a director of the company;
- No person other than the holder has any interest in any of its shares or debentures; and
- Neither the company nor its directors are privy to any agreement whereby the policy of the company is determined by persons other then its shareholders and directors.[4]

9-8 As implied, exempt private companies are exempt from certain provisions of the Companies Law, such as:

- They need not file financial statements with the annual return submitted to the Registrar of Companies;
- They need not have auditors who are qualified under section 155 of the Companies Law;
- They may give loans and guarantees to their directors; and
- They have no need to print special resolutions to be filed with the Registrar of Companies.

Meaning of Public Companies

9-9 Invariably, public companies are under stricter control by the Registrar of Companies because the affairs of such affect and concern its entire membership, which may number many thousands. As indicated previously, a public company under the Companies Law is a corporation which does not have the quality of a private company. These differences must, therefore, be examined and the main provisions applicable to public companies, but not private companies, under the Companies Law be considered. In summary, these are as follows:

- The minimum number of members must be seven with no maximum applicable;[5]
- A public company must have at least two directors;[6]
- If directors are appointed by the company's articles, the consent of these directors must be filed on incorporation;[7]
- A public company must obtain a trading certificate from the Registrar of Companies before it can commence business;[8]

4 Companies Law, s 123.

5 Companies Law, s 3(1).

6 Companies Law, s 171.

7 Companies Law, s 175(1).

8 To obtain such a certificate, the company must issue a prospectus or a statement in lieu of prospectus; Companies Law, s 104(1).

- A public company must have a statutory meeting and its directors must make a statutory report to its members;[9]
- Only public companies may issue share warrants;[10] and
- A public company must issue a prospectus or a statement in lieu of prospectus before issuing any of its shares or debentures to the public.[11]

International Business Companies

9-10 As has been seen, all Cypriot companies are incorporated under the provisions of the Companies Law. At this stage, companies known as international business companies (IBCs), which currently enjoy tax-preferential status in Cyprus, can be introduced briefly. In terms of the existing provisions of the Cypriot Income Tax Laws,[12] for a company to enjoy IBC status, it must have:

- Its shares belonging exclusively to aliens, either directly or indirectly; and
- Its income derived from sources abroad.

Partnerships

9-11 Partnerships are registered in Cyprus under the Partnerships and Business Names Law, Chapter 116 of the Laws of Cyprus, as amended, which also is based on English legislation. A partnership may consist of between two and 20 natural or legal persons, carrying on a business in common with a view to profit. Cypriot law recognises two forms of partnership, namely general and limited partnerships.

In a general partnership, every partner is liable severally and jointly with the other partners, without limit, for all debts and obligations of the partnership incurred while he is a partner. After a partner's death, his estate is severally liable for such debts and obligations, subject to prior payment of his separate debts.

A limited partnership consists of at least one general partner liable for all the debts and obligations of the partnership and one or more limited partners who at the time of joining the partnership must contribute a stated amount to its capital. Beyond this contributed amount, a limited partner is not liable for the debts and obligations of the partnership. As indicated, a partnership may be formed between individuals or legal persons. Accordingly, it is entirely feasible for a corporate entity to form a partnership with one or more corporations, assuming this is *intra vires* the constitutive companies' articles of association or, indeed, with one or more individuals.

9 Companies Law, s 124(1).
10 Companies Law, ss 8 and 107.
11 Companies Law, s 48(1).
12 Income Tax Law, Law 58 of 1961, as amended, s 28A.

Capacity to Contract

9-12 Until a company has been incorporated, it cannot contract or enter into any other act under the law. Nor, once incorporated, can it become liable on, or entitled under, contracts purporting to be made on its behalf prior to incorporation, for ratification is not possible when the ostensible principal did not exist at the time when the contract was originally entered into.[13]

A company comes into existence as a legal entity once the Registrar of Companies is satisfied that all the statutory requirements in respect of registration and other matters connected or incidental thereto have been complied with, and he certifies under his hand that the company is incorporated as a limited company.[14] The certificate of incorporation given by the Registrar of Companies is conclusive evidence that all the requirements of the Companies Law in respect of registration and all matters precedent and incidental thereto have been complied with and that the company is duly registered under the provisions of the Companies Law.[15]

In practice, the situation does arise where the promoters of a company cause transactions to be entered into ostensibly by a company, but before it is incorporated. As already seen above, a company may not contract until it has been formed nor, after incorporation, may a company adopt the contract. In order that the company may be bound by an agreement entered into before its incorporation, there must be a new contract to give effect to the previous agreement, although this new contract may be inferred from the company's acts when incorporated, except where such acts are done in the mistaken belief that the previous agreement is binding.[16]

The above situation must be distinguished from any contract made by a company before the date at which it is entitled to commence business. Here, the contract is provisional only, and becomes binding on the company when it is so entitled.

So far as the promoter is concerned, his legal position in relation to pre-incorporation contracts appears to be as follows. If the contract was entered into by the promoter and signed by him 'for and on behalf of XY Company Limited', according to the decision in *Kelner v Baxter*,[17] the promoter would be personally liable. However, if the promoter signed the proposed name of the company adding his own name to authenticate it (eg, 'XY Company Limited, AB Director'), according to *Newborne v Sensolid* (*Great Britain*) *Ltd*,[18] there would be no contract.

13 *Natal Land and Colonisation Co v Pauline Syndicate* [1904] AC 120.

14 Companies Law, s 15(1).

15 Companies Law, s 17(1).

16 *Howard v Patent Ivory Manufacturing Co* [1898] 38 Ch D 156; *Touche v Metropolitan Railway Warehousing Co* (1871) LR 6 Ch App 671.

17 *Kelner v Baxter* (1866) LR 2 CP 174.

18 *Newborne v Sensolid* (*Great Britain*) *Ltd* [1954] 1 QB 45.

Memorandum and Articles of Association

Constitution of a Registered Company

9-13 The constitution of a registered company consists of two documents, the memorandum of association and the articles of association. The memorandum of association registers in its objects clause the activities which the company is authorised to carry on, whereas the articles of association contain the rules governing and regulating the internal management procedures of the company. The memorandum and articles, when registered, bind the company and its members to the same extent as if they had respectively been signed and sealed by each member and contained covenants on the part of each member to observe all their provisions.[19]

The articles constitute a contract between the company and a member in respect of his rights and liabilities as a shareholder. The company may sue a member and a member may sue a company to enforce, and restrain breaches of, the regulations contained in the articles dealing with such matters.[20] As between individual members, it would seem that the articles do not constitute a contract *inter se*, with the result that the rights and liabilities of members as members under the articles can only be enforced by or against the members through the company.[21]

The memorandum and articles of association must be drafted and printed in the Greek language and subscribed by at least one founding member.

Memorandum of Association

9-14 In General. Pursuant to section 4 of the Companies Law, the memorandum must contain five clauses, these being:

- The name clause;
- The objects clause;
- The limited-liability clause;
- The capital clause; and
- The association clause.

9-15 Objects and Powers. As noted, the objects clause of a company's memorandum of association records the sphere of its permitted operations. Any act beyond a company's legitimate powers as defined in its memorandum is *ultra vires* and void *ab initio*. On the other hand, a transaction which is *ultra vires* the directors but within the powers of a company may be ratified by resolution of its members. Given the continued importance of the doctrine of *ultra vires* in Cyprus, it becomes

19 Companies Law, s 21(1).
20 *Johnson v Lyttle's Iron Agency* (1877) 5 Ch D 687.
21 *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653.

necessary, in determining the capacity of a company, to examine the terms of the objects clause of its memorandum.

In reality, the objects clause consists of a compilation of numerous objects as well as powers which the company would be entitled to exercise in carrying out its objects. Some forms of memoranda include among the objects of a company 'the doing of all such other things as are incidental or conducive to the attainment of the above object'.[22] Even without these words, the same powers would be implied.[23]

It becomes important to distinguish between an object and a power, given that an object may be pursued by a company without fetter, whereas a power may only be legitimately exercised if incidental to an object.[24] It is not sufficient merely for a power to be convenient; it must have the quality of being incidental to an object. Otherwise, its performance will be *ultra vires* and void.

It is the case that memoranda do not usually distinguish between objects and powers and, in practice, memoranda are drawn as widely as possible to enable a company to engage in any type of business or activity, without this being *ultra vires*. Unless, on a true construction, it can be interpreted as an object, the performance of a permissible activity must be regarded as a power. The question whether the exercise of that power is *intra vires* the company depends on the true construction of the memorandum and all the circumstances of the case. Unless it can be concluded that the power will facilitate or is otherwise incidental to the business which the company was formed to carry on, its exercise is *ultra vires* and void.

9-16 Alteration of Objects Clause. The objects clause may be amended, within the seven conditions mentioned in section 7(1), so far as may be required to enable the company to:

- Carry on its business more economically or efficiently;
- Obtain its main purpose by new or improved means;
- Enlarge or change the local area of its operations;
- Carry on some business which, under existing circumstances, may be conveniently or advantageously combined with the business of the company;
- Restrict or abandon any of the objects specified in the memorandum;
- Sell or dispose of the whole or any part of the undertaking of the company; or
- Amalgamate with any other company or body of persons.

9-17 The alteration must be effected by special resolution of the company and to be valid must be confirmed by the court. Prior to confirmation, the court must be satisfied that sufficient notice of the application for confirmation has been given to all creditors or persons that may be affected by the alteration. An office copy of

22 *Rayfield v Hands* [1958] 2 All ER 194, where it was held to be unnecessary to join the company in the action.
23 *A-G Great Eastern Railway Co* (1880) 5 App Cas 473.
24 *Re Lands Allotment Co* [1894] 1 Ch 616.

the court order confirming the alteration together with a printed copy of the memorandum as altered must be filed with the Registrar of Companies within 15 days. The memorandum, as altered, becomes the memorandum of the company only on the issue of a certificate by the Registrar confirming the alteration.[25]

In recent years, the tendency of the courts is to enlarge the scope of the seven conditions to the extent that a complete re-writing of the objects may be allowed, provided this does not entail a change in the whole substratum of the objects.

9-18 Alteration of Share Capital. A company limited by shares or a guarantee company having a share capital may, if so authorised by its articles, and by special resolution, amend the provisions of its memorandum regarding its capital so as to:

- Increase its share capital by new shares of any amount;
- Consolidate and divide all or any of its share capital into shares of a larger amount;
- Convert any paid-up shares into stock and reconvert the stock into paid-up shares of any denomination;
- Subdivide any of its shares into shares of a smaller amount; and
- Cancel shares which have not been taken up.

9-19 A company with a share capital may, if so authorised by its articles, reduce its share capital by special resolution and, in particular, may:

- Extinguish or reduce the liability on shares in respect of share capital not paid-up;
- Cancel or reduce liability on any of its shares or cancel any paid-up share capital which is lost, either with or without extinguishing or reducing the liability on any shares; and
- Pay off any paid-up share capital which is in excess of the needs of the company.

9-20 A reduction of capital requires confirmation by an order of the court. Prior to this, the court may require the company to publish the application for reduction so as to give any creditor the opportunity to file an objection. The court also may direct that the company add the words 'and reduced' to its name for a specified period of time.

A copy of the court order, together with a minute approved by the court showing the amount of the reduced share capital, must be filed with the Registrar of Companies. The reduction of capital takes effect on registration and issue of a certificate by the Registrar confirming the reduction.

9-21 Variation of Class Rights. Apart from the five obligatory clauses previously discussed, the memorandum may contain additional conditions conferring special rights on a class of shares. The question arises whether such conditions can be altered. The answer in part lies in the nature of the condition concerned.

25 Companies Law, s 7(6).

Section 24 of the Companies Law provides that anything which could lawfully have been included in the articles instead of the memorandum may be altered by special resolution subject to confirmation by the court on petition. However, pursuant to section 23(2), the section does not apply where the memorandum itself provides for or prohibits the alteration of all or any of the said conditions; nor does it authorise any variation or abrogation of the special rights of any class of members, a limitation which will be mentioned later.

It may, therefore, be concluded that a condition in the memorandum may be altered, unless the memorandum expressly prohibits such alteration or contains no provision allowing for a variation, or where no alteration may be otherwise effected by virtue of section 23(2). However, despite these restrictions, it may still be possible to effect a desired alteration to an otherwise unalterable condition by means of a scheme of arrangement under section 198. The provisions of this section are complicated but, if resorted to, ultimately require the sanction of the court to the arrangement.

As has been seen, special class rights embodied in the memorandum cannot be varied or abrogated unless otherwise permitted by the memorandum. If a company is created with one class of shares, the rights attached to such shares may be viewed as the normal incidents of membership but hardly special rights. These special rights normally relate to dividends, voting, or return of capital on winding up.

It would appear that special rights as such arise only when the shares of the members are somehow divided into separate classes. Once a distinction is created between shares, the rights attached to each individual class of shares will be regarded as the special rights of that class, if they are expressly described in the memorandum, articles, or terms of issue. It follows from the above that, in the example of a company with one class of shares with rights embodied in the memorandum such rights may be altered by special resolution, provided the memorandum does not expressly prohibit alteration.

If the share capital of the company is already divided into separate classes, it appears that the special rights of each class cannot be varied unless there is a variation of rights emanating from section 70. This section states that, where the share capital of the company is divided into different classes of shares, the company may, if so authorised by its memorandum or articles, alter the rights attached to any class of shares if separate class resolutions are passed at separate meetings of the holders of the class, provided that where not less than 15 per cent of the dissenting shareholders of a class of shares apply to the court within 21 days to have the variation cancelled, any variation decided will not have effect unless and until it is confirmed by the court.

As can readily be seen, section 70 applies in the situation where the share capital of the company is already divided into different classes of share. Nevertheless, the Registrar of Companies adopts a flexible approach and permits the procedure to be used even where there is only one class of shares, provided the alteration is authorised by a unanimous resolution of the company, thus ensuring full minority

protection rights. Of fundamental importance, so far as membership of a company is concerned, is that alteration of the memorandum or the articles cannot compel a member to take up more shares or have his liability increased.[26]

Articles of Association

9-22 Section 12(1) of the Companies Law gives to a company power by special resolution to alter or add to its articles subject to the provisions of the Companies Law and any conditions contained in the memorandum. Although the terms of the section are very wide, some limit is placed on the operation of section 12(1), ie, that the section cannot be used to oppress or defraud a minority of shareholders, or to violate any statutory provision or principle of law.[27]

In instances where it is thought desirable that a particular article should not be altered, except with the consent of a particular person, two mechanisms are available to achieve this result. First, the individual concerned can be issued with shares of a separate class, whose class rights (alterable only with the consent of the class) include the right to veto any alteration of the article concerned. Second, the article concerned may include a term that, on any resolution proposed to alter it, the shares held by the person to be protected shall carry 26 per cent of all the votes which can be cast on such resolution. By this, no special resolution, which requires 75 per cent of the votes cast to pass, can be carried without the assenting vote of the protected member.

Constructive Notice and the Turquand Rule

9-23 In General. The memorandum and articles of association of a registered company are public documents. They must both be registered with the Registrar of Companies on incorporation of the company and as such, anyone dealing with the company is deemed to have constructive notice (the so-called 'constructive notice doctrine') of the contents, including the objects clause of the memorandum. A transaction clearly outside of these objects is, as already seen, *ultra vires* and void, whether or not the other contracting party knew it, as he will be invested with constructive notice of the invalidity. He will not be able to sue the company; nor, it seems, will the company be able to sue him.

The remedy commonly available to either would be to recover money or property paid or transferred under the void transaction to the extent to which it is possible to trace it or, in the case of a lender, to be subrogated to the claims of *intra vires* creditors of the company to the extent that the money has been used to pay them.[28]

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26 Companies Law, s 23.
27 *Re Peveril Gold Mines Ltd* [1898] 1 Ch 122.
28 *Sinclair v Brougham* [1914] AC 398.

The rule laid down in *Royal British Bank v Turquand*,[29] which applies in Cyprus, was enunciated to mitigate the effects of the constructive notice doctrine. It protects parties who deal with a company from outside against defects in the internal management of the company's affairs. The protection is granted because, if directors appear to be acting in accordance with a company's memorandum and articles of association, those dealing with them externally are entitled to assume that the directors have the authority which they claim to have.

The *Turquand* rule, also known as 'the indoor management rule', applies only to transactions which are within the company's powers but beyond the directors' powers. Thus, the rule may cure defects in the authority of the company's representatives, but it will not cure a defect where the transaction is beyond the company's capacity. A contracting party cannot claim the benefit of the *Turquand* rule where he is put on notice or inquiry of the indoor management irregularity or in the event of fraud.

Although normally requiring a collective act of the board, the *Turquand* rule may be extended to cover the acts of individual directors by use of the ordinary principles of agency. Accordingly, a company as principal will be bound by the act of a director as agent, if the director acted within:

- The actual scope of the authority conferred on him by the company prior to the transaction or by subsequent ratification; or
- The usual apparent or ostensible scope of the director's authority, eg, by virtue of his office.[30]

9-24 The rule in *Turquand* must now be considered in the light of section 33A introduced into the Companies Law by Law 21 (I) of 1997, known as the Companies (Amending) Law of 1997. An unofficial translation of section 33A is as follows:

> Transactions made by duly authorised directors, which are for the benefit of any person who transacts in good faith with the company, are binding on the company and are not subject to any terms or restrictions unless there is an express restriction of these powers in the memorandum or the articles of association of the company or in any other law.

9-25 'Transactions Made by Duly Authorised Directors'. It is open to conjecture whether this means that the section applies only in the situation where a contract is made by the directors acting collectively as a board, or by the managing director or other directors individually.

In the case of the former, this is narrower than the *Turquand* rule, given that the rule may be extended as seen to cover the acts of individual directors by the use

29 *Royal British Bank v Turquand* (1856) 6 E & B 327.
30 *Demetriou Georghios v Cyprofruta Ltd* (1974) 7-9 JSC 847.

of the ordinary principles of agency.[31] With regard to the wording 'duly authorised directors', it is submitted that ordinary agency principles should again be applied to determine whether the directors are vested with authority to contract (see text, below).

9-26 'Which Are for the Benefit of Any Person Who Transacts in Good Faith with the Company'. There is no requirement that an analogous benefit must accrue to the company. Furthermore, the outside party must transact in good faith.

Good faith is a subjective test and a party acts in good faith if he acts genuinely and honestly in the circumstances of the case.[32] A person is presumed to have acted in good faith unless the contrary is proved.

9-27 'Unless There Is Express Restriction of These Powers in the Memorandum or the Articles of Association of the Company'. This would appear to apply fully the doctrine of constructive notice to the party. Although not entirely clear, the 'express restriction' seemingly relates to the power of the directors to bind the company.

If the ability of the directors to contract and bind the company is dependent on a preliminary act in the nature of indoor management, could this be conceived as an 'express restriction' within the terms contemplated by the section? The section would not appear to provide an answer. In view of these uncertainties, a third party might need to turn for relief to the basic Common Law principles of agency as refined in relation to companies by the *Turquand* rule.

Share Capital

In General

9-28 As seen previously, every memorandum of a company must contain a capital clause setting out the authorised or nominal capital of a company and its division into shares of a fixed amount. No minimum share capital is provided by law, but each subscriber to the memorandum must subscribe for at least one share. Although usually denominated in Cyprus pounds, the nominal share capital of a company may, subject to the consent of the Registrar of Companies, be denominated in other currencies.

The word 'capital', as used in company law, has several meanings which need to be distinguished. The following uses of capital are common in practice:

- Issued capital, being the part of the nominal capital which has actually been allotted to shareholders, hence also called 'allotted capital';

31 *Re Hampshire Land Co* [1896] 2 Ch 743.
32 *Barclays Bank Ltd v TOSG Trust Fund* [1984] AC 626.

- Called-up capital, being the total amount called up by the company on the shares allotted;
- Paid-up capital, being that part of the called-up capital which has been paid up by the shareholders; and
- Loan capital, which is not, strictly speaking, capital.

9-29 The term 'loan capital' denotes debentures and debenture stock issued by the company as a means of raising money otherwise than by an issue of shares. The holders of these securities are creditors of the company and have no voting rights or any share in the control of the company in the way that an ordinary shareholder has.

Class of Capital

9-30 The share capital may be divided into different classes of shares, the main types being ordinary shares, preference shares, and deferred shares. Although the share capital must be stated in the memorandum, the types of shares and their respective rights need not be set out in it, and power may be reserved in the articles to issue different classes of shares; article 2 provides such power. Accordingly, it is necessary to refer to the articles or terms of issue to ascertain the rights attaching to the various classes of shares.

Ordinary shares, sometimes called 'risk capital', normally confer on their holders the residue of rights in the company, which have not been conferred on other classes. Invariably, ordinary shareholders are entitled to a dividend only after the preference dividends have been paid. Furthermore, where preference shares have preference as to capital, the ordinary shares rank behind the preference shares for repayment of capital on winding up.

Preference shares, as their name implies, carry some preferential rights over other classes of shares, particularly ordinary shares. These rights may vary greatly but refer normally to the right to dividends and the right on winding up to receive priority repayment. A right reserved in the articles to a preferential dividend, without more being said, is a right to a cumulative dividend, ie, if no dividend is declared on the preference shares in any year, the arrears are carried forward and must be paid before any dividend can be declared on ordinary shares.[33]

Preference shares do not carry the right to participate in any surplus profits of the company, unless the articles or terms of issue so provide. Moreover, preference shares carry no inherent priority right to repayment of capital in a winding up. If the articles or the terms of issue are silent as to priority rights, then preference shares and ordinary shares will be paid off rateably according to the nominal value of the shares in toto.

33 *Webb v Earle* (1875) LR 20 Eq 556.

Section 57 allows a company to issue redeemable preference shares, if so authorised by its articles. The terms of redemption will again be set out in the articles or terms of issue. Redemption is only possible if the statutory conditions for redemption as set out in section 57(1) are satisfied; these include that repayment is made out of profits or the proceeds of a fresh issue made for the purpose of redemption. It should be noted that preference shares may be made redeemable only on issue. It is not possible to convert shares already in issue into redeemable preference shares.

Deferred or founders' shares, as their name suggests, are usually deferred in priority to ordinary shares. Where such shares are issued, they are usually mentioned in the capital clause of the memorandum, with the memorandum generally defining the rights attached to the deferred shares.

Membership of a Company

9-31 In General. Section 27 provides that the subscribers of a memorandum will be deemed to have agreed to become members of the company and, on its registration, will be entered as members in its register of members, and every person who agrees to become a member and whose name is entered in its register of members shall be a member of the company.

Apart from the subscribers, therefore, an examination is required of how a natural or legal person becomes a member of a company. There are two methods, either by transfer or transmission from an existing shareholder or by allotment of shares by the company after incorporation.

9-32 Transfer and Transmission of Shares. The shares of limited companies are personal property and may be transferred in the manner provided in the articles.[34] An instrument of transfer is always required and no transfer should be registered unless a proper instrument is filed with the company. There is no special form for this instrument.

As previously mentioned, the right to transfer shares is unlimited in the case of public companies, but must be limited in relation to private companies. Article 3 of Table A, Part II, of the First Schedule to the Companies Law provides a general limitation as follows:

> The directors may, in their absolute discretion and without assigning any reason therefor, decline to register any transfer of any share, whether or not it is a fully paid share.

9-33 Where such sweeping power is vested in the directors, a court will not draw unfavourable inferences against the directors because they do not give their reasons

34 *Lindos Constructions Ltd and Others v Skordi*, Civil Appeal Number 9345.

for refusing to pass a particular transfer. Directors are under no obligation to disclose their reasons either in or out of court; it is enough that they have in fact considered the transfer, and that in exercise of the discretion given to them under the articles they have not passed it. If the directors, however, choose to give their reasons, the court will then consider whether they are legitimate or not.[35]

Where there is a discretion to refuse to register a transfer to persons to whom they do not approve (article 24), the refusal must be on grounds personal to the proposed transferee.[36] Generally, a court will not interfere in the exercise by directors of their discretion to refuse a transfer, unless it is proved that the directors are not exercising it *bona fide*, ie, that they are acting oppressively, capriciously, or corruptly or in some way *mala fide*.[37] The power to decline to register, however, must be exercised to be effective; unless the directors so positively resolve, a transferee has the statutory right to be registered.

Another mode of transfer of shares is a transmission of shares that occurs on the death or bankruptcy of an existing shareholder. In this case the executor or administrator of the deceased shareholder or his trustee in bankruptcy may apply to the company to become registered as the owner of the shares in question (article 30). Alternatively, the executor/administrator/trustee may execute a transfer of the shares to a third person (article 31). All the limitations on the transfer of shares and other conditions apply equally here as in the ordinary transfer of shares.

9-34 Allotment of Shares. Shares may be allotted by a company for a cash or non-cash consideration (or a combination of both), at par fully paid or partly paid or at par plus premium. If shares are not fully paid at once, there is an unpaid liability, which the member is bound to satisfy when called on to do so by the company. The company invariably exercises a first and paramount lien on unpaid shares, with the result that an unsatisfied call may result in the shares being sold to a third party.

A public company, to allot shares to the public at large, must first issue a prospectus (see text, below). The prospectus constitutes an invitation to the public to acquire shares in the company. The form of prospectus is according to the Fourth Schedule to the Companies Law, and it must include the matters specified in that Schedule.

The purpose of the prospectus is to provide information on certain matters to the public, so that they may gauge the risks before deciding whether or not to acquire shares in the company. The prospectus is, therefore, a very important document as may be seen from the fact that any director of the company or promoter may be liable for any misstatement contained in the prospectus.

35 *Re Coalport China Co* [1895] 2 Ch 404.
36 *Re Bede Steam Shipping Co* [1917] 1 Ch 123.
37 *Re Bell Brothers Ltd ex parte Hodgson* (1891) 65 LT 245.

Rectification of Register of Members

9-35 If the register of members of a company is inaccurate because either a person who is entitled to be registered as a member is not so registered or a person has been incorrectly registered as a member, relief to redress the situation is provided by section 111. An aggrieved person in either instance may apply to the court under section 111 to rectify the register. As a general rule, a company ought not to rectify its own register without making application to the court, even where the case for rectification is clear.[38]

Pursuant to section 108, the register of members must be open for not less than two hours daily for inspection by members without charge, and for inspection by any other person on payment of a nominal amount. Although copies cannot be taken, on request these must be provided within 10 days.[39] The register of members, along with the company's other statutory registers, must be kept at the registered office of the company and, in practice, this normally coincides with the registered address of the secretary of the company.

Acquisition of Own Shares and Prohibited Financial Assistance

9-36 A company, subject to the satisfaction of statutory criteria, may redeem redeemable preference shares. Nevertheless, a company may not purchase its own shares, this principle being firmly established in *Trevor v Whitworth*,[40] except by way of reduction of capital with the sanction of the court, as explained previously. This decision is now augmented by section 28(1), which precludes a subsidiary company from being a member of its holding company, and section 53(1), which normally prohibits a subsidiary company from providing direct or indirect financial assistance for the acquisition or subscription of shares in its holding company.

In its application, section 53 is wider and prohibits any financial assistance which may lead to the purchase of such shares unless otherwise permitted by section 53(1), notably if the lending of money is part of the ordinary business of the company. Contravention of this provision renders the company and every officer in default liable to a fine. There may, in addition, be proceedings on behalf of the company against the directors for breach of trust or, when the company is wound up, for misfeasance.

Directors and Secretary

Directors

9-37 In General. The Companies Law does not define the term director, but section 2(1) provides that a 'director includes any person occupying the position of director by whatever name called'.

38 *Re Derham and Allen Ltd* [1946] Ch 31.
39 Companies Law, s 108(2).
40 *Trevor v Whitworth* (1887) 12 App Cas 409.

It was established in *Ferguson v Wilson*[41] that directors are agents of the company for which they act. The general principles of the law of principal and agent regulate in most respects the relationship between the company and its directors. To some extent, directors also are trustees of the company in that many of their duties are analogous to those of trustees. In fact, many of the fiduciary duties of directors are identical to those of agents and trustees.

9-38 Appointment. A private company may have only one director and a secretary but the same person may not be a sole director and the secretary. A public company must have at least two directors and a secretary. In the case of a public company, a director, before being appointed in accordance with the articles, or on registration of the company by the promoters, or before being named as a director in any prospectus, must file with the Registrar of Companies his consent to be a director, and the company must file a list of all such persons named as directors.

The Companies Law says little about the means of appointing directors, leaving this to the articles. In practice, these provide for initial appointment by the subscribers to the memorandum and thereafter for the annual retirement of a certain proportion and the filling of the vacancies at an annual general meeting. Alternatively, the articles themselves may specify who shall be the first directors. It is not uncommon for certain directors not to retire by rotation but to be appointed for life.

However, section 178(1) provides specifically that any director may be removed from office by an ordinary resolution of the company notwithstanding anything in its articles or any agreement between it and him. This provision has effectively eliminated the concept of a life director, although there is one exception, ie, where the director held office for life on 16 February 1951 (the date on which the Companies Law came into effect).

There is no requirement under the Companies Law for directors to hold shares in the company. However, where the articles provide for such share qualification, every director appointed must acquire such share qualification within two months of his appointment; otherwise, his office as director is deemed vacated.

Section 174 provides that the acts, *inter alia*, of a director will be valid, notwithstanding any defect that may afterwards be discovered in his appointment or qualification. This statutory provision is embodied in article 105. This appears to add little to the protection which an outsider would have in his dealings with the company under the *Turquand* rule. It applies only where a director has been appointed but subsequently some defect in his appointment has been discovered.[42] It appears that, if there is no appointment, no reliance may be placed on section 174.

41 *Ferguson v Wilson* (1866) 2

42 *Kalomiras Savva Solomou v Vineyard View Tourist Enterprises Ltd*, Civil Appeal Number 9788.

9-39 Loans to Directors. Loans to directors are normally absolutely prohibited.[43] In this instance, a director of a company also means a director of its holding company.

However, loans to directors of an exempt private company are permissible[44] and in certain other circumstances.[45]

9-40 Powers of Directors and the Board of Directors. Between the board and the members of the company, they may exercise all the powers of the company. How these powers are distributed between them is a matter for the articles, except where the Companies Law specifically reserves the exercise of certain powers to the members. The board's powers can, therefore, be as wide or as restricted as the articles may provide.

The authority to exercise the company's powers is delegated to the board as a whole and not to individual directors. This may be ascertained from article 80, which provides that the 'business of the company shall be managed by the directors'. Article 80 may be considered as all-embracing and effectively confers on the board all the powers of the company, except those required to be exercised by the members in general meeting in accordance with the Companies Law or the articles.

In its present form, article 80 excludes the ability of the members to dictate to the board how the business of the company is to be managed; nor are the members able to overrule any *intra vires* decision come to by the directors in the exercise of their powers. Members who wish to exercise such control only do so by altering the articles.

Although vested in the board as a whole, the powers of the directors may, if the articles so provide, be sub-delegated by the board to the managing director, individual directors, or other officers of the company, or duly authorised third parties.

As previously noted, an act of the directors which may be *ultra vires* the directors but *intra vires* the company may, nevertheless, be ratified by the members in general meeting. This has the effect of retrospectively validating the act of the directors. However, this cannot be utilised to cure acts which are in breach of the directors' fiduciary duties, where the directors control the voting at a general meeting.[46]

It sometimes happens that a board may be unable or unwilling to act. This may occur where the board members have fallen below the necessary number to constitute a quorum, or where the board members by virtue of their fiduciary duties are, in a given instance, unable to act. In such a case, the members of the company in general meeting may resolve the situation by appointing any person to fill a casual vacancy or as an additional director (article 97). If need be, this power may be

43 Companies Law, s 182(1).
44 Companies Law, s 182(1)(a).
45 Companies Law, s 182(1)(b)(c) and (d).
46 *Cook v Deeks* [1916] 1 AC 554.

exercised in conjunction with article 94 to increase the number of directors. It should be noted that the provision of article 97 does not derogate from the power granted to directors to fill a casual vacancy on the board or to increase their number (article 95).

9-41 Minority Rights and Directors. If the affairs of the company are conducted by the directors, or indeed the shareholders,[47] in a manner oppressive to some of the members, a petition may be filed in court for an order under section 202. In such an instance, the court may, if satisfied that the facts justify a winding up order but that such order would unfairly prejudice the aggrieved members, make such order as it thinks fit. The court's power is unfettered, and such order may be made as the court deems appropriate to bring the oppressive state of affairs to an end.

Although section 202 is headed 'minorities', this is in recognition of the fact that oppression may be committed by a minority of the members who otherwise control the company.

It has been said that, for a finding of oppression, the complaining member(s) must be under a burden that is 'unjust, harsh or tyrannical'.[48] In the earlier case of *Elder v Elder and Watson Ltd*,[49] Lord Cooper said that 'the essence of the matter appears to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely'.

9-42 Directors' Fiduciary Duties. In general, directors owe a duty to their company to manage it in accordance with the provisions of Cypriot law generally and with the memorandum and articles of association. Thus, they are liable to the company for loss caused by illegal or *ultra vires* acts.

The basic rule that directors, as such, owe duties to their company does not extend generally to a duty being owed to the members of the company, either collectively or individually. Accordingly, these duties are not owed to other companies or bodies corporate with whom the company is associated, nor do they operate in favour of any person because he is a person to whom the company stands in a fiduciary position.[50]

However, in exceptional circumstances, a director may come into a special relationship with a person other than the company (who may include a shareholder), and by virtue of that relationship the director will owe fiduciary duties to such a person.[51]

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47 *Iordanou & Co Ltd v Confirmex* (*Ioannou Bros*) *Ltd et al*, District Court Judgment Number 10304/97.

48 Per Boone JP, *Marshall v Marshall* (*Property*) *Ltd* (1954) 3 SA 571.

49 *Elder v Elder and Watson Ltd* [1952] SC 49.

50 *Percival v Wright* [1902] 2 Ch 421.

51 *Allen v Hyatt* (1914) 30 TLR 444, PC.

The fiduciary duties owed by directors have been examined on a number of occasions where the concerned company has been involved in a take-over bid. In *Dawson International plc v Coats Patons plc*,[52] it was held that directors did not owe a duty to present shareholders during a take-over bid. However, in the earlier case of *Gething v Kilner*,[53] it was decided that directors owe duties to shareholders in the course of a take-over bid when they are advising shareholders to accept or reject a bid. In this position, the directors clearly owe a duty to the shareholders to be honest and not to mislead.

In a number of English cases, the suggestion that directors owe a duty to creditors has been emphatically rejected. However, the position appears to be otherwise when the company is insolvent or close to insolvency. In such instances, the interest of the creditors has been held to be paramount, imposing on the directors of the company concerned a duty to the company's creditors to ensure that the affairs of the company are properly administered and its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors.[54]

9-43 *Content of Fiduciary Duties.* The fiduciary duties owed by directors to their company are partly statutory and partly founded in case law. They may be viewed as falling into two broad but overlapping categories: firstly, those duties designed to ensure the loyalty of directors and, secondly, those duties aimed at ensuring that directors do not abuse their powers. Duties which arise under case law include the following:

- A duty to exercise powers for the benefit of the company — This duty requires directors to act in what they honestly believe to be the best interests of the company. In doing so, they also must exercise the powers for the purpose for which they were given to them. This is sometimes referred to as 'the proper purpose rule'.[55] The test of what is in the best interests of the company is a subjective one, and the court will not substitute its own view for that of the directors in exercising their managerial powers.
- A duty to retain freedom of action — This duty imposes on directors the obligation not to fetter or restrict their right to exercise their duties and powers freely and fully. Thus, directors may not contract with one another or a third party as to how they will vote at future board meetings.
- A duty to avoid a conflict of interest — This duty requires directors not to place themselves in a position where their duties to their company and their personal interest conflict, unless the company otherwise consents following full and proper disclosure by the directors. As seen earlier, the position of a director

52 *Dawson International plc v Coats Patons plc* (1989) SLT 655.
53 *Gething v Kilner* [1972] 1 All ER 1166.
54 *Winkworth v Baron (Edward) Development Co Ltd* [1987] 1 All ER 114.
55 *Galloway v Hallé (Concerts Society)* [1915] 2 Ch 233.

vis-à-vis the company is that of an agent and, as such, may not contract with his principal. This duty therefore manifests itself, in particular, in regard to transactions made by the company and to secret benefits obtained by directors by reason of their position.

9-44 If a director is associated with another entity with which the company contracts, his fiduciary duty to the company requires him to give proper notice of his interest to the board and/or the company. His failure to do so may entitle the company to rescind the contract, provided it is possible to restore the *status quo*.[56] Alternatively, the articles may authorise such a contract whether or not prior notice has been given by the director, or the company in general meeting may ratify the contract. A director must account to the company for any personal benefit or profit he may make in the course of his dealing with the company's property. Furthermore, a director, even though acting outside the scope of his directorship, cannot retain any profit he has made through the actual misuse of his representative position. The reason for this is that there has been a conflict of interest. A director may keep a personal profit if the company consents, but the consent must be that of the company in general meeting and not that of the board. A resolution in general meeting to this effect may be rendered invalid as prejudicial to the minority, if the director concerned controls the voting in general meeting. This principle does not fetter the right of a director to receive remuneration from his company for his services, where this right is provided for in the articles, or where otherwise approved by the company's members in general meeting pursuant to an implied power of the company to reward its directors.[57] Article 84(5) provides that a director may act by himself or his firm in a professional capacity for the company and will be entitled to remuneration for professional services as if he were not a director. This does not authorise the director to act as the auditor of the company.

9-45 *Duty of Skill and Care.* In addition to their fiduciary duties, directors owe a duty of care to their companies at Common Law not to act negligently in managing the affairs of the company. The standard of care of a reasonable man looking after his affairs expounded in earlier case law has been somewhat superseded by a higher standard in recent times, in particular where directors are employed by companies in a professional capacity or are qualified or experienced in some relevant discipline.

An error of judgment does not of itself constitute negligence. To amount to negligence, it must be such as would make the director liable in an action and in point of law.[58]

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56 *Per* Lord Denning MR, *Hely-Hutchinson v Brayhead* [1968] 1 QB 549.
57 *Re Halt Garvage (1964) Ltd* [1982] 3 All ER 1150, at p 1150.
58 *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392.

9-46 *Statutory Duties.* As stated earlier, duties imposed on directors arise under statutory law as well as Common Law. Section 190 places directors under a general duty to make disclosure for the purposes of sections 187, 188, and 189, except so far as it relates to loans made by the company, or by any other person under a guarantee from or on a security provided by the company, to an officer thereof.

Section 187 contains provisions for the keeping of a register of directors' shareholdings. Section 188 relates to particulars in the accounts of the company of the directors' salaries and pensions. Section 189 contains provisions for particulars in the accounts of loans to officers, which includes directors. Non-compliance with section 190 renders a director liable to a fine.

Section 191 enshrines in part the Common Law fiduciary duty of a director to avoid a conflict of interest. Pursuant to section 191, a duty is imposed on directors who are directly or indirectly interested in a contract or proposed contract with the company to declare the nature of their interest at a meeting of directors. Any director who fails to comply with the section is liable to a fine.[59]

9-47 *Fraudulent Trading and Misapplication of Property.* Section 311 concerns fraudulent trading and provides that if, in the course of winding up, it appears that any business of the company has been carried on with intent to defraud creditors or for any fraudulent purpose, the court may declare that any of the directors who were knowingly parties to the fraud will be personally responsible for all the debts of the company.

Intent to defraud creditors is a subjective test, and there must be enough evidence to justify a finding of fraud, ie, actual dishonesty.[60] It was held, in *Re William C Leitch Brothers Ltd*,[61] that, if a company continues to carry on business and incur debts, when there is to the knowledge of the directors no reasonable prospect of the creditors being paid, it is in general a proper inference that the company is carrying on business with intent to defraud.

Section 312 renders a director liable to repay or restore money or property or any part thereof with interest to the company if, in the course of winding up, it appears that a director has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any misfeasance or breach of trust in relation to the company. This may be decided on application by the official receiver, the liquidator, or any creditor or contributory, and the court must examine the conduct of such a director.

59 Companies Law, s 191(4).
60 *Re Patrick and Lyon Ltd* [1933] Ch 786.
61 *Re William C Leitch Brothers Ltd* [1932] 2 Ch 71.

9-48 *Protective Relief.* In addition to imposing duties and liabilities on directors, the Companies Law supplies protective relief for directors in certain cases. Section 383(1) provides that, in any proceedings against a director for negligence, default, breach of duty, or breach of trust, if a director who is or may be liable has in the opinion of the court acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the court may wholly or partly relieve him from his liability on such terms as the court thinks fit.

To emphasise, it is not enough for the director to have acted honestly and reasonably; additionally, it must be proved that he ought fairly to be excused.

9-49 Vacation of Office. The office of a director may become vacant for a number of reasons which will be considered briefly. Article 89 makes provision for automatic retirement by rotation. This provides for all directors to retire at the first annual general meeting of the company, with one-third of the directors for the time being retiring at subsequent annual general meetings. Retiring directors are eligible for re-election.

The office of director also may be vacated by disqualification, normally resulting from a director resigning his office in writing to the company (article 88(e)). Disqualification also may arise under the Companies Law. If a director is required to take up a share qualification but fails to do so within the prescribed time, his office immediately becomes vacated.[62] Further grounds for disqualification are found in section 179 where the person in question is an undischarged bankrupt, and section 180 where a disqualification order (which may not exceed five years) has been made against him by the court. The ability of the members by ordinary resolution to remove a director from office[63] has already been examined above.

Secretary

9-50 Normally, the secretary will be appointed by the board of directors. The Companies Law does not explicitly define the duties of a secretary but, in general, they are administrative and not managerial. Unless the secretary is otherwise empowered by the company or the board, he may not bind the company, although in certain cases such power is recognised even without authority. This is, however, confined to contracts of an administrative nature, including the employment of office staff.[64]

Although the duties and powers of the secretary emanate from the members of the company and the board (rarely under the articles), there are certain duties imposed

62 Companies Law, s 176(3).
63 Companies Law, s 178.
64 *Panorama Developments* (*Guildford*) *Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711, CA.

on the secretary under the Companies Law. The statutory duties of the secretary include those to:

- In the case of a public company, make the statutory declaration required before the commencement of business;[65]
- Sign the annual return and accompanying documents;[66] and
- In the case of the winding up of the company by the court, verify the statement to be submitted to the Official Receiver.[67]

9-51 Additionally, many of the duties prescribed by the Companies Law, imposing liability on officers in default, would give rise to liability on the part of the secretary, given that by definition an officer of a body corporate includes the secretary.[68] Such duties include:

- Delivery of a return of allotments;[69]
- Issue of share or debenture certificates;[70]
- Registration of charges with the Registrar of Companies,[71] keeping the company's register of charges, and making it available for public inspection;[72] and
- Ensuring that the company's name is affixed outside its place of business, engraved on its seal, and printed on its publications.[73]

Meetings and Resolutions

In General

9-52 There are four types of meetings of members of a company, namely:

- Statutory meetings;
- Annual general meetings;
- Extraordinary general meetings; and
- Separate class meetings of shareholders.

Statutory Meeting

9-53 A statutory meeting must be held by all public companies limited by shares within a period of not less than one month nor more than three months from the date on which the company is entitled to commence business.[74] The directors

65 Companies Law, s 104(1)(c).
66 Companies Law, ss 120(1), 121(1)(a), 122, and 123(1)(b).
67 Companies Law, s 341(2).
68 Companies Law, s 2(1).
69 Companies Law, s 51.
70 Companies Law, s 78.
71 Companies Law, ss 91 and 92.
72 Companies Law, ss 99 and 100.
73 Companies Law, s 103.
74 Companies Law, s 124(1).

must, at least 14 days before the day of the meeting, forward to each member a statutory report certified by two directors and containing the information required by section 124(3). The directors must provide the meeting with a list of the members of the company and the shares held by each member.

Members present at the meeting may discuss any matter relating to the formation of the company or arising out of the statutory report. In practice, the statutory meeting is usually dispensed with by the device of forming the company as a private company and converting it subsequently into a public company.

Annual General Meeting

9-54 All companies are required to hold, in each calendar year, an annual general meeting, specified as such in the notice convening it, and not more than 15 months must elapse between one annual general meeting and the next. So long as the first annual general meeting is held within 18 months of incorporation, it need not be held in the year of incorporation or in the following year.[75] Penalties in the nature of a fine may be imposed on the company and its officers for default.[76]

The only statutory business required to be transacted at an annual general meeting is the appointment of the company's auditors.[77] Invariably, however, the company's articles provide for certain business to be transacted annually, which it is envisaged will be done at the annual general meeting. This business normally includes the appointment of directors in place of those retiring, the declaration of dividends, the consideration of accounts, the appointment of auditors, and the fixing of their remuneration. Business of this nature may be interpreted as ordinary business, given that article 52 deems any other business to be special business.

Extraordinary General Meeting

9-55 The articles normally provide that the directors may call an extraordinary general meeting at any time and when they think fit (article 49) and, further, that they shall call an extraordinary general meeting when required to do so on the requisition of the holders of at least 10 per cent of the paid-up capital of the company.[78] It should be noted that the power reserved to members to requisition an extraordinary general meeting is independent of the articles. If the directors do not, pursuant to such requisition, convene a meeting within 21 days, the requisitionists, or any of them representing more than one-half of the total voting rights, may themselves convene such a meeting, and their reasonable expenses shall be paid by the company and recovered from the fees or other remuneration of the defaulting directors.

75 Companies Law, s 125(1).
76 Companies Law, s 125(5).
77 Companies Law, s 153(1).
78 Companies Law, s 126.

Finally, the Companies Law provides a residual power whereby the court may convene a meeting if, for any reason, it is otherwise impracticable to do so.[79] The court may direct that any one person present, whether personally or by proxy, will be deemed to constitute a meeting.

Class Meeting

9-56 It may be necessary to convene meetings of separate classes of shareholders, eg, to consider variation of rights. Article 4 states that the provisions of Table A, Part I relating to general meetings will apply to such class meetings.

Additionally, section 130 (relating to proxies), section 133 (relating to representation of corporations), and section 138 (relating to resolutions passed at an adjourned meeting) also are expressed to cover meetings of a class of members.

Notices

9-57 Section 127 states that any provision in a company's articles shall be void in so far as it enables the calling of a meeting by a notice shorter than 21 days' notice in writing in the case of an annual general meeting or a meeting for the passing of a special resolution, or 14 days' notice in any other case. The notice period means 'clear' days, excluding both the day of service and the day of the meeting.[80]

In the case of an annual general meeting, a shorter notice period may be agreed by all members entitled to attend and vote thereat; for other meetings a shorter notice period may be validly agreed by not less than 95 per cent of members entitled to attend and vote.[81]

Although the Companies Law lays down minimum lengths of notice, it does not say to whom or how the notice is to be given and, therefore, recourse must be had to the articles. Articles 131 to 134 provide for service on members and the company's auditor either personally or by post, with service deemed effective 24 hours after posting. In modern articles, it is not uncommon to provide for notice to be given by facsimile transmission or electronic means. Accidental omission to give notice to a member, or non-receipt by him, does not invalidate the meeting (article 51).

As already seen, article 52 distinguishes between ordinary and special business. A meeting at which special business is to be considered must set out in the convening notice the general nature of the business concerned (article 50). Apart from this, every notice must show the time and place of the meeting.

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79 Companies Law, s 129.
80 *Re Hector Whaling Ltd* [1936] Ch 208.
81 Companies Law, s 127(3).

The notice must be adequate to enable members to judge whether they should attend a meeting to protect their interests.[82] In the case of special or extraordinary resolutions, it also appears to be necessary to set out in the notice the exact terms of the resolutions.

A question to be considered is whether ordinary members are entitled to move their own resolutions at an annual general meeting. The answer is in the affirmative, with the statutory authority found in section 134. This provides that members holding not less than one-twentieth of the total voting rights, or 100 members holding shares on which there has been paid up an average of CY £100 per member, may require the company to give notice of their resolutions, which can then be dealt with at the next annual general meeting. The members' requisition must be deposited with the company six weeks before the meeting, but the deposit is valid if after its receipt an annual general meeting is convened within the six weeks.[83]

Thus far, only notices to be issued by the company have been considered. Section 136 refers to the requirement of a 'special notice' which arises in the following instances, namely where it is intended to move a resolution to dismiss a director by ordinary resolution[84] or for the supersession of the company's auditor.[85] In these cases, the notice referred to means the notice to be served on the company. The prescribed notice period is 28 days prior to the meeting where the resolution is to be moved. Sections 154 and 178 require the company, on receipt of the notice, forthwith to send a copy of it to the auditor or director concerned.

Quorum

9-58 A quorum means the minimum number of members present and entitled to vote in order that business may be validly transacted. If a quorum is not present the meeting will be a nullity. If the articles do not specify the quorum required for meetings, in the case of a private company two members, and three members in the case of any other company, personally present, will be a quorum.[86]

The articles, however, may provide for members to be present by proxy (article 4). Article 54 provides that if within half an hour after the time stated for a meeting a quorum is not present, the meeting, if convened on the requisition of members, shall be dissolved and, in every other case, it will stand adjourned for one week, when the members present shall constitute a quorum.

82 *McConnell v E Prill & Co Ltd* [1916] 2 Ch 57.
83 Companies Law, s 134(4).
84 Companies Law, s 178.
85 Companies Law, s 154.
86 Companies Law, s 128(c).

Chairman

9-59 The position of chairman is an important one, as he will be in charge of the meeting and will be entrusted with the responsibility for ensuring that the meeting is properly conducted. The chairman will be the chairman of the board of directors, if any, present and willing so to act.

Failing his presence, the board may elect one of its members to take the chair but, if no director is present and willing to act, the members may appoint one of their number as chairman (articles 55 and 56).

Voting

9-60 Unless the articles provide to the contrary, voting is in the first instance on a show of hands by each member raising his hand. Each member shall have only one vote on a show of hands regardless of his shareholding (article 62). It should be noted that article 62 does not allow proxy votes on a show of hands.

On controversial issues, it is usual to demand a poll, on which members present can vote according to their shareholdings and proxy votes can be used. A poll may be demanded, before or on the declaration of the result of the show of hands, in the manner and subject to the limitations provided under the articles (article 58). In the case of equality of votes, the chairman has a second or casting vote (article 60).

Adjournments

9-61 It may be necessary to adjourn the meeting, eg, because a quorum is not present. An adjourned meeting is deemed to be a resumption of the original meeting, and no further notice is required, unless the articles otherwise provide, and no business can be transacted except that left over.

A resolution passed at an adjourned meeting shall be treated as having been passed on the actual date of passing and not on the date of the original meeting.[87]

Resolutions

9-62 The Companies Law contemplates three types of resolution: ordinary, special, and extraordinary. An ordinary resolution is one passed by a simple majority of the persons who, being present and entitled to vote on the resolution, do vote. It is used for all matters not requiring an extraordinary or special resolution. A special resolution is passed by a three-quarters majority at a meeting of which not less than 21 days' notice has been given, specifying the intention to propose the resolution as a special resolution.

87 Companies Law, s 138.

An extraordinary resolution again requires a three-quarters majority at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been given. The notice period, however, depends on the notice of the meeting at which the resolution is to be proposed. If it is to be proposed at an annual general meeting, 21 days' notice is required but, if it is to be proposed at an extraordinary general meeting, 14 days' notice will suffice.

Annual Return

9-63 Every company having a share capital is required at least once in every calendar year to make an annual return to the Registrar of Companies setting out particulars relating to the company.[88] The particulars are as specified in Part I of the Second Schedule to the Companies Law. Every company not having a share capital also must make an annual return.[89]

The purpose of the annual return is to provide an annual consolidation of periodical information for the public who may wish to inspect the company's public file held at the Registrar of Companies.

A company need not file an annual return either in the year of its incorporation or the following year, provided that no more than 18 months elapse from the date of incorporation to the filing of the return.

The annual return must be completed within 42 days of the annual general meeting for the year, and it must be made up to the fourteenth day after the annual general meeting. Unless the company is an exempt private company, there must be annexed to the return certified copies of the balance sheet, profit-and-loss account, and directors' and auditors' reports.[90]

Failure to file an annual return or the documentation ancillary to it may result in a default fine on the company and any responsible officer. Another remedy available to the Registrar of Companies is to strike the company off the register of companies pursuant to section 327.

Accounts, Audit, and Auditors

Accounts and Audit

9-64 Pursuant to section 141(1) of the Companies Law, every company is obliged to keep proper books of account with respect to:

- All sums of money received and expended by the company and the reason for such receipt and expenditure;

88 Companies Law, s 118.
89 Companies Law, s 119.
90 Companies Law, s 121.

- All sales and purchases by the company; and
- The assets and liabilities of the company.

9-65 These books of account must be such as to give a fair and true picture of the state of the company's affairs and to explain its transactions. They must be kept at the registered office of the company or such other place as the directors think fit, and at all times be open for inspection by the directors.[91] The articles of a company commonly provide for books of account to be made available for inspection by the members of the company on procedural conditions laid down by the directors (article 125). Even if such right is not reserved to the members, they have the right to receive a copy of the balance sheet and auditors' report to be laid before the annual general meeting.[92]

The contents and form of the accounts must follow the defined format in the Eighth Schedule to the Companies Law. Where a company has subsidiaries, the holding company must prepare group or consolidated accounts to be laid before the annual general meeting of the holding company,[93] except where:

- The holding company is itself the wholly owned subsidiary of a company incorporated in Cyprus; and
- The directors of the holding company are of the opinion that (a) it would be impracticable or of no real value to the members of the holding company, or would involve expense or delay out of proportion to the value to the members; (b) the result would be misleading or harmful to the business of the holding company or any of its subsidiaries; or (c) the business of the holding company and that of its subsidiary are so different that they cannot be reasonably treated as a single undertaking.[94]

9-66 The balance sheet must be signed on behalf of the board by two of the directors or, if there is only one director, by that director.[95] Any accounts annexed to the balance sheet must be approved by the board prior to signature of the balance sheet.[96] The balance sheet, profit-and-loss account, auditors' report, and directors' report must be laid by the company before the annual general meeting, and at least 21 days prior thereto copies must be sent to every member.[97]

91 Companies Law, s 141(3).
92 Companies Law, s 152.
93 Companies Law, s 144(1).
94 The approval of the Registrar of Companies is required where the result would be harmful or on the ground of difference between the two businesses. Companies Law, s 144(2).
95 Companies Law, s 149(1).
96 Companies Law, s 150(2).
97 Companies Law, s 152(1).

Auditors

9-67 Every company must, at each annual general meeting, appoint an auditor or auditors to hold office from the conclusion of that, until the conclusion of the next, annual general meeting.[98] An auditor must be qualified so to act within the meaning of section 155(1). Prior to the first annual general meeting, an auditor may be appointed by the directors until the first annual general meeting.

A retiring auditor will be reappointed without any resolution being passed unless he is not qualified, or a resolution has been passed at the meeting that he should not be reappointed, or he has given notice in writing of his unwillingness to be reappointed.[99]

Special notice is required for a resolution to appoint as auditor a person other than the retiring auditor or to provide expressly that the latter should not be reappointed.[100]

Borrowing Powers and Registration of Charges

Borrowing Powers

9-68 The issue of the capacity of a company, which includes its ability to borrow, has already been examined.

An international business company must acquire an exchange control permit under the Exchange Control Law, Chapter 199, of the Laws of Cyprus, as amended, before the company can be said validly to exist. With the permit in place, no further permit or government licence or authority is required to enable the company to make foreign borrowings or to borrow foreign currency from an international banking unit established in Cyprus. A local company requires the prior approval of the Central Bank of Cyprus under the Exchange Control Law to borrow foreign finance.

Borrowings made without the requisite exchange control permits will not be invalidated under the provisions of the Exchange Control Law, unless the lender knew of a breach under the Exchange Control Law. However, loans granted in contravention of the Exchange Control Laws are illegal and void by virtue of section 23 of the Contract Law, Chapter 149 of the Laws of Cyprus, as amended, with the result that a party to such a contract cannot be compelled to return any consideration already received under or pursuant to the contract.

Registration of Charges

9-69 Section 90(1) provides that every registrable charge by a company registered in Cyprus conferring security on such company's property or undertaking will be

98 Companies Law, s 153(1).
99 Companies Law, s 153(2).
100 Companies Law, s 154(1).

void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge together with the instrument creating it are delivered to the Registrar of Companies for registration within 21 days of the date of its creation.

In the case of a charge executed outside Cyprus over property situated outside Cyprus, the prescribed period is 21 days from the date on which, in due course of post and, if dispatched with due diligence, the charge could have been registered in Cyprus. The period of registration may be extended by court order.

For the purposes of section 90(1), a registered company includes overseas companies, which are defined by section 346 as 'companies incorporated outside Cyprus which establish a place of business within Cyprus'. Section 90(2) lists the categories of registrable charges, and these include, *inter alia*, a charge for securing any issue of debentures, a floating charge on the undertaking or property of the company, and a charge on immovable property wherever situated. The requirement to register extends to all property in the ownership of a company whether situated inside or outside Cyprus and, clearly by operation of section 90(2), a floating charge may, on crystallisation, encompass property not within the ownership of the company at the time of its creation.

The particulars required to be filed with the Registrar are the date, and the description of the instrument creating the charge, the name of the company and particulars of any commission paid in connection with the transaction. The certificate of registration of the charge is conclusive evidence that the requirements of the Companies Law have been complied with. Section 91(1) imposes an obligation on the company to register 'prescribed particulars' of the charge, but it allows 'any person interested' in the charge to deliver the particulars to the Registrar.

The omission of a definition of a charge from the Companies Law is somewhat curious. This is particularly so as the corresponding section of the United Kingdom Companies Act 1948 (section 95(10)(a)), on which section 90 is based, specifically provides that a charge includes a mortgage. Nevertheless, mortgages of all types are registrable with the Registrar of Companies at the instance of either the lender or the borrower. In the case of a mortgage of immovable property situated within Cyprus, it must be registered with the competent District Land Office prior to registration with the Registrar of Companies.

It is important to note that registration under section 90(1) is a perfection requirement, not a priority point. Absence of registration does not affect the enforceability of the charge as between the contracting parties, but it does render the security unenforceable against the liquidator and any creditor of the company. A search against the public records of the company will indicate the existence of a registrable charge.

The fact, however, that section 90(1) is not a priority point may lead to inequity. A situation may involve two non-related lenders where the second, without knowledge of the first, may grant a secured loan to a company and register its

security under section 90(1) prior to the first lender registering its interest. Provided the first lender registers its charge within the prescribed time limit, it will have priority over the second lender. The onus, therefore, rests firmly on any potential lender to take appropriate warranties and undertakings from a borrower that its assets and properties are free from any charge, lien, or other encumbrance.

Overseas Borrowers

9-70 A foreign company which establishes a place of business in Cyprus is defined by the Companies Law as an 'overseas company',[101] and it is popularly known as a branch. Such companies are not, in fact, incorporated in Cyprus, as they already exist as corporate bodies under the law of the jurisdiction of their place of origin. The registration of a branch requires the prior approval of the Central Bank of Cyprus, given that it is considered as a non-resident of Cyprus.

Within one month of establishing a place of business in Cyprus, a foreign company must apply to the Cypriot Registrar of Companies to register a branch by providing the documents and information listed in section 347(1). The requirement of an established place of business is satisfied, *inter alia*, if the company has some physical connection with premises within Cyprus, eg, an office.[102]

For a branch to obtain international business status and take advantage of the attendant benefits, the shares in the foreign company must belong, directly or indirectly, to non-residents, and the business of the company and that of the branch must be carried on outside Cyprus. There is a distinct difference between branches which have their management and control located in Cyprus and those whose management and control is located abroad.

Although both are able to enjoy the usual benefits available to all international business entities in Cyprus, it is important to distinguish between the two as they are subject to entirely different tax rates. Under current legislation the net profits of a branch whose management and control is located abroad are exempt from payment of tax in Cyprus. However, if the management and control of the branch is in Cyprus, the currently applicable tax rate that will be levied in Cyprus on the net profits of the branch is 4.25 per cent.

Branches are required to prepare a balance sheet and profit-and-loss account. These must be filed with the Registrar of Companies.

Dividends and Profits

9-71 Dividends are sums of money authorised to be paid out of the profits (not the capital) of a company to its members.

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101 Companies Law, s 346.
102 *Lord Advocate v Huron & Erie Loan and Savings Co* [1911] SC 612.

The declaration and payment of dividends is usually dealt with by the articles. If a company adopts for its articles Table A, Part I of the Companies Law, article 114 provides that the company in general meeting may declare dividends, but no dividend may exceed the amount recommended by the directors. Although the members cannot declare a dividend in excess of the directors' recommendation, they may reduce the dividend as recommended or decide to declare no dividend at all. It should be noted that article 114 creates only a right, not an obligation, to declare a dividend.

Normally, the articles will provide that dividends should be distributed among the members according to the amounts paid or credited as paid on their shares (article 118). If there is no such provision, the members are *prima facie* entitled to participate in the profits of a company in proportion to their shareholdings.[103]

Article 118 recognises the existence of shares which may carry a special right to a dividend. In such instances, any infringement of such right will give a cause of action against the company and directors responsible for the infringement. If shares are given a preferential dividend, then, in the absence of contrary provision in the articles or terms of issue, they are presumed to be non-participating as regards further dividends.[104] If a preferential dividend is provided for, it is a rebuttable presumption that the dividend is cumulative.[105] This does not alter the fact that preferential dividends are payable only if declared.

Notwithstanding the perceived control of the members embodied in article 114, the directors are authorised to declare and pay to members, from time to time, interim dividends as appear justified by the profits of the company (article 115). This authority is not conditional on the subsequent declaration of such dividend by a general meeting. In any event, it is often the case that the dividend payable in a particular year is paid before the general meeting is held. If the members at the general meeting reduce the dividend recommended and physically paid beforehand, this would require an adjustment in the accounts for the following year.

Unless the articles otherwise provide, dividends are payable in cash. Article 120 provides that the company may distribute specific assets, in whole or part satisfaction, in particular paid-up shares, debentures, or debenture stock, of any other company. If paid in cash, this is usually done by cheque or warrant (article 121).

Once the dividend has been lawfully declared, the amount due to each shareholder becomes a debt for which he can sue the company.[106] No dividend will bear interest against the company (article 122).

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103 *Birch v Cropper Re Bridgewater Navigation Co Ltd* (1889) 14 App Cas 525.

104 *Will v United Lankat Plantations Co Ltd* [1914] AC 11.

105 *Webb v Earle* (1875) LR 20 Eq 556.

106 *Re Severn and Wye and Severn Bridge Railway Co* [1896] 1 Ch 559.

Reorganisation of Companies

In General

9-72 The Companies Law provides two distinct means by which the capital structure of a company may be reorganised, one in section 198 and the other in section 270.

In addition, section 201 provides the means whereby the shares of shareholders dissenting from a scheme or contract approved by the majority may be acquired.

Companies and Arrangements under Section 198

9-73 Section 198 provides a method whereby a compromise or arrangement may be made between a company and:

- Its creditors or any class of creditors;
- Its members or any class of them; or
- Any combination of the above.

9-74 A scheme under section 198 requires the sanction of the court. It is applicable both to a going concern and a company in the process of winding up.

A 'compromise' presupposes the existence of a dispute, whereas the meaning of an 'arrangement' is not to be limited to something analogous to a compromise.[107]

The usefulness of section 198 may be seen principally in two instances. In the first situation it enables a company to agree a compromise with a majority of its creditors, which may then be imposed on all its creditors. In *Re Empire Mining Co*,[108] creditors were required to give up their security, and their debts were replaced by paid shares of the company. The second instance enables class rights to be varied where no provision otherwise exists to vary them, eg, where such rights are contained in a memorandum of association which provides no procedure for their alteration.

The section offers no assistance where the compromise or arrangement may be *ultra vires* the company. Clearly, a scheme cannot be sanctioned where it may usurp Cypriot law or be contrary to it, eg, to convert issued ordinary shares into preference shares, which would fall foul of section 57.

As indicated above, a scheme under section 198 must be sanctioned by the court. Application to the court is made by summons, providing the information set out in section 199. In deciding whether to exercise its jurisdiction and sanction a scheme, the court will normally need to be satisfied on three matters, as follows:

- The provisions of the statute must have been complied with;

107 *Re Guardian Assurance Co* [1917] 1 Ch 431.
108 *Re Empire Mining Co* (1890) 44 Ch D 402.

- The class must have been fairly represented; and
- The arrangement must be such as a man of business would reasonably approve.[109]

Amalgamations or Reconstructions under Section 270

9-75 Section 270 relates only to a members' voluntary winding up. It enables a company to be reconstructed, whereby the liquidator sells or transfers the whole or part of the business or assets of the transferor company to a transferee company in exchange for shares or other securities of the transferee company. In turn, the acquired shares or securities are distributed among the shareholders of the transferor company, so that they become holders in the transferee company.

In effect the assets and property of the transferor company have been absorbed by the transferee company; an amalgamation has taken place. The same principle applies where two or more companies are absorbed by a third company incorporated for that purpose.

The authority conferred on the liquidator is by special resolution of the shareholders of the old company. It should be noted that the transferee company need not be a company incorporated under the Companies Law. It may, therefore, include a foreign entity provided that such is defined as a 'company' under the law of its place of origin.

Any sale or arrangement pursuant to section 270 is binding on all the members of the transferor company.[110] However, by virtue of sub-section (3), members who did not vote in favour of the special resolution may within seven days of the resolution express their dissent by written notice addressed to the liquidator, requiring the liquidatior to abstain from carrying the special resolution into effect or to purchase their interests.

If the liquidator proceeds with the scheme or proposes to do so, the shares of dissenting shareholders must be purchased before the company is dissolved. Accordingly, the liquidator will need to retain sufficient liquid reserves to discharge payment. The value of the shares of dissentients should be based on their value prior to the company's reconstruction.

Creditors of the transferor company remain its creditors. It is usually part of the amalgamation process under section 270 for the transferee company to agree to meet the liabilities of the creditors or for the transferor company to retain sufficient assets to satisfy its creditors. Statutory protection, to a degree, is, however, afforded to creditors by virtue of section 270(5). This provides, *inter alia*, that if, within a year of the passing of the special resolution, a winding up order is made by or subject to the supervision of the court, the special resolution will not be valid unless sanctioned by the court.

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109 *Per* Maugham J, *Re Dorman, Long & Co Ltd* [1934] Ch 635, at p 655.
110 Companies Law, s 270(2).

Take-Over Bids under Section 201

9-76 In simple terms, section 201 enables a company, which has made what is commonly called a 'take-over bid' for all the shares or class of shares of a company and which has been accepted by 90 per cent or more of the holders of the target shares, to acquire the shares of dissenting members on the same terms, unless the latter can persuade the court not to permit such acquisition.

This compulsory acquisition of shares must strictly follow the mechanism provided by section 201.

Securities Law

Introduction

In General

9-77 The inauguration of the official Cyprus Stock Exchange on 29 March 1996 marked a new era for the Cypriot securities sector.[111]

The new Exchange, the successor to the previous unofficial 'over-the-counter' market at the Chamber of Commerce and Industry, is modelled on current international securities rules and practices and aspires to consolidate Cyprus' position as a regional business and financial services centre and boost the growth of capital markets in Cyprus.

Sources of Law

9-78 The issue and trade in securities in Cyprus has, to a large extent, been codified. The various laws and regulations which have been enacted endeavour not only to protect investors but also to harmonise the existing regime with the main European Union (EU) Directives in the field of securities regulation. The principal pieces of legislation are:

- The Companies Law;
- The Cypriot Securities and Stock Exchange Law;
- The Cypriot Securities and Stock Exchange Regulations of 1995, as amended; and
- Various regulations passed under sections 19(3), 60A, and 71 of the Securities and Stock Exchange Law, such as the Mergers and Acquisitions Regulations of 1997.

111 The authors wish to thank BNA International for permission to use extracts from the following copyright material: Elias A Neocleous, Zalewski and Laulhé, 'Cyprus', in Campbell (ed.), *International Securities Law*, rel 4 (2000).

9-79 In 1999, the legislature enacted the long-awaited Law on Possession, Use and Announcement of Privileged Confidential Information,[112] which essentially prohibits insider trading. Furthermore, the Central Depository and Central Securities Register Law[113] and new trading and clearing procedures in the form of the Trading Rules of the Stock Exchange (Electronic System), Regulations 100 of 1997, were adopted.

However, Cyprus lacks a comprehensive financial services law similar to the United Kingdom Financial Services and Markets Act regulating all aspects of investment business. Notwithstanding the codification of the principal areas of securities law in Cyprus, it should not be forgotten that the Cypriot legal system draws heavily on its Common Law heritage. English Common Law and equity principles, therefore, also play an important role in the securities field.

Regulatory Authorities

9-80 The Cyprus Stock Exchange was established under the Securities and Stock Exchange Law in the form of a public corporate body in April 1993. The Cyprus Stock Exchange is governed by a seven-member Council ('the Council') and the Securities Commission ('the Commission'), which comprises a Government commissioner, a representative of the Central Bank, and three other members appointed by the Council of Ministers. Whereas the Council is assigned the day-to-day management of the Cyprus Stock Exchange and the implementation of its policies, the Commission is responsible for supervising the operation of the Exchange in accordance with the provisions of the Securities and Stock Exchange Law.

Since the commencement of trading, the regulatory authorities have shown that they are prepared to achieve the objectives of the prevailing securities regime by implementing the relevant laws and regulations in the context of modern business transactions.

The regulatory regime is used by the authorities to protect local and foreign investors, without making it unduly onerous for companies to obtain a listing on the Cyprus Stock Exchange. One remaining disadvantage of the Cyprus Stock Exchange relates to the time which is required for a listing application to be processed. The listing procedure may take several months, but efforts are being made to shorten it.

Admission to the Cyprus Stock Exchange

In General

9-81 The Cyprus Stock Exchange is the only official investment exchange in Cyprus. Following Cyprus' independence in 1960, a number of public companies

112 Law 36 (I) of 1999.
113 Law 27 (I) of 1996.

were incorporated under the Companies Law. To facilitate transactions in the securities of these companies, a few visionary businessmen founded the first stock broking firms during the 1960s.

From these modest beginnings, an embryonic market developed, encouraging more and more companies to offer their shares to the public at large. The Stock Exchange as an institution dates from 1979, when the Cyprus Chamber of Commerce and Industry decided to establish an unofficial over-the-counter exchange, which was designed to regulate the growing securities market. As a result, a dynamic market had developed by the time the Cyprus Stock Exchange opened its doors.

Market Participants

9-82 To exercise the profession of stockbroker, it is necessary to become a member of the Cyprus Stock Exchange and obtain from the Council of the Stock Exchange the requisite permit. Such permit is readily granted if the broker satisfies a set of requirements relating to, *inter alia*, educational qualifications, professional experience and personal and financial integrity.

Stockbrokers may effect securities' transactions as agents or as principals. In the latter case the Securities and Stock Exchange Law specifically limits the participation of brokers to five per cent of the issued share capital of a listed company unless the Council's prior approval in writing to exceed this threshold has been obtained.

Types of Traded Securities

9-83 Pursuant to the Securities and Stock Exchange Law, listed public sector securities, corporate securities of listed companies, and other securities which the Council has declared as Stock Exchange securities can form the subject of transactions on the Cyprus Stock Exchange. These securities include shares, rights, warrants, corporate bonds, government bonds, and treasury bills.

By virtue of Law 63 (I) of 2000, which provides for an amendment to the Cyprus International Investment Schemes Law,[114] it has become possible for the shares or units of Cypriot international collective investment schemes to be admitted to the Cyprus Stock Exchange. Admission is possible in respect of shares or units of schemes which have been authorised by the Central Bank to be marketed on a retail basis to the eligible investors.

Furthermore, admission is only permitted in respect of shares or units of schemes which have been recognised as international variable capital companies or international unit trusts schemes. The listing of shares or units of schemes is effected following an application to the Council of the Cyprus Stock Exchange.

114 Law 47 (I) of 1999.

Types of Transactions

9-84 The Cyprus Stock Exchange system boasts advanced technology, comparable with that of established overseas bourses. An automated trading system was put into operation on 7 May 1999, pursuant to section 22 of the Securities and Stock Exchange Law and regulation 33 of the Securities and Stock Exchange Regulations. At the initial stages of the transformation of the Exchange to an electronic bourse, brokers are still obliged to continue trading from the Exchange floor but, at a later stage, they will be allowed to trade from their own premises.

The full automation of the clearing and settlement system is scheduled to be implemented as soon as possible. The Cypriot legislature has already taken the necessary steps to dematerialise the on-exchange and over-the-counter share trading by passing the Central Depository and Central Securities Register Law.[115] This legislation provides for the establishment and operation of a central register for all securities listed on the Cyprus Stock Exchange, the dematerialisation of these securities, the settlement of transactions in respect of dematerialised securities, and related matters.

Eventually, the Exchange's computerised central register for listed securities will replace the share registers currently held by all quoted companies. The central depository and securities register envisaged by the legislation will entail the replacement of share certificates by electronic computer records. Instead of securities' certificates, beneficiaries of registered securities will be granted a certification of their status, the securities involved, and any charges they carry.

Currently, it takes approximately nine working days from the day of the transaction for the buyer to receive the new certificate of ownership. With the introduction of the electronic system, the settlement cycle is expected to be reduced to three working days. Moreover, settlement on a delivery versus payment basis should become the rule. This will reduce settlement risk and consequently is expected to boost both investors' confidence and the volume of trading.

As a general rule, the Securities and Stock Exchange Law prohibits over-the-counter trading of securities. Certain transactions, however, as set out in section 23(1) of the Securities and Stock Exchange Law, may be executed outside the Stock Exchange provided that they are notified to the Cyprus Stock Exchange within three working days. Listed securities of Cyprus-registered international business companies, for instance, come within the ambit of section 23(1)(f) of the Securities and Stock Exchange Law and may, therefore, be traded outside the Stock Exchange.

The purchase of securities by the issuer, securities transactions of a Stock Exchange value of at least CY £100,000, or the sale or purchase of certain securities following direct invitation to all owners these securities also fall into this category. The same exemption from registration in the central depository and securities register applies

115 Law 27 (I) of 1996.

to transactions of units in collective investment schemes or other transferable securities which are explicitly exempted by a decision of the Council on receipt of a favourable opinion from the Securities Commission.

Issuer Requirements

9-85 Each issuer, whether local or based abroad, which seeks a listing on the Cyprus Stock Exchange must meet certain basic requirements, the most important of which are:

- The issuer must have been duly constituted and must operate in accordance with the law of the country of constitution;
- The law of the country of constitution of the company and its memorandum and articles of association must give the issuer the authority to issue the specific titles for which a listing is sought;
- The issuer must have published audited accounts for at least three years preceding the application;
- No shareholder of the issuer may control more then 70 per cent of the share capital;
- At least 25 per cent of the issuer's share capital must be satisfactorily spread among the public at large, and the issuer must not favour any individual investor or group of investors;
- The issuer must ensure that existing shareholders will be given an opportunity to take advantage of pre-emptive rights in subsequent issues of shares;
- The issuer must show to the satisfaction of the Council that it has sufficient working capital at its disposal; and
- The issuer must submit itself to the authority of the Council and comply with all statutory reporting and disclosure requirements.

9-86 Exceptionally, some of the above requirements may be waived at the discretion of the Council. For example, for recently established companies which have published audited accounts for less than three years, this disclosure requirement can be dispensed with provided that information is made available to investors which enables them properly to evaluate the financial position of the issuer.

Securities Requirements

9-87 In terms of the attributes of the securities to be listed, be they shares or debt instruments, issuers must adhere to a number of conditions. Firstly, the estimated stock market value of the proposed issue must be in excess of CY £600,000 unless the Council at its sole discretion grants an exemption from this listing requirement. Such exemptions can readily be obtained for a continuing issue or a new issue of titles already listed.

There may be no restrictions on the transferability of the titles. However, the Council may accept the listing of titles whose transfer is restricted, as long as such restrictions do not affect the smooth functioning of the market with respect to

such titles. Furthermore, the issuer must commit itself to listing all the titles of the same category already issued or to be issued in future. Finally, bond issuers must ensure the equal treatment of the beneficiaries of the bonds with respect to all rights and obligations arising from them.

Prospectus Requirements

9-88 Requirements under the Securities and Stock Exchange Law and Regulations. The prospectus and listing particulars requirements imposed on issuers seeking a listing on the Cyprus Stock Exchange closely follow the principal body of EU law in the field of securities regulation, namely:

- The Admissions Directive;[116]
- The Listing Particulars Directive;[117]
- The Interim Reports Directive;[118] and
- The Prospectus Directive.[119]

9-89 To obtain a listing on the Cyprus Stock Exchange, a company must submit to the Council for approval a signed application and various other documents as laid down in regulation 64 of the Securities and Stock Exchange Regulations. Foreign issuers also must provide the Council with copies of any relevant board resolutions required for the introduction or issue of the financial instruments in question in accordance with the laws of their place of incorporation.

If the issuer's titles are already quoted on a foreign stock exchange, additionally, a written confirmation of such stock exchange is required, stating the number and the amount of the titles listed thereon.

The most important of the aforementioned documents is the listing particulars. Listing requirements serve disclosure and screening purposes. Additionally, they are designed to help investors to evaluate in the best possible manner the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of the rights attaching to the securities to be listed on the Stock Exchange.[120]

The degree of disclosure varies according to the issuer (general commercial issuer, investment company, or government), the type of placement (private or public), and the type of security (shares, rights, warrants, or bonds). Precise details of the amount of information to be published are laid down in Schedules I and II to Annex E to the Securities and Stock Exchange Regulations.

116 Directive 79/279, OJ 1979 L66/21, as amended.

117 Directive 80/390, OJ 1980 L100/1, as amended.

118 Directive 82/121, OJ 1982 L48/26.

119 Directive 89/298, OJ 1989 L124/8.

120 Securities and Stock Exchange Law, s 57(1); Securities and Stock Exchange Regulations, reg 68(1); Directive 80/390, OJ 1980 L100/1, art 4.

9-90 Requirements under the Companies Law. In the present context, it should not be forgotten that the Companies Law also lays down certain prospectus requirements with regard to public issues of securities. Section 2(1) of the Companies Law defines a prospectus as 'any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company'. The main requirements can be found in the prospectus and allotment provisions[121] and the Third, Fourth, and Fifth Schedules to the Companies Law.

The prospectus provisions of the Companies Law are mainly concerned with invitations to the public to acquire shares or debentures. The definition of a public offer given in section 54 is very broad and encompasses 'any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner'. This formula is not only wide but also flexible, enabling the courts to deal with each case on its own merits and in accordance with its specific circumstances. As a result, companies must comply with the prospectus requirements of the Companies Law not only in cases of direct offers for subscription or rights and conversion issues but also whenever they publish a document of any kind to the effect that they allot or agree to allot any securities with a view to their being offered for sale to the public.[122] Therefore, the latter provision also covers offers for sale and placements unless they are of a purely domestic nature without involving either renounceable allotment letters or a stock exchange introduction.[123]

The Companies Law provides that a copy of the prospectus signed by the directors must be filed with the Registrar of Companies prior to its issue. The matters which must be stated in accordance with the Fourth Schedule are, *inter alia*, particulars of the founders of the company and their respective interests, the company's share capital, minimum subscription, underwriting commission, preliminary expenses, payments to promoters, material contracts, auditors, directors and their interests, as well as a report by the company's auditors on the financial position of the company and, if relevant, its subsidiaries as well as a report by accountants on any business to be acquired.

An abridged prospectus which does not need to comply with the requirements of section 39 and the Fourth Schedule to the Companies Law is admitted whenever shares or debentures are in all respects uniform with those already issued and quoted on a prescribed stock exchange.[124]

Prospectuses offering securities of companies incorporated abroad are subject to similar disclosure and registration requirements and exemption provisions to those

121 Companies Law, ss 38–51 and 355–361.

122 Companies Law, s 45(1).

123 Gower, *Principles of Modern Company Law* (2nd ed, 1957), at p 278.

124 Companies Law, s 39(5)(b).

applicable to prospectuses issued by a Cyprus-registered company. It should be noted that the relevant statutory provisions[125] apply not only to companies incorporated outside Cyprus which have established a place of business in Cyprus, ie, overseas companies, but also to companies which have not done so but issue a prospectus in Cyprus. A foreign company, however, may qualify for a certificate of exemption by a prescribed stock exchange, enabling it to file an abridged prospectus with the Registrar of Companies.[126]

In cases in which a public company, on its formation or after its conversion from a private company, does not publish a prospectus or subsequent to such publication does not proceed with the allotment of its securities, sections 31 and 48 and the Third and Fifth Schedules to the Companies Law place such company under the obligation to file a statement in lieu of prospectus with the Registrar of Companies.

The Third and Fifth Schedules demand the publication of information and reports similar to those required by the Fourth Schedule but are slightly less onerous on the company, in that matters specifically relating to public issues may be omitted.

Registration of Public Offerings

9-91 Prospective corporate issuers may list their securities on the Stock Exchange by one of the following methods:

- Public offer for subscription for the purchase of titles which have not yet been issued or allotted;
- Public offer for sale of titles which have already been issued or allotted;
- Offer for sale through the introduction of titles already issued or allotted; or
- Private placement, ie, through marketing exclusively to specific investors for the sale of shares which have already been issued or are about to be issued.

9-92 When the issuer applies for the registration of a public offer for subscription for the purchase of titles which have not yet been issued or allotted, the issue must be underwritten by at least one underwriter. Any underwriters chosen for the issue must be approved by the Cyprus Stock Exchange Council on the basis of their solvency, knowledge, and experience.[127]

Public offerings are subject to full prospectus requirements to enable potential investors to make informed investment decisions based on publicly available and easily accessible information. If the marketing effort in respect of the relevant securities does not target the general public, regulation 70 of the Securities and Stock Exchange Regulations provides for certain exemptions from the generally

125 Companies Law, ss 355–361.
126 Companies Law, s 356.
127 Regulation 80 and section 2.3.7 of Schedule I in Annex E to the Securities and Stock Exchange Regulations.

prescribed disclosure and publication requirements, examples of which are, *inter alia*, private offerings and secondary market trading.

The legislative approach taken is therefore characterised by the prohibition of all sales of securities without a complying prospectus unless certain well-defined exceptions to this general rule are applicable.

To be able to publish a prospectus for the introduction of an issuer's titles on the Cyprus Stock Exchange, the issuer requires a licence from the Council. Having obtained the licence, the issuer is under the obligation to publish the listing particulars within 15 days in at least two daily national newspapers.

Moreover, the prospectus must be made available at an address in Cyprus where interested parties can obtain a copy of it. Within 48 hours of publication, the issuer must deposit with the Council three copies of the above newspapers. The final step is for the Council officially to announce its decision to accept the listing of the titles and to fix a date for the commencement of their trading.

Registration of Placements

9-93 The Cyprus Securities and Stock Exchange Regulations contain a number of provisions which wholly or partly free the issuer from the obligation to prepare and register a prospectus with the Council. Private placement exemptions are usually couched in terms of particular classes of offerees. Pursuant to regulation 70 of the Securities and Stock Exchange Regulations, the Council is empowered to grant discretionary exemptions from prospectus requirements mainly to the following types of securities' offerings:

- Shares whose number or nominal value or market capitalisation is below one-tenth of that of the same category of shares already listed on the Exchange;
- Shares allocated to employees of the issuer provided that shares of the same category are already listed on the Cyprus Stock Exchange;
- Shares issued as remuneration to management for the non-exercise of any constitutional rights to the profits of the company on condition that shares of this category are already listed on the Stock Exchange;
- Shares offered free to beneficiaries of titles already listed on the Stock Exchange; and
- Shares arising from the exercise of rights to purchase shares provided that the shares of the company offered to the beneficiary are already quoted on the Cyprus Stock Exchange.

9-94 It should be noted that there is legislation in Cyprus[128] requiring companies to return funds to investors if their listing on the Cyprus Stock Exchange is delayed. Law 42 (I) of 2000 imposes an obligation on any company failing to secure entry on the Exchange within three months of lodging its application with the competent

128 Cyprus Securities and Stock Exchange (Amending) Law (Number 4), Law 42 (I) of 2000.

authorities to return to investors all funds received for private placement purposes plus interest at the rate of six per cent.

This is to discourage companies from holding onto investors' funds for long periods of time, earning interest or other forms of income from private placement money deposited with them and thus affecting the liquidity of the market. Companies and their senior officers who do not comply with the requirements of Law 42 (I) of 2000 are liable to a fine of up to CY £50,000 and/or a term of imprisonment of up to two years.

Because of the broad wording of sections 45 and 54(1) of the Companies Law, private placements also will come within the ambit of the prospectus and registration provisions of the Companies Law unless the offer can essentially be regarded as not being calculated to result in the securities becoming available for subscription or purchase by persons other than those receiving the offer or otherwise as being the domestic concern of the persons making and receiving such offer.[129]

Periodic Disclosure

Continuing Disclosure Obligations of Ordinary Corporate Issuers

9-95 Issuers of titles must comply with the continuing obligations set out in Annex F to the Securities and Stock Exchange Regulations. Additionally, issuers must, at all times, satisfy the basic requirements for listings. The aim of placing issuers under ongoing scrutiny is to prevent the emergence of a false market, where transactions in securities are effected on the basis of incorrect or outdated information. By the same token, periodic disclosure duties serve investors' protection purposes by keeping them well informed about the issuer's activities, current profits or losses, and future prospects.

Listed companies are under an obligation to publish half-yearly accounts, preliminary annual accounts, and annual accounts. Approved investment companies are subject to a stricter reporting regime, which requires them to publish accounts on a quarterly basis.

Apart from making financial statements available to the public at large on the indicated dates, listed companies have the obligation to announce at least 10 days in advance the date on which the board of directors is to recommend payment or non-payment of a dividend, to approve financial statements, or to discuss any matter regarding the listed securities of the company concerned. In view of the sensitivity of the price of listed securities to corporate acts, companies must announce to the Cyprus Stock Exchange immediately, and at least one hour before trading, decisions relating to certain matters, such as new bond issues, changes to their capital structure, and amendments to their constitutive documents.

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129 For a detailed analysis of when an offer is made 'to the public', see Schmitthoff and Curry, *Palmer's Company Law* (20th ed, 1959), at pp 153 *et seq*.

Any person failing to comply with the obligation to announce information in accordance with the provisions of the Securities and Stock Exchange Law or Regulations commits a criminal offence which is punishable by imprisonment of up to two years and/or a fine of up to CY £5,000.[130] The offence also may be penalised by the deletion of the listed company from the Stock Exchange following a reasoned decision from the Council.

Exemption from Continuing Disclosure Duties

9-96 Pursuant to section 28(3) of the Securities and Stock Exchange Law, the Council has the power to exempt certain issuers from some of their continuing disclosure obligations.

The Council exercises this power in accordance with regulation 81(3) of the Securities and Stock Exchange Regulations under which it may grant issuers from abroad an exemption from any of the periodic disclosure obligations if such obligation is not provided for by the law of the country of their incorporation and on condition that this is not likely to mislead the investing public.

Disclosure Requirements under the Companies Law

9-97 With the exception of share warrants, bearer shares or bearer instruments are not permitted under Cypriot law. Investors may therefore gain valuable information about the status of their investments through the recording procedure for securities' transfers and by means of inspection of securities' registers.

This transparency of dealings in securities is embodied in the Companies Law,[131] in the relevant provisions of Part V of the Securities and Stock Exchange Law, and in Parts IV and V of the Securities and Stock Exchange Regulations.

Trading Rules and Trading Environment

Securities' Offerings

9-98 Listed Securities. Once the Council has approved the introduction of an issuer's securities in the stock market, these may be freely transferred from the current holder to any purchaser. Every transfer of listed securities through the Stock Exchange must be recorded on a transfer form.

The member of the Stock Exchange acting on instructions from the offeror is responsible for presenting the form to the buyer within the time limit prescribed by the Securities and Stock Exchange Regulations. Subsequent to the settlement of the transaction, it falls on the member acting on instructions from the buyer to ensure

130 Securities and Stock Exchange Law, s 59(4).
131 Companies Law, ss 71–82 and 90–113.

that the certificate of transfer is duly issued. The law imposes a joint responsibility on both members whenever a transaction is not completed within the prescribed time limit.

All transactions in listed securities negotiated outside the Stock Exchange must be notified to the Stock Exchange within three working days. As far as securities issued or redeemed by the offeror are concerned, notification is to be made by the offeror. In the case of securities transferred due to death, this task falls on the administrator or the executor of the will of the deceased. In all other cases, notification is the responsibility of the beneficiary. Failure to notify transactions which are executed outside the Stock Exchange in accordance with section 23(1) of the Securities and Stock Exchange Law within the prescribed time limit entails their cancellation.

Once the electronic Stock Exchange is fully operational, the transfer of ownership of dematerialised securities following the settlement of a Stock Exchange transaction will be valid from the time the transaction is registered on the central depository and securities register.

9-99 Rules Pertaining to Stock Exchange Transactions. Stock Exchange transactions are executed and cleared as prescribed in the Securities and Stock Exchange Regulations. Short selling of Cyprus Stock Exchange-listed securities is prohibited. Transactions of registered securities are completed with the issue of a certificate of transfer. In order that a certificate of transfer may be issued, the following cumulative conditions must be met:

- Deposit with the competent department of the Stock Exchange of a document of transfer which is duly signed by the seller and the buyer or their representatives;
- Compliance with the prescribed time limit for completion of the relevant Stock Exchange transaction;
- Deposit of the original title of ownership or a valid substitute thereof; and
- Payment of the prescribed fees.

9-100 The certificate of transfer must bear the official Stock Exchange seal, which is evidence that the relevant transaction has been executed through the Cyprus Stock Exchange. Brokers must take action towards completion of Stock Exchange transactions during the period elapsing between the day of the execution of the transaction and the hour of opening of Stock Market trading on the day which follows three working days during which the Stock Market is open for trading.

By the eleventh hour before noon on the last working day of the time limit, the two brokers involved in the transaction must have reached the settlement stage of the transaction. This settlement date is prescribed by the Securities and Stock Exchange Regulations. Purchaser and seller can therefore not stipulate to the contrary. As a general principle, settlement of transactions in securities through the Cyprus Stock Exchange operates on a delivery versus payment basis, which also is implied in regulations 30(2), 41(1)(a), and 49(3) of the Securities and Exchange Regulations.

A Stock Exchange transaction which is not completed within the prescribed time limit is not enforceable unless one of the parties within a time limit of 48 hours from the end of the eleventh hour before noon on the last working day of the time limit for settlement informs the Director of the Stock Exchange that it is ready to execute its own obligations and states at the same time the terms of the transaction.

If a Cyprus Stock Exchange member fails to complete a Stock Exchange transaction within the prescribed time limit, the other broker member can apply to the Director of the Cyprus Stock Exchange for the Director, himself, to take the necessary steps for the transaction to be completed. The member responsible for the failure is liable to the Stock Exchange for the amount of money required for the execution of the transaction.

Once the operations department of the Cyprus Stock Exchange has satisfied itself that all the requirements for buying or selling securities, as the case may be, have been complied with, it notifies the listed company which initiates the recording of the transfer of shares. The listed company has five working days to process the transaction and issue the new share certificate. During this period, the issuer may raise objections to the transfer provided it gives exact details and reasons as to why it rejects the transaction.

If an investor wishes to sell his shares within the first 10 days of the purchase, he may proceed to do so after receiving an authorisation certificate from his stockbroker. Thereafter, the broker is barred from issuing such a certificate, and the investor needs to wait until the share certificate is delivered to him.

9-101 Acquisition of Securities by Non-Residents. While there are no specific requirements to be fulfilled by local buyers ('residents') to acquire shares or other securities listed on the Cyprus Stock Exchange, the acquisition of shares by foreign buyers whose permanent residence is located outside Cyprus ('non-residents') is subject to the Exchange Control Law.

In addition, Cypriot companies which enjoy a tax preferential treatment in Cyprus by virtue of the fact that they are entirely owned by non-residents and derive their income from non-Cypriot sources, ie, international business companies, can now, pursuant to an amendment to the Income Tax Law in 1998, acquire shares of companies listed on the Cyprus Stock Exchange.

Generally, pursuant to the Exchange Control Law, the transfer of securities in a Cyprus-incorporated entity, especially a private company, from or to a non-resident must be notified to the Central Bank of Cyprus and will not be allowed except with its prior permission. However, the securities of Cypriot international business companies listed on the Cyprus Stock Exchange can be freely transferred without the prior approval of the Central Bank.

The Central Bank determines the maximum level of permitted foreign participation in certain commercial activities, eg, banking, travel agencies and tourist projects, agriculture, fishing and forestry, as well as the services and trade sectors. In accordance with the Bank's Foreign Direct Investment Policy Guidelines, non-EU

residents may own up to 49 per cent of the issued share capital of listed companies (up to 100 per cent for EU residents) and up to six per cent in the case of banking institutions (up to 50 per cent for EU residents). The maximum individual shareholding participation of non-EU residents is restricted to 0.5 per cent in the banking sector and to five per cent for all other listed companies.

The Central Bank is vested with all the powers necessary to ensure the proper implementation of the Exchange Control Law and the applicable Guidelines on Foreign Direct Investments. The acquisition of shares or other securities in excess of the prescribed limits will not be approved by the Central Bank, and any acquisition of shares without the permission of the Central Bank contravenes the provisions of the exchange control laws and regulations and may be void.

Any exchange control violation also may result in penalties. Furthermore, any transfer of shares or other securities made without the permission of the Central Bank will not be registered by the Registrar of Companies and will therefore be ineffective.

Regulatory Requirements Applicable to Stockbrokers

9-102 The regulatory authority which inspects securities firms acting as stockbrokers in Cyprus Stock Exchange transactions is the Securities Commission. The Commission is charged with the overall supervision of the operation of the Stock Exchange, which it exercises on behalf of the Minister of Finance. Banks and insurance companies are not allowed to be registered as stockbroker members with the Exchange. However, on obtaining member status, their subsidiary companies may undertake brokerage activities.[132]

Foreign entities can be licensed as brokers provided that they are established in accordance with the Companies Law and the Exchange Control Law. A foreign entity wishing to undertake brokerage activities in Cyprus may register either a subsidiary company or a branch. Furthermore, foreign entities must comply with the necessary requirements of the Securities and Stock Exchange Law. To this effect, the foreign company must become a registered member of the Cyprus Stock Exchange.

A person who carries on the business of a broker without being registered as a member of the Exchange is liable to an offence which is punishable with up to two years' imprisonment and/or a fine of up to CY £5,000. There are statutory rules of conduct and duties for members of the Stock Exchange as laid down in Part III of the Securities and Stock Exchange Regulations. The chief duty of members is to serve the interests of their clients in good faith and in accordance with the existing Stock Exchange laws and practice.

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132 Securities and Stock Exchange Law, s 31, in conjunction with s 33(2).

Breach of the statutory rules of conduct and duties may result in the imposition of an administrative fine on the Stock Exchange member concerned by a Council Committee. In practice, disciplinary measures are imposed on stockbrokers mainly in cases of repeated failure to complete Stock Exchange transactions within the prescribed time limit. Violations of the Stock Exchange regulations governing the minimum paid-up capital or the required bank guarantee may lead to the suspension of the stockbroker's licence. More severe disciplinary offences are punishable with exclusion from the Stock Exchange for up to 15 days or temporary or permanent removal from the register of members of the Stock Exchange.

The Securities and Stock Exchange Law provides for the establishment of a compensation fund whose purpose is to provide security for Stock Exchange transactions in cases where a Cyprus Stock Exchange member faces financial difficulties in meeting its obligations to its principals or third parties. Membership of this fund is compulsory for all members of the Stock Exchange.

Disclosure of Substantial Holdings

9-103 Shareholders' and Directors' Duties. Section 60 of the Securities and Stock Exchange Law imposes an obligation on substantial shareholders and those who by acting in concert have a substantial interest in a quoted company to disclose their holdings and report subsequent transactions.

This applies where their holdings have an aggregate value equal to or higher than five per cent of a listed company's securities. Furthermore, a person will be deemed to have a substantial holding in such securities as are held by a nominee, spouse, or blood relative up to the second degree or companies which he controls. To address the practice of 'warehousing', there are 'concert party' provisions under which persons will be regarded as acting in concert, if there is an agreement or arrangement between them for the acquisition by any one or more of them of interests in securities of a particular public company. The disclosure requirement on acquisition of substantial holdings also extends to the company's board of directors, officers, auditors, and any provident funds.

A person who fails to comply with the disclosure and reporting requirements of the Securities and Stock Exchange Law and Regulations is liable to a one-off administrative fine of up to CY £2,000 or alternatively to a fine of up to CY £500 for every day the infringement continues. Deliberate or intentional non-compliance with the disclosure or reporting requirements is a criminal offence, which is punishable by imprisonment of up to two years and/or a fine of up to CY £5,000.

The Mergers and Acquisitions Regulations (see text, below) contain additional disclosure and reporting requirements for substantial holdings.

9-104 Companies' Duties. Under the Companies Law, a company must not purchase its own shares. A body corporate cannot be a member of a company which is its holding company, and any allotment or transfer of shares in a company to its subsidiary will be void.

Moreover, it is illegal for a company, directly or indirectly, to give financial assistance for the acquisition of any of its shares or any shares in its holding company. It is therefore not possible for a company to acquire a substantial holding in itself.

Under the Securities and Stock Exchange Law, a company whose shares are listed on the Cyprus Stock Exchange is under an obligation to notify the Securities Commission and the Council of any commercial activity it undertakes with its management or any other person with whom it is connected in some way within seven days from the time such activity is entered into, where its value exceeds CY £50,000.

The above obligation is in addition to the provisions contained in the Companies Law relating to disclosure on the part of directors and certain other insiders, controlling such persons' involvement in substantial property transactions with the company and related companies and regulating the circumstances in which they may receive loans and other financial facilities.

The Securities and Stock Exchange Law also imposes an obligation on a listed company to supply the Securities Commission and the Council immediately and on its own initiative with any information in its possession which may affect the value of its listed securities. A listed company which fails to comply with the disclosure requirements laid down in the Securities and Stock Exchange Law may be de-listed following a reasoned decision from the Council.

Insider Trading and Fraud

9-105 On 16 April 1999, new legislation on insider trading was enacted.[133] The provisions of the Insider Dealing Law are based on the Directive co-ordinating regulations on insider dealing,[134] and they reflect the ongoing effort of the Cyprus government to harmonise domestic legislation with the *acquis communautaire*. The need for the enactment of legislation specific to acts of insider trading grew out of the inadequacies of the general law.

The objective of the insider trading legislation is to secure a free and open market and to discourage share price fluctuations which are not attributable to facts relating to the issuer's assets, profits, or prospects. It thus reinforces existing reporting requirements under the Securities and Stock Exchange Law, whereby listed companies are under an obligation promptly to publish any significant new developments which may affect their share price.

In essence, the legislation makes the act of insider dealing a criminal offence. For the purposes of Law 36 (I) of 1999, insider dealing consists of the use made of privileged confidential information acquired under specific circumstances.

133 Law 36 (I) of 1999, as amended by Law 68 (I) of 2000, 'the Insider Dealing Law'.
134 Directive 89/592, OJ 1989 L 334/30.

Section 3 of the Insider Dealing Law defines 'privileged confidential information' as all information of a precise nature relating to one or several issuers of transferable securities, which is not publicly known and which, if it were made public, would be likely to have a significant effect on the price of the transferable securities.

A piece of information is taken to concern an issuer of titles not only when it refers to the issuer as such but also when the information concerns events which might possibly influence the business prospects of that issuer. If an issuer realises that there is an information leak, the issuer is required to make an immediate warning announcement to the Securities Commission and the general public.[135]

A person is regarded by law as having acquired privileged confidential information if such information has been obtained, *inter alia*, by reason of his position as a member of the managerial or supervisory board or as a shareholder of the issuer or through his employment, office, or profession.

Section 5 of the Insider Dealing Law prohibits the following types of acts relating to the use of privileged confidential information:

- Buying, selling, mortgaging, or otherwise making available securities whose price may be substantially affected by such information;
- Encouraging or assisting another person in or recommending to him a transaction in securities whose price may be substantially affected by such information, irrespective of the fact that the other person is aware of it; and
- Announcing this information to a third party, unless such announcement occurs in the usual conduct of a person's employment, profession, or duties.

9-106 The offences established by the Insider Dealing Law are punishable by a maximum five-year prison sentence, or a fine of up to CY £5,000, or both. Any person convicted of any of the insider dealing offences loses his right to transact business, directly or indirectly, in Cyprus Stock Exchange securities for a period of five years from the conviction. Finally, section 9 of the Insider Dealing Law provides that any person acting in violation of section 5 also may be liable under civil law for any damage caused by his acts, including loss of profits.

Public Take-Over Bids

9-107 The Cyprus Stock Exchange (Public Take-Over Bids or Acquisitions of Titles and Mergers of Listed Companies) Regulations of 1997, as amended ('the M&A Regulations'), passed pursuant to the Securities and Stock Exchange Law,

135 Full details on the code of conduct to be followed by persons deemed by law to possess privileged confidential information, and particularly on the obligation to communicate information leaks to the Securities Commission, are set out in Regulation 128 of 2000, passed under section 31 of the Insider Dealing Law.

are based on the relevant European Directives[136] harmonising Cypriot law with the *acquis communautaire* in this area of law. The M&A Regulations are only applicable in respect of companies whose titles are admitted to the Cyprus Stock Exchange.

The Council is vested with the duty to supervise the application and enforcement of these regulations. These stipulate that any person or group of investors acquiring more than five per cent of a target company's stock should immediately notify the Council and the target company's board of directors and thereafter proceed to notify the public of the acquisition of such a stake. A third party building a similar stake in the target company also is required to notify the Cyprus Stock Exchange of every 0.5 per cent capital acquisition in the target company.

The M&A Regulations provide that counter-offers can be made by other groups within seven working days. When the 10 per cent threshold is passed, the bidder should make public its intention and notify all concerned. If the intention is to raise the stake to 20 per cent, then another offer should be made to all shareholders on a *pro rata* basis, irrespective of size. When the 30 per cent limit is reached, the bidder must make a public offer to acquire up to 50 per cent of the capital of the target company. When the stake exceeds 50 per cent, the bidder must make a public offer to acquire up to 70 per cent of the capital of the target company and, when the 70 per cent threshold is passed, the company will cease to be a public company and will be de-listed.

Subject to certain conditions, the Council will allow those bidding for the shares concerned to scale down their offer or withdraw from bidding. Cases falling within this category include the premature death of the bidder and the ensuing passage of the stake to the next in line or beneficiary of the will.

Other exceptions exist where the stake is passed to a company through liquidation of the bidding company or where the stake is indirectly acquired through a merger with another company. In the event that the 30 per cent threshold is passed accidentally, the bidder will be given a one-year grace period, during which time the stake should be reduced to below 30 per cent. Where the stake is acquired as a result of the increase of the target company's issued share capital and the exercise by the bidder of his pre-emptive rights, the Council may exempt the bidder from initiating a public offer in accordance with regulation 24 of the M&A Regulations.

The M&A Regulations lay down the following time frame for the bidding process. Within 10 working days of the announcement of the offeror's decision to make a public take-over bid, a document providing details thereof will be submitted to the Council, the Securities Commission, and the board of directors of the target company and, once approved by the Cyprus Stock Exchange, it will be published.

136 Directive 78/855, OJ 1978 L295/36, as amended; Directive 90/434, OJ 1990 L225/1, as amended.

The Council is required to issue its decision on the admissibility of the public take-over bid within three working days of its filing.

The deadline for acceptance of the relevant offer is specified by the offeror in the document of the public bid; however, this deadline will be not earlier than 30 days and not later than 45 days from the day on which the document was made available to the public. In the event of a review of the bid, the stated deadline will be automatically suspended for a week. Anyone who intends to make a counter-offer is required to do so by the beginning of the seventh day before the deadline set for acceptance of the initial public bid. Within 48 hours after the deadline for acceptance of the offer, the results of the public bid(s) must be announced in the Stock Exchange and published on the following day in two daily national newspapers.

Finally, the M&A Regulations make 'stock parking' and 'stock pushing' illegal and impose severe penalties on bidders who violate the relevant provisions. In addition to heavy fines, penalties include stripping bidders of their voting rights for three years and barring them from appointing a representative to the board of directors of the target company for five years.

Conclusion

9-108 The dealing and clearing system of the Cyprus Stock Exchange is in the process of undergoing fundamental changes, leading to its full computerisation. The coming into effect of the Cyprus Securities and Stock Exchange Central Depository and Central Securities Register Law[137] will signal the final hours of the share certificate and call into being the 'paperless Exchange'.

The transfer of ownership of dematerialised securities will then be effected instantaneously when the transaction is registered on the central depository and securities register. Through the implementation of the above measures, the Cyprus Stock Exchange is not merely keeping up with technological change but, having taken on board the ever-growing internationalisation and inter-penetration of securities markets, it aspires to become the most significant exchange in the Eastern Mediterranean region.

137 Law 27 (I) of 1996.

CHAPTER 10

Law of Contract

Evelina Koudounari

Introduction

In General

10-1 Cypriot contract law is identical to the Indian Contract Act 1872, as amended by the Indian Contract Act (Amendment Act) 1889. Many of Cyprus' legal provisions are identical to the Indian contract law, and these will be discussed in the chapter that follows.

Cypriot law also is modelled on the English contract law due to the fact that Cyprus was a British colony for many years and has adopted the English legal system. However, since 1960, Cyprus has begun to introduce its own legal principles, following and being guided by the English and Indian legal systems. Cypriot contract law has been adopted in the Cypriot legal system with Cap 149, Law 10(1)/94, as the Cypriot Law for the Sale of Goods.

Contract law is the law relating to agreements or promises. It is primarily concerned with promises which constitute part of an agreed exchange, and it governs such questions as which agreements the law will enforce, the kind of obligations imposed by the agreement in question, and the remedies available if the obligations are not enforced. Hence, it can be stated that contract law is the law based on liability for breach of a promise. However, it is considered that contract law includes many rules that in the strictest sense are not 'contractual', being based on a promise to do something, but being very closely connected with contracts.

Contract law has many purposes, but the central one is to support and control the agreements that collectively make up the 'market economy'. Contract law operates in the context of dispute resolution in the courtroom. However, it will be apparent that contract law also has an importance outside the courtroom; by empowering the parties to make an agreement that the law will then enforce, it enables them to make exchanges that might otherwise carry too great a risk whether of disruption by some contingency or of default by the other party.

Parties can arrange disputes between them so that the risk is shared, and they can devise remedies to coerce each other into performance. There are limits to what the law permits in this respect, but the planning function of contract law is an essential one.

People in their everyday dealings enter into transactions which constitute contracts without realising it. Any possible breach of an agreement entered into between legal or personal entities confirms the existence of the parties' contractual obligation to one another.

The Essentials of a Valid Contract

10-2 The essential elements in the formation of a valid and enforceable contract are as follows:

- An offer and an acceptance which are, in effect, the agreement;
- An intention to create legal relations;
- A requirement of written formalities in some cases;
- Consideration;
- Capacity to contract; and
- Genuineness of consent by the parties to the terms of the contract.

The contract may not be contrary to public policy.

Classification of Contracts

10-3 A void contract has no binding effect. A voidable contract is binding, but one party has the right at his option to set it aside.

An unenforceable contract is valid in all respects, except that it cannot be enforced in a court of law by one of the parties should the other refuse to carry out his obligations under it.

Executed and Executory Contracts

10-4 A contract is considered to be executed when both parties have performed their obligations.

A contract is considered to be executory when the obligations of one or both parties have not yet been carried out.

Formation of a Contract

In General

10-5 To demonstrate that a contract has come into existence, it is vital to establish that there has been an agreement between the parties. It must be shown that an offer was made by one party and was accepted by the other party,[1] hence, legal relations were intended.

Offer and Acceptance

10-6 An offer is an undertaking by the offeror that he will be bound in contract by the offer if there is a proper acceptance of it, provided that the offeree is aware

1 *N K Shiakolas (Merchants) Ltd v Andersons* (1978) 1 JSC 116; *EAC v Petrolina* (1971) 1 CLR 19; *Petrolina v Vassiliades* (1976) 2 JSC 398; *Evripidou v Demosthenous* (1971) 1 CLR 112; *Antoniou v Georgiou* (1969) 8 JSC 1066; *Antoni v Theoharides* (1969) 1 CLR 512; *Georgiades v Vasander Estates* (1986) 1 CLR 672.

of the offer. An offer may be made to a specific person or to any member of a group of persons and, in cases of an offer embracing a promise of an act designed to produce a unilateral contract, to the world at large.

However, a mere invitation to treat, a mere 'puff' or boast, a declaration of intention, and simply giving information are not offers in the sense described above. An offer does not continue indefinitely, and it can come to an end in one of the following ways:

- If the offeror revokes or withdraws his offer prior to acceptance, revocation being effective only if it is communicated to the offeree either expressly or by conduct;
- If the offeror fixes a time limit for accepting the offer, and such time passes;
- If either party dies before accepting the offer;
- If a counter offer is made;[2] and
- If there is failure to meet the conditions of an offer, thus leading to the lapse of the offer.[3]

Acceptance by making the contract also brings the offer to an end.

10-7 The acceptance takes place while the offer is still open. It must be an absolute and unqualified acceptance[4] of the offer with any terms that may be attached. Acceptance completes the contract and the place where the acceptance is made is considered to be the place of the contract. Acceptance may be made orally in the form of words spoken or in writing, or it may be implied by conduct in cases where the offeree performs at the offeror's request. Silence cannot amount to acceptance except where there is prior consent of the offeree.

The offeror may stipulate a method of acceptance and, if so, a contract will arise only if such method is followed by the offeree. However, the offeror could waive his rights to have the acceptance communicated to him in the specified way and agree to an alternative method. If a method of acceptance is stipulated, but it is not made clear that only one method will suffice, then a quicker or more expeditious method will be effective since there will be no prejudice to the offeror if his offer is accepted earlier or at the same time as it would have been had the stipulated method been followed.

If a method of acceptance has not been stipulated, the offeree may choose his own method, although acceptance by word of mouth is not adequate unless heard by the offeror.

The rule is that acceptance is only effective on communication, but there are exceptions. First, the offeror may dispense with communication and indicate that

2 A counter offer will operate as a rejection and, once the offeree has rejected an offer, he cannot go back on his rejection.
3 *Xenopoulos v Thomas Nelson* (1982) 1 CLR 674.
4 *Xenopoulos v Thomas Nelson* (1982) 1 CLR 674.

the offeree should, if he wishes, accept by carrying out his bargain without informing the offeror as in unilateral contracts, such as a promise to pay money in return for an act to be carried out by the offeree; performance of the act operates as an acceptance and no communication is required. Second, the 'posting rule' provides that acceptance is deemed complete immediately when the letter of acceptance, properly addressed and properly posted, is actually posted, even if it is delayed or is lost or destroyed in the post so that it never reaches the offeror.

The general rule is that an offer may be revoked at any time before it is accepted. Once the offer has been accepted, it cannot be withdrawn.

Even where offer and acceptance are complete, there may still be no agreement and no contract at all, if it cannot be said what the parties have agreed because the terms are too uncertain. This will arise in cases where the parties have left essential terms to be settled between them.

Consideration

10-8 Consideration,[5] essential to the formation of any contract, was defined in the English case of *Currie v Misa*[6] to be 'some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other'. Paying (or promising to pay) money in return for the supply of goods or services constitutes the most common form of consideration.

Consideration need not be adequate, but it must have some value, however, slight.[7] The courts will not concern themselves with whether or not the value is adequate, for the value of a particular article or service is a matter of opinion and for the parties to the contract to decide. The price paid may be relevant in determining whether goods correspond to their price, but this does not directly affect the existence of the contract; a transaction of this kind could raise a suspicion of fraud, duress, or undue influence on the part of the person gaining the advantage.

Consideration must be sufficient. Sufficiency of consideration is not the same as adequacy of consideration. Sufficiency of consideration involves the issue whether the act in question amounts to consideration. This arises in cases where the consideration offered is an act which must be carried out.

If any consideration or any purpose of the contract is illegal, then the contract is void.[8] If the consideration constitutes fraud or is of such a nature that if permitted it would be contrary to the provisions of any law, cause damage to any person or property, or is contrary to public policy, it renders the contract void.

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5 *Photiades v General Insurance* (1965) 1 CLR 188; *Raif v Dernish* (1971) 1 CLR 158; *Pantelides v Salamis Holdings* (1976) 5 JSC 833; *Nicolaou v Kile* (1982) 2 JSC 260; *Georgiou v Kleanthous* (1977) 1 JSC 86.

6 *Currie v Misa* (1875) LR 10 Ex 153.

7 *Panayiotou v Solomou* (1979) 1 CLR 779.

8 *Iosifakis and Three Others v Ghani* (1967) 1 CLR 190.

Past consideration is applicable and accepted under the Cypriot contract law.[9] The rule on past consideration provides that a promise in return for acts which have already been performed prior to the promise made is generally unenforceable because the consideration provided is past, according to the English law of contract. As a general rule, according to the English law, if two parties have already entered into a binding agreement and one of them subsequently promises to confer an additional benefit on the other party, that promise is not binding due to the fact that the promisee's consideration which is his entry to the original contract is past.

Cypriot contract law treats the rule on past consideration somewhat differently to the English. Section 25(b) of the Contract Law[10] provides that an agreement made without consideration is void unless 'it is a promise to compensate wholly or in part a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do'.

Hence, Cypriot contract law recognises an act done in the past to be adequate consideration for a promise made by the promisor. It is further recognised and upheld that an individual who abandons his right to litigate provides good consideration in law due to the fact that what is abandoned is not his ultimate right or claim but his right to have the assistance of a court to determine such a claim and if the same is held good, to have it enforced.

Mistake

10-9 A common mistake renders the contract void for a mistake where the parties have made an agreement relating to a fundamental fact essential to the contract. The circumstances giving rise to the mistake must exist at the time when the contract was entered into by the parties. A mutual mistake relates to a situation where the mistake is so fundamental that it consequently means that there was no agreement between the parties. A mutual mistake as to the identity of the subject matter will render the contract void.

An error relating to its value does not constitute a mistake of a fundamental fact and does not render the contract void. A contract is not voidable because it was entered into due to a mistake in relation to any law of Cyprus; however, a mistake about any law which is not in force in Cyprus constitutes a mistake of a fundamental fact essential to the contract as above and renders the contract void.

A contract is not voidable due to the fact that it was entered into between parties and one of them was mistaken in relation to a fundamental fact.

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9 *Raif v Dervish* (1971) 1 CLR 158; *Pantelides v Salamis* (1976) 5 JSC 833; *Romanos v Chrysanthou*, Civil Appeal 7664, 12 November 1991.

10 Contract Law, Cap 149.

Misrepresentation

10-10 Prior to the conclusion of a contract, both parties may exchange oral representations which will persuade the other party to proceed to conclude the contract. These representations could induce a party to enter into the contract; if any such statement is false, this constitutes a misrepresentation.

A misrepresentation[11] can be defined as a false statement of fact, not of law or opinion, made by a party to a contract before the conclusion of the contract which induces the creation of the contract, ie, without the statement there would probably be no contract. A misrepresentation includes:

- The positive affirmation of a fact which is not justified from the information of the person who affirms an untrue fact despite the fact that he believes that it is true;
- Any breach of a duty, benefiting the person performing it even although he has no intention to deceive, which results in damage to another or any other person claiming through him; and
- The cause of a mistake, even if it is made unintentionally, relating to the substance of the object of the agreement.

10-11 'Inducement of a contract' means that:

- The statement must be made with the intention that it should be acted on by the person who relied on it;
- The representation induced the contract and the person misled by it did not rely on his own skill and judgment;
- The representation was so material that it affected the judgment of the person misled; and
- The alleged misrepresentation was known to the person misled.

10-12 Remedies for misrepresentation are the rescission of the contract, the refusal of the injured party to comply with his obligations under the contract by raising the principle of misrepresentation as a defence to an action for specific performance or damages, and/or an action claiming damages.

Rescission releases the aggrieved party from performing his part of the contract and carrying out his future obligations and the party in default from performing his future obligations. Even so, the remedy of rescission does not excuse the liability of the party in default to pay damages if his failure to perform the contract constituted a breach.

Rescission starts from the time when the misled party informs the other party of his intention to repudiate the contract or acts likewise. However, an injured party may lose his right to rescind the contract if he affirms it. Affirmation of a contract is made if the injured party, with full knowledge of the misrepresentation, expressly affirms the contract by stating his intention to proceed with it or does an act

11 *Morfiti v Vassiliades* (1981) 1 JSC 134.

impliedly expressing his intention to proceed. Lapse of time or delay in seeking a remedy can be considered as affirmation and can defeat an action for rescission.[12]

Damages are usually awarded in lieu of rescission and cannot be awarded unless the party seeking them would have been entitled to rescind. If a bar to rescission exists, that party will not be entitled to damages either.

Duress and Undue Influence

10-13 The principle of duress[13] involves actual violence or threats of violence to the person of the contracting party or those near to him. The threat must be considered to produce fear of loss of life or bodily harm. The threat must be illegal in that it must be a threat to commit a crime or tort. According to the Cypriot law on contract, and contrary to the English law, illegal withholding of, or a threat to withhold, property or any asset of the contracting party intending to damage any person constitutes duress.

A contract which is induced by duress is voidable, not void. The remedy which an aggrieved party will seek in such a case is to escape from the agreement entered into as a result of the duress exercised on him, ie, the remedy of rescission. As is stated above in the doctrine of misrepresentation, rescission may be lost through lapse of time, impossibility of restitution, or the intervention of third party rights.

For a contracting party to establish that the contract was entered into because of undue influence,[14] he must prove that this was not the result of improper threats but of influence by the other party, intentional or not. The doctrine of undue influence is a doctrine of equity. It aims to deal with contracts or gifts obtained without free consent by the influence of one mind over another.

Equity intends to relieve those persons who enter into an agreement after pressure has been exercised on them which does not fall within the Common Law definition of duress. Equity also has assisted in cases where no undue influence was necessarily exercised, but it was enough that the relationship between the parties was such that one of them was able to take unfair advantage of the other. If a confidential or fiduciary relationship exists between the parties, eg, the relationship between spouses, the party in whom the confidence was placed must show that he did not exercise undue influence over the act and that the contract was the act of a free and independent mind.

Undue influence renders the contract voidable and, therefore, it can be rescinded. However, since rescission is an equitable remedy, there may be no delay in claiming relief after the influence has ceased to have effect. Delay would bar the claim since it would be evidence of affirmation.

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12 Evangelou, 'The Loss of the Right to Reject Goods under the Legislation of the Sale of Goods' (1991) *Cyprus Law Review* 5529.

13 *Sidiropoulos v The Ship Panagia Myrtidiotissa* (1987) 1 CLR 564.

14 *Koudounari v Winnifred Koudounaris* (1980) 1 CLR 581; *Cyprus Development Bank v Kyriakou* (1989) 1 CLR 96.

Capacity

In General

10-14 To create a valid, enforceable, and binding contract, the contracting parties must have capacity in law to contract. It is the general rule that everyone is fully capable of entering into contracts and these contracts are enforceable against and by them.

However, some groups of persons and corporations or unincorporated groups have certain disabilities in this regard.

Infants and Persons of Unsound Mind

10-15 According to the English contract law, whose provisions are very similar to the Cypriot contract law, people who have not reached the age of 18 years are considered to be minors with limited capacity to enter into contracts.

This is done to protect minors from the consequences of their actions. Consequently, the law will sometimes penalise those with whom minors contract. Lack of knowledge of a minor's age does not affect the enforceability of a contract. It is a presumption that minors' contracts are either voidable or void.[15]

The first exception relates to contracts for necessaries, which are enforceable. Necessaries are defined as 'goods suitable to the condition in life of the infant and to his actual requirements at the time of sale and delivery'. The test which must be satisfied for necessaries is that of utility and, in this respect, the minor's situation in life together with the supply of such goods which he already has.

Food, clothes, lodging, and similar things are considered to be necessary; educational books, medical attention, and legal advice are classed as necessaries. The rule of necessaries relating to the purchase of goods applies also to the purchase of services. The reasoning behind this rule lies in the fact that, if such a contract is unenforceable, this would act to the minor's disadvantage. People would avoid entering into any transactions with minors and the latter would not be able to obtain all the necessities of their everyday life.

The second exception to the rule of minors' contracts relates to contracts which are for the minor's benefit, and they are valid and enforceable. Contracts for the minor's benefit include contracts of employment, of apprenticeship, of service, and for education; any others related to these also are considered to be enforceable contracts against the minor. However, if a contract is for the minor's benefit but its terms are onerous, the contract will not be enforced.

Trading contracts by minors are not enforceable, no matter how beneficial they could be to the minor's trade or business. A trading purpose under these

15 *Vartholomeou v Kannaourou* (1978) 1 CLR 221; *Mirianthousis v Petrou* (1956) 21 CLR 32; *Papadopoulou v Polykarpou* (1968) 1 CLR 352; *Spyrou v Zapiti* (1976) 10 JSC 1552.

circumstances is one in which the minor buys or sells goods as a dealer or supplies a service and where the minor's capital is at risk. Such a contract may be binding if it is regarded as analogous to a contract of service.

When a minor has paid money under a void or voidable contract, although he can repudiate it and disclaim all future liability, he cannot recover any money unless he can prove a total failure of consideration, ie, that he did not receive any benefit at all under the contract.

Despite the fact that minors' contracts other than those for necessaries are void, the minor can still give a good title to a third party who acquires goods which have been bought by the minor, provided that the third party takes *bona fide* and for value. The contracting party with the minor in the first contract (ie, the tradesman) cannot recover anything from the third party.

Any action by a minor is brought by his 'next friend', who is an adult liable for the costs awarded against the minor in the action. He defends an action brought against him by a guardian *ad litem*, and this person is not liable for costs.

Contracts made by persons of unsound mind[16] are valid but, if the other party knew that he was contracting with a person who, by reason of the unsoundness of his mind, could not understand the nature of the contract, then the contract is voidable at the option of the insane person. A person of unsound mind can make a valid contract during a lucid interval, even although the other party knew that he was of unsound mind at times. A contract made during a period of unsoundness of mind can be ratified during a lucid interval.

Corporations and Unincorporated Associations

10-16 According to the Cypriot Companies Law,[17] contracts on behalf of a company may be made as follows:

- A contract, which if made between private persons would be required by law to be in writing and, if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company;
- A contract, which if made between private persons would be required by law to be in writing and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied; and
- A contract, which if made between private persons would be valid by law although made by parol only, and not reduced into writing, may be made by parole on behalf of the company by any person acting under its authority, express or implied.

16 *Charalambous v Krystallis* (1984) 1 CLR 656.
17 Companies Law, Cap 113.

10-17 Any contract entered into in the manner described above binds the company and its successors and other parties thereto.

Terms of the Contract

In General

10-18 Despite the fact that a contract entered into by the parties may be valid, it is still essential to identify the parties' obligations under the contract to be able to say whether each has performed or not performed his part of the agreement. To determine this, what was said or written by the parties must be established. When this is done, it is necessary to decide whether the statements were mere inducements (or representations) or terms of the contract itself.

The importance of the latter statement lies in the distinction between representations and terms and the remedies involved in each case. If a statement constitutes a promise which forms part of a contract, then the person in breach of the contract will be liable for such a breach and the plaintiff will be entitled to damages which will compensate for the profits that may have been lost as a result of the broken promise.

However, a statement which is not a term and turns out to be untrue can still attribute liability and render the plaintiff eligible for remedies for such a breach. If, however, there were statements made prior to the contract and there is a dispute as to whether they were intended to be part of the contract, the courts will try to determine the parties' intentions in this respect.

There is no need for a contract to be put into writing. If, however, the parties have committed their contract to writing, the courts will be reluctant to interfere and find that it does not contain all the terms essential to either party of the contract. If a written contract was duly signed, the party who has done so will find it impossible to avoid the consequences of its express stipulations.

The principle of 'parol evidence rule' will not apply in this case, as the courts will be reluctant to accept oral evidence which would add to the terms of a complete, as it appears, written contract. This is not an absolute rule and the courts may accept such evidence if it is shown that the term which was not included was of the utmost importance.

The court, in deciding whether an oral pre-contractual statement should be treated as a contractual term, will take into account any imbalance of skill and knowledge between the contracting parties. Expertise by the defendant in relation to the subject matter of the contract will favour the position that the statement was part of the contract.

The court will treat a statement as a term of the contract provided that it was made closely in time to the conclusion of the contract. If a long delay changed the circumstances of the contract and the statement is no longer necessary to the conclusion of the contract, such a statement will not form part of the contract.

If the delay was caused by matters irrelevant to the statement and the plaintiff accepted no difference in the circumstances of the contract, there is no need to re-state it at the time of the contract.

It can be concluded that, in general, statements as described above may not be part of the contents of the contract and the remedies available to the aggrieved party will be decided only by considering the consequences of whether a statement is part of the contract or not. The remedies involve actions for misrepresentation, breach of a collateral contract, and the tort of negligent misstatement.

Express Terms

10-19 Express terms of the contract are terms which have been stated by either party as terms of the agreement. Disputes may arise as to whether such a clause was incorporated into the contract, as to its proper construction, and as to the consequences of its breach. The approach of the courts is once more very careful in attempting to identify the parties' intentions.

Even where there is no dispute as to whether a clause was incorporated into the contract, the parties may still disagree on their intention as to the meaning of the same. The courts will try to solve the dispute objectively, but it is always a hard task to assess and interpret the parties' intentions and the meanings of their statements.

Provided the contract is in a written form, parol evidence will not apply and no oral evidence can be put before the court relating to oral statements. Such evidence is admissible only to show or to establish local custom or a trade as to the meaning of a specified statement.

The court, having concluded that a particular statement is a term of the contract and not a mere inducement, must consider the importance of that statement in the general context of the contract. Such a statement is recognised only by the remedy available if it is being breached by the party obliged to perform his part of the agreement according to this term.

A condition is a vital term which goes to the root of the contract, so that in case of a breach the aggrieved party can repudiate the contract, but he may decide to carry on with the performance of the contract and only claim damages. Damages will be the sole remedy available for breach of a condition if the plaintiff has affirmed the contract after knowledge of a breach of a condition. He may do so expressly, or by lapse of time.

A warranty[18] is an obligation which, although it must be performed, failure to do so will not go to the substance of the contract. The aggrieved party will only be entitled to damages and will not be entitled to reject the goods.[19]

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18 *Lambrias v Chrysos & Co Ltd*, Civil Appeal 7730, 18 February 1992.

19 Evangelou, 'The Loss of the Right to Reject Goods under the Legislation of Sale of Goods' (1991), *Cyprus Law Review* 5529.

Whether a term is a condition or a warranty can usually be determined from the intentions of the parties and from the circumstances of the case. However, mere description of a term as a condition or a warranty does not bind the court to accept and rule that the same is such a term.

There is a third type of term, the intermediate or innominate term, and these are terms which the parties may have called conditions or warranties. The effect of these on the contract depends on how serious the breach has proved to be. If the breach was a serious one, the court will treat the term as a condition. If the breach was not so serious, the court will treat it as a breach of a warranty and the parties must proceed with the contract. The aggrieved party's claim is for damages in the latter case.

Implied Terms

10-20 There are cases where the parties to an agreement may wish to sue despite the fact that a particular claim has not been set out explicitly, either in words or writing, but it can be implied into the contract. Terms can be implied by the court, by custom, in fact, and by law.

The courts generally appear to be reluctant to imply terms.[20] The parties are expected to outline the provisions of their agreement in full. Cases where, in a contract, certain terms are implicit leave wide areas for dispute, and the courts are not willing to encourage parties to try to escape from their contractual obligations by relying on a term which was not stated but appears to be of great significance.

However, there are certain situations where the court's reluctance to imply terms is overcome. Such is the case of the implication of a term deriving from a local custom.

The courts will be prepared to establish the custom and interpret the contract in the light of the same provided that there is adequate evidence to do so. The issue in the implied custom term is one of fact, ie, if it was the case for a long time, depending on the circumstances surrounding the contract. The party wishing to rely on the custom must produce convincing factual evidence that such a custom exists and is generally accepted, for the courts to accept and imply a term of such a kind by giving effect to it. If, however, an express term exists in the contract which is inconsistent with the custom term, the express term will prevail over the custom.

Implied terms involve another area in which the courts may be requested to determine such a term. In this case, the courts must determine the true intention of the parties. Such an implication will only occur if the courts are convinced that the

20 *Saab and Another v Holy Monastery Ayios Neophytos* (1982) 1 CLR 499; *GIP Constructions v Assiotis* (1982) 1 CLR 535; *Constantinides v Mavrogenis* (1983) 1 CLR 662; *Bowman v The Ship Cutter* (1988) 1 CLR 337; *Pontikopoulou v Christis* (1985) 1 CLR 14.

term represents the true intention of the parties on a particular issue. The term here is implied in fact depending on what the parties agreed.

The difference between terms implied in fact and by law is that the first category involves deciding what the parties themselves would actually have agreed to put into the contract had they considered the issue. Terms implied by law, however, do not depend on ascertaining the parties' intention. Here, the courts will impose on the parties the actual term independently of whether or not they had agreed on it. Before such a term is implied and imposed by the courts, two requirements must be met, namely:

- The contract must be of a sufficiently common kind to be able to identify the typical obligations of such a contract; and
- The matter to which the implied term refers is one that the parties did not touch on in their contract.

Inequality of Bargaining Power

10-21 It is the normal assumption that parties to a contract have agreed and freely negotiated the terms of their bargain. This is not always the case, especially where one party is in a stronger economic position than another.

Inequality in the bargaining power between parties arises where one of the parties enjoys a monopoly position. If a person decides to transact business with a monopolist to acquire goods or services supplied by the latter, he cannot really negotiate any favourable terms for himself. He must either accept the terms of the monopolist or abstain from contracting at all. This situation also is met where there are only a few suppliers and a party is forced to enter into a contract with them under unfavourable terms.

The court in such a situation will interfere to interpret the contract, and any terms arising thereof, usually against the stronger party because the latter would be in a better position to impose harsh terms which would be accepted by the other party. Furthermore, the stronger party will not lose so much from a contractual breach in comparison with the weaker party, bearing in mind his power advantage as well as his experience in similar contracts.

Exclusion Clauses

10-22 Contracts sometimes contain certain express terms under which one or more of the parties excludes or limits their liability for breach of the contract. The exclusion can be total or may limit the party's liability to a specified sum of money. It appears that the courts have been reluctant to permit exclusion clauses which have been imposed on a weaker party by a stronger party, in accordance with the principle above. Judges, in an attempt to protect the ordinary consumer against the effect of such exclusion clauses, have decided that the clause never became part of the contract and have construed the contract in such a way as to prevent the application of the clause.

An exclusion clause[21] cannot be effective and exclude liability by any party unless the court is satisfied that the other party agreed to it at or before the time when the contract was entered into; otherwise, it will not be considered as part of the contract.

The party who agrees on the exclusion clause must have reasonable notice of its existence. Reasonable notice will apply if the clause was presented as part of a set of standard terms and the other party had his attention drawn to the clause at the time of the making of the contract. If the aggrieved party has signed the contract without noticing the exclusion clause, then the clause will be considered as part of the contract and the courts will be able to do nothing to protect the other party.

A contract can be said to contain an exclusion clause if it is put forward at the time of the contract and not after. If the latter is the case, the clause is not incorporated in the contract because all the terms of the contract must be agreed at the time of the acceptance.

If an exclusion clause has been communicated and become part of the contract, the party who wants to rely on the same must prove that the breach and the loss are covered by the clause or otherwise fall within its scope. Certain rules of construction exist which prevent the application of an exclusion clause by cutting down its scope. The most important rules of construction are the following.

Under the *contra preferentem* rule,[22] the courts, in case of ambiguity or doubt about the meaning of an exclusion clause, will construe it in a way unfavourable to the party who inserted the clause in the contract. This is done to protect the aggrieved party who suffered from the breach, and it does not exclude or limit the liability of the other party in breach.[23]

Contrary to the principle of exclusion clauses, the so-called doctrine of fundamental breach[24] provides that some breaches of contract are so serious that they cannot be overcome by the existence of any exclusion clause. This doctrine is divided into two forms, namely:

- A breach of a fundamental term where a specified term of the contract is so fundamental that there cannot be any exclusion for a breach of the same; and
- A fundamental breach where the breach which occurs or its effects are so serious that, consequently, it destroys the whole contract and there can be no exclusion of liability.

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21 *Kokkalos v Karayiannis* (1976) 11 JSC 1630; *Photo Staff v Geadis* (1980) 2 JSC 366; *Andreou v Hamalis* (1980) 1 JSC 218; *Demetriou v Attorney General* (1982) 2 JSC 381; *Antoniou v National Bank of Greece* (1981) 1 JSC 17.

22 *Ch Stavrakis Ltd v Zim Israel Navigation*, Adm Action Number 214/87, 29 November 1991.

23 *Saab and Another v Holy Monastery Ayios Neophytos* (1982) 1 CLR 499; *Kypio v Kassap* (1980) 2 JSC 259; *Samourides v Hadjicostas* (1982) 1 CLR 735; *Edco v Lartico* (1978) 1 CLR 201; *GIP Constructions v Assiotis* (1982) 1 CLR 535.

24 *Melaisi v Georgiki Eteria* (1979) 1 CLR 748; *Photiou Bros v Autolifts* (1984) 1 CLR 422; *Shiacolas v Michaelides* (1967) 1 CLR 290; *Bower v Erodotou*, Civil Appeal Number 8015, 27 April 1994.

10-23 The Unfair Contract Terms Law 93 of 1996 represents a major attempt to regulate the use of exclusion clauses in Cyprus. It cannot claim to be a wholly satisfactory piece of legislation. The main difficulty lies in identifying the essential nature of an exclusion clause. Does it define the nature of the contractual obligation or is it a defence to a breach of an obligation? The courts have traditionally seen exclusion clauses in defensive terms.

Illegality

In General

10-24 The courts will intervene where the element of illegality exists in a contract to prevent the enforcement of such an agreement even if, on its face, it has all the characteristics of a binding contract.[25] As a general rule, the courts will not enforce a contract which is illegal or contrary to public policy; nor will a party be permitted to recover benefits which accrued under an illegal contract.

Section 10(1) of the Cypriot Contract Law provides that all agreements are contracts enforceable by law if they are made with the free consent of parties who are competent to enter into such agreements, for a lawful consideration and with a lawful object and are not expressly declared to be void. Section 23 of the Law provides that the consideration or the object of an agreement will be lawful unless the same is forbidden by law or is of such a kind that it would defeat the provisions of any law if permitted. Illegality can affect a contract in two ways, namely:

- Illegality relating to the formation of the contract so that the contract is illegal at the moment of its creation and such a contract is illegal *ab initio* because it is infected by illegality from the beginning; and
- Illegality in the performance of an otherwise valid and enforceable contract, meaning that the contract is valid at the time of formation but is rendered void when it is affected by the occurrence of illegality during its performance.

10-25 English commentators distinguish between statutory illegality and illegality under Common Law.

Statutory Illegality

10-26 A contract is illegal if its formation is expressly or impliedly prohibited by statute. Where the statute expressly prohibits the formation of a contract, the courts

25 *Panayi v Artemiou* (1976) 3 JSC 510; *Xenophontos v Valentini* (1974) 4 JSC 578; *Mavromoustakis v Yeroudes* (1965) 1 CLR 176; *Demades & Sons v Kaoullas* (1972) 3 JSC 270; *Kanaris v Tosoun* (1969) 1 CLR 637; *Iosifakis v Ghani* (1967) 1 CLR 190; *Tornari v Savva* (1974) 3 JSC 389; *Stavrou v Vasiliou* (1973) 8 JSC 1019; *Cyprus Import Corp v Kaisi* (1974) 12 JSC 1234; *Petrou v Petrou* (1978) 1 CLR 257; *Panayiotou v Solomou* (1979) 1 CLR 779; *Mosfiloti v Panagi* (1979) 2 JSC 384; *Platritis v Computer Patent Annuities* (1988) 1 CLR 135.

easily infer that the contract is illegal. Difficulty may arise where the courts must interpret the statute to decide whether a contract is illegal if the statute impliedly prohibits the creation of such a contract.

It is provided by statute law that all contracts or agreements, whether oral or in writing, by way of gaming or wagering are null and void, and no action can be legally pursued in any court to recover any money won by gaming or wagering.

Illegality under Common Law

In General

10-27 A contract may be illegal at Common Law if it is contrary to public policy. Such contracts include contracts which are contrary to public morals or prejudicial to family life, contracts to commit a crime or a civil wrong, contracts which are prejudicial to the administration of justice or to public relations, and contracts in unreasonable restraint of trade.

Contracts Contrary to Public Morals

10-28 A contract purporting to promote sexual immorality is illegal on the ground that it is contrary to public policy.

Hence, a contract to supply goods to a prostitute to be used by her in exercising her profession will be held invalid, as will a promise made by a man to pay a woman if she becomes his mistress; such contracts are illegal and thus unenforceable.

Contracts Prejudicial to Family Life

10-29 A contract which is prejudicial to marriage also is contrary to public policy.

Hence, a contract which restrains an individual from getting married and a marriage contract entered into on a promise to pay a certain amount of money are both unenforceable.

Contracts to Commit a Crime or Civil Wrong

10-30 A contract to commit a certain crime will be held unenforceable as contrary to public policy. It also is illegal if it is agreed that monies will be paid to an individual for the commission of an unlawful act.

A contract to commit a tort is illegal, but it will not be treated as such where neither party was aware that the performance of the contract involved the commission of the tort.

Contracts Prejudicial to the Administration of Justice

10-31 Contracts prejudicial to the administration of justice relate to a promise to give false evidence in criminal proceedings as well as the obstruction of bankruptcy proceedings.

An agreement to oust the jurisdiction of the courts by stating that a contracting party is not legally entitled to bring proceedings in the event of a dispute arising between the parties will be unenforceable.

Contracts Prejudicial to Foreign Relations

10-32 Contracts which are prejudicial to relations between foreign friendly countries are held to be contrary to public policy and unenforceable.

Thus, a contract to assist in the overthrow of a government will be held void as will a contract to further or promote corruption in public life.

Contracts in Unreasonable Restraint of Trade

10-33 A clause or a covenant in restraint of trade whereby a party agrees to restrict his freedom to trade or to conduct his profession or business in a particular locality for a specified period of time, if shown to be unreasonable, will be held to be void and unenforceable.

In this category of contract, there are two types. The first is a covenant by an employee not to compete with his employer either during or after the termination of his employment, and the second is a covenant by the seller of a business and its goodwill not to carry on a business which will compete with the business of the purchaser.

Assignment

10-34 Assignment of a debt does not exist as an express provision in the Contract Law. Guidance on such an issue should be sought in the English law which regulates assignment. This is the Law of Property Act 1925, which is not applicable in Cyprus. The Cypriot courts examine this kind of issue on the principles of equity which were applicable before the enactment of the statute in England.

A debt owed by a defendant to a party who assigns the debt to the plaintiff is a legal chose in action, and there can be an equitable assignment of such a legal chose in action. Such an assignment of the debt does not need to be in any particular form due to the fact that equity will examine the intention of the parties, not the form used. An equitable assignment of a debt is considered to be complete even if no notice was given to the debtor affected by the assignment.[26]

26 *Chrysostomou v Halkousi & Sons* (1976) 1 CLR 10.

Privity of Contract

10-35 The doctrine of privity of contract[27] provides that only those who are parties to a contract can have rights or liabilities under it, not third parties. Thus, if a contract is entered into between A and B, requiring B to benefit C, the rule of privity of contract prevents C from suing B. However, A can sue B for breach of contract and the court can award C damages or make an order for specific performance by B in favour of C. Even if C is a party to the contract between A and B, C will not be able to sue B unless some consideration is given by C. Hence, this doctrine involves consideration coming from the promisee.

Nevertheless, there are cases in which an individual is allowed to sue on a contract to which he is not a party, and these are the following:

- A principal, even if he is not a disclosed principal, may sue on a contract made by his agent;
- The assignee of a debt or a chose in action, may, if the assignment is a legal assignment, sue the original debtor; and
- The holder for value of a bill of exchange can sue prior parties and the acceptor.

Novation

10-36 Under the principle of novation,[28] the parties to a contract who agree to substitute a new contract for it, or to rescind or alter it, do not need to perform their original contract.

Novation provides that a contract may be brought into existence either between the same parties or between different parties, the consideration being the discharge of the old contract. Novation of the contract consists of the discharge of a debt and the replacement of the same by a new one. Novation was introduced by section 62 of the Contracts Law, which is identical to section 62 of the Indian Contract Act 1872 and is brought into effect either by the introduction of new parties or by an alteration between the same parties with the introduction of new terms to the contract. Novation also can be effected by the parties' conduct.[29]

In contrast to the Cypriot contract law and the Indian contract law, the English law, when using the term 'novation', refers to agreements which only introduce a new party; it does not apply to the substitution of a new agreement or the variation of particular terms in an existing agreement between the same parties.

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27 *Hadjikyriakou v Fina* (1978) 2 JSC 321; *Protopapas v Zina Gunther* (1974) 10 JSC 981.

28 *Hellenic Bank v Polydorides*, Civil Appeals Number 7535-3, 22 February 1993; *Bank of Cyprus and Others v Coudounaris Food Products Ltd and Others*, Civil Appeal Number 8688, 23 June 1995.

29 *Cyprus Agriculture & Transport Co Ltd v Attorney General* (1971) 1 CLR 267.

Where, in a case of novation, there is an attempt to prove a variation not by an express agreement, but by a course of conduct, it must be shown that the variation was intended and understood by both parties. The substituted contract must be a valid and enforceable contract to effect a novation.

Discharge

In General

10-37 A contract may be discharged in one of four ways, ie, by:

- Performance;
- Agreement;
- Frustration; and
- Breach.

10-38 If one of these takes place, a party is discharged from his contractual obligations and he must no longer perform them.

Discharge by Performance

10-39 A contract is discharged by performance when both parties have fulfilled their obligations under the contract. The court may be in a position to construe a contract in such a way that the manner of performance complies with the terms of the contract.[30]

The mode of performance is a question of construction. If the contract does not specify the place of performance, then the place depends on the implied intention of the parties which will be concluded from the nature and all the surrounding circumstances of the contract.

In some contracts, certain promises may be made conditional on the occurrence of a certain event. The contract may require that notice of the occurrence must be given to the other party by the promisor but, if no such provision exists, the general rule is that, if this is not known to the party other than the promisor, no notice is necessary.

The general rule, however, is that a party to a contract does not need to request or demand performance, and the promisor must fulfil his contract without being requested to do so. Such a request is necessary only if there is an express stipulation in the contract for a request or the nature of the contract shows an implied condition precedent requiring a request.

It is the position in Common Law that, in the absence of a contrary term or agreement contained in the contract, performance of the contract is required at the

30 *Kranidiotis v Apehi* (1977) 9-10 JSC 1716; *Hadjiantoni v Matsisi* (1979) 1 CLR 260; *Savvidou v Christou* (1982) 2 JSC 436; *Michalakis v Georgiou* (1973) 8 JSC 1039.

exact date in accordance with the parties' agreement in the contract. If no performance is carried out within the time specified in the contract, the aggrieved party will have a claim for breach of contract for not completing the performance on the fixed date, since time was of the essence.

The position in equity is different where time is of the essence in only three cases, ie, where:

- The parties have indicated a time for performance in the contract and have further specified that this time is in its nature a condition;
- Time was not initially of the essence but has been made so by the aggrieved party giving notice to this effect; and
- From the circumstances of the case, it appears that the contract must be performed by the agreed date.

10-40 If no precise time for performance is stipulated and the performance of a contract depends entirely on a party or merely provides that the contract is to be performed, the law implies an undertaking that it will be performed within a reasonable time, taking into consideration all the circumstances and the facts of the case.[31]

Discharge by Agreement

10-41 The parties to the contract can agree to abandon or to discharge their contract. An agreement to discharge a contract must be supported by consideration. Where performance is not completed by either party to the contract, the consideration required can be found in the fact that the parties give up their rights to compel each other to perform, and the giving up of such performance is regarded as the consideration.

Where, however, one of the parties has performed his part of the contract, then an agreement to abandon the contract will not be supported by such consideration as above and it will be unenforceable unless the party who has performed his obligations is prevented or estopped from going back to his representations that he will not enforce or he has waived his rights under that contract.

Sometimes, a contract may include a provision which itself provides for its own discharge. It could make the completion of the contract a condition precedent, a warranty, or a condition subsequent.

Discharge by Frustration

10-42 A contract is said to be discharged by frustration[32] if, as a result of events outside the control of the parties, it becomes impossible to perform. Such an

31 *Protopapas v Zina Ganther* (1974) 10 JSC 981.
32 *Cyprus Cinema & Theatre v Karmiotis* (1967) 1 CLR 42.

agreement could be impossible to perform from the outset, ie, there is no contract, or it could be the case that the parties made a contract which was capable of performance at the beginning but, subsequently, became impossible to carry out wholly or in part. In these cases, what would be the position of the parties, ie, what would be their rights and liabilities?

The position, as it appears now under the doctrine of frustration, is that if performance of a contract was possible at the time of making it, subsequent impossibility may discharge it. According to the various cases relating to this matter, the following categories have been recognised by the courts as amounting to frustration of the contract:

- Destruction of the subject matter — A contract is void for mistake if the subject matter is destroyed prior to the formation of a contract. If the subject matter is destroyed at a later stage, this will fall under the doctrine of frustration.
- Personal services — If an individual has agreed to provide services prior to an agreement with another party, the subsequent incapacity of that individual to perform the services will frustrate the contract, unless a substitute likely to be satisfactory is found.[33]
- Non-occurrence of an event — If the parties' agreement depends on the occurrence of a certain event which does not take place, the contract will be considered as being frustrated.[34]
- Governmental interference — This category is similar to the category of non-occurrence of events, but it might be that the event could not occur due to the intervention of the government, thus rendering the contract frustrated.[35]
- Supervening illegality — If the purpose of the contract at the time of its making was legal but became illegal, the contract would be frustrated.[36]

The doctrine of frustration will not apply if one of the following is present:

- The parties have made an express provision for the event which occurred; or
- Either party caused the frustrating event (self-induced frustration).

10-43 The first case above is self-explanatory. If the parties have expressly agreed in their contract that, if such an event occurs, the contract is frustrated, then this will be the case.

If the behaviour of one of the parties does not amount to a breach of the contract, but causes the circumstances which frustrate the contract, this will create the situation of 'self-induced' frustration and will not discharge the contract. The difficulty in this case will be for the innocent party to prove which type of behaviour brought

33 *Katselli Michalakis v Georgiou* (1973) 8 JSC 1039.
34 *Cyprus Import Corp v Kaisis* (1974) 12 JSC 1234; *Courtis Omiros v Iasonides* (1973) 12 JSC 1656; *Leonidou v Kourris* (1977) 1 CLR 261.
35 *Xenophontos v Tyrimou* (1984) 1 CLR 23.
36 *Grivas v Heinami Distributors* (1963) 2 CLR 442.

about the frustrating circumstances. Furthermore, the exercise of any choice between contracts by one of the parties which contributes to the impossibility of the contract will prevent the doctrine of frustration from arising.

The difficulties mentioned above can be avoided prior to entering into the contract if the parties foresee a situation and include a *force majeure* clause. This clause is one which the parties insert in their contract to cover certain events outside their control which may affect the contract. The existence of such a clause covering the events which occur will prevent the contract from being frustrated.

The effect of the doctrine of frustration in Common Law is the immediate end of the contract. The ending of the contract due to a frustrating event is very different from the situation where a party can permit the contract to continue despite the existence of a default, such as a mistake or a breach of a contract term. The frustrating event in a contract brings it to an automatic end and discharges both parties from their obligations.

Nevertheless, frustration does not render a contract void *ab initio*; all the obligations arising from the contract prior to the frustrating event remain unaffected.

Discharge by Breach

In General

10-44 A breach of contract[37] may be treated as having discharged the contract, but it may sometimes provide the innocent party with a right to treat the contract as discharged. It is the general rule that a breach of contract gives the right to a cause of action, but such a breach does not necessarily discharge the contract.[38] For a party to maintain an action, he must show that he has sustained some damage.

A contract can be discharged under three circumstances, as follows:

- A party to the contract renounces his liabilities under it;
- An impossibility to perform is created by his act; and
- There is total or partial failure of performance.[39]

10-45 The aggrieved party may then treat the contract as continuing or may consider it as breached and pursue a claim for damages for his losses sustained as a consequence of the breach.[40]

The renunciation of the contract should take place either before or at the time for performance. If, before the time for performance, an intention to break the contract is expressed by one party or he acts in such a way that a reasonable person would

37 Demetriadou, 'The Recovery of Benefits Gained from a Breach of Contract' (1989), *Cyprus Law Tribune* 106.
38 *Beit v Papa and Another* (1971) 1 CLR 172.
39 *Christou v Pilia* (1975) 1 JSC 108.
40 *Rodoulli v Papasavvas* (1988) 1 CLR 540.

conclude that he does not intend to fulfil his part, this in itself entitles the other party either to treat the renunciation as a breach of contract and sue for damages or to wait until the time for performance arrives and then sue.

Anticipatory Breach

10-46 A renunciation of the contract that is a complete refusal to perform it by one party before the time for performance arrives does not amount, by itself, to a breach of contract, but a party may rely on it and treat such behaviour as a rescission of the contract, giving rise to a right of action.[41] Where a party is assumed, by anticipation of performance, to refuse to perform the contract, he is declaring his intention to rescind the contract;[42] the other party, relying on such a renunciation, may treat the contract as at an end except for the purposes of pursuing a claim in damages for the compensation of his loss.

However, the second anticipatory breach position is that, if a party acts in a way which shows that he does not intend to perform the contract and the other party does not accept such behaviour as terminating the contract and carries on without pursuing any claim for damages, but on the way to its completion performance of the contract becomes impossible, then the contract subsists at the risk of both parties and the anticipatory breach is ineffective.

Where the promisor by his act or omission renders performance of his contract impossible, he cannot rely on this and the other party can treat the contract as discharged. Impossibility of performance of a contract, in most cases, would mean renunciation of the contract, as it is easier to establish, and the aggrieved party need only show that the promisor's conduct was of such a nature as to lead a reasonable person to think that he did not intend to proceed with his promise.

If the innocent party decides to rely on the impossibility of performance of the contract, he must prove that the contract was in fact impossible to perform due to the promisor's default. In such a case, the aggrieved party can recover damages[43] for the losses sustained due to the impossibility of performance of the promisor's contractual obligations.

The courts are willing to imply the existence of a condition in any contract and, as a result, the promisor's liability will be discharged where he is prevented from performing his part of the contract due to the act or default of the promisee. Such a condition will not be implied if its implication and existence would be illegal, contrary to public policy, or *ultra vires*.

Failure of performance, whether total or partial, may allow the innocent party to treat the contract as discharged. For such a situation to arise, certain requirements

41 *Leniana Tourist Services v Karpasitis & Sons*, Civil Appeal Number 7743/30/1/1991.
42 *Beit v Papa and Another* (1971) 1 CLR 172; *Theodorou v Sekkeris* (1971) 1 CLR 337.
43 *Christodoulou v Sitarenou* (1979) 1 JSC 71.

must be met. It is necessary to identify the relation between the two promises of the parties which form the contract. Such promises are independent if one party's obligation is not conditional on the other party's performance, and they are considered to be dependent when the obligation of one party depends on the performance of the other.

Other Modes of Discharge

10-47 Other modes of discharge involve the death of a contracting party (if is a personal contract), bankruptcy, winding up, set-off, and counterclaim.

The Discharge of Joint Obligations

10-48 Joint liability of two or more parties is created when these parties jointly promise the same thing and everyone must comply with and perform their promises. Several liability is created when these parties make separate promises.

As a joint promise creates only one obligation, all the promisors must be joined as defendants in an action against them. An individual who is declared bankrupt, someone outside the jurisdiction, or an infant is considered to be an exception to the rule.

Discharge of joint obligations can be effected by performance, ie, by payment of a debt by any one of the debtors; the others will be immediately discharged from their obligations.

A judgment issued against one of several debtors will bar any further action against the others. If, however, a judgment is issued against one debtor in default of appearance or in default of defence, proceedings against the others will not cease.

Joint debtors have an obligation to each other. If one has paid more than his share of the debt, he can recover the excess from the others equally.[44]

Remedies for Breach of Contract

In General

10-49 A breach of a contract provides the aggrieved party with one or more of the following remedies:

- A right of action for damages;
- A right of action on a *quantum meruit*;
- A right to sue for specific performance or an injunction;
- A right to ask for rescission of the contract; and
- A refusal of further performance of the contract by the aggrieved party.

44 *Nicolaou v Nicolaou* (1978) 2 JSC 281.

Damages

In General

10-50 Every breach of a valid and enforceable contract provides the innocent party with a right to recover damages[45] in relation to the loss he has suffered as a result of the breach, unless the other party's liability for the breach was excluded by the existence of an exclusion clause in the contract. The right to an action for damages will arise provided that the term of the contract which is breached is a condition, a warranty, or an innominate term (see text, above).

Damages are the Common Law remedy which involves the payment of money intended to compensate for the plaintiff's loss and not to punish the defendant for the breach. The principle is that the breach of a contract should not put the plaintiff in a better position than if the contract had been properly performed. The purpose of the award of a remedy for a breach is to put the injured party in the same position as he would have been in had the contract been performed.

Within the principle of compensation damages can be calculated in terms of 'expectation', 'reliance', and 'restitution' interest. Expectation interest involves a plaintiff's expectations which, engendered by the promise of a defendant to perform his contractual obligations, have not been met; damages should compensate him for his expectations by putting him 'in as good a position as he would have been had the defendant performed his promise'.

Reliance interest involves actions of a plaintiff to his detriment, as a result of the defendant's promise to perform his contractual obligations, in entering into the contract and an award of damages to compensate him to the extent that he has relied to his detriment on the defendant's promise. The purpose here is 'to put the plaintiff in as good a position as he was in before the promise was made'. Restitution interest involves the plaintiff's desire to deprive the defendant of a gain made at his expense.

In regard to expectation interest, in general, a party who sustains loss due to a contractual breach is going to be placed in the same position as if the contract had been performed. The reasoning behind this approach lies in the fact that a binding promise creates in the promisee an expectation of performance, and the remedy awarded for the breach of such a promise tries to fulfil or protect that expectation. Two possible measures may put the plaintiff in the position he would have been in had the contract been performed. The first is the difference in value between what the plaintiff has acquired and what he expected to acquire; the second measure is the cost of putting the plaintiff in the position he would have been in had the contract been performed.

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45 *Photiades v Director of Ports* (1982) 1 CLR 249; *GIP Constructions v Assiotis* (1982) 1 CLR 535; *Saab and Another v The Holy Monastery Ayios Neophytos* (1982) 1 CLR 499; *Leonidou v Kourris* (1977) 1 CLR 310; *Philippou v Hoyle* (1982) 1 CLR 625; *Eliades v Adriatica* (1987) 1 CLR 523; *Xenophontos v Tyrimou* (1984) 1 CLR 23.

A plaintiff, by requesting the protection of reliance interest, is put in the position he would have been in had he not entered into a contract with the defendant. A plaintiff would have been awarded both gains and losses caused had the contract been performed to fulfil his expectation interest; the plaintiff would have been compensated for his loss and rewarded by making profit whereas reliance interest would be recovered if the plaintiff believed that the interest exceeded his expectation interest.

A party is not in a position to seek the protection of both expectation and restitution interest. A plaintiff can only receive a restitutionary remedy if he establishes that the defendant obtained a gain, and that gain was at the plaintiff's expense and that it is not fair that the defendant keeps the benefit without any compensation to the plaintiff.

A plaintiff can bring a claim for a restitutionary remedy, alleging that the basis on which he has conferred the benefit on the defendant has failed because of the latter's breach of contract. The plaintiff's argument is that the benefit was conferred on the defendant only for the performance of the contract and that the breach ought to restore the benefit to the plaintiff. Money paid to the defendant would only be recovered on proving total failure of consideration.

Furthermore, a plaintiff could argue that the defendant has obtained an unjust benefit in the form of a profit which would not have been earned under different circumstances. This argument differs from the first in that, in the failure of consideration, the defendant was enriched by receiving a benefit whereas, in the second, his benefit arises from his wrongdoing.

The court will award and assess damages as at the date of the breach of the contract. If the breach was not known to the plaintiff, damages will be assessed as at the date on which the plaintiff could, by exercising due diligence, have discovered the breach. In calculating all types of damages, the court will take into account whether the plaintiff took all reasonable steps to mitigate or minimise his losses.

Remoteness

10-51 A plaintiff's loss of expectation interest will not be completely protected where some of the loss suffered is too 'remote' a consequence of the defendant's breach of contract.[46]

This doctrine limits the right of the innocent party to recover damages which he would be entitled to receive under different circumstances. The plaintiff can only recover damages in respect of losses which were within the reasonable contemplation of the parties at the time of the entry into the contract.

46 *Sophocleous v Eleftheriou* (1979) 2 JSC 287.

Causation

10-52 A plaintiff will not be in a position to recover damages relating to loss suffered if he cannot establish a causal link[47] between his loss and the defendant's breach of contract. It is not essential that the defendant's breach is the only cause of loss, but it must be one which causes loss to the plaintiff.

Classification of Damages

10-53 Damages are classified as ordinary, general and special, exemplary, nominal, and liquidated and unliquidated.

Ordinary are the damages assessed by the court for losses arising naturally from the breach of contract.

General damages are those which the law presumes to be the result arising from the infringement of a legal right or duty. Special damages are those awarded for losses which do not arise naturally from the breach so that they will not be recoverable unless they are within the contemplation of the parties and they are the precise amount of the pecuniary loss.

Exemplary damages[48] are those awarded to punish the defendant. They aim to deter him or others from similar future conduct.

Nominal damages are awarded as a token sum to show that the plaintiff has sustained a breach of contract or an infringement of his right but that he has suffered no loss as a result thereof.

Liquidated damages are those agreed by the parties in the contract, and it is sufficient that a breach of contract is proved; no proof of loss is required.

Unliquidated damages arise where no damages are fixed by the contract, and the court is left to decide their amount. The plaintiff must produce evidence to prove his damages.

Specific Performance and Injunction

10-54 Both specific performance[49] and injunction are equitable remedies, and they are not available to a plaintiff as of right, as is the case with damages. They remain at the discretion of the court.

A decree of specific performance is an order of the court instructing a party to a contract to perform his actual contractual obligation. This remedy is often requested and made available in cases which concern land because such contracts are unique

47 *Costantinou v Moustakas Shipping* (1986) 1 CLR 1.

48 *Georgiou v Attorney General* (1977) 2 JSC 275; *Papakokkinou v Kanther* (1982) 1 CLR 65; *Constantinides v Pitsillou* (1980) 2 JSC 279; *Charalambous v Tryfonos* (1982) 2 JSC 290.

49 *Saab v Holy Monastery Ayios Neophytos* (1982) 1 CLR 499; *Nicolaou v Kile* (1982) 2 JSC 260; *Adamou v Kitsiou* (1978) 1 JSC 12.

and damages will never be adequate to compensate an aggrieved party. If no pecuniary loss can be established or it is not possible or easy to quantify the loss, this would mean that for a breach of contract no effective sanction would exist in the absence of an order of the court for the specific performance of the contract.

A court will only order specific performance if there is a valid contract, the identity of the parties to it is clear, and the property is sufficiently defined therein.

A specific performance order will not be granted when damages are an adequate remedy to compensate for the loss sustained by the aggrieved party. Furthermore, the court will refrain from making such an order if the contract involves a contract for personal service, relying on the fact that the court is unable to supervise its enforcement over a period of time.

The court will be deterred from granting a specific performance order if the plaintiff delayed in bringing his claim or showed acquiescence. Even in cases where time is not of the essence of the contract, the plaintiff may be considered 'guilty' of unjustified delay and, as a result, will be precluded from obtaining specific performance of the contract.

An injunction is an order of the court requiring an individual to refrain from committing the act complained of in the action. In cases of contract, an injunction is granted to enforce a negative stipulation where it would be unjust to confine the plaintiff to an action for damages.

In contrast to the court's unwillingness to grant the remedy of specific performance in cases concerning contracts for personal services, the court can enforce such a remedy indirectly by making an order restraining the party who entered into the contract from serving someone else.

In contracts which contain a negative stipulation, it is obvious that the court will issue an injunction restraining an individual from acting elsewhere than promised, even if the plaintiff cannot prove that he will suffer damage from a breach of the restriction. Where the contract is not completely negative or is purely affirmative, a restraining injunction may not be issued.

Limitation of Actions

10-55 In Cyprus, all claims which were to be legally pursued were regulated by certain time limits within which an aggrieved party could bring his claim to justice.[50] Following the events of 1963–1964 (which included a Turkish invasion), however, and to safeguard the rights of citizens who might have faced difficulties in pursuing claims legally in those circumstances, limitation times were changed. Cyprus enacted the Law of Suspension of Limitation of Action Number 57 of 1964,[51] which provided for the suspension of any time bars relating to actions

50 Tornaritis, 'Time-Bar under Cyprus Law', (1977) *Cyprus Law Tribune* 3.
51 *Pamporis v National Bank* (1986) 1 CLR 578.

instituted on or after 21 December 1963. The effect of this legislation was to suspend the operation of the different limitation periods which existed and thus time ceased running for the purposes of such legislation as from 21 December 1963.

In 1971, Law 25 of 1971 was enacted and aimed to interpret the provisions of Law 57 of 1964 with regard to the powers vested in the Council of Ministers to end the suspension period. It provided that the Council of Ministers could cancel, suspend, amend, or substitute an order signifying the termination of the suspension period, provided an advance notice of three months was given.

That Law was amended by Law 36 of 1982, which provided that the suspension period which started on 21 December 1963 was to be declared as terminated by the Council of Ministers only three months after the end of the situation created by the Turkish invasion.

Time, for the purposes of limitation, begins to run when there is a person who can sue another, the other can be sued, and all material facts giving rise to a claim have occurred. When the remedy is barred by virtue of a statute of limitation, not the right, a plea of such prescription must be specially raised in the action.

Quasi-Contract and Restitution

In General

10-56 Quasi-contract[52] and restitution are considered to be a category of the Common Law which provides remedies for cases in respect of money had and received, or unjust enrichment or unjust benefit, to prevent an individual from retaining money given to him, eg, by mistake, so that the innocent party will avoid suffering a loss because the standard contractual remedies are not available to him due to the non-existence of a contractual relationship between the parties.

This will be because the parties' efforts to make a binding agreement failed or because their negotiations never reached the stage of an acceptable contract. These remedies involve situations where the parties have some relationship relating to, but falling outside, contract. Restitution provides a set of rules which provide for the recovery of money or property, aiming to prevent unjust enrichment.

Equity also provides a remedy for cases of unjustified enrichment and, to achieve this, two methods are followed, being:

- The doctrine of a constructive trust, ie, an individual who receives money and/or property is considered to be the trustee of it for the plaintiff so that all the trust remedies are available to the plaintiff as the beneficiary; and

52 *Sekavin v Ship Platon CH* (1987) 1 CLR 297; *Theodoulou v Theodoulou* (1987) 1 CLR 101; *Paraskevas v Lantas* (1988) 1 CLR 285; *CTC Consultants v Grindlays Bank* (1988) 1 CLR 294.

- A tracing order, so that the property can be traced by the true owner, even if changes have occurred or the property has been mixed with other property.

10-57 Under the principle of quasi-contract, in an action for money had and received, the money sought to be recovered must have been received by the defendant under such circumstances as would create a privity between himself and the plaintiff. 'Privity of contract' is the relationship between the parties in an ordinary contract which arises either expressly or impliedly; in quasi-contract the relationship between the parties arises on the facts of the case by applying a specific legal rule, eg, if a plaintiff acting under a mistake of fact pays money to the defendant, the relationship of the parties arises from the payment and the receipt of the money, respectively.

There are three situations in which money paid to the defendant can be recovered by the plaintiff, these being where:

- There is a total failure of consideration;
- The money was transferred under a mistake of fact; and
- The money has been paid to a third party for the benefit of the defendant.

10-58 A party can recover all his money deposited or paid under a contract if he receives nothing in return, ie, there is total failure of consideration, in an action for money had and received.

Furthermore, an aggrieved party can recover all his money in a case where a contract is frustrated even though there has only been a partial failure of consideration. However, with the exception of the doctrine of frustration, a claim for money had and received cannot be maintained if the contract has been partly performed and the plaintiff has obtained some benefit from it.

Recovery of Money Paid under a Mistake of Fact

10-59 Money paid under a mistake of fact will be recoverable, provided that the mistake made relates to a material fact and under normal circumstances, if the mistake was true, the payment would have been legal or the plaintiff would be obliged to pay the money.

In cases where the contract is void due to a mistake of fact, then recovery will be possible. The plaintiff in such a case would have to show that the payment was directly induced by the mistaken fact.

Recovery of Money Paid under a Mistake of Law

10-60 If, however, the mistake relates to a mistake of law and a person has paid money with complete knowledge of the facts, he cannot recover the money at Common Law, even if the payment was made as a consequence of a threat of legal proceedings.

If money has been paid to a third party, the plaintiff will be in a position to claim his money only if he was not acting as a volunteer in paying the money and he was under constraint. This means that if the plaintiff was acting wilfully and was doing this because he wished to do so, he will not be able to recover; if he was acting because he was forced to do so to save a situation, he will be able to recover.

The plaintiff must show that he paid the money to the defendant for his use on his express or implied request to him. It will be insufficient to prove only that the defendant was liable to pay the money to the third party and that the plaintiff discharged such liability. Furthermore, it must be proved that the defendant paid the money under a legal obligation to the third party.

Under this heading, an additional remedy is available, that of a *quantum meruit* basis calculation. The plaintiff under this heading will not have paid the defendant money, but may have done some work or provided some benefit for him. The plaintiff's compensation is not defined by any agreement between the parties so he will seek to be compensated on a *quantum meruit* basis, relying on the benefit he has provided.

Money paid on a *quantum meruit*[53] basis can be recovered where the contract is void if the work was equally performed.

Constructive Trust

10-61 The constructive trust is used in cases where an innocent party gives money or property to the defendant under circumstances which provide grounds for recovery. In such a situation the plaintiff may pursue an action requesting an order of the court that the defendant is holding the money or the property as a constructive trustee for him as the beneficiary.

In a constructive trust, the rules of equity, irrelevant to the intentions of the parties, determine that the money or the property is in the wrong hands and compel the 'trustee' (the defendant) to convey the property to the 'beneficiary' (the plaintiff). Under these circumstances, the trust is used as a remedial institution and, to distinguish it from the pure equitable constructive trust, it is called 'a constructive quasi-trust'.

In cases where the property of the plaintiff can be identified in the hands of the defendant, the plaintiff, being the true owner of that property, can pursue a claim requesting the remedy of tracing, to 'follow' or 'trace' the property and seek its recovery. This remedy may lie against an innocent recipient of the property even though there is no personal claim against him whether in tort, in quasi-contract, or in equity. If the recipient is insolvent, the true owner may claim specific performance and obtain priority over the claims of the other creditors.

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53 *Associated Levant Lines v N Anastasiou* (1972) 5 JSC 504; *Kyriakou v Petrou* (1961) 1 CLR 300.

Tracing in Common Law and Equity

10-62 The remedy of tracing is available both in Common Law and in equity. The Common Law permits a plaintiff to trace and claim his property if it has not been mixed with other property and can be identified as it was before its delivery to the defendant. If the property is money and the money is mixed with other money of the defendant in his bank account, it cannot be identified. A remedy could lie in the tort of conversion or an action in quasi-contract for money had and received under the Common Law.

Tracing in equity requires a fiduciary relationship to exist prior to the creation of an equitable interest; once an equitable interest in the property is established, the beneficiary will be in a position to trace the property in the hands of anyone irrespective of the fact that he is a *bona fide* purchaser for value or the property is no longer identifiable.

Equity allows the tracing of property to a wide extent even if that property is then in a different form. If a trustee mixes trust money with his own in his bank account, a beneficiary can claim a first charge on the mixed fund or any asset purchased with the mixed fund. If trust funds of two separate trusts are mixed, there is an equal equity in each beneficiary and each can claim, trace, and share on a *pari passu* basis or enjoy, *pari passu*, an equitable lien or charge on an asset purchased with the mixed fund. However, if the identity of the property is lost, then not even equity can trace it.

Rule in Clayton's Case

10-63 The English rule in *Clayton's* case also is applicable in the Cyprus legal system. Money in a current bank account is presumed to have been paid out in the same order as it was paid in, and this applies in a case where a trustee mixes moneys of two trust funds together or trust money and a volunteer's money.

However, if the trustee mixes his own money with trust money, the trustee is deemed to draw out his own money first until it is exhausted in his account. If the trustee pays out all the trust money and later pays in his money, the property cannot be traced unless it is proved that the trustee intended to replace the trust money.

Agency

In General

10-64 Agency[54] is considered to be the relationship which exists between two parties where one expressly or impliedly agrees that he is going to be represented by the other party to act on his behalf, and the other agrees to this. The 'principal'

54 *Bowstead on Agency* (14th ed, 1976).

is the person who is going to be represented and the 'agent' is the person who acts on behalf of or represents the principal.

In law, where the principal requests the agent to act on his behalf and the latter agrees to do so, it is recognised that the agent can affect the principal's legal position by certain acts, which are not to be treated as the agent's acts but are to be treated as the principal's acts.[55]

Capacity to Act as Principal

10-65 An individual's capacity to act as an agent co-exists with the principal's capacity to make contracts himself or do an act which he authorised the agent to make or do. It is a principle that all persons of sound mind, including infants and other persons of limited or no capacity at all to contract on their own behalf, are competent to act or contract as agents.

However, such a person's personal liability as an agent and any contract entered into by him with a third party, will depend on his capacity to contract on his own behalf. The reasoning behind this is that the agent will only be the principal's instrument to act according to his orders or instructions and it is the principal who will bear the risk of being inadequately represented.

Agency by Agreement

10-66 An agency relationship between the parties arises by an express agreement which does not need to be contractual and will contain both parties' consent. An 'actual' authority held by the agent is a legal relationship which exists between the principal and the agent, and it is created by a consensual agreement to which the two are the sole parties.

A relationship between a principal and an agent may arise in a case where the principal ratifies the unauthorised acts of the agent who acted for him while having no actual authority to do so.[56] This gives rise to such a relationship retrospectively along with its consequences. The ratification creates the relationship of an agency only in the transaction ratified, provided that the transaction involves an act, either lawful or unlawful, and is capable to be done by means of an agent.

Agency of Necessity

10-67 A third category which can give rise to an agency relationship involves situations where the law makes someone an agent of another without any agreement between them, to act and take steps necessary to protect the interests of the other party. This is called an agency of necessity.[57] Cases of an agency of necessity

55 *Andreou v Cyprus Travel* (1976) 5 JSC 758.
56 *Spyrou v Kyriakou*, Civil Appeal Number 7667, 14 April 1992.
57 *Lambides v Antoniou* (1982) 2 JSC 369.

refer to situations where a person is empowered to affect the legal relations of the principal by entering into a contract or effecting the disposition of property binding the principal.

The agent, under these circumstances, is allowed to defend an action for breach of contract. Cases where a person acts on behalf of another seeking reimbursement or wishes to defend himself against an action for breach of contract also may give rise to an agency of necessity. In this situation, the agent does not seek to affect the relations of the principal with third parties, but he aims to show that the principal's actions were justified and that he was entitled to reimbursement.

Authority of Agent

10-68 An agent's authority can be actual, express or implied, or apparent.[58] Actual authority, as stated above, is the authority which the principal gives to the agent by means of words or is regarded as being given by the law. Implied authority can be divided into incidental authority (which is implied authority to do whatever is necessary or incidental to the activity authorised), usual authority (which is implied authority to do whatever an agent of the type concerned would have authority to do), and customary authority (which is implied authority to act according to reasonable business customs).

Under the doctrine of apparent authority, a principal, representing that another has authority, is bound as against a third party by the acts of that other person within the authority the latter has although, in reality, he has given either limited or no authority to act, unknown to the third party.

Delegation of Authority to Sub-agent

10-69 The authority of an agent can be delegated to a sub-agent only with the express or implied authority of the principal. Where the agent is not authorised to delegate (*delegatus non potest delegare*), but he proceeds to do so, any acts of the sub-agent will not be valid and payment of his commission will not bind the principal. If, however, the agent has an authority to delegate and appoints a sub-agent, the acts of an authorised sub-agent bind the principal as if the acts had been performed by the agent.

The relationship between a principal and an agent, and an agent and a sub-agent, would create privity of contract between the principal and the sub-agent and the full consequences of agency would arise therefrom, provided that the agent had express authority to delegate to a sub-agent or by ratification.

58 *Liopetri Transport v Constantinou* (1971) 1 CLR 424.

Duties of Agents towards Their Principals

10-70 It is in the proper nature of an agency agreement that the agency appointed by the principal renders the agent bound to act in accordance with the terms of that contract and not to exceed his authority. It is the agent's contractual duty, *inter alia*, to obey the principal's instructions, to carry out the contract with due diligence, and to use proper skill and care.

An agent owes his principal fiduciary duties and a duty to make full and frank disclosure where he may have a personal interest which may conflict with that of his principal. An agent is liable to account for any money received as a bribe or a secret commission, in his capacity as an agent acting for his principal, as well as if he uses his position to obtain a benefit for himself. An agent must abstain from using his principal's property to acquire a benefit for himself without obtaining his principal's consent first.

Rights of Agents against Their Principals

10-71 An agent can only receive remuneration for his services provided as an agent relying on the express terms of the agency contract.[59] If there are no express terms relating to remuneration, then terms relating to remuneration will only be implied where the circumstances of the parties' contract would indicate that such remuneration would be paid.[60] If the agent performs services at the request of the principal which do not fall within the remit of his duties and no remuneration is expressly provided for them, a term may be implied that a reasonable sum will be paid for the services rendered to the principal.

An agent will not be entitled to receive any remuneration if he has performed an unauthorised transaction which was not ratified by the principal or for a transaction in respect of which he was in breach of his duties as an agent and the breach goes to the root of the contract or otherwise justifies the principal's right to repudiate his liability to pay.

Relations between the Principal and Third Parties

10-72 It is the general principle that any act of the agent while acting within the scope of his actual or apparent authority, even if it was fraudulent or he was acting in furtherance of his own interests, binds the principal. A disclosed principal can sue or be sued on any contact entered into on his behalf by his agent acting in that capacity and having the actual authority of the principal. If, however, an agent does an act which falls outside the scope of his implied or

59 *Patsalides v Takkas* (1976) 6 JSC 978.

60 *J F Ahoet Fils Trading under the Style Societe BEPIN and Another v Photiades & Co* (1968) 1 CLR 477.

apparent authority, a disclosed principal will not be bound by such an act unless he in fact authorised the agent to act in that way.

In cases where the principal is undisclosed, he may sue or be sued on any contract made on his behalf or in relation to money paid or received on his behalf if his agent was acting within his actual authority.[61]

Where the agent enters into a contract in his own name and the principal wishes to sue on the contract in his name, then parole evidence will be admissible to show who is the real principal. However, where there is an express term of the contract that the agent is the only party to it, there can be no intervention by the undisclosed principal to sue in his name. Where the agent implies that he is the principal, the undisclosed principal's intervention would be inconsistent with the contract in which he seeks to intervene.

Relations between Agents and Third Parties

10-73 Where an agent enters into a contract, acting in his capacity as an agent only, between his principal and a third party, he is not liable to the third party.[62] This is because, when the agent negotiates the contract, he makes his principal the party to the transaction and his agency ceases at that stage. Due to the fact that he undertakes no personal contractual liability, the agent does not incur any liability.

However, if the agent was undertaking personal liability to the third party, he would be held personally liable. If the agent was shown to be the principal in the contract and was acting on his own behalf, he would be personally liable in the contract. If an agent in a contract made by him on behalf of his principal contracts personally, he can sue on such a contract.

The actual authority of an agent can be determined by an agreement between the principal and the agent, by agreement that with the completion of a particular transaction the agency would be terminated, by the expiration of a particular period of time, by the happening of a specified event agreed between the principal and the agent, or by the destruction of the subject matter of the agency and the rendering of the agency or its objects unlawful, impossible, or frustrated.

Furthermore, the actual authority of the agent can be determined by the death, insanity, or bankruptcy of the principal or the agent or by notice of revocation[63] given by the principal to the agent and by notice of renunciation given by the agent to the principal.

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61 *Holiday Tours v Kouta and Another*, Civil Appeal Number 8058, 8 October 1993; *Georgiades v Bernoulli Trading Co Ltd*, Civil Appeal Number 8299, 17 October 1994.

62 *Andreou v Cyprus Travel (London) Ltd* (1976) 5 JSC 758.

63 *Kasinos & Co v Letraset* (1982) 2 JSC 443.

Bailment

10-74 Bailment is defined in section 106(I)(b) of the Contract Law as 'the delivery of goods by one person to another for some purpose on a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them'. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.

The bailee's responsibility is to take such care of the goods bailed to him as a man of ordinary prudence would take of his own goods of the same bulk, quality, and value as the goods bailed to him. If there is no special contract, the bailee is not responsible for any loss, destruction, or deterioration of the thing involved if he has taken care of it in accordance with the above standard.[64]

The standard of care required to be exercised by a bailee depends on the type of bailment. It is divided into two kinds, namely:

- The gratuitous bailment; and
- The bailment for reward.

10-75 The standard of care required in the first kind of bailment is higher than in the second kind. In both cases, any breach of duty should arise from the contract of bailment and the bailee must show that any loss of the goods was not due to his fault. The burden of proof in bailment cases rests on the defendant, who must prove that he took the amount of care described above.[65]

The principle on which a party can rely and claim damages for breach of a contract of bailment is that of *restitutio ad integrum*. This principle provides that a plaintiff can recover and be compensated for future possible losses, but he still must establish such a possibility.[66]

Sale of Goods

The Contract of Sale of Goods

10-76 The sale of goods[67] is governed by Law 10 (I)/1994, and this consolidates the law relating to the sale of goods. A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the ownership of goods to the buyer with the payment of their price. A sale can occur in two ways, namely:

- Immediately by a contract which operates to transfer the ownership of the goods from the seller to the buyer and ownership passes when the contract is made; or

64 *Lamides v Antoniou* (1982) 2 JSC 369.
65 *Charalambous v Nicola* (1976) 12 JSC 1920.
66 *Stavrou v Vassiliou Ttoouli and Another* (1973) 8 J SC 1019.
67 Michaelides, 'The Meaning of "Position" and the Difficulties Property Rules Present in the Sales of Goods', (1989) *Cyprus Law Tribune* 81.

- By a contract which at the beginning is an agreement to sell and is later performed with the transfer of the property.

10-77 Section 2(1) of Law 10(I)/1994 provides that 'goods' include all kinds of movable property other than things in action and money, and include debentures and shares, emblements, crops, and things attached to or forming part of land, which are agreed to be severed before sale or under the contract of sale.

Goods can be classified into existing (those which form the subject of the contract for sale and are owned or in the possession of the seller) and future (those which are the subject of the contract but are to be manufactured or acquired by the seller at a future time after the formation of the contract). Specific goods are those which are identified at the time of the contract; no reference is made to the meaning of unascertained goods, but it can be implied as the goods which are not agreed on at the time of the contract.

Formation of the Contract

10-78 The formation of a contract of sale is like that of any other contract and adopts the same principles. An agreement must exist between the parties shown by offer and acceptance.

A contract for the sale of goods concerns the transfer of the ownership of the goods sold from the seller to the buyer. To determine the issues of whether and when the ownership passes to the buyer, the intentions of the parties must be examined. If no intention is expressed, the law provides for this lacuna.

Passing of Property

10-79 The ownership of the goods passes to the buyer before, at, or after the time of their delivery.[68] It is necessary to identify the precise time of the passing to locate the risk in the goods. When the contract is for unascertained goods, ownership of the property does not pass unless and until the goods are ascertained. Where the contract is for the sale of specific goods, the ownership is transferred to the buyer at such time as the parties intend it to be transferred. To discover the intentions of the parties, one must look at the terms of the contract, the parties' conduct, and the circumstances of the case.

When there is an unconditional contract for the sale of specific goods in a deliverable state, the ownership passes to the buyer at the time of entering into the contract even if the time of payment of the price or the time of delivery of the goods is suspended.

Where there is a contract for the sale of specific goods and the seller must put the goods into a deliverable state, the ownership does not pass until this condition is

68 *Taylon Ltd v Soteriou* (1982) 1 CLR 777.

fulfilled and the purchaser is informed of it. Where there is a contract for the sale of specific goods in a deliverable state but the seller must weigh, measure, or test the goods to ascertain the price, the ownership is not transferred until such act is done and the purchaser is informed of it.

Goods Delivered on Approval or on Sale or Return

10-80 When goods are delivered to a buyer on approval or on sale or return, the ownership passes to the buyer when he signifies his approval or acceptance to the seller or otherwise accepts the transaction, or if he does not signify his acceptance or approval but keeps the goods without rejecting them, if a time was set for the return of the goods, ownership passes on the expiration of that time or, if no time was agreed, on the expiration of a reasonable time. Goods delivered 'on approval' means that it was the parties' intention that they should be retained and purchased by the purchaser at the agreed price on his approval. Goods 'on sale or return' means that they will be considered as sold if they are not rejected by the buyer and returned to the seller within the prescribed contract time for rejection.

The ownership of the goods does not pass when the contract contains any other condition essential to the passing of the property. However, it could be the parties' intention that ownership should pass immediately on delivery provided that, if the goods are not approved, they are returned to the seller.[69]

Unascertained Goods

10-81 Where there is a sale of goods which are unascertained, no ownership passes to the buyer unless and until the goods are ascertained. This does not mean that the ownership will pass when the goods are ascertained, but it means that it will pass when the parties intend it to pass.

A contract for the sale of unascertained goods is an agreement to sell. Unascertained goods are not defined by the Sale of Goods Law; they could be considered to be goods which are not specifically identified.

Reservation of the Right of Disposal

10-82 Despite the fact that ownership can pass to the buyer if the contract of sale is unconditional and the goods have been ascertained and unconditionally appropriated to the contract, the seller can reserve the right to dispose of the goods until certain conditions stated in the contract are met.

Such a condition may be the full payment of the price, and the title will not pass until this is done.

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69 *Bodewes-Gruno v The Ship Algazera* (1987) 1 CLR 186; *Demeco v Beckhoff* (1988) 1 CLR 82.

Transfer of Title by Non-Owners

In General

10-83 Unless otherwise agreed, the risk in the property remains with the seller until the ownership is transferred to the buyer, when the risk passes to the buyer, whether the property is delivered or not. If the delivery of the property is delayed due to the fault of either the seller or the buyer, the risk will fall on the party who is in default.

It is a general principle of the sale of goods law that no one can transfer a better title to goods than he holds. This principle is expressed in the Latin phrase *Nemo dat quod non habet*. The law provides that, where a buyer purchases goods from a seller who was not the owner of the goods and did not have the authority or the consent of the actual owner to proceed with the sale, the purchaser cannot obtain a better title than the one that the seller had in the first place,[70] unless the owner of the goods is estopped by conduct from denying that he authorised the seller to carry out the said sale.

Estoppel

10-84 The doctrine of estoppel referred to above prohibits the true owner of goods from denying his ownership, and the buyer would then acquire a good title to the goods by estoppel. This kind of estoppel may arise by reason of a representation made by the true owner that the seller is the owner of the goods.

Where the true owner of the goods, either by his words or conduct, represents or allows the representation of another that the other is the owner of the goods, any sale made by that person will be valid against the true owner as if the seller was the true owner, provided that reliance was placed by the buyer on such a representation. The representation must be clear and unequivocal.

Mercantile Agents

10-85 Furthermore, if a mercantile agent is in possession of goods or the title to them with the owner's consent, and he proceeds with a sale of the goods during his course of business, any sale carried out under these circumstances will be valid and a good title will pass to the buyer as if the agent had the authorisation of the owner to act in that way. The buyer must have been acting in good faith and not have been aware of the fact that the agent did not have an authorisation to sell.

A co-owner is in a position to pass a good title to a third party without giving notice of the fact that he is a co-owner provided that the goods were in his possession with the other owner's permission.

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70 *Kyriakidou v Solomonides* (1975) 11 JSC 1723.

Seller in Possession

10-86 If the goods came into the possession of the seller through a voidable contract in accordance with articles 18 or 19 of the Sale of Goods Law, but the contract had not been terminated by the time of a subsequent sale, the buyer will obtain a good title to the goods provided that he is a *bona fide* purchaser.

In cases where a person who has sold goods continues in possession of the goods sold or of the title documents to the goods, the delivery or transfer by that person, or by a mercantile agent acting on his behalf, of the goods or the title documents under a sale or pledge to a third party who has bought in good faith and without notice of the previous sale can create ownership over the goods as if the person who made the delivery or the transfer was expressly authorised by the owner of the goods to sell them.

Therefore, if the delivery or transfer takes place as a sale of goods, the purchaser from the original seller will obtain a good title to the goods. If it takes place in the form of a pledge, the pledgee will obtain an interest as a pledgee which will be enforceable against the original buyer.

Buyer in Possession

10-87 The position is the same where a buyer, who has bought goods or has agreed to do so and acquires possession of the goods or their title documents with the consent of the owner of the goods, delivers or transfers the goods under any sale or pledge, either himself or through a mercantile agent acting on his behalf, to a third party receiving them in good faith and without notice of the lien of the owner of the goods over them. The third party obtains ownership as if the person making the delivery or transfer were a mercantile agent in possession of the goods or their title documents acting with the consent of the owner.

A purchaser in good faith from a buyer in possession will acquire a good title to the goods purchased, but a buyer from a thief or a bailee of the goods gets no better title than the seller had. Where the disposition by the buyer occurred by virtue of a pledge, the pledgee will acquire an interest in the goods which can be asserted against their true owner. However, where goods are pledged in consideration of the delivery or transfer of other goods or of a document of title to those goods, the pledgee acquires no right or interest in the goods pledged in excess of the value of the goods or document delivered or transferred in exchange.

Delivery

In General

10-88 A contract for the sale of goods requires the seller to deliver the goods to the buyer according to the terms of their contract of sale. Delivery of the goods does not necessarily require physical transfer of the goods; it could involve the transfer of documents of title to the goods, or a bailee of the goods may hold them

on behalf of the buyer. Unless it is otherwise agreed, the seller should be ready to deliver the goods to the buyer in exchange for the payment of the value agreed and the buyer must be ready and willing to pay their value. Delivery and payment need not be at the same time.

Delivery of the goods constitutes the making of the goods available to the buyer by the seller in a deliverable state at the place and time designated in the contract of sale so as to enable the buyer to obtain custody of or control over the goods. If no time for delivery was specified in the contract, such a stipulation would be ascertained by reference to the terms of the contract.

Quantity of Goods Delivered

10-89 It is the duty of the seller to deliver to the buyer the exact quantity of goods in accordance with their contract. Where the seller has delivered a smaller quantity than agreed, the buyer may reject them or accept the delivery and pay the appropriate value.[71] If the buyer decides to reject the goods, he can sue for any loss occasioned by the seller's breach. If he chooses to keep the goods, he must pay at the contract rate and be able to recover the price paid for the undelivered quantity; he also can claim damages for breach.

Where the quantity of goods delivered is larger than the one agreed between the parties, the buyer may accept the quantity ordered in the contract and reject the rest or he may reject them all. If the buyer accepts them all, he must pay for them at the contract rate. If the buyer decides to rejects the goods, the seller cannot insist on the buyer purchasing the right quantity from the goods delivered. If the quantity of goods delivered differs very slightly from the quantity ordered, the courts will not permit the buyer to take advantage of the trivial difference in the quantity delivered; this rule is known as the *de minimis* rule.

Delivery by Instalments

10-90 Unless otherwise agreed, the buyer is not bound to accept delivery of the goods by instalments nor is he entitled to request such a delivery, although he may waive his right to delivery of all the goods and accept delivery by instalments.

If the contract is one for the delivery of goods by instalments, it may be an entire and indivisible contract for the delivery of the quantity agreed. Hence, the full and complete delivery of the goods constitutes a condition precedent to the payment of the price by the buyer. If the buyer receives one or more instalments, he is not precluded from rejecting those instalments if the total quantity of the goods is not completed, but he will have to pay for any instalments he has accepted as an owner and kept after the period stipulated for complete delivery.

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71 *Kypio v Kassapi* (1980) 2 JSC 259.

Contracts for the delivery of goods by instalments will be construed as divisible contracts and not as entire. Hence, a breach relating to one or more instalments must be seen in the light of the effect on the contract as a whole, and the innocent party will not need to treat the contract as repudiated by breach. A divisible contract is not the same as a series of contracts, and different rules apply to the first kind. A contract for the sale of goods by instalments is a single contact and not as many contracts as there are instalments.

In a contract where it is agreed that goods are to be delivered by instalments which are to be paid for separately, and there is a defective delivery in relation to one or more instalments or the buyer refuses to take delivery or pay for the instalments, the courts will look at the terms of the contract and the facts of each case to determine whether the breach of the contract is a repudiation of the whole contract or whether it could be treated as a severable breach, giving rise to a right to compensation but not a right to treat the whole contract as repudiated.

A party may treat the contract as repudiated if the other party renounced his obligation to be bound by it or he expressly states his intention not to be bound or his behaviour implies such an intention. Failure of performance by one party could also amount to an express or implied renunciation of the contract and may allow the other party to treat the instalment contract as repudiated. Irrespective of whether the contract was for delivery by instalments paid for separately or whether each delivery was a separate contract, the aggrieved party will be entitled to refuse further performance and consider himself as discharged from further liability.

Acceptance and Payment

Acceptance

10-91 Acceptance of the goods takes place when the buyer does an act in relation to the goods which recognises an existing contract of sale, whether there be an acceptance in performance of the contract or not. Where an acceptance has already occurred, breach of any condition by the seller enables the buyer to treat the breach as a breach of a warranty and not as an excuse to reject the goods and treat the contract as repudiated. A wrongful neglect or refusal to accept the goods by the buyer may constitute a repudiation of the contract. Refusal to accept the goods prior to delivery constitutes an anticipatory breach by the buyer and gives rise to an action for damages for the breach.

Where the seller accepts the buyer's repudiation, he is no longer bound to deliver the goods to the buyer but, where the seller does not accept the repudiation, it would be expected that the contract would be kept alive for the benefit of both parties, unless the repudiation by the buyer was brought about by the seller's failure to perform a condition precedent of the contract.

Payment

10-92 Payment in a contract, in general, is the duty of the buyer, to pay for the value of the goods in accordance with the terms of the contract. The method, place, and time of payment are normally agreed in the terms of the contract but, according to section 32 of the Sale of Goods Act, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, so the delivery of the goods would require, in exchange, the payment of the price.

An unpaid seller would be entitled to exercise a lien, or a right of retention, over the goods, and where the buyer is insolvent. He also may have, provided certain circumstances are satisfied, a right of stoppage in transit where the buyer is insolvent.

Terms of the Contract

In General

10-93 For a contract to be agreed, certain statements are exchanged between the parties; some statements involve no legal liability, such as statements of opinion or intention, and others involve legal liability, such as misrepresentations inducing the contract (which have been discussed above), contractual promises separate from the main contract (collateral contracts separate from the main agreement of the parties), and contractual promises which are terms of the main contract.

The latter category is divided into conditions, warranties, and innominate terms (see text, above).

Correspondence with Description

10-94 Where in a contract goods are sold based on their description, there is an implied condition that the goods will correspond with that description. Statements made in relation to the description of the goods could be either conditions, the breach of which could terminate the contract, or warranties, the breach of which could give rise to a claim for damages.

The dictum of Lord Diplock, relating to the sale of unascertained goods, explains that the test to determine the nature of the descriptive words is whether the buyer could reasonably refuse to accept the goods offered to him, relying on the fact that they did not correspond with what was agreed between the parties, which makes the goods of a different kind from what was agreed.[72]

Merchantable Quality and Fitness for Purpose

10-95 Where there is a sale of goods in the course of the seller's business, there is an implied term that the goods will be of merchantable quality. 'Merchantable

72 *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972].

quality' is defined by section 16(3) of the Sale of Goods Act as meaning goods which are fit for the purposes they are to be used for and that a reasonable person would consider them to be so, taking into consideration their description, their price, and other relevant circumstances.

There will not be an implied condition of merchantable quality in relation to any existing defects which were properly brought to the buyer's attention before the contract was entered into and provided that the buyer examined the goods before he entered into the contract and the defects were obvious during the examination.

Other Implied Terms

10-96 Where a seller during his course of business is made aware by the buyer, expressly or impliedly, of the particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract will be reasonable fit for that purpose except where the circumstances show that the buyer has not relied, or it is unreasonable for him to rely, on the seller's skill and judgment.

'Particular purpose' does not mean a special purpose; if no notice was given of the purpose for which the goods were to be used by the buyer, it would be considered to be for their normal purpose.

Sale by Sample

10-97 Section 17 of the Sale of Goods Act provides that, in a contract for a sale by sample, an express or implied term can be contained in the contract. Where it is the latter, the following are implied:

- The bulk will correspond with the sample in quality;
- The buyer will be able to compare the bulk with the sample; and
- The goods will not have any defects which would render them unmerchantable and which would not be apparent on a reasonable examination.

10-98 In relation to the second item, above, the seller must provide the buyer with an opportunity to examine the goods to confirm their compliance with the contract. The buyer will not be bound to accept the goods if no such opportunity is given.

Remedies

In General

10-99 Section 47 of the Sale of Goods Act provides that an unpaid seller of goods has the following remedies against the goods:

- A lien on the goods for their price while they still are in his possession;
- In case of insolvency of the buyer, a right of stoppage of the goods in transit after the goods ceased to be in his possession; and
- A right to resell the goods in accordance with the provisions of the Act.

These remedies are available to the seller in addition to his right to sue the buyer for the price and for damages for non-acceptance as a form of security for payment of the price and as a form of preference of the seller over the general creditors of a bankrupt buyer.

Lien and Stoppage in Transit

10-100 The remedies of lien and stoppage in transit aim to give protection to the unpaid seller, provided that the goods have not yet reached the actual possession of the buyer. Insolvency of the buyer will discourage the seller from delivering the goods to him and, while the goods are in his possession, he can exercise his right of lien.

Where the goods are under the control of a carrier and before they are delivered to the buyer or his agent, the seller can give notice to the carrier to prevent delivery to the buyer and to instruct redelivery to himself or his agent, thereby exercising the right of stoppage in transit and regaining possession of his goods until the price is paid.

A lien is the right of an individual to retain in his possession something which belongs to another until his demands are fully satisfied. The seller's lien is not a general lien which can be exercised for all debts due from the buyer to the seller; it is a special lien which only arises in the circumstances specified by the Act. The seller's lien is his entitlement to the goods only until the buyer pays the whole of the price; his lien is only an advantage of his duty to deliver the goods to the buyer. The right to be paid is independent of the existence of a lien; it is considered to be an additional security for the unpaid person.

The lien arises where the seller is unpaid, where the goods have been sold without any provision as to credit, where the period of credit has expired, or where the buyer has become insolvent and where the seller is in possession of the goods or part of them. The exercise of a lien may result in the resale of the goods by the unpaid seller, but the lien itself does not give the seller any property in the goods.

The buyer may still obtain the right of possession if he fully pays the outstanding price. The right to resell arises in the circumstances described below. The right to a lien is lost when the seller delivers the goods to a carrier or other bailee for the purpose of giving them to the buyer without reserving the right to dispose of the goods, when the buyer or his agent lawfully obtains possession of the goods, and by waiver of the lien or the seller's right of retention.

Stoppage in Transit

10-101 The right of stoppage arises where the goods are delivered to a carrier for their delivery to the buyer, the seller has lost his right of lien, and the buyer has become insolvent. With the exercise of this right, the seller regains possession of the goods, but this does not of itself terminate the contract of sale; it merely prevents the buyer from obtaining possession of the goods and puts the seller in a position to exercise his statutory power to resell the goods.

If the buyer pays the full price to the seller before the latter terminates the contract by resale, the seller must accept the price and redeliver the goods to the buyer. A person becomes insolvent if he has ceased to pay his debts or he cannot pay his debts and if he has become bankrupt. The fact that a buyer has become bankrupt does not of itself terminate the contract, but the buyer's trustee in bankruptcy may disclaim an onerous contract.

Section 52 contains seven subsections which list the rules on the duration of transit relating to the right of stoppage. These rules arise from the codification of the Common Law:

> The essential feature of a stoppage *in transitu* . . . is that the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with and the purchaser who has not yet received them.[73]

The goods are deemed to be in transit from the time when they are delivered to a carrier for the purpose of delivering them to the buyer, until the buyer takes delivery. The transit may end between the seller and buyer when agents instructed by the buyer receive the goods to be held at the buyer's disposal.

The unpaid seller who has exercised either his right of lien or of stoppage in transit may decide to resell the goods; in such a case, he can pass to the new buyer a good title to the goods and the original contract is terminated. For the legal right to resell the goods as against the original buyer to exist there must be:

- An express term in the contract;
- A failure by the original buyer to pay the price within a reasonable time after he received a notice from the seller of his intention to resell the goods; or
- A termination of the contract by the unpaid seller, relying on the buyer's repudiation of his obligations under the contract.

The Remedies of the Buyer

10-102 Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may bring an action against the seller for damages for non-delivery. Damages also may be sought for delay in the delivery of the goods and for inferior quality.

The court may further make an order for specific performance depending on the kind of contract (both damages and specific performance have been discussed above). The aggrieved party must in his action prove that he has tried to mitigate his losses.

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73 *Achotsmans v Lancs & Yorks Ry* (1867) L R Ch Appeal 332, at p 338.

CHAPTER 11

Agency and Distribution

Andreas Neocleous, Panayiotis Neocleous, and Maria Koundourou

Introduction

In General

11-1 Both agency and distribution law are relatively new concepts in the Cypriot legal system. However, the continuous development of the island's economy indicates that this area of law is becoming very significant.[1]

Sections 142–198 of the Cypriot Contract Law[2] are the general legislative provisions governing this branch of the law and essentially reflect the Common Law principles. English Common Law principles are applicable where no express statutory provisions are made and offer much guidance in interpreting the provisions of the Cypriot Contract Law.

In addition, various pieces of legislation have been enacted as a result of the continuous effort of harmonisation with the *acquis communautaire* of the European Union. The most important of them, which relate to commercial agents, are:

- Commercial Agents Law[3] ('the 1986 Law');
- Regulation of Relations between Commercial Agents and Principals Law[4] ('the 1992 Law'); and
- Commercial Agents (Amendment) Law[5] ('the 1994 Law').

What Is an Agent?

11-2 In General. At Common Law, the term 'agency' is used to describe the body of general rules under which one person, the agent, has the power to change the legal relations of another, the principal. Section 142 of Cap 149 defines an agent as '. . . a person employed to do any act for another, the principal, or to represent the principal in dealings with third parties'.

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1 A Neocleous, P Neocleous, and Christodoulidou, 'Cyprus' *International Agency and Distribution*.

2 Contract Law, Cap 149.

3 Law 76 of 1986.

4 Law 51(1) of 1992.

5 Law 21 (1) of 1994.

The most important branches of law in which the power of the agent to bind the principal is analysed are the law of contract and the law of property. An agent may have power to bind his principal by contract and by acts connected with the performance of a contract, or he may have power to receive property for his principal or make a valid disposition of his principal's property. Similar reasoning may appear in areas such as torts.

The legal doctrines that have developed can be divided into two broad categories. The first category relates to the agent's power to bind his principal and is of great importance to third parties dealing with such agents.

The second category concerns the rights and liabilities of the principal and agent *inter se* and imposes fiduciary duties on the agent and regulates his rights to remuneration and indemnity. The first category concerns the external aspects of agency whereas the second deals with the internal aspects of agency.

Where the agent's authority results from a manifestation of consent that he should represent or act for the principal, expressly or impliedly, made by the principal to the agent himself, the authority is called actual authority, express or implied.

Where the agent's authority results from such a manifestation made by the principal to a third party the authority is called apparent authority.[6]

Section 147 of Cap 149 provides that implied authority may be inferred from the circumstances of the case. Any written or oral evidence or the usual business practice may be regarded as circumstances of the case. As a result, the agreement between agent and principal need not be contractual. An agent can act gratuitously. The consent also may be given subsequently by ratification.

Categories of Agents

11-3 General Agent. A general agent has authority to act for his principal in all matters concerning a particular trade or business, or to do some act in the ordinary course of his trade, profession, or business, for example, as a solicitor or factor.

11-4 Special Agent. A special agent is an agent who has authority only to do some particular act or to represent his principal in some particular transaction not being in the ordinary course of his trade, profession, or business as an agent.

11-5 Sub-Agent. A sub-agent is defined under section 151 of Cap 149 as '. . . a person competent to contract, employed by and acting under the control of the original agent in the business of the agency'.

Section 152 provides that, if a sub-agent is properly appointed, the principal is, so far as third parties are concerned, represented by the sub-agent and is bound by and accountable for his acts as if he were an agent originally appointed by the

6 *Bowstead on Agency* (14th ed), at p 70.

principal. The agent is responsible to the principal for the acts of the sub-agent and the sub-agent is responsible for his acts to the agent, but not to the principal except in case of fraud or wilful wrong.[7]

Section 154 clearly states that, where an agent appoints without authority a person to act as a sub-agent, the agent is liable for his acts both to the principal and to third persons. The principal is not represented by or liable for the acts of the sub-agent; nor is the sub-agent liable to the principal.

11-6 Mercantile Agent. The definition of a mercantile agent can be found in section 2(1) of the Sale of Goods Law.[8] He is a person who has, in the customary course of his business as such agent, authority to sell goods, to consign goods for the purpose of sale, to buy goods, or to raise money on the security of goods. The significance of the term 'mercantile agent' has been greatly reduced, and it has become very rare.

11-7 Canvassing Agent. A canvassing agent is a person who often represents others, such as estate agents or insurance agents. The function of a canvassing agent is generally to introduce business. They are not strictly agents but are covered by certain doctrines established by the law of agency and especially those relating to the fiduciary obligations owed by the agent to the principal.

11-8 Distributors and Franchisees. Franchise holders and distributors of particular products are often referred to as agents. Although it is possible that such persons are agents in the sense that their obligations to their principal are those of an agent, even though they deal with the outside world in their own names, such persons are regarded at Common Law as purchasers for resale and agency principles are not strictly applicable.

11-9 Commercial Agents. A 'commercial agent' is defined by section 2 of the 1986 Law, as amended by the 1992 Law and the 1994 Law, which states:

> Every legal or natural person who, by his capacity as an independent intermediary, has the permanent authority to negotiate on behalf of another person, the principal, the sale or purchase of goods or negotiate and conclude such actions in the name and on behalf of the principal.

11-10 Officers of companies or associations, partners, administrators appointed by the court, insolvency practitioners, and liquidators are expressly excluded from the ambit of the definition. It should be noted that, before the amendment of the 1986 Law by the 1994 Law, the definition of commercial agent covered distributors, as well.

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7 Contract Law, Cap 149, ss 151 and 152.
8 Law 19 (1) of 1994.

Future Prospects

11-11 The 1986 Law and subsequent pieces of legislation were enacted to bring domestic law into line with European Union (EU) Law. The 1986 Law contains provisions similar to those of European Community (EC) Council Directive 86/653/EC ('the 1986 EC Directive').

Section 3 of the 1986 Law establishes a Council responsible for the registration of commercial agents and sets the qualifying conditions for such registration. Under section 4, a register of commercial agents is established. The Council has power to remove the name of a commercial agent from the register in accordance with the provisions of section 5 and has the power to issue regulations. Breach of any of the provisions of the 1986 Law is an offence punishable by up to six months' imprisonment or a maximum fine of CY £300, or both.

Another important related piece of legislation is the 1992 Law, which was a further attempt to bring domestic law in line with European Community Law. It covers the duties of agent to his principal and *vice versa*, remuneration, commission, termination of the contract, rights to indemnity, and compensation on such termination and restraint of trade.

It is not yet certain whether the above statutory provisions are reconcilable or incompatible with Common Law principles. However, since these laws incorporate verbatim the text of the 1986 EC Directive on the coordination of the laws of member states relating to self-employed commercial agents, any interpretation given by the European Court of Justice on this point is extremely significant and is likely to be followed by the Cypriot courts.

Implementing regulations governing, *inter alia*, the procedure of registration and renewal of a commercial agent's annual licence were passed in January 1988. There have been approximately 1,300 commercial agents registered in Cyprus since 1988.

The Cypriot National Committee of the International Chamber of Commerce (ICC) has implemented a firm policy to educate and train Cypriot businessmen on issues relating to the smooth conduct of international trade.

The ICC has prepared a model form of international commercial agency contract and distributorship contract to assist business people engaged in international trade. The model form of agency contract has been prepared on the assumption that it will apply only to international agency agreements with self-employed commercial agents for the sale of goods.

The model form of distributorship contract is intended to apply only to international agreements where distributors act as buyers/re-sellers and as importers in their own country. The set of uniform contractual rules devised by the ICC seeks to strike a balance by protecting the interests of both exporters and importers. At the same time, it attempts to provide flexibility by allowing the insertion of a choice of law clause. The ICC model forms of contract may offer useful guidance if adopted to meet the parties' specific requirements and the particular circumstances.

General Business Climate

11-12 Cyprus has a free-market, open economy. The authorities have implemented simple administrative procedures to expedite matters concerning foreign entrepreneurs, reflecting the importance Cyprus has attached to the development of its potential as an international business centre. The attraction of foreign capital has always been among the primary objectives of the island's development policy as it contributes to, among other things, the introduction of high technology and increased export prospects. Cyprus offers numerous advantages to the foreign investor.

The Constitution guarantees the right of private property and does not discriminate between Cypriots and non-Cypriots. Nationalisation has never been part of government policy; nor is it contemplated in the future. Furthermore, Cyprus is a signatory to the Convention for the Settlement of Disputes between States and Nationals of Other States and to the Multilateral Investment Guarantee Agency Agreement.

In its efforts to liberalise the economy and attract foreign capital, in February 1997, the government relaxed the rules and regulations applicable to inward investment. Under the new regime, administrative procedures have become simpler, and it is possible for foreign firms to own up to 100 per cent of local manufacturing industries provided that the investment does not pose any national or environmental risks.

Other sectors also have been made less strict, and investors from EU member states receive preferential treatment during the continuous liberalisation of foreign investment in Cyprus.

Import Regime, Customs, and Duties

11-13 The Cypriot economy is highly dependent on the import and export of goods and services. The largest trading partner of Cyprus is the EU, and it is expected that there will be even higher import penetration following EU accession as tariff barriers remaining under the Association Agreement will be lifted.

A general rate of duty is applied on all goods, apart from those emanating from EU countries, which are subject to European Union rates of duty. Certain goods, including plant and machinery, are exempt from import duty. Cypriot international business companies and their employees benefit from certain duty-free goods.

Under the Customs Union Agreement with the EU, the movement of goods is subject to the system of the Rules of Origin. Cypriot products, therefore, enjoy duty-free access to the Community provided they are wholly produced or have undergone sufficient processing in Cyprus.

Goods imported into Cyprus from overseas are subject to customs duty. The rates (EU and general) vary with the classification of the goods imported, from nil on woollen products originating from Commonwealth countries to 148 per cent on cosmetics from countries outside the EU.

Goods which carry high import duties are mainly confectionery, whisky, cosmetics, clothing, fabric, television sets, videos, motor vehicles, and furniture. Almost 50 per cent of imported goods are duty-free, the main categories of such goods being food, raw materials for manufacturing, agriculture, and other industrial activities, as well as machinery and equipment used in the manufacturing and catering industries. Excise taxes are imposed on a limited number of goods, mainly cigarettes, motor vehicles, alcohol, and petrol goods.

The government's policy is to revise duties periodically and aims at protecting local industries by increasing import duties on goods competing with local industries. However, in the light of the general policy of encouraging foreign investment in Cyprus, international business companies and their foreign employees are exempt from import duties on goods such as cars, office equipment, and household equipment, provided that certain criteria are met.

The majority of articles imported in Cyprus do not require an import licence, although the Minister of Commerce and Industry is empowered by law to regulate the import of certain goods to encourage local production and industry and to improve the trade deficit.

The articles that require import licences represent roughly five per cent of all imported goods and appear in relevant categories published in the *Official Gazette*. These articles vary from rubber gloves and matches to raw materials for medicine. For these articles, the Minister may refuse or grant a licence, or grant a licence on terms.

Exchange Control

11-14 The basic legislation governing exchange control matters in Cyprus is chapter 199 of the Laws of Cyprus.[9] Exchange control policy is implemented by the Ministry of Finance, which has ultimate authority in its overall implementation with the purpose of conserving foreign currency balances and protecting the balance of payments.

The administration of the Law is entrusted to the Central Bank of Cyprus. In practice, most of the day-to-day transactions on current accounts are dealt with by commercial banks to which the necessary powers have been delegated. Any investment in Cyprus by a non-resident requires the prior approval of the Central Bank.

Such investment might be in the form of a direct investment on the island (ie, participation in a company which is doing business in Cyprus), in the form of business activities carried on outside Cyprus by a Cyprus-registered legal entity which is fully owned by non-residents (ie, international business company), or

9 The exchange control system is almost entirely modelled on that which existed in the United Kingdom prior to the lifting of the relevant controls.

in the form of shipping activities carried on through a local company owned exclusively by non-residents or jointly by non-residents and residents.[10]

Permission for non-residents to participate in a Cypriot company is based on certain criteria and, in relation to agency agreements, two main considerations should be taken into account, namely:

- Either the agent or the principal must be a non-resident and should obtain prior approval from the Central Bank before importing or exporting any goods according to the terms of the agency agreement; and
- Authorised dealers such as banks may, without reference to the Central Bank, approve applications by residents of Cyprus for the remittance abroad of commission on exports of locally produced goods and advertisement fees.[11]

11-15 Where exchange control permission is required, but not obtained prior to the conclusion of a contract, it does not render that contract illegal or invalid. In many cases, permission is not sought or granted prior to the parties entering into the contract. Unless it is inconsistent with the intention of the parties, it is an implied condition of every contract that before the performance of any term requiring exchange control permission, such permission will be given. If the permission is not eventually given, the term becomes unenforceable, and any party having received consideration therefor is bound to return it to the other party. It is advisable, therefore, to obtain permission before the contract is entered into.

The Central Bank's right to grant or refuse permission for exchange control reasons is, according to Cyprus law, an administrative act which may be judicially reviewed by the Supreme Court of Cyprus. However, there have been no cases in which this discretionary power granted to the Central Bank has been challenged successfully and the presumed principle is that the courts are hesitant to interfere.

For example, in *York International Securities v The Central Bank of Cyprus*,[12] it was stated that:

> . . . the administrative organ has a very wide discretion as it covers a matter of fiscal policy and the court is always very cautious and slow to interfere with its exercise of discretion.

10 A non-resident is defined as a person who is not considered to be a permanent resident of Cyprus according to the Exchange Control Law, while no distinction is made in the Law between residents and non-residents on the basis of nationality or ethnic origin. In the case of companies, the place of incorporation or the location of their registered office determines residency.

11 Such commission should not exceed 5 per cent of the total invoiced amount of goods exported and should only be remitted through the authorised dealer who has already received payment for the export effected. In the case of an appointed selling agent, a copy of the contract or some other document of appointment should be submitted to and kept by the authorised dealers.

12 *York International Securities v The Central Bank of Cyprus* (1987) 3 CLR 933.

11-16 During the EU accession negotiations, the Cypriot authorities have reconfirmed their intention to proceed with the liberalisation of capital movements, so that, by the time of accession, exchange control restrictions will be abolished.

Formation of Agency Relationship

In General

11-17 An agency may be created by:

- Express appointment;
- Implication of law from the conduct or situation of the parties or from the necessity of the case; or
- Subsequent ratification by the principal.

11-18 The actual relationship of the parties is determined by all the circumstances of each case and not merely from the use of the word 'agent' or 'agency' in an agreement. The relationship of principal and agent can be established only by the consent of both parties. An agency relationship usually arises by way of an agreement, but this need not be in writing.

Capacity

11-19 Section 143 of Cap 149 provides that any person may appoint an agent provided he himself has capacity to contract. Section 11 provides that any person of sound mind whose capacity to contract is not restricted by reason of any other law has capacity to contract. The law applicable in England concerning contracts concluded with minors is applicable in Cyprus to contracts concluded with any person under the age of 18.

Under the Cypriot Companies Law, Cap 113, which closely resembles the British 1948 Companies Act, a company registered in Cyprus under Cap 113 has capacity to enter into any contract or to do any act provided for in the company's memorandum.

Agent's Rights and Duties

In General

11-20 It is an agent's duty to conduct the business of his principal in accordance with the directions given by the principal.[13] In the absence of such directions, the agent is bound to conduct the business according to the prevailing trading customs of the particular business at the place where the agent conducts such business. If the agent does not act in accordance with such directions and any loss or damage

13 Contract Law, Cap 149, s 171.

results, the agent is under a duty to compensate the principal. If any profit accrues, the agent must account to the principal for it.

Agents are under a duty to conduct the business of the agency with the skill and diligence generally possessed by persons engaged in a similar business.

An agent must exercise reasonable care in the execution of his duties. What is reasonable will depend on the circumstances of the given case and the trading customs. If direct and foreseeable losses result from the agent's negligence, want of skill, or misconduct, the agent must compensate the principal. However, an agent is not liable if the damage is unforeseeable or too remote. If the agent encounters difficulties, he is obliged to communicate with the principal and seek his instruction.[14] The agent must submit proper accounts at the request of the principal.

Section 3 of the 1994 Law, which amended section 4 of the 1986 Law, provides that not every person is capable of becoming a commercial agent. The necessary requirements are that the commercial agent:

- Was not convicted, within the last 10 years preceding the date of the submission of the application, of any offence under the Exchange Control Law or the Customs and Consumption Taxes Law, or any other offence which entails immorality or dishonesty;
- Has never been declared bankrupt; and
- Is a high school graduate.

11-21 Section 3 of the 1992 Law places a commercial agent under a general duty to act according to the law and in good faith towards the principal and in the best interests of the principal. Specifically, every commercial agent is under a duty to make every possible effort to negotiate or conclude the transactions entrusted to him and pass to the principal all necessary information he has acquired.

Section 9 of the 1986 Law renders commercial agents liable for up to six months' imprisonment or a maximum fine of CY £3,000, or both, if they breach any of the provisions of the law.

A principal is, by virtue of section 182 of Cap 149, under a duty to indemnify the agent against the consequences of every legal act of the latter within the authority conferred on him. The principal must indemnify the agent for the consequences of any act performed under his instructions by the agent in good faith, even if they harm third-party rights. However, the principal is not liable to indemnify his agent for any act entailing criminal liability, even if performed under his command. Under section 185, the principal is under a duty to compensate the agent for damage or loss incurred by him as a result of his omission or lack of skill.

The principal has the right to repudiate the agency agreement if the agent, in the course of conducting the agency, transacts for his own benefit and without the

14 Contract Law, Cap 149, ss 172 and 174.

principal's consent, provided that it is obvious either that the agent dishonestly failed to disclose to the principal any material fact or that the transactions of the agent have damaged the principal. In such case, the principal may claim from the agent any profit the latter has acquired from such transactions.

The authority of an agent may be express or implied. If there is an express agreement, whether contractual or not, between principal and agent, this agreement will regulate the relationship of principal and agent. The scope of the agreement is determined by applying the ordinary principles of the construction of contracts, including any proper inferences from any express words used, trading customs, and the course of business between the parties.[15]

The agreement may be contractual, in which case the relations between principal and agent are regulated by the law of contract. However, an agency may be implied where each party has acted in a way in which it would be reasonable for the other to infer from his conduct that they have consented to an agency relationship.

In a contract entered into through an agent, any obligations arising from the acts of the agent may be enforced in the same manner and will have the same legal consequences as if the contract had been entered into and the acts done by the principal in person.[16]

An agent having authority to do an act has authority to do every lawful thing that is necessary to complete such an act. An agent having authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business. In an emergency, an agent has authority to do whatever is necessary to protect his principal from any loss.[17]

If an agent appoints and delegates the execution of acts and duties to a sub-agent, without express or implied authority to do so, the agent is liable for the sub-agent's acts both to the principal and to third persons.

The principal is not represented by the sub-agent nor is he responsible for the acts of the sub-agent; nor is the sub-agent accountable or liable to the principal. Where an agent has express or implied authority to appoint a person to act for the principal in the business of the agency, such a person is not a sub-agent but an agent of the principal for such part of the business of the agency as is entrusted to him. So long as the agent exercises the diligence of a man of ordinary prudence in selecting a sub-agent, the agent is not responsible to the principal for the acts or negligence of the selected sub-agent.

Section 14 of the 1992 Law provides that the parties to a commercial agency agreement must conclude and sign a written contract which will determine the terms of the agreement and any other terms which are to be agreed on subsequently.

15 Contract Law, Cap 149, s 146.
16 Contract Law, Cap 149, s 186.
17 Contract Law, Cap 149, ss 148 and 149.

Section 15 provides that where the parties to a commercial agency agreement of a defined duration continue to assume obligations after its termination, the agreement is transformed into a commercial agency agreement of indefinite duration.

Lack of Authority and Subsequent Ratification

11-22 Section 159 of Cap 149 provides that, where one person does act on behalf of another without his knowledge or authority, the other may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed with his authority.

Ratification may be express or implied by the conduct of the person on whose behalf the acts are done, but there can be no valid ratification by a person whose knowledge of the facts of the case is materially defective.[18]

An authorised act done by one person on behalf of another which, if done with authority, would have the effect of subjecting a third person to damage or of terminating any right or interest of a third person, cannot by ratification be made to have such an effect.

Actual or Implied Authority

11-23 An agent who is appointed by a contract is bound to act in accordance with the terms of that contract and not exceed his authority. The authority of an agent may be actual (express or implied) or apparent. Actual authority is the authority which the principal has given the agent wholly or in part by means of words or writing (express) or is regarded by the law as having been given to him because of either the legal interpretation or the relationship and dealings of the two parties (implied).

An actual authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying the ordinary principles of construction of contracts, including any proper inferences from the express words used, the usage of the trade, or the course of the business and the parties. Where the express authority is not clear, the court will interpret it.

Apparent authority involves the assumption that there is no authority at all. Under this doctrine, where a principal represents that another person has authority, he may be bound as against a third party by the acts of that person within the authority which that person appears to have; in such a case the principal may be bound although he has not given that person such authority or had limited that authority by instructions not made known to the third party. The authority, express or implied, of every agent is confined within the limits of the powers of his principal.

If an agent deals on his own account in the business of the agency without first obtaining the consent of his principal and acquainting him with all material

18 Contract Law, Cap 149, ss 157 and 158.

circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction where any material fact has been dishonestly concealed from him by the agent or the dealings of the agent have been disadvantageous to him. The principal is also entitled to claim from the agent any benefit that may have resulted to the agent from the transaction.

Contracts entered into through an agent and obligations arising from acts done by an agent may be enforced in the same manner and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

Any notice given, or information obtained, by the agent in the course of the business transacted by him for the principal will have the same legal consequences as between the principal and third parties.[19]

If an agent exceeds his authority and the two elements (authorised and unauthorised) can be separated from each other, the authorised element will be binding on the principal. Consequently, the principal will then have the choice to affirm or reject the unauthorised act.[20] However, where the unauthorised act cannot be separated from the *intra vires* act, the principal is not bound to recognise the transaction.

Unless it is a term of any contract, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor do they personally bind him. Such a term will be presumed to exist where:

- The contract is made by an agent for the sale or purchase of goods to or from a merchant who is residing abroad;
- The agent does not disclose the name of his principal; or
- The principal, though disclosed, cannot be sued.[21]

11-24 Where an agent, acting without authority, assumes obligations on behalf of his principal against third parties, the principal is bound by such acts or obligations if he had by his words or conduct induced third parties to believe that such acts and obligations were within the scope of the agent's authority.

Similarly, misrepresentations made or frauds committed by an agent, acting in the course of his principal's business, have the same effect on agreements made by such an agent as if such misrepresentations or frauds had been made or committed by the principal. However, where the agent has made misrepresentations or committed fraud in matters which do not fall within his authority, the principal is not liable.[22]

Under the 1992 Law,[23] the commercial agent is under an obligation, during the exercise of his duties, to act according to the law and in good faith towards the

19 Contract Law, Cap 149, s 190.

20 Contract Law, Cap 149, ss 186 and 187.

21 Contract Law, Cap 149, s 190.

22 Contract Law, Cap 149, ss 197 and 198.

23 Law 51 (1) of 1992, s 3(1) and (2).

principal and to guard the principal's interests. Every commercial agent is under a statutory duty to:

- Make proper efforts to negotiate and, where appropriate, conclude the assignment appointed to him; and
- Communicate to his principal all the necessary information available to him.

Disclosed and Undisclosed Agency

11-25 A 'disclosed principal' is a principal, whether identified or unidentified, whose existence as principal is known at the time of the transaction to the person dealing with the agent, ie, the third party.

An 'undisclosed principal' is a principal whose existence as principal is not known at the time of the transaction to the person dealing with the agent. It is settled law that an undisclosed principal can sue or be sued on the contract of his agent, but the origins of this rule are uncertain.

Commission on Sales

In General

11-26 It is the duty of the principal to pay his agent any commission or other agreed remuneration. Where there is an express term as to payment, the remuneration and the amount will depend on the term. There is an implied agreement to pay remuneration whenever a person is employed to act as an agent in circumstances which raise the presumption that he would, to the knowledge of his principal, have expected to be paid.

In *Tsamkoshoglou Trading Company v Cytechno Limited*,[24] it was held that an agent is entitled to his commission at the time he earns it. An agent has earned his commission when the agent has brought about the event on which commission is to be paid. The question whether the event has happened is a matter of interpretation of the mandate given to the agent.

The case of *Kokkinomilos v Kalisperas*[25] decided a particular issue, ie, as to when the principal must pay an agreed commission to the agent, despite the fact that the sale was effected after the termination of the contract. The judgment is based on the construction of the agency agreement and does not create any new principles.

As established under Common Law, subject to any special term in the contract, the agent will not be entitled to commission unless he can show that the transaction, into which the third party entered, was due to his direct intervention.

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24 *Tsamkoshoglou Trading Company v Cytechno Limited* (1974) 11 JSC 1124.
25 *Kokkinomilos v Kalisperas* (1967) 19 JSC 1999.

The agent is still entitled to his commission if the principal contracts at a lower price or on terms other than those which the agent was authorised to offer, provided that the contract as finally concluded is merely a different way of carrying out the same contract which the agent was employed to arrange. However, in such a case, the terms of the agency contract will be strictly scrutinised to ascertain whether the agent was the effective cause. In *Socrates Eliades v Pantelis Petrides*,[26] it was held that contracts under which a principal is bound to pay commission for an introduction which does not result in a sale must be expressed in clear language.

Remuneration

11-27 An agent is entitled to remuneration for his services as agent, if either the express or implied terms of any agency contract so provide. Where the contract contains express terms, the agent cannot claim remuneration other than in accordance with those terms. In the absence of express terms, the right to claim any remuneration and the amount and terms of payment are determined by such terms as may be implied. In deciding what terms are to be implied, the court must consider:

- All the circumstances of the case;
- The nature and length of the services;
- The express terms of the contract; and
- The customs and usage of the particular trade.[27]

11-28 In the absence of any factors to the contrary, a term will be implied to hold that the agent is entitled to reasonable remuneration.[28]

In *J F Aho et Fils*, *Trading Under the Style Societe BEPIN and Another v Photos Photiades & Co*,[29] the court held that the contract should be interpreted and applied as if the parties had made it, if made at all. The court should not tailor the contract to the parties or reconstruct an agreement on equitable principles.

Where the agent is to be remunerated on the happening of an event, the question whether that event has occurred depends on the facts of the case and the express or implied terms of the agency contract. In *Ioannis Patsalides v Georghios Th Takkas*,[30] Artemis J said:

> The obligation of the principal to pay remuneration (commission) to the agent exists only where it has been created by an express or implied agreement and such obligation arises mainly where the agent has earned it.

26 *Socrates Eliades v Pantelis Petrides* (1972) 1 CLR 5.

27 *Read v Rann* (1830) 10 B & C 438.

28 *Orphanides v Michaelides* (1967) 1 CLR 309.

29 *J F Aho et Fils*, *Trading Under the Style Societe BEPIN and Another v Photos Photiades & Co*, Civil Appeal number 4704 (1968).

30 *Ioannis Patsalides v Georghios Th Takkas* (1976) 6 JSC 978.

11-29 An agent is entitled, from the sums received on account of the principal, to retain any remuneration due to him for acting as agent, as well as advances he has made or expenses he has incurred in conducting the agency business. Subject to these deductions, the agent must pay to his principal all sums received on account.[31]

As previously stated, when there is an express contract providing for the remuneration of the agent, the amount of remuneration and conditions under which it becomes payable must primarily be ascertained from the terms of the contract. In the absence of any special contract (which includes a contract arising by implication from custom or usage), payment for the performance of any act is not due to the agent until the completion of such an act.

However, an agent may retain money received by him on account of goods sold, even though the sale of all the goods consigned to him may actually be complete. Furthermore, an agent is entitled to retain goods, papers, and other property, whether movable or immovable, belonging to the principal until the amount due to him for commission, disbursements, and services has been paid or accounted for.[32]

If services are not rendered by the agent pursuant to a contract, but the principal with full knowledge has freely accepted them, it appears that the courts may award a reasonable sum to the agent as remuneration on a *quantum meruit* basis.[33]

If an agent is guilty of misconduct in the business of the agency, he is not entitled to any remuneration with respect to that part of the business which he has misconducted. In *Socrates Eliades v Pantelis Petrides*,[34] the court stated that:

> A principal is entitled to have an honest agent and it is only the honest agent who is entitled to any commission. . . if an agent directly or indirectly colludes with the other side and so acts in opposition to the interest of his principal, he is not entitled to any commission.

11-30 Part III of the 1992 Law reflects the above principles and provides that, in the absence of an agreement between the contracting parties in relation to the amount of the remuneration, the commercial agent is entitled to remuneration according to the trade customs which prevail in the place where he carries on his business. In the absence of such trade customs, the commercial agent is entitled to reasonable remuneration, taking into consideration all the material facts of the commercial transaction.[35]

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31 Contract Law, Cap 149, ss 177 and 178.

32 Contract Law, Cap 149, ss 179–181.

33 *Tsamkoshoglou Trading Company v Cytechno Limited* (1974) 11 JSC 1124.

34 *Socrates Eliades v Pantelis Petrides* (1973) 7 JSC 804.

35 Law 51 (1) of 1992, s 5.

According to the 1992 Law, every part of the remuneration that fluctuates according to the number and the value of the transactions will be considered as constituting commission. The remuneration may be in the form of commission or a fixed amount or both.

Commercial Agency Commission

11-31 In cases of remuneration in the form of commission, the 1992 Law[36] sets out the circumstances in which a commercial agent is entitled to a commission for the commercial transactions contracted during the commercial agency agreement and the transactions contracted after expiration of the agreement. An agent is entitled to commission during the agreement if:

- The transaction was secured by the mediation of the commercial agent;
- The transaction was contracted with a third party whom the commercial agent had secured earlier as a client for transactions of a similar kind; or
- The agent was appointed to cover a particular geographical area and/or particular group of people, and the transaction was contracted within the same geographical area, or with a person who belongs to that group even if, for the transaction, negotiations were carried out by a person other than the commercial agent or a different agreement was contracted by the commercial agent.

11-32 An agent is entitled to commission after expiration of the agreement if:

- The act is mainly due to the activity he developed himself during the duration of the agreement; or
- The order of the third party came to the commercial agent or the principal before the expiration of the agreement.

11-33 In all cases, the test is whether, as a matter of construction of the commercial agency agreement, the parties intended that the agent should be entitled to be paid commission after termination. The older authorities held that there must be clear and unequivocal words to entitle the agent to such commission, but this has been doubted; it appears that the normal rules for the implication of terms into a contract must be applied. Commission may be shared between the previous and the present commercial agent, if it is just and right in the circumstances. According to section 11 of the 1992 Law, a right to commission exists in one of the following cases:

- The principal executed the act of the agreement which was contracted with the third party;
- The principal ought to have executed the act; or
- The third party executed the act.

36 Law 51 (1) of 1992, ss 8 and 9.

11-34 The right to commission arises, at the latest, when the third party executes his part of the transaction or the part he should have executed if the principal had executed his part of the act. The commission is payable on the last day of the month following the six-month period during which the relevant right arose. The agent loses his right to commission if:

- It is proved that the agreement between the third party and the principal will not be executed; and
- The non-execution is due to the principal's fault.

11-35 Where the agent's right to commission is lost, he must return any commission he has already received. In estimating the amount of commission due, the principal must provide the commercial agent with an account of the commissions owed by the last day of the month following the three-month period during which the relevant commissions arose. This account should contain all substantial data on the basis of which the amount of the commissions has been calculated. Furthermore, the commercial agent is entitled to demand that all information be supplied to him and particularly an extract of the books which are at the disposal of the principal and which he needs to verify the amount of the commission owed.[37]

The 1992 Law does not allow the parties to deviate from the statutory provisions relating to commission, to the detriment of the commercial agent.

Reimbursement of Agent's Expenses

11-36 Every agent has a right against his principal to be reimbursed for all expenses and to be indemnified against all losses and liabilities incurred by him in the execution of his authority. Where the agent is sued for money due to his principal, he has a right to set off the amount of any such expenses, losses, or liabilities unless the money due to the principal is money which was deposited with the agent for a specific purpose which has failed or is the balance of money so deposited which remains after such purpose has been fulfilled.

Where the agency agreement is contractual, in the absence of an express agreement to reimburse and indemnify, such term may be implied, unless it is clearly excluded. No agent is entitled to reimbursement of expenses incurred by him, or to indemnity against losses or liabilities:

- With respect to any unauthorised act or transaction not ratified by the principal;
- Incurred due to his negligence, default, insolvency, or breach of duty; and
- With respect to any act or transaction which is obviously, or to his knowledge, unlawful.

37 Law 51 (1) of 1992, s 13.

11-37 It should be borne in mind that, usually, the right of reimbursement of expenses would not apply because any expenses are included in the agents' remuneration.

Agent's Accounting Duties

11-38 An agent is bound to render proper accounts to his principal on demand.[38] If an agent fails to keep proper accounts or fails to pay his principal money or receives a secret profit or bribe, he is liable to his principal in an action to account for profits. In an action to account, the agent will be allowed to deduct all reasonable expenses incurred on his principal's behalf, unless such deduction is contrary to the terms of the agency agreement.

An agent will usually be held to be bound by his own accounts; thus, if they show that he has credited his principal with money received, the agent will be presumed to have received that money and will be liable for it to his principal. However, the agent will not be liable if the account shows that the money has not, in fact, been received or if the principal's accounts show that the agent has not received the money.

If an account is agreed, the principal can sue on an account stated. This may be a mere acknowledgment of a debt, in which case the agent may show that no such debt in fact existed or that there is an account containing debts on both sides in which the parties have agreed that the debts of one should be set against the debts of the other and only the balance paid. It is the duty of every agent to:

- Keep the money and property of his principal separate from his own and from that of other persons;
- Maintain at all times proper accounts of all his dealings and transactions in the course of his agency; and
- Produce for inspection, to the principal or to a proper person appointed by the principal, all books and documents in his hands relating to the principal's affairs.

11-39 Every agent is under an obligation to keep an accurate account of all transactions entered into on his principal's behalf and must be ready at all times to produce it to his principal. If he fails to keep and preserve correct accounts, there is a presumption against him.

There is no law in Cyprus regulating sales quotas, but the parties may agree such a provision. It is common for the principal to quote a minimum number of sales which imposes an obligation on the agent to cover at least the specified quotas. In any agreement, there will usually be a term, express or implied, that the agent will take whatever steps are necessary to promote, advertise, and market the product. The expenses incurred in doing so and any budget will again be subject

38 Contract Law, Cap 149, s 173.

to agreement between the parties, who are obliged to ensure that the advertising material used in promoting the product and the description given to the goods comply with local standards and laws. Such an agreement, however, may violate the national competition law.

Indemnity and Failure to Exploit Agency

11-40 Where there is no express agreement to reimburse and indemnify, such a term may be implied, unless this is clearly excluded. Thus, there is no difficulty in such cases in holding that the principal is liable to reimburse and indemnify the agent for all payments made and liabilities incurred within the agent's express or implied authority.

The right to recover any losses arising from the failure of either party to exploit the agency is likely to depend on all the circumstances of the case. An agent's failure to exploit an agency may entitle the principal to terminate the agency agreement under the general principles of company law, and the principal may be able to claim damages for any loss suffered.

Termination and Revocation

In General

11-41 Section 161 of Cap 149 provides that an agency is terminated by the following:

- Revocation of the agent's authority by the principal;
- Renunciation of the business of the agency by the agent;
- Completion of the business of the agency;
- Death or unsoundness of mind of either the principal or agent; or
- Adjudication of the principal as bankrupt or insolvent under the provisions of any law relating to bankruptcy or insolvency.

Revocation

11-42 The following circumstances in which the actual authority of an agent is revoked are often cited by the Cypriot courts:

- Agreement between the parties;
- Expiration of an agency for the agreed period or, in any case, after a certain time has elapsed which is reasonable in all the circumstances;
- Occurrence of an event which, by agreement between the principal and the agent, will determine the authority or on the occurrence of which the agent may reasonably infer that the principal does not or would not wish the authority to continue;
- Destruction of the subject matter of the agency; and

- Happening of any event rendering the agency or its objects unlawful, impossible or otherwise frustrating the agency or its objects.[39]

11-43 Furthermore, section 162 of Cap 149 provides that, where the agent has himself an interest in the property which forms the subject matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Subject to this provision, the principal may revoke the agent's authority at any time before the authority has been exercised so as to bind the principal. If the agent's authority has been partly exercised, the principal cannot revoke the agent's authority concerning actions and obligations arising from acts already undertaken by the agent.

The Contract Law provides that, where there is an express or implied contract that the agency should continue for any particular period of time, the parties must compensate each other (as the case may be) for any earlier revocation or renunciation of the agency (which may be express or implied from the conduct of the principal or agent) without sufficient cause.

The parties are obliged to give reasonable notice of such revocation or renunciation to each other and, unless they do so, any resulting damage must be made good to the one by the other.[40] The termination of the agent's authority does not take effect before it becomes known to him and before it becomes known to third parties. When an agent's authority is terminated, it also terminates the authority of all sub-agents appointed by him.

If the agency is terminated because of the principal's death or unsoundness of mind, the agent is bound to take, on behalf of the representatives of his principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Execution and Expiration of Commercial Agency Agreement

11-44 Part IV of the 1992 Law[41] makes provision for the execution and expiration of a commercial agency agreement. It imposes an obligation on both parties to contract and sign a written agreement which determines the terms of the commercial agency agreement and any other subsequent terms to be agreed. The following Laws will determine whether the contract between principal and agent will fall into the ambit of the 1992 Law:

- The Contract Law, Cap 149, and/or Common Law principles apply to an agreement made in writing before July 1992;

39 *Bowstead on Agency* (14th ed), at p 420.
40 *Kazinos & Co v Letraset* (*Export*) (1982) 2 JSC 443.
41 Law 51 (1) of 1992, ss 14–17.

- All provisions of the 1992 Law apply to an agreement made before July 1992, but not in writing; and
- The 1992 Law applies to written agreements made after 1992.

11-45 Where the parties continue to execute a fixed term commercial agency agreement after its expiration, it is considered to have become a commercial agency agreement of indefinite duration.

Notice

11-46 If a commercial agency agreement is for an indefinite period, either party may terminate it because of the failure of the other party to perform the whole or part of its obligations by giving a written notice. The period of this notice shall be the same for both parties and is specified in the 1992 Law as being one month for the first year of the agreement, two months for the second year, three months for the third year, four months for the fourth year, five months for the fifth year, and six months for the sixth and subsequent years.

When calculating the period of notice, any previous fixed terms also are taken into account. It is not possible for the parties to agree a shorter period of notice, but they can agree longer periods provided that the notice by the principal is not shorter than that by the commercial agent. Provided the parties have not agreed otherwise, the expiration of the period of notice of termination must coincide with the end of a calendar month.

There have been no reported cases concerning the 1992 Law. However, because it incorporates verbatim the text of the 1986 EC Directive, any interpretation given by the European Court of Justice will provide useful guidance.

If the 1992 Law is inapplicable (eg, because of its narrow definition section), the Cypriot courts will apply Cap 149 and/or Common Law principles to determine what constitutes a reasonable period of notice. In applying these principles, a judge will, of course, exercise his discretion and much will depend on how he views the merits of the case as a whole.

The principle deduced from the authorities[42] is that the question of length of notice depends on the facts existing at the date the notice is given. A weighty factor to be considered is the expense incurred in establishing and running an agency. In *Kazinos & Co v Letraset (Export) Ltd*,[43] the District Court of Nicosia held that:

> Primarily, the matter is governed by sections 165 and 166 of the Contract Law, Cap 149. Section 165 provides that the principal is bound to compensate the agent where there is an express or implied contract that the agency should

42 *Martin Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* (1955) 2 All ER 722.
43 *Kazinos & Co v Letraset (Export) Ltd* (1985) 2 JSC 443.

> be continued for any period of time and the agent's authority was previously revoked without sufficient cause. Section 166 provides that reasonable notice must be given of such revocation, otherwise the principal is liable to make good the damage suffered by the agent. It is to be noted that both provisions are modelled on sections 205 and 206, respectively, of the Indian Contract and Specific Relief Acts of 1872.
>
> In the present situation where the contract made no provision for termination, it was conceded, and rightly so in our opinion that the agreement was terminable on reasonable notice. For a discussion of the principles involved in the termination of contracts of indefinite duration, see *Staffordshire Area Health Authority v South Staffordshire Area Waterworks Co* (1978) 3 All ER 769, in which the authorities were reviewed.[44]

11-47 In that case, the court took into account the fact that the agents spent more than CY £30,000 on advertising, employed six extra salesmen, and moved into new premises to cope with the work, and the fact that, at the time notice was given, practically the whole of their business emanated from the agency agreement. In the circumstances, it found that reasonable notice was nine months.

Another judgment, delivered on 27 April 1993 in *Panayides Ltd v Karatsi Ltd*,[45] found that, for a five-year contract, the reasonable notice period was 10 months. In this case the plaintiffs, who were producers of a shoe polish and detergent, brought an action for a debt, and the defendants, who were the agents for the distribution of these products, counter-claimed for breach of the agency agreement. The parties had had dealings since 1957 in their personal capacity but, in 1979, the defendants incorporated a limited company, as did the plaintiffs in 1983.

The main issues were whether an exclusive agency agreement existed between the parties, whether the plaintiffs had lawfully terminated the agreement, and the amount of compensation to which the defendant was entitled if termination of the contract was found.

In 1987, the parties entered into an oral arrangement whereby the defendant would pay each invoice within four to six weeks. The relationship between the parties throughout was excellent until 1987, when differences arose relating to the mode of payment that led to the termination of the agency for distribution. Termination was held to have taken place on 7 December 1987, when the plaintiff sent two letters to the defendant and made a public announcement that the relationship had ended.

The judge stated that the court had to decide whether the termination was lawful, as alleged by the plaintiffs, who argued that they were entitled to terminate the

44 *Halsbury's Laws of England* (3rd ed), vol 8, at p 156.
45 *Panayides Ltd v Karatsi Ltd*, Judgments of Cypriot Courts, Nicosia Bar Association (1993), vol 6, at p 505.

agency due to the breach of the agreement by the defendants regarding the mode of payment, or whether the termination was unlawful, as claimed by the defendant.

The court applied the general principles of English contract law and the Cypriot Sale of Goods Law. On the basis of the evidence adduced, the judge found nothing which made the mode of payment a condition of the agreement between the parties and decided that the agreement had been terminated illegally without reasonable notice which, in the court's opinion, should have been 10 months on the basis of a five-year contract.

Termination Indemnity and Damages

In General

11-48 Subject to the Cypriot laws already discussed, every agent has a right against his principal to be indemnified against all losses and liabilities incurred by him in the execution of his authority.

In *G G Kazinos & Co v Letraset* (*Export*) *Ltd of London*,[46] the plaintiffs, a general partnership registered in Cyprus, claimed more than CY £50,000 against the defendant, a London-based company, as damages for breach of an agency agreement. The plaintiffs carried on business mainly as commission agent, acting as representatives of foreign manufacturers, and the defendant was an exporter of graphic products.

The issue was whether the agency agreement could be terminated and, if so, the appropriate notice in the circumstances. The contract made no provision for termination, and the court concluded that the agreement was terminable on reasonable notice. The court emphasised that the question of length of notice depends on the facts existing at the date notice is given.

A factor that the court considered as weighty is the expense incurred in establishing and running an agency. Taking this and other relevant factors into account, the court found that reasonable notice was nine months. The defendant was entitled to damages on the basis of the amount it would have earned if reasonable notice had been given. The pecuniary loss caused to the plaintiffs through the loss of the goodwill of a customer was considered to be too remote and, thus, irrecoverable.

In the same case, nine months before termination, the defendant stopped supplying the plaintiffs with its products. The plaintiffs' claim for damages estimated on their net annual earnings was not explicitly claimed and any loss suffered was held not to be part of the general damages. In the absence of evidential proof of the loss, this part of the claim was dismissed.

46 *G G Kazinos & Co v Letraset* (*Export*) *Ltd of London* (1982) 2 JSC 443.

Damages

11-49 In *Pipis and Another v Constantinidou and Another*,[47] the court held that reasonable notice must be given of the revocation or renunciation of authority; otherwise, the damage caused to the principal or the agent, as the case may be, must be made good.

It was held that damage may be recovered if it flows naturally from the breach of the contract or if it is of a type that could reasonably be said to have been within the contemplation of the parties as likely to result if either party is in default.

In this case, the court assessed the damage suffered by the aggrieved party by using as a measure the market value of the property at the date of the breach. The object of the award was to restore the plaintiffs to the position in which they would have been had the contract been performed. Therefore, the damages to which the innocent party was entitled were calculated on the basis of the market value of the property at the date of the breach less the contract price.

In *Scandia Company Limited v Schneider Rundfunkwerke GmbH & Co of the Federal Republic of Germany and Pambos Papadopoulos of Limassol*,[48] the court took the view that the recognised measure of damages is the loss of profit which the plaintiff would have earned during the period of the notice which it was entitled to receive from the manufacturers.

The opinion of the court found support in the following extract from *Bowstead on Agency*:

> Where the contract is terminated without giving sufficient notice the innocent party is entitled to damages as to the amount he would have earned if reasonable notice had been given (less expenses and amount earned in substitution).[49]

11-50 The court decided that the plaintiff was entitled, under the circumstances, to compensatory damages, ie, damages for loss of profit that the aggrieved party would have earned but for the breach of contract by the other contracting party. However, the court noted that there was a claim for recovery of special damages and it should have been specifically pleaded. The plaintiff did not specifically plead this element of damages but instead claimed CY £20,000 as expenses incurred for advertising and promotional purposes, and participation in exhibitions and special display and demonstration arrangements.

The court took the view that the measure of damages in the present case was not the expenditure incurred by the plaintiff. Before the plaintiff could succeed in

47 *Pipis and Another v Constantinidou and Another* (1982) 1 JSC 170.

48 *Scandia Company Limited v Schneider Rundfunkwerke GmbH & Co of the Federal Republic of Germany and Pambos Papadopoulos of Limassol*, 1984 *Cyprus Law Review*, vol 4, Issue 13, at p 2431.

49 *Bowstead on Agency* (13th ed), at p 20.

recovering its actual expenditure as damages, it must first show that such expenditure was wasted as a result of the breach and that it was reasonably in the contemplation of the parties that such expenditure would be wasted if the contract were broken. The plaintiff did not satisfy the court on these two limbs, but evidence of loss of profits was adduced by the plaintiff and accepted by the court.

The court also considered the plaintiff's entitlement to exemplary damages. In applying the case of *Addis v Gramophone Co*,[50] it decided that exemplary damages are not recoverable in cases of breach of contract, irrespective of the motive or conduct of the party breaking the contract.

In *Yiannis Panayides Ltd v Costa Karatsi Ltd*,[51] the court again applied section 73(1) of Cap 149 and referred to *Hadley v Baxendale*[52] and other authorities in determining the level of damages to be awarded on the termination of an agency agreement. The criteria to be considered by the court include the duration of the agreement, the volume of work involved, and whether the agent, according to the agreement, had incurred expenses introducing the principal's product in the market; these factors also are considered when deciding a reasonable notice period required for the termination of an agency agreement. It was confirmed that damages would be calculated for the period that the court deems to constitute a reasonable notice period, ie, they represent the profits which the agent would have made during that period. The conclusion reached in all cases is dependent on the facts and circumstances of each case.

Under section 18 of the 1992 Law, the commercial agent is entitled to damages if and to the extent that:

- He has introduced new customers to the principal or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and
- The payment of this indemnity is fair and equitable, having regard to all the circumstances and, in particular, the commissions lost by the commercial agent on the business transacted with such customers.

11-51 These circumstances include the application or otherwise of a restraint of trade clause. The amount of the indemnity may not exceed an indemnity for one year calculated on the commercial agents average annual remuneration over the preceding years and, if the contract goes back less than five years, the indemnity is calculated on the average for the period in question. The award of such damages does not prevent the commercial agent from claiming damages for loss suffered.

50 *Addis v Gramophone Co* (1909) AC 488.
51 *Panayides Ltd v Karatsi Ltd*, Judgments of Cypriot Courts, Nicosia Bar Association (1993), vol 6, at p 505.
52 *Hadley v Baxendale* (1854) 9 Exch 341.

The 1992 Law also states that the agent is entitled to compensation for the damage he suffers as a result of the termination of his relations with the principal and, in particular, when the termination takes place in circumstances which have:

- Deprived the commercial agent of the commission which proper performance of the agency contract would have procured for him while providing the principal with substantial benefits linked to the commercial agent's activities; and/or
- Prevented the commercial agent from amortising the costs and expenses that he had incurred during the performance of the agency contract on the principal's advice.

11-52 It is important to note that the agent's right to claim indemnity and damages is lost if he does not notify the principal, within one year following termination, of his intention to pursue his claims.

The 1992 Law does not allow the parties to agree to a deviation from these provisions to the detriment of the commercial agent. The 1992 Law[53] also sets out the circumstances in which damages are not due, namely, where:

- The principal terminates the commercial agency agreement due to the agent's fault, which would justify, according to the law, an immediate termination;
- The commercial agent terminates the commercial agency agreement, unless the termination is due to the fault of the principal or is justified due to the age, physical fitness, or ailment of the agent, as a result of which it is not possible reasonably to request him to continue his activities; or
- After an agreement with the principal, the commercial agent assigns to a third party the rights and obligations which he has undertaken by virtue of the commercial agency agreement.

Commission on Post-Termination Sales

11-53 In all cases, the test is whether, as a matter of construction of the agency contract, the parties intended that the agent should be paid commission after termination.

The older authorities support the view that the words used in the contract must be clear and unequivocal so as to entitle the agent to such commission. However, this view has often been questioned and it now seems that the normal rules as regards implying terms into a contract must be applied.

In *Sellers v Conlpont Countries Newspapers*,[54] it was suggested that the intention was to pay commission after termination. In addition, the agency agreement can be more readily found in cases where the agent is an independent contractor rather than a servant.

53 Law 51 (1) of 1992, s 19.
54 *Sellers v Conlpont Countries Newspapers* (1951) I KB 784.

A further indication is perhaps that the right to be paid may accrue for a considerable time after the right to receive payment has ceased. In such a case, it may be said to be likely that the contract has been terminated at some point between these two events. A similar situation may arise where the commission is received for a long period, as in the case of a hire-purchase contract.

Even if the contract provides for commission on 'repeated orders' by customers introduced by the agent, there may still be no right to receive commission after termination. The parties may only have intended to refer to repeated orders taken while the agency subsisted. However, if the court finds that the parties did intend that commission should be paid on certain transactions regardless of whether the agency still existed, it will award damages or order an assessment of damages.

Section 9 of the 1992 Law provides that, if an agency agreement falls within the scope of this Law, the commercial agent is entitled to receive commission for commercial transactions which were concluded after the termination of the agreement if:

- The transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency agreement and the transaction was entered into within a reasonable period after the expiration of the agreement; or
- The order of the third party was placed either with the commercial agent or with the principal before to the expiration of the agency agreement.

Goodwill

11-54 An agent has a right to be indemnified if the contract expires or is terminated for reasons other than his default. Such indemnity may be construed as compensation for the goodwill created by the agent which accrued to the principal after the end of the contract or as compensation for the loss suffered by the agent (an example would be the commissions he would have earned had the contract lasted for a longer period, or the investments he would have amortised if the contract had not been terminated), as a consequence of the expiration or termination of the contract.

Goodwill is one of the criteria that the court takes into account when assessing the amount of damages on the expiration of the contract or on its termination for reasons other than the agent's default. It remains to be seen how the courts will apply the 1992 Law when assessing this type of damage in the future.

Return of Documents

11-55 The principal is entitled to have delivered up to him, at the termination of the agency, all documents concerning his affairs that have been prepared by the agent. In every case, it is necessary to decide whether the document in question came into existence for the purpose of the agency relationship or for some other purpose, for example, in pursuance of a duty to give professional advice.

The 1992 Law and the Cyprus Contract Law do not contain any specific provisions on this point.

Agent's Rights in Principal's Bankruptcy

11-56 The Contract Law states that an agency may be terminated where the principal is declared bankrupt or insolvent under the provisions of any bankruptcy or insolvency law.

The question whether the authority of an agent is revoked by the bankruptcy of the principal depends on the nature and terms of his employment.[55] The agent will rank with all other unsecured creditors.

Principal's Property Held by Agent and Agent's Bankruptcy

11-57 An agent's bankruptcy will not necessarily end the relationship. This will depend on the agency agreement and the individual circumstances of the case.

The trustee in bankruptcy or receiver of the agent will not be entitled to the property of the principal. No person may become a commercial agent if he has ever been declared bankrupt.

National Competition Law

In General

11-58 The most important piece of legislation in this area is the Protection of Competition Law,[56] which came into force on 8 June 1990. The introduction of the Protection of Competition Law is part of the Cypriot government's general policy and firm commitment to bring Cypriot law into line with EU Law.

The Protection of Competition (Amendment) Law[57] of 1999 amended article 6 of the 1989 Law. It added a paragraph, stating that the abuse of exploitation by one or more related undertakings involving economic dependence is prohibited when this exploitation is exercised towards a client, supplier, producer, agent, distributor, or commercial co-operator, even when involving a specific type of product or services and not providing an equivalent alternative.

The above-mentioned abuse of exploitation could be the imposition of arbitrary terms in a transaction, the implementation of discretionary treatment, the termination of commercial relations by the transfer of enterprises in a way which affects competition adversely, or a sudden and unreasonable termination of prolonged commercial relations.

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55 *Bowstead on Agency* (14th ed); *Re Douglas, ex p Showball*, 1872.
56 Law 207 of 1989.
57 Law 111 (I) of 1999.

The 1989 Law is based on the Competition Law introduced in Greece prior to its entry into the EU. The Law reproduces the text of articles 85 and 86 (now articles 81 and 82) of the EC Treaty and the provisions of the Council Regulations 17/62 of 6 February 1962 and 27/62 of 3 May 1962. Section 4 reads as follows:

> 1. All agreements between undertakings, which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, are prohibited, and in particular those which:
>
> a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> b) Limit or control production, markets, technical development, or investment;
>
> c) Share markets or sources of supply;
>
> d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
>
> 2. The agreements prohibited pursuant to this section are void *ab initio*.
>
> As an exception, an agreement between undertakings falling within the ambit of section 4(1) may be allowed and considered valid and legally enforceable either pursuant to a Regulation or pursuant to a decision by the [Competition] Committee, provided the conditions set out in the following section apply.

11-59 Section 5 provides that:

> 1. An agreement between undertakings or a category of agreements falling within the ambit of section 4(1) may be allowed and considered valid and enforceable provided the following conditions apply conjunctively:
>
> a) It contributes, while allowing consumers a fair share of the resulting benefit, to improve the production or distribution of goods or to promote technical or economic progress;
>
> b) It does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
>
> c) It does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

11-60 Section 6 provides that:

> The abuse of the dominant position of an undertaking is prohibited.
>
> Such abuse may in particular consist of:
>
> a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> b) Limiting production, markets, or technical development to the prejudice of consumers;
>
> c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

11-61 As mentioned above, section 6 also provides that the abuse of exploitation by undertakings, such as the imposition of arbitrary terms of a transaction, the implementation of discretionary treatment, the termination of commercial relations by the transfer of enterprises in a way which affects competition adversely, or a sudden and unreasonable termination of prolonged commercial relations, is prohibited.

There also are a number of Orders[58] of the Council of Ministers regarding Block Exemptions from the provisions of the Protection of Competition Law, which are in force today and constitute an exact replica of EU Regulations.

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58 The Orders are as follows: Exclusive Purchasing Agreements (Block Exemptions) Order of 1995 (in force since 26 January 1996), reproducing the text of EC Regulation 1984/83 of 22 June 1983; Exclusive Distribution Agreements (Block Exemptions) Order of 1995 (in force since 26 January 1996), reproducing the text of EC Regulation 1983/83 of 22 June 1983; Patent Licensing Agreements (Block Exemptions) Order of 1996 (in force since 26 January 1996), reproducing the text of EC Regulation 2349/84 of 23 July 1984, as amended by EC Regulation 151/93 of 23 December 1992; Know-how Licensing Agreements (Block Exemptions) Order of 1996 (in force since 21 June 1996), reproducing the text of EC Regulation 151/93 of 23 December 1992; Exclusive Franchise Agreements (Block Exemptions) Order of 1998 (in force since 30 April 1998), reproducing the text of EC Regulation 4087/88 of 30 November 1988; Block Exemptions (Research and Development Agreements) Order of 1997 (in force since 24 January 1997), reproducing the text of EC Regulation 418/85 of 19 December 1984, as amended by EC Regulation 151/93 of 23 December 1992; Block Exemption (Specialisation Agreements) Order of 1997 (in force since 24 January 1997), reproducing the text of EC Regulation 417/85 of 19 December 1984, as amended by EC Regulations 151/93 of 23 December 1992; Block Exemption (Maritime Conferences) Order of 1997 (in force since 18 July 1997), reproducing the text of EC Regulations 4056/86 of 22 December 1986; Block Exemption (Agreements, Decisions and Concerted Practices between Liner Shipping Companies–Consortia) Order of 1997 (in force since 18 July 1997), reproducing the text of EC Regulation 870/95 pursuant to EC Regulation 479/92; Block Exemption (Agreements between Undertakings Relating to Computerised Reservation System for Air Transport Services) Order of 1997 (in force since 18 July 1997),

A draft law for the Control of Concentrations between Undertakings was prepared and forwarded to the House of Representatives for adoption in January 1997. It reproduces the text of EC Regulation 4064/89 of 21 December 1989.

In 1999, the Control of Concentrations between Undertakings Law[59] was enacted and was amended in the same year by the Control of Concentrations between Undertakings (Amendment) Law of 1999. The Law is applicable to all the concentrations of great importance. According to the Law, a concentration of great importance arises when:

- The turnover achieved by at least two of the participating undertakings each exceeds the amount of CY £2 million;
- At least one of the participating undertakings deals with commercial activities within Cyprus; and
- At least CY £2 million of the turnover of all the participating undertakings together concern the trading of products or the provision of services within the Republic of Cyprus.

11-62 A concentration may be regarded as one of great importance, even though it does not meet the above requirements, by an Order of the Minister of Commerce, Industry, and Tourism. Section 4 of Law 22 (I) of 1999 provides that a concentration between undertakings takes effect when either:

- Two or more previously independent undertakings amalgamate; or
- One or more parties control at least one undertaking or one or more undertakings obtain direct control of the whole or part of one or more other undertakings or when a common undertaking is established which regularly performs all the activities of an autonomous economic unit.

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reproducing the text of EC Regulation 3652/93 of 22 December 1993; Block Exemption (Agreements between Air Transport Undertakings concerning Joint Planning and Co–ordination of Schedules, Joint Operations, Consultations on Passenger, and Cargo Tariffs on Scheduled Air Services and Slot Allocation at Airports) Order of 1998 (in force since 20 February 1998), reproducing the text of EC Regulation 1617/93 of 25 June 1993; Block Exemption (Technical Co-operation in the Air Transport Sector) Order of 1997 (in force since 12 December 1997), reproducing the text of EC Regulation 3975/87 of 14 December 1987; Block Exemption (Agreements, Decisions and Concerted Practices Concerning the Production or Trade in Agricultural Products) Order of 1998 (in force since 23 January 1998), reproducing the text of EC Regulation 26/62 of 4 April 1962; Block Exemption (Agreements, Decisions, and Concerted Practices in the Road Transport Sector) Order of 1997 (in force since 12 December 1997), reproducing the text of EC Regulation 1017/68 of 19 July 1968; Block Exemption (Exclusive Motor Vehicle Distribution and After Sales Servicing Agreements) Order of 1998 (in force since 20 February 1998), reproducing the text of EC Regulation 1475/95 of 28 June 1995; Block Exemption (Agreements, Decisions, and Concerted Practices in the Insurance Sector) Order of 1997 (in force since 31 October 1997), reproducing the text of EC Regulation 3932/92 of 21 December 1992; and Block Exemption (Technology Transfer Agreements) Order of 1998, reproducing the text of EC Regulation 240/96 of 31 January 1996.

59 Law 22 (I) of 1999.

The Competition Committee

11-63 The Competition Committee has the power and the right to alter a decision concerning the convention of a concentration within the competitive market when it discovers that:

- False or misleading information was provided or important information was withheld from any participant in the concentration between undertakings; or
- Any term that was imposed on the participants in the concentration has not been upheld.

11-64 After the Committee exercises the above-mentioned powers, it has the right to order the full or partial dissolution of a concentration to guarantee the restoration of the competitive market.

The Committee has the right to impose a fine on those who abuse or neglect to abide by the provisions of the Law. The fines which may be imposed can reach CY £50,000, depending on the degree of seriousness of the offence. For instance, where information of the concentration has been withheld contrary to section 13 of the Law, the fine imposed may reach CY £50,000 and, in addition, up to CY £5,000 for every day on which the section is violated. Furthermore, a fine may be imposed for inadequate, insufficient, inaccurate, and false information provided by the participants in the concentration.

A new Bill which amends the Protection of Competition Laws[60] is under consideration. The Bill provides for the upgrading of the Competition Committee, which will consist of five members, a Chairman, and four other members who will be appointed by the Council of Ministers on the recommendation of the Minister of Commerce, Industry, and Tourism. The term of office of the Chairman and the members of the Committee will be reduced to five years and may be renewed only once.

The Bill introduces the post of a Chairman who will devote all his time to the functions of the Committee and who will be a person of high repute and calibre (eg, a judge or a former judge). The Bill also provides that the Committee will have its own service, the members of which will be members of the civil service.

Litigation Issues – Principal's Exposure to Local Jurisdiction

Agent's Ability to Accept Process for Principal

11-65 Order 5, Rule 8, of the Civil Procedure Rules provides that, where a contract has been entered into in Cyprus by or through an agent residing or carrying on business in Cyprus on behalf of a principal residing or carrying on business outside Cyprus, a writ of summons in an action relating to or arising out of such a contract may, by leave of the court or a judge given before the determination of such agent's

60 Law 207 of 1989; Law 111 (I) of 1999; Law 87 (I) of 2000.

authority or of his business relations with the principal, be served on such agent. Notice of the order giving such leave and an office copy thereof and of the writ of summons will forthwith be sent by prepaid, double-registered letter post to the defendant or defendants at their address out of the jurisdiction.

It is the agent's duty under section 189 of Cap 149 and under Common Law to communicate relevant information to his principal, and he will be deemed to have done so. This principle is reflected in the provisions of Order 5, Rule 8, above.

Agent's Authority to Initiate Suits on Behalf of Principal

11-66 An agent is entitled to initiate proceedings against third parties on behalf of the principal. However, the usual practice is that such actions are brought by both the principal and the agent.

Where the principal is undisclosed, the agent is able to sue third parties in his own name, despite the fact that ultimately it is the principal that will be entitled to any damages or relief.

Arbitration

11-67 If there is a term in an agency agreement or in a written agreement between the principal and the third party to the effect that any dispute is to be referred to arbitration, Cypriot courts will usually give effect to such term (provided it is valid) and stay any proceedings before them which are subject to the arbitration clause. English Common Law principles are applicable in this area of law.

The Cypriot Law on International Commercial Arbitration 1987[61] applies to international commercial arbitration. The Law clearly defines the words 'international arbitration' as 'an arbitration between two parties who have their places of business in different states'. The word 'commercial' is defined as referring to matters 'arising from relationships of a commercial nature' and thus may be widely interpreted.

There is little, if any, case law on matters of international commercial arbitration in Cyprus. However, the Common Law principles are applicable, and courts are likely to use English or Commonwealth cases for guidance and reference.

Foreign Jurisdiction

11-68 It has been firmly established by case law that principles of Private International Law form part of the law of Cyprus, but only in so far as they form part of the Common Law of England. Therefore, although no cases concerning choice of law clauses have been reported, Cypriot courts are likely to follow their English counterparts and uphold choice of law clauses.

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61 Law 101 of 1987.

The courts have the power to restrain by injunction the institution or continuation of proceedings in a foreign court brought in breach of an arbitration or jurisdiction clause in favour of Cyprus. However, this power is exercised with great caution.

Applicability of Foreign Law

11-69 Cypriot courts will usually uphold a choice of law clause. If no such clause is inserted, Cypriot law will normally be applied unless the circumstances indicate that another law is applicable.

However, it should be borne in mind that it has been specifically held by the Supreme Court of Cyprus that a party which argues that a foreign law is applicable to its case must provide expert evidence of that foreign law to the satisfaction of the court and, failing that, Cypriot law will be applied.

Product Liability

In General

11-70 The Trade Description Law of 1987[62] was enacted to protect consumers from inaccurate or misleading trade descriptions. The Law prohibits any person carrying on a trade, business, or profession from applying an inaccurate trade description to goods, or supplying or offering to supply goods to which an inaccurate trade description has been applied. The Law applies to advertisements that are misleading or inaccurate.

Section 5 of Law 5 of 1987 prohibits the importation or supply within Cyprus of any goods which are not labelled or accompanied in an obvious and clear manner with an indication of the country of production or manufacture.

Section 14 of the Law gives to the Minister of Commerce, Industry, and Tourism the power to make an order for the labelling of any goods or an order that certain goods must be accompanied by a clear indication of certain information.

Section 18 of the Law provides that the authorities may confiscate products with an inaccurate trade description which are imported to Cyprus. Any person who breaches or fails to meet any of the provisions of the Law is subject in the case of conviction to a fine not exceeding CY £750 or to imprisonment not exceeding 12 months, or both. In the event of a second or subsequent conviction, the penalty is increased to a figure not exceeding CY £1,000 and a term of imprisonment not exceeding two years, or both. It is a defence to a criminal prosecution if the accused proves that the committing of the offence was due to:

- Mistake;
- Information supplied to him;

62 Law 5 of 1987.

- An act or omission of another person; or
- A cause beyond his control.

11-71 The Trade Description Law of 1987 was amended in 1992 by the Trade Description (Amendment) Law of 1992.[63] The Law states that an offence is committed by a person who, during the execution of a trade, business, or profession, provides consumers with any misleading indication as to the price of any product or services. The Trade Description (Amendment) Law of 1992 came into force on 17 January 1994 (PI 7 of 1994).

The Sale of Goods Law (Law 10 (I) of 1994), as amended,[64] which amends the Sale of Goods Law, Chapter 267, represents an attempt to bring the pre-existing law into line with the new international trends and perceptions of consumer protection as regards the sale of goods. The Law offers protection to consumers who are buying pre-packed goods from self-service shops that subsequently prove to be defective. In such cases, the buyer does not lose his right to reject the products since he did not have the chance to inspect them before they came into his possession.

The Safety of Consumer Products Law,[65] which came into force on 11 January 1995, introduces and implements European standards for the safety of products. The Law provides that buyers must be informed of any dangers resulting from incorrect use of products, outlines the legal responsibility of manufacturers, as well as importers and suppliers for bodily harm or death of a consumer resulting from the use of their products, and provides for the banning or confiscation of products which do not meet safety standards. It also gives extensive powers to the Consumer Protection Authority to conduct searches and to confiscate or ban products.

Law 99 (I) of 1997, which came into force in December 1997, amends section 5 of the Safety of Consumer Products Law so that every producer-importer, seller, and deliverer of consumer products is under a duty within two working days to give to the Consumer Protection Authority any information of which he acquires knowledge which could lead to the conclusion that any consumer product might endanger the safety or health of consumers or is in any way defective.

The Defective Products (Civil Liability) Law,[66] which came into force on 1 January 1997, renders the producer/manufacturer of defective goods strictly liable for any damage caused by such products and brings the legislation in this area into line with European legislation. The Law implements all European Directives in the

63 Law 3 of 1992.
64 Sale of Goods (Amendment) Law 8 (I) of 1995; Sale of Goods (Amendment) Law 101 (I) of 1999.
65 Law 74 (I) of 1994.
66 Law 105 (I) of 1995.

area of product liability, including the 85/574/EEC Directive. Its main provisions are as follows:

- Wherever a defect in a product wholly or partly causes personal injury or damage, the victim or his dependants may invoke the rules of strict liability to sue under the new Law. Liability is not limited to manufacturers alone. The Law imposes liability under certain circumstances on the importers of products into Cyprus and on the suppliers unless they comply with a request to name within a reasonable time the person supplying them with the product.
- 'Defect' is defined in section 4 of the Law, which provides that there is a defect in a product if the safety of that product is not such as the consumer is entitled to expect. Of course, the circumstances under which the product is used, possessed, and consumed should always be taken into account. The burden of proving that there was a defect in the product and that the relevant injury or damage was wholly or partly caused by that defect lies on the plaintiff.
- Section 12 of the Law provides several defences to strict liability. It is important to note that the defendant will not be liable where he can show that the state of scientific and technical knowledge at the time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control (the development risks defence).
- Section 11 of the Law provides that the action must be brought within three years of the date on which the plaintiff becomes aware, or could reasonably become aware, of the damage or injury. Moreover, no action may be brought in any circumstances more than 10 years after the date on which the defendant supplied the relevant product to another.

11-72 The Law Regulating Consumer Protection in relation to Certain Aspects of the Sale of Consumer Products and Relevant Guarantees Law[67] was enacted to offer an effective protection to consumers when they enter into a contract for the purchase of consumer products, as well as for complete harmonisation with the EU. The Law, which came into force on 28 January 2000, provides that the seller is under an obligation to supply the consumer with goods which are in accordance with the terms of the contract.

If the goods supplied to the consumer are not in accordance with the description applied by the seller, or they are not suitable for any specific use which the consumer demands and which use was notified by the consumer to the seller at the time of the contract, or they are not suitable for the use for which such goods are usually intended, or they do not have the quality which may be reasonably expected by the consumer, the consumer is entitled either to a free of charge repair or a replacement of the product, or to an appropriate reduction in the product's price or to a repudiation of the contract as far as the said product is concerned.

67 Law 7 (I) of 2000.

Law 7 (I) of 2000 provides that the guarantee offered by any person to a consumer binds that person legally. The guarantee must include a clear statement that the consumer has legal rights according to the present law and that such rights are not affected by that guarantee. Moreover, the Law provides that the guarantee must explain, in simple and understandable language, the contents and the substantial elements which are required for the effectiveness of the guarantee.

When the Consumer Protection Authority of the Ministry of Commerce, Industry, and Tourism considers that there has been a violation of any of the provisions of the present Law by any person involved, it may apply in court for the issue of a restrictive or mandatory order, including an interim order.

According to section 15 of Law 7 (I) of 2000, the provisions of the Contract Law, as well as the provisions of the Sale of Goods Laws,[68] will still be applied to contracts for the sale of consumer products unless these provisions come into conflict or are incompatible with the express provisions of the present Law.

Inscription of the Sale Price

11-73 A relevant law which should be mentioned is the Inscription of the Sale Price and the Unitary Price of Products Law.[69] It was recently enacted to provide consumers with information and to enable them to compare prices of products offered to consumers.

The above-mentioned law, which will come into force on 24 March 2001, provides that the trader who sells or displays products for sale to consumers is obliged to ensure that the products are marked with the selling price as well as the price per unit.

The selling price and the price per unit of a product must be clearly visible, distinct, and readable. These prices also must be inscribed either on the products themselves or on their packaging or on the shelves and be displayed in such a way as not to confuse the consumer.

A trader who violates or neglects to abide by the provisions of this Law will be subject on conviction to imprisonment not exceeding six months or to a fine not exceeding CY £1,000, or both. In the event of a second or subsequent conviction, such a trader is subject to imprisonment not exceeding one year or to a fine not exceeding CY £2,000, or both.

Distributorship

11-74 There are no statutory provisions governing distributorship relationships and often the legislation does not make any distinction between agent and

68 Law 10 (I) of 1994; Law 8 (I) of 1995; Law 101 (I) of 1999.
69 Law 112 (I) of 2000.

distributor. Therefore, the principles discussed in the previous parts of this chapter as regards agents would *prima facie* apply to distributors.

However, in the area of competition law, the Exclusive Distribution Agreements (Block Exemption) Order of 1995 is of the utmost importance. Legal advisers ought always to draft exclusive distribution agreements consistent with its main principles and, if this is not possible, to tailor the agreement as closely as possible to the provisions of the Order so that the Competition Committee will more readily grant an individual exemption.

The Order provides obligations which may be imposed on the supplier of an exclusive distribution and which may be imposed on the distributor. It also states that, in certain cases, an exemption will not be granted and provides that the Committee may, in certain cases, revoke the benefit of the application of the Order. The Order is not applicable to agreements entered into for the resale of drinks in premises used for the sale and consumption of beer or for the resale of petroleum products in service stations.

CHAPTER 12

Criminal Law and Procedure

Andreas Thoma

Introduction

12-1 Criminal law is the body of legal rules that specify the conduct of which society disapproves. A criminal wrong is quite distinct from a civil wrong as it 'unjustifiably and inexcusably inflicts or threatens substantial harm to individuals or public interests'.[1] Criminal law seeks to protect society and to discourage such conduct by inflicting punishments on those committing such acts.

In Cyprus, criminal law represents to a great extent the general principles and main offences of the English Common Law. This also is evidenced by the adoption of an accusatorial system of criminal justice similar to that at Common Law. This system has been in force for more than a century and has come (as was judicially pronounced in 1972) 'to be cherished and respected as a cornerstone of fairness'.[2] The substantive part of Cypriot criminal law is to be found in the Criminal Code (Cap 154). The Code represents a codified version of all major offences and criminal responsibility which exist at Common Law. The procedural aspect of criminal law is regulated by the Criminal Procedure Law (Cap 155), which also bears a number of similarities to established Common Law principles.

The interpretation of these laws is greatly assisted by the precedents of English case law and interpretations obtaining in England.[3] Although these have no binding authority,[4] under Cypriot law, they nevertheless provide useful guidance on numerous points of law, and it is rarely that the Supreme Court will depart from English precedents.[5] It should be noted that, although English precedents have only a persuasive effect in Cyprus, the decisions of the Supreme Court are binding on all inferior courts.

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1 Smith and Hogan, *Criminal Law* (9th ed, 1999), at p 3.

2 Artemis, 'An Outline of Criminal Law and the Working of the Judicial System in Criminal Cases', *Cyprus Law Review*, Issue 26 (April–June 1989), at p 4016.

3 Courts of Justice Law 1960, s 29(1)(c).

4 *Mouzouris v Xylophagou Plantations Ltd* (1977) 1 CLR; *Adamtsas Ltd v Republic* (1977) 3 CLR 181; *The Police v Xidia* (1992) 2 CLR 26; *Parris v The Republic*, Criminal Appeal 6314, 5 May 1999.

5 *Attorney General v Tsioli* (1991) 2 CLR 194; *Police v Andreas Ioannou* (1989) 2 CLR 61.

The courts involved in the administration of criminal justice are the District Courts, the Assize Court, and the Supreme Court in its appellate jurisdiction. The structure and jurisdictions of the courts are regulated by the Courts of Justice Law 1960.[6]

It can be seen that criminal law has developed not only from the Common Law principles, but also from the Ottoman Penal Code and the continental European criminal systems. Cypriot criminal law can be rightly described as a mixture of various criminal jurisdictions. According to Clerides, prior to the British occupation of Cyprus in 1878, the applicable criminal law of Cyprus was the Ottoman Penal Code, which was mainly based on the continental European law and especially on the French Penal Code.[7]

This continued to be applied until Cyprus became a colony of the Crown in 1925, which led to the replacement of the Ottoman Penal Code by the present Criminal Code in 1928. Nevertheless, there are still certain resemblances to the Ottoman Penal Code, such as in the area of premeditated murder, where no malice aforethought is required under Cypriot criminal law in contrast to the Common Law.

Criminal law and procedure in Cyprus also are influenced by the civil rights and liberties entrenched in the Constitution of the Republic of Cyprus. Paschalides argues that rights of freedom and personal safety as set out in article 11 of the Constitution represent fundamental rights of the citizens and that the current criminal law principles must be shaped in such a way as to ensure the proper application of these rights.[8] Paragraph 5 of article 11 of the Constitution partly reproduced the provisions of article 5, paragraph 3, of the European Convention on Human Rights and Fundamental Freedoms, which was ratified by Law 39 of 1962, and it forms part of the legal order of Cyprus.

On this point, Artemis also is explains that the Constitution has 'moulded present day rules of criminal law and procedure in such a manner as to uphold in an effective way civil rights and liberties'.[9] Consider, for example, the abolition of the mandatory or minimum sentence as a result of the unconstitutional provision that no law shall provide for a punishment disproportionate to an offence, with the exception

6 Law 14 of 1960, as amended by Law 50 of 1962, Law 11 of 1963, Law 8 of 1969, Law 40 of 1970, Law 58 of 1972, Law 1 of 1980, Law 35 of 1982, Law 29 of 1983, Law 91 of 1983, Law 16 of 1984, Law 51 of 1984, Law 83 of 1984, Law 93 of 1984, Law 18 of 1985, Law 71 of 1985, Law 89 of 1985, Law 96 of 1986, Law 317 of 1987, Law 49 of 1988, Law 64 of 1990, Law 136 of 1991, Law 149 of 1991, Law 237 of 1991, Law 42 of 1992, Law 43 of 1992, Law 102 of 1992, Law 26 of 1993, Law 82 of 1995, Law 102 of 1996, Law 4 of 1997, Law 53 of 1997, Law 90 of 1997, Law 27 of 1998, Law 53 of 1998, Law 110 of 1998, Law 34 of 1999, Law 146 of 1999, and Law 41 of 2000.

7 Clerides, 'The Cypriot Criminal Code — Development and Problems', *Cyprus Law Review*, Issue 5 (January–March 1984), at p 889.

8 Paschalides, 'Principles of Criminal Justice', *Cyprus Law Review*, Issue 36 (October–December 1991), at p 5587.

9 Artemis, 'An Outline of Criminal Law and the Working of Judicial System in Criminal Cases', *Cyprus Law Review*, Issue 26 (April–June 1989), at p 4016.

of a mandatory life sentence for premeditated murder. Another example would be the right of arrest and detention on suspicion that has been formulated in such a way as to comply with the constitutional requirements contained in article 11[10] and the right of liberty of an individual.

The preparation of Cyprus for accession to the European Union (EU) also has had an effect on the criminal law of Cyprus. Despite the fact that the area of criminal law is not currently within the competence of the EU, the preparation of Cyprus for accession to the EU has led to a number of changes in the area. An example is the abolition of the death sentence in the Criminal Code and its replacement with a term of life imprisonment.[11]

General Principles of Criminal Responsibility

In General

12-2 According to the Constitution of Cyprus, every person charged with an offence is considered as being innocent until proven guilty.[12] Under Cypriot law, the burden of proving the commission of a crime lies on the prosecution, and in discharging this duty the prosecution must persuade the court, beyond any reasonable doubt, that the accused committed the offence in question. In cases of certain defences or where it is prescribed by law, the burden of proof may fall on the defence. It is important to note that for a person to be held criminally responsible for any act or omission, the law requires that that person should not be below 10 years of age.[13] A person below the age of 10 cannot be held criminally liable for any offence committed.

One fundamental rule of Cypriot criminal law is that a person cannot be guilty of his actions unless he also has a guilty mind. Before any criminal responsibility and/or sanctions are imposed, Cypriot criminal law requires as a general rule the co-existence of the physical act and the necessary mental condition of the accused. This requirement is commonly expressed in the words of the ancient *maxim actus non facit reum nisi mens rea*.[14] In other words, the mere doing of an act will not constitute guilt unless a guilty intention on behalf of the accused is co-existent. The terms *actus reus* and *mens rea* refer to the physical act committed by the accused and the mental state of the accused, respectively.

10 Article 11.2.c of the Constitution explains the reasons which must be satisfied when requesting a warrant for arrest of a person; see text, below.

11 Criminal Code (Amending) Law 1999, Law 15 of 1999.

12 Constitution, art 12.4.

13 Criminal Code, s 14.

14 James, *Introduction to English Law* (7th ed, 1969), at p 180.

Criminal Conduct — 'Actus Reus'

12-3 The term *actus reus* refers to the conduct, physical act, state of affairs, or omission which a particular offence prohibits. The accused must voluntarily act or pursue a course of conduct which results in the commission of the crime. If the accused's conduct fails to effect such a consequence, no issue in relation to the existence of the *actus reus* arises.

In such a case, the accused may find himself liable for the offence of attempt. An omission of the accused also may suffice to establish the requisite *actus reus*. Consider, for example, the situation where the accused has taken it on himself to look after another. In such a case, an omission by the accused would suffice to prove the necessary *actus reus*.[15]

State of Mind — 'Mens Rea'

12-4 The nature of the mental element has been the subject of a vast number of academic works and its importance is immense for the proper operation of the criminal justice system in a democratic state. The nature of the mental element depends on the definition of the particular crime in question. On this point, Artemis argues that there may be 'different mental attitudes which a man may have with respect to the *actus reus* of the crime in question'.[16] As will be discussed below, offences may require intent to commit the specific crime or knowledge of the circumstances, whereas others may be committed due to the recklessness of the accused judged in certain cases on an objective standard.

Despite the fact that, in many offences, the *mens rea* required is that of intention, there is nevertheless no explicit definition of this term. Artemis suggests that 'the elements of a crime are brought about intentionally where a person brings them about with the desire to do so'.[17] One well-settled proposition is that 'a person intends to cause a result if he acts with the purpose of doing so'.[18]

The courts, however, have sought to define 'intention' in a wider sense, rendering as intention not just that which may come about directly but also an oblique intention. Smith and Hogan explain that, according to the present state of the case law,[19] intention also may encompass situations when the result is a virtually certain consequence of the act and the accused knows that it is a virtually certain consequence.[20]

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15 *Stone and Dobinson* [1977] 1 QB 354.

16 Artemis, 'The Mental Element in Crime', *Cyprus Law Review*, Issue 11 (July–September 1985), at p 1761.

17 Artemis, 'The Mental Element in Crime', *Cyprus Law Review*, Issue 11 (July–September 1985), at pp 1761–1762.

18 Smith and Hogan, *Criminal Law* (9th ed, 1999), at p 54.

19 *Hyam v DPP* [1975] AC 55; *Moloney* [1985] AC 905; *Hancock v Shankland* [1986] AC 455; *Nedrick* [1986] 3 All ER 1; *Woollin* [1999] AC 82.

20 Smith and Hogan, *Criminal Law* (9th ed, 1999), at p 55.

Foresight of the consequence used to be regarded as different from intention. In *Moloney*,[21] it was held that the fact that an accused foresaw that his act would result in the death of the victim was insufficient to sustain a conviction for murder. This, however, was overruled in *Woolin*.[22] In this case, Lord Steyn said that 'a result foreseen as virtually certain is an intended result'. It cannot be pretended that determining the existence of a guilty intention is a simple matter.

All the principles which have been established by the various cases on this issue do not provide us with a clear set of rules in determining the existence of intention. The authorities may sometimes take a narrow view and at other times may interpret the matter in a more flexible manner. In establishing the requisite *mens rea* in cases where the offence requires proof of intention, it must be asked whether intention bears the original narrow meaning or the broader meaning attributed to it thereafter.[23]

Certain offences may be committed when the accused is reckless as to the outcome of his acts, even though he may have no intention to commit the offence. Smith supports the view that a person 'is not to be adjudged reckless in the criminal sense, unless he has taken an unreasonable risk — a risk that a reasonable and prudent man would not have taken'.[24] The notion of recklessness conveys the taking of unjustifiable risk by the accused, without implying that all forms of risk-taking would be classified as reckless.

In establishing recklessness, the prosecution must prove that the accused took an unjustifiable risk, but it also may need to go further. This is due to the fact that there are two types of recklessness at Common Law. One type of recklessness is that of a subjective character which is commonly referred to as '*Cunningham* recklessness'.[25] This form of recklessness is usually required for crimes which can be committed maliciously.[26] If this subjective standard is adopted, the accused would not be guilty unless he had foreseen that the particular kind of harm might be done and yet went ahead to take this risk.

The other type of recklessness which exists is of an objective character. This is commonly referred to as '*Caldwell* recklessness'. In *Caldwell*,[27] Lord Diplock stated that a person is reckless if '(1) he does an act which in fact creates an obvious risk that property would be destroyed or damaged and (2) when he does the act he

21 *Moloney* [1985] AC 905.

22 *Woolin* [1999] AC 82.

23 Artemis, 'The Mental Element in Crime', *Cyprus Law Review*, Issue 11 (July–September 1985), at p 1763.

24 Smith, 'Criminal Liability — Past Developments and Modern Trends', *Publication of Ministry of Justice* 1 (1984).

25 *R v Cunningham* [1957] 2 QB 396.

26 Smith and Hogan, *Cyprus Law* (9th ed, 1999) at p 61; Artemis, 'The Mental Element in Crime', *Cyprus Law Review*, Issue 11 (July–September 1985), at p 1765.

27 *Caldwell* [1981] 1 All ER 974, [1982] AC 341.

either has not given any thought to the possibility of there being any risk or has recognised that there was some risk involved and has nonetheless gone on to do it'.[28] If the accused fails to give thought to whether the harm which ensues might occur and the risk of such harm would have been obvious to the ordinary prudent person, he would be deemed as reckless in the *Caldwell* sense. This test seeks to establish not what the accused actually foresaw, but rather what he ought to have foreseen under the circumstances.

The test in *Caldwell* gave rise to considerable confusion in relation to the type of offences to which it would apply. Case law has established that the test in *Caldwell* does not apply to offences requiring malice or to offences against the person[29] and rape.[30] In *Savage and Parmenter*,[31] the court decided that the accused need not foresee the particular harm which occurs but will be held reckless if he foresees that his unlawful act may cause some physical harm to the victim, even of a minor character. This is to be interpreted as a confirmation of the application of the *Cunningham* test for recklessness to offences against the person and a return to the position adopted in *Mowatt*.[32] This, therefore, leaves little room for the application of the objective test as set out in *Caldwell*. The courts, however, still have the opportunity of reconsidering *Caldwell* at a later stage and thus reverse the authorities outlined above.

Strict Liability

12-5 As stated above, it is a fundamental rule of criminal law that a man cannot be guilty by his actions unless he also has the requisite mental element or guilty mind for the commission of an offence. As a general exception to this rule, certain criminal offences, referred to as strict liability offences, have dispensed with the requirement of the existence of the requisite *mens rea*. Such offences therefore may be committed without proof of any *mens rea*, provided that the physical elements of the offence have been established.[33]

Strict liability offences aim at promoting greater safety and improved standards of prevention. In *Aristodimos Michael alias Tsaoushis v R*,[34] the court sought to classify this type of offence in three categories, namely those relating to offences against public interest, those relating to offences causing public nuisance, and to those which, although the proceedings are in criminal form, represent a summary mode of enforcing a civil right. This, however, does not represent an exhaustive list of what offences may be classified as strict liability offences. Consider, for example,

28 *Caldwell* [1982] AC 341, at p 354.
29 *Venna* [1976] QB 421; *Parmenter* [1992] 1 AC 699.
30 *R v Morgan* [1976] AC 182.
31 *Savage and Parmenter* [1991] 4 All ER 698.
32 *Mowatt* [1968] 1 QB 421.
33 *Larsonneur* (1933) 24 Cr App R 74.
34 *Aristodimos Michael alias Tsaoushis v R*, 21 CLR 100.

section 305A of the Criminal Code, which deals with the issuing of dishonoured cheques (see text, below). Such an offence could be described as being a strict liability offence or at least a borderline offence between ordinary and strict liability offences.

The reasons for the existence of strict liability are that it offers better protection to the public and also raises the prospects of securing a conviction as the prosecution is not under an obligation to prove *mens rea*. It is of interest to note that, in certain cases, the offence may be of such a strict nature that even a defence may not absolve the accused of criminal responsibility. In *Kontos v The Police*,[35] the accused was charged with an offence under section 3 of the Motor Vehicles (Third Party Insurance) Law (Cap 133) and, although he justifiably pleaded mistaken belief as a defence under section 10 of the Criminal Code, the court held that such an offence was absolute and, therefore, any defences negating the requisite *mens rea* would have no application.

Despite the terminology used to describe these offences, if they are examined closely, it is clear that the element of *mens rea* is not entirely absent. As Artemis argues, 'in most instances no *mens rea* need be proved for a single element in the *actus reus* which usually is one of great significance; but it does not follow that *mens rea* should not be required for to the remaining constituents of the offence'.[36] Consider, for example, a charge of selling meat unfit for consumption. In this case, it would be unnecessary to prove that the defendant knew that the meat was unfit, but it must be proved that he at least intended to sell meat for the commission of an offence, although the offence in question is a strict liability offence.

General Principles of Criminal Procedure

In General

12-6 The system of criminal procedure currently in force in Cyprus emanates from the English system of criminal proceedings with the necessary adaptations, in certain respects, to Cypriot standards. The Criminal Procedure Law (Cap 155) is designed in such a way so as to cater for all the relevant provisions contained in the Constitution, international treaties, and the European Convention for the Protection of Human Rights.

This enables the Law to be applied in a way which guarantees the rights of individuals while not hampering the protection of citizens from criminal wrongs and the proper administration of justice. Although the Law has been codified in an attempt to provide certainty, it is nevertheless subject to a certain flexibility as provided by the interpretations given by the Supreme Court and, in certain instances, by English precedents.

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35 *Kontos v The Police* (1967) 2 CLR 272, (1967) 10 JSC 1195.

36 Artemis, 'The Mental Element in Crime', *Cyprus Law Review*, Issue 11 (July–September 1985), at p 1765.

Arrest of a Person

12-7 The detention of a person against his will and without a lawful arrest is considered both unlawful and a serious interference with the citizen's constitutional right to liberty.[37] A citizen's right to liberty is entrenched in the Constitution and states that no person shall be deprived of the enjoyment of this right, save as provided by the Constitution.

Article 11(2) of the Constitution contains an exhaustive list of the situations whereby interference with a person's right of liberty may be effected. Examples are the detention of a person after conviction by a competent court, the arrest of a person on reasonable suspicion of having committed an offence or to prevent the commission of an offence, the detention of a person to prevent his unauthorised entry into Cyprus, and the arrest of a person for non-compliance with a lawful order of a court. If the detention of a person is made for reasons other than those contained in this section, it will be considered as unlawful. In *Pitsillos v The Police*,[38] the court made it abundantly clear that when the police fail to carry out a lawful arrest, individual freedom should permit a person to resist such unlawful arrest as the police have exceeded their lawful authority.

Save in a flagrant offence punishable with detention or imprisonment, a person may be arrested only under the authority of a reasoned judicial warrant.[39] In *Kyriakides v The Republic*,[40] the court held that the notion of flagrancy connotes that the commission of the offence and the arrest of the offender must follow one another directly in point of time and sequence.

The procedure for the issue of a warrant of arrest is regulated by sections 18 and 19 of the Criminal Procedure Law.[41] According to section 18, a judge may issue a warrant of arrest if satisfied by the written submissions that there is reasonable suspicion that the person in question has committed the offence or that the detention of the person is reasonably necessary for preventing the commission of offences or the escape of the suspect.

Furthermore, in *Re Polykarpou*,[42] the Supreme Court held that, for a warrant to be issued under section 18 of the Criminal Procedure Law, the provisions of article 11.2.c of the Constitution also had to be satisfied. This article contains provisions similar to the current provisions contained in section 18 of the Criminal Procedure Law and set out above.

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37 Constitution, art 11.

38 *Pitsillos v The Police* (1966) 2 CLR 50.

39 Constitution, art 11.3.

40 *Kyriakides v The Republic* 1 RSCC 66.

41 Criminal Procedure Law, Cap 155, as amended by Criminal Procedure (Amending) (Number 2) Law 1996 (Law 10 of 1996).

42 *Re Polykarpou* (1991) 1 CLR 207.

It should be noted that this case was decided according to the law in force prior to the 1996 amendments.[43] A judge was permitted to issue a warrant for the arrest of a person if he considered it to be necessary or desirable. These provisions were considered to be unsatisfactory[44] as they failed to address the real essence of the problem, which was the interference with the liberty of a person. Persons were being arrested on suspicion of having committed an offence and then released due to lack of incriminating material against them. Such arrests in conjunction with the small-scale society of Cyprus had the effect of stigmatising a person and causing him mental, as well as financial, damage.

For these reasons, the Supreme Court decided that the provisions of section 18 of the Criminal Procedure Law, as they then existed, should be read and applied in the light of article 11.2.c of the Constitution. Now, this requirement is not as essential as the present formulation of section 18 of the Criminal Procedure Law contains provisions similar to those contained in article 11.2.c of the Constitution.

In deciding whether to issue a warrant of arrest, the court must draw its own conclusions from the affidavits presented to it when deciding whether a reasonable suspicion exists or not.[45] The opinions of the police officers making the statements do not form the basis for issuing an arrest warrant. The court must draw its own conclusions by examining the facts before it and should not place emphasis on the opinions of the police officers presenting the facts.

If the judge is satisfied, a warrant of arrest is issued which must be dated, showing also the time of issue, and must be signed by the judge, explaining the reasons for issuing it.[46] The warrant also must contain information relating to the offence in question, the name of the suspect, and the steps which must be taken by the person conducting the arrest.[47] Once a warrant is issued, it remains in force until it is executed or until it is cancelled by a judge.[48] It should be noted that, if the judge decides not to issue a warrant for the arrest of a person because no reasonable suspicion arises from the facts presented to him, such decision cannot be made the subject of an appeal.[49]

There are instances where an arrest can be made lawfully without the issue of a warrant of arrest. Sections 14 and 15 of the Criminal Procedure Law make it possible for a police officer or a private citizen to make an arrest without a warrant in certain cases. It is important to note that the powers of arrest under these two sections must be read and applied subject to the provisions of article 11 of the

43 Criminal Procedure (Amending) (Number 2) Law 1996 (Law 10 of 1996).

44 Pantelides, 'Some Observations on the Criminal Procedure Law of Cyprus and Suggestions for Reform', *Cyprus Law Tribune*, Issue A (April–May 1968), at p 12.

45 *Re Polykarpou* (1991) 1 CLR 207, at pp 214–216.

46 Criminal Procedure Law, s 19(1).

47 Criminal Procedure Law, s 19(2).

48 Criminal Procedure Law, s 19(4).

49 *Attorney General v Savvas Elias* (1996) 2 CLR 79.

Constitution restricting such a right to cases where a warrant is in force or where the offence is flagrantly committed.[50] It is evident that, even in cases where the law permits an arrest to be effected without a warrant of arrest, the fundamental rights of a person to liberty and freedom enshrined in the Constitution are still to be respected.

The approach adopted by the law on this topic is evidence of the importance the law attaches to the fundamental rights of citizens in relation to liberty while at the same time not preventing the proper administration of justice. This also is supported by Loizou and Pikis, who state that 'the courts in Cyprus, guided by the traditions of the Common Law, and reinforced by a written Constitution, have constantly emphasised that, in matters involving the arrest of a citizen, a fair balance must be kept between the need to uphold the right of a citizen to freedom on the one hand, and the social security on the other'.[51]

Once arrested, a person must be informed in a language that he understands of the reasons for his arrest and be allowed to have the services of a lawyer.[52] It was decided the court decided that what was necessary was for the person to have knowledge of the reason why he had been arrested and that did not necessarily involve the use of precise or technical language.[53] The language to be used by the person making the arrest must be appropriate to the personal characteristics of the person.[54]

Remand

Remand of a Suspect in Custody

12-8 Article 11 of the Constitution and section 24 of the Criminal Procedure Law contain provisions relating to the circumstances whereby an arrested person may be detained while under arrest and before being charged. These are fundamental constitutional and statutory provisions, and failure to comply with them will render the detention unlawful and unconstitutional.

Article 11.5 of the Constitution prescribes that a person arrested must, as soon as is practicable after his arrest, and in any event not more than 24 hours after the arrest, be brought before a judge, if not earlier released. As previously mentioned, article 11.5 of the Constitution partly reproduced the provisions of article 5, paragraph 3, of the European Convention of Human Rights and Fundamental Freedoms which have been ratified by Law 39 of 1962 and form part of the legal order of Cyprus.

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50 *Kyriakides v The Republic*, 1 RSCC 66.

51 Loizou and Pikis, *Criminal Procedure in Cyprus* (1975), at pp 13–14.

52 Constitution, art 11.4.

53 *R v Phaidonos*, 22 CLR 21; *Azimas v The Police* (1981) 2 CLR 9.

54 *R v Inwood* (1973) 2 All ER 645.

Once the arrested person is brought before a judge, the judge will have to inquire into the grounds for the arrest and, within three days from the day of the appearance, the judge must either release the arrested person on such terms as he may deem fit or, where the investigation into the commission of the offence has not been completed, remand the arrested person in custody for a period not exceeding eight days.[55] To avoid abuse of power, an application for remand must be made by a police officer not below the rank of inspector.[56]

On the termination of the remand period, the court may order the arrested person to be re-remanded in custody for a further period of up to eight days. The remands ordered by the court should not exceed the time period of three months from the date of the arrest of the person; otherwise, the person must be set free. For an arrested person to be re-remanded, the original period of remand must elapse and a new application for a further remand of the arrested person should be made on the last day of the original period of remand.

As stated, the judge, in deciding on an order, is interfering with a fundamental right of persons and must therefore strive to maintain 'a healthy balance between individual liberty on the one hand and public interest in the investigation and suppression of crime on the other'.[57] It is imperative that, in considering an application for the detention of an arrested person, a judge must exercise proper care in balancing the need to protect society with the right of freedom of a person as enshrined in the Constitution.

The principles on which the court will exercise its discretion in remanding an arrested person in custody have been considered in a number of cases.[58] Before making an order for the remand of a person in custody, the judge must be satisfied that there is a genuine and reasonable suspicion of involvement of the accused in the crime under investigation.

Such reasonable suspicion, as manifested by article 11.2.c of the Constitution and section 24 of the Criminal Procedure Law, must exist at every stage of the investigation. In *Stamataris and Another v The Police*,[59] it was held that this suspicion must be genuinely entertained. This is essential to eliminate the possibility of the police authorities abusing their powers to seek the remand of a suspect in custody. Such suspicion also must be reasonable.

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55 Constitution, art 11.6; Criminal Procedure Law, s 24.

56 Criminal Procedure Law, s 24.

57 *Stamataris and Another v The Police* (1983) 2 CLR 107, at pp 113 and 114.

58 *Costas Tsirides v The Police* (1973) 2 CLR 204; *Papacleovoulou and Another v The Police* (1974) 2 CLR 55; *Stamataris and Another v The Police* (1983) 2 CLR 107; *Aeroporos v The Police* (1987) 2 CLR 232; *Shimitras and Another v The Police* (1990) 2 CLR 397; *Houris v The Police* (1989) 2 CLR 56; *Simillides v The Police*, Criminal Appeal 6331, 6 June 1997; *Mezerides and Others v The Police*, Criminal Appeal 6685, 22 March 1999.

59 *Stamataris and Another v The Police* (1983) 2 CLR 107.

In determining whether a suspicion is reasonable, regard must be had to the circumstances of the case as they appeared at the time of arrest and detention.[60] The notion of 'reasonable suspicion' should not be extended to mean actual commission of the offence. In *Aeroporos v The Police*,[61] the court decided that such an approach would be undesirable as it would be illogical to require for the purpose of remand proceedings that the offence should be finally defined and proved. Furthermore, it is not necessary that every relevant fact presented to the court should create by itself a reasonable suspicion. A reasonable suspicion may arise in any event when all the facts available to the court are considered collectively.[62]

The judge also must determine that the inquiries and investigations conducted by the police into the commission of the offence have not yet been completed. There is no stipulation as to the permissible time frame within which such investigations are to be completed. As stated in *Stamataris and Another v The Police*,[63] the investigation is not completed when the nature of the crime is established; nor does the process of investigation come to an end *vis-à-vis* any participant in the crime when his complicity becomes apparent. The court will have regard to the circumstances of the case and any associated complications before determining whether the investigations are complete and whether an order should be made.

The judge also must determine whether the suspect is likely to interfere with prosecution witnesses, destroy or hide any incriminating evidence, abscond, or generally interfere with the investigation process. If the facts before the judge indicate that an arrested person may obstruct the proper administration of the investigative process, that would be a factor in support of the detention of the accused. In such case, the court would have to inquire into the likelihood of any of the above acts occurring and whether such possibility is reasonably justified in the light of the circumstances of the case.[64]

The material to be supplied by the police must be sufficient to determine whether a 'reasonable suspicion' exists, without this meaning that a full disclosure of all witnesses or any other means of information must be made.[65] The burden of proof lies on the police authorities, and this burden becomes progressively higher with every new application for remand in custody. The length of the renewal period also affects the burden the police must discharge.

If the court is satisfied as to the above, an order for the remand of a suspect may be made. Although there is no right of appeal in respect of interlocutory decisions of the court, a decision of the court to remand a suspect in custody can be the subject

60 *Costas Tsirides v The Police* (1973) 2 CLR 204.

61 *Aeroporos v The Police* (1987) 2 CLR 232.

62 *Simillides v The Police*, Criminal Appeal 6331, 6 June 1997.

63 *Stamataris and Another v The Police* (1983) 2 CLR 107, at p 112.

64 *Aeroporos and Another v Police* (1987) 2 CLR 232; *Shimitras and Another v The Police* (1990) 2 CLR 397.

65 *Costas Tsirides v The Police* (1973) 2 CLR 204.

of an appeal. This right is granted to the person remanded in custody by virtue of article 11.6 of the Constitution. Such an appeal, however, is not an opportunity for rehearing the case. The Supreme Court will only consider whether the judge exercised his discretion judicially[66] by examining whether the judge was guided by the appropriate principles. Such principles include the burden of proof, its discharge by the police, the existence of reasonable suspicion, and the nature and level of investigations conducted into the commission of the crime.

Remand of an Accused Person in Custody

12-9 A court exercising criminal jurisdiction has power either to release an accused on bail (see text, below) or to order that the accused be remanded in custody. This matter arises at the stage when the accused, on completion of the preliminary inquiry, will be committed for trial to the Assize Court[67] and at the stage when an adjournment of the case by the court takes place.[68]

In exercising its discretion to direct the detention of an accused, the court will have regard to the possibility of the accused not being present at the next hearing. In determining whether such possibility exists, the court will take into consideration issues such as the gravity of the offence, the likely punishment to be imposed, as well as the likelihood of obtaining a conviction in the light of the circumstances of the case. Any evaluation of the likelihood of the accused being convicted of the offence in question does not conflict with any fundamental rights of the accused.[69] Such an evaluation may work in either way, and by no means does it replace the actual determination of the case by the trial judge. It provides a means of resolving procedural issues relating to whether an accused should be remanded in custody.

The court also will weight the possibility of committing further offences. In the case of *Konstantinidis v The Republic*,[70] the court held that the evaluation of such a possibility should not be made in the abstract. The court must be satisfied that, on the facts of the case, the accused may commit further offences. In evaluating such a possibility, the court will have regard to any previous convictions of the accused or behaviour of the accused in the past and any tendencies which the accused may have exhibited during the trial. Any further offence which may be committed by the accused need not be the same or similar to the offence for which he is being tried. It should be noted that the mere possibility or likelihood of the commission of further offences would not suffice. The court must be satisfied that in the prevailing circumstances there is a strong possibility that the

66 *Yiannakis Papacleovoulou and Another v The Police* (1974) 2 CLR 55; *Stamataris and Another v The Police* (1983) 2 CLR 107.

67 Criminal Procedure Law, s 93(i).

68 Criminal Procedure Law, s 48.

69 *Konstantinidis v The Republic*, Criminal Appeal 6315, 6 May 1997.

70 *Konstantinidis v The Republic*, Criminal Appeal 6315, 6 May 1997.

accused will commit further offences and thus his detention is necessary to protect society from further criminal conduct.[71]

The court also will consider the possibility of interference with witnesses. In *Shimitras and Another v The Police*,[72] the court formulated the view that what must be determined is the extent to which any fears by the police of interference with prosecution witnesses are reasonably justified in the light of the circumstances of the case. Any general remark or statement made that the accused will interfere with any witness or with the administration of justice in general would not suffice to justify the detention of an accused, unless the circumstances of the case suggest otherwise and thus render such detention justifiable.

The Constitution, unlike the situations in which a suspect may be remanded in custody, contains no provisions for the period for which an accused may be remanded in custody. This, however, does not grant unlimited power to courts to order the detention of an accused indefinitely.[73] In *Charalambos Shiakallis v The Republic*,[74] the Supreme Court was of the opinion that the facts of the case justified the remand of the accused for a period of three months. It should nevertheless be borne in mind that this approach does not undermine the rights of individuals enshrined in the Constitution. Fundamental principles, such as the right to freedom of any person and the presumption of innocence, have still a role to play at this stage.

Section 48 of the Criminal Procedure Law, on the other hand, provides that, when the court adjourns the hearing of a case, the accused may then be remanded in custody for a period of up to eight days in each case for summary trials or for preliminary inquiries. Any detention in excess of this period would be set aside[75] as the court has exceeded its jurisdiction. This provision is interrelated with the constitutional right of the accused to a speedy trial as laid down in article 30(2) of the Constitution, which should not prolong either the outcome of the case or the detention of the accused due to the adjournment of the case.

Bail

12-10 Apart from the power to order a remand in custody, a court also has power to release an accused on bail.[76] In Cyprus, this matter is regulated by sections 157–165 of the Criminal Procedure Law. As prescribed by section 157(1), the power

71 *Konstantimides v The Police*, Criminal Appeal 6315, 6 May 1997; *Charlambos Shiakallis v The Republic*, Criminal Appeal 6297, 14 May 1997.

72 *Shimitras and Another v The Police* (1990) 2 CLR 397.

73 *Charalambos Shiakallis v The Republic*, Criminal Appeal 6297, 14 May 1997.

74 *Charalambos Shiakallis v The Republic*, Criminal Appeal 6297, 14 May 1997.

75 *Ioanna Elia Stamou v The Police*, Criminal Appeal 6429, 7 January 1998; *Andreas Christodoulou and Another v The Police*, Criminal Appeal 6604-5, 29 October 1998.

76 Criminal Procedure Law, s 157(1).

of the court to grant bail is of a discretionary nature,[77] and this power can be exercised at any stage of the proceedings, even after conviction and before sentence.[78]

Bail may be granted to any accused in respect of any offence. The present law states that bail is not available for offences punishable with death or to an accused sentenced to death. The death sentence, however, has now been abolished and replaced by a term of life imprisonment.[79] Therefore, bail may now be granted in respect of any offence committed by the accused, even those which were previously punishable with death.

In exercising its discretion whether to release an accused on bail, the court is once more interfering with the fundamental rights of citizens and therefore must take proper care when making its decision. A refusal to grant bail should not be construed as an intermediate mode of punishment for the accused. 'The starting point is that every person charged with a criminal offence is entitled to bail unless there are cogent reasons to the contrary.'[80]

A court will grant bail to an accused if it thinks it proper under the circumstances.[81] In *Attorney General v Mustafa Ibrahim and Others*,[82] the court construed the meaning of the words 'if it thinks it proper' in a wide manner indicating the high level of discretion which may be exercised by courts when deciding on bail. The factors which a court may take into consideration were spelt out in *Rodosthenous and Another v The Police*,[83] the main one being the likelihood of the accused to attend his trial.

In addition, the court will consider other relevant factors, including the possibility of the accused interfering with witnesses or obstructing the administration of justice or committing further offences, as well as the likelihood of absconding. The likelihood is examined not on the basis of sufficiency but on the force of the available evidence and on the totality of the prevailing circumstances.[84]

On the grant of bail, a court has the power to impose such conditions as it deems proper to secure the attendance of the accused at the hearing and to prevent the commission of further offences. The most common form of conditions that may be imposed includes the provision of sureties to ensure that the accused appears at the hearing and the deposit of money by the accused.[85] The amount to be deposited will be proportional to the gravity of the offence in question.

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77 *Attorney General of the Republic v Yousouf Mehmet* (1966) 2 CLR 12.
78 Criminal Procedure Law, s 157(1).
79 Criminal Code (Amending) Law 1999 (Law 15 of 1999).
80 Loizou and Pikis, *Criminal Procedure in Cyprus* (1975), at p 35.
81 Criminal Procedure Law, s 157(1).
82 *Attorney General v Mustafa Ibrahim and Others* (1964) CLR 195.
83 *Rodosthenous and Another v The Police* (1961) CLR 50.
84 *Loukaides v The Police* (1988) 2 CLR 119.
85 *The Police v Nikola and Others*, 7 CLR 14.

Institution of Criminal Proceedings

12-11 The great majority of criminal prosecutions are instituted by the state. The Constitution[86] confers power on the Attorney General of the Republic, who is an independent officer of the state, to institute, conduct, take over, and continue or discontinue any proceedings for an offence against any person in Cyprus. The police also have power under the Police Law (Cap 285) to institute proceedings through the District Divisional Commander of the police under the Police Law. These prosecutions tend to have a public element, and they are usually under the supervision of the Attorney General.

As a means of protecting unimpeded access to justice, the law permits private individuals to initiate and pursue a private prosecution subject to certain statutory restrictions. Such prosecutions are usually confined to summary offences such as assault, insults, and the issue of dishonoured cheques. Despite the rights conferred on individuals to institute private prosecutions, those may nevertheless be discontinued by the Attorney General exercising his power under the Constitution. Any criminal proceedings may be terminated by the Attorney General by entering a *nolle prosequi*.[87]

This will cause the immediate termination of the proceedings against the accused and his discharge.[88] Such a power can be exercised only by the Attorney General, and it is not subject to judicial control and, therefore, he need not provide any reasons for such a decision.[89] According to Loizou and Pikis, 'such discharge is no bar to the re-institution in the future of the same or another charge based on the same facts, since the accused is not, by the entry of a *nolle prosequi*, acquitted on the merits of the case'.[90]

The role of the Attorney General in criminal prosecutions is central to a proper administration of the judicial system. Being an independent officer and the *ex officio* leader of the Bar, the Attorney General can ensure an unbiased administration and delivery of justice. As Artemis rightly explains, the Attorney General acts both in his capacity as such and as the Director of Public Prosecutions.[91]

Mode of Trial

12-12 A trial for a criminal offence can take the form of either a summary trial or a trial on information, for which a preliminary inquiry must be held. According to section 2 of the Criminal Procedure Law, a summary trial means any trial held

86 Constitution, art 113.2.

87 Criminal Procedure Law, s 154.

88 *Isaias v The Police* (1966) 2 CLR 43.

89 *Police v Athienitis* (1983) 2 CLR 194.

90 Loizou and Pikis, *Criminal Procedure in Cyprus* (1975), at p 63.

91 Artemis, 'An Outline of Criminal Law and the Working of Judicial System in Criminal Cases', *Cyprus Law Review*, Issue 26 (April–June 1989), at pp 4016 and 4017.

before a judge in the exercise of his summary jurisdiction. Every President, Senior District Judge, and District Judge of a District Court has jurisdiction to try summarily all offences punishable with a term of imprisonment not exceeding five years and/or a fine not exceeding CY £5,000 .[92] They also have jurisdiction to try any offence summarily, provided the consent of the Attorney General is obtained.[93] In such cases, the sentence passed could not exceed the sentence which could be passed by the court trying the case summarily, regardless of what the Criminal Code or any other law may provide for this offence.

A trial by information usually takes place before the Assize Court. As provided by section 20(1) of the Courts of Justice Law 1960, the Assize Court has jurisdiction to try all types of offences with the exception of those where specific provisions are made in article 156 of the Constitution of the Republic. Unlike a summary trial, a trial on information involves the filing of an accusation in writing of an offence by or on behalf of the Attorney General in the Assize Court against an accused for trial before the Assize Court.[94] This information must comply with all the formalities provided under section 39 of the Criminal Procedure Law. This is an important document as it provides the means for an accused to determine the offence he is being accused of and thus enable him to determine his defence.

When an accused is committed to the Assize Court for a trial on information, it may be possible for the accused to be remitted to the District Court for summary trial. The power of such remittal is vested in the Attorney General, who can exercise his discretion if he considers that a case is more appropriate for summary trial.[95] A case involving a non-summary offence also may be remitted for summary trial through the application of section 24(2) of the Courts of Justice Law 1960. By virtue of this section, an offence will be sent for summary trial directly, on obtaining the approval of the Attorney General. According to Loizou and Pikis, there is no inconsistency between the provisions of section 24(2) of the Courts of Justice Law 1960 and section 155(b) of the Criminal Procedure Law, as the latter is 'intended to afford an extra tool in the armoury of the law, to facilitate the speedy administration of justice'.[96] On this point, it is important to note that although the above provisions appear to have a similar effect, the committal for summary trial under section 24(2) of the Courts of Justice Law 1960 takes place before the accused is committed for trial to the Assize Court.

Similarly, it is possible for a court dealing with a case in a summary trial to commit the case for trial to the Assize Court and order a preliminary inquiry if, before or during the summary trial, it appears to the court that this is a case which should have

92 Courts of Justice Law 1960, s 24(1).

93 Courts of Justice Law 1960, s 24(2).

94 Criminal Procedure Law, s 107.

95 Criminal Procedure Law, s 155(b).

96 Loizou and Pikis, *Criminal Procedure in Cyprus* (1975), at p 65.

been committed for trial to the Assize Court.[97] In such cases, the offence in question must be punishable with a term of imprisonment exceeding five years (the maximum penalty that the District Court can impose within its jurisdiction).[98] Otherwise, the District Court would be under an obligation to try the case summarily and impose the relevant punishment.[99]

In addition, when remitting the case to the Assize Court by virtue of section 90 of the Criminal Procedure Law, the holding of a preliminary inquiry becomes necessary. According to Pikis, the wording of section 90 'impliedly lays down that the power of the judge to stop summary proceedings under its provisions can only be exercised where no preliminary inquiry has been held'.[100] This also was reaffirmed in the Attorney General's Reference 123/99 of 16 November 1999, where the Supreme Court held that, when a case is remitted to the Assize Court for trial by virtue of section 90 of the Criminal Procedure Law, the holding of a preliminary inquiry according to section 92 becomes necessary.

Preliminary Inquiry

12-13 Section 92 of the Criminal Procedure Law provides that, when a preliminary inquiry must be held by a judge in accordance with the provisions contained in sections 93–105 of the Criminal Procedure Law, a charge has been brought against a person for an offence not triable summarily or as to which the court is of the opinion that it is not suitable to be disposed of by summary trial.[101]

The preliminary inquiry should not be regarded as the start of the hearing of the case. Loizou and Pikis explain that it is a 'preparatory investigation, not a trial in any respect, meant to elicit the evidence forthcoming against the accused with a view to deciding whether there are grounds for committing him to trial'.[102] At this stage, the accused is not called to plead before the court and any plea entered by the accused should be disregarded by the judge.[103] It is an opportunity for the judge to evaluate the facts of the case and the evidence available to decide whether to commit the accused for trial on information at the Assize Court.

At this stage, the judge also must familiarise the accused with the charges against him by providing the appropriate explanations and clarification. The presence of the accused during the preliminary inquiry is necessary; otherwise, the validity of the proceedings will be affected.[104] If, however, during the proceedings, the accused does not behave in an orderly manner or affronts the dignity of the court, the judge

97 Criminal Procedure Law, s 90.
98 Courts of Justice Law 1960, s 24(1).
99 Attorney General Reference 123/99, 16 November 1999.
100 Loizou and Pikis, *Criminal Procedure in Cyprus* (1975), at p 65.
101 Criminal Procedure Law, s 90.
102 Loizou and Pikis, *Criminal Procedure in Cyprus* (1975), at p 159.
103 Criminal Procedure Law, s 93(a).
104 Criminal Procedure Law, s 93(2).

may order his removal and his remand in custody until the end of the proceedings by virtue of section 93(b) of the Criminal Procedure Law. The absence of the accused from the proceedings those circumstances would not affect the validity of the proceedings.

The evidence of witnesses appearing before the judge is presented in the form of depositions. The judge must record the substance of these depositions in a narrative manner and read this over to the witness to verify its correctness.[105] As a means of ensuring the appearance of the witness at the hearing, the judge is under a duty to bind over every witness whose deposition has been taken.[106] The witness will be obligated to enter into a recognisance in a sum specified by the judge. In certain circumstances, a bind over also may be ordered on the condition that the witness be obliged to attend when notice to do so is served on him.

After all the prosecution witnesses have given their depositions, the judge will then decide whether there are sufficient grounds for committing the accused for trial. In making this decision, the judge will focus only on the evidence which tends to incriminate the accused and any evidence to the contrary must be disregarded. As a means of assisting the judge in making a decision, section 94 of the Criminal Procedure Law provides that, where there is a conflict of evidence, the judge must consider the evidence to be sufficient to commit the accused for trial if the evidence against him is such as, if contradicted, would raise a probable presumption of his guilt. The extent to which the available evidence raises a probable presumption of guilt is a matter of fact and degree. This probability must be of a realistic nature and should not represent some extreme hypothetical concept. Loizou and Pikis explain that 'the probability envisaged by the law must be a real and not a fanciful one; the guilt of the accused must be probable as a matter of logical inference'.[107]

If the judge is satisfied that, on the available evidence, and having regard to the provisions of section 94 above, there are sufficient grounds for committing the accused for trial at the Assize Court, the judge must again read the charge and explain the nature of it to the accused.[108] The judge also is under an obligation to address the accused in the following way so as to acquaint the accused with his rights and to warn him of any implications that his defence statements may have at this stage:

> This is not your trial. You will be tried later before the Assize Court. You will then be able to conduct your defence and call any witnesses on your behalf. Unless you wish to reserve your defence, which you are at liberty to do, you may now either make a statement not on oath or give evidence on oath and in any case call witnesses on your behalf. If you give evidence on oath you

105 Criminal Procedure Law, s 96(1).

106 Criminal Procedure Law, s 99(1).

107 Loizou and Pikis, *Criminal Procedure in Cyprus* (1975), at p 167.

108 Criminal Procedure Law, s 93(c).

> will be liable to cross-examination. Anything you may say, whether on oath or not, will be taken down and may be used in evidence at your trial before the Assize Court.

12-14 After this, the judge must declare to the accused that he has nothing to fear from any threats made or otherwise and to warn him that any statement made from this point onwards will be recorded and may be given as evidence during the trial.[109] Irrespective of whether the accused decides to make a statement, the judge must inquire whether the defence wishes to call any witnesses and must proceed to take the evidence of the defence witness if the accused so wishes.[110]

Subject to the provisions of section 94 of the Criminal Procedure Law, if at the close of the case for the prosecution the judge is of the opinion that the evidence is insufficient to warrant a committal of the accused to the Assize Court, the accused must be discharged.[111] This discharge does not bar any further prosecutions of the accused based on the same facts. On the other hand, if the accused is not discharged because there are sufficient grounds for committal, the accused must be committed for trial at the Assize Court next sitting in the district in which the offence is alleged to have been committed. The accused must then either be released on bail according to the provisions of section 157 of the Criminal Procedure Law or remanded in custody.[112]

In dealing with the aftermath of the Turkish invasion of 1974, a law[113] was passed which dispensed with the holding of a preliminary inquiry as above, provided that the Attorney General's approval was obtained and that copies of each prosecution witness' statement were served in advance on the accused or his counsel. This has enabled criminal proceedings to be conducted and concluded in a more expedient manner as in most cases a preliminary enquiry involves a repetition of the actual hearing.

Plea

12-15 In reply to a charge of a criminal offence, an accused may enter either a guilty or a not guilty plea.[114] Section 69 of the Criminal Procedure Law refers to other types of plea which are referred to as special pleas. As stated by Loizou and Pikis, these special pleas cannot constitute a reply to the charge in question. They represent objections to the charges which must be dealt with preliminarily. This

109 Criminal Procedure Law, s 93(c).
110 Criminal Procedure Law, s 93(e).
111 Criminal Procedure Law, s 93(h).
112 Criminal Procedure Law, s 93(i).
113 Criminal Procedure (Temporary Provisions) Law 1974 (Law 42 of 1974), as amended by Law 44 of 1983.
114 *Pourikkos v Vasileiou* (1993) 1 CLR 256.

view also is supported by the Supreme Court which held, in *Pourikkos v Vasileiou*,[115] that what would constitute a valid plea would be a guilty or a not guilty plea.

If the accused enters a not guilty plea, the court will continue according to the procedure outlined in section 74 of the Criminal Procedure Law, which is considered below.[116] When a guilty plea is entered and the court is satisfied that the accused has knowledge of the outcome of this plea, the court will proceed as if the accused had been found guilty by a decision of the court at the end of the hearing.[117] If, during the sentencing stage, there appear to be inconsistencies between the prosecution's case and the case for the defence, the court should not accept a guilty plea and should enter a not guilty plea.[118] If these inconsistencies do not relate to the plea but are merely factual in nature, the court should resolve the matter, bearing in mind that the burden of proof lies on the prosecution to prove their case beyond reasonable doubt.[119]

Although the Criminal Procedure Law contains no explicit provisions regulating a change of plea by the accused, nevertheless the accused has a right to change his plea at any time before the imposition of sentence.[120] This right is based on articles 12.4 and 30.2 of the Constitution, which provide that an accused is presumed to be innocent until proved guilty and that the accused has a right to a fair and public hearing. Section 12.5 of the Constitution and article 6(3) of the European Convention for the Protection of Human Rights also provide certain minimum rights which must be respected by courts.

These are fundamental human rights which by no means are to be considered as being of a procedural nature. In this respect, the accused is considered to be innocent until a guilty verdict is entered by the court, and the accused has a right to change his plea from guilty to not guilty, and *vice versa*, at any stage before the delivery of the guilty verdict and the imposition of sentence.[121] Despite the fact that the leave of the court must be sought before a change of plea takes place, this does not imply that the court has a discretion to refuse a change of plea by the accused. This is just a formality and it confers no right on the court to decide on such a matter, which would imply the violations of fundamental rights entrenched in the Constitution.

Trial

12-16 Building on its Common Law background, Cypriot law has adopted an adversarial system of trial. The judge acts as the referee between the two contending

115 *Pourikkos v Vasileiou* (1993) 1 CLR 256.
116 Criminal Procedure Law, s 68(2).
117 Criminal Procedure Law, s 68(1).
118 *Ioannis Efstathiou v The Police*, 22 CLR 191; *Demetris Demosthenos v The Police* (1985) 2 CLR 1.
119 *Ioannis Haraki and Another v The Police* (1996) 2 CLR 183.
120 *Herakleous v Limassol Municipality* (1993) 2 CLR 410, at p 424.
121 *Herakleous v Limassol Municipality* (1993) 2 CLR 410, at pp 423 and 424.

parties in their quest to win an 'evidence contest'.[122] Each party puts forward its own case and seeks to substantiate its case with the available evidence, subject to the restrictions imposed by rules of law, evidence, and procedure. Any conflicts arising out of the application of the well-defined principles of law, evidence, and procedure are resolved by the judge, who has the overall responsibility to see that all rules in place are duly observed and that justice is properly delivered. As there is no jury system in Cyprus, the judge act as arbitrator of both the law and the facts of the case.

On the entering of a not guilty plea, the judge will proceed with the hearing of the case. The procedure at the trial is regulated for the most part by section 74 of the Criminal Procedure Law. Once all the witnesses have vacated the court room, the prosecution will be given the floor first to open its case. Although it is not obligatory, the prosecution has the right to make an opening statement to prepare the ground for what will follow. The defence also has a right to make an opening statement. According to the provisions in section 74(2) of the Criminal Procedure Law, this right of the defence is applicable irrespective of whether or not the accused decides to call witnesses in his defence.

Once the prosecution has completed its opening statement, it will call its first witness.[123] There is no prescribed order in which the witnesses are to be called, but it is considered good practice to call them in such a way that the foundations of the case are laid progressively. After the examination-in-chief of every witness by the prosecution, the defence will have the opportunity to cross-examine the witness as a means of undermining the prosecution's case and witness and as a means of putting forward its own case.[124] This also applies to the witnesses called by the defence who will be cross-examined by the prosecution. If it were to be suggested that cross-examination should be limited to the issues arising from the examination-in-chief, the effectiveness of the whole adversarial system would be severely undermined. The cross-examination need not be restricted to matters raised during the examination-in-chief, but can include other related matters which support the propositions of the party making the cross-examination.[125]

On completion of the cross-examination, the party who called the witness may have a right to re-examine its witness.[126] The right to re-examine is not to be construed as meaning a 'second chance' for the party which called the witness to complete its examination-in-chief. It offers the opportunity to clarify or challenge new matters that may have arisen during cross-examination. With the leave of the court, a party may introduce new evidence at this stage, and the other side also will have a right to cross-examine on the newly introduced evidence. The judge may, at

122 Loizou and Pikis, *Criminal Procedure in Cyprus* (1975), at p 96.
123 Criminal Procedure Law, s 74(1)(a).
124 Criminal Procedure Law, s 56(1).
125 Criminal Procedure Law, s 56(2).
126 Criminal Procedure Law, 56(3).

any stage of the examination of a witness, ask any questions that he may consider to be relevant to the facts of the case. This is common in cases where the accused is not represented by an advocate during the trial.

After the close of the case for the prosecution, the accused or his counsel can make an application that a *prima facie* case does not exists against the accused.[127] Even in the absence of such a submission, the court is under a duty to deal with this matter on its own motion and decide accordingly whether a *prima facie* case exists against the accused.[128] If the court is satisfied that the prosecution has failed to establish a *prima facie* case, the court must order the acquittal and discharge of the accused without inviting him to make a defence.

The meaning of the term *prima facie* has troubled the courts on numerous occasions.[129] A particularly instructive analysis was carried out by the Supreme Court in *Attorney General v Christodoulou*,[130] where it tied in all the previous principles enunciated by the Supreme Court in previous occasions.

In deciding whether a *prima facie* case exists against the accused, it does not necessarily mean that the court will proceed to the assessment of the case for the prosecution as if it were to reach the final decision at this intermediate stage. Such an approach would be undesirable as it would defeat the whole purpose of conducting the trial in the first place and it also would affect the unbiased treatment of the accused. In deciding whether a *prima facie* case exists, the court must apply the Practice Directions of 1962 as adopted in *Azinas and Another v The Police*.[131] According to these Directions, an accused must be discharged only when the court is satisfied on an objective basis that:

- The case for the prosecution cannot be substantiated as one or more of the necessary elements of the crime are missing; and
- The available evidence is of such a tenuous character because of inherent weaknesses, vagueness, or inconsistencies that, when taken at its highest, no court could properly convict on it.

12-17 In deciding on the above, the judge becomes the arbitrator of both the legal and factual issues of the case before him. At this stage, however, the evaluation is done on an objective basis and by no means does the decision whether or not a *prima facie* case exists predetermine the conviction of the accused.

If the court is satisfied that a *prima facie* case exists against the accused, the court will call on the accused to make his defence. At this stage the judge is under a duty

127 Criminal Procedure Law, s 74(1)()b).

128 *Charalambos Savva 'Pambos' v The Police* (1986) 2 CLR 30.

129 *R v Mustafa Kara Mehmed*, 16 CLR 46; *Azinas and Another v The Police* (1981) 2 CLR 9; *Re Kakos* (1985) 1 CLR 250; *Attorney General v Christodoulou* (1990) 2 CLR 133; *Makriyiannis v The Police* (1996) 2 CLR 41.

130 *Attorney General v Christodoulou* (1990) 2 CLR 133, at p 144.

131 *Azinas and Another v The Police* (1981) 2 CLR 9, at pp 54–57.

to inform the accused that he may, if he so decides, elect not to make a sworn statement and will thus not be liable to cross-examination by the prosecution.[132] The explanation of the rights of the accused by the court is a matter to which great importance is given, and any failure by the court to carry out such task in the proper manner would lead to the quashing of any conviction of the accused.[133]

According to section 74(1)(d) of the Criminal Procedure Law, the accused will be called first to give evidence, regardless of whether this evidence is given under oath or not. Once the accused has completed his statement, the defence will then proceed to calling the defence witnesses or any other evidence in support of its case in any order that the defence deems proper. The same procedure as outlined above in the prosecution witnesses also will be followed for the defence witnesses. In other words, once the defence has completed its examination-in-chief of its witnesses, the prosecution will have the opportunity to cross-examine them and, depending on the outcome of the cross-examination, the defence may have an opportunity to re-examine its witnesses. In cases where there is more than one accused person, a different order will be followed.

According to section 76 of the Criminal Procedure Law, where, during a joint trial, one of the accused gives evidence under section 74(1 (c) of the Criminal Procedure Law which incriminates any of the other co-accused, such co-accused will be entitled to cross-examine him and such cross-examination will take place before the cross-examination by the prosecution. A similar approach also will be adopted in cases where a witness called by one accused gives evidence incriminating a co-accused.[134]

Once the defence case is closed, the court has no discretion whatsoever to permit the prosecution to reopen its case, unless the provisions of section 74(1)(e) of the Criminal Procedure Law are met.[135] This provides that the only occasion on which the prosecution can legitimately call evidence after the close of its case is to rebut new matters which were raised by the accused during his defence and which the prosecution could not have foreseen, and provided that the leave of the court is obtained.

At the conclusion of the cases for the prosecution and the defence, both sides will have an opportunity to make their closing speeches as a means of summarising and stressing the merits of their respective cases. Section 74(2) of the Criminal Procedure Law provides that the party who has called a witness last addresses the court first and that the other side has a right to reply.

At the conclusion of the closing speeches, the court will then consider the whole case and will deliver its judgment.[136] Depending on whether the court is satisfied

132 Criminal Procedure Law, s 74(1)(c).
133 *Rex v Vasilis Toffi*, 14 CLR 256.
134 Criminal Procedure Law, s 57(b).
135 *Charalambos Savva 'Pambos' v The Police* (1986) 2 CLR 30.
136 Criminal Procedure Law, s 77(1).

beyond reasonable doubt that the accused has committed the offence he is charged with, the court will deliver a guilty or not guilty verdict. If the case is being tried by more than one judge, unless a majority of the court considers the accused guilty, the accused will be acquitted.[137] If the accused is found guilty, the court will proceed, subject to the provisions of sections 78 and 79 of the Criminal Procedure Law, to the sentencing stage, which is considered below.[138] If, at the end of the trial, the accused is found not guilty, he will be immediately discharged, unless he was acquitted by reason of insanity. In such a case, the courts will follow the procedure outlined in section 70(4) of the Criminal Procedure Law and will issue an order for the detention of the person in a psychiatric hospital.

Appeals

12-18 The right to appeal from a decision of a court of first instance is provided in section 131 of the Criminal Procedure Law. This section provides that a right of appeal lies in respect of judgments or orders of a court exercising criminal jurisdiction, unless otherwise provided in the Criminal Procedure Law. Furthermore, there is no right of appeal against an acquittal except at the instance or with the written approval of the Attorney General.

Apart from the Criminal Procedure Law, section 25(2) of the Courts of Justice Law 1960 contains similar provisions which grant a general right of appeal against every decision of a criminal court on any ground. This Law has created an unfettered right of appeal by abolishing the requirement to seek leave to appeal as contained in the Criminal Procedure Law. It has now been authoritatively settled that, when the Law provides that a right of appeal exists, that right can be exercised without the need to seek leave by virtue of the provisions of section 25(2) of the Courts of Justice Law 1960.[139]

Section 25(2) of the Courts of Justice Law 1960 has produced some case law on whether it creates an unqualified right of appeal independently of the right to appeal contained in the Criminal Procedure Law. In a number of cases, the Supreme Court has held that the right of appeal contained in section 25(2) of the Courts of Justice Law 1960 must be read and applied in the light of the provisions contained in section 131(1) of the Criminal Procedure Law.[140] Section 25(2) is not to be interpreted as creating an unqualified right of appeal independently of the provisions in section 131(1) of the Criminal Procedure Law; it can be exercised only to the extent that it is permissible under the provisions of the Criminal Procedure Law.

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137 Criminal Procedure Law, s 77(2).

138 Criminal Procedure Law, s 77(3).

139 *Theodoros Panayioti Shourris v The Republic and Gregoris N Kazantzis v The Police* (1961) CLR 11; *Anastasiou v The Police*, Criminal Appeal 6783, 31 August 1999.

140 *Lefkios Rodosthenous and Another v The Police* (1961) CLR 48; *Evangelos Christofi v The Police* (1970) 2 CLR 117; *Attorney-General v Pourris and Others* (1979) 2 CLR 15; *The Republic v Ermogenous et al* (1990) 2 CLR 459.

The decisions of the courts exercising criminal jurisdiction which can be the subjects of appeals are defined exhaustively in sections 132, 133, 135, and 136 of the Criminal Procedure Law and section 25(2) of the Courts of Justice Law 1960. Similarly, section 137 of the Criminal Procedure Law and article 133 of the Constitution prescribe the rights conferred on the Attorney-General to appeal against decisions of both the District and Assize Courts. It is evident, therefore, from the above provisions that a right of appeal exists only for decisions or judgments which finally dispose of the case. Any decisions or judgments of an interlocutory nature would therefore not qualify as appealable decisions under the provisions of the Criminal Procedure Law.

Previously, when called on to rule on the legality of certain interlocutory orders, the Supreme Court refrained from challenging its jurisdiction to deal with such orders according to sections 132, 133, 135, 136, and 137 of the Criminal Procedure Law. In *Attorney-General v Enimerotis Company and Others*,[141] the Supreme Court assumed jurisdiction to hear an appeal against an interlocutory order of a court to adjourn a criminal trial according to the provisions of section 48 of the Criminal Procedure Law without examining whether any grounds existed on which such jurisdiction could be exercised.

A similar approach was adopted for appeals against a decision to release a person on bail or *vice versa*. Although such decisions do not dispose of the case, the Supreme Court was of the opinion that although no ground existed on which the Supreme Court can assume jurisdiction to deal with such interlocutory decisions, it would nevertheless be contrary to fundamental human rights to refuse such an appeal.[142] In this respect, the Supreme Court adopted a practice which would consider all decisions of courts exercising criminal jurisdiction as appealable regardless of whether any grounds or authority existed on which such jurisdiction could be exercised. The justification offered by the Supreme Court was that the absence of any authority in this respect should not prohibit the Supreme Court from dealing with matters of this kind as that would lead to repercussions on fundamental human rights.

The position in relation to whether a right of appeal lies in respect of interlocutory orders of the court was clarified in *Kyriakou v Municipality of Engomi*.[143] In this case, the Supreme Court, considering previous authorities on this matter, held that no right of appeal lies in respect of interlocutory judgments of the court. An accused has a right of appeal only against conviction or sentence or as is otherwise provided by law. The Supreme Court does not possess jurisdiction to construe the provisions of the Criminal Procedure Law in such a way as to grant an unfettered access to

141 *Attorney-General v Enimerotis Company and Others* (1966) 2 CLR 25.

142 *Lefkios Rodosthenous and Another v The Police* (1961) CLR 48; *Petri v The Police* (1968) 2 CLR 1; *The Police v Nikola*, 7 CLR 14; *R v Charalambos Solomonides*, 14 CLR 127; *Varellas and Others v The Police*, 19 CLR 46.

143 *Kyriakou v Municipality of Engomi* (1992) 2 CLR 414.

appeal for every decision of the court independently of what the law provides. The position adopted in *Kyriakou v Municipality Engomi* was repeated and reaffirmed in *Anastasiou v The Police*,[144] where the court held that there is no right of appeal against interlocutory judgments of the court, unless this is expressly provided by the law or the Constitution.

It has now been authoritatively settled by case law that the Supreme Court has no jurisdiction to hear cases on appeal unless specifically provided for by the law or the Constitution regardless of whether such treatment would be contrary to the human rights of a person.[145] It may, however, be possible to raise on appeal the interlocutory judgment of a court, if that is raised as a ground of appeal against the final decision of the court. In the case of *Makriyiannis v The Police*,[146] the appeal against conviction referred to the interlocutory decision of the court at first instance as to whether a *prima facie* case existed as well as to the final decision of the court at first instance.

Unlike the provisions in the Criminal Procedure Law, the Constitution contains, in article 11.6, a right of appeal against an interlocutory judgment of a court to remand an arrested person in custody. This particular provision is, however, limited in application to the circumstances outlined above and it is not to be construed in a wide manner.

The Constitution, with the exception of article 11.6, does not provide for a general right of appeal or review of a decision of a court of first instance.[147] The provisions set out in sections 131–137 of the Criminal Procedure Law remain the determinative factors as to whether a right of appeal exists against a decision of a court of first instance exercising criminal jurisdiction. The practice adopted by courts in the past is no longer considered as being good authority that a ground of appeal could exist regardless of what the Law provided. Unless expressly provided by the Law or the Constitution, there would be no right of appeal on which the Supreme Court could exercise its jurisdiction.

Evidence

12-19 The law of evidence as applied in Cyprus is a reflection of the rules of evidence prevailing in England in 1914, subject to certain subsequent statutory amendments and modifications. Cyprus enacted in 1946 the Evidence Law (Cap 9), which essentially reproduced the legislation on evidence in force in England on

144 *Anastasiou v The Police*, Criminal Appeal 6783, 31 August 1999.

145 *Kyriakou v Municipality Engomi* (1992) 2 CLR 414; *Anastasiou v The Police,* Criminal Appeal 6783, 31 August 1999.

146 *Makriyiannis v The Police* (1996) 2 CLR 41.

147 *Attorney-General v Georgiou* (1984) 2 CLR 251; *Attorney-General v Lazarides et al* (1992) 2 CLR 8; *Kyriakou v Engomi Municipality* (1992) 2 CLR 414.

5 November 1914 in the national laws of Cyprus, making certain adjustments to reflect the developments effected by the relevant case law.

The development of Cypriot rules of evidence has not followed that of the English law on evidence. Under Cypriot law, there is ample room for improvement as the rules of evidence in force in 1914 in England were tailored to the needs of the system and circumstances which were then in place. One illustration of the problems faced today because of the present state of the law of evidence is the rule against hearsay.

The rule against hearsay prohibits the admission of any statement, other than the one made by a witness while giving oral evidence, which is tendered as evidence of the facts stated therein. In this respect, any statement introduced as evidence for the purpose of proving the truth of its contents would be rendered inadmissible. This is a deeply rooted Common Law principle which aims at avoiding any inaccuracies and inconsistencies during trial and at placing the burden on the party who asserts something to provide direct evidence from a witness rather than relying on other indirect sources.

Some improvements have been effected in this area which introduced some flexibility in the application of the rules against hearsay. Consider, for example, section 5A of the Evidence Law, which now permits the use of computer-generated material as admissible evidence, provided that certain preconditions are satisfied.[148] Despite the above change, the rules against hearsay are still subject to a rigid interpretation and application by Cypriot courts, and legislative intervention would be highly recommended for revision of the current state of the rule against hearsay and the law of evidence generally.

Even the position taken in English law has been modified since 1914 in a way which treats the rule against hearsay in a more flexible manner. Consider, for example, the Police and Criminal Evidence Act 1984, as well as the Criminal Justice Act 1988, which have permitted the introduction of hearsay evidence in a number of instances which previously would have been impossible. At present, the preparation of a bill on the rule against hearsay is under consideration by the House of Representatives which may bring about the changes required in the law on hearsay. Nevertheless, this draft bill has caused much controversy over whether a more flexible approach like that adopted in continental European systems should be followed, or whether the Common Law principles should persist but be updated and revised to suit current standards. The extent to which this draft bill will bring about the necessary improvements on the rule against hearsay is a matter which still needs to be determined.

Apart from the rule against hearsay, one other characteristic of the Cypriot law on evidence is the need for the prosecution to provide corroborative evidence in certain cases. As an exception to the general rule that no corroborative evidence needs to be submitted in support of the evidence given by a witness, the law requires evidence

148 Law 54 of 1994.

to be corroborated in the cases of a child giving unsworn evidence,[149] procuration,[150] perjury,[151] actions for breach of promise of marriage,[152] claims on the estate of a deceased person,[153] contradictory statements made during trial on information,[154] and in certain other cases. The law leaves no room for discretion in respect of the need for corroborative evidence, and lack of such evidence would lead to the acquittal of the accused. There are instances, however, where the existence of corroborative evidence is not compulsory and, in such cases, the trial judge only needs to warn himself of the dangers involved in reaching a decision without the existence of corroborative evidence.

In cases involving sexual offences,[155] accomplices giving evidence for the prosecution,[156] divorce and other marriage-related cases, identification evidence,[157] and a witness with some purpose of his own to serve,[158] the judge may convict an accused in the absence of corroborative evidence, provided that he has warned himself of the dangers involved in reaching such a decision without any corroborative evidence.

The existence of the need for corroborative evidence undoubtedly raises a number of obstacles for the prosecution in discharging its duty during a trial. Although the reasons for the existence of this rule are acceptable as a concept, as tending to limit the possibilities of incriminating a person on the basis of false or inaccurate evidence, the focus of this rule, however, should not be on the number of available sources of evidence but on the contents and the quality of the evidence submitted during trial. Certain authors such as Eliades[159] support the view that the application of this rule should be more limited in scope and should relate only to circumstances where there is a real danger that the evidence given during a trial would not be accurate and true. Consider, for example, the sexual assault of a young person; in this case, there is a need to admit corroborative evidence before any decision is reached, as there may be doubts as to the accuracy of the version of events given by the young person.

Apart from the above mentioned, the law on evidence closely follows the Common Law position in relation to the rules on confessions, illegally obtained evidence,

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149 Evidence Law, s 9.

150 Criminal Code, s 157.

151 Criminal Code, s 112.

152 Evidence Law, s 6.

153 Evidence Law, s 7.

154 Evidence Law, s 11.

155 *Makris* (*Petinos*) *v The Police* (1961) CLR 330; *Attorney-General v Petrou* (1972) 2 CLR 81; *Theodorou v The Police* (1971) 2 CLR 245; *Solomou v The Republic* (1978) 2 CLR 117; *Fourri and Others v The Republic* (1980) 2 CLR 152; *Savva v The Republic* (1993) 2 CLR 258; *Yiangou Andreas alias Mongolos v The Republic*, Criminal Appeal 6177, 18 February 1999.

156 *Baskerville* (1916) 2 KB 658; *Psaras and Licha v The Republic* (1987) 2 CLR 132.

157 *Turnbull*, 65 Cr App R 16.

158 *R v Prater* [1960] 1 All ER 298; *Zesimides v The Republic* (1978) 2 CLR 382.

159 Eliades, *The Law of Evidence — A Practical Approach* (1994), at pp 185 and 186.

similar fact evidence, character evidence, compellability of witnesses, examination of witnesses, and privileged documents. Although the position under Cypriot law reflects to a great extent the rules on evidence prevailing in England in 1914, their development and revision over the years has not followed that of English law. The law of evidence in England has been subject to a number of changes as outlined above, to alleviate the problems arising in the application of the rules of evidence and in the interests of proper administration of justice. Although an exact copy of the rules of evidence currently in existence under English law would not be the most appropriate solution for Cyprus, the legislative and executive authorities should use this as a guide in their attempts to amend the present Cypriot law on evidence in a way which would cater for the current needs of the criminal and civil justice system in Cyprus.

General Exemptions from Criminal Liability

Self-Defence

12-20 Self-defence allows reasonable force to be used as a means of defending oneself, another person, or property from attack or damage. Such acts done by a person in self-defence are deemed to be justified and therefore not liable to any criminal sanctions. Although self-defence is not mentioned specifically in the Criminal Code, it seems to come within the ambit of section 17 of the Code, which provides 'necessity' as a defence.[160] Furthermore, it has never been doubted that it forms part of the Cypriot criminal law, and its application in so many decided cases tends to show that it has a basis in the law. In 1971, in *Miliotis v The Police*,[161] the Supreme Court dealt with the issue of self-defence as being cognisable for the purposes of the criminal law of Cyprus, which was reaffirmed in *Christou v The Police*.[162] When a defence of self-defence is raised, the prosecution is under an obligation to disprove this as an essential part of their case.[163]

The principles on which the defence is based originate from a number of cases at Common Law. The classic pronouncement on the law relating to self-defence, which also is favoured by Cypriot courts, was made by the Privy Council in *Palmer*,[164] and it states that:

> It is a straightforward concept. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself.

160 *Maifoshis v The Police* (1978) 2 CLR 9.
161 *Miliotis v The Police* (1971) 2 CLR 292, at p 296.
162 *Christou v The Police* (1972) 2 CLR 38, at p 40.
163 *Wheeler*, 52 Cr App R 28; *Miliotis v The Police* (1971) 2 CLR 292, at p 297.
164 *Palmer* [1971] AC 814.

> It is both good law and good sense that he may do, but may only do, what is reasonably necessary. However, everything will depend on the particular facts and circumstances . . . . If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is so serious that it puts someone in immediate peril then immediate defensive action may be necessary.[165]

12-21 The application of these principles to the facts of a given case is not an easy task in view of the rather special situation in which the defendant may find himself at the material time. Many problems seem to arise about what is deemed to be relatively necessary under the circumstances and what an accused may do in an attempt to defend oneself. In *Maifoshis v The Police*,[166] for example, the accused found himself standing at the railings of a terrace, high above the ground with no possibility of retreating, and returned the blows he suffered from his attacker.

A person is not expected to wait until he is struck or attacked by the other person and then proceed to defend himself. Authority[167] exists to suggest that, if someone is attacked and receives a blow, he does not automatically forfeit the advantage of the plea of self-defence if he does not restrict himself to merely warding off the blow but strikes back in return. According to Lord Griffiths in *Beckford v R*,[168] 'a man about to be attacked does not need to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike'. As stated previously, the determinative factor, whether the accused is entitled to get his blow in first, will be the circumstances of a case.

In cases where the actions of the accused in self-defence were instigated by a mistake of fact, the courts will measure the use of force against the facts which the accused honestly believed to exist rather than those which actually existed.[169] The extent to which such a mistake of fact was reasonable may determine whether the mistake was or may have been genuine. On the other hand, if the mistaken belief of the accused is caused by his voluntary intoxication, such a defence is likely to fail, depending on whether the crime in question requires specific or basic intent (see text, below).

As stated above in *Palmer*, the reasonableness of the force used must be considered in the light of the fear and pressure the accused was under at the material time. In *Clegg*,[170] the House of Lords held that, where a person kills another with the requisite intent for murder (not premeditated murder as in section 203 of the Criminal Code) in circumstances in which he would have been entitled to acquittal on grounds of self-defence, but exerts excessive force in defending himself, he

165 *Palmer* [1971] AC 814, at pp 831 and 832.
166 *Maifoshis v The Police* (1978) 2 CLR 9.
167 *Deana*, 2 Cr App R 75; *Maifoshis v The Police* (1978) 2 CLR 9.
168 *Beckford v R* [1988] AC 130, at p 144.
169 *Williams* (G), 78 Cr App R 276 CA; *Beckford* [1988] AC 130.
170 *Clegg* [1995] 1 All ER 334.

cannot benefit from this defence; the defence of self-defence fails altogether. In this case, the firing of four shots by a soldier at a stolen car which did not stop at a checkpoint in Northern Ireland was considered to be the use of excessive force and thus the defendant could not invoke self-defence to be acquitted.

It was considered that the first three shots had been fired in self-defence but the fourth was not, as the car had passed the checkpoint and was moving away and thus posed no threat. The House of Lords also refrained from reducing the charge to manslaughter as all the elements of murder existed and left the issue to be considered by Parliament. It has been said that the extent to which the force used is reasonable is to be determined not from a purely objective point of view,[171] although a line of authorities culminating in the decision in *Clegg* indicates that the test is a purely objective one.

Mistake of Fact and Bona Fide Claims

12-22 The Criminal Code provides that a person committing an offence who is acting under an honest and reasonable, but mistaken, belief in the existence of a state of things cannot be held criminally liable for the offence.[172] The application of this principle may be excluded, however, by the express or implied provisions of the law relating to the subject. This principle does not operate as a defence but rather negatives the mental element required for the commission of an offence.

If the accused is entertaining an honest and reasonable belief that implies that the required mental element for the commission of the offence, the *mens rea*, is absent and the prosecution will not be in a position to secure a conviction. In *Demetriou v The Police*,[173] the accused was removing earth from a field under the mistaken belief that the field belonged to the person who gave him permission to do so. The accused had done what he had been accused of while believing in the existence of a state of things which did not exist, but which he reasonably and honestly, though mistakenly, believed to exist. Such a mistaken belief, which was honest and reasonable, could not make the accused criminally liable.

If, however, the offence committed is one of strict liability, the fact that the accused was entertaining an honest and reasonable belief would not absolve him of criminal liability. A strict liability offence is constituted merely by proving the physical acts of the accused (*actus reus*). The fact, therefore, that an honest and reasonable belief, though mistaken, cannot form the requisite *mens rea* for the commission of the offence would have no bearing on the commission of a strict liability offence as no *mens rea* needs to be established.[174]

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171 *Palmer* [1971] AC 814; Archbold, *Criminal Pleading, Evidence and Practice* (2000), at p 1632.

172 Criminal Code, s 10.

173 *Demetriou v The Police* (1979) 2 CLR 259.

174 *Kontos v The Police* (1967) 2 CLR 272.

Under English law, the position on mistake of fact has developed to such an extent that it makes it difficult to construe a general principle for a mistaken belief. The most important development came with the decision in *DPP v Morgan*,[175] which dealt with a mistaken belief of the accused that the victim was consenting to sexual intercourse. However, other cases[176] seem to revert to the old principle enunciated in *Tolson*[177] which is similar to the position under Cypriot law. According to Archbold, 'the general rule now is that a belief in the existence of circumstances which, if true, would make the act or omission in respect of which the defendant is accused an innocent act or omission, will negative guilt. The reasonableness of the belief goes only to the question of whether it was in fact held.'[178]

The honest and reasonable belief of the accused must relate to the existence of the circumstances of the case and not to a mistake as to the law. Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.[179]

In the same way as an honest and reasonable mistaken belief, an act done in the exercise of a *bona fide* claim of right[180] also may discharge the accused from criminal liability. In *Costas P Antoni v Christos Loizou*,[181] the accused destroyed a ditch in dispute on the assumption that it was his property, ie, the act was done by the accused in the exercise of an honest claim of right. The Supreme Court held that the accused had a *bona fide* claim of right to the ditch in question, which was his own land, and that was a complete defence to the charge. If the accused had relied on the principle of mistaken belief, it would not have succeeded because his mistake was not as to the facts but as to the law. If, therefore, the accused is exercising an honest claim of right, that may absolve him of criminal liability.

Insanity

12-23 A person suffering from a disease of the mind which affects his actions and behaviour may escape criminal liability by reason of insanity.[182] Every person is deemed by law to be of sound mind[183] and, if an accused intends to rely on insanity,

175 *DPP v Morgan* [1976] AC 182, HL.
176 *Albert v Lavin*, 72 Cr App R 178; *R v Barrett and Barrett*, 72 Cr App R 212, CA; *Phekoo*, 73 Cr App R 107.
177 *Tolson* (1889) 23 QBD 168.
178 Archbold, *Criminal Pleading*, *Evidence and Practice 2000* (2000), at p 1561, pt 17-11.
179 Criminal Code, s 7.
180 Criminal Code, s 8.
181 *Costas P Antoni v Christos Loizou* (1961) CLR 295.
182 Criminal Code, s 12.
183 Criminal Code, s 11.

the burden of proof will rest on him, to be discharged on the balance of probabilities.[184] The defence of insanity is concerned with the accused's mental state at the time of the commission of the alleged offence.

Although this defence has been the subject of much controversy and various academic writers have attempted to analyse and rationalise, it remains of infrequent use.[185] One of the reasons is that, under English law, an accused may now raise the defences of diminished responsibility (available only in cases of murder) and automatism. Furthermore, there are inconsistencies between what medical science recognises as insanity and what the law regards as a state of insanity.

The leading case on the issue of insanity is the English case of *M'Naghten*.[186] The guidelines laid down ('M'Naghten Rules') in that case have been accepted repeatedly as the proper construction of the law on insanity.[187] They state that, to establish a defence of insanity, the defence must prove that, at the time of the commission of the offence, the accused was labouring under such a defect of reason arising from a disease of the mind which rendered the accused incapable of knowing the nature and quality of the act he was doing or, if he did know it, not knowing that what he was doing was wrong.

A disease of the mind is a term used in its legal context rather than its medical one. Devlin J, in *Kemp*,[188] argued that 'the law is not concerned with the brain but with the mind, in the sense that 'mind' is ordinarily used, the mental faculties of reason, memory and understanding'. There is no need to establish that the brain itself was affected: the focus is on the condition of the mind. In *Bratty v Attorney-General for Northern Ireland*,[189] the *dicta* of Devlin J were reaffirmed by Lord Denning, who stated that 'any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind'.[190]

A disease of the mind giving rise to a defence of insanity must arise from an internal cause (such as disease or psychological illness) and not an external cause (such as injury or consumption of drugs).[191] In *Quick and Paddison*,[192] the accused was suffering from hypoglycaemia which was caused not by his diabetes but by his use of insulin prescribed by a doctor. This was an external factor, and he could not rely on the defence of insanity. Had it been caused by his diabetes, it would have been considered to arise from an internal factor. In cases of hyperglycaemia, for example,

184 *Hjisolomou v The Republic* (1964) CLR 170; *Smith* (*Oliver*), 6 Cr App R 19.
185 Mackay, 'Fact and Fiction about the Insanity Defence', (1990) *Crim LR* 247.
186 *M'Naghten* (1843) 10 Cl & F 200.
187 *Holt*, 15 Cr App R 10 CCA; *R v True*, 16 Cr App R 164 CCA; *Windle* [1952] 2 QB 826; *Sullivan* [1984] AC 156, HL.
188 *Kemp* [1957] 1 QB 399, at p 407.
189 *Bratty v Attorney-General for Northern Ireland* [1963] AC 386.
190 *Bratty v Attorney-General for Northern Ireland*, [1963] AC 386, at p 412.
191 *Bratty v Attorney-General for Northern Ireland* [1963] AC 386.
192 *Quick and Paddison* [1973] 3 All ER 347.

the accused may rely on insanity as the condition is produced by the disease of diabetes which is an internal cause.[193] A similar approach is adopted for attacks carried out during an epileptic seizure. These seizures caused impairment of the faculties of reason, memory, and understanding to such an extent as to render the accused incapable of controlling his actions or judgments.[194]

If the defence of insanity is to succeed, the disease of the mind must give rise to a defect of reason. The power of reasoning of the accused must be impaired as a result of the disease of the mind, rendering the accused incapable of knowing the nature and quality of his act or, if he did know this, he did not know that what he was doing was wrong. In *Hjisolomou v The Republic*,[195] however, the state of insanity of the accused rendered him incapable of understanding that he was in no danger from his good neighbour and friend who had not betrayed him and who was actually sharing with him whatever danger there may have been. Labouring under the affliction of his mind, the accused was incapable of understanding that he was not killing a dangerous enemy, but his own friend. If the accused, however, was aware that what he was doing was wrong but could not control himself due to the impairment of the mind, that would prevent him from relying on the defence of insanity.[196]

If, at the end of the trial, the court is satisfied that the accused was suffering from a disease of the mind within the meaning of the M'Naghten Rules at the material time, it will find the accused 'not guilty by reason of insanity'. This verdict is followed by a direction for the detention of the accused according to section 70(4) of the Criminal Procedure Law. Although the decision of the court is that the accused is not guilty of the offence committed, it does not permit him walk free due to his state of insanity.

Intoxication

12-24 Intoxication may arise from the consumption of drugs, alcohol, and other related substances. Although it may negative the requisite *mens rea* for certain offences, in some circumstances, intoxication is the essence of a criminal offence. Consider, for example, section 94 of the Criminal Code, which makes it illegal to be in a state of intoxication in a public place.

The effect of intoxication on criminal liability is not that of a defence which may be pleaded in answer to a charge. It is not an excuse for an accused to plead that, had he been sober, he would not have committed the offence.[197] The relevance of intoxication is only in respect of the existence of the requisite *mens rea* for the

193 *Hennessy* [1989] 2 All ER 9.
194 *Sullivan* [1984] AC 156.
195 *Hjisolomou v The Republic* (1964) CLR 170.
196 *Koliandris v The Republic* (1965) 2 CLR 72.
197 *DPP v Majewski* [1977] AC 433.

commission of the offence. In other words, intoxication may have such an effect on an accused as to render him unable to form the necessary *mens rea*. The extent to which a state of intoxication will negate the required *mens rea* will depend on whether the offence is one requiring basic or specific intent.

An offence which can be committed recklessly is considered to be an offence of basic intent.[198] If it is an offence where proof of intention is required, that would be an offence of specific intent. In *DPP v Majewski*,[199] it was held that voluntary intoxication will not negate the necessary *mens rea* if the offence committed by the accused is one of basic intent. The voluntary intoxication of the accused will rather substitute the requisite *mens rea* that the prosecution needs to establish. A plea of intoxication in cases of offences of basic intent would be fatal for the accused. On the other hand, where the offence committed by the accused requires specific intent (eg, rape, murder, malicious injury to property, or stealing), evidence of self-induced intoxication may negate that intent.[200]

This, however, does not imply that the accused will avoid criminal liability altogether in cases where he successfully relies on a plea of intoxication. There will be alternative counts of basic intent offences which will render him liable. In *Aristidou v The Republic*,[201] the Supreme Court held that the intoxication of the accused prevented his ability to form the necessary *mens rea* for premeditated murder. As a result, the conviction for premeditated murder was set aside and the accused was convicted of homicide. According to Loizou,[202] this represents an attempt by the Supreme Court to introduce the principle of diminished responsibility, which exists at Common Law and is applicable only to convictions for murder, by way of a judicial precedent rather than wait for the legislature to do so.

If the accused voluntarily becomes intoxicated so as to find the necessary courage to commit the offence, such intoxication would not negate the *mens rea* even in specific intent offences.[203]

Intoxication may affect the extent to which an accused can rely on other defences, such as self-defence or that of mistaken belief. In *O'Grady*,[204] a mistaken belief by the accused that he was under attack and thus had to defend himself failed as it was caused by voluntary intoxication. Lord Lane C J considered that:

> . . . the question of mistake can and ought to be considered separately from the question of intent. A sober man who mistakenly believes he is in danger of immediate death at the hands of an attacker is entitled to be acquitted of

198 *Caldwell* [1982] AC 341.
199 *DPP v Majewski* [1977] AC 433.
200 *Bailey* [1983] 2 All ER 503.
201 *Aristidou v The Republic* (1967) 2 CLR 43; (1967) 3 JSC 251.
202 Loizou, 'Criminal Justice and the Treatment of Offenders, Part II', *Cyprus Law Tribune*, Issue 3–4 (May–June 1972), at pp 7 and 12.
203 *Attorney General for Northern Ireland v Gallagher* [1963] AC 349.
204 *O'Grady* [1987] 3 WLR 321, [1987] QB 995.

> both murder and manslaughter if his reaction in killing his supposed assailant was a reasonable one. What his intent may have been seems to us to be irrelevant to the problem of self-defence or number.[205]

12-25 If the defendant was mistaken in his belief that any force, or the force which he used, was necessary to act in self-defence and this mistaken belief was the result of his voluntary intoxication, such a defence would fail. This was reaffirmed in *O'Connor*,[206] where the court held that intoxication was irrelevant to whether the accused was acting in self-defence. The conviction for murder, however, was quashed on other grounds. The fact that a man uses force in an honest though mistaken belief, due to his intoxication, in the need to defend himself does not follow that he did not have the necessary intent to commit the crime.

Attempts

12-26 An attempt to commit a crime is an offence in itself. To constitute an attempt, there must be an intention to commit an offence, which must be manifested by some overt act, albeit this intention may not be fulfilled to such an extent as to commit the offence.[207] Furthermore, it is immaterial, except as regards punishment, whether the offender does all that is necessary on his part to complete the commission of the offence. As Clerides comments, for such an offence to occur, 'all is required is an overt act which puts the intention into execution by means adapted to its fulfilment. The intention will be carried out by a method formulated for the purpose'.[208] Before embarking on an examination of this offence, it is important to mention that the Common Law offence of attempt on which the Cypriot Law is based has been abolished in England and replaced by the Criminal Attempts Act 1981.

Section 366 of the Criminal Code provides no explanation as to at which point an attempt is committed by overt acts. Guidance on this point is sought from established Common Law principles. In the early case of *R v Nicos Sampson Georgiades* (*Number 2*),[209] Zekia J followed the guidelines included in Archbold (33rd ed), at page 1489, which stated that:

> It is submitted that the *actus reus* necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime.

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205 *O'Grady* [1987] QB 995, at pp 999 and 1000.

206 *O'Connor* [1991] *Crim LR* 135 CA.

207 Criminal Code, s 366.

208 Clerides, 'Criminal Attempts (A Comparative Study of Greek, English, and Cyprus Law)', *Cyprus Law Review*, Issue 2 (April–June 1983), at pp 259 and 271.

209 *R v Nicos Sampson Georgiades* (*Number 2*) (1957) 22 CLR 128.

12-27 The same position was adopted in the later case of *Police v Savvides*,[210] where Pikis, Ag PDC held that the modern exposition of the law of attempt is to be found in *Davey v Lee*,[211] where it was decided that:

> . . . the *actus reus* is complete if the prisoner does an act which is a step towards the commission of a specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime.

12-28 The position as formulated originally in *R v Nicos Sampson Georgiades* (*Number 2*) was followed in *Police v Skordis*.[212] The judgment in this case also was delivered by Pikis, who explained that the acts that would constitute this offence 'must be immediately and not remotely connected with the commission of the offence and further such acts must be unequivocally referable to the commission of the specific crime the accused is alleged to have intended to commit'.[213]

Furthermore, the acts committed by the offender may not be of a preparatory nature. The offender must commit such acts which would have a direct and immediate effect on the commission of the offence. The line, however, to be drawn between actions which are preparatory and acts which are linked directly to the commission of the offence is by no means clear. In an attempt to clarify this matter, the courts have stated that acts preparatory to the offence are acts which merely set the scene for the commission of the offence,[214] whereas what is required under the law is a positive act going some way towards committing the offence.[215]

The propositions put forward in these decisions lend themselves to a number of criticisms. As stated previously, acts which are a step towards the commission of the offence can take various forms. Moreover, the distinction between the stages of preparation and attempt itself is a difficult one to draw. On this point, Clerides also argues that a person may have more than one goal in mind with the line of action he proposes to follow, thereby making it impossible to determine by looking at his acts what is the desired end.[216] Consider for example, the case of a man who approaches a haystack, fills his pipe, and lights a match. The act of lighting may be ambiguous, depending on what he had in mind, even to the most suspicious person. This makes the task of the court even more difficult when analysing the facts of a case.

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210 *Police v Savvides* (1976) 5 JSC 872.

211 *Davey v Lee* [1967] 2 All ER 423.

212 *Police v Skordis* (1976) 6 JSC 1000.

213 *Police v Skordis* (1976) 6 JSC 1000, at p 1007.

214 *Kyprianou v Reynolds* [1969] *Crim LR* 656; *Bloomfield* [1971] Cr App R 305.

215 *Police v Skordis* (1976) 6 JSC 1000, at p 1007.

216 Clerides, 'Criminal Attempts (A Comparative Study of Greek, English and Cyprus Law)', *Cyprus Law Review*, Issue 2 (April–June 1983), at pp 259 and 269.

It has been pointed out that the law in England has been changed with the introduction of the Criminal Attempts Act 1981. Under this Act, the intention was to move away from the old Common Law principles and introduce the test of 'acts which are more than merely preparatory'. Nevertheless, this test also has been subject to a number of interpretations courts and, in cases such as *Boyle v Boyle*,[217] the courts also referred to the old Common Law principles mentioned above. Despite any criticisms that may arise from the present state of Cypriot law as far as the crime of attempt is concerned, it cannot be argued that the current position under English law lends itself as a suitable alternative as it is not free from inconsistencies. It should be borne in mind that this is a crime which can apply to almost any type of situation, whether homicide or arson, and therefore it would be almost impossible to design a rule to cater for all the various scenarios that may occur. It is not a coincidence that, apart from this offence under section 366, the Criminal Code has other specific offences of attempts for particular crimes, such as the cases of attempted rape[218] or murder,[219] which are governed by sections other than section 366 of the Criminal Code.

There also is the situation where the accused intends to commit an offence and does an act in that direction, believing that he thereby commits an offence whereas, in law, his acts do not constitute an offence. In such a situation, the accused is attempting to do something which is not a crime and therefore cannot be guilty of the offence of attempt to commit an offence. On this issue of impossibility, Lord Hailsham explained, in *Haughton v Smith*,[220] that, in a situation where the commission of the crime is a physical impossibility, it would not be possible to convict an accused of attempt. An example of such a situation would be an attempt by the accused to steal from the pocket of his victim, but unknown to him, the pocket is empty. Similarly, the crime may not be committed due to a legal impossibility; the accused attempts to receive or retain stolen goods but such goods are in fact not stolen. The goods in this case lack a quality essential for the commission of the offence.

Under Cypriot law, section 366 provides that it is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence. The position under Cypriot law is, therefore, different from the Common Law position in relation to impossibility as enunciated by Lord Hailsham, above. The provision renders an accused liable for an attempt to commit an offence regardless of the fact that the circumstances predominating in the particular case may render the commission of the offence a physical impossibility. This view also is supported by Clerides, who substantiates his opinion by judgments from Common Law jurisdictions which adopt a similar approach to

217 *Boyle v Boyle* [1987] 84 Cr App R 270.
218 Criminal Code, s 146.
219 Criminal Code, 214.
220 *Haughton v Smith* [1975] AC 476.

Cypriot law.[221] Clerides further argues that, even in situations of legal impossibility, the offender may still be liable under section 366 since, according to the second paragraph of this section, it is immaterial whether 'the complete fulfilment of his intention is prevented by circumstances independent of his will'.

It should be pointed out that the Common Law position as explained above has been reformulated in England, after the enactment of the Criminal Attempts Act 1981. In *Shivpuri*,[222] the House of Lords, in considering the application of section 1(2) of this Act to cases of impossibility, held that a person may be rendered liable to conviction regardless of the impossibility which prevented commission of the intended offence. As Stavrinakis explains, despite any differences which may have existed in the past between the position under Cypriot law, and under English law, 'the enactment of the Criminal Attempts Act 1981 seems to have come in line with our own provisions'.[223]

Having established that the acts of the accused were directly and immediately connected with the commission of the offence, the prosecution must establish the existence of the requisite intent. In the case of *R v Nicos Sampson Georgiades* (*Number 2*),[224] Zekia J, explains that:

> When the presence of intent in an attempt to commit a particular offence is sought to be established, the nature of the evidence must be such as to rule out all other inferences inconsistent with the presence of such intent. It is not enough, in ascertaining whether a particular intent is proved or not, to say that this was a reasonable inference to be drawn from the facts but one must go further and be able to say that that was the only reasonable inference which could be drawn from the facts as found.

12-29 The above suggests that intent must be shown from the evidence as the only reasonable inference which could be drawn and therefore any doubt or indecision should result in an acquittal. In the case of *Whybrow*,[225] which was adopted in *Pefkos v The Republic*,[226] the Court of Appeal held in relation to the requirement of intent that, although on a charge of murder proof of intention to cause grievous bodily harm would suffice to establish the requisite *mens rea* at Common Law, on a charge of attempted murder, it must be proved that the accused intended to kill. The reason is that in cases of attempted crimes, the intent becomes the principal ingredient of the crime. Any presumption, therefore, that a man intends the natural and probable consequences of his act cannot apply to a charge of attempt.

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221 Clerides, 'Criminal Attempts (A Comparative Study of Greek, English and Cyprus Law)', *Cyprus Law Review*, Issue 2 (April–June 1983), at pp 259, 276, and 277.

222 *Shivpuri* [1987] AC 1.

223 Stavrinakis, 'Attempts', *Cyprus Law Review*, Issue 3 (July–September 1991), at pp 558 and 559.

224 *R v Georgiades* (*Number 2*) (1957) 22 CLR 128, at p 133.

225 *Whybrow* [1951] 35 Cr App R 141.

226 *Pefkos v The Republic* (1961) CLR 340.

The same principle was followed in subsequent cases. In *Andreou v The Republic*,[227] the Supreme Court followed the decision of the Court of Appeal in *Mohan*,[228] which concluded that specific intent must be proved; that what was required was 'a decision by the accused to bring about, so far as it lay within his power, the commission of the offence which it was alleged that he had attempted to commit'.[229] In this respect, therefore, Cypriot case law suggests that the prosecution would be expected to prove specific intent by the offender in cases of attempts under section 366.

Clerides has commented that 'any further extension of the scope of intention by virtue of case law in England will undoubtedly leave its mark on Cyprus law'.[230] Recently, in the English case of *Khan*,[231] concerning an offence of attempted rape, the court considered the application of the statute to the reckless element. For the purposes of the statute, a person has the requisite intention to commit rape if he intends to have sexual intercourse with the victim, being reckless whether she consents or not. The decision in *Khan* was affirmed by the Court of Appeal in *Attorney-General's Reference* (*Number 3 of 1992*)[232] where, on a charge of attempted arson, it was sufficient that the accused intended to cause damage to the property by fire and was reckless whether life would be endangered.

It is obvious from the approach adopted by English courts in this area that eventually a transition may take place, setting the requisite intention on an objective basis and judging the offender by the standard of the reasonable man. As stated above, with such reformulation of the English law, a similar development in the area of attempts under Cypriot law may be anticipated. Since such English cases have only persuasive authority under Cypriot law, the matter is subject to the willingness of the Cypriot judiciary to treat 'intent' in such a flexible manner for the purposes of section 366 of the Criminal Code.

Offences Relating to Property

In General

12-30 Offences relating to property can take various forms and their degree of seriousness can vary substantially. As a means of safeguarding the rights of a person over his property which also form part of his constitutional rights,[233] the Criminal Code contains various provisions aimed at safeguarding such rights.

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227 *Andreou v The Republic* (1977) 2 CLR 81.

228 *Mohan* (1976) QB 1, at p 11.

229 *Andreou v The Republic* (1977) 2 CLR 81, at p 87.

230 Clerides, 'Criminal Attempts (A comparative Study of Greek, English and Cyprus Law)', *Cyprus Law Review*, Issue 2 (April–June 1983), at pp 259 and 265.

231 *Khan* [1990] 2 All ER 783.

232 *Attorney-General's Reference* (*Number 3 of 1992*) [1994] 2 All ER 121.

233 Article 23.1 of the Constitution provides that every person has the right to acquire, own, possess, enjoy, or dispose of any movable or immovable property.

Stealing

12-31 In relation to the offence of stealing, section 255(1) of the Criminal Code provides that:

> A person who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.

12-32 For the prosecution to secure a conviction under this section, it must determine initially as part of the *actus reus* that the subject matter was something capable of being stolen and secondly that it was taken and carried away by the offender. The definition of the subject matter in the Criminal Code[234] is broad and encompasses many types of property. The view taken by the courts on this issue is similar. Their approach, in determining what could be classified as the subject matter of stealing, has been made explicit in *Police v Chrysomilis and Others*,[235] where the Supreme Court held that sand severed from the land became a movable thing capable of being stolen. A similar line of thought, which is determinative of the flexible approach which the Courts may adopt, can be found in *Police v Protopapas*.[236] In this case, the Supreme Court held that this section is applicable not only to fixtures, but that trees and soil removed from land also could constitute the subject matter of the offence of stealing.

As far as the other elements of the *actus reus* are concerned, the Criminal Code makes reference[237] to what type of conduct could amount to the taking and carrying away of stolen property. The expression 'takes' includes obtaining possession by any trick, intimidation, or mistaken belief and by finding the property which is similar in some respects to the Common Law position as examined in *Middleton*.[238] Additionally, for the offence of stealing, the property which is being taken or carried away must be property belonging to another person and not the offender. On this matter, Viscount Dilhorne, in *Lawrence*,[239] stated that the term 'belonging to another' signifies no more than that, at the time of the appropriation or the obtaining, the property belonged to another person.

The expressions 'fraudulently and without a claim of right', 'in good faith', and 'with intent to permanently deprive the owner' as used in the definition of the offence describe the mental element (*mens rea*) of the offence which must be proved for a conviction under section 255 to be obtained. In *Platritis v The Police*,[240] the

234 Criminal Code, s 255(3).
235 *Police v Chrysomilis and Others* (1975) 1 JSC 124.
236 *Police v Protopapas* (1973) 10 JSC 1382.
237 Criminal Code, s 255(2)(a) and (b).
238 *Middleton* [1873] LR 2 CCR 38.
239 *Lawrence* [1972] AC 626, at p 633.
240 *Platritis v The Police* (1967) 2 CLR 174.

Supreme Court explained that the term 'fraudulently and without a claim of right' is used to describe a situation where the taking was made intentionally and deliberately and, therefore, the taking was not done under a mistaken belief. It must be established not only that the offender obtained the property without a claim of right, but also that such taking was intentional and deliberate. According to Vassiliades, P:

> Fraudulently, does not always mean with the intention of never paying it back. In the circumstances of this case, for instance, 'borrowing' the money in his custody may well amount to fraudulent conversion of the money to his own use, under our code, notwithstanding an intention at the time, of paying back an equal amount of money at some future time. By taking the money to use it for a purpose other than that for which it was entrusted to him, the appellant did deprive the owner permanently of the property in certain particular bank-notes or bills, notwithstanding his intention to replace them later with other notes or bills of equivalent value. And, he did so 'fraudulently' in order to derive the advantage of their use, knowing he had no such right; nor did he have the consent of the owner to make such use of his money.[241]

12-33 In this respect, the offender may act in a fraudulent manner, regardless of any intent he must return the stolen property to its rightful owner at a later stage. In determining whether the actions of the offender were fraudulent, one must concentrate on the acts committed by the offender and determine whether the taking was deliberate and intentional.

The prosecution also must establish that the accused intended permanently to deprive the rightful owner of the stolen property. Whether there are reasonable grounds for believing that there was an intention to return the property will be determined by the facts of each case. The formation of the intent permanently to deprive need not necessarily take place at the exact moment of the taking and carrying away of the property. The act of taking or carrying away is considered to be a continuous act and the intent to deprive will be formed through the synergy of 'time' and 'appropriation'; the appropriation of the stolen property continues in time up to the point where the intention permanently to deprive is formed in the mind of the offender. It is possible, therefore, for someone who has taken property belonging to another with the intent to return it, to be found guilty of stealing when he subsequently changes his mind and decides to keep the property.

Burglary and Housebreaking

12-34 The offence of burglary consists of breaking into certain premises at night with intent to commit a felony therein.[242] Under Cypriot law, if the breaking takes place during the daytime, such an offence would be classified as housebreaking. Unlike burglary, which is punishable by a term of up to 10 years' imprisonment,

241 *Platritis v The Police* (1967) 2 CLR 174, at p 188.
242 Criminal Code, s 292.

housebreaking attracts a lesser sentence of up to seven years' imprisonment. According to Pikis, the reason for this distinction lies in the fact that hazards from night breaking are to a large extent greater than breaking during the daytime and detection is generally harder during the night.[243] The courts treat offenders charged with burglary or housebreaking with little leniency as these crimes interfere with a person's right of enjoyment of his dwelling and a quiet life. In the case of *Attorney General of the Republic v Behjad Cham and Others*,[244] the Supreme Court supported the view that the punishments imposed for the offence of burglary must be of such a nature as to act as deterrents to the commission of such crimes.

According to section 292 of the Criminal Code, a person will be guilty of burglary or housebreaking (depending on the time the offence is committed) if he breaks and enters any building, tent, or vessel used as a human dwelling with intent to commit a felony therein; or if, having entered any building as above with intent to commit, or having committed, a felony in any such building, he breaks out thereof.

One of the elements of burglary in section 292 is the commission of a felony. Under the Criminal Code, stealing is classified as a felony under section 262 and, therefore, if the offender breaks into a house with intent to steal, it will be possible to charge him with burglary. It is important to note that, as the offence of stealing constitutes an integral part of burglary, it will not be possible for an accused to be convicted of both offences in one case. The same applies to any other felonies committed by the accused which he commits or intends to commit which the offence of burglary or housebreaking is being committed.

Section 291 of the Criminal Code defines breaking and entering widely, and almost any form of breaking or entering from any part of a dwelling can be considered as being a breaking into the house. According to this section, for a person to be deemed to have entered a building, it is not necessary for the whole act of entering to be completed. It suffices for the purpose of this offence that any part of the offender's body or any part of any instrument used by him is within the building. Any entry, therefore, however minimal, whether by the offender himself or by an instrument used by him, would suffice. However, the view taken at Common Law in relation to entry seems to concentrate more on the 'effectiveness' of the entry than on the act itself. In *R v Brown*,[245] the Court of Appeal abandoned the old Common Law principle that entry by a part of the body, however minimal, was sufficient. Instead, it took the view that entry must be 'effective' and that should be a matter for the jury. This introduces a standard different from that followed by Cypriot law and raises many questions as to what acts are to be deemed as effective. It suffices to state that the standard required by Cypriot law is more realistic than that followed in England and makes explicit reference to the very acts which could constitute entering a building.

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243 Pikis, *Sentencing in Cyprus*, at p 57.

244 *Attorney General of the Republic v Behjad Cham and Others* (1993) 2 CLR 129.

245 *R v Brown* [1985] *Crim LR* 611.

Apart from the physical acts mentioned above, the prosecution also must establish as part of the *mens rea* that the accused had an 'intent to commit a felony'. It must be proved that the offender gained entry or broke into the building intending to commit a felony therein. The ulterior intent to commit a felony must be proved and any conditional intent would not suffice.[246] Moreover, if the accused breaks into or enters a building with intent to commit a felony such as rape or to cause grievous bodily harm, but the victim is absent, the accused will still be considered as having sufficient intent for committing burglary or housebreaking.

Obtaining Goods by False Pretences

12-35 The offence of obtaining goods by false pretences is dealt with under section 298 of the Criminal Code:

> Any person who by any false pretences, and with intent to defraud, obtains from any person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour, and is liable to imprisonment for three years.

12-36 False pretences are defined in the Criminal Code and encompass any representations made, whether oral, written, or by conduct, at present or in the past, by a person knowing that they are false. A thorough examination of this term was made by Pikis J in *Police v Petrou alias Yiatros*,[247] as follows:

> Some preliminary observations must be made in relation to a charge of false pretences and the form it may take. More than one pretence may be relied on to support the charge. The charge will be sustained even in the absence of proof of the falsity of each one of the pretences provided the falsity of the substance of the pretences is established. If, however, one pretence is made comprising more than one representation the prosecution must prove the pretence as a whole to be false. The representation must be of an existing fact. A promise in future will not do. However, a representation of an existing fact coupled with a promise to do something at a future date is sufficient to support a charge. The expression of opinion cannot be made the subject matter of a charge of false pretences.[248]

12-37 The prosecution, therefore, is under an obligation to establish that the pretence made is a fact rather than an opinion and that the offender had knowledge of the falsity of the pretence. Nevertheless, if the pretence contains a number of representations, the prosecution is required to prove the falsity of the pretence as a whole. As stated in section 297 of the Criminal Code, the false pretence must

246 *Attorney-General's Reference* (*Numbers 1 and 2 of 1979*) [1979] 3 All ER 143.

247 *Police v Petrou alias Yiatros* (1971) 12 JSC 1524.

248 *Police v Petrou alias Yiatros* (1971) 12 JSC 1524, at pp 1525 and 1526.

refer to a fact which exists at present or from the past. If it refers to a future matter, it will not suffice unless it is coupled with an existing fact.

Knowledge of the falsity of the pretences also must be established by the prosecution as an element of this crime. As explained earlier, under section 10 of the Criminal Code, a person cannot be deemed to have an intention to commit a certain act if that person is unaware of the facts and therefore has a mistaken belief. Knowledge of the falsity of the facts by the offender is therefore necessary and such, knowledge can be actual or can be evidenced from the facts of the case, particularly in cases where the accused wilfully shuts his eyes to the truth.[249]

To secure a conviction under this offence, the prosecution also must prove that the complainant was wholly or partly relying on the false pretences made by the offender and as a result was induced to part with his money or property.[250] The question to be set is of a subjective nature and looks at how the mind of the complainant was affected by the false pretences and whether as a result of these false pretences he was induced to part with his property or money. If the complainant was going to part with his property or money for the benefit of the offender, regardless of the false pretences made, this particular offence is not constituted.

It is evident from the elements of this offence that one other necessary ingredient is the existence of an intent to defraud. Unlike 'false pretences',[251] the meaning of 'intent to defraud' is not determined by the Criminal Code. The concept of intent to defraud has been the subject of many cases, such as *Re London Global Finance Corporation Ltd*,[252] *Welham v DPP*,[253] and *Petri v Police*,[254] the court made a specific reference to the interpretation given by the court and, in particular, by Lord Denning in *Welham v DPP*. In that case, the interpretation was that this type of intent requires an intent to prejudice or to take the risk of prejudicing another's right, knowing there is no right to do so. If anyone might be prejudiced in any way as a result that would suffice. There is no need to show that the victim suffered economic loss or damage. Intent to defraud is not confined to a risk of possible injury resulting in loss of an economic or financial nature.[255]

On this issue, Loucaides[256] agrees that the correct interpretation which must be followed by the courts is that of Lord Denning in *Welham v DPP*.[257] Loucaides also sets out certain rulings from subsequent cases, such as *Sinclair*[258] and *Scott v*

249 Loucaides, 'Intent to Defraud', *Cyprus Law Review*, Issue 2 (April–June 1983), at p 253.
250 *Police v Petrou alias Yiatros* (1971) 12 JSC 1524, at p 1526.
251 Criminal Code, s 297.
252 *Re London Global Finance Corporation Ltd* [1903] 1 Ch 28.
253 *Welham v DPP* [1961] AC 103.
254 *Moon* [1967] 1 WLR 1536; *Petri v Police* (1968) 2 CLR 40.
255 *Welham v DPP* [1961] AC 103; *Adams v R* [1995] 2 Cr App R 295.
256 Loucaides, 'Intent to Defraud', *Cyprus Law Review*, Issue 2 (April–June 1983), at p 248.
257 *Welham v DPP* [1961] AC 103, at p 133.
258 *Sinclair* [1968] 52 Cr App Rep 618.

Metropolitan Police Commissioner,[259] which support the proposition that for an intention to defraud there must be damage to a proprietary right of a person or financial loss, but he explains that such rulings cannot be considered as affecting the general rule as adopted by Lord Denning in *Welham v DPP*.

As justification Loucaides argues that such rulings represent *obiter dicta* or minority judgments and, in any event, misinterpret the case law that they relied on.[260] It should be noted that the position adopted in *Welham v DPP* was affirmed by the Privy Council in *Wai Yu-tsang v R*.[261] In this respect, therefore, the correct approach to be followed is that enunciated by Lord Denning in *Welham v DPP*, which states that intent to defraud means intent to prejudice or take the risk of prejudicing a person as a result of fraud, without necessarily causing financial damage to the victim. Such intent is to be determined in the subjective sense and not in relation to the intent of the reasonable man.

Dishonoured Cheques

12-38 The Criminal Code includes a provision which relates to the issue of dishonoured cheques and imposes criminal sanctions on the drawer of such cheques. The courts are of the opinion that the issue of cheques without the existence of sufficient funds in the bank has serious repercussions on the economy of the state[262] and, therefore, punishment of these crimes should have a dissuasive effect in the commission of such offences. Section 305A(1) of the Criminal Code, as amended by Law 36 of 1997 and Law 129 of 1999, provides that:

> Any person who issues a cheque which, when presented to the issuing bank on or after the date it is deemed payable, cannot be paid due to insufficient funds in the drawer's account, and remains unpaid for a period of seven days from the date it was presented for payment, shall be guilty of an offence and will be subject to a term of imprisonment not exceeding two years and/or a fine of £1,500.

12-39 The elements of this offence which the prosecution must prove are that the person issued a cheque, which was presented for payment on or after the date it was deemed payable to the issuing bank, that the cheque was not paid due to insufficient funds in the account of the drawer, and the cheque remained unpaid for a period of seven days since the date it was presented for payment. If the person who issued the cheque is a company, the offenders will be the company itself as well as the directors or any other official who signed the cheque as accessories by virtue of section 20 of the Criminal Code.[263]

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259 *Scott v Metropolitan Police Commissioner* [1974] 60 Cr App Rep 124.

260 Loucaides, 'Intent to Defraud', *Cyprus Law Review*, Issue 2 (April–June 1983), at p 250.

261 *Wai Yu-tsang v R* [1991] 4 All ER 664.

262 *Attorney General v Aresti*, Criminal Appeal 6209, 24 October 1996.

263 *Ajini v Ajini*, Criminal Appeal 6174 and 6175, 19 December 1996; *Zakakiotis v Kalavas*, Criminal Appeal 6433, 8 March 1999.

Before the amendments introduced by Law 36 of 1997 and Law 129 of 1999, the prosecution was faced with a number of difficulties in securing a conviction under this section. Rules of evidence raised many obstacles for the prosecution, particularly in determining lack of funds on the date on which the cheque was presented for payment. However, the recent changes in the law have inserted a specific provision in section 305A, sub-section (3), which states that, in cases where a cheque is dishonoured, the bank must stamp and date the cheque and state in writing the reason for not honouring it. By virtue of the express provisions in this subsection, the prosecution will then be in a position to introduce the cheque in court as acceptable evidence for establishing this offence.

The reason for not honouring the cheque must be the existence of insufficient funds in the account of the drawer. Where the prosecution seeks to secure a conviction on a charge under section 305A(1), it must prove that the cheque was not paid due to insufficient funds in the account of the drawer on the date the cheque was presented for payment and that no payment was made within seven days from presentation. In *Zakakiotis v Kalavas*,[264] the court at first instance failed to link the dishonouring of the cheque with the unavailability of funds in the account of the drawer. On appeal, the Supreme Court held that, as there was no evidence contradicting the dishonouring of the cheque and the insufficiency of funds in the drawer's account on that date, the only conclusion that could be drawn from the above was that on the date the cheque was presented for payment, the cheque was not honoured due to lack of sufficient funds in the account of the drawer.[265]

The case of *Pashali v Police*[266] also must be considered. In that case, a cheque was referred back to the drawer due to insufficiency of funds in the drawer's account. The drawer kept other accounts with sufficient funds with the bank but had given orders to the bank not to make payment on presentation of the cheque. The bank refrained from using other accounts to cash the cheque due to instructions from the drawer. In this respect, the reason for non-payment of the cheque was not lack of funds but rather the specific instructions given by the drawer not to honour the cheque. This raises the question of what would happen in a case where a person gives specific instructions for non-payment but at the same time has insufficient funds in his account to make payment. In that case, what is the reason for non-payment of the cheque? Despite the fact that the Supreme Court has distinguished this case on its facts, the question still remains as to what would be the reason for not honouring the cheque in such a situation.

The situation may now be dealt with under section 305A(2), which provides that a person causing the non-payment of a cheque issued by himself, without a reasonable cause, may be found guilty of an offence punishable with a term of imprisonment of up to two years and/or a fine of up to CY £1,500. If, for example,

264 *Zakakiotis v Kalavas,* Criminal Appeal 6570, 21 October 1999.

265 *Zakakiotis v Kalavas*, Criminal Appeal 6433, 8 March 1999.

266 *Pashali v Police* (1993) 2 CLR 283.

a person gives instructions to his bank to stop the payment of a certain cheque and there are no reasonable causes for this act, he may be found liable for this offence. The burden of proving that there is reasonable cause lies on the accused.

The available case law on offences under section 305A of the Criminal Code provides no guidance on what the term 'reasonable cause' means, but the Supreme Court dealt with the definition of this term in *Pitsillides and Another v The Republic*,[267] which involved a refusal by two men to join the National Guard, contrary to the National Guard Laws 1961–1981. In this case, the Supreme Court held that the term:

> . . . 'reasonable' is a relative term and there must be *bona fides*; for the cause to be reasonable there must be good faith in it; it must be objectively fair; that the cause must be one that is not contrary to or incompatible with the Law of the land.[268]

12-40 Although this explanation by the Supreme Court provides useful guidance in interpreting what would constitute a 'reasonable cause', its precise definition in the context of section 305A(2) is a matter which remains to be determined by the court.

According to section 305A(6), the drawer may have a defence if no right of action arises on the issued cheque. The burden of proof lies on the accused, who must prove this defence, on a balance of probabilities,[269] that there is no right of action against him arising from the issue of the cheque. For example, in *G P Ergatides Motors Ltd v Police*,[270] a new agreement made between the parties provided the company with no right of action for non-payment of the cheque, the reason being that the new agreement set aside and replaced the obligations of the parties under the original agreement, for which payment was made by the cheque which was dishonoured. In this respect, the company had no right of action against the drawer of the dishonoured cheque as that was issued in satisfaction of the terms of the original agreement which had been replaced by the new agreement.

This defence also was put forward in *Neophytou v Kyriakidi*,[271] where the appellants argued that no right of action existed as the interest payable under the contract was contrary to that prescribed by law. The Supreme Court held that for a right of action to arise, the cheque must have all the necessary characteristics of a cheque as determined by the provisions of the Bills of Exchange Law (Cap 262) and that the complainant must be the legal bearer of the cheque as determined by the provisions of that Law. It also noted that, for the purpose of this defence, a 'cause of action' must be distinguished from a 'right of action' which is limited to the existence of the above elements.

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267 *Pitsillides and Another v The Republic* (1983) 2 CLR 374.
268 *Pitsillides and Another v The Republic* (1983) 2 CLR 374.
269 *Loizou v Republic* [1994] 2 CLR 108, at p 110.
270 *G P Ergatides Motors Ltd v Police*, Criminal Appeal 6138, 19 June 1997.
271 *Neophytou v Kyriakidi*, Criminal Appeal 6433, 8 March 1999.

The defence in question refers not to the existence of a good or possible cause of action, but to that of a right of action. The court must limit itself to the correct application of the criminal law and should not proceed to findings which concern the civil liability of the parties involved. What is material to this defence is whether the complainant has a right of action, as explained in *Neophytou v Kyriakidi*,[272] above, against the drawer arising from the issue of the cheque.

Apart from the above defence, an accused may rely on a defence provided in section 305A(7), ie, if the cheque dishonoured was issued pursuant to a contract the performance of which was immoral or illegal. It must be noted that the case of *Neophytou v Kyriakidi*,[273] above, was decided prior to the introduction of this particular section as a defence by Law 129 of 1999.

A general remark which can be made in relation to the offence under section 305A is that no mention is made of the intention or recklessness of the drawer of the cheque. As stated above, this particular section seeks to deter the issue of dishonoured cheques due to the undesirable effects on the financial state of an individual and companies, as well as the economy as a whole. If this is, indeed, what was intended by the legislature, it can be understood why the intention or recklessness of the drawer are not given any weight.

The wording of section 305A gives a clear indication that the intention of the legislature was to create an effective measure to combat the issue of dishonoured cheques which would enable individuals suffering from this commercial malpractice to seek an effective remedy through the courts. This also is evident in considering the state of the law in 1996 when section 305A was introduced as a part of the Criminal Code through the enactment of Law 186 of 1996. Originally, the constituent elements of this offence were less strict in nature, and the enactment of the various amendments have resulted in the present state of the law which resembles to a great extent a strict liability offence. The fact that no attention is given to the *mens rea* of the accused and the fact that no intention or recklessness need be established as part of this offence seem to indicate that the offence, under section 305A(1) lies on the borderline between ordinary criminal offences and those of strict liability.

Receiving Stolen Goods

12-41 According to section 306 of the Criminal Code, the offence of receiving entails receiving or retaining stolen property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour. This offence is punishable by a term of imprisonment of up to two or five years depending on whether the stolen property resulted from the commission of a felony or a misdemeanour. Pikis says that the courts tend to classify

272 *Neophytou v Kyriakidi*, Criminal Appeal 6433, 8 March 1999.
273 *Neophytou v Kyriakidi*, Criminal Appeal 6433, 8 March 1999.

this offence as being of equal gravity with stealing, 'in recognition of the fact that the rewards of thieves would not be as attractive without the receivers, the persons who normally assume responsibility for pushing stolen property into the market making the whole venture profitable'.[274]

The prosecution must prove that, at the material time, the property received or retained was stolen or obtained by means of a felony or a misdemeanour. Property can take the form of anything animate or inanimate capable of being the subject of ownership.[275] In this sense, property is not restricted to goods or tangible things, but also may take the form of a chose in action, such as the transfer of money between bank accounts.[276]

For the commission of this offence, it is necessary that the property in question has been stolen in fact or is the fruit of a felony or a misdemeanour. For this reason, if the receiver believes the property to be stolen, but in actual fact it is not, he will not be guilty as a receiver.[277] At Common Law, the receiver's belief that the property was stolen does not constitute proof that it was,[278] and the prosecution needs to prove as a separate element of this offence that the property in question is stolen or is the fruit of a felony or a misdemeanour.

Having established that the property in question has been stolen or has been obtained under circumstances which amount to a felony or a misdemeanour, it is necessary to establish that the accused received or retained the property. The terms 'receiving' or 'retaining' do not imply that the offender must have physical contact with the property. Common Law authorities suggest that to establish receiving it is necessary to establish possession in the sense of control by the defendant.[279] It also is possible that an offender may physically receive or retain the property but nevertheless may not exert any control over it. This may occur in a situation where the master orders the servant to receive certain goods and keep them in a certain place.[280] It must be stated that receipt of the goods need not be exclusive but might be shared with the person who stole the property[281] or with another receiver.[282]

As part of the *mens rea*, the prosecution will have to establish that the accused received or retained the said property knowing that it was stolen or that it has been obtained under circumstances which amount to a felony or a misdemeanour. Actual

274 Pikis, *Sentencing in Cyprus* (1978), at p 66.
275 Criminal Code, s 4.
276 *Attorney-General's Reference* (*Number 4 of 1979*), 71 Cr App R 341; *Forsyth* [1997] 2 Cr App R 299.
277 *Haughton v Smith* [1975] AC 476.
278 *Attorney-General's Reference* (*Number 4 of 1979*), 71 Cr App R 341.
279 *Wiley* (1850) 2 Den 37; *Watson* [1916] 2 KB 385.
280 *Cavendish*, 45 Cr App R 374.
281 *Smith* (1855) Dears 494; *R v Seiga*, 45 Cr App R 25.
282 *Payne*, 3 Cr App R 259.

knowledge must be proved on the part of the accused and therefore it would not suffice to establish that any reasonable man would have realised that the goods were stolen.[283] Although the circumstances of a case may be such as to indicate that the receiver ought to be guilty of this offence, if no guilty knowledge can be proved then no conviction can be secured.

The requirement of subjective knowledge imposes a high standard on the prosecution. Foresight that the goods are probably stolen[284] or suspicion,[285] however strong, would not amount to knowledge. On the other hand, in *Hall*,[286] the court decided that, where the accused 'cannot say for certain that these goods are stolen, but there can be no other reasonable conclusion in the light of all the circumstances',[287] that would amount to knowledge. It can safely be argued that this decision leads to some confusion as to what evidence would determine that a person is certain or not and thus would amount to the required knowledge. The propositions set out in *Hall* have been addressed in *Forsyth*,[288] where the court referred to the decision in *Hall* as being potentially confusing. The fact, however, remains that it is the subjective knowledge of the offender which is put under examination in such offences in determining whether he had the necessary knowledge.

Offences against the Person

In General

12-42 There are a number of provisions in the Criminal Code which deal with unlawful homicide and non-fatal offences against the person. These offences are classified according to the severity of the crime, the existence of the element of premeditation or intention in the unlawful killing, and generally the degree of violence used.

The right to life and its protection is heavily guarded by the courts, and all offences against the person are treated very severely, particularly those which involve the killing of another person.

Premeditated Murder

12-43 Premeditated murder is the most serious offence under the Criminal Code. Section 203(1) of the Code defines premeditated murder as follows:

> . . . any person who with premeditation by an unlawful act or omission causes the death of another person is guilty of the felony of premeditated murder.

283 *Atwal v Massey* [1971] 56 Cr App R 6.
284 *Reader* [1977] 66 Cr App R 33.
285 *Grainge* [1974] 1 All ER 928; *Woods* [1968] 3 All ER 709; *Ismael* [1977] *Crim LR* 557.
286 *Hall* [1985] 81 Cr App R 260.
287 *Hall* [1985] 81 Cr App R 260, at p 264.
288 *Forsyth* [1997] 2 Cr App R 299.

12-44 The law imposes as punishment for the commission of this felony a mandatory life sentence.[289] The *actus reus* comprises the killing or causing the death of a person either by an unlawful act or by omission. It is important to note that to be a victim of a murder or a homicide, a person must be 'in being', meaning that a person who is already dead or a baby still in the womb cannot be the victim of a murder.[290] It also is necessary for the death to occur within a year and a day of the act alleged to have caused it.[291] This rule still persists at Common Law[292] despite recommendations by the Law Commission in England to abolish it.

The prosecution must prove that there is a causal link between the death of the victim and the conduct of the accused. The Criminal Code makes specific reference to a number of possibilities whereby causation can be proved.[293] The conduct of the accused can cause death in any direct or indirect manner, and death need not be immediate. In investigating the factual and legal cause of death, emphasis should be placed on the sole or the main cause of death. Consider, for example, the situation where a person is stabbed by another person, is then taken to hospital, and dies due to negligent treatment. The courts usually take a narrow view in such cases, and negligent medical treatment would not necessarily break the chain of causation.[294] The question would be whether the accused's act is still an operating and substantial cause or a significant contributory factor.[295]

The victim's vulnerability or frailness due to his medical or psychological condition will not affect the liability of the accused regardless of any knowledge the accused may have had of the victim's state of health.[296] The same would apply if the victim's religious beliefs prohibit certain treatment and as a result the victim's death occurs.[297] An accused also may be liable for any injuries or death suffered to the victim in the course of escaping from the accused, provided that the victim's response is reasonable.[298]

It is not necessary for the accused to do a positive act to cause the death of his victim. An accused's omission also may establish the necessary causal link. Consider, for example, the situation where the accused's relationship with the victim imposes a duty to act, as in *Gibbens and Proctor*,[299] where the accused was the father and failed to carry out his duty as a parent towards his child and as a result the child died.

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289 Criminal Code, s 203(2).
290 Criminal Code, s 212.
291 Criminal Code, s 213.
292 *Dyson* [1908] 2 KB 454.
293 Criminal Code, s 211.
294 *Smith* [1959] 2 QB 35.
295 *Cheshire* [1991] *Crim LR* 709.
296 *Hayward* (1908) 21 Cox CC 692.
297 *Blaue* [1975] 3 All ER 446.
298 *Pitts* (1842) Car & M 284; *Roberts* (1971) 115 Sol Jo 809.
299 *Gibbens and Proctor* (1918) 13 Cr App R 134.

Once the prosecution has established a causal link between the death of the victim and the acts or omissions of the accused, the next step would be to establish the requisite *mens rea* for this offence. For the offence of premeditated murder to be complete, the element of 'premeditation' must be established. Premeditation denotes the *mens rea* required for a conviction of premeditated murder to be secured. According to section 204 of the Criminal Code, as amended by the Criminal Code (Amendment) Law 1962 (Law 3 of 1962):

> Premeditation is established by evidence proving whether expressly or by implication an intention to cause the death of any person, whether such person is the person actually killed or not, formed before the act or omission causing the death is committed and existing at the time of its commission.

12-45 Originally, the Criminal Code referred to 'malice aforethought' as being the necessary mental element of murder. This position was changed with the passing of Law 3 of 1962 to reconcile the provisions of the Criminal Code with those of article 7.2 of the Constitution, which singles out the crimes of outmost severity. The replacement of 'malice aforethought' with 'premeditation' resembles the position adopted by the Continental European systems and thus represents a divergence from the Common Law position.[300] In the case of *Loftis v Republic*,[301] the court decided in its interpretation of article 7.2 of the Constitution that the meaning which should be given to the words 'premeditated murder' is that given by the French Criminal Code, from which the Ottoman Penal Code adopted this particular term. As a result of this judgment, section 203 of the Criminal Code was considered to be in contrast with article 7.2 of the Constitution and so was amended accordingly.

As mentioned above, the requirement of the element of 'premeditation' for a person to be convicted of the felony under section 203 of the Criminal Code places this particular crime in a position quite distinct from that of 'murder' at Common Law. At Common Law, a murder is committed when there has been an unlawful homicide committed with 'malice aforethought'. There is no clear definition of the term 'malice', aforethought and the courts tend to be inconsistent in their use of the terms 'express' or 'implied' malice. The development of the case law demonstrates that, at Common Law, a person could be convicted of murder where he intended to kill (express malice) or where he intended to cause grievous bodily harm. The difference between these two terms was referred to by Zekia J in his judgment in *Halil v The Republic*,[302] where he stated that:

> The phrase 'premeditated homicide and murder' unlike the phrase 'malice aforethought', is not a term of art and it must be taken in its ordinary

300 Clerides, 'The Cypriot Criminal Code — Development and Problems', *Cyprus Law Review*, Issue 5 (January–March 1984), at pp 889 and 891.

301 *Loftis v Republic* (1961) CLR 108.

302 *Halil v The Republic* (1961) CLR 432.

> meaning. When a person makes up his mind either by an act or omission to cause the death of another person and notwithstanding that he has time to reflect on such decision and desist from it, if he so desires, goes on and puts into effect his intent and deprives another of his life that person commits a premeditated homicide or murder which entails capital punishment.
>
> There is no presumption of law in premeditation but this must be inferred in each particular case from the surrounding circumstances.[303]

12-46 The requirement of premeditation is more descriptive and more sophisticated in nature and has been the subject of many appeal cases in the Supreme Court. The term was first examined in *R v Shaban*,[304] which was decided in 1908 when the Ottoman Penal Code was in force. The majority of the court held that premeditation is a question of fact and it is to be determined by whether a person has had sufficient opportunity, after forming his intention, to act on such intention and thus carry it out. This depends on the circumstances predominating in each case and on the condition and state of mind of the offender during the time of the killing. A thorough examination of this term also was made in *Aristidou v Republic*,[305] which adopted and reaffirmed the position adopted in the *Shaban* case. The judgment delivered by Vassiliades P encapsulates the approach which a court must adopt when dealing with the issue of premeditation:

> Premeditation, in the ordinary meaning of the word, must be established as a fact in each case. It is one of the fundamental ingredients of the crime in section 203 of the Code, which must be proved by the prosecution to the satisfaction of the court, beyond reasonable doubt. And, it may, of course, be proved by direct or circumstantial evidence; it may be inferred from established surrounding facts, leading safely to that one conclusion; or, it may be a matter so apparent that the defence will not even dispute it. In a very recent case before this court, the element of premeditation in the murder was so obvious that it was never questioned.[306]
>
> Intent in the act which caused the death of the victim and premeditation in the conception and preparation of the crime are two different matters; and the distinction between them must be kept clear in the court's mind. Frequently, they overlap, in as much as to constitute the crime of premeditated homicide, they must both exist at the time of the commission of the crime. But, confusion between intent in the act causing death, and premeditation in the commission of the crime, may lead to the error of confusing premeditated murder under section 203 with murder of malice aforethought, under the repealed section 204, no longer part of our Criminal Code.[307]

303 *Halil v The Republic* (1961) CLR 432, at p 434.
304 *R v Shaban*, 8 CLR 82.
305 *Aristidou v Republic* (1967) 2 CLR 43, (1967) 3 JSC 251.
306 *Aristidou v The Police* (1967) 2 CLR 43, at p 74.
307 *Koumbaris v The Republic* (1967) 2 CLR 74.

12-47 Another case which dealt with the issue of premeditation was *Hadjisavvas v Republic*.[308] After considering the various propositions which emerge from the case law, Pikis J stated that:

> Premeditation connotes prior planning or contemplation of the heinous deed in circumstances permitting cool reflection on one's act. To find premeditated murder the killing must be the result of contemplated action conceived and carried out in cold blood. Consequently, no premeditation can be inferred from the instantaneous reaction to events because the element of prior contemplation is missing.[309]

12-48 It follows from all the foregoing explanations that 'premeditation' is a term quite distinct from that of intent. It prescribes the existence of a well-thought-out plan to execute a killing, and the accused must have followed and acted on this plan in carrying out the killing. The fact that the accused had the intention to cause death or even grievous bodily harm to his victim would not suffice in a charge of a premeditated murder. The critical issue at stake is whether a pre-arranged action plan existed in the mind of the accused prior to the killing and whether, notwithstanding any time he may have had to reflect on such a plan, his actions represented completion of the plan.

There must be a causal link between the determination of such a plan and the actual killing. The killing should be a pre-determined killing on consideration and not an impulse of passion due to provocation which does not allow any time for reflection. Furthermore, the actual killing itself will not suffice on its own as the basis for establishing premeditation. This represents the significant difference between the position at Common Law and the crime of premeditated murder where no inference about premeditation can be drawn from the killing itself.

As stated by Loizou J in *Anastassiades v The Republic*,[310] premeditation 'is a question of fact which must be proved by the prosecution either by direct or indirect evidence'. In that case, it also was decided that circumstantial evidence (eg, previous grudges, threats, expressions, ill feelings, and the acts of the accused after the execution of the killing) may be used as a means of proving the premeditation of the killing. In that case, the evidence available was largely circumstantial but, when looked at collectively, it provided all the necessary ingredients to constitute premeditation. The dissenting judgments of Triantafilides J and Hadjianastassiou J make specific reference to the value of the evidence which was used for determining premeditation. In particular, Triantafilides J explains that the acts of the accused after the commission of his crime could not be used under the circumstances as a means of determining premeditation, but might be relevant to the homicide itself.

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308 *Hadjisavvas v Republic* (1988) 2 CLR 37.

309 *Hadjisavvas v Republic* (1988) 2 CLR 37, at p 44.

310 *Anastassiades v The Republic* (1977) 2 CLR 97.

Another important matter to consider is the way in which the killing was carried out and the brutality of the acts. These may suffice in determining premeditation. On the evidential value of the brutality of the attack, Loizou J, in his judgment in *Anastassiades v The Republic*,[311] provides a thorough explanation of this matter:

> That there was premeditation is apparent from the brutality of the blows. They started when the victim was standing in the room, as suggested by the locks of hair found on the floor and continued while the victim was lying on the floor with his face and head severely wounded, which is indicative of the determination of the appellant to finish him off. Connected with this is the instrument used and the fact that it could not have been found there, unless it had been intentionally brought in. The nature of the instrument used, and the circumstances under which it came to the scene of the crime, are most significant factors with regard to the issue of premeditation.

12-49 A similar approach also was adopted by Pikis J, in *Hadjisavvas v The Republic*,[312] where the accused brutally killed his mistress with a knife. In delivering his judgment, Pikis J stated that 'what emerges on careful consideration of the medical evidence is that the blows were delivered with unabated determination to finish off [the victim]'.[313] Although the approach adopted by the Supreme Court in these two cases leads to an understanding that the brutality of the acts may by itself lead to an inference of premeditation, this was not accepted by Pikis J in the more recent case of *Onisillou v The Republic*.[314] The judge stated that the violence with which the act of killing was carried out could not be equated to the existence of premeditation. Such an approach would lead to setting premeditation on the same level as the intention of the accused during the time when the killing was being carried out. For this particular offence, premeditation must be proved as a separate element of the offence and should not be inferred from the prevailing circumstances. The judge further stated that what could be drawn from the violence and generally from the circumstances in which the offence was committed was the determination and the brutality of the assailant which tended to show the existence of earlier planning.

It is of interest to note at this stage that the existence of motive does not form a requisite element of the *mens rea* for this offence or for homicide.[315] The prosecution is under no obligation to establish that the accused had a motive for killing the victim, but it may be accepted as circumstantial evidence as it would shed light on the acts or omissions of the accused. In *Anastassiades v The Republic*,[316] the Supreme Court held that any existence of motive would be considered as circumstantial evidence

311 *Anastassiades v The Republic* (1977) 2 CLR 97, at p 151.
312 *Hadjisavvas v The Republic* (1988) 2 CLR 37.
313 *Hadjisavvas v The Republic* (1988) 2 CLR 37, at p 46.
314 *Onisillou v The Republic* (1991) 2 CLR 556.
315 *Michaelides v The Republic* (1989) 2 CLR 172, at p 193.
316 *Anastassiades v The Republic* 1977) 2 CLR 97.

in the sense of connecting the accused with the commission of the offence; by itself, it is not of any decisive significance.

In ascertaining whether there existed premeditation of the murder, it also is necessary to examine the time which elapsed between the conception of the plan to murder and the execution of this plan by the offender. The lapse of time may be one of the factors to determine whether a causal link existed between these two stages. In the early case of *R v Shaban*,[317] Tyser C J, in delivering the majority judgment, stated that:

> There might be a case in which a man has an appreciable time between the formation of his intent and the carrying of it into execution, but he may not be in such a condition of mind as to be able to consider it.
>
> On the other hand, a man might be in such a calm and deliberate condition of mind that a very slight interval between the formation of the intent and its execution might be sufficient for premeditation.[318]

12-50 A thorough examination of the relevance of time was made by Loizou J in *Anastassiades v The Republic*,[319] where he stated:

> The time which elapses between the formation of the intention to kill and the execution of that intention is a relevant factor in determining whether there was sufficient opportunity to reflect whether to kill or not and in this respect the state of the person's mind is an essential element. In other words, if there was or was not premeditation does not merely depend on the length of the period that elapsed between the formation of the intention and its execution but also on the state of mind of the assailant as an element affecting his capacity to reflect on his decision and desist from it within such period. For premeditation to be established it is, therefore, essential to show intention to cause death which was formed and continued to exist before the time of the act causing the death as well as at the time of the killing notwithstanding that having regard to the assailant's state of mind, he had the opportunity to reflect on and desist from such decision.[320]

12-51 In *Ioannis P Ioannides v The Republic*,[321] the Supreme Court was willing to set aside a conviction for premeditated murder, on the ground that the interval of time that had elapsed between the time when the defendant had decided to kill the victim and the time when the act of death was carried out, given his state of mind at the time, was 'insufficient to allow for proper reflection and adequate opportunity to relinquish his evil intent'.[322]

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317 *R v Shaban*, 8 CLR 82.
318 *R v Shaban*, 8 CLR 82, at p 84.
319 *Anastassiades v The Republic* (1977) 2 CLR 97.
320 *Anastassiades v The Republic* (1977) 2 CLR 97, at p 161.
321 *Ioannis P Ioannides v The Republic* (1968) 2 CLR 169.
322 Pikis, *Sentencing in Cyprus*, at p 48.

The Supreme Court followed a similar approach in *Onisillou v The Republic*.[323] The accused had confessed that he had conceived a plan to kill his girlfriend the morning before the murder (the murder took place in the early hours of the morning of the next day). The majority of the judges of the Supreme Court held that the events which occurred between the time when the intention to cause death was formed and the time when the actual act took place, could not amount to premeditation. Emphasis was placed on the fact that the accused and the victim, prior to her killing, had consensual sexual intercourse. The majority of the judges concluded that any thoughts which the accused had in the morning about committing the act of death had degenerated and were absorbed by his sexual intentions. In other words, the sexual intercourse was interpreted as having changed the intention of the accused to carry out his predetermined plan. In this respect, the events which had occurred during the time which had elapsed between the formation of the intention to kill and the actual act itself offered the accused the opportunity to reflect on and desist from his decision.

The killing of the victim had no causal link to the plan the accused had made in the morning, but was a result of a quarrel which began after the act of love making was concluded and was therefore not premeditated. The accused was acting in a rage of passion which was caused by the quarrel and the discussion which took place between himself and the victim.

The dissenting judgment by Artemides J placed the facts of the case in a different perspective and was less restrictive in ascertaining premeditation. Before embarking on an examination of this judgment, it is worth reciting the events in this case for clarification and comprehension purposes. The offender and the victim drove to the seaside, where they made love. After the sexual intercourse was completed, an argument began which led to the offender hitting the victim many times. The offender also attempted to strangle the victim. As a result of these attacks, the victim was rendered unconscious. At this point, while the victim was still unconscious, the offender drove to another part of the beach, nearer to the sea, pulled the victim out of the car, and threw her into the water. The victim regained consciousness on contact with the water and started resisting. The offender then pushed her head down into the water until she was dead.

In examining the above events, Artemides J focused on the fact that the accused had an opportunity to reconsider his original plan and to decide on its execution after the sexual intercourse was complete and the quarrel had taken place, when the victim was still unconscious. The events which occurred between the time when the victim lay unconscious and the time when her actual killing was carried out led the judge to conclude that the accused was acting on his original preconceived plan. This approach suggests that his acts were driven not by outrage arising from the quarrel but rather by his original preconceived plan to kill his victim. Regardless

323 *Onisillou v The Republic* (1991) 2 CLR 556.

of the fact that the original intention may have been lost during the act of love making, the accused reverted to his original plan and carried out the killing with his original intention reinstated.

Unlike the stricter approach which was followed by the majority, Artemides J presents a different method of viewing the sequence of events which took place within the relevant time frame. The point at which the accused ceases to act according to his plan is a matter which requires thorough examination in each case based on the facts of each case, and this dissenting judgment may lead to a less prescriptive examination of the issue of premeditation in subsequent cases.

Provocation

12-52 When one person kills another under circumstances which would constitute murder, but carries out the killing due to provocation which causes him to lose his self-control like any other reasonable man under the circumstances, he would be guilty only of manslaughter.[324] This defence reduces a charge of murder to that of manslaughter and is only applicable in cases of murder. During a trial, if this defence is raised the prosecution would be under an obligation to disprove it beyond any reasonable doubt.[325]

Provocation, as enunciated by Lord Goddard C J in *Duffy*,[326] is 'some act, or series of acts, done (or words spoken) by the dead person which would cause in any reasonable person, and actually causes in the accused, a sudden or temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind'.

When dealing with this issue, the court must be satisfied that there is evidence of specific provocation of the accused and that the accused lost his self-control. It also must be established that the reasonable man in similar circumstances would have lost his self-control. The evidence available must be sufficient to support such a claim; otherwise, the court cannot be invited to speculate or provocative incidents of which there is no evidence and which cannot be reasonably inferred from the evidence.[327]

Provocation must cause the accused to have a sudden and temporary loss of his self-control.[328] This loss must be of such a kind as to render the accused unable to control his actions. Actions, however, which are linked to a desire for revenge are inconsistent with provocation because they denote that a person had the opportunity to think and to reflect and that would negative a sudden loss of self-control.[329]

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324 Criminal Code, s 208.
325 *R v McPherson*, 41 Cr App R 213 CCA.
326 *Duffy* [1949] 1 All ER 932.
327 *Dervish Halil v The Republic* (1961) CLR 432.
328 *Duffy* [1949] 1 All ER 932; *Whitfield*, 63 Cr App R 39; *Ibrams and Gregory*, 74 Cr App R 154 CA.
329 *Duffy* [1949] 1 All ER 932.

However, this does not mean that the possibility of cumulative provocation is ruled out. Provocation is not confined to the last act before the killing, but may come about due to a series of acts or words. This is most common in cases of domestic violence. A prolonged period of provocative acts by the victim may cause the accused to lose his self-control.[330] Furthermore, such 'slow-burn' reaction may cause the accused to react more strongly.

Having established that the accused had a sudden and temporary loss of his self-control, it also would be necessary to establish the same for the reasonable man. Although this is an subjective test, it has a objective element built into it, ie, whether the reasonable man sharing the same characteristics as the accused would have lost his self-control under the circumstances.[331] These characteristics must be of a definite nature and of sufficient significance and relevance to make the offender a different person from the ordinary man.[332] It must be noted that not all the characteristics of the accused will be attributed to the reasonable man. The reasonable man must be sober;[333] if the defendant was provoked in circumstances where a reasonable sober man would not have been provoked, he cannot avail himself of this defence.[334] In *Newell*,[335] although the court invited the jury not to take account of the fact that the accused was intoxicated, it left open the question whether, in other circumstances, a case of chronic alcoholism might be relevant. Similar characteristics, such as a situation of chronic post-traumatic stress disorder[336] or even abnormal immaturity regardless of the age of the accused,[337] may be attributed to the reasonable man. After attributing all the relevant characteristics of the accused to the reasonable man, it would then be necessary to determine whether the reasonable man would have lost his self-control and whether this reasonable man would have reacted in the way the accused did.

Homicide

12-53 At Common Law, all unlawful homicides which are not murder are considered to be manslaughter.[338] In *Onisillou v The Republic*,[339] the court stated that the offence of homicide covers a wide spectrum of criminal behaviour and it would be difficult to devise an appropriate formula for its punishment, even within wide

330 *Ahluwalia*, 96 Cr App R133 CA; *Thornton* (*Number 2*) [1996] 2 Cr App R 108 CA.
331 *DPP v Camplin* [1978] AC 705 HL.
332 *Newell* (1980) 71 Cr App R 331; *McGregor* [1962] NZLR 1069.
333 Archbold, *Criminal Pleading*, *Evidence and Practice 2000* (2000), at p 1637, pt 19-62.
334 *McCarthy*, 38 Cr App R 74 CCA; *Attorney-General for Northern Ireland v Gallagher* [1963] AC 349.
335 *Newell* (1980) 71 Cr App R 331.
336 *Ahluwalia*, 96 Cr App R133 CA.
337 *Humphreys* [1995] 4 All ER 1008 CA.
338 Smith and Hogan, *Criminal Law* (9th ed), at p 352.
339 *Onisillou v The Republic* (1991) 2 CLR 556.

limits. Under Cypriot law, the relevant legislation is section 205 of the Criminal Code, as amended by section 5 of the Criminal Code (Amendment) Law 1962 (Law 3 of 1962), which reads as follows:

> (1) Any person who by any unlawful act or omission causes the death of another person is guilty of the felony of homicide.
>
> (2) An unlawful omission amounts to culpable negligence to discharge a duty, though such omission may not be accompanied by an intention to cause death.

The substance of this particular crime lies in the fact that the death of the victim must have been caused by the unlawful act or omission of the offender. Although the physical acts (*actus reus*) of this offence are identical to those of premeditated murder, there is no requirement for premeditation or for intention to cause death to exist. As is provided in sub-section (2) of section 205 of the Criminal Code, what needs to be established as the mental element of the crime (*mens rea*) is that the offender intended the unlawful act which eventually killed the victim or was reckless. It is not necessary for the prosecution to prove that the offender intended by his acts to cause death to the victim. At Common Law, it also is possible for a person to be found guilty of homicide for being grossly negligent in the performance of his duties under the law and which resulted in the death of the person.[340]

The crime of homicide was examined in *Fostieri v The Republic*,[341] where the accused had caused death to his victim by stabbing the victim with a knife several times in the stomach area. The Supreme Court held that for the commission of this crime it was necessary to establish that the unlawful acts or omissions of the accused resulted in the death of the victim and that the accused intended to commit the unlawful act which resulted in the death of the victim. In delivering his judgment, Vassiliades P explained that:

> So long as it is established to the satisfaction of the court that the offender intended the unlawful act which eventually resulted in the death of the victim within the period prescribed by law, it is not necessary for the prosecution to prove that the offender intended the death of the victim. In the present case, the unlawfulness of the act of the appellant in using that dangerous knife in the way he did, was sufficiently established to the satisfaction of the trial court, on the evidence before it, at the end of the trial. The conclusions and findings of the Assize Court to that effect have not been successfully challenged by the appellant and the conviction resting on them must be affirmed.[342]

340 *Andrews v DPP* [1937] AC 576.

341 *Fostieri v The Republic* (1969) 2 CLR 105.

342 *Fostieri v The Republic* (1969) 2 CLR 105, at p 112.

12-54 The approach which was adopted by the Supreme Court in that case was followed in subsequent cases. In *Poutziouris v The Republic*,[343] the Supreme Court, reiterating the decision in *Fostieri v The Republic*, explained that intention to cause death was not a prerequisite of the crime of homicide. Boyadjis J went on to state that if, in addition to the basic requirements for the commission of this crime, there existed proof of an intention to cause death by an unlawful act, such homicide could be described as 'voluntary' as opposed to 'involuntary' homicide, which is committed without an intention to cause death. The judge did not explain whether there would be any difference in the treatment of these two types of homicide, but the existence of an intention to cause death is likely to be considered as an aggravating factor in the imposition of punishment.

In *Savva v The Republic*,[344] the accused was charged with homicide. This was a borderline case where the charge of premeditated murder was reduced to one of homicide due to the element of tension and other exceptional circumstances which existed. The Supreme Court, reviewing the sentence imposed by the Assize Court, stated that such borderline cases attract the highest level of sentence prescribed by the law (ie, a life sentence).[345] Although the court did not attempt to classify the homicide in this case as 'voluntary', it was obvious from its line of thought that the extent to which a sentence would be severe would depend on the seriousness of the facts of the case.

Serious Assaults

12-55 At Common Law, the meaning of 'grievous bodily harm' has been the subject of many deliberations. In *DPP v Smith*,[346] the term 'grievous' was interpreted as meaning 'really serious'. Under Cypriot law, the Criminal Code provides a more explicit definition of the term 'grievous bodily harm' in section 4 than the one provided at Common Law. The definition reads as follows:

> . . . grievous bodily harm means any harm which amounts to a maim or dangerous harm or seriously or permanently injures health or comfort, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense.

12-56 An offender who unlawfully causes grievous bodily harm to another person is liable under section 231 of the Criminal Code to seven years' imprisonment and/or the imposition of a fine. This offence is committed when the offender causes grievous bodily harm intentionally or recklessly in its *Cunningham* sense. Recklessness in this case is given its subjective meaning which requires foresight of the

343 *Spyros Poutziouris and Another v The Republic* (1990) 2 CLR 309, at p 355.
344 *Savva v The Republic* (1992) 2 CLR 231.
345 *Savva v The Republic* (1992) 2 CLR 232, at p 238.
346 *DPP v Smith* (1961) AC 290.

consequence.[347] In *Mowatt*,[348] an English case involving a charge of grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861, Lord Diplock stated that the issue was not whether the accused 'ought to have foreseen some harm but rather whether he did foresee some harm, even of a minor character: This position was affirmed subsequently by the House of Lords in *Savage and Parmenter*.[349]

The offender does not necessarily have to assault the victim directly to cause grievous bodily harm. The offender may inflict grievous bodily harm upon the victim by doing something intentionally which, although it is not in itself a direct application of force, nevertheless results in force being applied violently to the body of the victim so that he suffers grievous bodily harm.[350] Consider, for example, the situation where the accused digs a hole and causes the victim to fall into it and, as a result, the victim suffers grievous bodily harm.

The nature of the assault and the way in which the injuries were caused would be factors relevant to the determination of the sentence. In *Georghios Elia Psaras v The Police*,[351] a policeman was convicted for assaulting a young boy and causing grievous bodily harm. The violence involved and the unconstitutional character of this event led the Supreme Court to increase the sentence imposed by the Assize Court from 12 months to 18 months. Similarly, in *Demetris Michael Kontos v The Republic*,[352] the Supreme Court upheld a sentence of six years' imprisonment due to the degree of violence involved and the fact that the accused was acting with an ulterior motive.

Less Serious Assaults

12-57 As a means of discouraging violent conduct and promoting discipline, the Criminal Code also contains a number of provisions which are aimed at offences of a less serious character than the ones dealt with previously. Such offences comprise common assault punishable under section 242 of the Code and assaults occasioning actual bodily harm punishable under section 243. Section 244 makes specific reference to various kinds of assault which are mainly directed against police officers acting within their employment.

When one person unlawfully assaults another person, he may be guilty of the offence of common assault,[353] provided that the assault does not fall under any other section of the Criminal Code which carries heavier punishment. Assault can be committed in a number of ways and the courts have adopted a broad view of

347 *Cunningham* [1957] 2 QB 396.
348 *Mowatt* [1967] 3 All ER 47.
349 *Savage and Parmenter* [1991] 4 All ER 698.
350 *Wilson* [1984] AC 242.
351 *Georghios Elia Psaras v The Police* (1968) 2 CLR 8.
352 *Demetris Michael Kontos v The Republic* (1965) 2 CLR 115.
353 Criminal Code, 242.

what the term means. An assault is committed when the accused intentionally or recklessly causes the victim to apprehend immediate and unlawful personal violence.[354] The act committed by the offender 'must be accompanied by a hostile intent calculated to cause apprehension in the mind of the victim. Where the hostile intent is not present there will be no assault (*R v Lamb* [1967] 2 QB 981) unless it can be shown that the offender was reckless whether the victim would apprehend immediate and unlawful violence'.[355]

Although there is no clear authority on the type of recklessness which is required, *dicta* from the House of Lords in *Savage and Parmenter* suggest that it is recklessness in the *Cunningham* sense which is required. In other words, it must be proved that the accused actually foresaw the risk of causing apprehension of violence by the victim.

Under Cypriot law, common assault is punishable by a term of imprisonment of up to one year and/or a fine of up to CY £1,000.[356] A fine is the more common form of punishment and recourse to imprisonment is sought only if the circumstances of the case are of a serious nature.[357]

There are several crimes involving assaults which are subject to more severe penalties due to the existence of aggravating factors. If, as a consequence of the assault, the victim suffers actual bodily harm, that would render the offender liable for a conviction under section 243 of the Criminal Code. According to this section, assaults occasioning actual bodily harm are punishable by a term of imprisonment of up to three years.[358]

The *actus reus* of this offence is satisfied by proof of an assault which has caused actual bodily harm to the victim. Actual bodily harm is defined as 'any bodily harm, disease or disorder, either permanent or temporary'.[359] At Common Law, actual bodily harm has been defined in a similarly wide manner as meaning 'any hurt or injury calculated to interfere with the health or comfort of the victim'.[360] In *DPP v Smith*,[361] the House of Lords went to the extent of stating that bodily harm 'needs no explanation'. The courts tend to classify actual bodily harm as bodily harm which is not really serious. The flexible approach adopted in this definition also is visible in cases where actual bodily harm was not limited to physical injuries. In certain cases such as *Chan-Fook*,[362] even psychiatric injury was capable of

354 *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439; *Venna* [1976] QB 421, Ireland; *Burstow* [1998] AC 147.
355 Archbold, *Criminal Pleading*, *Evidence and Practice 2000* (2000), at p 1668, pt 19-166.
356 Criminal Code, s 242.
357 Pikis, *Sentencing in Cyprus*, at p 53.
358 Criminal Code, s 243.
359 Criminal Code, s 4.
360 *R v Miller* [1954] 2 QB 282, at p 292.
361 *DPP v Smith* [1960] 3 All ER 161, at p 171.
362 *Chan-Fook* [1994] *Crim LR* 432.

amounting to actual bodily harm. This psychiatric injury, however, must be distinguished from other emotions such as fear, distress, or panic.

In cases where the harm caused to the victim is not the direct result of the offender's act, it may nevertheless constitute an assault. Consider, for example, the situation where the offender acts in a manner which provokes the victim to jump from a moving car and suffer injuries.[363] Such conduct would amount to assault if it could be said that the victim's act was a natural result of the offender's action or words, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing.[364]

Apart from the physical acts, the prosecution must establish that the necessary *mens rea* existed. The commission of an assault represents an integral part of this offence and, therefore, it is necessary to establish the necessary *mens rea* for assault. The question then arises whether the prosecution is under an obligation to prove fault for the occasioning of actual bodily harm by the accused. After hearing a number of cases, the House of Lords decided in *Savage and Parmenter* that, once assault is established, it remains only to prove that the accused caused actual bodily harm as a question of causation, not requiring any further proof of fault or *mens rea*.[365] In this respect, a person who with intention or recklessness puts the other in fear of violence (assault) and causes actual bodily harm is liable for a conviction under section 243 of the Criminal Code.

Rape

12-58 The offence of rape is committed when a man has unlawful carnal knowledge (ie, sexual intercourse) with a woman without her consent.[366] This offence also may be committed despite any consent by the woman if consent was given under threat of violence or fear of injury. Under Cypriot law, the offence is punishable by a term of life imprisonment.[367]

It was a rule of Common Law that rape could not be committed within the relationship of marriage. As Sir Matthew Hale put it, 'by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract'.[368] The position at Common Law, however, has developed greatly since that time, and it is now possible for the offence of rape to be committed by a husband. In *R*,[369] the court held that there was no rule that a husband cannot

363 Archbold, *Criminal Pleading*, *Evidence and Practice 2000* (2000), at p 1675, pt 19-195.
364 *R v Roberts*, 56 Cr App R 95.
365 *Roberts* [1971] *Crim LR* 27.
366 Criminal Code, s 144.
367 Criminal Code, s 145.
368 James, *Introduction to English Law* (7th ed, 1969), at p 203.
369 *R* [1991] 4 All ER 481.

be guilty of raping his wife and that the term 'unlawful' which existed in the Sexual Offences (Amendments) Act 1976 was 'surplusage'.

Since this case, the English law on the offence of rape has been amended by removing the requirement of 'unlawful' sexual intercourse from the definition of rape. Under Cypriot law, however, the unlawfulness of the sexual intercourse is still a necessary element of this offence which must be proved by the prosecution. Furthermore, the current position under English law does not restrict the offence of rape to female victims. Unlike Cypriot law, which limits the application of rape to female victims, English law provides that a man or a woman may be a victim of rape.

At Common Law, the term 'sexual intercourse' has been given a wide interpretation and encompasses any form of penetration of the female genitalia.[370] It is unnecessary to show that actual emission of semen occurred, as sexual intercourse can be proved by mere penetration. Any minimum contact, therefore, would suffice and it is not necessary to prove that the hymen was ruptured or that the vagina in its proper sense was penetrated.[371] While slight penetration is sufficient to constitute sexual intercourse, sexual intercourse is regarded as a continuing act until the man withdraws. In *Kaitamaki*,[372] it was decided that, if consent had existed for the initial penetration, but this consent was later withdrawn, rape is committed if sexual intercourse continued.

The issue of consent is a central element of this offence. For an offence of rape to be committed, the absence of the victim's consent is necessary. It must be proved that the victim did not consent to have sexual intercourse with the offender, and not that the victim positively dissented.[373] The use of force[374] or fear of bodily harm or, in a married woman, the impersonation of her husband, vitiates any consent given by the victim. Determining the existence or absence of consent is a difficult matter particularly when that has been obtained by force, violence, or misrepresentations. In *Olugboja*,[375] the consent was obtained by fear and Dunn L J stated that the jury should be directed 'that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent'.[376]

This, however, is a very formalistic approach as the dividing line between consent and submission is not an easy one to draw. Furthermore, the perceptions of different persons in relation to what amounts to submission and consent tend to vary. There

370 *Hill*, 1 East PC 439; *Hughes* (1841) 9 C & P 752.
371 Hughes (1841) 9 C & P 752.
372 *Kaitamaki* [1985] AC 147.
373 *Lang* (1975) 62 Cr App R 50.
374 *Olugboja* (1982) QB 320.
375 *Olugboja* (1982) QB 320.
376 *Olugboja* (1982) QB 320, at p 332.

also may be instances where a submission may lead to lack of consent due to the constraint being imposed on the victim. For this reason, the focus should be not on distinguishing whether there is consent or submission but on whether there is voluntary agreement by the victim. This voluntary agreement should not be induced or imposed on the victim by other factors whether those are instigated by the offender or not.

The requisite *mens rea* for rape is an intention to have sexual intercourse with a woman without her consent. In *Morgan*,[377] the defendants claimed that, even though they had sexual intercourse with a woman without her consent, they believed or may have believed that she was consenting according to instructions given by the victim's husband. Lord Hailsham stated that, as a matter of inexorable logic, if the defendants believed that the woman was consenting, they did not have the necessary intention and thus could not be convicted of this offence. This also can be interpreted as a mistake of fact which is inconsistent with intention or foresight and, therefore, negates the *mens rea*. The case is no longer of any significance in England as the offence of rape has been statutorily defined in the Sexual Offences Act 1956, as amended by the Sexual Offences (Amendment) Act 1976 and the Criminal Justice and Public Order Act 1994.

Homosexual Offences

12-59 Recently, the provisions of the Criminal Code dealing with homosexual offences[378] had to be amended in a way which brought the Code in line with the law of the EU member states. As mentioned previously, although criminal law is not within the competence of the EU, it was necessary for accession purposes to effect a number of changes to the Criminal Code, such as the abolition of the death penalty[379] and the legalisation of consensual homosexual conduct.[380]

Prior to the passing of this law, the Criminal Code treated homosexual activity as conduct amenable to criminal sanctions. Although not a disease *per se*, such conduct was considered to be contrary to nature and inconsistent with the strong family foundations of Cypriot society.[381]

The present state of the law permits homosexual conduct between consenting males, provided that they are not under the age of 18 years and that the activity is not carried out in a public place.[382] Furthermore, it prohibits such activity between

377 *Morgan* [1976] AC 182.
378 Criminal Code, ss 171–174.
379 Law 15 of 1999.
380 Law 77 of 2000.
381 *Michalakis A Xirishis v The Republic* (1969) 2 CLR 125; *Georgios I Peristianis v The Police* (1969) 2 CLR 137; *R v Christophoro Ianni*, 8 CLR 106; *Michael Theodorou Matsentides v The Police* (1975) 10 JSC 1498.
382 Criminal Code, s 171.

males under the use of force or violence.[383] This could be described as an equivalent offence of rape[384] designed for cases where the victim is a male.

Sentencing

In General

12-60 The criminal law seeks to establish the parameters within which social control of society and protection of its citizens can be effected. Sentencing is an integral part of the criminal law which serves a leading role in the determination of these parameters and is viewed as 'the principal tool in the hands of the court for the furtherance of the objects of the criminal law'.[385] The courts in the execution of their sentencing powers usually carry out a balancing exercise between the need to protect society and maintain social order and the intrinsic elements or idiosyncrasies (if any) of the case. The sentencing exercise must be carried out in a way which 'makes the criminal process socially fruitful, sustaining thereby the faith of the public in the law and the administration of justice'.[386]

Sentencing is not an easy task to perform and a great deal of care must be exhibited by courts. According to Artemis, examination of the decisions of the Supreme Court reveals that 'the relevant considerations on passing sentence are the public interest in law enforcement, the circumstances of the person of the accused and that of the victim and the social environment referable to the needs of our society'.[387]

Sentencing serves a number of purposes, the most important of which is the protection of the interests of society. Proper law enforcement is central to the democratic operation of a society and to the protection of the interests of its citizens. In *R v Sofoclis Georghiou*,[388] the Supreme Court spelt out that decisions on sentencing should always be based on a number of considerations, by which the first and the foremost is the public interest. The criminal law is publicly enforced not only with the object of punishing crime but also in the hope of preventing it. The sentence must reflect the seriousness of the crime committed and serve simultaneously as a deterrent to further commissions of the offence by the accused and/or by other persons. The perception of the Supreme Court has remained as the guiding principle for determining the level of sentence to be imposed.[389] In *Attorney General v Ioannou*,[390] the Supreme Court held that

383 Criminal Code, s 172.
384 Criminal Code, s 144.
385 Pikis, *Sentencing in Cyprus*, at p 3.
386 Pikis, *Sentencing in Cyprus*, at p 3.
387 Artemis, 'An Outline of Criminal Law and the Working of the Judicial System in Criminal Cases', *Cyprus Law Review*, Issue 26 (April–June 1989), at p 4021.
388 *R v Sofoclis Georghiou*, 22 CLR 147.
389 *Piskopou v The Republic*, Criminal Appeal 6660, 23 June 1999, *Attorney-General v Ioannou*, Criminal Appeal 6727, 30 November 1999.
390 *Attorney General v Ioannou*, Criminal Appeal 6727, 30 November 1999.

punishment is not an end in itself, but it is a means of defence against violations of law and its principles.

The classification of crimes in the Criminal Code according to their degree of seriousness reflects the importance of the crime to society. The categorisation of the crimes and the relevant punishments provided by law is not a matter which lies within the jurisdiction of the courts. These are determined by the House of Representatives in their attempt to reflect the view of society, and must be followed by the courts in delivering justice. The courts therefore follow what the legislature prescribes and use their discretion in determining the relevant sentence to be imposed, thus expressing the values of society. This procedure, however, is not followed blindly.

According to Pikis, 'the circumstances of the accused, the repercussions of the sentence on him and his family and his inclination to reform are of great interest to the public and to that extent the sentence must be individualised'.[391] Individualisation of the sentence, however, should not be viewed as a method of setting aside the main reason behind the imposition of a sentence, namely the punishment of the accused, and replacing that with a sentence tailor-made to the needs of the accused. In *Antoniades v The Police*,[392] the Supreme Court concluded that the duty to individualise sentences should not lead to the neutralisation of the effectiveness of the law.

Additionally, individualisation of a sentence according to the material circumstances of the case should not be perceived as a method of eliminating the dissuasive effect of a sentence and its deterrent effect against further commissions of the offence in question.[393] The gravity of the offence also is another element which must be reflected in the sentence imposed and should not be set off against attempts made to individualise the sentence.[394]

Individualisation of a sentence should not be construed as meaning that all the characteristics of the accused and any hardship suffered are to be superimposed on the duty properly to enforce the law. As exemplified in *Kokkinos v The Police*,[395] individualisation of a sentence has the purpose of relating the punishment for the particular offence to the identity/person of the accused, without implying exclusive correlation with all the personal conditions of the accused.

Apart from the need to secure the public interest in law, the courts concentrate on the person of the accused as one of the parameters for establishing the appropriate sentence, with the intention that the imposition of the appropriate sentence will

391 Pikis, *Sentencing in Cyprus*, at p 4.

392 *Antoniades v The Police* (1986) 2 CLR 21.

393 *Piskopou v The Republic*, Criminal Appeal 6660, 23 June 1999; *Kleovoulou v The Republic*, Criminal Appeal 6716, 11 October 1999.

394 *Piskopou v The Republic*, Criminal Appeal 6660, 23 June 1999; *Attorney General v Ioannou*, Criminal Appeal 6727, 30 November 1999.

395 *Kokkinos v The Police*, Criminal Appeal 6727, 30 November 1999.

offer the accused the opportunity of rehabilitation and thus convert him into a useful member of society. In examining the person of the accused, the court will focus on his age, habits, personal circumstances and any inclinations he may have. According to Pikis, such an exercise would involve individualisation of a sentence which would 'not only fit the offence but the offender as well'.[396] This, however, should not be misconstrued as implying that the rules of sentencing are relaxed and space is made for compassion or strictly humanitarian reasons. In delivering the judgment of the Supreme Court on a plea to the judges to release the accused on humanitarian grounds, Triantafillides, P commented that 'there is no room for such a compassionate approach within the limitation of the exercise of their judicial powers'.[397]

One other parameter for the determination of the proper sentence to be imposed is the existing social environment. The perception of society and its needs will establish which conduct is considered to be threatening and harmful and thus seek protection from such conduct. Sentencing, therefore, should reflect the views and social values of society. If the courts were to ignore such perceptions, 'that would undermine the faith of people in law enforcement, an estrangement most detrimental to the ends of justice'.[398]

Punishments

12-61 The types of punishment available to a court as set out in the Criminal Code[399] are as follows:

- Life imprisonment;
- Imprisonment;
- Fine;
- Payment of compensation;
- Provision of security to keep the peace and be of good behaviour, or to come up for judgment;
- Supervision; and
- Any other kind of punishment or treatment as provided by any other law.

12-62 Although not included in the Criminal Code, the court also has power to impose probation orders[400] and make an order for an absolute or conditional discharge.[401]

The Criminal Code prescribes the maximum penalty which is to be imposed for a certain offence. These maximum sentences are set by the legislative authority and,

396 Pikis, *Sentencing in Cyprus*, at p 5.
397 *Varnava v The Police* (1975) 9 JSC 1279.
398 Pikis, Sentencing *in Cyprus*, at p 7.
399 Criminal Code, s 26.
400 Probation of Offenders Law, Cap 162.
401 Probation of Offenders Law, s 6.

in delivering justice, the courts must follow the desires of the legislature, which indirectly express those of the citizens. The courts, therefore, must adhere to the determination of what type of punishment is available for a particular crime. Although the maximum penalties are prescribed by the Criminal Code, the courts never have an absolute discretion both as regards the choice of punishment and its extent. This is subject to certain exceptions as in cases of premeditated murder, piracy, and treason, where the Criminal Code imposes mandatory sentences for the commission of those offences.

The principles which govern the type of punishment to be imposed are very similar to those applicable in England.[402] In *Polycarpos A Polycarpou v The Police*,[403] the Supreme Court held that a sentence of imprisonment is the most drastic sanction and, therefore, should only be imposed if all the other alternative modes of punishment are inappropriate or have failed to deal with the circumstances of a particular case. The gravity of the offence may be such as to call for the imposition of imprisonment as a means of punishing the offence and protecting the public from such an offender.[404]

Apart from a sentence of imprisonment, the court also may impose a fine as punishment for the commission of an offence. A fine is usually viewed as an alternative punishment to imprisonment if the facts of the case do not justify the imposition of a term of imprisonment. The court also may impose a fine in lieu of life imprisonment or any other term of imprisonment except in cases of premeditated murder, treason, and instigation of invasion.[405] The level of fine which is to be imposed is usually stated in the relevant section of the Criminal Code. If no amount is mentioned, the level of fine will be determined by the court and must not be excessive.[406]

As part of their sentencing powers, the courts, in addition to or in substitution for any other mode of punishment, may order the payment of compensation to the victim.[407] Payments of compensation avoid the institution of further proceedings for recovery of money or damages and therefore save time and costs for both parties. These payments are different to those ordered in civil proceedings as they may be enforced under the provisions of Part IV of the Criminal Procedure Law and recovered as penalties.

Furthermore, in all cases except premeditated murder, treason, and instigation of invasion, the court may, in addition to or in substitution for any punishment, order

402 Artemis, 'An Outline of Criminal Law and the Working of the Judicial System in Criminal Cases', *Cyprus Law Review*, Issue 26 (April–June 1989), at p 4021.

403 *Polycarpos A Polycarpou v The Police* (1970) 2 CLR 111.

404 *Panayiotis Agathocleous v The Police* (1965) 2 CLR 119; *Panayiotis Efstathiou Mirachis v The Police* (1965) 2 CLR 28.

405 Criminal Code, s 29.

406 Criminal Code, s 31.

407 Courts of Justice Law 1960, s 20(2).

the accused to enter into a recognisance with or without sureties in a sum named by the court to keep the peace and be of good behaviour.[408] Similarly, the court may decide to discharge the accused instead of giving him a sentence, on the condition that the accused will enter into a recognisance with or without sureties, in a sum that the court thinks fit that he will appear before the court at a future date or whenever he is called to appear. If the accused breaches such security, this makes him liable to a punishment both for the original offence committed and the breach of the security.

A supervision order also may be ordered as a corollary of sentences of imprisonment imposed on an accused who has been convicted at least twice for an offence punishable with more than two years of imprisonment. The supervision order places the convict under supervision for a maximum period of five years after the expiration of his term of imprisonment.[409] Unlike a supervision order, a probation order may be ordered as an alternative mode of punishment to imprisonment. Probation seeks to reform the accused outside prison, and the accused is assisted in this attempt by the Welfare Office.

Suspended Sentence of Imprisonment

12-63 The courts have power to suspend a term of imprisonment under certain circumstances. The law[410] on suspended sentences was passed in 1972 and confers power on the courts to suspend a sentence of imprisonment of no more than two years for a period of three years.[411] The law is based on the corresponding English legislation on suspended sentences. The courts in England have emphasised that a suspended sentence of imprisonment is a sentence of imprisonment with the exception that its execution is postponed.[412] The period of suspension is of a mandatory nature and is fixed at three years. This means that if, within the suspension period, the accused violates the conditions on which the sentence is suspended, the accused may be called on to serve his sentence. The decision to suspend a sentence of imprisonment must be justified by exceptional circumstances predominating in the given case and by the personal circumstances of the accused.[413] Otherwise, the court would not be in a position to make such an order.

The power conferred on a court to suspend a sentence of imprisonment should not be viewed as the provision of an alternative mode of punishment. Nicolatou[414]

408 Criminal Code, s 32.

409 Criminal Code, s 34.

410 Law on Suspended Sentence of Imprisonment in Certain Cases (Law 95 of 1972, as amended by Law 41 of 1997).

411 Law 95 of 1972, s 3(1).

412 *O'Keefe* (1969) 1 All ER 426; *Hunter* (1969) Cr LR 502.

413 Law 95 of 1972, s 3(2).

414 Nicolatou, 'Suspended Imprisonment', *Cyprus Law Review*, Issue 29 (January–March 1990) 4565, at p 4569.

argues that this power may be used as an 'easy solution' and courts may be inclined to make such an order even if the circumstances are not appropriate for it to be made. A suspended sentence of imprisonment remains a sentence of imprisonment for all purposes. An order of the court to suspend a sentence on imprisonment merely puts off the execution of this sentence.[415] The imposition of a suspended sentence does not represent any relaxation of the rules on punishment. The court must first ascertain that the offence committed is liable to attract a sentence of imprisonment. If, however, there are exceptional circumstances which would render the immediate execution of a term of imprisonment unfair, the court may order a suspension of the term.

The court has taken a strict approach on what matters could be termed as exceptional. Circumstances which operate as mitigating factors should not be interpreted as being exceptional and thus call for a suspension of the sentence.[416] For example, long dependence on and use of drugs has not been classified as an exceptional matter which would call for the suspension of a sentence.[417] Nor has the willingness of the accused to change his plea to guilty and promise to give up the use of drugs been sufficient to constitute exceptional circumstances.[418] These were classified by the court as being mitigating factors which reduced the level of sentence imposed by the court. In *Agathangelou v The Republic*,[419] which involved a different area of law, the court dealt with the issue of exceptional circumstances and commented that it is difficult to specify exhaustively the meaning of this term. It noted, however, that such circumstances have as their common denominator their exceptional nature and their peculiar character. In *Vasileiou v The Republic*,[420] the Supreme Court held that the existence of no previous criminal record, the age of the offender and the fact that he was the father and sole provider for three children aged between three months and nine years, created collectively exceptional circumstances which called for the suspension of the sentence of imprisonment in that particular case.

The exceptional nature of these circumstances will be determined by the facts of the case and the personal circumstances of the offender. A similar position is taken by the English courts which have held that there could be no definition of 'exceptional terms',[421] but matters such as good character, youth, and an early plea of guilty could not be treated as being exceptional. In *Lowery*,[422] the courts in England did not classify as 'exceptional circumstances' the fact that the accused

415 *Louca v The Republic* (1986) 2 CLR 141.
416 *Vasileiou v The Republic*, Criminal Appeal 6704, 26 November 1999.
417 *Pagiavlas v The Police*, Criminal Appeal 6560, 7 August 1998.
418 *Vasileiou v The Republic*, Criminal Appeal 6704, 26 November 1999.
419 *Agathangelou v The Republic*, Appeal Review 2121, 29 May 1998.
420 *Vasileiou v The Republic*, Criminal Appeal 6704, 26 November 1999.
421 *Okinikan* [1993] 1 WLR 173.
422 *Lowery* 14 Cr App R (S) 485.

had numerous mitigating factors, financial difficulties, loss of career and home, had attempted to commit suicide, and was under psychiatric supervision.

Pikis suggests that a person who does not have a criminal record has a better claim to have his sentence suspended, as the need to deter him from repetition of like acts in the future is not strong; nor should institutionalisation be considered unavoidable.[423] On the other hand, nowhere in the law is it stated that suspension of sentence is only available for persons who commit an offence for the first time. Nicolatou[424] suggests that suspension of a sentence also may take place in cases of persons who, despite their criminal record, may have nevertheless not committed any offence in the recent past. The basis of the decision of the courts should be whether there exist any exceptional circumstances to justify the making of such an order.

If the accused breaches a condition of the order within the suspension period, the court may take a number of measures. Section 4(1), which reflects the policy of the law with regard to the implications of breach of the conditions of suspension, states that the court may order execution of the sentence in its entirety or partially, may amend the original order and replace the suspension period with a period not exceeding two years, or may opt to do nothing.[425] In *Louca v The Republic*,[426] the Supreme Court held that activation of the sentence should be perceived as the rule in cases of breach, and adoption of alternative measures are to be considered as exceptions to the rule. In cases of breach, the court will not examine afresh the propriety of the sentence originally suspended, but only whether this breach is excusable or its gravity is reduced on account of any extenuating circumstances.

According to section 4(1), the suspended sentence may be activated if the offender, within the suspension period, is convicted of an offence punishable by a term of imprisonment. It is of interest to note that, in *Louca v The Republic*,[427] the Supreme Court held that it is implicit in the scheme of the law that the punishment for the subsequent offence, putting in issue the activation of the suspended sentence, should be known before the implications of the breach of the conditions of the suspension are considered. If the subsequent offence committed within the suspension period, is of a different nature from the original offence that in itself is not determinative of whether the suspended sentence should be activated or not.[428] This principle was reiterated in *Ioannou v The Police*,[429] where the court explained that

423 Pikis, *Sentencing in Cyprus*, at p 13.

424 Nicolatou, 'Suspended Imprisonment', *Cyprus Law Review*, Issue 29 (January–March 1990) 4565, at p 4567.

425 Law 95 of 1972, s 4(1).

426 *Louca v The Republic* (1986) 2 CLR 141.

427 *Louca v The Republic* (1986) 2 CLR 141.

428 *R v Saunders* (1970) 54 Cr App R 247; *R v Craine* (1981) 3 Cr App R (S) 198; *R v Clitheroe* (1987) 9 Cr App R (S) 159.

429 *Ioannou v The Police* (1989) 2 CLR 251.

activation of the suspended sentence is principally related to the violation of the conditions imposed by the court and not to the similarities between the original offence and the present one.

As mentioned above, for a suspended sentence to be activated, the offender must be convicted of an offence punishable with imprisonment. This implies that if the new offence does not attract a sentence of imprisonment, activation of the sentence would not be possible. At Common Law, however, this position is treated in a more flexible manner. In *Calladine*,[430] the Court of Appeal held that the statutory provisions (which are similar to the law in Cyprus) do not automatically preclude the activation of the sentence in cases where the new offence is of a kind which cannot attract a custodial sentence. Generally speaking, the sentence would not be activated, but each case depends on its own facts.[431]

Factors Relevant to Sentence

In General

12-64 Apart from the parameters which are outlined above, when passing a sentence, the court takes into account all the facts of the case and the circumstances surrounding the commission of the offence. According to Pikis, a sentence 'can never be standardised and attention must be focused on the intrinsic facts and circumstances of the case'.[432] If the courts were to adopt a standardised sentencing method, that would defeat the whole purpose of delivering justice and also of individualising a sentence.[433]

The factors which a court may take into consideration vary in nature, and they can have either a positive or a negative effect on sentence. It must be stressed that such factors do not obviate the need for proper enforcement of the law or the need for the sentence to serve as a deterrent to violence. They are a means of delivering justice fairly without setting aside any personal element or any intrinsic elements of the offence. One other point which must be considered is that, in an offence of a serious nature, the effect of these factors tends to have only a marginal bearing on sentence due to the gravity of the offence. In *Onisillou v The Republic*,[434] the court emphasised the value of human life and the right of a person to life, not leaving any room for consideration of mitigating circumstances due to the severity of the crime.

It must be stressed that the factors which the courts take into account when passing sentence are neither rules nor authority, but rather represent principles which the court may follow. Nor can they be considered as absolute in their application. A

430 *Calladine*, 15 Cr App R 159, followed in *R v Stacey*, 15 Cr App R 585.
431 Archbold, *Criminal Pleading*, *Evidence and Practice 2000* (2000), at p 560, pt 5-184.
432 Pikis, *Sentencing in Cyprus*, at p 23.
433 *Kleovoulou v The Republic*, Criminal Appeal 6716, 11 October 1999.
434 *Onisillou v The Republic* (1991) 2 CLR 556.

court is free to approach the circumstances of a case at its own discretion. Its duty is to deliver justice and, as part of this exercise and in delivering it in a more proper manner, it can take these factors into account.

Mitigating Factors

12-65 A person who has no previous convictions is likely to be treated more leniently by a court. If the person is convicted of an offence for the first time, that may help the court to reduce the prescribed sentence to encourage the person not to re-offend. The same applies if the person is of a young age or is very old. The court takes the view that a person of a young age has a great number of opportunities to improve his life nowadays and for this reason it may be justifiable to treat young persons more leniently. As with all types of offence, this will depend on the seriousness of the offence and the facts of the case. The approach adopted by the courts when dealing with persons of a young age is exemplified in *Nicos Demetriou Meitanis v The Police*.[435] In this case, the court was willing to pass a less severe mode of punishment than a term of imprisonment on a young offender for indecent assault, although the commission of this offence called for a sentence of imprisonment to be imposed. The reason for such treatment was that a sentence of imprisonment would interrupt the higher studies of the accused and thus would not be beneficial to the upbringing and the rehabilitation of the accused.

Lack of education and upbringing also may serve as mitigating factors as these tend not to cultivate a sense of responsibility in the accused. Similarly, the family environment and other personal matters may shed light on the inclinations of the accused to commit an offence and may therefore have some bearing on sentence.[436]

The capacity of a person to appreciate the implications of criminal conduct are also taken into account. If the accused is of low intellectual ability, which affects his inclinations or prevents him from evaluating the implications of his actions, that may justify the use of leniency by the court when passing a sentence; diminished responsibility cannot serve as a complete defence. The defence of insanity[437] could be raised, but it is of limited application due to the problems involved in establishing insanity. The mental health of the accused may be determinative of the mode of punishment which will be selected. If, for example, the mental illness of the accused can be cured better outside prison or if the prison environment is inappropriate, a more appropriate order may be made.[438]

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435 *Nicos Demetriou Meitanis v The Police* (1966) 2 CLR 84.

436 *Andreas Spyron Yiangon Mongolos v The Republic*, Criminal Appeal 6177, 18 February 1999.

437 Criminal Code, s 12.

438 *Robert Levon Yenovkian v The Republic* (1963) 1 CLR 44; *Raymondos Anastasiou v The Republic* (1969) 2 CLR 193.

The emotional distress under which the accused is operating is relevant to the determination of the proper sentence.[439] Provocation also may cause effects similar to the above on the accused. On the issue of provocation, the Supreme Court commented in *Ioannis Kyrmizis v The Republic*[440] that:

> . . . in imposing sentence a competent judicial authority cannot ignore certain fundamental principles of justice, which govern the administration of criminal justice, even in military offences. In the case before us, it does not seem that the trial court attached the necessary importance to the act of provocation which induced the appellant to commit the offence charged.

12-66 Provocative behaviour by the victim may lead to loss of self-control by the accused and result in the accused behaving in a manner inconsistent with his nature. The extent to which provocation may act as a mitigating factor will depend on the provocative acts or behaviour and their effect on the accused. In *Piskopou v The Republic*,[441] the court accepted that the accused was provoked to assault the victim, but the acts of the accused which followed could not have been instigated by the provocative behaviour of the victim and were considered as being remote. Provocation by the victim was not treated as a valid reason for mitigation as the actions of the accused could not be related to the provocative behaviour of the accused.

Although ignorance of the law cannot operate as a defence, the courts may nevertheless consider it to be inexpedient to inflict punishment for any absence of knowledge of the law.[442] In assessing pleas by the accused in relation to ignorance of the law, the court will 'have regard to the opportunities that the accused had to acquaint himself with the existence of the relevant law and the length of time during which the enactment had been in force'.[443] The Supreme Court, in *Miliotis v The Police*,[444] established that, 'although [the accused] was ill-advised and failed to seek legal advice as to the proper course to follow to vindicate any rights he thought he had, in the circumstances we do not think that he had any intention of defrauding the Revenue'. If there is an honest and objective basis for lack of knowledge of the law and not mere ignorance, the court may be willing to attribute some weight to this and to reduce the sentence.

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439 Kyprianou *v The Republic* (1971) 2 CLR 158; *Costas Christodoulou Katsiaris v The Republic* (1975) 2 CLR 17; *Savva v The Republic* (1992) 2 CLR 231, at p 238; *Ioannou v The Republic* (1996) 2 CLR 200, at p 208; *Attorney General v Ioannou*, Criminal Appeal 6727, 30 November 1999.

440 *Ioannis Kyrmizis v The Republic* (1965) 2 CLR 55.

441 *Piskopou v The Republic*, Criminal Appeal 6660, 23 June 1999.

442 *Hadjikyriakou v The Police* (1974) 10 JSC 970; *Nicos Kyriakou Miliotis v The Police* (1966) 2 CLR 62.

443 Pikis, *Sentencing in Cyprus*, at p 30.

444 *Miliotis v The Police* (1966) 2 CLR 62, at p 70.

Article 30.2 of the Constitution provides that every person is entitled to have a charge brought against him determined within a reasonable time. Failure by the prosecution authorities to act in the way prescribed by the Constitution may be a mitigating factor.[445] This stems from the fact that this particular right of the offender is entrenched in the Constitution and strict obedience is expected from the relevant authorities.

Furthermore, apart from reducing the anxiety of the offender, it makes the administration of justice more efficient as the courts do not need to decide cases based on aged facts. It must be stated that not all kinds of delay would be considered as mitigating factors. If a delay is caused by the conduct of the accused, the court would not treat the offender leniently for such delay.[446]

Another fundamental right which is entrenched in the Constitution is that all persons are equal before the law and the administration of justice and are entitled to equal protection thereof and treatment thereby.[447] This is a fundamental principle in the administration of justice, and any misapplication of it would lead to injustice. Equality of treatment is not restricted to the sentence imposed by the court but relates to all kinds of treatment to which an accused may be subject, eg, failure by the authorities to bring one co-accused before the court.[448] The Supreme Court has been willing to set aside or reduce sentences, to ensure effective compliance with this constitutional right.[449] This may occur regardless of the fact that the case may call for a more severe punishment to be imposed. In *Pitsillos v The Republic*,[450] the court was willing to set aside a sentence of immediate imprisonment and replace it with a suspended sentence.

Despite the fact that the circumstances of the case were not exceptional and thus did not justify the order of a suspended sentence for either of the accused, as a means of safeguarding the principle of equality of treatment, the Supreme Court ordered that the same sentence as imposed on the co-accused be imposed on the appellant.

Actions and behaviour by the accused subsequent to the commission of the offence are factors relevant to sentence.[451] Such behaviour would include co-operation with

445 *Nicos Charalambous Terlas v The Police* (1970) 2 CLR 30; *Attorney General v Neophytou* (1991) 2 CLR 5, at p 10; *Attorney General v Tella* (1991) 2 CLR 71, at p 77; *Attorney General v Avraamides* (1993) 2 CLR 355, at p 361; *Varnava v The Police*, Criminal Appeal 6628, 22 June 1999.

446 *Attorney General v Aresti*, Criminal Appeal 6209, 24 October 1996.

447 Constitution, art 28.1.

448 *Georghios Yiasoumis Nicoalou v The Police* (1969) 2 CLR 120, at p 126; *Panayi v The Republic* (1991) 2 CLR 115; *Kattou and Another v The Police* (1991) 2 CLR 498; *Demetriou v The Republic*, Criminal Appeal 6493, 6 April 1999.

449 *Georghios Yiasoumis Nicoalou v The Police* (1969) 2 CLR 120; *Katsatronas and Others v The Police* (1975) 11 JSC 1644.

450 *Pitsillos v The Republic*, Criminal Appeal 6575, 28 October 1998.

451 *Limassol Police v Toorac Fashion Ltd* (1993) 2 CLR 117.

the police or any other relevant authority,[452] return of stolen property to its rightful owner, repentance after arrest,[453] and admission of the crime. A plea of guilty at an early stage also may be a valid reason for mitigation.[454] Admissions of guilt are considered to be in the public interest and may attract substantial discount on sentence by the court.

In *Buffrey*,[455] Lord Taylor C J said that there was no absolute rule as to what the discount should be but, as a general guide, the court believed that something of the order of one-third would be an appropriate discount.[456] Even if the plea is made at a later stage, it may still attract some discount depending on the facts of the case and the stage at which the guilty plea is made.[457] In *Vasileiou v The Republic*,[458] the accused admitted guilt on arrest by the police. At the commencement of the hearing, however, the accused pleaded not guilty and then, half-way through the hearing, he again changed his plea to guilty. In these circumstances, such a plea of guilty could not be considered as being a timely admission and thus a valid reason for mitigation. Admissions of guilt will be evaluated against all the facts of the case, the stage at which they were made, and whether there exists any ulterior motive behind such admissions.

Aggravating Factors

12-67 The court will usually consider previous convictions of the accused as being a factor aggravating the sentence to be imposed. This, however, does not mean that the accused will receive a sentence more severe than the one which must be imposed under the circumstances, by virtue of his previous convictions. In *Michalakis Spyrou Kakathymis v The Republic*,[459] the Supreme Court held that it would be wrong to extend a sentence of imprisonment beyond what is deserved by the circumstances of the case due to the existence of previous convictions. Although the offender has been punished for his offences committed in the past, the fact remains that the court will withhold the leniency which would have been demonstrated in a first-time offender. The existence of previous convictions also may have the effect of depriving the accused of a plea in mitigation.[460] The extent to which any weight may be attached to previous convictions as well as the extent to which an accused may be prevented from making a plea in mitigation will depend on issues such as the types of offences previously committed, the period when they

452 *Sinfield*, 3 Cr App R (S) 258 CA; *Rose and Sapiano*, 2 Cr App R (S) 239.
453 *Ioannis Antoni Vounioti v The Republic* (1971) 2 CLR 203.
454 *Wood* [1997] 1 Cr App R (S) 347 CA.
455 *Buffrey*, 14 Cr App R (S) 511.
456 Archbold, *Criminal Pleading, Evidence and Practice 2000* (2000), at pp 5-139, pt 5-139.
457 *Fanaras v The Republic*, Criminal Appeals 6466 and 6467, 8 February 1999.
458 Criminal Appeal 6704, 26 November 1999.
459 *Michalakis Spyrou Kakathymis v The Republic* (1971) 2 CLR 301.
460 *Hjinicolaou v The Police* (1976) 4 JSC 647.

were committed, and the existence of any similarities between the previous crimes and the present one.[461]

Any elements of planning of the commission of the offence also may not operate in favour of the accused. The existence of a plan to commit an offence sheds considerable light on the criminal inclination and culpability of the offender and is thus treated with utmost severity by courts.[462] Pikis argues that the element of planning is treated as a factor augmenting the gravity of the offence because the 'threat to society from the conduct of one who acts with cool deliberation is far greater compared to that of one who acts impulsively on the spur of a moment'.[463] Additionally, crimes which have been pre-planned usually take into consideration all the angles of the crime and thus make it more difficult for the authorities to detect them and prove them.

The circumstances of the victim also may have an effect on the gravity of the offence. In *Pittas v The Republic*,[464] the Supreme Court held that the personal circumstances of the victim, a widow with four children, were a valid aggravating factor in the imposition of punishment.

Factors with a Variable Effect on Sentence

12-68 According to Cypriot case law, intoxication is a factor which must be taken into consideration but can have either positive or negative effects on sentence.[465] The intoxication of an accused may be a mitigating factor due to its effects on the judgment of the accused.[466]

In *The Police v Andreas Ioannou*,[467] the court, acknowledging that intoxication may sometimes be considered as a mitigating factor and sometimes as an aggravating factor, held that, in cases of common assault, intoxication has only a marginal bearing on sentence. This, however, was not welcomed in the subsequent case of *Attorney General v Tsioli*,[468] where the Supreme Court spelt out that the ruling in *Police v Andreas Ioannou* is not to be interpreted as being absolute.

It also commented on the position predominating in England and other Northern European countries which attach no value to intoxication as a mitigating factor. On this point, the court commented that the situation is somewhat different in Cyprus as the social problems created by alcohol consumption are not as grave as

461 *Theodoros Panayioti Shourris v The Republic* (1961) CLR 41.
462 *Michaelides v The Republic* (1965) 2 CLR 113; *Pittas v The Republic* (1973) 2 JSC 200; *Panaoullas v The Police* (1974) 5 JSC 597.
463 Pikis, *Sentencing in Cyprus*, at p 24.
464 *Pittas v The Republic* (1973) 2 JSC 200.
465 *Demetris Michael Kourris v The Police* (1970) 2 CLR 53.
466 *Francis Kenneth Smith and Another v The Police* (1969) 2 CLR 189; *Pernell v The Republic*, Criminal Appeal 6148, 30 November 1998.
467 *The Police v Andreas Ioannou* (1989) 2 CLR 61.
468 *Attorney General v Tsioli* (1991) 2 CLR 194.

those in Northern Europe and that the Cypriot courts are at liberty to exercise their discretion in relation to their sentencing powers. The position adopted in *Attorney General v Tsioli* was reaffirmed in *Fanaras v The Republic*,[469] where the Supreme Court held that, depending on the particular facts of the case, intoxication may serve as a valid reason for mitigation.

When the court is assessing the effects of intoxication, emphasis will be given to the extent to which intoxication has affected the self-control of the accused, provided that intoxication was not deliberate to enable the accused to commit the crime in question. On the role of intoxication, Pikis argues that the courts should not overlook the fact that intoxication is a self-imposed condition and therefore should not be encouraged.[470] This position resembles that adopted by the courts in England and in other Northern European countries where problems and criminal conduct related to intoxication are common phenomena. Nevertheless, even in crimes of the utmost gravity, the effects of intoxication on the accused may be taken into account by the courts if they have affected his mental state and thus may operate as a mitigating factor on sentence.[471]

According to the Supreme Court, the proper application of the constitutional right of equality of treatment amounts to exceptional circumstances within the meaning of the law on suspended sentences of imprisonment. It must be stated, however, that subsequent to this case the Supreme Court, in *Vasileiou v The Republic*,[472] permitted the imposition of a suspended sentence of imprisonment on only one of the co-accused due to the existence of exceptional circumstances in the case of that particular co-accused, without making any reference to the above mentioned principles.

469 *Fanaras v The Republic*, Criminal Appeal 6466, 8 February 1999.
470 Pikis, *Sentencing in Cyprus*, at p 31.
471 *Pernell v The Republic* of Cyprus, Criminal Appeal 6148, 30 November 1998.
472 *Vasileiou v The Republic*, Criminal Appeal 6704, 26 November 1999.

CHAPTER 13

Law of Torts

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Introduction

Meaning of Torts

13-1 In any society, conflicts of interest are bound to lead to the infliction of losses which increase with the level of social interaction. However, it is only when an interest is recognised at law that it gives rise to a legal right, the violation of which constitutes a wrong.[1] An accurate definition regarding this area of the law is impossible, bearing in mind the various functions of the law, the different types of torts, and the interests which the law purports to protect. Most of the existing definitions are either too abstract or too cumbersome to be of any practical value.

Generally, the law of torts is concerned with those situations where the conduct of one party causes or threatens harm to the interests of other parties. Compensation is a major function of the law of torts and it is best performed only when compensation is rightly payable. The very concept of compensation entails the notion of harm or damage. Nevertheless, damages are sometimes awarded where no harm has been suffered, its absence being concealed by the statement that the plaintiff's rights were infringed.

Functions of the Law

13-2 The main function of the law of torts is the recognition and protection of interests. An interest may be defined as a claim or need or desire of a human being or a group of human beings which the individual or group seeks to satisfy and of which, therefore, the ordering of human relations in a civilised society must take account.

Harm or damage to those interests may take many forms, such as injury to the person, damage to physical property, damage to financial interests, and injury to reputation. In any given situation, it is of the essence that the plaintiff should be restored to the position he would have been in had the tort not been committed.[2]

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1 The word 'tort' comes through Old French from a Latin word meaning twisted and thus wrong.

2 Jones, *Textbook on Torts* (5th ed, 1996), at p 3.

However, proof of any kind of damage will not give rise to a claim in tort.

> There are necessarily some types of loss which the law cannot recognize as giving rise to legally redressable injury. Thus, some harm is too trivial to found an action, while the courts look on other harm as part of the give and take of life in a world in which interests must often compete and conflict.[3]

13-3 Theoretically, deterrence could be a function of the law of torts by the application of a standard of reasonable care. It is certainly true that at least some parts of the law dealing with premeditated conduct do help to serve this purpose as well as that of deciding whether or not redress for damage already suffered should be ordered.

Another function which the law of torts performs is that of allocating or redistributing loss and this is so in relation to actions where the plaintiff is seeking monetary compensation for the injury he has suffered. 'It is the business then of the law of torts to determine when the law will and when it will not grant redress for damage suffered or threatened and the rules of liability whereby it does this.'[4]

General Principles

In General

13-4 According to section 8 of the Civil Wrongs Law,[5] a person under the age of 18 years may sue and, subject to the provisions of section 9, be sued in respect of a civil wrong, provided that no action shall be brought against any such person in respect of any civil wrong when such wrong arises directly or indirectly out of any contract entered into by such person.

The Civil Wrongs Law also provides that no action may be brought against any person in respect of any civil wrong committed by a person under the age of 12.[6]

Under section 61 of the Civil Wrongs Law, compensation in respect of any civil wrong is recoverable only once. Liability in this area of the law may arise in any of several ways.

First, liability may be imposed as a legal consequence of a person's act, or omission if he is under a legal duty to act. Liability also may be imposed as the legal consequence of the act or omission of another person with whom he stands in some special relationship, such as that of master and servant, known as 'vicarious liability'.[7]

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3 *Allen v Flood* (1898) AC 1.

4 *Rogers*, *Winfield*, *and Jolowicz on Tort* (13th ed, 1989), at p 2.

5 Civil Wrongs Law, Cap 148.

6 Civil Wrongs Law, s 9.

7 Civil Wrongs Law, ss 13 and 14; *Brodie and Others v Theodourou and Others*, Civil Appeal 9497, 22 September 1998.

Second, liability may be based on fault. Sometimes, an intention to injure is required but more often negligence is sufficient. In other cases, which are called cases of strict liability, liability arises in varying degrees independent of fault.

Finally, whereas most torts require damage resulting to the plaintiff which is not too remote a consequence of the defendant's conduct, a few (such as trespass and libel) do not require proof of actual damage.

Elements of Liability

13-5 In General. There are certain common elements of tortious liability which may be reduced to three primary categories, namely:

- Act or omission on the part of the defendant or a person for whom he is vicariously liable;
- Mental element, whether of intention or negligence; and
- Damage (see text, below).

13-6 Act or Omission. With regard to the first element, 'it is the act of the defendant which entails liability on him for the harm happening to another whether the act be one of commission or omission'.[8] Positive acts trigger liability in tort more easily than omissions to act. The duty not to cause harm seems stronger than the duty to prevent it happening. The thief and the vandal are always liable; not so those who merely fail to deter the miscreants and forestall the harm.[9]

A person who makes a defamatory statement will not ordinarily be liable for a repetition of it, for that is not his act; but he may be liable if either he authorised the repetition or may be presumed to have intended it or there was a duty on the part of the party to whom the statement was first made to repeat it.

The law has rarely provided a remedy for damage arising from mere omission. However, an important distinction must be drawn. A failure to do something in the course of an activity will be regarded as a bad way of doing the act, not as an omission. Thus, a failure to stop at a 'halt' sign while driving a car is a bad way of performing the active operation of driving. An omission is the failure to do some act as a whole, for which there is generally no liability but, in some cases, the law has imposed a duty to prevent inertia.[10] Omission must be voluntary, ie, a person knows that he is under a duty to act or of the circumstances giving rise to the duty and abstains.

Another important element of the foundation of an action in tort is the relation between the original activity or omission and the consequences to the plaintiff. The

8 *Read v J Lyons and Co* (1945) KB 216.
9 Weir, *A Casebook on Tort* (8th ed, 1996), at p 8.
10 *Slater v Worthington's Stores* (1941) KB 1 488, (1941) 3 All ER 28.

issue of causation is of greater importance where damage is a necessary element in liability. However, a blameworthy person is not liable for all the damage he can be said to have 'caused'.

Causation is a complicated notion, especially when used in the way lawyers do, ie, to attribute responsibility. Plaintiffs have traditionally been required to persuade the judge that it was more likely than not that the particular defendant's conduct contributed to the occurrence of the harm in issue.[11] If a person manages to persuade the judge of that, even by a bare margin, then he should obtain full compensation. Causation is a question of fact.

In deciding this issue, the test applied by the courts is neatly illustrated in *Barnett v Chelsea and Kensington Hospital Management Committee*,[12] known as the 'but for' test. Once a causal connection between the defendant's conduct and the plaintiff's harm is established in this sense, it must be asked whether this connection, is sufficient for it to be fair to impose liability on the defendant. Apart from causation, the following point relating to the issue of 'remoteness of damage' must be considered:

- The damage must be of a kind recognised by law;
- There must be foreseeability of damage to the plaintiff;[13] and
- The damage sustained must be the same as the damage that was foreseen; otherwise, it is considered to be too remote.[14]

13-7 The principle that the defendant is not relieved of liability because the damage was more extensive than might have been foreseen still applies.[15]

13-8 *Mental Element*. The mental element has been customarily analysed in three categories, namely:

- Absolute or strict liability;
- Intention; and
- Negligence.

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11 Weir, *A Casebook on Tort* (8th ed, 1996), at p 12.

12 *Barnett v Chelsea and Kensington Hospital Management Committee* (1969) 1 QB 428.

13 Foreseeability is a question of fact. As Lord Reid has said, 'The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it'; *Koufos v C Czarnikow Ltd* (1969) 1 AC 350, at p 385.

14 The case of *The Wagon Mound* (1961) AC 388 is the governing authority. An increasingly favoured interpretation of that case is that the tortfeasor is liable for any damage which he can reasonably foresee, however unlikely it may be, unless it can be brushed aside as farfetched; Heuston and Buckley, *Salmond & Heuston on the Law of Torts* (21st ed, 1996), at p 517.

15 *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 88, (1969) 3 All ER 1681; on appeal, (1971) 1 QB 111n, (1970) 3 All ER 553n.

13-9 An act or omission is intentional with regard to its consequences in so far as the consequences are foreseen and desired. It is negligent with regard to consequences in so far as the consequences are not adverted to when a reasonable man would have adverted to them.

Where the consequences are adverted to but are not desired, the term 'recklessness' is to be preferred to 'gross negligence', which is sometimes used.

13-10 *Absolute or Strict Liability.* The common feature of torts classified as of strict liability is that there can be liability independent of intention or negligence on the part of the defendant.[16]

13-11 *Intention.* Intention as a jurisprudential term means the state of mind of a person who foresees and desires that certain consequences shall result from his conduct. Intention refers to the defendant's knowledge that the consequences of his conduct are bound to occur where the consequences are desired or, if not desired, are foreseen as a certain result. Recklessness is usually categorised with intention where it is used to signify the defendant's awareness of a risk that the consequences will result from his act.[17]

13-12 *Negligence.* Negligence in tortious liability is complicated by the existence of a separate tort of negligence. At this point, the concern is with negligence merely as a state of mind, ie, either a person's lack of attention to the consequences of his conduct or the deliberate taking of a risk without necessarily intending the consequences attendant on that risk.

Sources of the Law

13-13 The relevant legislation in Cyprus regarding this area of the law is the Civil Wrongs Law,[18] hereinafter 'the Law', which is divided as follows:

- Part I, Preliminary;
- Part II, Rights and Liabilities of Certain Persons;
- Part III, Civil Wrongs and Defences to Certain Actions Therefor;
- Part IV, Miscellaneous Provisions as to the Recovery of Remedies; and
- Part V, Miscellaneous.

13-14 Furthermore, section 29(1)(c) of the Courts of Justice Law of 1960[19] provides that the Common Law and the principles of equity apply in Cyprus,

16 *Rylands v Fletcher* (1868) LR 3 HL 330.
17 Jones, *Textbook on Torts* (5th ed, 1996), at p 9.
18 Civil Wrongs Law, Cap 148, as amended by Law 87 of 1973, Law 54 of 1978, Law 156 of 1985, Law 41 of 1989, Law 73 (I) of 1992, Law 101 (I) of 1996, Law 49 (I) of 1997, and Law 29 (I) of 2000.
19 Law 14 of 1960.

provided that they do not conflict with the Constitution of the Republic or with Laws passed by the House of Representatives.

In the case of *Peletico Plasters Ltd v George Mouskalli and Others*,[20] the Supreme Court, *inter alia*, stated that the Civil Wrongs Law, as amended by Law 156 of 1986with the Supreme Court's judgments, shows that no exhaustive codification of the law of torts exists since the Cypriot courts apply the English Common Law according to the provision of section 29(1)(c) of the Courts of Justice Law of 1960.

The Cypriot courts exercising civil jurisdiction have never attributed a binding effect to the various English judgments; these are only considered to be persuasive since the Cypriot courts over the years have developed their own precedents in this area of the law and, in reaching a decision, the courts consider the facts and circumstances of each case separately.

Classification of Torts

In General

13-15 Historically, torts are divided into two main classes, namely:

- Trespasses; and
- Actions 'on the case'.

13-16 A trespass is a direct and forcible injury and actions 'on the case' were actions for damage caused otherwise than directly and forcibly. Nevertheless, remedies now depend on the substance of the right and not on whether they can be fitted into a particular framework. The interests which the law of torts will protect include physical harm, both to the person and to property; a person's reputation, dignity, or liberty; the use and enjoyment of his land; and his financial interests. Whether a particular type of harm will entitle the victim to redress varies considerably with the manner in which it occurred. In broad terms, there is a spectrum of conduct ranging from intentional through careless to accidental.

Just as there are several types of contract, so there are numerous torts. However, whereas the types of contract simply reflect the different kinds of transaction people actually enter into, the different torts, rather like specific crimes, consist of different combinations of components, some factual, some legal.

Reading the Civil Wrongs Law, it is noticeable that no concrete classification of the offences exists. Despite this, it can be said that the various offences included in the law are classified as those concerning persons, eg, battery and and those concerning interference with interests in property, eg, trespass to land.

20 *Peletico Plasters Ltd v George Mouskalli and Others*, Civil Appeal 9356, 13 February 1998.

Negligence

In General

13-17 According to section 51(1) of the Law, negligence consists of causing damage by:

- Doing some act which in the circumstances a reasonable, prudent person[21] would not do or failing to do some act which in the circumstances such a person would do; or
- Failing to use such skill or take such care in the exercise of a profession, trade, or occupation as a reasonable, prudent person qualified to exercise such profession, trade, or occupation would in the circumstances use or take.[22]

13-18 Compensation may only be recovered[23] by any person to whom the person guilty of negligence owed a duty, in the circumstances, not to be negligent.

It was said, in *Sofocleous and Another v Georgiou and Another*,[24] that it has been stated in a number of cases that negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case and the categories of negligence are never closed.

The landmark decision of *Donoghue v Stevenson*[25] was referred to in *Sofocleous*, where it was stated that 'negligence is a fluid principle which must be applied to the most diverse conditions and problems of human life'.

Duty of Care

13-19 In negligence, the duty is not simply a duty to act carefully, but also not to inflict damage carelessly.

A general test by which the existence or non-existence of a duty of care is determined was formulated by Lord Atkin in *Donoghue v Stevenson*. The duty exists wherever one person is in a position to foresee that an act or omission of his may injure another, and by 'may' is generally meant not 'possibly might' but 'is reasonably likely to'.

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21 For the criterion of the reasonable, prudent person, see the recent case of *Ioannidou v Nicolaides*, Civil Appeal 10339, 18 February 2000.

22 *Municipality of Limassol v Tomazou*, Civil Appeal 9412, 7 June 1999.

23 *Spyrou v Hadjicharalambous* (1989) 1 CLR 298.

24 *Sofocleous and Another v Georgiou and Another* (1978) 1 CLR 154.

25 *Donoghue v Stevenson* (1932) AC 562; *Hedley Byrne & Co Ltd v Heller Partners* (1963) 2 All ER 575; *Anns v London Borough of Merton* (1977) 2 All ER 492; *L P Frangeskides Co Ltd v Ioanni Mama* (1989) 1(A) CLR 70; *The Attorney General v Pentaliotis Panapetrou Estates Ltd* and *Pentaliotis Panapetrou Estates Ltd v The Attorney General*, Civil Appeals 9067 and 9062, 23 October 1998.

Occupier's Liability

13-20 According to section 51(2) of the Act, a duty not to be negligent exists in the following cases:

- The occupier of any immovable property will owe a duty to the owner of such property;
- The occupier of any immovable property will owe such a duty to any persons and to the owner of any property who are lawfully in or on or so near to such immovable property as in the usual course of things to be affected by the negligence;[26]
- Any person, whether for reward or otherwise, exercising any profession, trade, or occupation or rendering any service to any other person will owe such a duty to any person on whom, on the property of whom, or to whom, such person is exercising his profession, trade, or occupation or rendering any service.

13-21 In Cyprus, the applicable law regarding the occupier's liability for immovable property is based on the Common Law and differs from the English law, which has been amended and codified in the Occupier's Liability Law of 1957.

According to the Common Law, the occupier's duty towards an invitee, a licensee, and a trespasser varies. In particular, invitees and licensees are the persons lawfully present on the land following the invitation or the permission expressed or implied of the occupier. The duty of care owed by the occupier towards such persons is to exercise reasonable care in order not to cause them any damage. The occupier's duty of care towards an invitee was discussed in *GIP Constructions v Neophytou and Another*,[27] and the court declared that:

> The current trend, as eloquently expressed by the House of Lords in *British Railway Board v Herrington* [1972] 1 All ER 79, is towards harmonizing the duties of an occupier at Common Law with contemporary precepts of social duty. The paramount consideration that permeates every notion of duty lies in the need to act with humanity towards fellow citizens. This salutary decision serves to indicate how law should keep pace with social ethos.[28]

26 *Cristiansen v Blue Med Hotels Ltd*, Civil Appeal 9756, 22 September 1998. The above is applicable provided that the owner and occupier of any immovable property will jointly owe such a duty in respect of the maintenance and repair of such immovable property to all persons who are not, and the owner of any property which is not, in or on such immovable property or in or on any immovable property adjoining and held together with such immovable property by the owner and occupier thereof, or either of them, and provided that the occupier of any immovable property will owe no such duty in respect of the condition of or of the maintenance or repair of the same to any bare licensee who is, or the property of whom is, in or on such immovable property save only to warn such bare licensee of any concealed danger or hidden peril in or on such immovable property of which such occupier know or must be presumed to have known.

27 *GIP Constructions v Neophytou and Another* (1983) 1 CLR 669.

28 *Polymetal Ltd and Another v Andreas Constantinou*, Civil Appeal 9321, 24 February 1998.

13-22 The occupier's duty towards a trespasser on his land is subjective depending on the occupier's knowledge, ability, and his financial resources. The occupier's duty to a trespasser is to take reasonable measures to enable the trespasser to avoid a danger.

Foreseeability

13-23 To decide whether an act or an omission is negligent, it must be asked whether a reasonable man would have foreseen that the act or omission in question would have caused damage.

The foresight test is now generally accepted as the appropriate criterion for determining whether a duty of care is owed. The yardstick used is the conduct of a reasonable man, who would have regulated his actions so as to avoid causing any harm.

Burden of Proof

13-24 According to section 52 of the Law, in any action brought in respect of any damage, the onus of proof shifts to the defendant when the damage was caused by any dangerous thing other than fire or an animal and the defendant was the owner of or the person in charge of such thing or the occupier of the property from which that thing escaped.

Under section 53 of the Law, in any action brought in respect of any damage, the onus of proof shifts to the defendant when the damage was caused by or in consequence of any fire and the defendant kindled such fire or was liable for the kindling of such fire or was the occupier of the immovable property or the owner of the movable on which such fire originated.

According to section 54 of the Law, the onus of proof shifts to the defendant when the damage was caused by a wild animal or by an animal other than a wild animal which the defendant knew or must be presumed to have known had a propensity to do the act causing the damage, and that the defendant was the owner of or the person in charge of such animal.

Res Ipsa Loquitur

13-25 Another instance where the onus of proof shifts to the defendant is provided for in section 55 of the Act, which embodies the well-known maxim of *res ipsa loquitur*, and it reads as follows:

> In any action brought in respect of any damage in which it is proved that the plaintiff had no knowledge or means of knowledge of the actual circumstances which caused the occurrence which led to the damage and that damage was caused by some property of which the defendant had full control, and it appears to the court that the happening of the occurrence causing the damage is more consistent with the defendant having failed to exercise reasonable care than with his having exercised such care.

13-26 In *Achilleas Morides v Chrystalla Ioannou*,[29] an action brought by the appellant against the respondent in respect of damage caused to his storeroom by the fall of the respondent's first floor, it was repeated that section 55 of the Act makes the *res ipsa loquitur* principle of the English Common Law part of the statutory law of Cyprus.

Furthermore, in *Costas Michael Skapoullaros v Nippon Yusen Kaisha and Others*,[30] A Loizou J, the then President of the Supreme Court, stated in his judgment:

> The plaintiff also rested his case on the doctrine of *res ipsa loquitur*. This doctrine was fully explained (see also *Pavli v Avraam*, Civil Appeal 10067, 24 February 2000) in *Emir Ahmet Djemal v Zim Israel Navigation Co Ltd and Another*, (1967) 1 CLR 227, at p 244, by reference to the English authorities and with which exposition of the law I fully agree. Indeed in the circumstances of this case this doctrine does apply if we are to ignore the explanation for its cause offered by the witnesses for the plaintiff. In such a case, then we are left with a situation where the cause of the accident is not known. Then, the *res* can only speak so as to throw the inference of fault on the defender in some cases where the act of the defender is unexplained.

13-27 A recent judgment of the Supreme Court of Cyprus referring to the doctrine of *res ipsa loquitur* is *Geopan Co Ltd and Others v Panagi*,[31] which cites the case of *Achilleas Morides*, where the following was stated:

> We are discussing issues relevant to the mechanisms of proving breach of the duty of care assuming that such a duty exists; otherwise the attempt is purposeless. The doctrine of *res ipsa loquitur* is of no significance at this preliminary stage.

Defences

13-28 Section 56 of the Act contains special defences to actions for negligence. It is a defence, notwithstanding that the defendant was negligent, to prove that:

- Some third person was negligent and that such third person's negligence was the decisive cause of the damage; or
- The damage was due to the happening of some extraordinary natural occurrence which a reasonable person would not have anticipated and the consequences of which could not have been avoided by the exercise of reasonable care.

29 *Achilleas Morides v Chrystalla Ioannou* (1973) 1 CLR 117.
30 *Costas Michael Skapoullaros v Nippon Yusen Kaisha and Others* (1979) 1 CLR 448.
31 *Geopan Co Ltd and Others v Panagi*, Civil Appeal 9594, 10 November 1999.

Contributory Negligence

13-29 Section 57 of the Law considers the apportionment of liability[32] in contributory negligence cases. Sub-section (1) reads as follows:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

13-30 In *Kyriakos Christodoulou v Gregori Gregoriou*,[33] Pikis, J, the President of the Supreme Court, said that the apportionment of liability is primarily the function of the trial court. The following two factors are decisive in relation to the issue of apportionment of liability, namely:

- Blameworthiness; and
- Causative potency.

13-31 Liability is distributed in the light of common sense and everyday experience. The omissions of both sides are not less appreciated but are appreciated according to the standard of the ordinary man.

Loss of Expectation of Life

13-32 According to section 57 A of the Law, as amended by Law 156 of 1985, in an action brought in respect of damages for loss of expectation of life, there exists no right of compensation. Nevertheless, the provision does not remove the right to be compensated for pain and suffering or loss of earnings.

The new section 58, which was substituted for the previous section 58 by Law 156 of 1985, concerns the right to compensation for the deceased's dependants in respect of any civil wrong that caused the death of the deceased.[34] The amount of compensation awarded by the court in respect of this right, known as bereavement, is CY £6,000.[35] In *Peletico Plasters Ltd v George Mouskallis and Others*,[36] it was decided that section 58 of the Law, as amended, does not codify exhaustively the types of compensation to be awarded by the court in respect of death caused by any civil wrong.

In section 58(3) of the Law, the word 'dependant' is defined and provision is made by the classes of persons entitled to recover. An action brought under this section must be filed within two years of the deceased's death.

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32 *Odysseos v Hadjilouca*, Civil Appeal 10485, 22 February 2000.

33 *Kyriakos Christodoulou v Gregori Gregoriou* (1989) 1 CLR 178, at p 183.

34 *Nicolaou v Michael*, Civil Appeal 10161, 4 November 1999.

35 Civil Wrongs Law, s 58(9); *Theodoulou v Kokkinofta*, Civil Appeal 10106, 13 May 1999.

36 *Peletico Plasters Ltd v George Mouskallis and Others*, Civil Appeal 9356, 13 February 1998.

In the recent judgment of the Supreme Court, *Kyriakou v Frantzides*,[37] it was held that an administrator obtains such a capacity on his appointment and has no right to file an action for compensation at any earlier time. An action brought by the administrator before his appointment is void and incompetent. In the same judgment, it was held that because the action was filed after the period of two years from the deceased's death, the court would reject the administrator's application for amendment of the writ of summons since the defendant would be deprived of the defence provided for in section 58(20).

Subject to the provisions of sub-sections (2) and (3) of section 33 of the Courts of Justice Law 14 of 1960 in conjunction with section 58A of the Law, as amended by Law 101 (I) of 1996, in any proceedings before any court for the payment of compensation for bodily injury or death on account of a civil wrong, the court, unless satisfied that special reasons to the contrary exist, must award interest at eight per cent *per annum* on the whole or part of the damages, for the whole or part of the period between the date on which the cause of action arose and the date of the filing of the writ of summons, as it may deem fit.[38]

Section 59 of the Law embodies the well-known doctrine of *volenti non fit injuria*,[39] ie, voluntary assumption of risk. Under this section, it is a defence to any action brought in respect of a civil wrong that the plaintiff knew and appreciated or must be taken to have known and appreciated the state of affairs causing the damage and voluntarily exposed himself or his property thereto. However, the defence is not applicable in the following circumstances:

- Any action brought in respect of any civil wrong, when such wrong was due to the non-performance of a duty imposed on the defendant by any enactment; and
- No child under the age of 12 years shall be deemed to be capable of knowing or appreciating such a state of affairs or voluntarily exposing himself or his property thereto.

13-33 In *Covotsos Textiles Ltd v Serghiou*,[40] reference was made to the English case of *Nettleship v Weston*,[41] where Lord Denning M R stated, *inter alia*:

> Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any

37 *Kyriakou v Frantzides*, Civil Appeal 10058, 10 December 1999.

38 *Petrou v Socratous and Another* (1988) 1 CLR 595; *Stefani v Lampi*, Civil Appeal 9966, 29 October 1999; *Peletico Plasters Ltd v George Mouskallis and Others*, Civil Appeal 9356, 13 February 1998..

39 For the distinction between *volenti non fit injuria* and contributory negligence, see *Clerk and Lindsell on Torts* (16th ed, 1997), at p 130; *Evangelou v Amathus Shipping Company and Others*, Civil Appeal 92177, 24 February 1997.

40 *Covotsos Textiles Ltd v Serghiou* (1981) 1 CLR 475, at p 490.

41 *Nettleship v Weston* (1971) 3 All ER 587 .

> claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him.

13-34 According to section 60 of the Law, it is a defence to any action brought in respect of a civil wrong that the act complained of was done under and in accordance with any enactment.

Furthermore, the Common Law defences of inevitable accident and contracting out of liability (waiver) are applied by the Cypriot courts.

The defence of inevitable accident can be successfully invoked by the defendant when, in doing an act which he may lawfully do, he causes damage without either negligence or intention on his part. In *Theodoulou v Pelopidha*,[42] it was held, *inter alia*, that, if the facts proved by the plaintiff raise a *prima facie* case of negligence against the defendant, the burden of proof is then cast on him to establish facts to negative his liability, and one way in which he can do this is by proving inevitable accident. In *Theodoulou v Pelopidha*, reference was made to *Merchant Prince*,[43] where the following was stated:

> The burden rests on the defendants to show inevitable accident. To sustain that, the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect and must, however, show with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident.

13-35 The defence of extinction of liability may be invoked when there exists such an agreement which may be construed before or after the infliction of the damage and may be covering personal or vicarious liability. However, such agreements are occasionally prohibited by various statutes or the Common Law. The Common Law prohibits such agreements when these are in conflict with the public policy.[44]

Assault

In General

13-36 Under section 26(1) of the Law, assault consists of intentionally applying force of any kind whether by way of striking, touching, moving, or otherwise to

42 *Theodoulou v Pelopidha* (1981) 1 CLR 230, at p 234.
43 *Merchant Prince* (1892) 179, at p 189.
44 *Rogers, Winfield, and Jolowicz on Tort* (13th ed, 1989), at p 712.

the person of another, directly or indirectly, without his consent, or with his consent if the consent is obtained by fraud, or attempting or threatening by any act or gesture to apply such force to the person of another if the person making the attempt or threat causes the other to believe on reasonable grounds that he has the present intention and ability to effect his purpose.

Under section 26(2) of the Law, the expression 'applying force' includes heat, light, electrical force, gas, odour, or any other substance or thing if applied in such a degree as to cause damage.

In *Georgios Toumba v Adamantios Loutsios*,[45] it was stated that assault is the intentional application of force of any kind to a person without his consent. The concept of intention involves consequences which a man not only foresees may result, but also desires that they should do so. Intention is thus contrasted with negligence, which brings about an event which a reasonable man would have foreseen and avoided. The necessity of proving intention in an action for trespass to the person was discussed in *Fowler v Lanning*[46] and *Letang v Cooper*.[47]

In *Fagan v Metropolitan Police Commissioner*,[48] it was held that 'for an assault to be committed, both the elements of *actus reus* and *mens rea* must be present at the same time. The *actus reus* is the action causing the effect on the victim's mind. The *mens rea* is the intention to cause that effect. It is not necessary that *mens rea* should be present at the inception of *the actus reus*; it can be superimposed on an existing act'.

Defences

13-37 Under section 27 of the Law, it is a defence in any action brought in respect of any assault if:

- The defendant acted to protect himself[49] or another person against an unlawful use of force by the plaintiff, and that in so acting he did no more than was reasonably necessary for that purpose, and the damage caused to the plaintiff by the assault was not disproportionate to the damage sought to be avoided;
- The defendant, being the occupier of any immovable property, or acting under the authority of such occupier, used a reasonable degree of force to prevent the plaintiff from unlawfully entering on such immovable property or to eject the plaintiff therefrom after he had unlawfully entered or remained thereupon;
- The defendant, being entitled to the possession of any movable property, used a reasonable degree of force to defend his possession thereof or, if the plaintiff has

45 *Georgios Toumba v Adamantios Loutsios* (1975) 1 JSC 115.

46 *Fowler v Lanning* (1959) 1 All ER 290.

47 *Letang v Cooper* (1964) 2 All ER 929.

48 *Fagan v Metropolitan Police Commissioner* (1968) 3 All ER 445.

49 *Halsbury's Laws of England*, (4th ed), vol 11, para 1180; *R v Julien* (1969) 2 All ER 856; *Palmer v R* (1971) 1 All ER 1077; *R v McInnes* (1971) 3 All ER 295.

wrongfully taken or detained such movable property from him, the defendant used a reasonable degree of force to retake possession thereof from the plaintiff;

- The defendant was acting in the execution of or lawfully assisting in the execution of any warrant, committal, order of commitment, or writ of attachment issued by any court or other lawful authority having jurisdiction thereto, provided that the act complained of was authorised by such warrant, committal, order of commitment, or writ of attachment and notwithstanding any defect in or in the issue of such warrant, committal, or order of commitment or writ of attachment;
- The plaintiff was of unsound mind or was suffering from infirmity of mind or body and the force used was, or appeared to be, reasonably necessary for his own protection or for that of other persons and was exercised in good faith and without malice;
- The plaintiff and defendant were both members of the Armed Forces and the defendant acted under the authority of and in accordance with any applicable law;
- The defendant was the parent, guardian, or schoolmaster of the plaintiff, or a person whose relationship to the plaintiff was similar to that of his parent, guardian, or schoolmaster, and administered to the plaintiff only such chastisement as was reasonably necessary for the purpose of correction; and
- The defendant acted in good faith for what he had reason to believe to be the benefit of the plaintiff but was unable before doing such act to obtain the consent of the plaintiff thereto, as the circumstances were such that it was impossible for the plaintiff to signify his consent or for some person in lawful charge of the plaintiff to consent on behalf of the plaintiff, and the defendant had reason to believe that it was for the benefit of the plaintiff that he should not delay in doing such act.

13-38 Section 28 of the Law provides that, notwithstanding anything contained in the Civil Wrongs Act, no principal or master will be liable for any assault committed by his agent or servant[50] against any other person unless he has expressly authorised or ratified such assault.

An assault is not merely a tort, but also a criminal offence. Civil remedies can be recovered by filing an action before a district court.

False Imprisonment

13-39 Under section 29 of the Law, false imprisonment consists of unlawfully and totally depriving any person of his liberty for any period of time by physical means or by a show of authority.

In *Symeon Georghiou v Attorney-General of the Republic*,[51] it was held that section 28 of the Civil Wrongs Law has no relevance to the liability of the State for the acts of its servants.

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50 *Yiangos Katsari and Others v Androulla Hambi* (1969) 1 CLR 298.
51 *Symeon Georghiou v Attorney-General of the Republic* (1982) 1 CLR 938.

Any parent, guardian, or schoolmaster may respectively temporarily deprive any child, ward or pupil of his liberty for such time as may be reasonably necessary for the purpose of correction.

Section 30 of the Civil Wrongs Law provides for special defences in any action brought in respect of false imprisonment, which are similar to the defences that can be raised in respect of an assault.

Nuisance

In General

13-40 Nuisances are divided into two main classes, ie, public nuisances and private nuisances. A public nuisance also is a crime indictable under Common Law, as opposed to private nuisance, which is solely a tort.

The focus of nuisance is primarily on the particular interest of the plaintiff affected, rather than on the nature of the conduct of the defendant responsible. Accordingly, once undue interference is proved, the task of the plaintiff is easier than in negligence. '. . . the great merit of framing the case in nuisance as distinct from negligence,' Denning LJ once observed, 'is that it greatly affects the burden of proof. It puts the legal burden where it ought to be, on the defendant, whereas in negligence it is on the plaintiff.'[52]

Public Nuisance

13-41 Public nuisance is an unlawful act or omission which materially affects the comfort and convenience of a class of subjects who come within the sphere of its operation. Public nuisance is not necessarily connected with an interference with the use of land, and therefore the plaintiff need not have an interest in land to be entitled to file an action.

Under section 45 of the Law, a public nuisance consists of some unlawful act or omission to discharge a legal duty where such act or omission endangers the life, health, property, or comfort of the public or obstructs the public in the exercise of some common right.

Furthermore, in section 45, a provision is made that no action shall be brought in respect of a public nuisance,[53] save by:

- The Attorney-General for an injunction; or
- Any person who has suffered special damage thereby.

52 Heuston and Buckley, *Salmond and Heuston on the Law of Torts* (21st ed, 1996).
53 *Alexandros Kina v Philippos A Protopapas and Another* (1977) 1 JSC 121, at p 124.

Private Nuisance

13-42 Private nuisance may be described as unlawful interference with a person's use or enjoyment of land, or some right over or in connection with it.[54]

Under section 46 of the Act, a private nuisance consists of any person so conducting himself or his business or so using any immovable property of which he is the owner or occupier as habitually to interfere with the reasonable use and enjoyment, having regard to the situation and nature thereof, of the immovable property of any other person. The provisions of this section shall not apply to any interference with daylight. No plaintiff may recover compensation in respect of any private nuisance unless he has suffered damage[55] thereby.

In *Androulla C Demetriou v Andreas Aristodemou and Another*,[56] it was stated that 'an essential ingredient of this civil wrong is that there should be habitual interference with the reasonable use and enjoyment of immovable property of any other person'.[57] The burden[58] was on the appellant to satisfy the court that there was such interference and, according to the findings of the trial court, she failed to do so.

On the facts of *Demetriou*, the noise created by the straightening workshop of the defendant was not excessive but was the ordinary noise of a straightening workshop which was audible if one approached the factory closely. Therefore, the noise complained of was not such as to interfere with the comfort and convenience of the appellant and the reasonable use and enjoyment of her property.

In *Chrysothemis Palantzi v Nicolas Agrotis*,[59] it was held that:

> It also is necessary to take into account the circumstances and character of the locality in which the complainant is living; The making or causing of such a noise as materially interferes with the comfort of a neighbour when judged by the standard to which I have just referred, constitutes an actionable nuisance and it is no answer to say that the best known means have been taken to reduce or prevent the noise complained of, or that the cause of the nuisance is the exercise of a business or trade in a reasonable and proper manner. Again, the question of the existence of a nuisance is one of degree and depends on the circumstances of the case.

13-43 Furthermore, it was stated that the law must strike a fair and reasonable balance between the right of the plaintiff, on the one hand, to the undisturbed enjoyment of his property, and the right of the defendant, on the other hand, to use his property for his own lawful enjoyment.

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54 *Read v Lyons & Co Ltd* (1945) KB 216, at p 236.

55 *Sakellarides and Another v Michaelides and Two Others* (1965) 1 CLR 367; *Symeonides and Another v Liasidou* (1969) 1 CLR 457.

56 *Androulla C Demetriou v Andreas Aristodemou and Another* (1988) 1 CLR 615, at p 617.

57 *Iosif Paphitis v Nicos Stavrou* (1970) 1 CLR 140.

58 *Andreas Nikita v Medcon Construction Limited*, Civil Appeal 8531, 29 May 1997.

59 *Chrysothemis Palantzi v Nicolas Agrotis* (1968) 1 CLR 448, at p 455.

According to section 47 of the Act, it is a defence to any action brought in respect of any private nuisance that the act complained of was done under the terms of any covenant or contract binding on the plaintiff which inures for the benefit of the defendant.

It is not a defence to any action brought in respect of a private nuisance that the nuisance existed before the plaintiff's occupation or ownership of the immovable property affected thereby.[60]

Rule in Rylands

13-44 Historically, the relationship between this rule and the law of nuisance was a close one. This was affirmed in *Cambridge Water Co. Ltd v Eastern Counties Leather PLC*.[61] This rule had its origins in nuisance, but it has developed in such a way that it is now quite distinct from it.

The rule in *Rylands v Fletcher*[62] may be formulated thus:

> The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must retain it at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

13-45 The rule is applied by the Cypriot courts and imposes tortious liability independent of any fault or negligence on the part of the wrongdoer. The conditions necessary for the Common Law rule to be applied were stated in *Christakis Christofi v Petrakis Exhaust Silencers Ltd and Others*.[63]

Defamation

In General

13-46 The tort of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification.

If, therefore, an entity has no legal personality, it cannot sue for defamation.[64] If the words are defamatory, they are presumed to be untrue unless the defendant proves otherwise; malice is generally not essential and most forms of defamation are actionable *per se*.

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60 Civil Wrongs Law, s 48.

61 *Cambridge Water Co Ltd v Eastern Counties Leather PLC* [1994] 2 AC 264.

62 *Rylands v Fletcher* (1868) LR 3 HL 330; *Cyprus Electricity Authority v Kanavva*, Civil Appeal 10407, 24 March 2000.

63 *Christakis Christofi v Petrakis Exhaust Silencers Ltd and Others* (1993) 1 CLR 543.

64 Heuston and Buckley, *Salmond & Heuston on the Law of Torts* (21st ed, 1996), at p 138.

Definition

13-47 In General. In Cyprus, defamation is governed by sections 17–24 of the Act. 'Defamation' consists[65] of the publication by any person by means of print, writing, painting, effigy, gestures, spoken words or other sounds, or by any other means whatsoever, including broadcasting by wireless telegraphy, of any matter which:

> (a) imputes to any other person a crime; or
>
> (b) imputes to any other person misconduct in any public office; or
>
> (c) naturally tends to injure or prejudice the reputation of any other person in the way of his profession, trade, business, calling or office; or
>
> (d) is likely to expose any other person to general hatred, contempt or ridicule; or
>
> (e) is likely to cause any other person to be shunned or avoided by other persons.

13-48 'Crime' means any offence or other act punishable under any enactment in force in the Republic and any act wheresoever committed which, if committed in Cyprus, would be punishable therein.

According to section 17(2) of the Law, defamation is committed by a person who utters a defamatory statement even though he:

- Makes it by way of repetition or hearsay;
- Gives at the time or afterwards the authority on which he makes the statement;
- Subject to the provisions of sections 19, 20, and 21, believes the statement to be true;
- Did not intend in fact to make or publish it of and concerning the plaintiff; or
- Subject to the provision of section 22, was unaware of the existence of the plaintiff.

13-49 The court takes into account the above instances when awarding compensation, in particular lesser compensation.

The issue of whether a publication is considered to be defamatory or not rests always on the court to decide. The court will determine the issue as a real fact by giving the common and natural meaning of the words or phrases uttered in the text. If they are adjudged to be defamatory to the plaintiff, the fact that a reader would accept the publication as being true or not will be immaterial. Any evidence given by various individuals on the interpretation or general meaning of the context will not be essential to the drawing of the conclusion that a document is indeed defamatory or not.[66]

Liability for defamation is divided into two categories, ie, libel and slander.

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65 Civil Wrongs Law, s 17.

66 *Tassos Papadopoulos v Kyrix Publishing Co Ltd* (1963) 2 CLR 290; *Dimosiografiki HLS Co Ltd and Others v Philippou*, Civil Appeal 9855, 18 May 1998.

13-50 Libel and Slander. Libel consists of a defamatory statement or representation in permanent form; if a defamatory meaning is conveyed by spoken words or gestures, it is slander. However, it is not always easy to determine whether in a particular case the proper cause of action is libel or slander.

Although libel and slander are for the most part governed by the same principles, there are two important differences, namely:

- Libel is not only an actionable tort, but also a criminal offence, whereas slander is a civil injury only; and
- Libel is, in all cases, actionable *per se*, but slander is, save in special cases, actionable only on proof of actual damage.[67]

13-51 An action for defamation[68] by gestures, spoken words, or other sounds (slander), other than broadcasting by wireless telegraphy, will not lie without proof of special damage, except where the gestures, spoken words, or other sounds:

- Impute a crime for which the plaintiff may be made to suffer corporal punishment or imprisonment in the first instance;
- Are calculated to injure or prejudice the reputation of the plaintiff in the way of his profession, trade, business, calling, or office;
- Impute to the plaintiff a contagious or infectious disease; or
- Impute adultery or unchastity to a woman or a girl.

13-52 Innuendo. According to section 17(4) of the Law, it is not necessary that a defamatory meaning should be directly or completely expressed; it suffices if such meaning, and its application to the person alleged to be defamed, can be understood either from the alleged defamatory statement itself or from any extrinsic circumstances, or partly by one and partly by the other means.

In *Alithia Ekdotiki Eteria Ltd and Others v Charalambou Leonida*,[69] where *Grubb v Bristol United Press Ltd*[70] was followed, it was stated:

> In an action for defamation, an innuendo properly so called, which is an allegation that words were used in a defamatory sense other than their ordinary meaning, and which provides a separate cause of action, must be supported by extrinsic facts or matters and cannot be founded only on interpretation because if the words bear the interpretation imputed to them they are defamatory in their natural and ordinary meaning; unless therefore, an innuendo has the support of extrinsic fact [which should be pleaded in accordance with RSC, Ord 19, r 6(2)] it should not go to the jury but should be struck out in the interlocutory stages of the action.

67 Heuston and Buckley, *Salmond & Heuston on the Law of Torts* (21st ed, 1996), at p 139.
68 Civil Wrongs Law, s 17(3).
69 *Alithia Ekdotiki Eteria Ltd and Others v Charalambou Leonida*, Civil Appeal 9435, 19 May 1997.
70 *Grubb v Bristol United Press Ltd* (1962) 2 All ER 380.

13-53 In *Ekdotiki Etairia Themelio Ltd and Others v Taki Kazolides*,[71] the Supreme Court affirmed the findings of the trial court that the publication against the respondent was not an innuendo, where it would have to be supported by extrinsic facts or matters; therefore, the publication had to be interpreted on its ordinary and natural meaning.

What is meant by 'ordinary and natural meaning' was explained in *Lewis v Daily Telegraph Ltd*[72] as follows:

> There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs.

Publication

13-54 What amounts to 'publication' is defined[73] as follows:

> A person publishes defamatory matter if he causes the print, writing, painting, effigy, gestures, spoken words, or other sounds or other means by which the defamatory matter is conveyed to be dealt with either by exhibition, reading, recitation, description, delivery, communication, distribution, demonstration, expression utterance, or otherwise, so that the defamatory meaning thereof becomes known or is likely to become known to any person other than —
>
> a) the person defamed thereby; or
>
> b) the husband or wife of the person publishing the defamatory statement so long as the marriage is subsisting.
>
> For the purposes of this section, communication by open letter or postcard, whether sent to the person defamed or to any other person, constitutes publication.

Defences

13-55 Section 19 of the Law sets out the defences available to a defendant in an action for defamation, which are that:

- The matter of which complaint was made was true;[74]

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71 *Ekdotiki Etairia Themelio Ltd and Others v Taki Kazolides* (1991) 1 CLR 607.
72 *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 154.
73 Civil Wrongs Law, s 18.
74 This is applicable provided that, where the defamatory matter contains two or more distinct charges against the plaintiff, a defence under this paragraph shall not fail by reason only that the truth of every charge is not proved, if the defamatory matter not proved to be true does not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

- The matter of which complaint was made was a fair comment on some matter of public interest;[75]
- The publication of the defamatory matter was privileged under sections 20 and 21 of the Act; and
- The defamation was unintentional under section 22 of the Law.

Privilege

13-56 Section 20 of the Act provides that the publication of defamatory matter is absolutely privileged if:

- The matter is published by the President of the Republic, the Council of Ministers, or any legislative body which may hereafter be established, in any official document or proceeding;
- The matter is published in the Council of Ministers or any legislative body which may hereafter be established, and is so published by the President of the Republic or by any member of such Council or body;
- The matter is published by order of the Council of Ministers;
- The matter is published concerning a person subject to military, naval, or police discipline for the time being, and relates to his conduct as a person subject to such discipline, and is published by some person having authority over him in respect of such conduct and to some person having authority over him in respect of such conduct;
- The matter is published in the course of any judicial proceedings by a person taking part therein as a judge or advocate or witness or party thereto;
- The matter is, in fact, a fair report of anything said, done, or published in the Council of Ministers or any legislative body which may thereafter be established and which is published by order or with the authority of such Council or body;
- The matter is, in fact, a fair, accurate, and contemporaneous report of anything said, done, or shown in any judicial proceedings before any court or tribunal which has not prohibited such publication;
- The matter is a copy or reproduction, or in fact a fair abstract, of any matter which has been previously published, and the previous publication of which was or would have been privileged under the provisions of this section;
- The person publishing the matter is legally bound to publish it; or

75 This is applicable provided that, where the defamatory matter consists partly of allegations of fact and partly of expression of opinion, a defence of fair comment will not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is a fair comment having regard to such of the facts alleged or referred to in the defamatory matter complained of as are proved and provided further that a defence under this paragraph will not succeed if the plaintiff proves that the publication was not made in good faith within the meaning of section 21(2) of the Act; *Stefanou v Hjiefthymiou* (1976) 1 CLR 225; *Papastratis v Hadjiefthymiou and Others* (1984) 1 CLR 905, *Eteria Elliniki Ekdosis Glafx Ltd v Vaso Loizia* (1984) 1 CLR 729.

- The matter is published in any military, naval, or police report made for the purposes of the defence or security of the Republic.[76]

13-57 According to section 21(1) of the Law, where any publication or defamatory matter is absolutely privileged under the provisions of section 20(1) of the Law, it is immaterial whether the matter was true or false and whether it was or was not known by the defendant to be false and whether it was or was not published in good faith.

In *Synomospondia Ergaton Kyprou v Cyprus Asbestos Mines Ltd*,[77] where reference was made to section 21 of the Civil Wrongs Law, the Common Law defence of qualified privileged is substantially reproduced.

The publication of defamatory matter is privileged on condition that it is published in good faith[78] (*bona fide*) if the relationship between the parties by and to whom the publication is made is such that the person publishing the matter is under a legal, moral, or social duty to publish it to the person to whom the publication is made and the last-mentioned person has a corresponding interest in receiving it or the person publishing the matter has a legitimate personal interest to be protected and the person to whom the publication is made is under a corresponding legal, moral, or social duty to protect that interest.[79]

In *Constantinides and Another v Vassiliou*,[80] it was emphasised that the very nature of the defence dependent on the relationship between the maker of a statement and the recipient of it and the context in which it is made requires that it should be specially pleaded.

Furthermore, it was stated that the defence is only available if there is a legal or moral duty on the part of the maker to make the statement and a corresponding interest on the part of a recipient to receive it.

Privilege is applicable if the matter is a censure passed by a person on the conduct of another person in any matter in respect of which he has authority, by contract or otherwise, over the other person, or on the character of the other person so far as it appears in such conduct.

Privilege is applicable if the matter is a complaint or accusation made by a person against another person in respect of his conduct in any matter, or in respect of his character so far as it appears in such conduct, to any person having authority, by contract or otherwise, over that other person in respect of such conduct or

76 This is applicable provided that nothing in this section shall authorise the publication of any seditious, blasphemous, or indecent mater.

77 *Synomospondia Ergaton Kyprou v Cyprus Asbestos Mines Ltd* (1965) 1 CLR 222.

78 Civil Wrongs Law, s 21(1).

79 This is applicable provided that the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion.

80 *Constantinides and Another v Vassiliou* (1986) 1 CLR 75, at p 78.

matter, or having authority by law to inquire into or receive complaints respecting such conduct or matter.

Privilege will apply if the matter is published for the protection of the rights or interests of the person who publishes it, or of the person to whom it is published, or of some person in whom the person to whom it is published is interested.[81]

Finally, privilege is applicable if the matter published is a fair and accurate report of anything said, done, or published in any legislative body hereafter to be established.

According to section 21(2) of the Law, the publication of defamatory matter shall not be deemed to have been made in good faith by a person, within the meaning of section 21(1), if it is made to appear that either:

- The matter was untrue, and that he did not believe it to be true;
- The matter was untrue, and that he published it without having taken reasonable care to ascertain whether it was true or false; or
- In publishing the matter, he acted with intent to injure the person defamed in a substantially greater degree or substantially otherwise than was reasonably necessary for the interest of the public or for the protection of the private right or interest in respect of which he claims to be privileged.

13-58 In any action brought in respect of the publication of any defamatory matter, if such publication might be privileged under the provisions of section 21(1) of the Act and the defence of privilege is raised, the onus of proving that such publication was not made in good faith shall be on the plaintiff.[82]

Offer of Amends

13-59 According to section 22 of the Law, a person who has published any matter alleged to be defamatory of another person may, if he claims that the matter was published by him innocently in relation to that other person, make an offer of amends under this section and, in any such case:

- If the offer is accepted by the party aggrieved and is duly performed, no proceedings for defamation shall be taken or continued by that party against the person making the offer in respect of the publication in question (but without prejudice to any cause of action against any other person jointly responsible for that publication); and
- If the offer is not accepted by the party aggrieved, then, except as otherwise provided by this section, it will be a defence, in any proceedings by him for defamation against the person making the offer in respect of the publication in question, to prove that the matter complained of was published by the defendant

81 *Kyriakides v Aristidou*, Civil Appeal 9565, 22 March 2000.
82 Civil Wrongs Law, s 21(3).

innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that it was or might be defamatory of the plaintiff and has not been withdrawn.

13-60 An offer of amends under this section must be expressed to be made for the purposes of this section, and it must be accompanied by an affidavit specifying the fact relied on by the person making it to show that the matter in question was published by him innocently in relation to the party aggrieved; and, for the purposes of a defence under section 22(1)(b) of the Law no evidence, other than evidence of facts specified in the affidavit, will be admissible on behalf of that person to prove that the matter was so published. An offer of amends under this section will be understood to mean an offer:

- In any case, to publish or join in the publication of a suitable correction of the matter complained of, and a sufficient apology to the party aggrieved in respect of that matter; and
- Where copies of a document or record containing the said matter have been distributed by or with the knowledge of the person making the offer, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the matter is alleged to be defamatory of the party aggrieved.

13-61 Where an offer of amends under this section is accepted by the party aggrieved:

- Any question as to the steps to be taken in fulfilment of the offer as so accepted shall, in default of agreement between the parties, be referred to and determined by the court, whose decision thereon will be final; and
- The power of the court to make orders as to costs in proceedings by the party aggrieved against the person making the offer in respect of the publication in question, or in proceedings in respect of the offer under the paragraph above, will include power to order the payment by the person making the offer to the party aggrieved of costs on an indemnity basis and any expenses reasonably incurred or to be incurred by that party in consequence of the publication in question.

13-62 If no such proceedings as aforesaid are taken, the court may, on application made by the party aggrieved, make any such order for the payment of such costs and expenses as aforesaid as could be made in such proceedings.

For the purposes of this section, matter will be treated as published by one person (in this subsection referred to as 'the publisher') innocently in relation to another person if and only if the following conditions are satisfied:

- The publisher did not intend to publish it and concerning that other person, and did not know of circumstances by virtue of which it might be understood to refer to him; or
- The matter was not defamatory on the face of it, and the publisher did not know of circumstances by virtue of which it might be understood to be defamatory to that other person and, in either case, the publisher exercised all reasonable care

in relation to the publication; and any reference in this subsection to the publisher will be construed as including a reference to any servant or agent of his who was concerned with the contents of the publication.[83]

13-63 Section 22(1)(b) of the Act will not apply in relation to the publication by any person of matter of which he is not the author unless he proves that the matter was written by the author without malice.

Mitigation

13-64 According to section 23 of the Act, the defendant in any action for defamation may, after reasonable notice to the plaintiff of his intention so to do, prove in mitigation of any compensation that may be awarded that:

- He made or offered an apology to the plaintiff before the commencement of the action or as soon afterwards as he had an opportunity, if the action was commenced before he had an opportunity of so doing;
- The defamatory matter was contained in a newspaper, a subsisting permit to publish which has been issued under the provisions of the Press Law, and that the plaintiff has already recovered, or brought an action for, compensation, or received or agreed to receive some recompense in respect of defamatory matter to the same purpose or effect as the defamatory matter in respect of the publication of which such action has been brought;
- Prior to the publication of the defamatory matter, the plaintiff was of generally bad reputation in connection with the particular trait of his character which is assailed by the defamation; and
- The defendant received provocation from the plaintiff, and the court may, having regard to the circumstances of the case, take all or any of such matters into consideration in assessing compensation.

13-65 In any action brought against the proprietor of any newspaper,[84] a subsisting permit to publish which has been issued to him under the provisions of the Press Law, in respect of any defamatory matter contained in such newspaper, the proprietor of such newspaper may, if he pays into court a sum of money which in the opinion of the court is sufficient amends, and pleads no other defence, prove by way of defence that:

- The defamatory matter was inserted without actual malice;
- There was no gross lack of reasonable care for which he was liable in connection with the insertion of such defamatory matter; and
- Before the commencement of the action or so soon afterwards as he had an opportunity, if the action was begun before he had an opportunity of so doing,

83 *Constantinides v Coureas* (1987) 1 CLR 139.
84 *Alithia Ekdotiki Eteria Ltd and Another v Charalambou Leonida*, Civil Appeal 9435, 19 May 1997.

he inserted in such newspaper a full apology or, if the newspaper is published at intervals exceeding one week, he offered to publish the apology in any newspaper selected by the plaintiff.

Injurious Falsehood

13-66 According to section 25 of the Law, injurious falsehood consists of the publication maliciously by any person of a false statement, whether oral or otherwise, concerning:

- The profession, trade,[85] business, calling, or office;
- The goods; or
- The title to property of any other person provided that, subject to section 25(2) of the Law, no person may recover compensation in respect thereof unless he has suffered special damage.[86]

13-67 In an action under section 25(1) of the Act, it will not be necessary to allege or prove special damage if:

- The words on which the action is founded are calculated to cause pecuniary loss to the plaintiff and are published in writing or other permanent form; or
- The words are calculated to cause pecuniary loss to the plaintiff in respect of any office, profession, calling, trade, or business held or carried on by him at the time of the publication.

13-68 For the purposes of this section, 'publication' has the same meaning as it has in section 18 of the Law in relation to defamatory matter.

It is well established that the main element for compensation in defamation actions is the plaintiff's reputation. However, the way in which damages are assessed in this area of the law is a difficult and complex issue for the court since there exists no realistic criterion which would be the basis for an objective assessment of damages.

According to Lord Atkin in *Ley v Hamilton*,[87] 'it is impossible to track the scandal, to know what quarters the poison may reach. It is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation'.

However, certain factors have prevailed which are taken into account by the courts when damages are calculated, ie, the nature and the contents of the publication, the plaintiff's position in society, eg, politician, the extent of the injury to his reputation, and the general conduct of the defence, eg, failure to apologise or bullying tactics by an advocate.

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85 *Agathangelou v S Mousoulides & Sons Ltd* (1980) 1 CLR 272.
86 *Saba & Co (TMP) v TMP Agents* (1984) 1 CLR 426.
87 *Ley v Hamilton* (1935) (153 LT) P 53, at p 386.

Now, the current trend followed by the Cypriot courts is to increase the amount of damages awarded in defamation actions to the conventional levels of award in personal injury cases.[88]

Trespass to Land

13-69 According to section 43 of the Law, trespass to immovable property consists of any unlawful entry on, or any unlawful damage to or interference with, any such property by any person. The meaning[89] given to 'immovable property' is identical to the meaning attributed by the Immovable Property Law.

The civil wrong contained in section 43 of the Law is actionable *per se* and, therefore, no actual damage must be proved, like the Common Law[90] position. Therefore, in an action where the plaintiff fails to prove actual damage, he is only entitled to nominal damages.[91]

Trespass is actionable at the suit of the person in possession of land in spite of the fact that he is neither the owner; nor does he derive title from the owner.[92] In *Adamou v Christofi*,[93] it was stated that the slightest amount of possession would be sufficient to enable the plaintiff to bring an action against the defendant.

In that case, it also was held that, in a case of trespass, the defendant must plead and prove that he had a right to possession of the land at the time of the alleged trespass, or that he acted under the authority of some person having such a right.[94]

Trespass does not depend on a balancing of the parties' rights, as occurs in nuisance. The fact that the trespass is trifling and causes no harm to the plaintiff is irrelevant to the defendant's liability and, moreover, the plaintiff will be entitled to an injunction to restrain a continuing trivial trespass, even if the consequences for the defendant are very serious.[95]

Section 43(2) of the Law provides for the defences available in actions for trespass, and it reads as follows:

> Where the acts complained of are permitted by local custom, such custom if established will be a defence but in any action brought in respect of any trespass to immovable property the onus of showing that the act of which complaint is made was not unlawful will be on the defendant.

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88 *Enomenoi Dimosiografi Ltd v Stavros Nathanael* (1993) 1 CLR 893; *Alithia Ekdotiki Eteria Ltd and Others v Charalambou Leonida*, Civil Appeal 9435, 19 May 1997.

89 *Piripitsis v Nicosia Municipality*, Civil Appeal 9566, 18 April 1997; *Chrysanthou v Pagratiou*, Civil Appeal 9766, 10 April 1998.

90 *Adrian Holdings Ltd v Republic of Cyprus*, Civil Appeal 9486, 14 October 1998; *Papacokkinou v Theodosiou* (1991) 1 CLR 379, at p 384.

91 *Kakkoullou v Kakoulli* (1985) 1 CLR 355.

92 *The Attorney General v Bahchegioglou and Others*, Civil Appeal 9562, 27 February 1998.

93 *Adamou v Christofi* (1974) 1 CLR 100.

94 *Panayi v Zouvani* (1987) 1 CLR 58.

95 Jones, *Textbook on Torts* (5th ed, 1996), at p 393.

Passing Off

13-70 The gist of passing off is that the goods are in effect telling a falsehood about themselves, are saying something about themselves, which is calculated to mislead. The law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders.[96]

Section 35 of the Law introduced into the Cypriot legal system the Common Law tort of passing off, which is defined as follows:

> Any person who by imitating the name, description, sign, label or otherwise causes or attempt to cause any goods to be mistaken for the goods of another person, so as to be likely to lead an ordinary purchaser to believe that he is purchasing the goods of such other person, shall commit a civil wrong against such other person; Provided that no person shall commit a civil wrong by reason only that he uses his own name in connection with the sale of any goods.[97]

13-71 In *Universal Advertising and Publishing Agency and Others v Vouros*,[98] it was established that, despite the narrow definition contained in section 35, a trader must not only refrain from passing off his goods as those of another but also from making any such representation in respect of his business. The principle underlining the decision is that liability for passing off may be extended to other situations recognised at Common Law.

The foundation of the passing off action lies in the injury to the reputation and goodwill of the plaintiff's business. The essential ingredients of the tort of passing off were stated in *Erven Warnink v J Townend & Sons*[99] as follows:

> Five characteristics must be present to create a valid cause of action for passing off:
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> (1) a misrepresentation,
>
> (2) made by a trader in the course of trade,
>
> (3) to prospective customers of his or ultimate consumers of goods or services supplied by him,
>
> (4) which is calculated to injure the business or goodwill of another trader, and
>
> (5) which causes actual damage to the business or goodwill of the trader by whom the action is brought or will probably do so.

96 Heuston and Buckley, *Salmond & Heuston on the Law of Torts* (21st ed, 1996), at p 382.
97 *Nicos M Markantonis v Demetrios A Nikolaides* (1974) 1 CLR 178.
98 *Universal Advertising and Publishing Agency and Others v Vouros*, 19 CLR 87.
99 *Erven Warnink v J Townend & Sons* (1979) 2 All ER 927, at p 932.

13-72 Similarly, in *Adidas Sportschuhfabriken Adi Dassler KG v The Jonitexo Ltd*,[100] it was held that, for the plaintiff to succeed in a passing off action, he must prove:

- A right to the use of the mark to the exclusion of the defendant established by reference to the association of the mark with the products of the plaintiff;
- Imitation or copying of the mark of the plaintiff by the defendant in the process of manufacture or sale of the products;
- Likelihood of confusion on the part of the ordinary purchaser arising from the imitation of the mark; and
- Damage resulting therefrom.

13-73 In the same case, it was stated[101] that no finding of the sustainment of specific damage is necessary to uphold a passing off action.

In *The Timberland Co of USA v Evans & Sons Ltd and Others*,[102] it was stated that, in actions for infringement of copyright, passing off, and breach of confidence, damages are not an adequate remedy since there are difficulties in both ascertaining and quantifying such damage as injury to the plaintiff's property, business, and goodwill.

In *General Biscuit Co GB Co v Geo M Hadjikyriakos Ltd*,[103] it was stated that the court must be satisfied that the defendant's conduct is calculated to pass off other goods as those of the plaintiff or, at least, to produce such confusion[104] in the minds of probable customers or purchasers or other persons with whom the plaintiff has business relations as would be likely to lead to other goods being bought and sold for his.[105] The onus of proving deception is on the plaintiff.

Fraud

13-74 According to section 36 of the Law, fraud consists of a false representation of fact, made with the knowledge that it is false or without belief in its truth or recklessly, careless whether it be true or false, with intent that it will be acted on by the person deceived.

No action may be brought in respect of any such representation unless it was intended to and did deceive the plaintiff and he has acted on it and has thereby suffered damage.

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100 *Adidas Sportshuhfabriken Adi Dassler KG v The Jonitexo Ltd* (1987) 1 CLR 383.

101 *Adidas Sportshuhfabriken Adi Dassler KG v The Jonitexo Ltd* (1987) 1 CLR 383, at p 395.

102 *The Timberland Co of USA v Evans & Sons Ltd and Others*, Civil Appeal 9776, 29 May 1998.

103 *General Biscuit Co GB Co v Geo M Hadjikyriakos Ltd* (1980) 1 CLR 80, at p 85.

104 *Adidas Sportshuhfabriken Adi Dassler KG v The Jonitexo Ltd* (1987) 1 CLR 383, at p 394.

105 *Mylonas Bros AE and Others v Michalakis Avraamides & Co Ltd*, Civil Appeal 9824, 21 September 1998.

No action may be brought in respect of any such representation as to the character, conduct, credit, ability, trade, or dealings of any person to obtain him credit, money, or goods unless such representation is in writing and signed by the defendant himself.

In *Nicolas Pyrgas v Theodora Charalambous Stavridou*,[106] a reference was made to section 36 of the Law as one species of fraud, fraudulent misrepresentation, which also is known as 'actual fraud'.

Damages

In General

13-75 An action in tort is usually a claim for pecuniary compensation in respect of damage suffered as the result of a legally protected interest. Furthermore, the task of the courts is, first, to decide which interests should receive legal protection and, second, to hold the balance between interests which have received protection.[107]

In *Paraskevaides* (*Overseas*) *Ltd v Christofis*,[108] it was stated that the object of an award of damages is to do justice to the loss and damage of the injured party without imposing an inordinate burden on the tortfeasor. In other words, the award must be socially acceptable. Consequently, the social ethos at the material time is invariably a consideration relevant to the task, particularly with regard to non-pecuniary loss. Pecuniary loss, being more amenable to mathematical calculation, is less dependent on social norms. The aim of the exercise is to arrive at a figure at the end of the process that is fair and reasonable in the circumstances of the case.

> Any person who shall suffer any injury or damage by reason of any civil wrong committed in the Republic will be entitled to recover from the person committing or liable for such civil wrong the remedies which the court has power to grant.[109]

The courts, in the performance of their duty, should give fair and reasonable compensation to the plaintiff to put him in the same position, so far as money can do it, as he would have been in had he not sustained those injuries.[110] The general principle of assessment is *restitutio in integrum*.

In economic torts, the basic question is what has the plaintiff lost, not what the defendant can pay.[111]

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106 *Nicolas Pyrgas v Theodora Charalambous Stavridou* (1969) 1 CLR 332, at p 340.
107 Heuston and Buckley, *Salmond & Heuston on the Law of Torts* (21st ed, 1996), at p 13.
108 *Paraskevaides* (*Overseas*) *Ltd v Christofis* (1982) 1 CLR 789, at p 793.
109 Civil Wrongs Law, s 3; *Spyrou v Hadjicharalambous* (1989) 1 CLR 298, at p 304.
110 *Poullou v Constantinou* (1973) 1 CLR 177; *Paraskevaides* (*Overseas*) *Ltd v Christofis* (1982) 1 CLR 789.
111 *General Tyre and Rubber Co Ltd v Firestone Tyre Co Ltd* (1975) 1 WLR 819, at p 824.

Nominal Damages

13-76 Nominal damages are a small sum of money, awarded by way of recognition of the existence of some legal right vested in the plaintiff and violated by the defendant. Nominal damages are recoverable only in torts which are actionable *per se*.

In *Antoniades v Stavrou*,[112] where the appellant proved the existence of the wrongdoing but failed to prove the exact damage he had suffered, the court awarded nominal damages instead of rejecting the action.[113]

Special Damages

13-77 Special damages signify the element of particular harm which the plaintiff must prove.[114]

In *Emmanuel and Another v Nicolaou and Another*,[115] it was stated that special damages are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and therefore must be claimed specially and proved strictly.

General Damages

13-78 General damages are for general damage. It is the kind of damage which the law presumes to follow from the wrong complained of and which therefore need not be expressly set out in the plaintiff's pleadings. General damages are awarded for physical injury, pain and suffering, loss of amenity of life, and the loss of future earnings.

In *Kyriakos Mavropetri v Georgiou Louca*,[116] it was stated that the case law reveals a steady increase in the level of general damages awarded, reflecting a greater sensitivity towards human pain, worry about disability, and distress due to exclusion from daily human activities.[117]

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112 *Antoniades v Stavrou*, Civil Appeal 9336, 29 May 1998.

113 *Ttantis v Hadjimichael and Another* (1982) 1 CLR 301; *Papakokkinou and Others v Theodosiou* (1991) 1 CLR 379.

114 *Heracleous v Pitrou* (1994) 1 CLR 239; *Kyriakides v Frangoudis & Stefanou Ltd and Others*, Civil Appeal 9811, 26 February 1999; *Loizou v Mourtzis*, Civil Appeal 10085, 21 June 1999.

115 *Emmanuel and Another v Nicolaou and Another* (1977) 1 CLR 15, at p 34.

116 *Kyriakos Mavropetri v Georgiou Louca* (1995) 1 CLR 66, at p 74.

117 *Paraskevaides Overseas Ltd v Christofi* (1982) 1 CLR 789; *Polycarpou v Adamou* (1998) 1 CLR 727; *Finikarides and Another v Georgiou and Others* (1991) 1 CLR 475; *Panayi v Theodorou* (1992) 1 (B) CLR 1303; *Constantinou v Ioannou* (1993) 1 CLR 669.

Exemplary Damages

13-79 Exemplary damages are not compensatory. They are awarded to punish the defendant and to deter him from similar behaviour in the future. In relation to the law governing the issue of exemplary damages, the English case of *Rookes v Barnard* is considered to be quite remarkable. In that case, the court set out the requirements[118] that must be met to award such compensation.

However, in *Papakokkinou and Others v Kanther*,[119] the Supreme Court of Cyprus, without ruling on the issue whether the principles of *Rookes v Barnard* apply in Cyprus, preferred the wider principle permitting the award of exemplary damages where the defendant's conduct was so mischievous that such punishment was necessary. Mischievous conduct is the kind which demonstrates intense arrogance, rudeness, or an immoral motive and especially where it tends to humiliate the victim of the tortious act.

Exemplary damages are punitive in nature; they are intended to teach the defendant that 'tort does not pay', and they are awarded in addition to compensatory damages.

Mitigation of Damage

13-80 The victim of a tort is obliged to mitigate his loss, ie, to say he may not claim damages in respect of any part of his loss that would have been avoidable by reasonable steps on his part.

Limitation

13-81 The limitation rules were initially contained in the Limitation of Actions Law,[120] which was suspended in 1964 by the House of Representatives, due to political conflict. On 22 November 1990, the House of Representatives enacted the Limitation of Actions (Temporary Provisions) Law,[121] which provides that all actionable rights relating to the tort of negligence and which are the result of accidents that occurred between 1 January 1964 and 31 October 1984 are statute-barred if in the meantime no action had been brought before the court.

Section 22 of the Motor Vehicles (Third Party Insurance) Law[122] provides that, irrespective of any provisions in any other law, any relevant action against a tortfeasor must be brought before the court within two years from the date of the accident.

118 *Adrian Holdings Ltd v The Republic of Cyprus*, Civil Appeal 9486, 14 October 1998.
119 *Papakokkinou and Others v Kanther* (1982) 1 CLR 65.
120 Limitation of Actions Law, Cap 15.
121 Law 217 of 1990.
122 Law 96 (I) of 2000.

Rules on limitation are to be found in section 68 of the Law, which reads as follows:

> No action shall be brought in respect of any civil wrong unless such action be commenced:
>
> (a) within two years after the act, neglect or default of which complaint is made, or
>
> (b) where the civil wrong causes fresh damage continuing from day to day, within two years after the ceasing thereof, or
>
> (c) where the cause of action does not arise from the doing of any act or failure to do any act but from the damage resulting from such act or failure, within two years next after the plaintiff sustained such damage, or
>
> (d) if the civil wrong has been fraudulently concealed by the defendant, within two years of the discovery thereof by the plaintiff, or of the time when the plaintiff would have discovered such civil wrong if he had exercised reasonable care and diligence:
>
> Provided that if at the time when the cause of action first arises the plaintiff is under the age of eighteen years or is of unsound mind or the defendant is not in the Republic such period of two years shall not begin to run until the plaintiff attains the age of eighteen years or ceases to be of unsound mind or the defendant is again within the Republic;
>
> Provided also that nothing in this section will be deemed to affect the provisions of sections 34 of the Administration of Estates Law and 58 of this Law.

13-82 This section should be read in conjunction with the Limitation of Actions Law, Cap 15, and the Limitation of Actions (Temporary Provisions) Law.[123]

123 Law 217 of 1990.

CHAPTER 14

Land Law

Lefkios Tsikkinis

Introduction

In General

14-1 Land is, in the quaint phrase of Sir Edward Coke, 'of all elements the most ponderous and immovable'.[1] Land endures, while all other property perishes or alters in the course of time. It follows that the rights and interests that can be enjoyed in respect of land are necessarily more complex than those that can be enjoyed in respect of any other property, as is the legislation which defines, regulates, and governs such rights, in Cyprus as well as in every other country.

The modern Cypriot land law is founded on numerous statutes enacted in Cyprus from the time the island passed from Ottoman Empire rule to British Empire rule (1878) and refers directly or indirectly to the rights and interests which may be enjoyed in respect of real property and the methods by which such property may be transferred from one living person to another.[2]

Prior to 1878, and for a considerable period thereafter, the law exclusively governing property matters in Cyprus was the Ottoman Law, as introduced and applied during the time of Ottoman rule,[3] and it continued under British rule until 1946.[4]

The most significant legislation on which the modern Cypriot land law is founded is the Immovable Property (Tenure, Registration, and Valuation) Law, now Cap 224[5] enacted on 1 September 1946, which date is considered to be the

1 James, *Introduction to English Law* (7th ed, 1969), at p 373.

2 The rules which govern devolution on death and bankruptcy are treated separately in other chapters.

3 The Ottoman Land Law was included mainly in the Ottoman Civil Code (*Mejelle*) and the Ottoman Land Code (Law 7, Ramazan 1274, ie, 21 April 1858), and in some other statutes of lesser importance.

4 Section 25 of the Courts of Cyprus Order in Council of 1882 provided that, in all actions concerning immovable property, the rights of the parties would be defined in accordance with the Ottoman Law, as amended in the future by Cypriot legislation.

5 Law 26 of 1945, which was codified in the issue of the Laws of Cyprus of 1949 as Cap 231 and amended by Law 9 of 1953 and Law 4 of 1954. In its last amended form, it comprised Cap 224 of the second and last issue of the Laws of Cyprus of 1959. It was then amended by Colonial Law 3 of 1960 and by Law 78 of 1965, Law 10 of 1966, Law 75 of 1968, Law 51 of 1971, Law 2 of 1978, Law 16 of 1980, Law 23 of 1982, Law 68 of 1964, Law 82 of 1984, Law 86 of 1985, Law 189 of 1986, Law 12 of 1987, Law 74 of 1988, Law 117 of 1988, Law 43 of 1990, Law 65 of 1990, Law 90 (1) of 1992, Law 6 (1) of 1993, and Law 40 (1) of 1996.

landmark in the evolution of modern Cypriot land law. This law will be referred to hereafter as 'the Immovable Property Law' or 'Cap 224'.

Ottoman Law

14-2 While the Immovable Property Law codified and amended the law applied until then to the tenure, registration, and valuation of immovable property and abolished the last provisions of the Ottoman Codes that had survived, some elements of the Ottoman Law remain in Cyprus land law at the present time. The reasons for this apparently peculiar phenomenon are the following:

- As the Supreme Court of Cyprus has repeatedly decided, the provisions of Law 26 of 1945 have no retrospective power and therefore facts in relation to the acquisition or loss of rights over immovable property before the enactment of the Law are decided on the basis of the law which was in force prior to 1 September 1946.[6]
- Unlike other cases of a civil nature, where the material facts relating to the claim of the plaintiff or the defendant usually take place within a short period prior to the dispute, such facts in property cases may sometimes go back a great number of years, as for instance the acts of possession on which a plaintiff bases his claim to land by adverse possession. Where such facts go back beyond 1946, the Ottoman law is applicable.

14-3 It is, therefore, still essential to have some knowledge of the provisions of the law prior to 1 September 1946, at least with regard to the various categories of land, not only for historic or academic purposes but also because in some cases they still form part of the present land law and are still applicable for the reasons stated above. Without this knowledge, it would not be possible to understand the reasoning (*ratio decidendi*) in the various judgments of the courts of Cyprus dealing with the relevant issues.

The Old Land Law — Categories of Land

In General

14-4 According to section 1 of the Ottoman Land Code, land was divided into five categories, ie, *Arazi Memlouke* or *Mulk*, *Arazi Mirie*, *Arazi Mefkoufe*, *Arazi Metrouke*, and *Arazi Mevat*.

Arazi Memlouke or Mulk

14-5 This category[7] mainly comprised the various buildings (such as houses), building sites (in towns and villages), vineyards and orchards (fruit trees), as well

6 *Enver Mehmet Chakarto v Houssein Izet Liono*, JSC vol 20, 1st part, at p 113.
7 Ottoman Land Code, s 2.

as small pieces of land (less than half a *donum* in extent)[8] used as yards or supplements of houses, known as *fracti*. There also were other kinds of land falling within this category, situated in areas occupied by the Ottoman army and distributed to the conqueror as prizes of war, known as *Arazi Ushrie* (or *terres decimales*), as well as pieces of land in areas occupied by the Ottoman troops and left to the non-Muslim residents, known as *Arazi Kharajie* (or *terres tributaires*) in Greek Taxed Lands, on which a tax was imposed, known as *Kharaj*, varying from one-tenth to one-half of the annual production derived therefrom.[9]

Land in this category was subject to registration and the issue to the owner of a title of ownership by the Imperial Land Registry (*Defter Khane*).[10] The owner of property in this category had an absolute right of ownership over it, which he could donate, sell, mortgage, dispose of by will, or pass on by inheritance.[11]

Unlike all the other categories of land, the tenure of which was regulated by the provisions of the Ottoman Land Code, all matters concerning *Memlouke* land were governed by the Ottoman Civil Code (*Mejelle*).

The Immovable Property Law abolished this category of land and renamed all the immovable property known as *Mulk* or *Arazi Memlouke*, and privately owned as such at the time of the coming into operation of the law, as 'private property' thereafter governed by the provisions of the same law.[12]

Arazi Mirie

14-6 The second category[13] of land according to the Ottoman Law was that of public properties known as *Arazi Mirie*. In this category belonged mainly cultivated land, meadows, and woods, the ownership of which belonged to the public, who delegated the possession thereof to individuals.[14]

For properties in this category, the possessor was furnished with a title stating the category of the property as *Arazi Mirie*. For possession and usage, the beneficial possessor (*mutessarif*) paid to the public by way of rent or tax an annual sum equal to one-tenth of the income he derived therefrom, as well as a lump sum on the grant of the title (*tapou*).

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8 One *donum*, or *scala*, is equivalent to 1,338 square metres.

9 *Minas Sylvestrou and Others v The High Council of Efkaf* (1959-60) 24 CLR 153; *Michael Tsingis v King's Advocate* (1914) 10 CLR 61; *Aspasia Millington Ward v Chloe Roubina* (1970) 1 CLR 88.

10 Law 28, Rejeb 1291, ie, 10 September 1874.

11 With regard to this category of land, the owner had not only the right of possession and enjoyment (*huqug* in Turkish) but also the right of real estate (*raqabe* in Turkish). In this category of land, the above two rights co-existed, thus forming the absolute ownership known in Roman Law as *dominium* or *proprietas*.

12 Cap 224, s 3(1) and (2).

13 Ottoman Land Code, s 3.

14 Such delegation was effected by the Special Agent of the High Gate, known as the 'Official'.

The main characteristic of properties in this category was that, unlike the *Memlouke* properties, the beneficial possessor had only the right to possess (*jus possidendi*), the right of use (*jus utendi*), and the right to collect the fruit and products thereof (*jus fruendi*), whereas the right to have or claim as owner (*jus habendi*) and the right to alienate, dispose of, or change in any other way the nature of such properties (*jus abutendi*) belonged to the state Treasury (*Beit-ul-mal*).

The extent of the *Arazi Mirie* properties was far greater than the extent of the *Mulk* properties because of the extension of the Ottoman Empire and the constant need for new funds and because, according to a provision of the Ottoman Land Law, properties of the category *Arazi Kharajie*, which belonged to the general category of *Mulk*, were returned to the state as *Arazi Mirie*, if the owner thereof died without heirs.

The nature of this category of land and the rights of and restrictions on the beneficial possessors of such land were defined and set out in a number of judgments of the courts of Cyprus,[15] where it was held that the state, in granting cultivated land to individuals, was aiming not only at the benefit of the individual but also at the benefit of the state, which was taking a share of the production. Therefore, according to a provision of the Ottoman Land Code, if the *mutessarif* failed to cultivate the land for a period of three years, the land was returned to the state, unless the *mutessarif* paid the *tapou* again.[16] In the case of *Aspasia Millington Ward v Chloe Roubina*,[17] it was held that the right of the beneficial possessor (*mutessarif*) of *Arazi Mirie* land was personal and could not be transferred to another person without the consent of the Official.

According to the law prevailing until 1946 (when the Wills and Succession Law came into force), *Arazi Mirie* land could not be disposed of by will and the succession of land in this category was governed by the Ottoman Land Code. In the case of *Sofronios Abbot of Kykko Monastery v The Director of Forests*,[18] it was held that the *Arazi Mirie* land was subject to succession, that it returned to the state if the beneficiary died without heirs, and that only agricultural structures could be erected thereon on a licence to this effect from the Official.

Section 3(3) of Cap 224 provides that immovable property known as *Arazi Mirie*, and privately possessed as such at the date of the coming into operation of the Law, will become the absolute property of the individuals who were in possession thereof at the material time and shall be owned, held, and enjoyed by them as private property.

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15 *Michael Gavrielides v Stylianou Hadjikyriakou and Others* (1898) 4 CLR 84; *Savvas Hadjikyriakou v Director of Forests* (1894) 3 CLR 87; *Rodothea Papageorgiou v Antonis Savva Charalambous Komodromou* (1963) 2 CLR 221.

16 *Michael Gavrielides v Stylianou Hadjikyriakou and Others* (1898) 4 CLR 84.

17 *Aspasia Millington Ward v Chloe Roubina* (1970) 1 CLR 88.

18 *Sofronios Abbot of Kykko Monastery v The Director of Forests* (1990) 1 CLR 111.

Arazi Mefkoufe

14-7 In this category[19] belong mainly properties in absolute private ownership, of the category *Memlouke*, which were denoted by their owners according to the Holy Law for a religious or communal purpose. As a result of such denotation (*Sahiha Vakf*), the properties became the property of the High Command of religious and communal matters of the Muslims (*Efkaf*).

Even properties in the category of *Arazi Mirie* could be donated, either by the state or by their private possessors, to the *Efkaf* under certain circumstances.

This category of land has not been abolished by the Immovable Property Law. Section 3(4) of Cap 224 provides that property known as *Vakf* will continue to exist and sections 36, 37, and 38 contain provisions with regard to such properties.

Arazi Metrouke

14-8 This category includes properties left for the use of the public, whether for general use, as for instance public roads, squares, and seashores, or for the use of the inhabitants of a specific village or town or a group of villages or towns, as for instance the rivers and the shepherds' land (*merra*). Any dealings in land in this category was absolutely prohibited, as well as its use for building purposes.

This category of land remained in existence after the coming into force of Cap 224, which provides (section 3(5)) that immovable property known as *Arazi Metrouke*, lawfully held and enjoyed communally by a town or village or quarter at the date of the coming into operation of the law, will continue to be held and enjoyed as the communal property of such town, village, or quarter.

Section 19 of Cap 224 gives the right to the Governor (now the Council of Ministers) to terminate the nature of a communal property as such and order that the property will be used for any of the purposes set out in the said section. Section 19 also provides that members of the village, town, or quarter, who have the right of use of a communal property, may by a majority of votes of two-thirds request the Council of Ministers to change the purposes to other purposes, more beneficial for them, or to dispose of the property. Section 19 of Cap 224 prohibits the acquisition of any private or exclusive right on communal property.[20]

Arazi Mevat

14-9 The last category of land, *Arazi Mevat*, includes the dead and arid land (*khali* or *hali*) land, such as dry, mountainous, and stony properties, not possessed by anyone, not having been left for communal use and being at least two kilometres away from built-up areas.[21]

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19 Ottoman Land Code, s 4.
20 *Ypsonas Village v Attorney General* (1979) 1JSC 250 (District Court).
21 *Ypsonas Village v Attorney General* (1979) 1JSC 250 (District Court).

To encourage the cultivation of such properties, the law allowed individuals to clean and cultivate them for a nominal fee. In this way large areas of arid land were converted into agriculture land. Furthermore, the Sultan had the right to grant *Arazi Mevat* land to individuals, thus converting it into *Mulk*.

Section 3 of the Government Lands Law, Cap 221, provides that, as from 23 April 1941, no valid title can be acquired to unoccupied land not belonging to individuals or belonging to the Government, whether registered or not, except on a special grant by the Governor, now the Council of Ministers.

Section 3(6) of the Immovable Property Law has converted land in the category of *Arazi Mevat*, as well as any other land not privately owned or lawfully possessed at the time the law came into operation, into Government land, now the property of the Republic of Cyprus.

The Immovable Property (Tenure, Registration, and Valuation) Law

14-10 The Immovable Property (Tenure, Registration, and Valuation) Law is considered to be the foundation of modern Cypriot land law. It has brought about (in its original form and as subsequently amended) very significant and radical changes in the system of tenure prevailing until its enactment and effected great and progressive reforms to the land law, the most important of which are the following:

- Abolition or preservation in a different form of the various categories of land;[22]
- Introduction of the horizontal division of buildings;[23]
- Variation of the prescriptive periods of time;[24]
- Definition of the various easements (servitudes);[25]

22 As a result, there are now four categories of land, ie, (a) private property (Cap 224, s 3(2)), (b) *Vakf* property (Cap 224, ss 3(4), 36, 37, and 38), (c) communal property (Cap 224, ss 3(5) and 19), and (d) property of the Republic of Cyprus. The last category comprises the following three kinds of immovable property: (i) immovable property formerly belonging to the category *Arazi Mevat* (*khali* land); this property became the property of the government, now the Republic of Cyprus, according to section 3(6) of Cap 224; (ii) the lakes, rivers, streams, and natural water resources which were not privately owned at the date of the enactment of the Law, with such properties becoming the property of the Republic by virtue of section 7 of Cap 224; and (iii) the public roads and seashores, which came under the ownership of the Republic for the use of the public (section 8 of Cap 224).

23 Law 24/1946, s 6, originally s 5(2). The respective provision in the Ottoman Law is section 1315 of the Ottoman Civil Code (*Mejelle*). Section 6 was amended by Law 16/1980, and it was finally repealed by Law 6 (1) 1993, which added a new part to Cap 224, ie, Part IIA after section 38, under the name 'Commonly owned buildings'.

24 Cap 224, ss 9 and 10.

25 Cap 224, ss 11 and 12, as amended by Law 10 of 1966, Law 75 of 1968, and Law 16 of 1980.

- Introduction of restrictions on division of land;[26]
- Abolition of dual ownership;[27]
- Restrictions on co-ownership;[28]
- Vesting the Director of the Land Registry with quasi-judicial powers with regard to the determination of boundary disputes and other matters;[29]
- Introduction of a procedure for the compulsory acquisition of access to a public road by immovable properties which did not have such access;[30]
- Introduction of provisions for the registration of leases and sub-leases and for the transfer thereof;[31]
- Introduction of provisions for the registration of trusts;[32]
- Introduction of provisions for the registration of restrictive contracts;[33] and
- Regulation of the valuation and revaluation of immovable property.[34]

14-11 In its present form, Cap 224 is divided into nine parts, namely:

- Part I – Preliminary;
- Part II – Tenure;
- Part IIA – Commonly owned buildings;
- Part III – Registration;
- Part IV – Registration of leases;
- Part V – Registration of trusts;
- Part VI – Registration of restrictive contracts;
- Part VII – Valuation; and
- Part VIII – Miscellaneous.

14-12 Cap 224 also contains four Schedules and a list of the laws which were abolished.

The Cyprus Land Registry Department

History

14-13 The Department was established in 1858, 20 years before the end of the Ottoman dominion of Cyprus, and it is considered to be the oldest Government

26 Cap 224, ss 27, 28, and 29, as amended by Law 51 of 1971, Law 16 of 1980, Law 189 of 1986, Law 12 of 1987, Law 117 of 1988, and Law 65 of 1990.

27 Cap 224, ss 30 and 33; Law 16 of 1980.

28 Cap 224, s 34, as amended by Law 16 of 1980.

29 Cap 224, ss 11A, 27, 58, and 6(1).

30 Cap 224, ss 11 and 12, as amended by Law 10 of 1966 (which added section 11A), Law 75 of 1968, and Law 16 of 1980.

31 Cap 224, ss 65A–651Ea, introduced by Law 2 of 1978 and Law 23 of 1982. Law 2 of 1978 added a new part to Cap 224, Part IV, after section 65, under the name 'Registration of leases'.

32 Cap 224, s 651E, introduced by Law 2 of 1978, which added a new part to Cap 224, Part V (section 65IE), under the name 'Registration of trusts'.

33 Cap 224, ss 651–65K (added by Law 16 of 1980).

34 Cap 224, ss 66–74, as amended by Law 16 of 1980.

Department in Cyprus.[35] Its original task was the settlement of all matters related to immovable property and at the same time the registration and issue of titles of ownership of immovable properties in the names of the beneficiaries. Although, in the course of time, the purposes and activities of the Land Registry have expanded greatly to include numerous and complicated services, its main function remains the registration of titles to immovable properties for the protection and security of the owners thereof.

The practice of the issue of titles of ownership was applied, in a primitive form, long before the establishment of the Land Registry. Some government officials, known as 'Inspectors' (in Turkish, *Multezims* or *Muhasils*) had the absolute right to grant government land to progressive farmers for a nominal sum and on an annual tax. Later, the Inspectors, to encourage the farmers further, were giving to them titles of ownership (*Tabu Senet*) by virtue of which the farmers were entitled to choose from the government land so much as was provided by their title. At the same time, another category of titles existed (*Hudjiet*), which were issued by the Muslim religious courts (*Sheri* courts) with regard to buildings, trees, waters, and building sites, unlike the *Tabu Senet*, which referred only to agricultural land.

The Ottoman Land Code introduced the division of land into the five categories which were examined above, and it made provision for the issue of title deeds and their registration in government books. The Land Registry undertook responsibility for the issue and registration of such titles, with the exception of the *Vakf* properties, which remained under the responsibility of the Muslim Religious Courts. The relevant books of the Land Registry under the Ottoman Land Code were:

- The Book Page Register;
- The *Yoklama* Register;
- The *Tedlik Yoklama* Register;
- The *Emlak Yoklama* Register; and
- The *Daime* Register (Transfers Ledger).

14-14 The title deeds issued by the Land Registry at that time were only those of the *Tabu Senet* type and were issued as a result of sales, donations, or exchanges of land.

On the passing of Cyprus under British rule (1878), the above books were translated into English and were amalgamated in a single book, 'The Register'. All the existing registrations, including those without a date (undated registrations, *Yoklama*) were transferred to the Register and there was one Register for each village. In addition to the Register, a new supplementary book was created, ie, *Tabu Hulassa*, in which the property of each owner was recorded on a separate page for each owner. Those two books replaced all the existing Land Registry books.

35 Ioannides, *The Department of Lands and Survey — Legislation and Land Registry Procedures*, vols A (April 1994) and B (February 1998); Ioannou, *The Land Registry* (1st ed, 1990); Coutas, *Immovable Property in Cyprus* (1st ed, 1992).

The British administration soon realised that for the successful management of immovable property matters it was essential that a proper survey of the whole island should be made and accurate Land Registry maps should be drawn up. This task was delegated to a lieutenant in the British Army, Herbert Horatio Kitchener (later Field Marshal Lord Kitchener of Khartoum), who arrived in Cyprus in 1878 and immediately began work. He was appointed Director of the Land and Survey Department in 1880 and left Cyprus in 1883, having prepared with his team the first Land Registry map of Cyprus, which is considered to be an excellent work under the difficult circumstances of the time.

To implement the achievements of Kitchener, the British administration proceeded with the enactment of a series of laws, the most important of which was the Immovable Property (Registration and Valuation) Law[36] for the registration and valuation of all the immovable property in Cyprus, according to the general survey of the island[37] which had already begun.

Law 12 of 1907 set up the foundations of the modern registration of immovable property in Cyprus and the issue of title deeds based on contemporary Land Registry plans, unlike the previous titles which were based on casual and inaccurate drawings. Under the new system, each title corresponded to the respective plan, which defined with accuracy the relevant plot and the shape, extent and nature of the property. The basic provisions of Law 12 of 1907 were those relating to the compulsory registration of all the immovable property in Cyprus, which rendered necessary the completion of the survey, as well as the cartography of all Cyprus. For this purpose, a special Department was set up in the Land Registry which finally completed the survey in 1929. The cartography was made on scales, and for better results Cyprus was divided into 59 Sheets and each Sheet into 64 Plans.

The whole work, which was carried out on the strength of Law 12 of 1907, may be classified as follows:

- Survey and cartography of all the immovable property in Cyprus;
- Definition of the 'certified value' of each separate plot; and
- Registration and issue of title deeds for a great part of Cyprus according to the system of the 'General Registration' or the system of the 'Sporadic Registration'.

36 Law 12 of 1907.

37 Law 12 of 1907 came into force in 1909, ie, two years later, due to the negative reaction of the public and the reluctance of the legislature to vote the law, fearing that its purpose was the increase of taxation on immovable property. It was only on the assurance of the administration that the purpose of the law was to improve the methods of registration of immovable property and not additional taxation that the bill was voted into law.

For the execution of the above work, the following books were opened:

- The Land Register;
- The Tax Register; and
- The Valuer's Schedule (Form 115).

14-15 The rights and interests of the owners of immovable properties continued to be defined, protected, and governed by the Ottoman Land Code, the Ottoman Civil Code, and the laws on *Efkaf* and *Vakuf* until 1946 and, in some cases, up to the present time.

The Modern Land Registry — Structure and Operation

In General

14-16 In its present form, the Land Registry Department has the exclusive responsibility and provides the means and instruments for the establishment of rights of ownership in immovable properties, the survey and cartography of Cyprus, the registration, transfer, or mortgage of immovable properties, the tenure of land, the valuation of properties, and the administration of government land. By its function, the rights in land are defined and secured and all transactions related to immovable properties are protected.

Cyprus is one of the four or five countries in the world which maintain such an accurate and effective Land Registry system, and the Land Registry Department continues to play a vital and important role in the social and economic development of Cyprus. Moreover, the effort to computerise all the services offered by the Department, which began in 1987 and is expected to be completed shortly, will not only accelerate the procedures but also will upgrade the quality of the services rendered by the Department, thus increasing its importance even more.

According to the existing work plan, the structure of the Land Registry Department of Cyprus comprises the General Director, three First Land Registry Officers, and seven Senior Land Registry Officers, each of whom heads one of the following seven branches of the Land Registry Department, namely:

- Registration;
- Tenure;
- Administration of government land;
- Valuation;
- Survey;
- Cartography; and
- Administration.

14-17 There also are six Senior Land Officers (District Lands Officers) heading the six District Lands Offices of Cyprus, who represent the General Director and exercise his duties in their respective Districts.

Registration

14-18 This branch has the exclusive responsibility for the registration of immovable properties on the submission of an application by the person entitled to such registration and for the conduct of the necessary local inquiry for the clarification of the rights of ownership of the applicant. This branch also conducts local inquiries for the settlement of boundary disputes and other purposes under the existing legislation.

Moreover, the registration branch is responsible for the reception and registration of the various transfers, mortgages, and other encumbrances, applications for the registration of leases, restrictive contracts, trusts, and easements, and the issue of titles. This branch prepares tax schedules for the taxation of immovable properties, fixes the reserve price in cases of compulsory sales, and conducts such compulsory sales by public auction in satisfaction of judgment debts in accordance with the existing legislation.

Tenure

14-19 This branch deals with the application of the provisions of Cap 224 with regard to the tenure of immovable property in Cyprus, the consolidation of agricultural land according to the relevant laws, and the completion of the general registration of all the immovable property in Cyprus on a more accurate basis.

Some of the targets of this branch are the restriction of the multiple division of land, the abolition of double and multiple ownership, the restriction of properties owned in undivided shares, and the completion of the registration of all the immovable property in Cyprus.

Administration of Government Land

14-20 The responsibility of this branch is the general administration of all the properties belonging to the Republic of Cyprus. Its works include:

- The leasing or exchanging of government property;
- The granting of rights of way though government land;
- The assignment of government land to Ministries or other government departments; and
- The conversion and declaration of government land (*Khali* land) into forests.

Valuation

14-21 This one of the most important branches of the Land Registry Department, and its main task is the valuation of the immovable properties for the purpose of defining the compensation payable in cases of compulsory acquisitions and for other purposes according to the existing legislation, such as the approximate compensation for various government development works, the compensation for

land planning restrictions, the valuation of leasehold interests, and the definition of the market value of properties for the collection of transfer fees.

In 1991, the Council of Ministers decided to delegate some survey and valuation work to the private sector.[38]

Survey

14-22 This branch deals exclusively with all survey work carried out by the Land Registry and assists the function of the Land Registry in matters of boundary disputes, town planning, court procedures, or the preparation of new plans.

It also assists private professional surveyors by furnishing them with all necessary information on payment of the prescribed fee.

Cartography

14-23 The purpose of the cartography branch is the production of plans and maps based on the various survey works.

This branch also deals with the updating of plans, the preparation of road maps, and the education of the staff in drawings and cartography.

Administration

14-24 The Administration branch handles matters concerning the income and expenditure of the Department, stores and supplies, promotions, transfers, and vacancies among the staff, the training of the staff of all branches in all Land Registry issues, including survey and valuation, and the legal training of the staff in all matters connected with the operation of the Land Registry.

Generally, this branch assists the Director and coordinates all the services in matters of administration.

Immovable Property

14-25 The meaning of the term 'immovable property' is given in section 2 of Cap 224, according to which it includes:

- Land;
- Buildings or other erections, structures, or fixtures permanently affixed to any land or to any building or other erection or structure;
- Trees, vines, and any other thing whatsoever planted or growing on any land and any produce thereof before severance;
- Springs, wells, water, and water rights, whether held together with, or independently of, any land;

38 Decision 36495 of 21 November 1991.

- Privileges, liberties, easements, and any other rights and advantages whatsoever appertaining or reputed to appertain to any land or to any building or other erection or structure; and
- An undivided share in any property hereinbefore set out.

14-26 'Movable property', on the other hand, includes anything not constituting immovable property.

The question whether a movable object is a fixture so solidly affixed to any land or building as to constitute immovable property is a legal as well as a factual question. It depends on the special circumstances of each case, the degree and the purpose of the connection, as well as the nature of the connection, whether permanent or not.[39]

The Right of Private Ownership in Immovable Property

Acquisition and Transfer

14-27 According to section 4 of Cap 224, no estate, interest, right, privilege, liberty, easement, or any other advantage whatsoever in, on, or over any immovable property shall subsist or shall be created, acquired, or transferred, except under the provisions of Cap 224.[40] That is so, despite section 29(1 (c) of the Courts of Justice Law,[41] according to which the provisions of Common Law and the law of equity constitute part of law applicable in Cyprus.[42]

In this context, the term 'estate in land' or 'real right' (in Roman law, *iura in re*) denotes any right directly connected with the ownership and tenure of any immovable property and capable of being registered at the Land Registry.

The Cyprus courts have held that a mortgage which burdens immovable property for the security of a debt does not constitute an 'estate in land', but only a

39 The published lectures of John Boyadjis (then President of the District Court and subsequently a Judge of the Supreme Court) on the law *in rem*, made for the Council of Legal Studies (1985), at p 61.

40 Section 4 of Cap 224 did not exist in Law 26 of 1945. It was introduced by Law 8 of 1953 as section 3A, and it took its final form as a result of Law 3 of 1960.

41 Law 14 of 1960.

42 In *Agni Kontou v Maria Parouti*, 19 CLR 172, Chief Justice Hallinan attempted to extend to Cyprus the application of the principles of Common Law and equity in matters concerning immovable property, using the argument that Law 26 of 1945 had abolished the categories of land under the Ottoman Law. The judgment was delivered on 6 February 1953 and Law 8 of 1953 was published in the *Gazette* on 4 March 1953, as a result of the immediate reaction of the Land Registry authorities who maintained that the application of such principles to matters of immovable property would totally upset the whole Land Registry system. In *Aspasia Millington Ward v Roubina*, it was held that the purpose of the legislature in passing Law 26 of 1945 was expressly to exclude the principles of Common Law and equity as regards immovable property.

contractual right for the benefit of the mortgagor and also a charge on the immovable property.[43]

It also has been held that an 'estate in land' cannot be acquired either by abandonment or by estoppel, for the reason that neither is mentioned in section 4 as a means by which one can acquire rights in immovable property.[44]

The right of the tenant over leased immovable property is not an estate in land connected to the property but is a contractual right, by reason of the provisions of section 4 of Cap 224,[45] and for the same reason the lease agreement does not create an estate in land over the leased property for the benefit of the tenant[46] unless if it is capable of registration according to the provisions of Part IV of Cap 224, which is dealt with in section 12.

Because of the provisions of section 4 of Cap 224, as well as the provisions of the Immovable Property (Transfer and Mortgage) Law,[47] there can be no legal or equitable assignment with regard to immovable property.[48]

Similarly, the deposit with the Land Registry of the sale agreement for immovable property, in accordance with the provisions of the Sale of Land (Specific Performance) Law,[49] does not create an estate in land but only a charge over the immovable property (according to the provisions of Law 9 of 1965) for the benefit of the purchaser who deposited such contract.[50]

Non-Application of Section 4

In General

14-28 The provisions of section 4 of Cap 224 do not apply to three particular cases mentioned in the same section.

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43 *Theodora Nicola v Ifigenia Sofocleous* (1955) 20 (II) CLR 49; *Spyros Michaelides v Chrysses Demetriades etc* (1968) I CLR 211.

44 *Halil Hussein Mustafa Ntai and Another v Halil Satrazam*, 24 CLR 259. But see *Nafsika Stylianou and Others v Kyriakos Papacleovoulou* (1982) 1 CLR 542, where the Supreme Court decided that rights in immovable property may be acquired by virtue of proprietary estoppel. This judgment was strongly criticised. However, the judgment of the Supreme Court, in full bench, *in Ayios Andronikos Development Co Ltd v The Republic of Cyprus and Others* (1985) 1 CLR 2362, seems to have re-established the principle set out in *Aspasia Millington Ward*.

45 *The Attorney General v The Nicosia Water Board* (1961) CLR 1.

46 *Cyprus Cinema and Theatre Co Ltd v Christodoulos Karmiotis* (1967) 1 CLR 42.

47 Law 9 of 1965.

48 *Ayios Andronikos Development Co Ltd v The Republic of Cyprus and Others* (1985) 1 CLR 2362.

49 Cap 232.

50 *Ayios Andronikos Development Co Ltd v The Republic of Cyprus and Others* (1985) 1 CLR 2362.

Trusts

14-29 Rights in immovable property deriving from the application of the principles of equity may, in the cases of trusts, constitute estates in land and may be registered in the Land Registry as any other immovable property.[51]

It is to be noted, however, that from 1 April 1980, according to the new section 65IE which was added to Cap 224,[52] a trust referring to immovable property is not valid unless it is established by a trust deed or by will and deposited in the relevant Register of the Land Registry.

Vakf Land

14-30 These are privately owned properties (of the previous category *Memlouke*) dedicated by their owners to Muslim religious or communal establishments, thus included in the category Arazi Mefkoufe, which category has not been abolished by Law 26 of 1945 (see text, above).

Rights in Immovable Properties Recognised by Other Law in Force

14-31 Such laws are the Government Property (Registration of Leases) Laws,[53] which were repealed by the Immovable Property (Tenure, Registration, and Valuation) (Amending) Law.[54] As a result of Law 2 of 1978, the basic provisions of Law 49 of 1967 and Law 88 of 1968 form Part IV of Cap 224. Section 651Ea of Part IV was added by Law 23 of 1982.[55] According to the provisions of those sections, the registration of some leases or subleases with the Land Registry creates an estate in land for the benefit of the lessee or sub-lessee, whether the leased property is privately owned or whether it belongs to the state.

Another exemption from the application of section 4 concerns estates in land created or transferred by deed on a reasonable consideration and existing on 4 March 1953.[56]

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51 *Nitsa Miltiadous v Kriton Miltiades* (1982) 1 CLR 797, which concerned the claim of a wife to a share in a house registered in the name of her ex-husband to the construction of which she had equally contributed.

52 Law 2 of 1978, which came into force on 1 April 1980 by Notice of the Council of Ministers published in the *Official Gazette* on 13 March 1980.

53 Law 49 of 1967 and Law 88 of 1968.

54 Law 2 of 1978.

55 Part IV of Cap 224 consists of sections 65A, 65B, 65C, 65D, 65E, 65F, 65G, 65H, 65I, 651A, 651B, 651C, 651D, and 651Ea. The last section was the result of the amending Law 23 of 1982.

56 Cap 224, s 4(2). Sub-section (2) was the result of Law 3 of 1960, with retrospective power as from 4 March 1953.

Validity of Certain Transactions Affecting Immovable Property

14-32 According to section 40 of Cap 224, no transfer of, or charge on, any immovable property will be valid unless registered or recorded in the District Lands Office and no transfer or voluntary charge affecting any immovable property shall be made in the District Lands Office by any person unless he is the registered owner of such property.[57] Therefore, no written or oral transfer or recognition of any estate in land is valid unless it is completed by registration with the Land Registry.[58]

The executor or administrator of an estate of a deceased person is for the purposes of section 40 deemed to be the registered owner of the property registered in the name of the deceased.

The Tenure of Immovable Property

In General

14-33 By the term 'tenure of immovable property' is meant all the rules which define the nature and extent of the rights, obligations, and restrictions which relate to the ownership and possession of immovable property in all categories recognised by the law, Cap 224. These rules govern the relations of the persons who exercise such rights and are subject to such obligations *vis-à-vis* the state, on the one hand, and themselves, on the other.[59]

According to section 2 of Cap 224, 'owner' (of immovable property) means the person entitled to be registered as the owner of any immovable property whether he is so registered or not.[60]

Extent of Private Ownership in Immovable Property

14-34 Section 5 of Cap 224 provides that the private ownership of land extends:

- To the surface and the substance of the earth;

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57 A similar provision is contained in the Immovable Property (Transfer and Mortgage) Law, Law 9 of 1963.

58 *Ayios Andronikos Development Co Ltd v The Republic of Cyprus and Others* (1985) 1 CLR 2362.

59 The published lectures of John Boyadjis (then President of the District Court and subsequently a Judge of the Supreme Court) on the law *in rem*, made for the Council of Legal Studies (1985), at pp 80 and 81.

60 In *Ioannis Panayiotis Michaelides v Maria Savva Tapoura* (1980) 1 CLR 610, the Supreme Court held that the phrase 'entitled to be registered as the owner' refers not only to cases where the claim to ownership is based on adverse possession but also to cases where all the formalities for a legally effective transfer have been completed according to the law and only the registration of the transfer with the Land Registry remains.

- Beneath the surface of the earth to as much depth as is reasonably necessary for the enjoyment and cultivation of the earth (but not extending to minerals); and
- To the space above the surface reasonably necessary for the enjoyment thereof.

14-35 With regard to the extent of private ownership on the surface of the earth, the relevant question that quite often arises is the determination on the ground of the actual position of the land and the area thereof. Section 50 of Cap 224 (as amended by Law 16 of 1980, which added section 50A) provides that, in the case of land covered by a registration of title to immovable property, the area of the land will be the area of the plot to which the registration can be related on any Government survey plan or any other plan made to scale by the Director of the Land Registry.[61] The accurate location, therefore, of any property is found by reference to the respective plot on the survey plan and not to the extent or the boundaries which are described on the title deed.[62]

On the other hand, when the registration cannot be related to any plan, which is the case with old, unbased registrations (*Yoklama*), the area of the land, according to section 50, will be that to which the holder of the title may be entitled by adverse possession, purchase or inheritance. In cases in this category, the decisive factor is the actual possession of the holder of the title.[63]

Concerning the extent of private ownership beneath the surface of the earth, section 5 expressly excludes minerals, as they belong to the Republic of Cyprus.[64] There is, however, an exception to this rule, in that even minerals may belong to the owner of the land if the land lies within the areas specified for the purposes of section 5 on the survey map signed by the Director of the Land Registry and deposited in the District Lands Office before the coming into operation

61 For this reason, in all new registrations, ie, those made after the general survey, the titles of ownership issued by the Land Registry mention, for purposes of identification of the property, the number of the respective plot on the survey plan to which the registration is related.

62 It can be said that the system of 'registration of titles of ownership' as it operates in Cyprus, unlike the system of 'registration of contracts' which prevails in many other countries and by which only the contracts for immovable property are registered, safeguards the quick and effective conclusion of transactions in land for the general benefit of the trade and economy of Cyprus.

63 The provisions of section 50 of Cap 224 have been judicially considered in a number of cases. See *Dorothea Papageorgiou v Antoni Savva Charalambou Komodromou* (1963) 2 CLR 224; *Georgios Nicolaou Ellinas v Ioannis Hadjisolomou* (1984) 1 CLR 225; *Panayiotou v Hadjikyriacou*, Civil Appeal 7502 of 25 April 1991; *Hadjioannou v Constantinou*, Civil Appeal 8112 of 15 November 1993, where the principle that the certificate of registration is only prima facie evidence of the ownership by a person of the property described therein was repeated.

64 The meaning of the term 'minerals' is given in sub-section (2) of section 5.

of Cap 224.[65] Mining leases (licences) are often granted to individuals or legal entities by the appropriate Government Departments for certain properties, whether such properties are registered in the name of the licensee or not.[66]

The extent of private ownership beneath the surface of the earth is also restricted by the Antiquities Law, Cap 31, and the Government Water Works Law, Cap 34, according to which antiquities and all underground waters belong to the state.

Further provisions defining the objects to which private ownership of land extends and the limits within which such ownership can be exercised are contained in sections 20, 21, 22, 23, 24, 25, and 26 of Cap 224, according to which:

- Anything growing in a wild state on any land will be deemed to be the property of the owner of the land;[67]
- Wild trees grafted after the date of the coming into operation of Cap 224 (1 September 1946) or trees or vines planted or springs found or watercourses or channels opened or constructed on any land after the enactment of Cap 224 or any fixtures affixed to any land or to any building or other erection or structure erected on any land after 1 September 1946 will be deemed to be the property of the owner of the land, unless another person is registered as the owner thereof or, being entitled to be so registered, applies for registration within two years from the date of the coming into operation of Cap 224 or from the date on which he became so entitled;[68]
- When any immovable property is held in undivided shares, all the co-owners will be entitled, in proportion to their respective shares, to any building or structure erected on the land or any tree or vine planted thereon or any well sunk therein, irrespective of the person who has built, planted, or sunk the building, tree, or well, respectively;[69]
- The registered owner of immovable property will be deemed to be the owner of any produce resulting from the cultivation of his land by any third person without his consent and to any profit therefrom, without payment of any

65 Proviso to sub-section (1) of section 5.

66 In *Georghios Miliotis v the Cyprus Unber Industrial Co Ltd and Another*, 20 CRL Part 1, at p 140, it was decided that such a licence does not of itself entitle the licensee to enter into the property of a third person for mining purposes without the consent of such person. In this case, the court did not award to the plaintiff damages according to the value of the minerals extracted by the defendant from his land, as such minerals belong to the Republic, but only damages for trespass.

67 Cap 224, s 22(1).

68 Cap 224, s 22(2). Any dealing affecting any land will be deemed to include any such wild tree, vine, spring, watercourse, channel, building, erection, structure, or fixture. See also the exceptions to this rule set out in Cap 224, s 22(3). Section 22 of Cap 224 has been considered in a number of cases. *Polou Hadjiosif Liatsou v Dionyssios Zannettos* (1953) 19 CLR 210; *Shakir Ilkai v Halit Kizim* (1954) 20 CLR Part 1, 103; *Halil Houssein Mustafa Ntai and Another v Rashit Halil Satrazam* (1960) 24 CLR 250.

69 Cap 224, s 21, as amended by Law 16 of 1980.

compensation whatsoever. When the land belongs to the Republic, the same provisions apply even in cases in which the property is not registered in the name of the Republic;[70] and

- When buildings, trees, or other structures belong to a person other than the owner of the land, and either owner has made a declaration before the District Lands Office that he has agreed to sell his interest to a third party, the other owner shall have the option to purchase such interest and a transfer of the interest to the third party shall not be registered unless the other owner fails to exercise such option.[71]

14-36 Similarly, if immovable property is held in undivided shares by two or more co-owners, any such co-owner will have the option to purchase the interest of the other or others, if it is sold to a third party and the registration of a transfer to the third party shall only take place if no co-owner exercises his option.[72] The provisions of sections 24 and 25 of Cap 224 do not apply to declarations of sale made under a written contract of sale entered into before the coming into operation of Cap 224 or presented to the District Lands Office and endorsed within three months from the date of the coming into operation of Cap 224.[73]

Restrictions on the Exercise of the Right of Ownership

14-37 The right of absolute ownership of a person in immovable property comprises the following elements:

- The right to have or to claim such property as his own (*jus habendi*);
- The right to possess (*jus possidendi*);
- The right to use (*jus utendi*);
- The right to tenure, enjoyment, and collection of fruit (*jus fruendi*); and
- The right to dispose of, which includes the partial or total alienation, the charge, the change, or the destruction of the subject of ownership (*jus abutendi*).[74]

14-38 Therefore, where one or more of the above elements is missing, it can be said that the exercise of the absolute right of ownership is restricted. The provisions

70 Cap 224, s 20.

71 Cap 224, s 24, as amended by Law 16 of 1980.

72 Cap 224, s 25, as amended by Law 16 of 1980.

73 Cap 224, s 26.

74 The published lectures of John Boyadjis (then President of the District Court and subsequently a Judge of the Supreme Court) on the law *in rem*, made for the Council of Legal Studies (1985), at p 81; see also *Michael Tsingis v King's Advocate* (1914) 10 CLR 61, where Chief Justice Tyser deals in detail with the elements of absolute ownership.

by which the 'absolute' right of ownership in immovable property is variably restricted are contained in various laws, and they may be classified in three categories.[75]

The first category consists of restrictions deriving from section 23 of the Constitution of Cyprus and the laws made pursuant to such section. Section 23 of the Constitution of Cyprus protects and safeguards the right of each person to acquire, own, possess, enjoy, and freely dispose of any immovable property and to demand from the state and from the other citizens respect for this right. Section 23, however, allows restrictions in the exercise, and even the deprivation, of such right in the cases which are set out in this section and which refer to the interest of public security or health or public morality or town planning purposes or the public utility or the protection of rights of third persons. Section 23 provides further that, when the restrictions on or the deprivation of any rights of the owner result in the substantial diminution of the value of his property, the owner is entitled to relevant compensation, payable to him as soon as possible. Section 23 also allows the compulsory acquisition or requisition by the Republic or the municipalities of immovable property (except church property and *Vakf* property) for educational, religious, social, or athletic institutions of the community of the owner of the property.[76]

By virtue of section 23 of the Constitution and the laws made thereunder, the absolute ownership of immovable property is restricted in the following cases:

- Compulsory acquisition;[77]
- Compulsory requisition;[78]
- Town planning zones and restrictions connected with town planning, imposed by the government or the appropriate authorities;[79]
- Laws and regulations defining the nature or extent of the buildings which the owner is allowed to erect on his property, the percentage of coverage, the number of floors, and the nature of the use of the building as residential, industrial, or commercial;[80] and
- Orders declaring some buildings as 'preserved buildings'.[81]

75 The published lectures of John Boyadjis (then President of the District Court and subsequently a Judge of the Supreme Court) on the law *in rem*, made for the Council of Legal Studies (1985), at pp 87–89.

76 Section 23 of the Constitution of Cyprus reserves the right of the Republic to underground waters, mines and quarries, and antiquities.

77 Compulsory Acquisition of Property Law, Law 15 of 1962, amended as in Appendix A.6.

78 Requisition of Property Law, Law 21 of 1962.

79 Town and Country Planning Law, Law 90 of 1972, and Cap 96.

80 Municipal Corporations Law, Law 64 of 1964 and Rules.

81 Buildings Preservation Law, Law 68 (1) of 1992.

14-39 The second category of legal restrictions on the absolute ownership derives from sections 27, 28, 29, and 30 of Cap 224, as amended. The above sections refer to the various powers granted to the Director of the Land Registry for the partition of immovable property,[82] for the sale in certain cases of property held in undivided shares,[83] for the partition of property held in undivided shares by two or more owners,[84] or for the re-adjustment of immovable property when the owner of the trees and the land is not the same person.[85]

The third category of restrictions on absolute ownership contains the cases where by operation of certain laws the owner of immovable property is under a prohibition because his property is subject to a charge by virtue of the existence of an estate in land (real charge) over it for the benefit of another person.[86] Such real charges are a mortgage,[87] the registration of a court judgment, known as Memorandum or Memo,[88] a writ of sale of immovables,[89] and the deposit of a sale agreement with the Land Registry for specific performance purposes.[90]

Finally, there are some other prohibitions,[91] the most common of which is the interim order (issued according to section 5 of the Civil Procedure Law, Cap 6) by which a defendant in a court case is not allowed to dispose of or alienate his immovable property until the determination of the action against him.[92]

Rights of Way and Easements over Immovable Property

14-40 The relevant provisions of the law governing the acquisition of rights of way and any other easements over the immovable property of another are contained in sections 11, 11A, 12, and 13 of Cap 224.[93]

82 Cap 224, s 27, as amended by Law 51 of 1971, Law 16 of 1980, Law 189 of 1986, Law 12 of 1987, and Law 117 of 1988.

83 Cap 224, s 28, as amended by Law 51 of 1971 and Law 16 of 1980.

84 Cap 224, s 29, as amended by Law 16 of 1980.

85 Cap 224, s 30, as amended by Law 51 of 1971.

86 According to section 9 of the Immovable Property (Transfer and Mortgage) Law, Law 9 of 1965, 'real charge' means a direct claim over the immovable property or a lien or an obligation imposed by virtue of the provisions of any law in force.

87 Law 9 of 1965, First Schedule.

88 Section 23 of the Civil Procedure Law, Cap 6.

89 Issued in accordance with sections 22 or 97 of the Civil Procedure Law, Cap 6.

90 Sale of Land (Specific Performance) Law, Cap 232, amended as in Appendix A.8.

91 Set out in the Second Schedule to Law 9 of 1965.

92 Another category of restrictions on the absolute ownership contains the various rights of way, privileges, liberties, easements, or any other rights or advantages of one person over another's immovable property, which are dealt with separately below.

93 Law 10 of 1966 added section 11A, which was amended thereafter by Law 75 of 1968 and Law 16 of 1980.

Sub-section (1) of section 11 provides that no right of way or any privilege, liberty, easement, or any other right or advantage whatsoever may be acquired over the immovable property of another except:

- Under a grant by the owner thereof duly recorded in the Land Registry;
- By the continuous, uninterrupted exercise of such right by a person or those under whom he claims for a full period of 30 years (government property or property vested in the government is excepted);[94]
- Where it has been recognised by a judgment of a competent court;
- Where it has been conferred by a firman or other valid document made before 4 June 1878;
- Where it has been acquired pursuant to the provisions of section 11A;
- Where it has been created and acquired in accordance with the provisions of the Compulsory Acquisition of Property Law of 1962 or any other amending law;[95] and
- Where it has been reserved in writing by the owner of the property at the time of the transfer thereof.[96]

14-41 Consequently, no person may exercise any right of way or any privilege, liberty, easement, or any other right or advantage over the immovable property of another, except where it:

- Has been acquired as is provided in subsection (1) of section 11;
- Is exercised under the provisions of any law in force for the time being; or
- Is exercised under a licence in writing from the owner thereof.[97]

14-42 Any right acquired as above in respect of any immovable property will be deemed to be attached to such property and included in any dealing made with such property.[98]

Any right, privilege, liberty, easement, or other advantage over any immovable property will be deemed to have lapsed if it has been abandoned by notice in writing to the District Lands Office or has not been exercised for the full period of 30 years without interruption.[99]

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94 In Civil Appeal 3791, the Supreme Court decided that section 11 of Cap 224 covers not only rights of way but also all other easements. See also Civil Appeal 4449 with regard to the completion of the period of 30 years and Civil Appeal 9047 of 14 October 1994 (*Dascalou v Vouris*), where it was held that the acquisition of a right of way should be made without violence, without secrecy, and without the consent of the owner (*nec vi*, *nec clam*, *nec precario*) and that the burden of proof of the acquisition of such right lies on the person who claims such right.

95 Compulsory Acquisition of Property Law 15 of 1962, amended as in Appendix A.6.

96 Cap 224, s 11(1), as amended.

97 Cap 224, s 11(2).

98 Cap 224, s 12(1).

99 Cap 224, s 12(2).

If an existing right of way ceases to be necessary as a result of the construction of a public road or for any other reason, the owner of either the servient or the dominant tenement may apply to the Land Registry for the deletion thereof.[100] In Civil Appeal 7729 of 22 October 1992 (*Paphitis v Kakouri*), it was decided that there is no provision in the law for the transfer of the right of irrigation from a certain spring of water to another if the first spring has dried up.

Compulsory Acquisition of Access to a Public Road

14-43 Where immovable property is for any reason enclosed in such a way as to be deprived of the necessary access to a public road or the existing access is insufficient for the proper use, development, or enjoyment thereof, the owner of such property may claim access through the adjacent immovable properties on payment of reasonable compensation.

The direction of the access, the extent of the relevant right, and the amount of compensation are decided by the Director of the Land Registry on notification to all interested parties. The owners of the adjacent properties will have no obligation to grant access if the original access of the dominant tenement ceased due to deliberate actions or omissions on the part of the owner of the dominant tenement.

If, by reason of the sale or disposition of part of any immovable property the access to the public road of either the disposed part or the remaining part has been interrupted, the owner of the part through which the access had been exercised will be obliged to grant access to the other part.

Access granted pursuant to section 11A will be deemed to be an easement or advantage acquired by virtue of the provisions of section 11 and will be subject to the provisions of Cap 224. The registration of a right of access over government land should be approved by the Council of Ministers who, in granting such approval, may impose any terms they consider necessary.

The Council of Ministers is empowered to issue rules regulating the application of the provisions of section 11A. Such rules are now the Immovable Property (Grant of Access) Rules of 1965.[101]

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100 Cap 224, s 12(3), added by Law 16 of 1980. See also *Solomontos v Papanikoli*, Civil Appeal 7497 of 22 June 1992, as to the relevant powers of the Director of the Land Registry.

101 Ioannides, *The Department of Lands and Survey — Legislation and Land Registry Procedures*, vols A (April 1994) and B (February 1998), at pp 60–68. See *Koumi v Kountourou*, Civil Appeal 7758 of 30 November 1992 and *Pavlou v Neophytou*, Civil Appeal 8634 of 28 November 1995 as to the relevant powers of the Director of the Land Registry. See also the published lectures of John Boyadjis (then President of the District Court and subsequently a Judge of the Supreme Court) on the law *in rem*, made for the Council of Legal Studies (1985), at pp 241–263.

Acquisitive Prescription (Adverse Possession)

In General

14-44 By the term 'acquisitive prescription' (or 'adverse possession', in Roman Law *usucapio*) is meant the acquisition of ownership or other real rights (estates in land) over immovable property of another person by adverse possession for a period of time (the prescriptive period).

The relevant provisions governing the subject are contained in sections 9 and 10 of Cap 224, which have no retrospective power.[102]

It is, therefore, essential that a brief analysis is made of the relevant provisions of the law prevailing until 1 September 1946 when Law 26 of 1945, now Cap 224, came into operation.[103]

The Old Law

14-45 The acquisitive prescription of rights over immovable properties in the category *Arazi Memlouke* or *Mulk* was governed by the Ottoman Civil Code (*Mejelle*), according to which the prescriptive period for properties in this category was 15 years.[104] The same law provided that the prescriptive period did not count for as long as the owner of the property was under a 'justified' disability, such as infancy or insanity.[105] Provisions with regard to the acquisitive prescription of rights over immovable properties in the category *Arazi Mirie* were contained in the Ottoman Land Code, according to which the prescriptive period was 10 years, and the same rule applied as regards the extension of the prescriptive period due to justified disability of the owner of the property, as in the cases of *Mulk* properties.[106]

The High Court held that the provisions of the *Mejelle* and the Ottoman Land Code on the subject of the prescriptive period were practically the same, although their wording differed, and that the same interpretation should apply to both.[107]

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102 *Thomas Antoni Theodorou v Christos Theori Hadjiantoni* (1996) CLR 203; *Enver Mehmet Chakarto v Houssein Izet Liono*, JSC vol 20, 1st part, at p 113; *Dorothea Papageorgiou v Antoni Savva Charalambou Komodromou* (1963) 2 CLR 221; *Stavros Kakoullos and Another v Ioannis Kakoullos* (1985) 1 CLR 355; *Christos Hadjiloizou Stokka v Christina Argyrou Solomi* (1956) 21 CLR 209; *Christophis Yianni Diplaros v Photou Nikola* (1974) 1 CLR 198.

103 The published lectures of John Boyadjis (then President of the District Court and subsequently a Judge of the Supreme Court) on the law *in rem*, made for the Council of Legal Studies (1985), at pp 93–103.

104 Ottoman Civil Code, s 1660.

105 Ottoman Civil Code, s 1663.

106 Ottoman Land Code, s 20.

107 *Molla Mustafa Hji Ahmet v Abdul Kadir Hassan* (1906) 7 CLR 42. In the same case, it was held that adverse possession is not only a defence for the possessor in case of legal proceedings brought against him by the owner of the land, but it also may form the basis of the possessor's claim for registration of the possessed land in his name.

A third law containing provisions on the same subject was the Prescription of Immovable Property Law.[108] According to this Law, the prescriptive period was interrupted if at any stage before the completion of the time of adverse possession the owner of the property registered it in his name.[109]

Before 1 September 1946, adverse possession was allowed against both the registered and the unregistered owner. It was also allowed against public properties of the category *Arazi Mirie*, which belonged to the Treasury, with the exception of properties of this category which belonged to the Sultan.[110]

The Modern Law

14-46 Section 9 of Cap 224 provides that no title to immovable property will be acquired by any person by adverse possession against the Crown (now the Republic of Cyprus) or a registered owner. From the interpretation of this section, it follows that its purpose is to protect the Republic and the registered owner. A claim, therefore, for adverse possession against the Republic will not succeed, whether the property in question is registered in the name of the Republic or not. On the other hand, the prohibition by section 9 does not concern immovable property for which there is a registration in the Land Registry but refers to and protects the registered owner.[111]

As section 9 has no retrospective power, any rights acquired by adverse possession under the provisions of the law prevailing before 1 September 1946 will continue to be valid, notwithstanding the prohibitions by section 9.[112]

As a result of section 9, the prescriptive period with regard to immovable property for which there is no registered owner and which either began before 1 September 1946 but was not completed by 1 September 1946 or began after 1 September 1946 is immediately interrupted as against the person who becomes the registered owner thereof.[113]

According to section 10 of Cap 224, 'proof of undisputed and uninterrupted adverse possession by a person or by those under whom he claims, of immovable

108 Law 4 of 1886. This Law remained in force until 1946, when it was repealed by Law 26 of 1945.

109 Law 4 of 1886, s 3.

110 More aspects of the old Law on this subject are examined in the analysis of the provisions of the modern Law.

111 This interpretation may lead to the conclusion that the prohibition by section 9 is valid only for as long as there is a registered owner of the property alive. This conclusion, however, is not unanimously adopted.

112 In *Thomas Antoni Theodorou v Christos Theori Hadjiantoni* (1996) CLR 203, it was held that 1 September 1946 is the material date before which any rights of adverse possession against a registered owner should have been completed, for the prescriptive period after 1 September 1946 does not count.

113 *Annou Hadjitofi Kannafkia v Cleopatra Argyrou and Others* (1953) CLR 186; *Eleni Angeli v Savvas Lambi and Others* (1963) 2 CLR 274; *Agathi Charalambous v Ioannis Ioannides* (1969) 1 CLR 72; *Ioannis Kyriakou v Ioannis Petri and Others* (1985) 1 CLR 275.

property for the full period of 30 years shall entitle such person to be deemed to be the owner of such property and to have it registered in his name'.[114]

Section 10 has no retrospective power. In *Christos Hadjiloizou Stokka v Christina Argyrou Solomi*,[115] the High Court held that, where the adverse possession refers to unregistered property, if the prescriptive period began before 1 September 1946, all the relevant matters, including the period of prescription, will be governed by the enactments previous to 1 September 1946, whether the prescriptive period was completed before 1 September 1946 or not.

For a legally effective adverse possession in accordance with the provisions of section 10, several following elements or facts must be proved.

There must be substantial and actual possession by a person not otherwise entitled to the registration of the property in his name. The possessor should exercise all the actions that constitute possession and fit the nature of the property over the whole of the property, absolutely, and in such a way as to exclude the owner from any possession or use of the property.[116] Furthermore, the possessor should not otherwise be entitled to the registration of the property in his name (ie, by virtue of purchase or inheritance).

There must be *animus domini* on the part of the possessor, ie, the whole attitude and behaviour of the person exercising the adverse possession should conform to the behaviour of an owner. In other words, the possession should be exercised *nec vi*, *nec clam*, and *nec precario*, ie, not as a result of violence, not secretly, and not without the consent of the owner.[117]

There must be a finding of adverse possession, ie, possession by a person not entitled to registration without the express or implied consent or licence of the owner.[118] Such implied consent has been accepted as existing in the cases of co-owners of immovable property who also are co-heirs; however, when the co-owners are strangers, implied consent cannot be presumed.[119] The presumption of implied

114 See also the two provisos to section 10, according to which (a) its provisions do not affect the prescriptive period with regard to any immovable property which began before 1 September 1946, and all matters concerning adverse possession during this period will be governed by the previous laws and (b) in the case of any disability operating under such enactment, the extension may not exceed 30 years, even if the disability continues to subsist at the expiration of 30 years.

115 *Christos Hadjiloizou Stokka v Christina Argyrou Solomi* (1956) 21 CLR 209.

116 *Agathi Charalambous, administratrix of the estate of Charalambos Neophytou v Ioannis K Ioannides* (1969) 1 CLR 72; *Morfia Hadjiyanni Mourmouri v Michael Hadjiyanni* (1907) CLR 94.

117 *Anna Sotiriou v Heirs of Despina Hadjipaschali* (1962) CLR 280; *Thekla Yiangou Aradipioti v Christos Kyriakou and Others* (1971) 1 CLR 381; *Christophis Yianni Diplaros v Photou Nikola* (1974) 1 CLR 198; *Dascalou v Vouria*, Civil Appeal 9047 of 14 October 1994.

118 Cap 224, s 2, is similar to the respective provision of the old law (section 1 of Law 4 of 1886), except that the new law added to the 'express' consent the 'implied' consent of the owner.

119 *Enver Mehmet Chakarto v Houssein Izet Liono*, JSC vol 20, 1st part, at p 113.

consent is a rebuttable presumption capable of being reversed by the proof of other facts, such as possession as a result of a marriage contract for the benefit of the possessor of which the other co-owners were aware.[120]

There must be undisputed and uninterrupted possession. If adverse possession is interrupted by any act recognised by the law as constituting a 'dispute', the time of possession before the interruption does not count and the prescriptive period starts again from the beginning.[121] A mere protest or letters through lawyers do not constitute a dispute capable of interrupting the possession.[122] The institution of legal proceedings interrupts possession,[123] whereas an application to the Land Registry by the beneficiary for the registration of the property in his name does not have this effect.[124] Subsequent registration, ie, the registration of the property in the name of the beneficiary during the prescriptive period and before completion of the adverse possession, interrupts the possession.[125] Interruption under section 10 differs from the renunciation or abandonment of the rights acquired by a person as a result of adverse possession.[126] The burden of proof of the above elements or facts lies with the person claiming rights under adverse possession.

A question that arises quite often in cases of adverse possession is whether the period of possession of the successor may be added to the period of possession of his predecessor for purposes of completion of the prescriptive period. The answer is that such addition is allowed only in two cases,[127] namely:

- When the immovable property which is the subject of the possession devolves to the successor without the need of a voluntary transfer, ie, in cases of inheritance. On the other hand, in cases where a transfer is necessary, such as the sale or donation of the property, the period of possession of the predecessor is not added to the period of the successor;[128] and
- When the proviso to section 50 of Cap 224 applies, ie, when the registration cannot be related to any government survey plan, in which case the area of the

120 *Nafsika Stylianou Ioanni and Another v Aresti Savva Georgiou and Another* (1983) 1 CLR 92; *Papandreou v Tyllirou*, Civil Appeal 7640 of 30 January 1992.

121 *Olga Hadjilouka v Stella Savvidou*, Appeal 4122 (1955).

122 *Savvas Hadjikyriakou v Director of Forests* (1894) 3 CLR 87.

123 *Eleni Angeli v Savvas Lambi and Others* (1963) 2 CLR 274.

124 *Annou Hadjitofi Kannafkia v Cleopatra Argyrou and Others* (1953) CLR 186.

125 Prescription of Immovable Property Law, Law 4 of 1886, s 3. See also *Annou Hadjitofi Kannafkia v Cleopatra Argyrou and Others* (1953) CLR 186; *Eleni Angeli v Savvas Lambi and Others* (1963) 2 CLR 274; *Agathi Charalambous v Ioannis Ioannides* (1969) 1 CLR 72; *Ioannis Kyriakou v Ioannis Petri and Others* (1985) 1 CLR 275.

126 *Vassiliou v Menelaou*, Civil Appeal 6801 of 27 December 1990.

127 The published lectures of John Boyadjis (then President of the District Court and subsequently a Judge of the Supreme Court) on the law *in rem*, made for the Council of Legal Studies (1985), at pp 108–114.

128 In other words, the heir can continue the possession of the predecessor but not the purchaser or the donee.

land will be the one to which the owner of the title is entitled by adverse possession, purchase, or inheritance.[129]

14-47 In the event of the owner of the adversely possessed property transferring and registering it into the name of a third person (the transferee) after the maturity of the prescriptive period but before completion of the adverse possession by registration of the property in the name of the possessor, the rule is that the rights acquired by adverse possession prevail over the rights of the transferee and, therefore, such transfer into the name of the transferee will be of no effect as against the possessor, unless the transferee can prove that he is a *bona fide* purchaser for value without notice.[130]

The defence of a *bona fide* purchaser for value without notice is based on the principles of equity in English law and, to succeed, the following elements or facts should co-exist:

- The purchaser must have acted at all material times in good faith and not in conspiracy with the vendor, in accordance with the general principle of equity that 'he who comes to the court must come with clean hands';
- The purchaser must not be a donee of the property but he should have given consideration of some value for the acquisition thereof; and
- The purchaser should have no notice of the right of the possessor.

14-48 The co-existence of these three elements is a question of fact, and the burden of proof lies on the purchaser, who should plead the relevant allegation in his pleadings.[131] The notice that the purchaser is deemed to have received may be actual notice, constructive notice, or imputed notice.[132]

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129 This position is the result of the interpretation given by the High Court to sections 10, 40, and 50 of Cap 224 and section 2(1) of Law 9 of 1965, in combination with the relevant provisions of the old law, in *Constantis Hadjiantoni v Kyriacos Hadjiantonis* (1897) 4 CLR 66, *Sherife Mulla Ibrahim v Mehmet Salim Suleiman* (1953) 19 CLR 237, and *Georgios Nicolaou Ellinas v Ioannis Hadjisolomou* (1984) CLR 225.

130 The rule of the *bona fide* purchaser for value without notice was applied for the first time in the case of *Hadjipetri v Haadjigrigori* 3 CLR 108 and then in *Savva v Paraskeva* (1898) 4 CLR 71 and *Hadjicharalambous Michael and Others v Hadjistylli Nicoli and Others* (1909) 8 CLR 113. It is based on the doctrine of good faith on the part of the transferee (bona fide purchaser) and on the doctrine of estoppel by conduct, according to which the plaintiff (possessor) was estopped from claiming rights over the property, because of his conduct, ie, his failure to register it in his name. In *Akil Hussein Arnaout v Emine Hussein Zinouri* 19 CLR 249, Judge Zekia differentiated his position as regards the application of the doctrine of estoppel and based his judgment on the general rule that the vendor cannot transfer to the transferee a better title than the one he has. The same principle was adopted in *Ioannis Panayioti Michaelides v Maria Savva Tapoura*.

131 *Erini Nicola v Charalambos Christofi and Another* (1965) 1 CLR 324; *Enver Mehmet Chakarto v Houssein Izet Liono*, JSC vol 20, 1st part, at p 113.

132 See the published lectures of John Boyadjis (then President of the District Court and subsequently a Judge of the Supreme Court) on the law *in rem*, made for the Council of Legal Studies (1985), at pp 117 and 118.

Registration of Leases and Sub-leases

14-49 The rules governing the registration of lease agreements with the Land Registry are to be found in Part IV of Cap 224. According to the relevant sections, the prerequisites for a valid registration of a lease agreement are the following:

- A valid lease agreement according to section 77(1) of the Contract Law, Cap 149;[133]
- The lease agreement is not expressly to prohibit the registration;[134]
- The lessor is to be the registered owner of the leased property;[135]
- The term of the lease is to exceed 15 years;[136]
- The contract is to be registered within three months from the day of its execution;
- The consent of the mortgagor or creditor if the leased property is mortgaged or otherwise charged;[137] and
- The estate in land created by the registration of the lease agreement is subject to the terms of the relevant contract and the lessee may transfer or sub-lease his right, provided that this is allowed by the terms of the lease agreement.

Registration of Trusts

14-50 Section 651E, forming Part V of Cap 224 (introduced by Law 2 of 1978), provides that:

- No trust referring to immovable property will be valid unless established by a trust deed, signed by the person entitled for this purpose, or by will;
- The trust deed or the will, as the case may be, should be recorded in the Register of the appropriate District Lands Office; and
- Only the registered owner of the property may apply to the Land Registry for the registration of a trust with regard to such property.[138]

Registration of Restrictive Contracts

14-51 The registration of restrictive contracts is governed by Part VI of Cap 224.[139] 'Restrictive contract' means a contract between the owner of one immovable

133 Cap 224, s 65B(4)(a).
134 Cap 224, s 65B(4)(b).
135 Cap 224, s 65B(4)(c).
136 Cap 224, s 65B(1).
137 Ioannides, *The Department of Lands and Survey — Legislation and Land Registry Procedures*, vols A (April 1994) and B (February 1998), at pp 153–166; Rules issued by the Council of Ministers on 31 March 1980.
138 Opinion of the Attorney General of the Republic of Cyprus of 1 August 1990. As to the procedure for the registration of a trust by an insurance company for the security of the insured public, in accordance to the provisions of the Insurance Law 72 of 1984 and Law 166 of 1990, see Ioannides, *The Department of Lands and Surveys — Legislation and Land Registry Procedures*, vols A (April 1994) and B (February 1998), at pp 167–169.
139 Part VI was added to Cap 224 by Law 16 of 1980.

property and the owner of another immovable property which contains any term by which the use or development of one property is restricted for the benefit of the other property, but it does not include a contract between the lessor and the lessee of an immovable property.[140]

The restrictive contract is registered in the Land Registry on an application to this effect by either of the owners of the properties affected thereby. The restrictive contract should describe all the properties affected thereby by reference to the relevant government survey plan and should be signed by the owner of the property which is burdened by the contract, as well as the owner of the property which benefits therefrom.

If the property which is burdened by the contract is not registered in the name of the person who burdens it or if such person is under any incapacity to contract, the registration cannot be effected. If the property is mortgaged or otherwise charged, the written consent of the mortgagor or other creditor should be obtained for the registration of the contract.

The registration of a restrictive contract creates a real right (estate in land) over the property burdened thereby, and it is binding on the owner thereof and his successors in title for the benefit of the owner of the other property and his successors in title.[141]

Once registered, the restrictive contract can be repealed or amended only by an order of the court. The relevant provisions with regard to restrictive contracts apply to any restrictions on the use of the immovable property, which restrictions may be imposed for the protection and for the benefit of the public pursuant to any 'town planning' legislation in force for the time being.[142]

Commonly Owned Buildings

14-52 The ownership, possession, and enjoyment of the various storeys of a building by the respective owners thereof, as well as the relations between them and their rights and obligations, were governed by section 6 of Cap 224, as amended by Law 16 of 1980. According to the above provisions:

- When a building consisted of more than one storey, each storey or part thereof which could properly and conveniently be held and enjoyed as a separate and self-contained tenement, might be owned held and enjoyed separately as private property;[143]
- The site on which the building is stood, the foundations thereof, the main walls supporting the whole building, its roof, the main staircase leading to the various storeys, the lift, if any, and any other part of the ground or building which had

140 Cap 224, s 65(16).

141 Cap 224, s 651H; *Sotiriades v Vassiliou*, Civil Appeal 7775 of 10 November 1992.

142 Cap 224, s 65K.

143 Cap 224, s 6(1), as amended by Law 16 of 1980.

been defined as 'of common use' to the owners of the various storeys, in accordance with the Streets and Buildings Regulation Law, Cap 96, or any Rules made thereunder, would be held and enjoyed by all the owners in undivided shares;[144]

- The owner of each storey or part thereof could make any alterations, additions, or repairs to his storey or part thereof, provided that they did not prejudice the rights of the owners of any other storey or part thereof and they did not unduly interfere with the enjoyment thereof by the owner of such other storey or part thereof;[145]
- Subject to any agreement between themselves, the owners of the several storeys or parts thereof should maintain, repair, or restore any part owned, held, and enjoyed by them in undivided shares as provided in sub-section (2) of section 6, and the cost thereof should be borne by every such owner in proportion to the value of his storey or part thereof as registered or recorded immediately before the need for incurring such cost had arisen;[146] and
- The provisions of section 6 applied also to buildings erected on certain plots, even if the building or any part thereof could not be divided horizontally, on such terms or restrictions as would be defined by the appropriate authority.[147]

14-53 The Immovable Property (Tenure, Registration, and Valuation) (Amending) Law[148] repealed section 6 of Cap 224 and added a new Part IIA immediately after section 38 of Cap 224, under the name 'Commonly owned buildings'.

The tremendous development of the building industry in the last 25 years and the great increase in commonly owned buildings led to various conflicts of interest and disputes between the owners, as well as to other practical problems, which the existing legislation was often inadequate to resolve and rendered necessary the enactment of a modern law, not only to effect the better registration of the commonly owned buildings, but also to regulate the relations between the owners of a commonly owned building and their rights and obligations towards each other in respect of the tenure of the building. This necessity was meant to be addressed by the enactment of Law 6 (I) of 1993. According to Law 6 (1) of 1993 (Part IIA of Cap 224):

- 'Commonly owned building' means a building consisting of at least five units, even if it belongs mainly to one owner, and will be registered as such according to section 38LA of the same law;[149]

144 Cap 224, s 6(2), as amended.

145 Cap 224, s 6(3), as amended.

146 If any owner should fail or neglect to comply with the above requirements, any other owner could do all such acts and incur such expense as would be reasonably necessary for the purpose and could recover the amount for which the owner in default might be liable by civil action. Cap 224, s 6(4), as amended.

147 Cap 224, s 6(5), added by Law 16 of 1980.

148 Law 6 (I) of 1993, published in the *Gazette* on 12 February 1993.

149 Law 6 (1) of 1993, s 38B. Buildings comprising two to four units may be registered as commonly owned on application by the majority of the owners of the units.

- 'Unit' means a floor or part of a floor, room, office, flat, or shop or any other part or space of a commonly owned building, which may be properly and conveniently occupied and enjoyed as a full, separate, and self-contained unit for any purpose;[150]
- 'Owner of unit' includes the lessee of a unit by virtue of a lease agreement registered with the Land Registry under the provisions of Part IV of Cap 224; and
- 'Restricted commonly owned ownership' means any part of a commonly owned building allotted by virtue of section 38(6) to the exclusive use of one or more unit, but not to all the units.[151]

14-54 The main provisions of Law 6(1) of 1993 are briefly the following:

- The share of each owner of unit is fixed by the original owner of the immovable property on which the commonly owned building is constructed (usually the developer) and is equivalent to the proportion of the value of such unit in relation to the total value of all the units of the commonly owned building;[152]
- In the event of the total destruction or sale or compulsory acquisition of the commonly owned building, the respective interests of the owners of the units will be their corresponding shares in the commonly owned building, as defined above;[153]
- The Administrative Committee must insure and always keep insured the commonly owned building against fire, lightning, and earthquake for a sum corresponding to its replacement value;[154]
- The commonly owned building will be governed by Regulations to be issued according to the provisions of the law, which shall provide for the control, operation, administration, management, use, and enjoyment of the units of the commonly owned property and shall regulate the relations between the owners of the units and their rights and obligations with respect to the commonly owned building and the commonly owned property;[155]
- All the expenses of the insurance, maintenance, and repair of the commonly owned building are to be borne proportionately by the owners of the units according to the share of each owner in the commonly owned property;[156] and

150 Law 6 (1) of 1993, s 38A. Each unit will be registered as such and a separate and exclusive certificate of registration will be issued for it (Law 6 (1) of 1993, s 38B).

151 Law 6 (1) of 1993, s 38A.

152 Law 6 (1) of 1993, s 38(T).

153 Law 6 (1) of 1993, ss 38I2, 38IE, and 38(5).

154 Law 6 (1) of 1993, s 381B.

155 Such Regulations will be registered with the Land Registry and once registered will be binding over every owner of unit and his successor in title. Where there is no registration of Regulations by virtue of section 38K, the 'Standard Regulations' set out in the Appendix of the law will be deemed to be the Regulations registered in relation to the commonly owned building. Law 6 (1) of 1993, ss K and KA, and Appendix.

156 Law 6 (1) of 1993, s 38IA.

- The Law contains provisions for the election and appointment of the Administrative Committee, its composition, and its rights and obligations, as well as provisions for the powers of the Director of the Land Registry in relevant matters.[157]

Powers of the Director of the Land Registry

In General

14-55 The most important of the powers exercised by the Director, or by officers of the Land Registry on his behalf, include the definition, on application and after conducting a local inquiry, of the direction of compulsory rights of way for enclosed immovables, the extent of the use of such rights and the amount of the compensation payable to the servient property, in accordance with the provisions of section 11A of the Law.

In exercising such powers, the Director acts as an arbitrator in a quasi-judicial capacity.[158] The relevant decisions of the Director should be duly reasoned and, in deciding, he must follow the rules of natural justice as well as the rules of evidence.[159]

The Director has the power of sale by public auction of immovable property owned in undivided shares, which cannot be divided between the co-owners without contravening the provisions of section 27 and the distribution of the proceeds of the sale among the co-owners in accordance with their respective shares, as provided by section 28 of the Law.

The Director may settle disputes as to the boundaries of any registered immovable property and the placement of land marks to indicate the correct boundaries as decided by the Director, by virtue of section 58 of the Law.[160] No court will entertain an action or other procedure concerning a boundary dispute unless the dispute is first resolved in the manner provided by section 58.

The Director may correct mistakes or omissions in the Land Register or on any other book or plan of the District Lands Office or in any certificate of registration,

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157 The rights of the Administrative Committee include the institution of legal proceedings against owners of units for the repair of damage caused by them, the recovery of their contribution to the common expenses of the building, and other matters.

158 See *Constantinou Nicolaou Georghiou v Evangelia Hadjigeorghiou Hadjifesa* (1970) 1 CLR 58 and *Charalambos Christodoulou Peyiotis and Another v Andreas Christodoulou Polemitis* (1982) 1 CLR 442, in which it was held that the relevant decisions of the Director refer to rights falling within the sphere of the private law and do not constitute administrative actions subject to recourse to the Supreme Court pursuant to article 146 of the Constitution.

159 *Adriani Demetriou Ioannou v Maria Savva Petrou* (1979) 1 JSC 204.

160 See *Panayiotou v Hadjikyriacou*, Civil Appeal 7502 of 26 April 1991, as to what constitutes a boundary dispute within the meaning of section 58. See also *Hadjioannou v Constantinou*, Civil Appeal 8112 of 15 November 1993.

pursuant to the power given to the Director by section 6(1) of the Law. Corrections in the Land Register or the plans of the Land Registry may be effected only through the procedures of section 61, and the courts have no such power except to revise the decision of the Director on appeal under section 80.[161]

Appeals from Decisions of the Director

14-56 Section 80 of Cap 224 provides that 'any person aggrieved by any order, notice or decision of the Director made, given, or taken under the provisions of this law may, within 30 days from the date of the communication to him of such order, notice, or decision, appeal to the Court and the Court may make such order thereon as may be just but, save by way of appeal as provided in this section, no Court shall entertain any action or proceeding on any matter in respect of which the Director is empowered to act under the provisions of this law'.

The court may extend the time within which an appeal may be made, if satisfied that the person aggrieved was prevented from appealing within 30 days for good reasons, such as absence or sickness.

The order of the court in appeals under section 80 is final and conclusive, and no appeal will lie therefrom, save where a question of personal status is involved or where the amount in dispute exceeds CY £25. Any person, including the Director, aggrieved by any order of the court on any appeal under section 80, may appeal therefrom to the Supreme Court on any point of law.[162]

The powers of the courts when dealing with appeals under section 80 are not confined to what is reasonable but extend to the substance of the decision of the Director; they may not only ratify or reverse but also amend or substitute such decision with a decision of their own as they may deem just in the circumstances.[163] Thus, the powers of the District Courts in trying appeals under section 80 are wider than the respective powers of the Supreme Court in trying recourses under article 146 of the Constitution.

The Relevant Legislation

In General

14-57 As pointed out above, the Immovable Property (Tenure, Registration, and Valuation) Law, Cap 224, as amended by a number of laws and as interpreted and applied by the Cypriot courts, forms the basic enactment governing most matters

161 *Philippou v Stylianou*, Civil Appeal 7761 of 19 March 1992; *Hadjioannou v Constantinou*, Civil Appeal 8112 of 15 November 1993; *Christodoulou v Hadjiloizi*, Civil Appeal 7643 of 14 April 1992.

162 Cap 224, s 81. See also *Charalambos Christodoulou Peyiotis and Another v Andreas Christodoulou Polemitis* (1982) 1 CLR 442, as to the interpretation of the word 'aggrieved'.

163 *Solomontos v Papaneocli*, Civil Appeal 7497 of 22 June 1992.

related to immovable property in Cyprus. However, the examination of this law alone does not cover all the aspects of the Cypriot land law, in the broad meaning of the term. There are many other laws regulating general or more specific matters concerning real estate and property which undoubtedly fall within the ambit of the so-called Cyprus Land Law. In addition, provisions related to or touching on real estate issues are to be found in a great number of other laws from the Constitution of Cyprus to the Wills and Succession and the Administration of Estate Laws, the Contract Law, family laws, and laws on taxation.

A list of the main laws which regulate matters affecting immovable property and transactions related thereto is set out in the Appendix hereto. The relevant legislation may be divided in two categories, as follows:

- Specific legislation, which includes laws and regulations referring exclusively to immovable property; and
- General legislation, comprising those laws which, although not directly regulating matters relating to immovable property, do contain important provisions applicable to rights in immovable property and to transactions connected with it.

The Immovable Property (Transfer and Mortgage) Law

14-58 The Immovable Property (Transfer and Mortgage) Law[164] came into operation on 1 January 1997. It contains general and specific provisions with regard to the transfer and mortgage of immovable properties as well as the sale of mortgaged properties.

Law 9 of 1965 repealed the Land Transfer Law, Cap 228, the Sale of Mortgaged Property Law, Cap 233, and the Security for Debts (Offences and Protection) Law, Cap 234, the basic provisions of which were embodied in the new Law, which also has brought about substantial reforms to meet contemporary needs.[165]

The Sale of Land (Specific Performance) Law

In General

14-59 By the term 'specific performance' of a contract for the sale of immovable property is meant the enforcement of the execution of such contract by an order of a competent court for the benefit of the purchaser who has fulfilled his contractual obligations, and the transfer and registration of the immovable property into the name of such purchaser after certain procedures have been followed. The court

164 Law 9 of 1965.

165 Ioannides, *The Department of Lands and Surveys — Legislation and Land Registry Procedures*, vols A (April 1994) and B (February 1998), at pp 189–260; Ioannou, 'Buying and Selling Immovable Property in Cyprus', *Cyprus Law Review* (July–September 1990), at pp 4828–4835.

order may be issued under certain conditions and prerequisites expressly laid down by the relevant legislation.[166]

The law governing the subject is the Sale of Land (Specific Performance) Law, Cap 232, as amended by Law 50 of 1970, Law 96 of 1972, Law 51 (1) of 1995, and Law 96 (1) of 1997.[167]

Section 2 of Cap 232 provides that, subject to the provisions of the Law, every contract for the sale of immovable property will be capable of being specifically enforced under the order of a District Court or the Supreme Court, if it is a valid contract according to the law and if the conditions set out by this section have been complied with.[168]

Valid Contract

14-60 The contract of sale must be valid in accordance with the provisions of the Contract Law, Cap 149[169] and the contracting parties must be competent to contract.[170]

Formalities Required

14-61 The contract must be in writing.[171] The purchaser must deposit a copy of the contract at the Land Registry within two months of the day of the execution thereof.[172] For acceptance of the deposit, the property should stand registered in the name of the vendor.

Before institution of an action to compel specific performance, the purchaser must have called the vendor to attend the Lands Office and declare his agreement to the sale of the property to the purchaser. The action for specific performance must be instituted within six months from the date of the execution of the contract. Where,

166 Specific performance is an equitable remedy, unknown in the Ottoman Law, introduced in Cyprus after the occupation of the island by the British.

167 The first enactment was the Sale of Land (Specific Performance) Law, Law 11 of 1885. The Contract Law, Law 24 of 1930, Cap 149, did not replace or repeal Law 11 of 1885 and expressly provided that this law should continue to govern matters of specific performance.

168 In *Melaisi v Georgiki Eteria* (1979) 1 CLR 66, it was held that the provisions of section 2 are not merely procedural but lay down the prerequisites which must be fulfilled to make a contract specifically enforceable. *Iordanou v Anyftos* 24 CLR 97; *Xenopoulos v Makridi* (1969) 1 CLR 488.

169 Cap 149, ss 10(1) and 14–22; *Saab and Another v Holy Monastery Ayios Neophytos* (1982) 1 CLR 499.

170 Cap 149, s 11. In *Saab and Another v Holy Monastery Ayios Neophytos*, it was held that a contract by an alien for the purchase of immovable be property is valid. The law merely restricts the registration in the name of the alien without the approval of the Council of Ministers.

171 It should be signed by both the vendor and the purchaser and witnessed by two witnesses and it also should be stamped.

172 Law 50 of 1970. The period according to the previous law was 21 days.

in the contract, a later date is specified or implied for the declaration of the transfer or for the payment of the last instalment of the purchase price, the period of six months will begin to be reckoned from such later date.[173] The deposit of the contract for specific performance purposes operates as an encumbrance on the property affected thereby from the date of the deposit to the expiration of the periods laid down by the law.[174]

If the purchaser who obtains an order for specific performance does not apply to the District Lands Office for the registration of the property in his name within three calendar months of the date of the order, the property cannot be transferred into his name under the authority of such order.[175]

The alternative remedy to the remedy of specific performance is the award of damages to the purchaser against the vendor in the case of breach of the contract of sale on the part of the latter. Such damages may be adjudged by the court where:

- The conditions of section 2 have not been fulfilled, in which case the court cannot order specific performance;
- Even if the conditions of section 2 have been fulfilled, the issue of the court order is not possible for the reason that there is no separate registration of the property in the name of the vendor on the date of the hearing of the application by the purchaser;[176] and
- In exercise of its discretion, the court considers it expedient to award damages instead of specific performance, even though the conditions of section 2 have been fulfilled.

14-62 The subject of an award of damages as aforesaid is governed by the general principles of contracts, as set out in the Contract Law, Cap 149.[177]

The Acquisition of Immovable Property (Aliens) Law

14-63 The Acquisition of Immovable Property (Aliens) Law[178] deals with the acquisition of immovable property in Cyprus by aliens. The original purpose of

173 Law 50 of 1970. See Law 96 of 1972 and Law 51 (1) of 1995 with regard to building sites under division or flats under construction.

174 Cap 232, s 27; Law 9 of 1965.

175 Cap 232, s 5; see also Law 51 (1) of 1995, according to which such order may be renewed if the court considers the renewal just and proper under the circumstances.

176 Law 96 (1) of 1997, however, allows the court, in cases where the vendor neglectfully renders separate registration impossible or unreasonably delays to take all reasonable steps for the issue of a separate title deed for the property, to order the vendor to do so within a reasonable period or to appoint another competent person to take all such steps for the purpose. Law 96 (1) of 1997, s 2, which amended section 3 of Cap 232.

177 Ioannou, 'The Specific Performance of Contracts for the Sale of Immovable Property as a Means of Protection of the Purchaser', *Cyprus Law Review* (January–March 1988), at pp 3334–3353; Koukounis, *The Immovable Property* (*Specific Performance*) *Law* (Cap 232) (1998).

178 Cap 109, amended by Law 52 of 1969, Law 55 of 1972, and Law 50 of 1990.

the law, enacted during World War II when Cyprus was under British rule, was to control the acquisition of immovable property in Cyprus by enemies or non-British subjects.[179]

Currently, the law, apart from the proper control of foreign investments, aims at the protection of the social, economic, agricultural, and industrial interests of Cyprus and its people, especially in view of the small area of the island and, at the same time, the protection of foreign investors and the implementation of the Exchange Control Restriction Law.

According to the Law, foreigners purchasing immovable property in Cyprus, apart from following the general rules which regulate such transactions, are obliged to adhere to special formalities, such as the obtaining of a licence to this effect from the Council of Ministers and the Central Bank of Cyprus, and they are subject to certain restrictions as regards the number of the properties sought to be acquired and the extent thereof.[180]

The Rent Control Law

In General

14-64 The legislation on rent control dates back many years and refers much to premises used for residence as to the business premises.[181]

The Turkish military invasion of 1974, as a result of which large numbers of refugees moved to the southern part of Cyprus, created serious housing problems and rendered necessary the immediate and effective imposition of legislation appropriate to solve or reduce the effects of such problems. Thus was enacted the modern legislation on rent control, which aims primarily to safeguard the occupation by all persons of premises for residential or business purposes at a reasonable rent, the protection of tenants, the regulation of evictions, the adjustment of rents, and generally the regulation of relations between landlords and tenants.

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179 Thus, the use of the word 'aliens', which should be interpreted as meaning 'foreigners' or 'non-Cypriots'.

180 Normally permission is granted to *bona fide* foreigners to acquire a flat or a house or a piece of land not exceeding in extent three *donums* (approximately 4,000 square metres). The restriction does not apply to British subjects classified as 'British Residents' according to Annex T of the Treaty of Establishment of the Republic of Cyprus.

181 The first legislation was codified in the issue of the Laws of Cyprus of 1949 as Cap 108. Law 13 of 1954 replaced Cap 108 and later formed Cap 86 in the second edition of the Laws of Cyprus of 1959. Law 17 of 1961 introduced special provisions for business premises. Law 36 of 1975 replaced all the laws enacted until then (Cap 86 and Law 17 of 1961, Law 39 of 1961, Law 19 of 1965, Law 8 of 1968, and Law 51 of 1974). Law 36 of 1975, as well as the laws that followed (Law 24 of 1977 and Law 28 of 1982) were replaced by Law 23 of 1983, which, as amended by a number of laws (see Appendix), constitutes the legislation governing the subject today.

The Law applies to tenancies of residential or business premises which lie within Controlled Areas, as defined by the Law (towns, suburbs, and rural centres) and which were completed before 29 December 1995. Non-citizens of the Republic (except the non-citizen wife of a citizen of the Republic) and legal entities controlled by non-residents are not covered by the provisions of the law.[182] 'Tenant' also may be the statutory tenant (post), the sub-tenant, the wife or children of a deceased tenant, the wife who has been abandoned by her husband (tenant), and the Republic of Cyprus.

Determination of Reasonable Rent

14-65 Any landlord may apply to the court and claim an increase in the rent payable by his tenant, provided that the first tenancy has either expired or has been terminated.[183] The court determines a reasonable rent, taking into consideration the opinion of the official valuer appointed for this purpose and all the circumstances of the case, such as the age, dimensions, location, and condition of the premises.

The court can increase the rent by up to 14 per cent of the rent currently paid but not before the lapse of two years from the date of the last application for an increase or from the date of the last voluntary increase. However, Law 102 (1) of 1995 gives the option to the landlord to claim either an increase of up to 14 per cent of the current rent or an increase equal to 70 per cent of the average rent in the area of the premises, which average rent is again defined by the court, as above.

Recovery of Possession

14-66 According to section 2 of Law 23 of 1983, a 'statutory tenant' is every tenant who at the expiration or termination of the first tenancy remains in possession of the premises and includes any statutory tenant before the date of the coming into operation of the law. Section 11(1) provides that no judgment and no order may be issued for the recovery of possession of any house or shop to which the provisions of this law apply or for the eviction therefrom of any statutory tenant, except in 12 cases laid down in the same section. The most common of those cases are where:

- Any rents are in arrear and the tenant fails to pay within 21 days from the date on which he receives from the landlord a written notice to do so;[184]

182 The tenancies of land for agricultural purposes, furnished apartments for less than six months, hotels and petrol stations (*vis-à-vis* the owner of the land) are not tenancies falling within the ambit of the Rent Control Law; *Re Calliopi Banchou*, Application 134 of 17 October 1994.

183 The tenant also may apply to the court for a decrease in the rent paid by him.

184 If the rents in arrear are paid within 14 days from the service of the relevant action on the tenant, no eviction order will be issued by the court. See *Georghiou Real Estates Ltd v Bendezi*, Civil Appeal 8593 of 7 November 1995, as to the legality and necessity of the notice to quit.

- The landlord needs a house for himself or for members of his family or his dependent parents;[185] and
- The landlord needs the premises to demolish it or to demolish and reconstruct it or to effect such substantial alteration or reconstruction thereof as to render the recovery of possession of the premises absolutely necessary.[186]

Stay of Execution, Damages, New Tenancy

14-67 In granting an order for eviction, the court may order a stay of execution of the order for a period of up to a year as long as the tenant pays the rent. Apart from damages equal to the rent for nine to 18 months, the court, in granting an order for eviction in the case of business premises,[187] may grant damages for 'good will' which increases the rental value of the premises, if the landlord may make use of such increase for his own benefit.[188]

Under certain circumstances, the court may, in cases of demolition and reconstruction, order the landlord to grant to the tenant, in lieu of damages, a right to a new tenancy after the reconstruction.[189] If an order for eviction has been obtained by false pretences, the court may grant damages to the evicted tenant.[190]

185 The need must be genuine and present. *Savvas Yiannopoulos v Maritsa Theodoulou* (1979) 1 CLR 215; *N Andreou v A Christodoulou* (1978) 1 JSOC; *Colomvou v Constantinou*, Civil Appeal 8460 of 31 May 1993; *Michaelidou v Makrides*, Civil Appeal 8640 of 30 June 1995.

186 *Kontou v Solomou* (1978) 1 CLR 425; *Xenophontos v Papasian* (1987) 1 CLR 154; *Lamarco v Kranos* (1987) 1 CLR 336; *Boyiadjis v Pilavakis and Others* (1988) 1 CLR 411; *Cosmos Ltd v Phylactou Ltd*, Civil Appeal 7904 of 25 August 1992; *Ioannou v Kokkoni*, Civil Appeal 8609 of 30 April 1993.

187 Law 102 (1) of 1995 abolished the previous provision according to which damages also were granted in cases of evictions from residential premises.

188 *Markoulli Nicolaidou v Chrysochou* (1988) 1 CLR 687; *Cosmos Ltd v Phylactou Ltd*, Civil Appeal 7904, 25 August 1992.

189 *Kyproxil Designs Ltd v Panos Englesos* (1988) 1 CLR 546.

190 *Charalambous v Tryfonos* (1982) 2 JSC 240; *Sizinos v Mouzouris* (1982) 1 CLR 752.

Appendix

Specific Legislation

1. Immovable Property (Tenure, Registration, and Valuation) Law, Cap 224, as amended.
2. Immovable Property (Transfer and Mortgage) Law, Law 9 of 1965, amended by Law 51 of 1970, Law 3 of 1978, and Law 6 of 1981.
3. Immovable Property (Fees and Charges) Law, Cap 219, amended by Law 10 of 1965, Law 81 of 1970, Law 61 of 1973, Law 31 of 1976, Law 66 of 1979, Law 15 of 1980, Law 2 of 1982, Law 34 of 1987, Law 193 of 1991, Law 82 (1) of 1992, Law 10 (1) of 1993, Law 84 (1) of 1995, Law 32 (1) of 1998, and Law 25 (1) of 1999.
4. Streets and Buildings Regulation Law, Cap 96, amended by Law 14 of 1959, Law 67 of 1963, Law 6 of 1964, Law 65 of 1964, Law 12 of 1969, Law 38 of 1969, Law 13 of 1974, Law 28 of 1974, Law 24 of 1978, Law 25 of 1979, Law 80 of 1982, Law 15 of 1983, Law 9 of 1986, Law 115 of 1986, Law 199 of 1986, Law 53 of 1987, Law 87 of 1987, Law 316 of 1987, Law 108 of 1988, Law 243 of 1988, Law 122 of 1990, Law 97 (I) of 1992, Law 45 (I) of 1994, Law 14 (I) of 1996, Law 52 (I) of 1996, Law 37 (I) of 1997, Law 72 (I) of 1997, Law 71 (I) of 1998, Law 35 (I) of 1999, Law 61 (I) of 1999, and Law 8 (I) of 1999.
5. Town and Country Planning Law, 90 of 1972, amended by Law 56 of 1982, Law 7 of 1990, Law 8 of 1991, Law 91 (1) of 1992, Law 55 (1) of 1993, Law 72 (1) of 1998, Law 59 (1) of 1999, and Law 142 (1) of 1999.
6. Compulsory Acquisition of Property Law, Law 15 of 1962, amended by Law 25 of 1983, Law 148 of 1985, Law 84 of 1988, Law 92 (1) of 1992, Law 63 (1) of 1996, Law 74 (1) of 1996, Law 30 (1) of 1998, and Law 135 (1) of 1999.
7. Agricultural Land (Consolidation) Law, Law 24 of 1969, amended by Law 52 of 1971, Law 8 of 1973, Law 18 of 1983, Law 44 of 1985, Law 125 of 1986, and Law 23 of 1987.
8. Sale of Land (Specific Performance) Law, Cap 232, amended by Law 50 of 1970, Law 96 of 1972, Law 51 (1) of 1995, and Law 96 (1) of 1997.
9. Acquisition of Immovable Property (Aliens) Law, Cap 109, amended by Law 52 of 1969, Law 55 of 1972, and Law 50 of 1990.
10. Immovable Property Tax Law, Cap 322.
11. Immovable Property (Towns) Tax Law, Law 89 of 1962.
12. Immovable Property (Conducting of Forced Sales) (Special Provisions) Law, Law 16 of 1968.
13. Rent Control Law, Law 23 of 1983, amended by Law 51 of 1983, Law 39 of 1984, Law 79 of 1986, Law 94 of 1986, Law 135 of 1988, Law 51 of 1989, Law 138 of 1991, Law 67 (1) of 1992, Law 2 (1) of 1993, and Law 102 (1) of 1995.

Subsidiary Legislation

1. Immovable Property (Tenure, Registration, and Valuation) Rules of 1956.
2. Immovable Property (Grant of Access) Rules of 1967.
3. Immovable Property (Registration of Leases) Rules of 1980.
4. Immovable Property (Disposition) Rules of 1989 and 1990.
5. Immovable Property (Lease of Property within Government Industrial Areas) Rules of 1990 and 1993.

General Legislation

1. Constitution of Cyprus.
2. Administration of Estates Law, Cap 189.
3. Wills and Succession Law, Cap 195.
4. Probates (Re-sealing) Law, Cap 192.
5. Estate Duty Law, Cap 319.
6. Contract Law, Cap 149.
7. Civil Procedure Law, Cap 6.
8. Stamp Law, Cap 228.
9. Trustees Law, Cap 193.
10. Capital Gains Tax Law 52 of 1980.

Subsidiary Legislation

1. Administration of Estates Rules of 1955.
2. Civil Procedure Rules of 1955.

CHAPTER 15

Law of Succession

Lefkios Tsikkinis

Introduction

15-1 The legal consequences of the death of a person as regards his property and the rights and liabilities attaching thereto have been considered by legal systems since the beginnings of legal history.

In primitive societies the will was unknown and the estate of the deceased devolved by law to the family or *gens*.[1]

With the progress of civilisation and the development of the personality of the individual, the will appears as an expression of the freedom of the person and as a mode of exercise of the right of absolute ownership (*jus abutendi*) over his property.[2]

Meanwhile, moral, social, and economic expediencies led the various legal systems to introduce certain rules, not only to protect the rights of the family of the deceased, but also to define the legal status of his estate and generally to regulate the succession to his property and his legal affairs.[3]

As a result, modern legislation, in formulating the rules of succession, has developed compound legal frameworks regulating the inheritance of a person's estate both

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1 The central idea prevailing in the early Roman inheritance law was that of the preservation of the family on the basis of co-ownership. The members of the family had a dormant right of co-ownership in the estate of the family, subject to the absolute authority of the *pater familias*. On the death of the *paterfamilias*, the estate devolved to his children (*heredes sui*) who, being already co-owners, continued in the ownership of the estate without having to succeed to it; Petropoulou, *The Roman Law* (1955), at pp 603 *et seq*.

2 In ancient Athens and Rome, the will appeared earlier than in other countries (such as Germany) but while, in Greece, the freedom of the testator was seriously restricted for the benefit of his family, in Roman Law, the will was greatly favoured to the extent of the absolute exclusion of any rules of intestacy, which could only apply in the total absence of a will. The doctrine *nemo pro parte testatus*, *pro parte intestatus decedere potest* (Inst 2, 14 para 5) illustrates the dominant power of the *pater familias* to determine his heirs in exercise of the right of absolute ownership over his property; Patropoulou, *The Roman Law* (1955), at p 605.

3 Thus, the doctrine *nemo pro parte testatus*, *pro parte intestatus decedere potest* is no longer followed by the legal systems of most countries, including Cyprus, in which, when the testator does not dispose by will of the whole of the disposable portion of his estate, the provisions of the law apply to the undisposed portion.

according to his will and on intestacy.[4] The rules governing the devolution of one person's property on his death, either according to his will or on intestacy, comprise the Law of Succession, which is the subject of this chapter.

Legislation

15-2 In Cyprus, the Law of Succession (or Inheritance) is incorporated in a number of enactments, the most significant of which are the Wills and Succession Law, Cap 195, and the Administration of Estates Law, Cap 189, hereinafter referred to as Cap 195 and Cap 189, respectively.

Cap 195[5] deals with both wills and intestacy. The part of the Law which deals with wills is based on the English Wills Act of 1837, whereas the part dealing with intestacy is based on the Italian Civil Code and reflects Continental Law.[6] In its present form, Cap 195 is divided into four parts, as follows:

- Part I, General provisions;
- Part II, Wills;
- Part III, Rights of surviving spouse and succession; and
- Part IV, Miscellaneous.

Cap 195 also contains 2 Schedules.

15-3 Cap 189[7] deals with execution of wills and administration of estates. Although the provisions of the Law are, to a great extent, of a procedural nature, it is considered to be a supplement to, and has always been read in conjunction with, Cap 195. The study, therefore, of the Law falls within the ambit of the law of succession in the wide meaning of the term and, in this respect, it is dealt with in this chapter.[8] Cap 189 is divided into seven parts, as follows:

- Part I, Preliminary;
- Part II, Deposit, discovery, and production of wills;
- Part III, Probate Registrar and Registry;

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4 The rules of intestacy apply in the absence of a valid will or with regard to the undisposed portion, if any, and the statutory portion of the movable or immovable property of the deceased.

5 Law 25 of 1945, codified as Cap 220 in the Laws of Cyprus of 1949, amended by Law 5 of 1951, Law 43 of 1954, and Law 15 of 1955 and codified as Cap 195 in the second and last issue of the Laws of Cyprus of 1959; amended by Law 75 of 1970 and Law 100 of 1989. See also Law 50 of 1979.

6 Gavrielides, 'The Law of Inheritance in Cyprus', *Cyprus Law Review*, Issue 26 (April–June 1989 (2)), at p 4047; *Tano v Tano*, IX CLR 110.

7 Law 45 of 1954, amended by Law 26 of 1958 and codified as Cap 189 in the second and last edition of the Laws of Cyprus of 1959; amended by Law 157 of 1985, Law 45 of 1990, and Law 20 (1) of 1994.

8 The same applies to the study of the Probates (Re-Sealing) Law, Cap 192, and the Rules made thereunder, ie, the Administration of Estates Rules of 1955 and the Probates (Re-Sealing) Rules of 1936.

- Part IV, Grants;
- Part V, Vesting of estate on grant and after administration;
- Part VI, Administration; and
- Part VII, Miscellaneous.

Succession

Vesting of Estate

15-4 According to section 3 of Cap 195, on the death of a person, his estate will pass as a whole to one or several other persons.

This rule tends to establish the *successio in universitatem hereditatis* or *successio in universum* of Roman Law, ie, the universal succession or the principle of the catholicity (*catholicotis*) of succession, according to which the estate of the deceased as a whole, and not in parts, passes to the successors (heirs) directly on the death of the deceased and the successors succeed the deceased not only in his rights but also in his liabilities, whether known to the successors or not, the latter being considered to continue the personality of the deceased.[9] In *National Bank of Greece v Metliss*,[10] Lord Simmonds observes:

> That is a concept of *the Roman Law* which found its way into many systems of law including the law of Scotland . . . . The Greek legislature using the words 'universal succession' in the relevant Act, was looking to the familiar principle under which the heir was the universal successor of his testator and regarded as *eadem persona cum defuncto* . . . .

15-5 The notion of direct succession is unknown as such to the English law, where the rights and liabilities attaching to the estate of the deceased are vested in the administrator of his estate or the executor of his will,[11] referred to in the law as 'personal representatives'.[12] The executor derives his powers over the estate of the deceased from the will of the deceased,[13] and the estate is vested in him at the time of the death of the deceased,[14] whereas the administrator derives such powers from the order of the court appointing him as such, which is the time when the estate vests in him,[15] but from the issue of such order the vesting operates as from the date of the death of the deceased.

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9 Petropoulou, *The Roman Law* (1955), at p 606. Such succession, however, was subject to acceptance of the inheritance by the heir who could renounce it.

10 *National Bank of Greece v Metliss* (1957) 3 All ER 612.

11 For the meaning of the words 'administrator' and 'probate', see section 2 of Cap 195.

12 Cap 189, s 2.

13 *Combers' Case* (1721) 1 P Wms 766; *Meyappa Chetty v Supramanian Chetty* (1916) AC 603, at p 608.

14 *Woolley v Clark* (1822) 5 B & Ald 744.

15 *Combers' Case* (1721) 1 P Wms 766; *Woolley v Clark* (1822) 5 B & Ald 744; *Creed v Creed* (1913) 1 IR 48.

This also is the law in general in Cyprus,[16] except for the following deviations:

- On the death of a person wholly intestate leaving heirs under disability and property exceeding CY £6,000 in value, such property shall, until administration is granted in respect thereof, or an order is made that the estate be administered summarily under section 49 of Cap 189, vest in the President of the District Court where the deceased ordinarily resided and, if he was resident abroad, in the President of the District Court of Nicosia.[17]
- If the deceased leaves no heirs under disability or (if there are such heirs) leaves property not exceeding CY £6,000 in value and an order is not made for summary administration under section 49 of Cap 189, an order for administration may not be made and the estate will vest in and devolve on the heirs charged with the debts and liabilities of the deceased. In such case and for a period of 18 months, no heir will be allowed to sell or alienate the portion of the estate so devolved on him and each heir will be liable to pay the debts and liabilities of the deceased up to the value of the property that comes into his hands or up to the value of the proceeds from the sale of such property.[18]
- Where the value of the property of a deceased person leaving heirs under disability does not exceed CY £10,000, the court of its own motion or on the application of any interested person may order that the probate may be administered summarily, ie, the probate registrar of the court or such other public officer as the court may appoint shall have the powers and duties of an administrator for the purposes specified in the law.[19]

In view of the above, section 3 of Cap 195, to be more consistent with the concept of the Cypriot law, should be interpreted as meaning that the estate of the deceased passes as a whole, either by will or by the operation of law, and not directly or automatically, to the personal representatives, except where otherwise expressly provided by the law.

Renunciation

15-6 An heir may renounce the estate, in which case he will have no liability in respect of the debts of the deceased and will receive no benefit from the estate of such deceased either by operation of law or under the will of the deceased.[20] Such renunciation is made by declaration in the prescribed form, filed with the court within three months from the date on which the declarant became aware of the death of the deceased and of the fact of his being an heir to such deceased.[21]

16 Cap 189, ss 25, 31, 41, and 48; Courts of Justice Law, Law 14 of 1960, s 29(1)(c).
17 Cap 189, s 26(1), as amended by Law 20 (1) of 1994. Nicosia is the capital of Cyprus.
18 Cap 189, s 27, as amended by Law 20 (1) of 1994.
19 Cap 189, s 49, as amended by Law 45 of 1990.
20 Cap 189, s 51(1) and (4).
21 Cap 189, s 51(2); Administration of Estates Rules of 1955, rule 37.

The renunciation should be unconditional and it should not purport to defeat the rights of the creditors of the declarant; otherwise, it may be set aside by the court on the application of any creditor.[22]

Similarly, the executor of a will or the administrator with will annexed may renounce probate of the will.[23]

Mode of Succession

15-7 Section 4 of Cap 195 provides that succession to an estate may be either by will or by the operation of law or by will and by the operation of law.

The meaning of this provision is that succession to an estate cannot take place except by will or, in the absence of a will or as regards the statutory portion or the undisposed portion of the estate, by the application of the rules of intestacy, as set out in the law.[24]

Application of Law

15-8 Section 5 of Cap 195 provides that the Law will regulate:

- The succession to the estate of all persons domiciled in the Colony (now the Republic of Cyprus); and
- The succession to the immovable property of all persons not domiciled in Cyprus.

15-9 From the above, it follows that the Wills and Succession Law, Cap 195, is applicable in two categories of cases, ie, in cases of succession to the movable property of any person who at the time of his death had his domicile in Cyprus and in cases of succession to the immovable property situated in Cyprus of every person, irrespective of whether he had at the time of his death his domicile in Cyprus.[25] The succession, therefore, to the movable property of a person who at the time of his death did not have his domicile in Cyprus is governed by the law of the country of his last domicile, even though he may have possessed Cypriot nationality.[26]

Consequently, to answer the question whether the provisions of Cap 195 apply to a given case, the preliminary question of the last domicile of the deceased must be resolved first.

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22 Cap 189, s 51(1) and (4).

23 Cap 189, s 16; Administration of Estates Rules of 1955, rule 27. For the meaning of 'letters of administration with will annexed' see section 2 of Cap 195.

24 The direct or automatic succession of the continental law is unknown to Cypriot law.

25 'Questions of material or essential validity of the will of movables are always governed by the law of the testator's domicile at the time of his death and not by the law he intended to govern and the validity of the will of immovables is determined in every aspect whether as regards capacity, form or material validity, by the *lex loci rei sitae*.' *Halsbury's Laws of England* (3rd ed), vol 7, at pp 51 and 53.

26 Cap 195, s 12.

Domicile

15-10 The subject of domicile is covered by sections 6–13 of Cap 195. According to section 6, every person has, at any given time, either:

- The domicile received by him at his birth ('the domicile of origin'); or
- A domicile (not being the same as the domicile of origin) acquired or retained by him by his own act ('the domicile of choice').

15-11 The domicile of choice is acquired by a person establishing his home at any place in Cyprus with the intention of permanent or definite residence therein, but not otherwise.[27]

Consequently, for the acquisition of a domicile of choice, two elements should co-exist: the establishment by a person of residence in a place and the intention of making such place his permanent home.[28] In no other way may a person acquire a domicile of choice.[29]

Section 10 provides that the domicile of origin prevails and is retained until a domicile of choice is acquired. The onus of proving that a domicile has been chosen in substitution for the domicile of origin lies on those who assert that the domicile of origin has been lost.[30]

The domicile of choice may be abandoned, in which case the domicile of origin is resumed unless the person acquires another domicile of choice.[31] No person can, for the purpose of succession to movable property, have more than one domicile.[32]

The domicile of origin of a legitimate child born during the father's lifetime is the domicile of his father at the time of the child's birth. The domicile of origin of an illegitimate or posthumous child is the domicile of his mother at the time of the child's birth.[33]

In conclusion, the resolution of the issue of domicile defines the law governing the succession to the movable property of a person, whereas the law of the country

27 Cap 195, s 9.

28 *Henderson v Henderson* (1965) 1 All ER 179, referred to in *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou and Another* (1971) 1 CLR 437, where D Stylianides (then Ag PDC and later President of the Supreme Court of Cyprus) made an elaborate statement of the law on most subjects of succession, including the issue of domicile, with reference to a number of judgments of the English and domestic courts.

29 Cap 195, s 9. Dicey and Morris, *The Conflict of Laws*, at p 86, reads: 'Every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence, but not otherwise'.

30 *Bell v Kennedy*, LR 1 Sc & Dir 307, at p 310; *Udny v Udny*, LR 1 Sc & Dir 441, at p 445; *Travers v Holley and Holley* (1953) 2 All ER 794.

31 Cap 195, s 11; *Henderson v Henderson* (1965) 1 All ER 179; *Udny v Udny*, LR 1 Sc & Dir 441; *Harrison v Harrison* (1953) 1 WLR 865.

32 Cap 195, s 13; *Academy of Athens v Panayiotou and Others* (1994) 1 JSC 472.

33 Cap 195, ss 7 and 8.

where immovable property is situated (*lex loci rei sitae*) governs the succession to such property.[34] The importance of this conclusion is not only of theoretical value as the domicile or any subsequent change thereof may involve far-reaching consequences in regard to succession, distribution, and other things connected with domicile and the law applicable to the succession to a person's estate.[35]

It also may affect the right of the wife or the next of kin of the deceased to *legitima portio* or the estate duty (inheritance tax) payable by the estate of the deceased. For instance, if a British subject dies domiciled in Cyprus, his movable property worldwide, as well as his immovable property in Cyprus will be free of inheritance tax, due to the fact that inheritance tax has been recently abolished in Cyprus.[36]

Issues in the Application of the Doctrine of Renvoi

15-12 In applying the above principles, questions of private international law (or conflict of laws) are often bound to arise. This may be the case when a person dies leaving movable and/or immovable property in various countries. The succession to his movable property will be governed by the law of the country of his domicile at the time of his death (*lex domicilii*). Such law will determine the material or essential validity of his will, if any, the persons who succeed him, and the order and extent of the succession. As to the succession to his immovable property, the above issues will be determined by the respective law of each country in which he left immovable property, with regard to the property left in each such country (*lex situs*).

The legal system of each of those countries contains, apart from the domestic provisions applicable to succession cases of its subjects, provisions of private international law as regards succession to the movable and immovable property of a deceased in conjunction with his domicile at the time of his death or the location of his immovable property. These rules comprise the 'conflict of laws rule' of each country. When the law of nationality of the deceased (municipal law), in applying the doctrine of *renvoi* (reference of a case to a different jurisdiction), looks at the *lex domicilii* or the *lex situs*, as the case may be, the domestic law of the country of domicile or the country where the immovables are to be found will be the law governing relevant matters.

If, however, the conflict of laws rule of the country of domicile or the country of the location of the immovables does not accept the *renvoi* and sends back (*renvoyer*) the decision to the country of nationality, an inextricable circle may be created in the doctrine of *renvoi*. The question in these cases is whether the court

34 *Halsbury's Laws of England* (3rd ed), vol 7, at pp 51 and 53.

35 *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou and Another* (1971) 1 CLR 470.

36 Estate Duty (Amending) Law, Law 74 (1) of 2000, according to which the basic law (Law 67 of 1962) was repealed with regard to persons who died after 1 January 2000.

should apply the domestic law or the conflict of laws rule of the country of domicile or of the *situs*. In *Re Annesley*, *Davidson v Annesley*,[37] Russell, J, having found that the testatrix died domiciled in France and having been satisfied that the French court would accept the *renvoi* and distribute according to the French municipal law, applied the French domestic law and decided accordingly. Basing, however, his decision on a further ground, he held that the law applicable should have been the French domestic law, even if the French conflict of laws rule referred to some other system of domestic law.[38]

This approach was not accepted in *Re Ross*, *Ross v Waterfield*,[39] where it was held that the law of the acquired domicile in Italy applied the law of the English nationality, the local law of the nationality, and that the Italian right to *legitima portio* was therefore excluded.[40] As regards immovables, however, so far as foreign land is concerned, the *lex situs* means not the domestic law of the situs, but the conflict of laws rule of the situs, which may refer to another system of domestic law.[41]

On that principle the writers on conflict of laws are almost unanimous.[42]

Declaration of Death

15-13 A person cannot be succeeded unless he is dead (*hereditas viventis non datur*), and proceedings for succession to the estate of a person may commence only on or after his death. In Cyprus the death of a person is certified and registered by the Registrar of Births and Deaths of the District where the death occurred, on production to him of medical or other evidence of such death.[43] It also is announced by the *Mukhtar* (the president of the community) of the village or quarter where the deceased had his ordinary residence, in a report issued to that effect by the *Mukhtar*, containing, apart from such announcement, the date of the death, the names of the heirs specifying which of them are under disability or absent from

37 *Re Annesley*, *Davidson v Annesley* (1826) Ch 692.

38 *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou and Another* (1971) 1 CLR 481, where the relevant cases are analysed.

39 *Re Ross*, *Ross v Waterfield* (1930) 1 Ch 377.

40 *Re Askew*, *Marjoribanks v Askew* (1930) All ER (Reprint) 174.

41 *Per* Stylianides, in *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou and Another* (1971) 1 CLR 483, where reference is made to *Re Duke of Wellington*, *Glentanan v Wellington* (1948) Ch 118 (CA); (1947) 2 All ER 854.

42 'Succession to immovables situated abroad or to money representing such immovables is determined in general by whatever system of the law the *lex situs* will apply . . . .' Dicey and Morris, *The Conflict of Laws*, at p 52; *Patiki v Patiki*, 20 CLR Part 1, at p 45; see *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou and Another* (1971) 1 CLR 437, where it was held that the principles of English Private International Law are part of the parcel of the English Common Law and applicable in Cyprus by virtue of section 29(1)(c) of the Courts of Justice Law, Law 14 of 1960, and that the part of Private International Law which was incorporated in Cap 195 is in line with the English principles.

43 Births and Deaths Registration Law, Law 85 of 1973.

Cyprus, the names of the nearest relatives of the deceased, and a list of the property left by him, stating approximately the value of the property.[44] Furthermore, the date and place of death is sworn in every application for grant or probate.[45]

The above formalities, however, cannot be applied to establish whether a person is alive or dead, if that person has disappeared or is missing for a long time and no news has been received that such person is alive. For this reason, the various legal systems created from early times certain 'presumptions' as to the death of a person or as to who died first in the case of several persons perishing in a common peril. In Cyprus, the subject is dealt with in section 14 of Cap 195, which provides that a person may be declared dead by an order of the court in the following cases:

- If he disappeared or is missing for 10 years and no news has been received that he is alive, and provided that no such declaration will be made before the close of the year in which the person who disappeared would have completed his 28th year of age and in the case of a person who would have completed his seventieth year, the period of 10 years is reduced to five years;[46]
- If, as a member of an armed force, he has taken part in a war, has been missing during the war, and has not been heard of for three years from the conclusion of peace or from the end of the war;[47]
- If he was a passenger on a ship or aircraft lost during a sea or air passage and has been missing for a year after the loss of the ship or aircraft, and such loss will be presumed if the ship or aircraft has not arrived at the place of destination or, having no fixed destination, has not returned within three years from the beginning of the sea or air passage;[48] and
- If, being in peril of his life in circumstances other than those in the second and third paragraphs, above, he has not been reported alive for three years since the occurrence whereby the peril of life arose.[49]

15-14 The declaration of death establishes the rebuttable presumption that the person who has disappeared or is missing died at the date fixed in the order for the declaration of death and, unless the ascertained facts indicate some other date, death is presumed to have occurred:

- In the cases provided for in the first paragraph, above, at the date at which the declaration of death could first be made;
- In the cases provided for in the second paragraph, above, at the date on which peace was concluded or at the close of the year in which the war was brought to an end;

44 Cap 189, s 48.

45 Administration of Estates Rules of 1955 and Forms in Appendix A thereto.

46 The above periods of five and 10 years will begin to run from the close of the last year in which the person was reported alive. Cap 195, s 14(2).

47 Cap 195, s 14(3).

48 Cap 195, s 14(4).

49 Cap 195, s 14(5).

- In the cases provided for in the third paragraph, above, at the date on which the ship or aircraft was lost or is presumed to have been lost; and
- In the cases provided for in the fourth paragraph, above, at the date on which the occurrence took place.[50]

15-15 If several persons have perished in a common peril, it is a rebuttable presumption that they have all perished simultaneously. In cases of dispute as to which of two or more deceased persons died first, the party asserting the priority of the death of one must give proof of his assertion, otherwise it will be presumed that they died simultaneously.[51]

An order for declaration of death may be made only by a court or tribunal within the jurisdiction of which the person who has disappeared or is missing had his last known place of residence and only on the application of the Attorney General or a person who derives rights from the death of the person concerned.[52]

As from the issue of an order for declaration of death, the provisions of Cap 189 will apply as regards the administration of the estate of the person so declared dead, as if he had died at the time specified in the order. In such a case the production of a certified true copy of the order will have the effect of a duly issued certificate of death.

Capacity to Succeed

15-16 The general rule is that every person is capable of inheriting,[53] except in those cases, mentioned in the law, where by his own wrongful conduct he has deprived himself of such right.

A posthumous child born alive will have the same right of succession as if he had been born before the death of the person from whom the succession is derived, provided that it is established that such child was *en ventre sa mere* at the time of the death of the person from whom the succession is derived.[54]

No person will be incapable of succeeding to an estate by reason of his being of a different nationality from that of the person from whom the succession is derived.[55]

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50 Cap 195, s 14(6), adding that, if the time of death is fixed only as a certain day, death is deemed to have taken place at the end of that day.

51 Cap 195, s 14 (7) and (8), adopting the principle of the rebuttable presumption of Roman Law.

52 Cap 195, s 14 (9).

53 The provisions of the early *ius civile* and some old legal systems, by which slaves, foreigners, heretics, those convicted of certain crimes, and some other classes of persons were excluded from the inheritance of a particular person or had no right to inherit at all, have long been abolished.

54 Cap 195, s 15.

55 Cap 195, s 16.

Section 17 of Cap 195 provides that no person will be capable of succeeding to an estate who has:

- Been convicted of wilfully and unlawfully causing, or attempting to cause, the death of the person to whose estate he would otherwise have succeeded;
- Been convicted of the murder or attempted murder of the child, parent, husband, or wife of the person to whose estate he would otherwise have succeeded;
- By coercion, fraud, or undue influence caused the person to whose estate he would otherwise have succeeded to make a will or to revoke a will already made;
- Prevented the person to whose estate he would otherwise have succeeded from making, altering, or revoking a will already made by him;
- Submitted to the person to whose estate he would otherwise have succeeded a suppositious will;
- Wrongfully altered or destroyed a will already made by the person to whose estate he would otherwise have succeeded; or
- Aided or abetted any person in the commission of any of the above acts.

15-17 The above incapacity to succeed may be annulled and removed if the deceased has voluntarily and in express terms pardoned the otherwise incapacitated person by a declaration in writing made and signed before and witnessed by a Commissioner, or by provision made to that effect in his will.[56] This incapacity does not extend to the descendants of the incapacitated person, but the latter will be debarred from any subsequent right of enjoyment over the estate so devolved on his descendants accorded to him by law.[57] Any action claiming an estate on the ground of incapacity to succeed must be commenced within three years of the death of the deceased.[58]

Children Born Out of Wedlock

15-18 Before the Wills and Succession Law[59] came into operation on 1 September 1946, the only method of legitimation of a child born out of lawful wedlock (illegitimate child) was by the subsequent marriage of its parents.[60] Section 52 of the Wills and Succession Law, Cap 220 (1949 edition), provided that an illegitimate child will have the legal status of a legitimate child in respect of his mother and his relatives by blood. Section 53 of the same law provided for legitimation by subsequent marriage and section 54 for legitimation by order of the court.

That part of the Wills and Succession Law (sections 53 and 54) was repealed and substituted by the Illegitimate Children Law,[61] which is Cap 278 in the 1959 edition

56 Cap 195, s 18.

57 Cap 195, s 19.

58 Cap 195, s 20.

59 Law 25 of 1945.

60 A method adopted through the Byzantine law by the Canon law of the Greek Orthodox Church; *In Re Charalambous* (1987) 1 CLR 427, at p 433.

61 Law 5 of 1955.

of the Laws of Cyprus. According to the Law, the legitimation of an illegitimate child may be effected either by the subsequent marriage of the parents[62] or by a legitimation order issued by the court.[63] The legal effect of a legitimation order of the court is to render the illegitimate child legitimate, as from the date of its birth, in respect of both his father and mother and their relatives by blood.[64]

An order for legitimation under Cap 278 may be made only on application to the court by or on behalf of the father and, where the father is dead, on the application of the child, but only if the father has recognised by his will the child as his.[65]

Sections 44 and 46 of Cap 195 and the First Schedule thereto restrict the right of inheritance to legitimate children of a deceased and their descendants only. Section 54 of Cap 195 provides that the Law will not be applied in any case in which the application thereof will appear to be inconsistent with any obligation imposed by treaty.

On 1 December 1978, Cyprus signed the European Convention on the Legal Status of Children Born Out of Wedlock. The Convention was ratified by Law 50 of 1979.[66] The Convention and its status in the legal order of Cyprus under article 169 of the Constitution of Cyprus was considered in *Malachtou v Armeftis and Another*,[67] where it was held that the Convention has superior force, not in the sense of repealing any domestic law inconsistent with it, but in the sense of having superiority and precedence in its application.

The general spirit of the Convention reflects the modern tendency to abolish any discrimination against illegitimate children and to assimilate them completely with children born in marriage. The replacement of the term 'illegitimate' with the term 'born out of wedlock' is one of the indications of such spirit.

Article 9 of the Convention provides that a child born out of wedlock will have the same right of succession to the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock. Article 3 of the Convention sets out the general rule according to which legal proceedings to determine paternity should in all cases be allowed. Any provision of the internal law limiting cases in which legal proceedings to establish paternity may be brought will thus be incompatible with the Convention.

In view of the above, it was held that the provisions of the Cypriot domestic law relating to the rights of succession of children born out of wedlock[68] are inconsistent

62 Cap 278, ss 4 and 5.

63 Cap 278, s 6.

64 Cap 278, s 7.

65 Cap 278, s 6(2).

66 The Convention on the Legal Status of Children Born Out of Wedlock (Ratification) Law 1979.

67 *Malachtou v Armeftis and Another* (1987) 1 CLR 207.

68 Cap 195, s 44 and the First Schedule thereto; Cap 278, ss 4, 5, and 6(2).

with the Convention and, therefore, inapplicable as being incompatible with the provisions of articles 3 and 9 of the Convention, respectively. The law applicable is that set out by the Convention. Subject to the establishment of paternal application, a child has the right of succession ensured by article 9 of the Convention.[69]

Wills

In General

15-19 In section 2 of Cap 195, 'will' is defined as the legal declaration in writing of the intentions of a testator with respect to the disposal of his movable property or immovable property after his death and includes codicil.[70]

Apart from disposing of the estate of the deceased, a will also may contain other instructions or declarations affecting the right of inheritance of certain persons or generally the affairs of the testator, such as the recognition of an illegitimate child,[71] the pardon of a person otherwise incapable of succession,[72] and the appointment of a guardian of a child for as long as such child is under disability or an incapable person.[73]

Due to the serious social and financial consequences of a will, involving the disposal of sometimes large properties and assets (poor people do not usually make wills) and the fact that at the material time the testator is not alive to explain his true intentions or to verify his signature, the various legal systems lay down strict rules as to the proof of wills and the ascertainment of the free expression of the wishes of the testator and the true meaning thereof.

At the same time, many legal systems, including that of Cyprus, impose certain restrictions on the freedom of testamentary disposition for the benefit of the members of the family of the testator. The relevant provisions of the Cypriot law, referring to the legal effectiveness, ie, the validity and enforceability, of the will, are examined in the following sections under the headings 'Testamentary capacity', 'Formalities of a will', and 'Restrictions on freedom of testamentary disposition'.

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69 *Malachtou v Armeftis and Another* (1987) 1 CLR 207; *In Re Charalambous*, (1987) 1 CLR 427.

70 'Codicil' also is defined in section 2 of Cap 195 as meaning an instrument in writing made in relation to a will, explaining, adding to, altering, or revoking in whole or in part its dispositions and considered as forming an amending or additional part of the will.

71 Cap 278, s 6(2).

72 Cap 195, s 18.

73 Cap 195, s 34. Thus, the definition of a will in *Halsbury's Laws of England* (3rd ed), vol 39, at p 842, as being the declaration in a prescribed manner of the intention of the person making it with regard to matters which he wishes to take effect on or after his death.

Testamentary Capacity

15-20 Section 21 of Cap 195 provides that every person may dispose of by will of the whole or any part of the disposable portion of his estate, provided that such will conforms with the provisions of section 23 of Cap 195.[74]

According to section 22 of Cap 195 and section 42 of the Administration of Estates Rules of 1955, a person who is not of sound mind, memory, and understanding or who has not completed the age of 18 years cannot make a valid will. Section 2 of Cap 195 contains the following definitions:

- 'Person under disability' means every person who is an infant or a mental patient or is prohibited by a court from the management of his affairs or is absent from the Colony (now the Republic of Cyprus);
- 'Mental patient' means any person adjudged to be a mental patient under the provisions of the Mental Patients Law; and
- 'Incapable person' means any person not under disability but who is certified by two duly qualified medical practitioners to be incapable by infirmity of mind due to disease or old age of managing his own affairs.

> It is necessary for the validity of a will that the testator should be of sound mind, memory and understanding, words which have consistently been held to mean sound disposing mind, and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature.[75]

15-21 The fact, however, that the testator suffers from mental illness which does not interfere with the general powers and faculties of his mind, so that there is no connection between illness and the will, will not render the will liable to be overthrown on the ground of the testator's incapacity.[76]

In *Greenwood v Greenwood*,[77] it was held that if the testator had a power of summoning up his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, he was competent to make his will.[78]

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74 The term means the capacity of a person to make a will, known in Roman Law as *testamenti factio activa*. The capacity of a person to succeed by will (*testamenti factio passiva*) has been dealt with in the text, above.

75 *Halsbury's Laws of England* (3rd ed), vol 39, at p 855, para 1293.

76 *Banks v Goodfellow* (1861–1873). All ER Reprint, at p 47; see *Antoniades v Solomonidou* (1980) 1 CLR 441, where it was held that undue weight should not be given to opinion of medical specialists in preference to positive testimony as to the actual capacity of the testator at the crucial period.

77 *Greenwood v Greenwood*, 163 ER 930, at p 943.

78 *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou and Another* (1971) 1 CLR 437.

Another element of testamentary capacity according to section 22 is the knowledge and approval of the contents of the will by the testator. If such knowledge and approval is missing, the will cannot be considered as the offspring of the testator's volition. Such knowledge and approval is missing in cases of unsoundness of mind, but it also may be found missing when a will is prepared under 'suspicious' circumstances. The onus of removing such suspicions and of proving positively that the testator knew and approved of the contents of a will is cast on the person propounding the will.[79]

Closely associated with the cases of unsoundness of mind are the cases where the will is null and void if the making of the same or any part thereof has been caused by coercion, fraud, or by the exercise of undue influence on the testator.[80] In both cases, the will is annulled for the reason that it does not reflect the true and free mind of the testator, either because of the state of mind of the testator or because of external interference and influence. It is in this respect that these cases are related to testamentary capacity and are examined in this part of this section, although a testator who has been coerced, deceived, or unduly influenced in making his will may otherwise be perfectly capable of making such will. In section 2 of Cap 195, 'coercion', 'fraud', and 'undue influence' are thus defined:

> 'Coercion' means the committing of, or threat to commit, any act forbidden by the Criminal Code or the unlawful detention, or threat to detain, any property, to the prejudice of any person whatever with the intention of causing any person to do any act against his will, and it is immaterial whether the Criminal Code is or is not in force in the place where the coercion is employed.
>
> 'Fraud' includes any of the following acts committed by a person or with his connivance or by his agent, with intent to deceive another person or his agent or to induce him to do any act, that is to say:
>
> (a) the suggestion as to a fact, of that which is not true by one who does not believe it to be true,
>
> (b) The active concealment of a fact by one having knowledge or belief of the fact,
>
> (c) Any other act fitted to deceive.
>
> 'Undue influence' means the exercise by a person of power to dominate the will of another person where the relations subsisting between them are such that one of them is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

79 *Giorgourou and Others v Anastassiades and Others* (1973) 3 JSC 337; *Panayiotou Mosaicou v Zehra Eren* (1958) 23 CLR 286; *Banks v Goodfellow* (1861–1873) All ER Reprint 47; *Boyse v Rossborough* (1843–1860) All ER Reprint 610; *Halsbury's Laws of England* (3rd ed), vol 39, at p 855, para 1293.

80 Cap 195, s 29.

> Influence, to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud.[81]
>
> Even if the power to overbear the will of the testator is admitted it must be shown that such power was exercised and that the circumstances of the execution are inconsistent with any other view but undue influence.[82]
>
> It is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do that it is undue influence.[83]
>
> The influence to vitiate an act must amount to force and coercion destroying free agency.[84]
>
> The person propounding a will has to prove that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent. The burden of proving that it was executed under influence is on the party who alleges it.[85]
>
> Undue influence and fraud cannot be presumed. The mere existence of the relation of husband and wife does not raise a presumption of undue influence sufficient to vitiate a gift by will.[86]

Formalities of a Will

15-22 Section 23 of Cap 195 provides that no will will be valid unless it is in writing and executed in a manner hereinafter mentioned, ie:

- It must be signed at the foot or end thereof by the testator, or by some other person on his behalf, in his presence and by his direction;
- Such signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time;
- Such witnesses must attest and must subscribe the will in the presence of the testator and in the presence of each other, but no form of attestation will be necessary; and

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81 *Boyse v Rossborough* (1843–1860) All ER Reprint 610.

82 *Panayiota Mosaicou v Zehra Eren* (1958) 23 CLR 286; *Graig v Lamourex* (1920) AC 349.

83 *Wingrove v Wingrove* (1855) 11 PD 81.

84 *Williams v Goude* (1828) 1 Hag Ecc 377.

85 *Bany v Butlin* (1838) 2 Moo PC 480; *Boyse v Rossborough* (1983–1860) All ER Reprint 610.

86 See *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou and Another* (1971) 1 CLR 437, where reference is made to *Parfitt v Lawless* (1872) LR 2 P & D 462 and *Boyse v Rossborough* (1843–1860) All ER Reprint 610. See also *Giorgourou and Others v Anastassiades and Others* (1973) 3 JSC 337.

- If the will consists of more than one sheet of paper, each sheet must be signed or initialled by or on behalf of the testator and the witnesses.

15-23 From the wording of section 23, it follows that a person cannot execute a will through an agent or representative.

In the case of a blind or illiterate testator, the will must be read out to him before execution and must be signed by some other person on his behalf, in his presence and by his direction; otherwise, the testator must place his sign on it. All other formal prerequisites of a will apply equally in the case of blind or illiterate testators.[87]

When two out of three attesting witnesses attested the will later than the time of the execution thereof and none of the witnesses signed in the presence of another, the will was held void.[88]

In a will consisting of more than one sheet, signed by the testator and initialled by the attesting witnesses, initials were held sufficient subscription.[89]

The provisions of section 23 of Cap 195 are of a mandatory nature and should be complied with rigidly. A will not in conformity with the requirements of section 23 is void.[90]

Any persons of sound mind who have completed the age of 18 years and are able to sign their names may be witnesses of a will.[91] The principles that apply to the soundness of mind of the testator also apply to the capacity of witnesses.

If, by the will, a beneficial legacy is made to a witness or to the spouse or child of a witness such legacy will be void, but the witness will be admitted to prove the execution of the will or the validity or invalidity thereof not withstanding the legacy mentioned in such will.[92] Any creditor or spouse or child of a creditor attesting a will by which his debt is charged will be admitted as a witness to prove the execution of such will or the validity or invalidity thereof, notwithstanding such charge.[93] Section 27 of Cap 195 provides that no person will, on account of his being an

87 Cap 195, s 23(a); Administration of Estates Rules of 1955, rule 16.

88 *Papavasiliou and Others v Papafedia and Others* (1975) 1 JSC 96; *Georghiades v Papakyriacou* (1979) 2 JSC 466.

89 *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou and Another* (1971) 1 CLR 437, and cases referred to therein. See *Georghiades and Others v Pittakas and Others* (1980) 2 JSC 320, where it was held that when a will consists of two pages but of one sheet only, it is not necessary for each page to be signed or initialled.

90 *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou and Another* (1971) 1 CLR 437; *Giorgourou and Others v Anastassiades and Others* (1973) 3 JSC 337; see *Anastassis Charalambous and Others v Alkis Demetriou and Others* (1961) CLR 30, where it was observed that in this respect the law of Cyprus is different from the law of England.

91 Cap 195, s 24.

92 Cap 195, s 25.

93 Cap 195, s 26.

executor of a will, be incompetent to be admitted as a witness to prove the execution of such will or to prove the validity or invalidity thereof.

The law does not require a specific form of attestation,[94] but absence of such attestation clause renders the will void.[95] In *Georghiades v Pittakas*, it was held that the attestation clause, although not conclusive and not precluding inquiry, affords a strong presumption that the statutory requirements of attestation have been complied with. Such presumption may be rebutted by evidence of the attesting witnesses, but the evidence as to some defect in execution must be clear, positive, and reliable.

According to section 28 of Cap 195, no obliteration, interlineation, or other alteration made in a will after the execution thereof will be valid or have any effect (except so far as the words or effect of the will before such alteration will not be apparent), unless such alteration be executed in like manner as required by section 23, but the will, with such alteration as part thereof, will be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or some other part of the will opposite or near to such alteration or at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will.[96]

Restrictions on Freedom of Testamentary Disposition

15-24 As already stated, the right of a person to dispose of his property by will is not absolute. Most legal systems restrict such right to part only of the property of the *de cujus*. This part is called 'the disposable portion of the estate' whereas the part which the person cannot dispose of by will is called 'the statutory portion of the estate.'[97] Section 41 of Cap 195, as amended by Law 100 of 1989, determines the disposable portion as when:

- The person dies leaving a spouse and a child, or a spouse and a descendant of a child, or no spouse but a child or a descendant of a child, the disposable portion may not exceed one-fourth of the net value of his estate;[98]
- He leaves a spouse or a father or a mother but no child or a descendant of a child, the disposable portion may not exceed one-half of the net value of his estate; and
- He leaves none of the above, he can dispose of the whole of his estate.

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94 Cap 195, s 23(c).

95 *Parisinou v Charalambides and Others*, 1994 vol 9, at p 402 (DCt).

96 See *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou and Another* (1971) 1 CLR 437, where it was held that alterations not made in conformity with the provisions of section 28 were ineffectual but the will was valid. Administration of Estates Rules of 1955, rule 17.

97 Cap 195, s 2.

98 Cap 195, s 41(1)(a). Before the amending Law 100 of 1989, the disposable portion in this case was one-third the net value of the estate.

15-25 Consequently, the statutory portion may be determined as follows:

- In the cases provided for in the first paragraph, above, three-fourths of the net value of the estate; and
- In the cases provided for in the second paragraph, above, one-half of the net value of the estate.

15-26 If the testator purports to dispose by will of a part of his estate in excess of the disposable portion, the will shall not be invalid, but such disposition will be reduced and abated proportionally so as to be limited to the disposable portion.[99]

The reduction and abatement referred to above will not apply when the testator leaves a spouse but no child or descendant of a child or father or mother and he disposes by will of more than the disposable portion, up to the whole of his estate, to the surviving spouse.[100]

Section 36 of Cap 195 provides that every will shall be construed, with reference to the estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears from the will.[101] Section 36 has been interpreted as establishing the principle that the will 'speaks from death', ie, as if it had been executed immediately before the testator's death.[102] This means that a will is capable of disposing of all the property of the testator, even if such property was acquired after the execution of the will.[103]

Consequently, the disposable portion is ascertained at the time of the death and not by reference to the time of the making of the will, since the law applicable is the law in force at the time of the death of the deceased.[104]

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99 Cap 195, s 42(2). *Giorgourou and Others v Anastassiades and Others* (1973) 3 JSC 337; *Papavasiliou and Others v Papafedia and Others* (1975) 1 JSC 96. See section 44 of the Administration of Estates Law, Cap 189, with regard to specific legacies.

100 See the proviso to section 41(2) added by Law 75 of 1970.

101 A similar provision is contained in section 24 of the English Wills Act 1837.

102 See *Antoniades and Another v Solomonidou* (1980) 1 CLR 441, where reference is made to *Halsbury's Laws of England* (3rd ed), vol 39, at p 1012, para 1533, and *Beddington and Another v Baumann and Another* (1903) AC 13, at p 16. *Ioannou v Marcou* (1981) 1 CLR 349.

103 This rule does not apply to a specific object, not existing at the death of the deceased.

104 *Ioannou v Marcou* (1981) 1 CLR 349; see *Antoniades and Another v Solomonidou* (1980) 1 CLR 441, where it was held that the intention of the testator was to leave to his wife all the property which the law in force at the time of his death allowed him to dispose of by will and that, by virtue of the amending Law 75 of 1970 which came into force after the execution of the will and before the death of the testator, such property was the whole of his estate, whereas at the time of the execution of the will and before the amendment of the Law that property was only half of his estate.

Section 42 of Cap 195, as amended by Law 75 of 1970, states that the provisions of section 41 with regard to the disposable portion will not apply in relation to:

- The will of a person who, or whose father, was born in the United Kingdom or in a country which is a member of the Commonwealth, irrespective of whether such person has his domicile in Cyprus or not; and
- The disposition by will of the movable property of an alien, irrespective of whether such alien has his domicile in Cyprus or not.

15-27 For the purposes of the above provision of the Law, 'alien' means a person who is not a citizen of the Republic of Cyprus, but it does not include an alien who was born in Cyprus while his parents had their domicile in Cyprus or whose father was born in Cyprus while his parents had their domicile in Cyprus; neither does it include the alien wife of a citizen of the Republic who is not divorced from him. The purpose of the above provision is to afford, mainly for British subjects, the same rights of disposition as they have under their national law, by which they enjoy freedom of testacy. As regards other foreigners, the exception covers only the disposition by will of their movable property.

Legacies

15-28 The Law defines the term 'legacy' as a gift by will of movable property or immovable property and a 'legatee' as a person to whom a legacy has been left.[105] The general rules governing legacies are set out in sections 30–33 of Cap 195. According to section 31, no legacy is valid if:

- Made to a person who is not in existence at the death of the testator, unless it is made to a posthumous child of the testator;[106] and
- It does not express a definite intention.

15-29 A legacy may be conditional; however, if it is dependent on an impossible, illegal, or immoral condition, such condition will be void but the legacy will be valid.[107] A legacy to a religious corporation is valid only if the following two conditions are fulfilled:

- The will is executed at least three months before the death of the testator; and
- The testator has no relatives within the third degree of kindred.[108]

105 Cap 195, s 2.

106 If such child predeceases the testator leaving issue living at the death of the testator, the legacy takes effect as if the death of such child had happened immediately after the death of the testator, unless a contrary intention appears by the will.

107 Cap 195, s 32.

108 Cap 195, s 33(1). See section 2 of Cap 195 for the definition of 'religious corporation'.

15-30 Section 33(2) provides that where the testator is a Muslim, a legacy under sub-section (1) will be deemed to be a 'valid dedication' and will be governed by the law in force relating to such dedications.[109] A testator may provide in his will for the substitution of a legatee by another legatee mentioned in the will.[110] Otherwise, the provisions of section 31(a) will apply.

In Cyprus, as in England, a legacy may be either specific or general. The main characteristics of a specific legacy are the following:

- It is a part of the testator's property, whereas a general legacy may or may not be a part of the testator's property; and
- It is a severed or distinguished part or, in another expression, it is emphatically distinguished from the whole of the testator's property.[111]

15-31 In *Robertson v Broadbent*,[112] Lord Selborne defined a specific legacy as something 'which a testator, identifying it by a sufficient description and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate'.

A specific bequest, if vested in possession, and if the subject matter is income-bearing, entitles the legatee to the income from the testator's death and all accelerations which arise after the death.[113]

Section 44(1) of the Administration of Estates Law, Cap 189, provides that specific legacies rank and are liquidated after the payment of the just debts and, unless the will shows a contrary intention, are liquidated before the general legacies.

In case the dispositions made by the will exceed the disposable portion, the general legacies are abated first or are reduced *pro rata*.[114]

Gifts in Contemplation of Death

15-32 Section 40 of Cap 195 provides that any person who is of sound mind and has completed the age of 18 years may dispose of any movable property by a gift made in contemplation of death if made in the presence of at least two witnesses who have completed the age of 18 years and are of sound mind.[115] From the

109 Cap 224, ss 36, 37, and 38.
110 Cap 195, s 30.
111 *Bothamley v Sherson*, 44 LJ Eq 589.
112 *Robertson v Broadbent* (1883) 8 App Cas 812, at p 815.
113 *Jarman on Wills* (8th ed), at p 1079.
114 See *Koursoumba and Others v Frangoudis* (1972) 10 JSC 1335 (DCt), where reference is made to the above authorities. See *Papavasiliou and Others v Papafedia and Others* (1975) 1 JSC 96.
115 Cap 195, s 40(1).

above, it follows that the prerequisites of a valid gift in contemplation of death (*donatio mortis causa*) are the following:

- The donor must have the testamentary capacity and the witnesses the attesting capacity required in a will;
- The gift can only be of movable property belonging to the donor; and
- The gift must be made in contemplation, although not necessarily in expectation, of the death of the donee, in circumstances which show that it is to take effect only in that event and so as to be recoverable by the donor if that event does not occur and void if the donee dies before it occurs.[116]

15-33 A gift will be deemed to be made in contemplation of death where a person who is ill and expects to die shortly of his illness delivers to another person the possession of any of his movable property to keep as a gift in case the giver will die of such illness.[117]

Due to the above characteristics, a gift made in contemplation of death, although it is treated on the administration of an estate in exactly the same way as if it were a specific legacy,[118] is neither a gift entirely *inter vivos* nor a testamentary gift.[119]

Revocation of Wills

Methods of Revocation

15-34 'A will is of its own nature revocable and, therefore, although a man should make his testament and last will irrevocable in the strongest and most express terms, yet he may revoke it, because his own act and deed cannot alter the judgment of law to make that irrevocable which is of its own nature revocable.'[120]

To effect a revocation, there must be an intention to revoke (*animus revocandi*). A will is not revoked by any presumption of intention based on an alteration of circumstances.[121] In Cyprus, the law with regard to the revocation of wills is set out in section 37 of Cap 195, which reads as follows:

> A will may be revoked —
>
> (a) by a subsequent will expressly revoking the former one;

116 Cap 195, s 40(2).
117 Cap 195, s 40(4).
118 Cap 195, s 40(3).
119 *Halsbury's Laws of England* (3rd ed), vol 18, at p 400; Bale, *Law of Inheritance* (1966), quoted in *Enver v Kasim and Others* (1976) JSC 1186.
120 *Halsbury's Laws of England* (3rd ed), vol 39, at p 888.
121 *Halsbury's Laws of England* (3rd ed), vol 39, at p 888.

(b) by a subsequent will inconsistent with the provisions of the former one, but so far only as the provisions of the two wills are inconsistent; or

(c) by burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking it.

15-35 This part of the law was taken from the English Wills Act, 1837.[122]

The provisions of section 37 are of a mandatory character, not allowing any deviation therefrom, so that no revocation of a will is possible unless the requirements of section 37 are complied with.[123]

The destruction of the will, referred to in sub-section (c) of section 37, should co-exist with the intention of the testator to revoke the will. Destruction, therefore, of the will without *animus revocandi* does not result in revocation; neither does the intention alone of the testator have this effect, without the physical destruction of the instrument of the will.[124]

According to sub-section (c) of section 37, the destruction should take place in the presence of the testator. This provision has been interpreted as meaning the physical presence of the testator and it cannot be satisfied by the presence of an agent or representative of the testator.[125]

A revocation may be absolute or conditional. By 'conditional' is meant that the efficacy of the revocation depends on the bringing into existence subsequently of a valid testamentary disposition, or on the existence or future existence of some fact. By 'absolute' is meant that the efficacy of the revocation takes effect at once, irrespective of the bringing into existence subsequently of a valid testamentary disposition, or the existence or future existence of some fact.

In answering the questions as to whether a revocation took place and whether the same was conditional or absolute, the intentions of the testator must be sought, to ascertain whether he intended to revoke his will or not and, if he did, whether he intended such revocation to be absolute or conditional, as well as the nature of the condition or contingency to which he subjected his intention to revoke.[126] In seeking the intentions of the testator, the court is entitled to take into consideration all the surrounding circumstances, including the general behaviour of the testator and his post-testamentary written statements.[127]

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122 See the corresponding section 20 of the English Wills Act, 1837, which, however, provides for an additional method of revocation, ie, by some writing declaring an intention to revoke the will and duly executed as a will.

123 *Kiki Kathidjiotis v Ioannis Mavronicolas* (1995) 1 JSC 447.

124 *Kiki Kathidjiotis v Ioannis Mavronicolas* (1995) 1 JSC 447.

125 *Kiki Kathidjiotis v Ioannis Mavronicolas* (1995) 1 JSC 447.

126 *Re Jones* (*deceased*), *Evans v Harries and Others* (1976) 1 All ER 593.

127 *In the Estate of Bridgwater* (*deceased*) (1965) 1 All ER 717.

If the condition or contingency to which the intention to revoke was subject has not been satisfied or occurred, the revocation is ineffective; otherwise, it is effective.[128]

According to section 38 of Cap 195, a will is deemed to be revoked by:

- The marriage of the testator after its execution; or
- The birth of a child to the testator after the execution of the will, if at the time of the making of the will the testator had no children.

15-36 However, marriage or birth, as above, does not operate to revoke a will if it appears on the face of it that it was made in contemplation of such marriage or birth. Here, the law sets up a presumption, which, however, cannot be rebutted except by declaration or other indication by the testator in the will itself and not by other evidence.

In England, section 18A of the Wills Act, 1837 (added by section 18(2) of the Administration of Justice Act, 1982), provides that where, after a testator has made a will, a decree of a court dissolves or annuls his marriage or declares it void, the will takes effect as if any appointment of the former spouse as an executor or as the executor and trustee of the will were omitted, and any devise or bequest to the former spouse lapses, except in so far as a contrary intention appears by the will.

Such a provision does not exist in Cypriot law, where the subsequent divorce of the testator does not render invalid any appointment of the former spouse as an executor of his will and does not result in the lapse of any devise or bequest to such former spouse, unless the testator revokes his will after the divorce. Perhaps a similar provision as in England should be made in Cypriot law, for the intentions of a testator after most cases of divorce may not agree with dispositions made during the dissolved marriage, which dispositions will, nevertheless, materialise, if for any reason he did not provide for the revocation of his will after the divorce.

Revival of Revoked Will

15-37 Section 39 of Cap 195 provides that a will revoked in any manner can only be revived by the re-execution thereof in the manner provided in section 23 and on demonstration of the intention of the testator to revive the same. When a will,

128 See *Georghiades and Others v Pittakas and Others* (1979) 2 JSC 466, where D Stylianides (then Ag PDC and later President of the Supreme Court of Cyprus), after making an elaborate statement of the relevant principles of the English law on the matter, with extensive reference to English jurisprudence, decided that the destruction of the will by the testator amounted to conditional revocation, dependent on the validity of the new will and that, since the new will was declared invalid, the condition of the revocation was not satisfied and therefore the revocation was ineffective.

partly and afterwards wholly revoked, is revived, such revival will not extend to the part revoked before the revocation of the whole, unless an intention to the contrary will be shown. From the wording of section 39, taken in its grammatical meaning, it is clear that:

- A will may be revived, however, revoked ('in any manner');[129]
- A will can only be revived by the re-execution thereof (in fact by a new will) and not in any other way;[130] and
- An essential element of a valid revival is the intention of the testator to revive the will, which intention must somehow be demonstrated (apparently) at the time of the re-execution of the will.[131]

15-38 In view, however, of the District Court judgment in *Georghiades and Others v Pittakas and Others* and the *ratio decidendi* thereof, it seems that a revoked will may be revived not only by the re-execution thereof, but also when the revocation is subsequently (even after the death of the testator) found to be ineffective, which is the case when such revocation was conditional on the validity of a new will and the condition was not satisfied because the new will was declared invalid. This approach is obviously based on the conclusion that in such a case the revocation is deemed never to have taken place and, therefore, the revoked will was never revoked. The opposite view could be supported by the following arguments:

- The provisions of section 39 are of a strictly mandatory nature and the rigid wording of the section does not allow a different interpretation;
- The ineffectiveness of the original revocation is not mentioned in section 39 as one of the means of revival of a revoked will;[132] and
- From the *ratio decidendi* of the above judgment, it follows that the time of the revival of the revoked will is the time when the condition failed and the revocation was rendered ineffective, which time may be some years after the death of the testator.[133]

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129 The methods of revocation are set out in section 37.

130 The additional manner of revocation in section 20 of the English Wills Act, 1837, is not included in section 39.

131 This element is not set out in the section in an alternative form but as a *condictio sine qua non* of the revival ('and on demonstration') and should co-exist with the re-execution.

132 A revocation may be conditional and such revocation may be ineffective if the condition does not occur, but this fact does not necessarily lead to the revival of the revoked will which, once revoked, cannot be revived except in the manner provided by the law and only in such manner. The trend of the English courts to preserve the will (any will) by all possible means is not one of the characteristics of Cypriot jurisprudence.

133 In such a case (as was the case in the judgment), the element of the demonstrated intention of the testator, co-existing at the time of the alleged revival, is missing. This issue may be resolved when the matter is considered by the Supreme Court in an appropriate case.

Rights of Surviving Spouse

Share in Statutory Portion and Undisposed Portion

15-39 The surviving spouse is entitled to a share in the statutory portion and in the undisposed portion, if any, of the net value of the estate (ie, after the debts and liabilities of the estate have been discharged), as follows, if the deceased has left, besides such spouse:

- A child or descendant of a child, such share is equal to the share of each child;[134]
- No child or descendant thereof but an ancestor or descendant thereof within the third degree of kindred to the deceased, such share is equal to one-half of the statutory portion and of the undisposed portion;
- No child nor descendant thereof, or any ancestor or descendant thereof within the third degree of kindred to the deceased, but an ancestor or descendant thereof of the fourth degree of kindred to the deceased, such share is three-fourths of the statutory portion and of the undisposed portion; and
- No child nor descendant thereof, or any ancestor or descendant thereof within the fourth degree of kindred to the deceased, such share is the whole of the statutory portion and of the undisposed portion.[135]

Property Received under Marriage Contract

15-40 Section 45 of Cap 195 provides that a spouse who becomes entitled to a share in the statutory portion or in the undisposed portion of the estate of the deceased spouse will not bring into account in reckoning such share any movable property or immovable property received from the deceased by virtue of a marriage contract.[136]

Succession of the Kindred

Classes of Kin and Shares

15-41 According to section 46 of Cap 195, after the deduction of the share of the surviving spouse, the remaining property is distributed between the remaining kin of the deceased in the manner provided for in the First Schedule to Cap 195 (see Appendix A). The First Schedule is headed 'Succession of the Kindred', and it is framed in three columns.

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134 Cap 195, s 44(a), as amended by Law 100 of 1989. Before the amendment, such share was one-sixth of the net value of the statutory portion and of the undisposed portion.

135 When the deceased leaves more than one lawful wife (as in the case of Muslims), the share given to the wife, as above, will be divided equally between such wives (see proviso to section 44 of Cap 195).

136 A marriage contract is a contract in contemplation or in consideration of marriage. Where such contract restricts the freedom of marriage, it is invalid as being contrary to public policy.

The first column, under the heading 'Class', divides the persons entitled to succeed to the estate of the deceased into four classes. The second column, under the heading 'Persons entitled', places the heirs entitled to succeed into those four classes, according to the degree of proximity of their relationship to the deceased. The third column, under the heading 'Shares', sets out the shares in which the heirs in each of the four classes are entitled to succeed to the estate.

The first of the four classes contains (a) the legitimate children of the deceased living at his death and (b) the descendants, living at the death of the deceased, of any of the deceased's legitimate children, who died in his lifetime. The second class contains the father, mother, brothers, and sisters of the deceased and likewise makes a distinction between the heirs living at the time of the death of the deceased and the descendants of brothers or sisters who died in his lifetime. The third class contains 'the ancestors of the deceased nearest in degree of kindred, living at his death', and the fourth class contains 'the nearest kin of the deceased living at the death, within the sixth degree of kindred, the nearer degree excluding those more remote'.

The heirs of each class generally succeed equally, as provided in the third column but, in the first and second classes, the succession is *per stirpes*, whereas in the third and fourth classes it is all *per capita*. According to section 49 of Cap 195, where in the Law it is provided that any class of persons will become entitled to the statutory portion and the undisposed portion *per stirpes*, it means that the child or children of any person of the defined class who has died in the lifetime of the deceased and who, if he had survived the deceased, would have become entitled on the death of the deceased to a share in the statutory portion, and the undisposed portion, if any, will become entitled to the share which the parent would have taken if he had survived the deceased and, if more than one, in equal shares.

Section 46 of Cap 195 provides that persons of one class will exclude persons of a subsequent class.[137]

Degrees of Kindred

15-42 The degrees of kindred down to the sixth degree are shown in the table set out in the Second Schedule[138] to Cap 195 (see Appendix B). The degree of kindred is ascertained in the manner provided in section 48(1) of Cap 195, which reads as follows:

> The degree of kindred between any two persons will be ascertained as follows that is to say, when the two persons are in the direct line of descent the one from the other, by reckoning the number of generations from either of them to the other, each generation constituting a degree; and where they are not in the direct line of descent the one from the other, by reckoning the number of generations from either of them up to their common ancestor and from the common ancestor downwards to the other of them, each generation constituting a degree.

137 *Pieras Michael and Others v Nicos Antoniou and Others* (1969) 1 CLR 547.
138 Cap 195, s 48(2).

15-43 When the deceased leaves no spouse and no kin living at his death within the sixth degree of kindred, he will be taken to have died without heirs and the undisposed portion of his estate will become the property of the Republic of Cyprus.[139]

No person may be in any way debarred from succeeding to any part of the statutory portion and of the undisposed portion, if any, should he be so entitled, by reason of his being entitled by virtue of the will of the deceased to succeed to any part of the disposable portion of his estate.[140] The provisions of section 46 of Cap 195 and the First Schedule thereto have been held ineffective as regards children born out of wedlock (illegitimate) and their respective rights of succession (see text, above).

Contribution (Hotchpot)

15-44 Contribution (hotchpot) is dealt with in section 51 of Cap 195, which reads as follows:

> Any child or other descendant of the deceased who becomes entitled to succeed to the statutory portion and to the undisposed portion, if any, shall in reckoning his share bring into account all movable property and immovable property that he has at any time received from the deceased –
>
> (a) by way of advancement; or
>
> (b) under a marriage contract; or
>
> (c) as dower; or
>
> (d) by way of gift made in contemplation of death.
>
> Provided that no such property will be brought into account if the deceased made a specific provision in his will that such property will not be brought into account.

15-45 In *Enver v Kasim and Others*,[141] Stylianides deals extensively and in detail with the history and scope of this rule of succession and the legal meaning of the relevant terms and expressions. Some extracts from his judgment are set out below:

> Contribution by children and other descendants provided in section 51 of Cap 195, is the *collatio descendentium* which was developed in the latest phase of Roman Law during the rule of Emperor Leon and Emperor Justinian. In England, this notion was not entertained by the Common Law Courts. In Cyprus, the rule was introduced by section 22 of the Intestate Succession Law of 1884 (number 8/84). It was modelled on the Italian Law of Succession which derived from the Roman through the French Civil Code.

139 Cap 195, s 47.

140 Cap 195, s 50.

141 *Enver v Kasim and Others* (1976) JSC 1186.

> The scope of this rule is the equalisation of the hereditary shares of the descendants who inherited from a common ancestor. It is presumed that a father or other ancestor looks on all his children with equal affection, treats them equally and does not favour any one of them unless he expresses such favour specifically.
>
> Advancement, by way of portion, is something given by the parent to establish a child in life or to make what is called a provision for him, not a mere casual payment of this kind.
>
> Dower means a marriage gift, a gift made on and in consideration of the marriage of the donor whether this gift is completed or not before or after marriage, provided the obligation is created before marriage.

15-46 The question as to which is the crucial date for the valuation of the property to be reckoned seems to be the date the grant of the property was made rather than the date of the death of the deceased.

Hotchpot applies between descendants and not between descendants and other heirs or between other heirs *inter se*. If the value of the property brought into account by a descendant exceeds the share to which he is entitled he receives nothing, but he is not required to refund the excess.[142]

Administration of Estates

Legislation

15-47 While death brings an end to the physical existence of a person, it does not have the same effect on his legal relations and property, which endure and are continued by or transferred to other persons. Such transition, made in accordance with the will of the deceased, if any, and by operation of law, is effected through the procedure of the administration of the estate of the deceased.

In Cyprus, all matters related to the administration of estates are regulated by the Administration of Estates Law, Cap 189, the Probates (Re-Sealing) Law, Cap 192, and the Rules made under these Laws, read together with the Wills and Succession Law, Cap 195. All the relevant legislation comprises the Law of Succession.

Letters of Administration and Probate

15-48 Where a person dies intestate, or where a person under disability or an incapable person is interested in an estate, the court authorises a person to administer such estate. The written authority given by a court to a person to administer

142 Gavrielides, 'The Law of Inheritance in Cyprus', *Cyprus Law Review*, Issue 26 (April–June 1989) (2), at p 4047.

the estate of a person who has died intestate or to administer an estate in which a person under disability or an incapable person is interested, is called 'letters of administration' and the person to whom a court has granted letters of administration is called 'administrator'.

Where a person appoints in his will another person (known as 'executor') to whom he confides the execution of his will, the court, on proof of the will, grants administration of the estate of the deceased to such person. The instrument in writing issued by the court declaring that the will of a deceased person has been duly proved and that administration of his estate has been granted to an executor named therein is called 'probate'.[143]

Where a person leaves a will without having appointed an executor or where the appointed executor has renounced probate or has become incapable of acting, the written authority given by a court to an administrator to administer the estate of such person is called 'administration with will annexed'.[144]

According to section 2 of Cap 189, 'personal representative' means an executor or administrator and 'grant' means a grant of probate or of administration. Section 2 provides also that 'administration' includes all letters of administration, whether with or without a will annexed, and whether granted for general, special, or limited purposes. The key roles in the procedure of the administration are played by the probate registrar, the court, and the personal representative (administrator or executor).

Probate Registrar and Registry

15-49 Section 3 of Cap 189 provides that the Chief Registrar is the principal probate registrar and the Registry of the Supreme Court is the principal probate registry. The Registrar of each District Court is the probate registrar for that district.

The authorities and duties of the probate registrar include, *inter alia*, the receipt of wills for safe custody, the receipt and entertainment of applications for grant and applications for probate or for administration with will annexed, and the submission to the principal probate registrar of notice in the prescribed form of every application made in the registry for a grant, as well as lists in the prescribed form of the grants made by him, and generally the supervision of the adherence to all administration procedures and formalities, according to the law (and the Rules). He also files and preserves all original wills of which probate or administration with will annexed has been granted by him, and keeps the official seal by which all letters of administration, orders, and other instruments and copies thereof are sealed.

143 See definitions in Cap 195, s 2.
144 As to when a court may grant administration with will annexed, see Cap 189, s 18.

The principal probate registrar examines all notices of applications for grant received from the several other probate registries for the purpose of ascertaining whether application for a grant in respect of the estate of the same deceased person has been made in more than one registry and communicates with the probate registrars in relation thereto. He also prepares and sends to the probate registries calendars of the grants made in the principal probate registry and the several probate registries during specified periods, with particulars of such grants.[145]

Deposit, Discovery, and Production of Wills

15-50 Any person may, in his lifetime, deposit his will for safe custody with a probate registrar or with any other person. A will may not be opened in the lifetime of a testator except with his consent and in the presence of the probate registrar. After the death of the testator, a will may be opened by his executor or other interested person in the presence of the probate registrar.

If, within four months from the testator's death, no steps have been taken for the opening of his will, the court may take such action as it deems fit to bring the existence of the will and its contents to the notice of any person likely to be interested.

Where any paper of the deceased purporting to be testamentary is in the possession of any person, such person must deliver the original to the probate registrar within 14 days after having had knowledge of the death of the deceased; otherwise, he is liable to a fine. Moreover, the court may, in a summary way, order this person to produce the paper and bring it into court. If it appears that a person knows that any paper is testamentary, the court may order that such person be examined in respect of that paper and should produce and bring it into court.[146]

Grants

15-51 Part IV of Cap 189 (sections 12–24) deals with all matters concerning grants made by the probate registrars. Section 12 of Cap 189, according to which no grant will be made until the provisions of section 54 of the Estate Duty Law have been complied with, ie, until the estate duty (inheritance tax) is paid or sufficient guarantee is given for the payment thereof, is no longer of any effect, as the Estate Duty Law, Law 67 of 1962, was repealed by the Estate Duty (Amending) Law, 2000[147] as regards persons who died after 1 January 2000.

Grants may be made in common form by probate registrars in the name and subject to the directions, special or general, of the court and under the seal of the registry and such grants have effect over the estate of the deceased in all parts of the Republic of Cyprus.[148]

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145 Cap 189, ss 4–8; Administration of Estates Rules of 1955.

146 Cap 189, ss 9–11.

147 Law 74 (1) of 2000.

148 Cap 189, s 13. See also section 2 for the definition of 'grant in common form'.

Where there is contention as to the grant or the probate or where the probate registrar has doubts or believes that a grant ought not to be made, the probate registrar should refer the matter for the direction of the court.[149] The court may, of its own motion or on the application of any interested person, give notice to the executors to come in and prove the will or renounce probate. Until a will has been proved, it will have no effect.[150]

The rights in respect of the executorship of a person appointed executor by a will shall wholly cease if he survives the testator but dies without taking out probate of the will or is cited to take out probate and does not appear to the citation, or if he renounces probate.

In granting administration, the court will have regard to the rights of all persons interested in the estate of the deceased or the proceeds of sale thereof. Administration with the will annexed may be granted to a devisee or legatee and may be limited in any way the court thinks fit. In exercising its discretion under section 17, the court may appoint as administrator some person other than the one who would by law have been entitled to the grant, notwithstanding anything in the law.

Grants may be limited in duration in respect of property, or for a special purpose and, in making such grants, the court or registrars must follow the probate practice for the time being in England (subject to the provisions of the law and rules in force).[151] Before making a limited grant, a probate registrar must obtain the directions of the court.[152]

In the case of administration *pendente lite*, the court may grant limited administration to another person for the purpose of representing the estate in the relevant proceedings, acting subject to the immediate control and under the direction of the court and on reasonable remuneration, as the court thinks fit.[153]

Sections 21 and 24 of Cap 189 contain provisions for the grant of special administration where the personal representative is abroad and for the administration during the minority of the executor. According to section 23 of Cap 189, no probate or administration will be granted to more than four persons for the same property and, if there is a minority or if a life interest arises under the will or intestacy, administration will be granted either to a public officer or to at least two persons.[154]

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149 The court in such case may order the probate registrar to proceed under such conditions as the court may impose or forbid any further proceedings by the registrar, leaving the party applying for the grant to apply to the court.

150 Cap 189, ss 14 and 15.

151 Cap 189, s 19. In practice, limited grants are often obtained for the purpose of instituting legal proceedings against the administrator for liabilities of the deceased, when no interested person applies for a grant.

152 Administration of Estates Rules of 1955, rule 28.

153 Cap 189, s 20. Administration *pendente lite* exists where any legal proceedings, touching the validity of the will, or for obtaining, recalling, or revoking any grant, are pending.

154 Administration of Estates Rules of 1955, rule 30, regulates the priority of rights to a grant of probate or letters of administration with will annexed.

Section 42 of the Administration of Estates Rules sets out the pleas allowed by a person in pleading to a declaration propounding a will or a testamentary script. No other pleas are allowed except by leave of the court. The pleas must be set out in writing, briefly stating the substance of the case which the party intends to advance thereunder. Where an application for grant is refused by the probate registrar, the applicant can apply by motion to the court for a review of the decision of the probate registrar. Any decision of the court is liable to appeal to the Supreme Court.[155]

Vesting of Estate on Grant and after Administration

15-52 From and after a grant of probate or of letters of administration with will annexed, the rights and liabilities attaching to the estate of the deceased (including the statutory portion and the undisposed portion) will be deemed to have vested in the personal representative from the date on which the deceased died.[156]

Any heir of a deceased person may apply for a certificate naming the persons who are heirs of the deceased (certificate of heirs). The application should be accompanied by a statement of the names of the heirs and whether any of them is under disability and a statement of the value of the property, and should be supported by an affidavit by the applicant and the *Mukhtar* of the place of the last residence of the deceased. The probate registrar will issue such certificate if satisfied that:

- The gross value of the estate does not exceed CY £10,000;
- The estate is not vested in the President of the District Court under section 26;
- No grant has been made or application for grant is pending in respect of such estate; and
- Fourteen days have elapsed since the deceased died.[157]

15-53 Section 30 of Cap 189 defines the liability of persons who fraudulently or without full valuable consideration obtain or retain property of the deceased or effect the release of any debt or liability due to the estate.

Administration — Generally

15-54 The general rules governing the administration by the personal representative are set out in sections 31–47 of Cap 189. A person to whom the administration of the estate of a deceased person is granted, will, subject to the limitations contained in the grant, have the same rights and liabilities and be accountable in like manner as if he were the executor of the deceased. An executor will have the powers and duties given and imposed on him by the Common Law and the doctrines of equity as applied in England, save in so far as other provision has been made or will be made by any law of the Republic.[158]

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155 Cap 189, s 24.
156 Cap 189, s 25.
157 Cap 189, s 29, as amended by Law 45 of 1990.
158 Cap 189, s 31.

For the purpose of paying the funeral and testamentary expenses and all just debts of the deceased, the personal representative may sell or mortgage immovable property of the deceased. For the purpose of facilitating the distribution of the estate of a deceased among the beneficiaries according to law, the court may order the sale, lease, mortgage, surrender, release, division, or other disposition of the estate or any part thereof, on application made by a personal representative or other interested person and under such conditions as the court may think fit.[159]

Section 34 of Cap 189 deals with the effect of death in certain causes of action. According to section 34, on the death of a person all causes of action subsisting against or vested in him will survive against or for the benefit of his estate.[160] For the purpose of legal proceedings under section 34, no person may represent the estate of a deceased except the personal representative.[161]

The right of a person to claim damages for bereavement by virtue of section 58 of the Civil Wrongs Law does not survive for the benefit of his estate on his death.[162] Where a cause of action survives as aforesaid for the benefit of the estate of a deceased, the damages recoverable for the benefit of such estate:

- Will not include exemplary damages or damages for loss of income in respect of any period after the death;[163]
- In the case of a breach of promise to marry, will be limited to such harm, if any, to the estate of that person as flows from the breach of promise to marry; and
- When the death has been caused by the act or omission which gives rise to the cause of action, will be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.[164]

15-55 Section 34 has been judicially considered in a number of cases.[165] In general, a personal representative administers the estate of the deceased according to the law, pays the just debts of the estate, collects and distributes the assets among the heirs according to the will, if any, and the hereditary rights of the heirs, and accounts to the

159 Cap 189, ss 32 and 33; see *Yvoni S Ioannou v Andreas Demetriou and Others* (1983) 1 CLR 892, where it was held that personal representatives are considered as trustees and that, according to section 58 of the Trustee Law, Cap 193, they are entitled to relief when there is no wilful negligence or misconduct on their part.

160 This rule will not apply to causes of action for defamation (section 34).

161 Cap 189, s 34(7).

162 Cap 189, s 34(1A), added by Law 157 of 1985.

163 Cap 189, s 34(1A), added by Law 157 of 1985.

164 Section 34 further provides for time limitation of actions under the Civil Wrongs Law or in tort at Common Law and for the administration in bankruptcy of an estate against which proceedings are maintainable by virtue of that section.

165 *Maroulla Paraskeva Chrysostomou and Another v Yugoslavenska Linijske Plovidba and Others* (1983) 1 CLR 596; *Charalambos Kasinou v Ioannis Efstathiou and Another* (1984) 1 CLR 77; *Maroulla Savva v Savvas Petrou* (1985) 1 CLR 127; *Maria Phylactou v Christodoulos Taliotis* (1989) 1 CLR 188.

court for his administration. In doing so, he is entitled to protection and indemnity for any payment or disposition made by him in good faith. The Law offers to him further protection by means of advertisement in the *Official Gazette* of any transfer or distribution to persons so entitled, as provided by section 47 of Cap 189.

Administration — Heirs under Disability

15-56 Section 48 defines the duties of the *Mukhtar* of the village or quarter where the deceased had his ordinary residence, which consist of the preparation, after reasonable inquiries, of a report announcing the death of the deceased, the date of death, the names of the heirs specifying which of them are under disability or absent from Cyprus, the property left by the deceased, and the value thereof.[166]

Where the deceased leaves heirs under disability, the *Mukhtar* will take possession of the moneys, securities for money, or jewellery (if they exceed in value CY £100) and will deliver the same, securely fastened and sealed, to the probate registrar.

Where the value of the property of a deceased person leaving heirs under disability does not exceed CY £10,000, the court, on its own motion or on application by any interested person, may order that the estate be administered summarily, ie, the probate registrar of the court or such other public officer as the court may appoint will have the powers and duties of an administrator, for the purposes specified in section 41(1)(a) and (b) and for the distribution of the residue of the estate according to law. Such probate registrar or other public officer may appoint one or more agents for the purpose, on remuneration payable out of the estate, as the court may direct.[167]

Section 50 contains provisions for the maintenance of heirs under disability pending distribution, when the property vests in a President of a District Court under section 26 of the law.

Power of Court to Remove or Replace Personal Representative

15-57 The court may, on its own motion or on the application of any person interested in the estate:

- Remove any executor or administrator for wilful neglect or misconduct in the administration of the estate; and
- Grant letters of administration to some other person for the purpose of carrying out the due administration of the estate in the place of an executor or administrator who has been removed or has died or has become incapable of acting.[168]

166 If the property does not exceed CY £6,000, no report is necessary. Cap 189, s 48(1), as amended by Law 2 (1) of 1994.

167 Cap 189, s 49, as amended by Law 45 of 1990. For the remedy in case of failure by the *Mukhtar* to perform any of his duties under the Law, see section 56 of Cap 189.

168 Cap 189, s 52.

Determination of Certain Matters by Originating Summons

15-58 Determination of certain matters by originating summons is dealt with in section 53 of Cap 189, which reads as follows:

> Personal representatives or any of them, creditors, devisees, legatees, or next of kin, or persons claiming through such creditors or beneficiaries by assignment or otherwise, may apply to the court by originating summons for the determination, without an administration in court of the estate, of any of the following questions or matters:
>
> (a) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin, or heir-at-law;
>
> (b) the ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others;
>
> (c) the furnishing of any particular accounts by the executors or administrators, and the vouching when necessary, of such accounts;
>
> (d) the payment into court of any money in the hands of the executors or administrators;
>
> (e) direction of the executors or administrators to do or abstain from doing any particular act in their character as such executors or administrators;
>
> (f) the approval of any sale, purchase, compromise or other transaction;
>
> (g) the determination of any question arising in the administration of the estate.[169]

15-59 Any of the above persons may instead of proceeding by originating summons bring an action claiming that the estate of the deceased be administered in court.[170] In any proceedings concerning the estate of a deceased person, the court may order that the costs or part thereof be paid out of the estate.[171]

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169 Section 53 further provides that the Rules of Court in force for the time being, relating to originating summonses, will apply to all proceedings under this section, and that applications under this section may be heard and determined in chambers.

170 Cap 189, s 54.

171 Cap 189, s 55.

Re-Sealing of Probates or Letters of Administration

Legislation

15-60 The sealing by Cypriot courts of probates or letters of administration granted by certain courts outside Cyprus is governed by the Probates (Re-Sealing) Law[172] and the Rules made thereunder.[173] Section 3 of Cap 192 reads:

> Where a Court of Probate[174] in the United Kingdom or in any British Dominion or in any country member of the Commonwealth granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters of administration so granted may, on being produced to, and a copy thereof deposited with, a District Court, be sealed with the seal of that Court, and thereupon will be of the like force and effect, and have the same operation in the Republic of Cyprus as if granted by that Court.

15-61 The relevant legislation, enacted when Cyprus was under British rule, purported to extend the enforcement of grants made by British courts in all parts of the British Empire.

Procedure

15-62 Application to seal a grant of probate or letters of administration may be made to the President or a District Judge of any District Court within the jurisdiction of which the deceased had property at the time of his death and may be made by the executor or the administrator or their lawful attorney, duly authorised to re-seal the grant under the Probates (Re-Sealing) Law.[175] The application must be by summons and must be accompanied by:

> (a) the probate or letters of administration, sealed with the seal of the court granting the same, or a copy thereof certified as correct by or under the authority of the court granting the same;[176]
>
> (b) an oath of the executor or the administrator or the attorney in the prescribed form;[177]
>
> (c) the power of attorney, in case the application is made by an attorney as above;

172 Cap 219 in the 1949 edition of the Laws of Cyprus and Cap 192 in the last edition of the Laws of Cyprus of 1959.

173 Probates (Re-Sealing) Rules of 1936.

174 'Court of Probate' means any court or authority by whatever name designated, having jurisdiction in matters of probate (Cap 192, s 2).

175 Probates (Re-Sealing) Rules, rules 2, 3, and 4.

176 Cap 192, s 6.

177 Probates (Re-Sealing) Rules, rule 4 and Form 2.

(d) a bond to cover the property of the deceased within the Republic, given by the administrator or his attorney on application to seal letters of administration.[178]

15-63 Notice of the application containing a note of the day fixed for the hearing must be advertised in the *Official Gazette* and one daily newspaper and a copy of the relevant issues should be attached to the application.[179] According to section 4 of Cap 192, the court must, before sealing a probate or letters of administration under the Law, be satisfied that:

- Estate duty has been paid in respect of so much, if any, of the estate as is liable to estate duty in Cyprus;[180]
- In the case of letters of administration, security has been given to cover the property in the Republic to which the letters of administration relate.

15-64 In every case, and especially when the domicile of the deceased as sworn in the affidavit differs from the one described in the grant, the court may require further evidence as to domicile and, if the deceased was not at the time of death domiciled within the jurisdiction of the court issuing the grant, the seal is not to be affixed unless the grant is such as would have been made by a court in Cyprus.[181]

The court also may, on the application of any creditor, require before sealing that adequate security be given for the payment of debts due from the estate to creditors residing in the Republic.[182]

Notice of the sealing in Cyprus of a grant must be sent to the court from which the grant issued,[183] and notice of the revocation of or any alteration in such a grant should be sent to the court by whose authority such grant was re-sealed.[184]

178 Probates (Re-Sealing) Rules, rule 6 and Form 4.

179 Probates (Re-Sealing) Rules, rule 5(2).

180 Law 74 (1) of 2000 repealed the Estate Duty Law (Law 67/1972) and, therefore, this provision is of no effect.

181 Probates (Re-Sealing) Rules, rules 8 and 9.

182 Cap 192, s 5. A creditor's application under section 5 must be supported by an affidavit setting out particulars of the claim (Probates (Re-Sealing) Rules), rule 7.

183 Probates (Re-Sealing) Rules, rule 13.

184 Probates (Re-Sealing) Rules, rule 14.

Appendix A

(First Schedule of Cap 195)

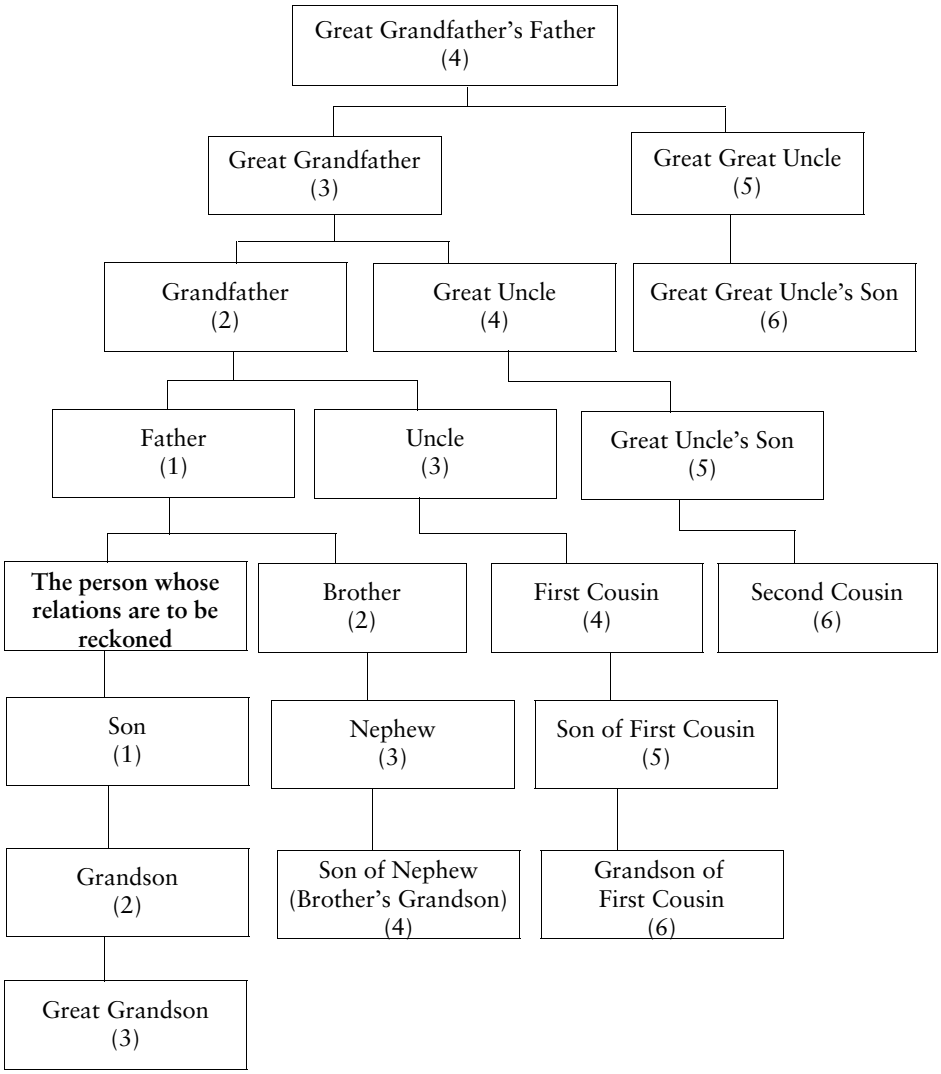
SUCCESSION OF THE KINDRED

Class	Persons entitled	Shares
1. First Class	1. (a) Legitimate children of the deceased living at his death; and (b) descendants, living at the death of the deceased, of any of the deceased's legitimate children who died in his lifetime.	1. (a) In equal shares; (b) in equal shares *per stirpes*.
2. Second Class	2. (a) Father, mother of deceased living at his death (or if not living at his death, the nearest ancestor living at his death) and brothers and sisters of the full and half blood of the deceased living at his death; and (b) descendants, living at the death of the deceased, of any of the deceased's brothers or sisters who died in his lifetime.	2. (a) All in equal shares except that brothers and sisters of the half blood take half the share of a brother or sister of the full blood; (b) in equal shares *per stirpes*.
3. Third Class	3. The ancestors of the deceased nearest in degree of kindred living at his death.	3. If there are ancestors of equal degree of kindred on both the father's side and on the mother's side, the ancestors on each side will take half of the undisposed portion if any and, if there are more than one of them on either side, in equal shares.
4. Fourth Class	4. The nearest kin of the deceased living at the death within the sixth degree of kindred, the nearer degree excluding those more remote.	4. In equal shares.

Appendix B

(Second Schedule of Cap 195)

TABLE OF DEGREES OF KINDRED



CHAPTER 16

Family Law

Anna Demetriou-Panayiotidou
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Introduction

In General

16-1 Modern Cypriot family law is connected with Greek family law, as amended by Law 1329 of 1983, which reformed the Greek Civil Code by introducing both the system of subjective irretrievable breakdown of marriage and divorce by consent.

This Law, which has been incorporated in the Civil Code and constitutes the existing Greek law, may be seen as the most serious step in adapting the Greek legislation to modern social structures and circumstances. By Law 1329 of 1983, the Greek law relating to divorce was aligned with the modern foreign enactments which had been reformed in view of social developments.

Cypriot family law, including the amendment of article 111 of the Constitution made by Law 95 of 1989, the Civil Marriage Law 21 of 1990, the Attempt to Compromise and Spiritual Dissolution of Marriage Law 22 of 1990, and the Family Courts Law 23 of 1990, follows the corresponding Greek family law.

Before the enactment of Law 95 of 1989, family matters were adjudicated by the ecclesiastical courts rather than by the civil courts.[1] In the sphere of Private International Law, the ecclesiastical courts had absolute jurisdiction, and the religious law applied. When an alien was a litigant in divorce proceedings, the applicable law was the civil law, and the jurisdiction belonged to the civil courts.[2] For Turkish Cypriots, Law 8 of 1976, sections 32–36, was in force.[3]

For a considerable time, the ecclesiastical courts had jurisdiction to try matrimonial matters and applied the law governed by the Charter of the Most Holy Church of Cyprus of 1914 and that of 1979 which came into existence on 1 January 1980. This revision also affected the grounds of divorce referred to in section 225 of the Charter.

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1 Constitution, art 111; *G Mantsafou v M Demetriadi* (1995) 1 JSC 762.
2 Courts of Justice Law, Law 14 of 1960, s 19.
3 Turkish Family Courts Law, Cap 228; Turkish Family Law, Cap 339.

The purpose of article 111 of the Constitution was to safeguard the rights of the Greek Orthodox Church and the churches of the other religious groups in Cyprus in matters relating to matters such as marriage of members who are citizens of Cyprus. Apart from the Greek Orthodox Church, the churches of other religious groups are those specified by article 2(3) of the Constitution. According to article 2, a religious group is a group of persons having their usual residence in Cyprus and being members of the same religious denomination, the number of which, at the time of the declaration of Cyprus as an independent Republic, exceeded 1,000 and of whom 500 obtained citizenship of the Republic of Cyprus on 16 August 1960. Such religious groups in Cyprus are the Maronite and Latin communities, both of which belong to the Catholic Church, and the Armenian community, belonging to the Armenian Church.

Family Courts

16-2 Article 111 of the Constitution was amended by the First Amendment of the Constitution Law.[4] Every matter relating to those who belong to the Greek Orthodox Church and connected with divorce, separation from bed and board, the cohabitation of spouses, or matrimonial relations is to be adjudicated by the Family Courts, composed in divorce proceedings of three judges, one of whom is a church legal officer appointed by the Greek Orthodox Church and who presides. The other two are chosen from lawyers of high professional and moral standing, belonging to the Greek Orthodox Church, and being appointed by the Supreme Court.[5] If the Greek Orthodox Church fails to appoint a church officer, the Supreme Court may appoint the President of the Court. A divorce may be granted only:

- For the reasons referred to in the Charter of the Most Holy Church of Cyprus as they were in force at the date the House of Representatives passed the First Amendment of the Constitution Law 1989, so long as they are not contrary to the Constitution;
- When the relations between the spouses have irretrievably broken down for reasons due to the defendant or to both spouses so that reasonably the continuation of matrimonial relations becomes impossible for the petitioner; and
- For any other reason as a law may provide and if the views of the Greek Orthodox Church of Cyprus are taken into consideration.

16-3 Every matter connected with those who belong to a religious group to which the provisions of article 2(3) apply, and related to divorce, separation from bed and board, the cohabitation of spouses, or matrimonial relations, is to be adjudicated by Family Courts, for the establishment, composition, and jurisdiction of which a law may provide, subject to the above.

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4 Law 95 of 1989; *Nicolaou v Nicolaou and Others (No 2)* (1992) 1 JSC 1338.

5 Notwithstanding these provisions, the free choice of civil marriage is offered to those who belong to the Greek Community.

A law may provide for appeal against the decisions of the Family Courts, for the composition of the judges trying and deciding such appeals, and for the jurisdiction and power of such appeal courts, composed of one or more judges of the Supreme Court, sitting alone or with another or other judges of the judicial service of the Republic, as the law may provide.

Proceedings pending at the date on which the Law came into force will be continued and completed before the court in which such proceedings were pending, composed as before and irrespective of the amendment of the Constitution provided by the present Law. The Law came into force on 1 January 1990.

For the regulation of marriage and divorce matters embodied in Law 95 of 1989, the Civil Marriage Law[6] and the Attempt to Compromise and Spiritual Dissolution of Marriage[7] were passed. The House of Representatives also passed the Family Courts Law,[8] by virtue of which the Family Courts have been established.

Section 11(1) of the Family Courts Law was recently amended by the Family Courts (Amendment) Law 1998[9] to simplify the question of jurisdiction in family matters.

The section now provides that 'the Family Courts have jurisdiction to exercise the powers granted to them by article 111 of the constitution and by any other law'. Section 11(2) provides that the Family Courts have in particular the power to entertain cases concerning:

- The dissolution of any religious marriage which was celebrated according to the canons and rites of the Greek Orthodox Church;
- The dissolution of any religious marriage of any other faith, provided that such dissolution does not come within the jurisdiction of the Family Courts of the religious groups;[10]
- The dissolution of any civil marriage;
- Family matters in court proceedings instituted under the provisions of bilateral or multilateral treaties to which Cyprus is a signatory; and
- Matters of parental support, maintenance, acknowledgement of paternity, adoption, property relations between spouses, and any other conjugal or family dispute, provided the parties or one of the parties are resident in the Republic.

Section 11(3) defines 'residence' to mean any continuous period of stay in excess of three months.

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6 Law 21 of 1990, as amended by Law 28 (I) of 1994 and Law 93 (I) of 1994.

7 Law 22 of 1990.

8 Law 23 of 1990, Law 88 (I) of 1994, Law 33 (I) of 1996, Law 61 (I) of 1997, Law 26 (I) of 1998, Law 92 (I) of 1998, and Law 46 (I) of 1999. *Kolaridou v Kolaridou*, Legal Question 332, 11 May 2000.

9 Law 26 (I) of 1998.

10 Such religious groups in Cyprus are the Maronite and Latin communities, both of which belong to the Catholic church and the Armenian community, belonging to the Armenian church.

Marriage

Validity of Marriage

16-4 The term 'validity' has a legal rather than phraseological or descriptive meaning. It refers to all the conditions or requirements, and existence or non-existence of such conditions or requirements, which specify the legal status of marriage or the so-called 'legal perfection' of marriage, or specify the invalidity of marriage, ie, the existence of any legal defect.

In the latter case, the marriage is generally called 'defective'. The meaning of marriage is, in essence, unique and indivisible, irrespective of the form of ceremony. The form of marriage, whether civil or religious, does not divide the meaning of marriage into two sub-meanings or two kinds of marriage.

Defective Marriages

In General

16-5 A valid marriage has full legal effect and cannot be impeached if all the legal requirements are complied with, while a defective marriage may be either void *ab initio* or voidable so that it may be annulled at a later stage by a court.

Continental law, in which Greek and Cypriot family law are included, applies the reclassification of a defective marriage as it exists in European law and which is contrary to the Roman Law. Such classifications are:

- Void *ab initio* marriage (*matrimonium nullum*); or
- Void marriage (*matrimonium non existens*) and/or voidable marriage.

16-6 In Anglo-Saxon law, defective marriages may be classified into two categories, void and voidable marriages, similar to contract law.

Void Ab Initio Marriage

16-7 A void *ab initio* marriage is one which has no legal effect, and no court decision is required to declare it as such. The same principle also applies to void marriages in English law. Such a marriage may, therefore, be validated only by a new valid marriage; otherwise, the children born are deemed illegitimate, the annulment, or rather its non-existence, may be invoked by any person, and the parties are entitled automatically to contract a new marriage without any impediment and without committing bigamy. In such case, an action may be instituted for the declaration of the non-existence of the marriage.

Cases arising out of various laws relating to void *ab initio* marriages are based on the lack of solemnisation or irregularity, marriage by proxy, or the incapacity of one or both of the spouses to contract a marriage.

Void Marriage

16-8 A void marriage is a marriage contracted without the existence of any positive requirements and with the existence of an impediment. Such voidness is divided into that which cannot be remedied or is absolute and that which can be remedied.

A voidness which cannot be remedied or is absolute exists when a marriage has been performed, irrespective of the existence of an impediment, ie, relationship, adoption, a previous valid marriage, or a previous third marriage by the Church.

A voidness which can be remedied is lack of the minimum age to marry, or lack of the parents' consent, or under certain conditions provided by the law. A voidness may be invoked not only by the parties concerned, but also by any third person having a legitimate interest or by any public prosecutor.

Voidable Marriage

16-9 According to Greek law before the 1983 amendment, a voidable marriage was a marriage contracted without the free consent of one of the spouses or by mistake, fraud, or threat. A voidable marriage is the weakest form which affects the validity of a marriage and usually lasts for a short time until an action for annulment can be instituted. The right of annulment is personal to the parties and recognition of the marriage is possible, ie, a waiver of the right to institute an action for its annulment.

The consequences of annulment of void or voidable marriages are the same, ie, the retrospective annulment of the marriage and the retrospective disappearance of its effects. In some legal systems, the consequences of annulment are treated in a special manner, particularly the legitimacy of the children, the relationship by marriage, and the rights of third persons. A special arrangement is made for the protection of a *bona fide* spouse, in the case of a so-called 'deemed marriage'.

In Cypriot law, a general division into two categories is made, ie, the null and void or absolutely void marriage and the void or voidable marriage.

Null and Void or Absolutely Void Marriage

16-10 Null and void marriages which cannot be remedied are:

- Marriages contracted without the solemnisation by a proper priest of the Greek Orthodox Church, according to the provisions of the Greek Orthodox Church;[11]
- Marriages contracted irrespective of the existence of any religious impediment;[12]

11 Charter of the Church of Cyprus, ss 217(c) and 220(2)(6)(2).
12 Charter of the Church of Cyprus, s 220(2).

- Marriages contracted irrespective of the existence of any previous marriage which has not been dissolved or has not been declared irrevocably void;[13] and
- Fourth marriages by the Church, if all previous marriages were valid.[14]

16-11 The above classification creates absolute voidness according to the relevant provisions, with retrospective effect, so that such marriages can neither be saved nor given any legal effect whatsoever. In such cases, no court decision is required for the declaration or confirmation of voidness; on the other hand, the institution of a declaratory action before the appropriate ecclesiastical court is not prohibited, if such is deemed fit by the persons so entitled. The persons so entitled are referred to in section 268 of the Charter of the Most Holy Church of Cyprus, ie, the spouses, all other interested persons, and the Bishop of the diocese. They are the same litigants entitled to institute an action for the annulment of marriage.

Void or Voidable Marriage

16-12 Void or voidable marriages are regulated without any distinction by section 222 of the Charter of the Most Holy Church of Cyprus. It is expressly provided that a marriage is voidable due to minority. If the marriage has continued after maturity, it is deemed valid.

A marriage is voidable by reason of mistake, duress, force, or threat, but it may be validated if the spouse whose consent was induced by any of these reasons does not institute any action for the annulment of the marriage or ratifies it.

A marriage which has been solemnised during the so-called mourning period (*Penthimos eniaftos*) is voidable, but it may become valid after 10 months have elapsed.

A voidable marriage has full legal effect until the time of annulment by the competent ecclesiastical court; the legal effects of annulment are retrospective *ab initio*. If the voidable marriage is recognised as valid according to the provisions of the law,[15] the validity has retrospective effect and runs from the date of solemnisation. The parties entitled to institute a declaratory action are again those referred to in section 268 of the Charter of the Most Holy Church of Cyprus.

Requirements for a Valid Marriage

16-13 The requirements for a valid religious marriage are set out in detail in section 220 of the Charter of the Most Holy Church of Cyprus. According to the provisions of sections 3 and 4 of Law 21 of 1990, the requirements for a valid civil marriage are as follows:

- There must be an agreement between the spouses on the contract of marriage;

13 Charter of the Church of Cyprus, s 220(3)(b).
14 Charter of the Most Holy Church of Cyprus, s 220(3)(a).
15 Charter of the Most Holy Church of Cyprus, s 222.

- The spouses must have attained 18 years of age. The marriage of persons who have attained the age of 16 may be allowed, provided that the persons exercising care of the minors or their legal guardians agree;
- A person having no contractual capacity cannot contract a marriage;
- The contract of marriage is prohibited before the dissolution or annulment of an existing religious or civil marriage;
- The contract of marriage is prohibited between any persons related to each other in the direct line and up to the fifth degree in collateral lines;
- The contract of marriage is prohibited between any relatives by marriage in the direct line up to the third degree in collateral lines;
- The contract of marriage between an adopting person or his descendants and the adopted person or his descendants is not allowed;
- The contract of marriage between a godfather or his parents or children and the children of the godchild is not allowed; and
- The contract of marriage between a child born out of wedlock and the father acknowledging him or their blood relatives is prohibited.

16-14 Every intending spouse must give notice of his intention to marry, addressed to the Officer of Marriages of the municipality of choice. Such notice must comply with Form A referred to in the First Table of the present Law, and it must be signed by the spouse.[16]

Form of Marriage

Religious Marriage

16-15 'Religious marriage' means a marriage solemnised according to the religious rules of the Greek Orthodox Church[17] or by any officer of another religious denomination or rite known in Cyprus.

A religious marriage cannot be contracted between an Orthodox Christian and a member of any other denomination or with a member of any Christian faith which does not accept the main Christian doctrines and the mystery of marriage.[18]

Mixed marriages between Muslims and Christians are prohibited by the law of the Orthodox Church and certainly by the law of the Church of Cyprus.[19] According to the rules of the Church of Cyprus, for there to be a valid mixed marriage between

16 According to the existing Greek family law, the requirements for a valid civil marriage are set out in sections 1350–1352 of the Civil Code. Georghiades and Stathopoulos, 'Family Law', Greek Civil Code, ss 1350–1352 (1991). The requirements for a religious marriage are set out in section 1367, paragraph 3, of the Civil Code. Kounougeri-Manoledakis, *Family Law* (2nd ed), vol 1.

17 Charter of the Church of Cyprus, s 221; Law 22 of 1990, s 2.

18 Charter of the Church of Cyprus, s 220(c). Marriage is one of the seven sacraments (*mystiria*) of the Greek Orthodox Church.

19 Charter of the Church of Cyprus, s 220b.

a Muslim and a Christian, the Muslim must be baptised as a Christian. Any dissolution of the marriage will then be effected by the Ecclesiastical Court.

Originally, the ceremony of a marriage by the church was not necessary. It was during the Justinian period that for the first time the mutual consent of spouses was given before the 'Official'[20] of the Church who, in the presence of three or four priests, prepared the minutes of the marriage. The reason why Justinian provided for the execution of a marriage before the 'Official' was to create registers and valid proof of the existence of a marriage.

The ceremony as an ingredient of marriage has been in existence since 893 AD with Neara 89 of Leon Sofos. It is apparent that, although from the legal point of view the ceremony is one of the prerequisites for the validity of a marriage, from the social point of view what is essential is the substantial object of marriage, which remains the same irrespective of the existence or non-existence of the ceremony. The object of marriage from the Church's point of view is no different from that of the social one, which is the perpetuation and increase of the human race. This object also is recognised by the Eastern Orthodox and Catholic Churches as the primary one.

Civil Marriage

16-16 'Civil marriage' means the performance of marriage in a manner, procedure, or ceremony other than a religious one.[21] The state, taking into consideration the constitutional provision for the religious freedom of its citizens,[22] accepts religious and civil marriages equally. This solution is not the perfect one, but it promotes the social concept of marriage and restricts the right of the Church to interfere with the legislative power of the state in matters relating to marriage and legal relationships which are within the exclusive jurisdiction of the state.

This is in accordance with the modern concept of the popular nature of a democratic state and is the logical application of the fundamental constitutional provision for respect for the religious freedom of all the citizens. The exclusive jurisdiction of the state is not affected by article 3(1) of the Constitution, referring to church texts, because such texts are binding on the state only in respect of the administration of the Church. Certainly, such exclusiveness does not preclude the state from taking into account, so far as it considers expedient, the views of the Church.[23]

Civil marriage has been recognised in Cyprus by Law 21 of 1990. The state considered that the modernisation of family law was necessary for various reasons,

20 *Ekdicos*.
21 Law 21 of 1990, as amended by Law 1250 of 1982, civil marriage was recognised in Greece for the first time, with a statement made before the Mayor or the President of the community.
22 Constitution, art 13.
23 Georgiades and Stathopoulos, *Greek Civil Code*, ss 1346–1504.

firstly, because of social developments, as the majority of people claimed that the family should be consistent with the new trends in marriage and divorce matters and, secondly, to enable the Republic of Cyprus to comply with its international obligations in respect of human rights, as well as to be in line with the legislation of other European countries.

Freedom of choice of marriage is provided by articles 15, 18, and 22 of the Constitution. In addition, under the Universal Declaration of Human Rights,[24] the right of marriage and the creation of a family is safeguarded without any limitation in respect of race, citizenship, or religion.

Interruption of Marital Life

In General

16-17 Historically, divorce is connected with monogamy in the sense that, for the performance of a second marriage, the dissolution of the first marriage is necessary. In addition, the development of divorce is connected with the development of marriage.

Divorce is not a punishment imposed on the spouse at fault, but it constitutes a means of therapy in a pathological situation. Bearing this in mind, most modern laws establish both the irretrievable breakdown of the marriage and divorce by consent, by virtue of which private autonomy is introduced with the law of divorce.

In Greece, under the influence of financial and social developments, the effort to reform the law of divorce focused on the need to introduce the principle of irretrievable breakdown achieved temporarily by Law 868 of 1979. The Law does not imply fault on the part of either spouse in granting a divorce and establishes, as an additional general ground of divorce, the subjective fact of termination of marital life for a period of six years. The defendant, however, has the right to:

- Oppose the dissolution of marriage on the ground that the restoration of the marital life is 'very possible';
- Allege abuse of right based on the special section which provides the 'clause of hardship'; and
- Seek a declaration that the plaintiff alone is responsible for the divorce.

16-18 The final phase of the modernisation of the law of divorce was embodied in Law 1329 of 1983, which reformed the Civil Code and introduced both irretrievable breakdown and divorce by consent as grounds for divorce. The Law is the existing law in Greece, and it may be characterised as the most important step towards the adaptation of our legislation to modern social structures and circumstances. By Law 1329 of 1983, the Greek law of divorce has been harmonised

24 Universal Declaration of Human Rights, s 16(1), (2), and (3).

with the legislation of other countries which had already been adapted in view of social developments.[25] Cypriot family law has been amended in the manner in which Greek family law is applied in Greece today.

Divorce

16-19 Dissolution of marriage and divorce is one of the main areas of jurisdiction of the Family Courts, and this is important for historical reasons because, from 45 AD, such jurisdiction was exercised by the ecclesiastical courts.

Amended article 111 of the Constitution introduced irretrievable breakdown of the bond of matrimony for reasons attributable to the respondent or both the spouses so that the continuation of marriage is intolerable for the petitioner. Amended article 111 also introduced section 1439 of the Greek Civil Code, with the exception of paragraph 3, which established the presumption of breakdown, provided that separation exceeded four years. In addition, article 111 introduced, as an independent ground, all the grounds for divorce referred to in the Charter of the Church of Cyprus which, by inclusion in article 111, took constitutional effect.

The grounds for divorce referred to in section 225 of the Charter, with the sole exception of absence, constitute specific manifestations of the breakdown, and they should be included in the ground of irretrievable breakdown of marital life, to be used as presumptions of breakdown, but this has not occurred. Among the reasons referred to in the Charter is that of 'immoral, disgraceful, or any other repeated inexcusable behaviour' which, as has been pointed out by the courts,[26] corresponds to the reason of irretrievable breakdown of marital life on an objective basis, as it was applied in Greece and in other European countries in earlier times.

An important aspect of the modernisation of the law of divorce was the recognition of the spouses' right to dissolve their marriage by consent,[27] ie, the introduction of the element of private autonomy in a field previously deemed not to be affected by it, ie, dissolution of marriage. With the introduction of divorce by consent, Greek law has been harmonised with most foreign laws.[28] The grounds for divorce enumerated in article 111 of the Cyprus Constitution do not include divorce by consent.

As far as relations between the spouses are concerned, conjugal relations during the interruption of marital life or the general legal consequences of termination of cohabitation may be divided into personal, property, and personal and property combined, depending on whether they concern the person or the property of the spouses or both.

25 Kounougeri-Manoledakis, *Family Law* (2nd ed), vol 1B.
26 *Chrysanthou v Panagi*, Application 19 of 1990, Nicosia Family Court.
27 Greek Civil Code, art 1441.
28 Kounougeri-Manoledakis, *Family Law* (2nd ed), vol IB.

Separation

Matrimonial Home

16-20 The settlement of the matrimonial home during the separation is provided for by section 17(1) of Law 23 of 1990 and is based on equity, not on the real or legal rights of the spouses.[29] The legislature has particularised the general principles of equity, taking into consideration the particular circumstances of each spouse and the interests of the children, and has expressly excluded the real or legal rights from consideration in such settlement, although they could be implied.

According to section 17(1), there should be three conditions for the Family Court to assume jurisdiction. The conditions are specified as alternatives and are not required to co-exist. The fault by one or both spouses in the interruption of their marital life does not affect the intervention of the court.

One of the conditions for the assumption by the court of its jurisdiction under section 17 is the interruption of marital life. The claim for the absolute or partial use of the matrimonial home arises in certain circumstances, one of which is the interruption of marital life, irrespective of the rights of ownership or any choice of action by the owner of the matrimonial home and one or both spouses. The protection conferred refers to the duration of interruption of marital life and does not include the question of divorce. The considerations specified by section 17 are as follows:

- Equity, taking into account the special circumstances of each spouse; and
- Welfare of the children.

16-21 Special circumstances will be determined by the court, taking into account the financial and professional aspects of each case as well as physical and mental health. The reference to the welfare of the children has particular significance because a change of the environment of children affects their development. The reasonableness or not of the interruption of the marital life and the existence of fault are considerations which must also be taken into account.[30]

Distribution of Movables

16-22 During the separation, the movables are distributed between the spouses according to the ownership of them, by virtue of section 1394 of the Greek Civil Code and section 17(2) of the Family Courts Law.[31]

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29 *E Vounou v A Vounou*, Appl 35, 28 February 1995; *M Christodoulou v K Christodoulou*, Appl 60, 19 March 1976; *Stylianou v Stylianou*, Appl 39/35, 24 April 1996; *Mainaki v Christou*, Appl 34/95, 1 July 1996; *P Pichide v E Pichide*, Appl 71, 4 December 1997.

30 Vathrakokoilis, The New Family Law (3rd ed, 1994), at p 207; *Androula Pafiti v Dimitri Pafiti*, Application 36/96, 3 February 1997, Limassol Family Court.

31 Law 23 of 1990, as amended.

Each spouse may receive the movables belonging to him even if they were used by both or only one of the spouses, unless (and this is the exception to the rule) the circumstances of the case show that the use of them by the other spouse is absolutely necessary for reasons of equity. On this point, the arrangement made for the distribution of movables is similar to that for the settlement of the matrimonial home because such settlement is guided by equity. The movables belonging to both spouses are distributed according to their personal needs.[32] The criterion for the distribution of movables is based on the needs of each spouse, as demonstrated by the mode of living during cohabitation and as they are expected to change during the separation.

The right of ownership is examined in the light of general provisions. In case of disputes, in Greek law, the presumptions in section 1398, paragraphs 2 and 3, apply and provide that the items which are in the possession or occupancy of both spouses are presumed to belong to both of them (jointly), while the personal items are presumed to belong to the spouse who uses them.

Fault does not play a part in the distribution of movables or the settlement of the matrimonial home. Therefore, the spouse who is responsible for the interruption of marital life is entitled to receive the movables belonging to him and to request the use of those which are necessary for his new situation.[33]

Claim for Maintenance

16-23 The obligation of spouses to contribute to the needs of the family exists irrespective of the separation and must conform to the new situation.[34] There is no obligation on the part of the spouses to contribute to the matrimonial home because there is no such house, but there is an obligation to support the financially weaker party.

The spouse entitled to maintenance is not required to be destitute. The beneficiary spouse, after the set-off has been made, is entitled to enjoy from the other's property what he enjoyed during the cohabitation. This obligation exists whether the beneficiary provoked the interruption for good cause or without reasonable cause.[35]

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32 Greek Civil Code, s 1395; Law 23 of 1990, s 17, para 3.

33 Papazisis, 'Relations between Spouses during the Marriage and Divorce', *Cyprus Law Review* (January–March 1992), at p 76.

34 Under section 1391 of the Greek Civil Code, if the spouse provoked the interruption for good cause, the maintenance due from the other party is payable in money and in advance every month. The liability for maintenance ceases to exist, or the amount of maintenance increases or diminishes, according to the circumstances of each case. Under section 1392 of the Greek Civil Code, the provisions of sections 1494 and 1498–1500 are applied to the maintenance of spouses. Section 1495 is applied if there is a good cause for divorce due to the fault of the spouse entitled.

35 Koumantos, *Family Law* (1988) vol 1, at p 163; Deliyiannis, *Family Law* (1987), vol 2, at pp 173 and 190; Georghiades and Stathopoulos, *Greek Civil Code*, s 1391; *Ioannou v Ioannou*, 1993 1 JSC 900.

Property Rights

16-24 The claim for participation in the property acquired is a rule supplementary to the autonomy of properties.[36] The claim is based on the principle of contribution by each spouse to the other's property and also on unjust enrichment[37] because such claim is connected with the increase of the property belonging to the responsible person. Section 1400 of the Greek Civil Code does not refer to a legal cause, and it seems that it does not include a legal cause. The lack of reference to a legal cause should not be deemed to be a lack of condition.[38]

The claim is a chose in action because the legislature considered that the uncertainty of the value of the property and of its realisation does not allow it to be given as security. The legislature passed Law 1329 of 1983, knowing all the social problems caused by the inability to mortgage the chose in action. It has supported the chose-in-action of the beneficiary with real security and granted to him a legal title to register a mortgage.[39]

According to the Greek Civil Code and Law 232 of 1991,[40] the claim is a personal one. Therefore, while the claim does not develop to the heirs of a beneficiary and cannot be exercised by them, it may succeed if it is recognised by contract or the action has been served,[41] and the beneficiary may apply to the heirs of the responsible spouse for satisfaction of his claim.

The claim is mandatory, and it cannot be excluded by agreement; otherwise, the beneficiary might be deprived of his claim. This leads to the conclusion that the intervention of private will would have as the only result the disappearance of such claim.

The claim is based on a presumption which must be proved, while the evaluation of the increase of such a claim is decided at the time of dissolution or annulment of the marriage. If a spouse bases his claim on the ground of three years' desertion, the court will decide the matter taking into consideration the circumstances as they appear at the time of dissolution or annulment.[42] According to the Greek Civil Code, for the assessment of the matrimonial property, all the property which is acquired by the spouses during the marriage and which does not constitute dowry

36 Georghiades and Stathopoulos, 'Family Law', *Greek Civil Code*, VII (1991), s 1400; Law 232 of 1991, ss 13–18.

37 Greek Civil Code, s 904.

38 The claim is a chose-in-action, personal (Greek Civil Code, s 401; Law 232 of 1991, s 15) and of public order.

39 Greek Civil Code, ss 1402 and 1262(41) (a provision not included in Cypriot law).

40 Law 232 of 1991, as amended by Law 49 (I) of 1995, Law 34 (I) of 1996, Law 25 (I) of 1998, and Law 58 (I) of 1999.

41 Greek Civil Code, s 1401(1), in connection with s 1710.

42 The relevant section of Law 232 of 1991 has been amended by Law 48 of 1995.

or gift is taken into account. Section 16 of Law 232 of 1991 states that any gift made by one spouse to the other is deducted from the claim of the beneficiary, while Greek law provides otherwise.

Such a claim may be exercised only in the beneficiary's lifetime. For the evaluation of the hereditary portion of the beneficiary spouse, on the death of the responsible spouse, the percentage which corresponds to the size of the claim in the property acquired is deducted first from the estate.

The claim is not of a gratuitous nature. In the Greek Civil Code, therefore, the claim in the property is not affected by any fault of the beneficiary in the separation or the dissolution of the marriage or by any other faulty behaviour of the beneficiary towards the responsible spouse, such as ingratitude of whatever nature.

On the other hand, Cypriot law provides that the claim for participation in the property acquired is connected with fault, resulting in the loss of such a claim if the beneficiary has committed the faults included in section 17 of Law 232 of 1991, which correspond to those relating to disinheritance and unworthiness to inherit referred to in sections 1840 and 1860 of the Greek Civil Code. This provision includes a dogmatic contradiction because it confuses the nature of the right of inheritance with that of the claim for participation in the property acquired.

Therefore, the provision enables the spouse who is unjustly enriched against the other during the marital life to maintain such enrichment. The beneficiary is guilty of committing a criminal offence and in addition is deprived of the right to participate in the property acquired. The criminal punishment is a sanction of the state while the right of succession or the claim for participation in the property acquired is connected with the matrimonial property and with such an interpretation appears to be an additional punishment by civil law. The plaintiff spouse neither seeks nor takes any property belonging to the other but claims the return of his property which for any reason was not in his management.[43]

Law 232 of 1991 was amended by Law 34(1) of 1996. The object of the amendment was to empower Family Courts to try causes arising out of the property relations of the spouses, which were previously tried by the District Courts in cases where both spouses belonged to the Greek community. This was the first limitation and was based on the legal status of the parties.

Law 34(1) of 1996 did not amended paragraph (c) of section 2 of the Law. Later, this limitation was removed by the Regulation of the Property Relations of the Spouses (Amendment) Law of 1998 (Law 25(1) of 1998).[44]

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43 Georghiades and Stathopoulos, *Greek Civil Code*, ss 1400–1402; Deliyiannis, *Family Law* (1987) vol 2, at p 114; Koumantos, *Family Law* (1988), at p 208.

44 *Pentafkas v Pentafkas* (1991) CLR 547; *Vounou v Vounou* (1995) 1 CLR 16; *Logginos v Logginos*, Appl 103, 26 July 2000; *Georgiou v Georgiou*, Appl 44/96, 31 December 1999.

Divorce

In General

16-25 By the amendment of article 111 of the Constitution by Law 95 of 1989 and with the provisions of Law 21 of 1990 in respect of civil marriage, of Law 22 of 1990 in respect of an attempt to find a compromise and for the spiritual dissolution of marriage, and of Law 23 of 1990 related to the establishment of Family Courts, the dissolution of marriage has been changed substantially.

By virtue of section 38 of Law 95 of 1989 and section 28 of Law 21 of 1990, both religious and civil marriages may be dissolved by the Family Court for any of the reasons referred to in the Charter of the Church of Cyprus or for the reason of irretrievable breakdown of the bond of matrimony. According to paragraph 3 of article 111 of the Constitution, a law may provide other grounds for divorce; under the previous legal regime, the inclusion of new grounds for divorce could be made only by amendment of the Charter.

Grounds for Divorce

16-26 Law 95 of 1989, called the First Amendment of article 111 of the Constitution, states the following as grounds for divorce in section 3B(a):

- The reasons referred to in the Charter of the Church of Cyprus which were in force at the time the First Amendment of article 111 of the Constitution was passed by the House of Representatives, so far as they are not contrary to the Constitution;
- When the relations between the spouses have irretrievably broken down by reason of fault on the part of the defendant or of both spouses so that the continuation of cohabitation becomes intolerable for the plaintiff; and
- Any other reason which the law may provide, taking into consideration the Church's views.

16-27 The grounds of divorce are contained in section 225 of the Charter of the Greek Orthodox Church of Cyprus.

The Family Courts established by Law 95 of 1989, to which for the first time the jurisdiction to dissolve marriages, which was previously exercised by the ecclesiastical courts has been entrusted, must apply, by virtue of their constitutional mandate, the ground of irretrievable breakdown and the other specific grounds included in the Charter.

The Family Court has recognised that the interpretation of irretrievable breakdown that must be given under Cypriot law, contrary to the interpretation given in Greece, is that it does not comprise the other divorce grounds, particularly the grounds referred to in section 225 of the Charter of the Church of Cyprus, which remains autonomous.

The ground of desertion for two years without any reason, contained in section 225(h) of the Charter of the Church of Cyprus, is frequently used in divorce petitions. In

the case of *Kokkinou*,[45] it was decided that the provisions of section 225(h) are substantially similar to the provisions of section 1441 of the Greek Civil Code as it was in force before its amendment by Law 1329 of 1983, with the only difference that in Cypriot law the desertion should be without any reason and not wilful as is provided in the Greek law. However, the court held that the meaning of desertion includes the unilateral intention to bring about the final breakdown of cohabitation.

A similar interpretation of desertion was given by the ecclesiastical courts that it should be contrary to the will of the other spouse who insists on the continuation of the cohabitation. In an ecclesiastical divorce, the petitioner must send to the respondent a formal invitation through the Bishop[46] to return to the matrimonial home and this request must be produced to the ecclesiastical court. Such an invitation is not today a condition for the institution of an action before the Family Court, because the court considers that it is a procedural provision not binding on the Family Courts.[47]

The cases of *Timotheou v Timotheou*[48] and *Constantinou v Constantinou*[49] contain a detailed interpretation of the meaning of desertion and of its ingredients and cite a number of Greek cases.

The persistent refusal to have a child, as provided by section 225 of the Charter of the Church of Cyprus, continues to constitute a ground for divorce in petitions before a Family Court. This ground for divorce has been interpreted in several cases in which the court held that it may constitute part of the irretrievable breakdown.[50]

The ground for divorce of immoral, disgraceful, or any other repeated inexcusable behaviour referred to in section 225(b) of the Charter is often alleged together with the ground of irretrievable breakdown but in the alternative. In *Chrysanthou v Panayi*,[51] the Nicosia Family Court held that the provisions of paragraph (b) of section 225 introduced irretrievable breakdown of the bond of matrimony as a ground for divorce based on a fault by one of the spouses, as it was in force in the old laws and in section 1442 of the Greek Civil Code, where no reference is made to the nature of the behaviour which caused the irretrievable breakdown. Section 225(b) of the Charter does not specify the acts which constitute the behaviour which causes the breakdown but limit it to 'immoral', 'disgraceful', or 'inexcusable' behaviour.

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45 *Kokkinou v Kokkinou*, Appl 4/90, 20 November 1990, Nicosia Family Court.

46 *Episkopiki prosklisi*

47 *Markides v Markidou*, Appl 20/90, 15 April 1991.

48 *Timotheou v Timotheou*, Application 8 of 1990, Nicosia Family Court.

49 *Constantinou v Constantinou*, Application 2 of 1990, Nicosia Family Court.

50 *Fiakas v Fiakas*, Application 1 of 1990, 10 January 1991, Limassol Family Court; *Manolis v Manolis*, Application 16 of 1990, 14 March 1991, Limassol Family Court; *Koutsokoumnis v Koutsokoumnis*, Application 21 of 1991, Limassol Family Court.

51 *Chrysanthou v Panayi*, Application 19 of 1990, Nicosia Family Court.

In *Panayiotou v Panayiotou*,[52] the court commented on the co-existence of the ground for divorce provided by section 225(b) and that of irretrievable breakdown provided by article 111(2B)(b) of the Constitution, pointing out that the establishment of breakdown on a subjective basis was one of the most important legal achievements and constitutes the development and modernisation of the objective breakdown or the irretrievable breakdown of marital life. The retention of both grounds constituted a superabundance which might cause confusion as regards the principles governing the grounds of divorce in Cyprus.

Lunacy and a prison sentence also are grounds on which a divorce petition may rely.[53]

The irretrievable breakdown of the bond of matrimony, as introduced in article 111(2B)(b) of the Constitution, is an exact copy of section 1439(l) of the Greek Code, with the exception of sub-sections 2 and 3 of that section, which refer to the presumptions of breakdown and the separation of spouses for four consecutive years. By the recent amendment made by Law 46(1) of 1999, which amended Law 23 of 1990, the duration of separation has been fixed at five consecutive years.

The interpretation of article 111(2B)(b) made by the Family Courts was guided by various books by Greek authors and decisions of Greek courts of first instance, appeal courts, and the *Areios Pagos*, the highest court in Greece.[54]

In all relevant cases in the Family Courts, it is admitted that breakdown is a general ground of divorce applied to the merits of each case. Reference also is made to the irretrievable breakdown of the marriage as it is applied by English law.

The circumstances that constitute irretrievable breakdown of marriage have been interpreted in *Argyris v Argyris*[55] and *Tsiali v Tsiali*.[56]

In *Andronicou v Andronicou*,[57] the court held that the circumstances which constitute the breakdown of the marriage should be connected with one or both of the spouses, although fault does not play a role in the meaning of breakdown which is a limited subjective failure. In *Andronicou*, the petition was dismissed because there was no proof of any connection between the circumstances which constituted the breakdown and the defendant or both spouses. Such circumstances are, for example, a breach of the obligation of cohabitation, of the obligation of

52 *Panayiotou v Panayiotou,* Application 21 of 1990, Nicosia Family Court.

53 *Nikodemou v Nikodemou*, Application 6 of 1992, Limassol Family Court, 12 November 1991.

54 To the meaning of breakdown and its elements, the following cases are relevant: *Zenonos v Zenonos*, Application 3 of 1990, Nicosia Family Court; *Chapea v Chapea*, Application 7 of 1990, Nicosia Family Court; *Zachariou v Zachariou*, Appeal 12, Appeal Family Court, 27 March 1993.

55 *Argyris v Argyris*, Application 8 of 1990, 18 April 1991, Limassol Family Court.

56 *Tsiali v Tsiali*, Application 3 of 1991, Famagusta Family Court.

57 *Andronicou v Andronicou*, Application 39 of 1991, 8 October 1992, Limassol Family Court.

conjugal faith, a breach of the terms of cohabitation, and acts affecting the personality of the other spouse. Character differences (*asimfonia charactiron*) also are a cause of divorce.[58]

Divorce Procedure in Cyprus

16-28 Divorce proceedings are completed in three stages, namely:

- The procedure of reaching a compromise before the Bishop;[59]
- The main procedure before a Family Court composed of three judges;[60] and
- The spiritual dissolution of marriage.[61]

16-29 The Family Courts follow the procedure strictly and actions instituted before the expiration of the three-month period for reaching a compromise are deemed void.

Parental Care

In General

16-30 The Relations of Parents and Children Law[62] regulates all the relations of parents with their children, personal, property, and moral.

The Law replaced the Guardianship of Infants and Prodigals Law, Cap 277, and matters of guardianship of infants regulated by that Law now fall under the term 'parental care'. Parental care has a wider meaning than the term 'care, custody, or guardianship of children', as applied by the previous law.

Definition

16-31 The definition of the term 'parental care' in given by section 5.1(b) of the Law, and it includes determination of the child's name, care of the child, administration of the child's property, and representation of the child in his personal or property relations.

The aspect of care is defined by section 9(l) of the Law, and it includes upbringing of the child, custody and education, and determination of the child's domicile. The administration of the child's property belongs to both parents who may maintain,

58 *Panayiotou v Panayiotou*, Application 25 of 1991, Larnaca Family Court; *Economides v Economides*, Application 28 of 1991, 31 October 1991, Limassol Family Court.

59 Law 22 of 1990.

60 Law 23 of 1990, as amended.

61 Law 22 of 1990.

62 Law 216 of 1990, as amended by Law 60 (I) of 1995, Law 95 (I) of 1997, Law 60 (I) of 1997, and Law 21 (I) of 1998.

develop, and increase it. The administration is in respect of the whole property of the child save the limitation imposed by the Law.

The persons who exercise parental care may take any necessary legal or other step. According to section 5(1)(a) of Law 216 of 1990, parental care is a duty but, at the same time, is a right which is exercised by both parents and, in normal circumstances, aims at the interest of the child.

In Cyprus, there was no paternal authority as provided in the Greek Civil Code but, according to sections 4 and 6 of Cap 277, the father had the right of guardianship of the child. Today, both parents have the parental care of the child, which includes guardianship. Parental care may be exercised by one of the parents if they agree on the matters which each one may undertake or to the execution by one parent of a decision taken by both of them.

Parental care is limited lawfully to one parent in the cases mentioned in subsections (2) and (3) of section 5 of Law 216 of 1990, ie, in case of death or where one has disappeared in the active absence of one of the parents or where there is a real incapacity and/or total or partial incapacity to contract.

The Child's Interest

16-32 The parents are representatives of the child in all litigation. If an action is brought on behalf of the child, the names of both parents should be added to the title of the action; otherwise, it is not maintainable. This is in accordance with Greek court decisions[63] and existing law in Cyprus.

Section 6 of Law 216 of 1990 introduced the general principle that 'every decision taken by the parents in the exercise of parental care should be aimed at the child's interest'. The section also specifies the objects and direction of parental care.

The 'interest of the child' has an indefinite legal meaning, and it corresponds to the expression 'welfare of the child' used in the previous law.[64]

This view is supported by the Law and particularly by section 9(2), which says that parents bring up a child to develop its personality freely and with a social conscience. The court, in deciding on the exercise or the manner of the exercise of parental care, takes into consideration the interest of the child, according to section 6(2). The child's interest includes the duty of the parent to provide the child with the appropriate means to develop his personality (discipline, custody, and education).

63 Areios Pagos 1864/84, Nomico Vima 3370, and Appeal Court 87/l/70.

64 Vathrakokoilis, *The New Family Law* (1990), at p 584; *Stylianou v Stylianou* (1988) 1 CLR 520, Civil Appeal 7635, 9 October 1988, in which the Supreme Court adopted the approach explained by that author.

Court Intervention

16-33 The court will intervene in the exercise of parental care if the parents disagree on matters calling for decision (section 7), and in cases of divorce, interruption of marital life, or annulment.[65] In the latter three cases, the court may decide that parental care should be exercised by one of the parents or even by both jointly if they agree.[66] The court also may grant parental care to both parents or to a third person if it considers it expedient.[67]

Section 6(b) of Law 216 of 1990 requires a court decision to respect the equality of the parents and not to discriminate according to sex, religion, race, nationality or property.[68]

Under the provisions of section 14 of the Law, the relations of the child with his parents and brothers and sisters and the agreements reached between the parents are taken into consideration when granting parental care. The court must examine the abilities of the parents, the environment, their professions, and their social activities.

By virtue of the express provision of section 6(3), the opinion of the child is a material factor which the court must seek and take into consideration. The child's opinion concerns both the parents' decisions taken in the exercise of parental care and the court decision. Thus, the Law, in the specified circumstances, imposes on the court the duty to communicate with the child. The European Convention for the Exercise of Children's Rights of 1996 also imposes on the court the obligation to hear the child.

Under the previous legislation (Cap 277, section 7(2)), the criteria were both the welfare and the wishes of the child. The Law recognises that a child is an autonomous personality. The maturity of the child is not connected to age and is a matter for judicial consideration. If the court considers that the child is mature and refuses to hear him, its decision is subject to appeal.[69]

The court, taking into account the child's opinion, must examine whether he formed that opinion without the unilateral influence of his parent.[70] The Greek courts have held that the tender age of a child increases the possibility of his opinion having been influenced by a parent.

The fault of either parent in the dissolution of the marriage or in the interruption of marital life does not affect the settlement of parental care. An important factor which is taken into consideration is the time available for one of the parents to deal with parental care personally. The fact that the mother has entered into a new relation with another man does not as such preclude her from parental care.

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65 Law 216 of 1990, s 14(1).
66 Law 216 of 1990, s 14(2).
67 Law 216 of 1990, s 14(3).
68 Vathrakokoilis, *The New Family Law* (1990), at p 583.
69 AP 419/87 No B 36/912.
70 AC 6974/851.

Every judgment in respect of parental care must take into consideration the relevant circumstances of the case. When they have changed since the delivery of a judgment concerning parental care, section 20 of the Law gives the opportunity for amendment of such judgment. Similar provisions existed in section 24 of the repealed Cap 277. The change of conditions has been established by case law.[71]

Deprivation of parental care is a most drastic measure,[72] and the court, before taking such a decision, must consider taking some other proper measures. In Greece, such measures are the division of parental care and the court's permission before the commission of any act.[73]

Maintenance

16-34 The maintenance of a minor child is one of the new features of the Law. According to section 33(1), 'parents are jointly responsible for the minor child's support and maintenance according to their abilities'. The section introduces the principle of the joint obligation of the parents for the minor child's maintenance, not in equal shares, but according to the abilities of each one.

Section 40 of the Court of Justice Law,[74] as it was in force before the new legislation, followed the principles of the Common Law and imposed the obligation for maintenance of the minor child on the father. However, the courts have decided that this obligation also may be imposed on the mother if she has sufficient income.[75]

Section 33 of Law 216 of 1990 regulates the obligation of the minor child's maintenance generally, not only in cases of interruption of cohabitation. The minor child has from each of his parents, whether they are living together or not, a personal and independent right of maintenance.

The word 'abilities' in section 33(1) denotes financial ability, and the parent who has the care of the child may count any money disposed during the exercise of the care. The parent against whom a maintenance application has been filed may claim contribution from the other, partially or wholly, according to his abilities.

The maintenance obligation ceases when the child reaches the age of 18. However, according to section 33(2), the court may decide that this obligation should continue after the child reaches full age for reasons such as incapacity or handicap or for educational reasons, according to the decision of the Greek courts.

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71 *Sidera v Papachrysostomou* (1993) 1 JSC 309.

72 Law 216 of 1990, s 18.

73 *K Iakovidou v A Iakovidou*, Appeal Family Court 61, October 1996; *C Charalambous v A Charalambous*, Appeal Family Court 69, 13 June 1997; *M Koufou v Tli Koufou*, Appeal Family Court 55, 6 February 1996; *E Kountouris v Ministry of Justice*, Civil Appeal 9868, 12 December 1997; *F Damianou v E Damianou* (1989) 1 JSC (E) 29; *E v Stylianou* (1993) 1 JSC 130.

74 Law 14 of 1960.

75 *Pieroua v Pieroua*, Application 6 of 1971, Famagusta District Court, 16 May 1972.

The degree and content of maintenance depend on the needs and circumstances of the person entitled as well as on the financial circumstances of the parents responsible for providing.[76] The degree differs from the content. The degree is the limit of satisfaction of the needs of the minor child, while the content is the collection of the needs of the person entitled and are always relevant to his person, age, health, sex, and mental and physical development.

Section 37(2)[77] *s*pecifies the exact content of support which covers the needs of the person entitled, including the needs of upbringing and education.

The maintenance Orders (Facilities for Enforcement) Law,[78] which reproduces the provisions of section 12 of the English Maintenance Orders (Facilities for Enforcement) Act 1920, allows for the reciprocal enforcement of maintenance orders between the courts of Cyprus and the courts of England or Ireland.[79] The section further provides that the Cypriot courts can make a provisional maintenance order against a person resident in England or Ireland which can be confirmed by the courts of England or Ireland or remitted to the Cypriot courts, and *vice versa*. Confirmation of a provisional order does not affect any right of the court in question to vary or rescind that order.

Maintenance after Divorce

16-35 Divorce does not completely terminate the relations of spouses, although their legal relations, rights, and obligations do cease to exist.[80] However, marital life creates a moral relation on which a spouse may rely and claim maintenance, irrespective of the dissolution of the marriage under the requirements provided by the law. Such requirements are not connected with fault or destitution. The legislature considered, for social reasons, that it was neither moral nor expedient, in the circumstances set out in section 1442 of the Civil Code, for a spouse to be without financial support from the former spouse.

The matter of maintenance after divorce differs from maintenance during the separation. In the Greek Civil Code, the relevant provisions have clearly different requirements while, in Cypriot law, the limits are confused.[81]

Maintenance after divorce may be limited or terminated for the reasons set out in section 6 of Law 232 of 1991, ie, if the claimant willingly caused his destitution, if the duration of the marriage was very short, or if the claimant was at fault as far

76 Law 216 of 1990, s 37(l)(2).

77 *A Menelaou v Menelaou* (1993) 1 JSC 381, 11 June 1993; *Markoulides v Markoulides* (2), Appeal 89, Appeal Family Court, 16 July 1998; *Titsinides v Titsinides* (1994), 1 JSC 385, 19 May 1994; *Vounou v Vounou*, Appeal 73, Appeal Family Court 13 March 1998.

78 Cap 16 of the Laws of Cyprus.

79 *The Attorney-General of the Republic v Panayiotis Christou* (1962) 1 CLR 129.

80 Law 232 of 1991, ss 5–11.

81 Law 232 of 1991, s 6.

as the divorce is concerned.[82] According to section 11 of Law 232 of 1991, maintenance after divorce ceases if the person entitled dies, remarries or cohabits with someone else in a form of free union.

Children Born Out of Wedlock

16-36 The paternity of children born out of wedlock may be established either by voluntary acknowledgement or by a court decree.[83] A voluntary acknowledgement cannot be revoked.[84] The mother is entitled to apply to the court to seek acknowledgement of the paternity of a child born out of wedlock.[85] This right also is granted to the child. The mother's right to claim acknowledgement by a court decree lasts for five years after the birth.[86]

In case of voluntary acknowledgment or acknowledgment by a court decree, the child obtains equal rights with a child born in marriage in relation to his parents and their relatives.[87]

Adoption

In General

16-37 Adoption[88] means the legal act by which a relationship of parents (father and mother) and child is established and the relationship itself.

Adoption derives its origin from both ancient Greek and Roman law (*adoptio*). The objective of the old laws was both to give happiness to those who had no children and to continue the family as a financial, social, and religious entity. The effort made by those laws was to maintain the concept of a patriarchal family and this is obvious in certain provisions by virtue of which only males, not females, were adopted; in the extreme case in which a female was adopted, the rights arising out of the adoption were for future male children. A characteristic provision of the ancient Greek law was a condition precedent that the adoptive parents should not have any male child of their own, not simply not to have any child.

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82 Greek Civil Code, s 1444(1).

83 Law 187 of 1991, as amended by Law 213 of 1991.

84 Law 187 of 1991, s 17(4).

85 Law 187 of 1991, s 20(1).

86 Law 187 of 1991, s 22(1).

87 Law 187 of 1991, s 23; *K Kosiaris v A Nikolaou*, Appeal 70, Appeal Family Court, 3 February 1998; *Xenofontos v Kkelis*, Appeal 57, Appeal Family Court, 7 October 1997; *P Trimithiotis v al Filotheou*, Appeal 87, Appeal Family Court, 3 February 1998; *S Trasyvoulou v A Fikardou*, Appeal 88, Appeal Family Court, 29 October 1999. Under Cypriot law, the court cannot compel the father to take a blood test.

88 Law 19 (I) of 1995, which replaced the Adoption Law, Cap 274.

Therefore, a prospective parent might adopt a male child although he already had a daughter, provided that, if the prospectus parent had more than one daughter, the adopted child should marry any one of them and give dowry to the others. Gradually, these provisions were changed and from the time of Diocletian women could be adopted, and from the time of Leon Sofos women might adopt any child.

At the beginning of the last century, the social object of adoption was totally changed. The new financial and social circumstances brought about by the development of industry together with the great number of orphan children due to wars gave adoption a legal status the main object of which is the protection of the child's interest. As the family is less productive and a less strong religious group, the members of which are independent, the object of continuation and of ensuring hereditary succession is losing its meaning, as well as the object of giving happiness to childless persons. Therefore, the primary social object of adoption now is the development of the child's position and the European Convention for the Adoption of Children is focused on this aim.[89]

Conditions

16-38 Adoption is effected by a court order referred to as the 'adoption order' after an application made in the prescribed form.[90] The application for adoption may be made by:

- Both spouses for a joint adoption;
- The natural father with his wife or the natural mother with her husband, jointly; or
- The mother's husband or the father's wife.[91]

For an adoption order to be granted the following are required:

- The consent of the parents or guardian;[92]
- The consent of the applicant's spouse if he is married; and
- The consent of the child if its age and mental condition permit.[93]

16-39 An adoption order also may be granted on an application made by an unmarried person if the court is satisfied that there are special reasons.[94] For adoption purposes, a child may be placed in the custody and care of a person chosen by the welfare office or directly.[95]

89 Kounougeri-Manoledakis, 'Relations of Parents and Children', *Family Law*, vol IIb.
90 Law 19 (I) of 1995, s 3(2).
91 Law 19 (I) of 1995, s 3(e).
92 The consent of the mother cannot be given before the lapse of three months from the child's birth.
93 Law 19 (I) of 1995, s 41.
94 Law 19 (I) of 1995, s 7.
95 Law 19 (I) of 1995, s 10.

Effects of Adoption

16-40 With the adoption order, all the rights and obligations of the natural parents or guardian cease to exist and are transferred to the adoptive parents.[96] The adoption order does not affect the rights and obligations of the parents which have arisen before such order.[97]

The adoption order terminates every obligation arising out of an agreement, will, or court decision for payment of the child's maintenance or in respect of any other matter relating to parental duties.[98] The adopted child will be considered for all purposes as the legal and natural child of the adoptive parents and in no case will be deemed to be the child of any other person.[99]

The provisions of sub-section 1 do not apply as regards the adopted child, the natural parents, and the blood relatives for relationship purposes in respect of marriage or for the establishment of the criminal offence of incest provided by the Criminal Law, Cap 154.[100]

Marriage between the adopted child and one of the adoptive parents is not permitted, whether or not the adopted child has been adopted afterwards by any other person.[101] Adoption made in contravention of the provisions of Law 19 (I) of 1995 has no legal effect.[102]

International Law

Convention on International Kidnapping of Children

16-41 The Convention on International Kidnapping of Children (Hague Convention), which was ratified in Cyprus by Law 11 (III) of 1994, provides for the interest of children in respect of matters connected with their custody. The object of the Convention is to secure the immediate return of children illegally removed from or detained in any of the contracting states and to ensure that all the rights of custody and access the legislation of a contracting state are followed in an effective manner by the other contracting states.[103]

The child's removal or detention is deemed illegal so long as it contravenes the custody rights conferred on a natural person, institution, or any other organisation either jointly or exclusively by virtue of the law of the state in which the child had its usual residence immediately before his removal or detention, and at the time of

96 Law 19 (I) of 1995, s 22(l) and (3).
97 Law 19 (I) of 1995, s 22(2).
98 Law 19 (I) of 1995, s 22(4).
99 Law 19 (I) of 1995, s 23(1).
100 Law 19 (I) of 1995, s 23(2).
101 Law 19 (I) of 1995, s 23(3).
102 Law 19 (I) of 1995, s 31.
103 Convention on International Kidnapping of Children, art 1.

removal or detention such rights were exercised in reality either jointly or exclusively or would have been so exercised if the removal or detention had not occurred.[104]

The Convention applies to every child who had his usual residence in a contracting state immediately before any breach of rights concerning custody or access. The Convention ceases to apply when the child reaches 16 years of age.[105] Each contracting state shall designate a Central Authority to carry out the functions provided for by the Convention.[106]

If a child has been illegally removed or detained, as defined by the Convention, before the date of the institution of proceedings before a judicial or administrative authority of the contracting state in which the child is located and a period of less than one year has elapsed since the date of removal or detention, the authority that undertook the proceedings should order the immediate return of the child. Even if proceedings have been instituted after the expiration of one year, the judicial authority may order the return of the child unless it is proved that the child has adapted to its new environment.[107]

European Convention on Recognition and Enforcement of Decisions Concerning Guardianship of Infants and on Restoration of Guardianship of Infants

16-42 The European Convention on Recognition and Enforcement of Decisions Concerning Guardianship of Infants and on Restoration of Guardianship of Infants (European Convention), which was ratified in Cyprus by Law 36 of 1986, is connected with the welfare of the infant, the receiving of decisions concerning his guardianship, and the recognition and execution of such decisions.

Although the European Convention was signed in 1984, when the family cases concerning matters of marriage were tried by ecclesiastical courts, such cases are not referred to in the Convention. This raises the question of whether the Convention also may apply to decisions of the ecclesiastical courts so long as those courts were competent to try such cases.

Bilateral Agreement on Legal Cooperation between the Republic of Cyprus and the Greek Republic on Matters of Civil, Family, Commercial, and Criminal Law

16-43 The Bilateral Agreement on Legal Cooperation between the Republic of Cyprus and the Greek Republic on Matters of Civil, Family, Commercial, and Criminal Law Convention was ratified in Cyprus by Law 15 of 1984 and in Greece by Law 1548 of 1985.

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104 Convention on International Kidnapping of Children, art 3.
105 Convention on International Kidnapping of Children, art 41.
106 Convention on International Kidnapping of Children, art 61.
107 Convention on International Kidnapping of Children, art 12.

Matters of family law are repeatedly referred to in the Convention compared with other cases of civil law. The main subjects of the Convention are judicial assistance and the recognition and execution of court decisions. According to article 4 of the Convention, judicial assistance is the transmission and service of documents and the taking of evidence.

'Court decision' means the decision delivered by a court in either contracting state which is competent to try the case in court. It is expressly stated in article 21 of the Convention that each contracting state should recognise and execute in its territories judgments relating to cases of civil, family, and commercial law. The decisions referred to in the same section are court and arbitration decisions as well as the settlements made while, in the second paragraph of the article, judgments and orders concerning hereditary succession are assimilated to the decisions hereinabove mentioned. The enumeration is restrictive and a wide interpretation is precluded to avoid the inclusion of cases or decisions not referred to.

In Greek law, a literal interpretation of sections 2–5 of the Civil Procedure Code, which refers to the doctrine of *res judicata*, established by a court decision and concerned with the personal status of litigants, imply judicial jurisdiction. The provision is express and positive. As regards Greek territory, a marriage cannot be dissolved without a court decision.

A court decision within the meaning of the law includes every act done by any competent organ of the foreign state which administers, according to the law, matters relating to the personal status of its citizens, even those matters which under Cypriot law are regulated exclusively by court decision. The recognition of the jurisdiction of ecclesiastical courts or administrative organs to regulate matters of the personal status of the citizens is aimed to show equity to litigants who would otherwise be obliged to institute new litigation, without being certain of its result.

Following this interpretation, in the sphere of divorce, decisions of ecclesiastical courts could be included in the meaning of court decisions so long as, according to the Constitution of one of the contracting states,[108] the ecclesiastical courts had exclusive jurisdiction to dissolve marriages. The amendment of the Cypriot Constitution made by Law 95 of 1989 abolished this jurisdiction and, today, court decisions are deemed to be those of Family Courts which are the only courts competent to dissolve marriages.[109]

108 Cypriot Constitution, art 111.

109 According to Law 95 of 1989, the jurisdiction of ecclesiastical courts has not been abolished generally but only in respect of dissolution of marriage and of the matrimonial causes referred thereto and, as a result, the recognition of such a decision is without substance in the Greek legal order.

CHAPTER 17

Banking Law

Stéphanie Laulhé

The Banking System

New Banking Legislation

17-1 The new Banking Law[1] (hereinafter referred to as 'the Banking Law') was passed by the House of Representatives in June 1997. Its main aims are to harmonise the island's banking legislation with the *acquis communautaire* of the European Union (EU), to regulate the banking system in Cyprus, and to grant protection to depositors.

While the new Banking Law gives the Central Bank of Cyprus wide-ranging powers, it also expressly provides that the Central Bank, in exercising its powers, should consider the best interests of the depositors as well as the efficiency of the banking system in general. The most important provisions of the Banking Law are the following:

- Bank confidentiality becomes a matter of law;
- All banking operations are regulated by the Central Bank of Cyprus, especially the acceptance of deposits and the provision of loans;
- All banking activity requires the prior approval and permission of the Central Bank of Cyprus;[2]
- The Central Bank of Cyprus has the authority both to specify the types of services which institutions are allowed to offer and to impose liquidity requirements at its discretion;
- The Central Bank of Cyprus has the power to take measures and action against parties violating the Banking Law;

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1 Law 66 (1) of 1997, as amended by Law 74 (I) of 1999 and Law 94 (I) of 2000. The author thanks Oceana Publications, Inc, for permission to use extracts from *International Banking Law and Regulation*. Andreas Neocleous, Colota, and Georgiou (Andreas Neocleous & Co), in Campbell (ed), 'Cyprus' *International Banking Law and Regulation* (2000).

2 The Central Bank of Cyprus Law 1963-1999 has been amended by the Law 124 (I) of 2000, adding a new section 19(A). Under section 19(A), a Committee for the Financial Programme of the Central Bank of Cyprus will be created. The Committee will be responsible for examining all relevant financial issues, such as the liberalisation of interest rates and the financial programme of the government. The new body will be an Advisory Committee to the Central Bank of Cyprus.

- The Central Bank of Cyprus is empowered to draw up a deposit protection scheme in the future through the enactment of specific laws for this purpose;[3]
- Banks are prohibited from carrying out a number of activities, including the purchase of immovable property, the purchase of more than 10 per cent of the share capital of any company, and trading of any kind; and
- The Central Bank has the power to issue general or specific directives which are communicated in any manner the Central Bank may determine.[4]

Definition of 'Bank'

17-2 Pursuant to section 2 of the Banking Law, a bank is a body corporate licensed to carry on banking business under the provisions of the Banking Law.

Banking business, according to section 2, means business carried on in Cyprus or abroad from within the Republic consisting of the lending of funds acquired from

3 Pursuant to the powers granted to the Central Bank of Cyprus under section 34(2) of the Banking Law to issue regulations with the approval of the Council of Ministers, the Central Bank proposed and the House of Representatives enacted on 3 March 2000 a new Law supplementary to the Banking Law ('The Law for the Setting-up and Operation of a Deposit Protection Scheme, Law 66 (1) of 2000, regulating the provision of a fund for the protection of private deposits ('the Fund')). The new Law came into force on 1 September 2000. The purpose of this Law is to protect private individuals who deposit money with Cypriot commercial banks by providing for damages to be paid to them out of the Fund if a commercial bank finds itself in one of the following situations: (a) the Central Bank of Cyprus has examined the situation and decided that the bank is not in a position to repay the deposit due to its financial position, (b) a court order has been granted for the winding-up of the bank, or c The Law sets out a list of commercial banks incorporated in Cyprus, together with their branches abroad, for which a contribution to the Fund will be compulsory. The minimum capital of the Fund has been fixed at CY £2 million, and it may be increased from time to time by the Committee in charge of the Fund. The Committee is composed of five members, of whom the President is the Central Bank's Governor. All deposits covered by the Fund must be in Cypriot pounds (section 18(1) of the Law provides a list of deposits which are excluded from the protection of the Fund). The amount of damages granted to a private depositor may be up to 90 per cent of the amount initially deposited in a commercial bank but may not exceed at any time the equivalent of euro 20,000 in Cyprus pounds at the time.

4 New section 41(3) of the Banking Law, as supplemented by Law 94 (I) of 2000, provides that the Central Bank also has the power to issue directives on banking conduct and ethics, including guidelines on the requirements and procedure to be followed for the opening, maintenance, operation, and closing of current accounts and for the granting or recalling of cheque books. New section 41(4) of the Banking Law, as similarly supplemented, provides that the Central Bank of Cyprus has the power to issue directives for the creation, maintenance, and operation of a central information archive system in which information related to the issuers of dishonoured cheques, insolvent issuers, issuers under liquidation, or persons convicted of the offence of issuing dishonoured cheques is stored. The responsibility for running, updating, and maintaining this archive will be allocated to an Administration Committee set up for this purpose. Section 41(5) of the Banking Law, as similarly supplemented provides that the Central Bank will be responsible for the appointment, the regulation, and the decision-making process of the Administration Committee. The Central Bank of Cyprus is in the process of drafting directives under section 41(3), which await approval by the House of Representatives.

the undertaking of obligations to the public whether in the form of deposits, securities, or other evidence of debt.

The Cypriot Financial Sector

17-3 The financial sector in Cyprus is composed of the following banking, credit, and financial institutions:

- Public and private banks;
- Co-operative societies;
- Housing Finance Corporation;
- Branches of foreign banks;
- International banking units (IBUs);
- Administered banking units (ABUs);
- Bank representative offices; and
- International financial services companies (IFSCs).

Activities of Banks and Other Credit Institutions

Banks

17-4 Banks in Cyprus are entitled to carry on banking business activities as defined in the Banking Law and no person, other than a bank, shall engage in banking business or in the business of accepting deposits.[5] Part V of the Banking Law contains certain limitations and prohibitions on activities and transactions carried out by the banks.

Section 11(1) of the Banking Law provides for limitations on credit facilities,[6] as follows:

- The total value of the credit facilities granted to a person by a bank may not exceed at any time 25 per cent of its capital base or such other lower percentage as the Central Bank of Cyprus may determine from time to time;
- The aggregate of all large credit facilities[7] may not exceed at any time 800 per cent of its capital base, or such other lower percentage as the Central Bank of Cyprus may determine from time to time;

5 Banking Law, s 3(1).

6 'Credit facility', in respect of a person as defined in section 11(4)(a) of the Banking Law, means 'any loan, advance, or overdraft granted to such person, or the granting of any financial leasing including hire purchase financing, or the discount of any bill of which he is either acceptor, or drawer or endorser, or the granting of any financial guarantee or the incurring of any other financial liability or obligation on behalf of this person or the investment in securities issued by that person, or the undertaking of any commitment to grant any of the above, and includes any of the above in respect of another person secured by the guarantee of this person'.

7 'Large credit facility' is defined in section 11(4)(b) of the Banking Law as 'the total value of credit facilities granted to any one person when this exceeds 10 per cent of the capital base of a bank'.

- The granting of a credit facility to a director must be approved by a resolution of the board of directors passed by a majority of two-thirds of the total number of directors of the bank and in the absence of the director concerned during the discussion of this subject by the Board of Directors, who may not vote on the resolution;[8]
- The total value of credit facilities in respect of all the directors may not exceed at any time 40 per cent of its capital base, or such other lower percentage as the Central Bank may determine from time to time; and
- The total value of any unsecured credit facilities[9] granted to all the directors of the bank together may not exceed at any time five per cent of its capital base, or such other lower percentage as the Central Bank of Cyprus may determine from time to time.

17-5 Section 12(1) of the Banking Law provides that a bank may not acquire or purchase any immovable property[10] or hold any right therein save where:

- The property may be required for the purpose of conducting its business or for providing recreation facilities for its staff or with the prior written approval of the Central Bank of Cyprus, for the purpose of establishing a cultural centre of a non-profit-making character; or
- The property is acquired as a result of a process of selling the property in the course of satisfaction of debts due to the bank or is acquired in the course of settlement of debts due to the bank.[11]

17-6 Section 13(1) of the Banking Law provides that, unless the Central Bank of Cyprus grants its prior written approval and subject to any conditions which the Central Bank may consider proper to impose, a bank may not acquire or hold directly or indirectly more than 10 per cent of the share capital of any other company or have control over such company and, in the case of a bank incorporated in Cyprus, the value of any share capital held in any other company may not exceed 10 per cent and, for all companies in aggregate, may not exceed 25 per cent of its capital base.[12]

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8 The facilities in such cases are granted on the same commercial terms as would apply to a customer in the ordinary course of banking business.

9 'Unsecured credit facility' under section 11(4)(c) of the Banking Law means 'any credit facility granted otherwise than on the security of assets, the market value of which is not less than the amount of the facility, or that part of a facility which is in excess of the market value of the asset constituting the security'.

10 Section 12(2) provides that, for the purpose of this section, the term 'immovable property' has the meaning assigned to it by section 2 of the Immovable Property (Tenure, Registration, and Valuation) Law, Cap 224, of the Laws of Cyprus, 1946.

11 It is provided that the property must be disposed of as soon as possible, and in any case within three years of its acquisition, except where the Central Bank of Cyprus extends the period of three years if it considers that such extension is justified on account of exceptional circumstances.

12 Sub-section (2) provides for exceptions whereby the provisions of sub-section (1) do not apply where the bank holds shares in a company which carries out banking business or other functions integral to or closely related to banking business, provided that such a company is incorporated in Cyprus.

According to section 14(1) of the Banking Law, a bank may not engage, whether on its own account or on a commission basis, in any trading activity or, save in so far as may be necessary in the course of ordinary banking operations, for the satisfaction of debts of the bank.

Under the Cyprus Securities and Stock Exchange Law,[13] banks are not permitted to exercise the activities of broker, although the activities of brokers may be exercised by their subsidiary companies duly licensed to that effect under the Cyprus Securities and Stock Exchange Law.[14]

Co-Operative Societies

17-7 Co-operative societies[15] are not subject to the Banking Law, but are regulated pursuant to the Co-operative Societies Law.[16]

Under the Co-operative Societies Law,, a co-operative society is a society whose object is the promotion of the financial interests of its members, or a society which was established to facilitate the operation of the first type of society. Co-operative societies are regulated by specific principles, which aim at improving the financial, social, and cultural status of their members, encouraging the spirit of saving and limiting usury, through the application of the principles of mutual help and assistance.[17] A co-operative society may be:

- A first degree co-operative society, if all its members are natural persons;
- A second degree co-operative society, when at least one of its members is a co-operative society itself; or

13 Law 14 (I) of 1993, as amended, s 33(2).

14 E Neocleous, Zalewski, and Laulhé (Andreas Neocleous & Co), in Campbell (ed), 'Cyprus', *Securities Law and Regulation* (1999).

15 In light of the European Union accession process and the harmonisation with the *acquis communautaire*, it would seem that co-operative societies in Cyprus will be treated as credit institutions and, therefore, will fall within the ambit of European Union banking regulations, with which Cypriot co-operative societies would have to comply. Under the European Union Banking Directives, a credit institution is 'any institution which takes deposits from the public and lends on its own account'. It has been argued, however, that the fact that co-operative societies in Cyprus represent 30 per cent of the loans and 70 per cent of housing loans could mean that the co-operative sector would be granted certain exemptions by the European Union. Such exemptions could be granted, for example, in cases of a number of small credit unions (with a limited, simple type of operation) which are part of a central body. Thus, the central body would be supervised and, in turn, would supervise each credit unit. In that case, they would be exempt from a number of major provisions regarding capital. (Speech by Pat McArdle, Head of Strategic and Economic Planning at the Ulster Bank, seminar on co-operatives held in Nicosia, Cyprus (28 and 29 April 1999)). Should they fall within the category of credit institutions, Cypriot co-operative societies would need to comply with European Union banking requirements while Cyprus attempts to secure a temporary exemption in this sector.

16 Law 22 of 1985, as amended.

17 Andreas Neocleous, Colota, and Georgiou (Andreas Neocleous & Co), in Campbell (ed), 'Cyprus', *International Banking Law and Regulation* (1998).

- A third-degree co-operative society, when at least one of its members is a second-degree co-operative society.

17-8 A co-operative society is a legal person, and it has power to own property, to sue and be sued, and generally to do everything which is necessary for the purpose of its establishment. Co-operative societies may be registered under the Law with limited or unlimited liability.[18]

Co-operative societies may give loans to their members, in accordance with the principles set out in the Co-operative Societies Law. A co-operative society cannot, however, give a loan to a person who is not its member.[19] A co-operative society may nevertheless grant loans to another co-operative society or to any group of persons, whether with or without legal personality, which is not one of its members with the consent of the Registrar of the Co-operative Societies. Such consent may be granted, taking into consideration the financial status of the relevant society and the asset offered as security. Notwithstanding the above provisions, a co-operative society may grant a loan to one of its depositors and use his deposit as security.

A co-operative society may accept deposits and receive loans from its members and from non-members only in accordance with the relevant provisions of the Co-operative Societies Law. A society may deposit or invest its capital in Government bonds or in the Central Co-operative Bank, or in any other bank with the consent of the Registrar of the Co-operative Societies. The members of a co-operative society may be:

- Any person not younger than 18 years; or
- Any registered companies.[20]

17-9 The company proposing to act as a co-operative society must be registered with the Registrar of the Co-operative Societies.[21] Should the Registrar be satisfied that the company has fulfilled the provisions of the Co-operative Societies Law and the regulations issued thereunder and that the regulations of the proposed company do not contravene the Law or the regulations issued thereunder, a certificate of registration of the company will be issued.[22]

The Registrar of the Co-operative Societies, together with the necessary officers, are appointed by the Committee of Public Service.[23]

Under the Co-operative Societies Law, the Minister of Commerce, Industry, and Tourism is the supervisory and regulatory authority for co-operative societies.[24] The Superintendent of Co-operative Societies and Co-operative Development

18 Co-operative Societies Law, s 6.
19 Co-operative Societies Law, s 37(1).
20 Co-operative Societies Law, s 8(1).
21 Co-operative Societies Law, s 9.
22 Co-operative Societies Law, s 10.
23 Co-operative Societies Law, s 4.
24 Co-operative Societies Law, s 3.

assists the Minister in the supervision of co-operative societies by providing reports, accounts, and other information as the Minister may request.[25] A Committee of Co-operative Development is appointed by the Council of Ministers and is composed of a president and 10 members.[26]

Housing Finance Corporation

17-10 The Housing Finance Corporation was established under the Housing Finance Law.[27] Under this Law, the Corporation is a legal person[28] whose main object is the provision of loans for housing purposes, giving priority to people with limited means and resources.[29] The Corporation may accept deposits, grant loans secured by promissory notes, and generally borrow capital in any way it may deem proper.[30] The Minister of Finance may, on behalf of the government, guarantee deposits, loans, or any other undertaking of the Corporation in any way and under any condition as the Minister may deem expedient.[31]

The provisions of the Company Law, Cap 113, of the Laws of Cyprus do not apply to the Housing Finance Corporation.[32] The provisions of the Banking Law will apply to the extent that these are not in conflict with the provisions of the Housing Finance Corporation Laws.[33]

The Board of Directors of the Housing Finance Corporation is appointed by the Council of Ministers, and it consists of seven members[34] who exercise control over the entity and determine its policy.[35] To that effect and to fulfil the objects of the Corporation, the Board of the Corporation may:

- Proceed with loans on mortgage and promote saving plans;
- Grant loans using deposits as a security;
- Act as trustee for the government, international or local organisations, foundations, or legal entities.

17-11 The Housing Finance Corporation, after being so requested by the Central Bank of Cyprus, must appoint a duly authorised official of the Central Bank to examine any books, records, and any other document, including those relating to

25 Co-operative Societies Law, ss 3 and 4.
26 Co-operative Societies Law, s 5.
27 Law 43 of 1980, as amended.
28 Housing Finance Law, s 3.
29 Housing Finance Law, s 5.
30 Housing Finance Law, s 19(1).
31 Housing Finance Law, s 2.
32 Housing Finance Law, s 23.
33 Banking Law, s 36.
34 Housing Finance Law, s 6.
35 Housing Finance Law, s 9.

loans and other credit facilities, as well as any other information given to the Corporation in relation to the employment and financial status of its debtors.[36]

Ownership Requirements in the Banking Sector

In General

17-12 A bank incorporated in Cyprus shall have at all times a minimum capital base of CY £3 million or such other higher amount as the Central Bank of Cyprus may determine.[37]

The Banking Law, as well as the Central Bank by means of regulations, provides for certain restrictions on the shareholding participation in banks incorporated in Cyprus.

Restrictions of the Banking Law on the Ownership of Banks Registered in Cyprus

17-13 Section 15 of the Banking Law provides that a bank shall neither acquire nor deal for its own account in its own shares, nor grant credit facilities to persons other than employees of the bank in excess of CY £50,000 per person for the purpose of purchasing its own shares or the shares of its holding company or the shares of any subsidiary of the bank or of its holding company.[38]

According to section 16 of the Banking Law and notwithstanding the provisions of any other Law of Cyprus, a bank may not sell or dispose of the whole or part of its business by amalgamation or otherwise, except with the prior written approval of the Central Bank of Cyprus.

Section 17 of the Banking Law provides that no person may, without the prior written approval of the Central Bank of Cyprus, either alone or with any associate or associates, acquire or have control over any bank incorporated in Cyprus or its holding company.[39]

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36 Housing Finance Law, s 5.

37 Banking Law, s 20.

38 Eurolife Insurance Co, the life insurance arm of the Bank of Cyprus Group, proceeded initially to buy 350,000 shares in the Bank of Cyprus Ltd on account of its trust fund and subsequently purchased more shares, bringing its stake in the mother company to 492,051 shares for a total value of CY £1,492,511. The Attorney General of Cyprus ruled that this acquisition of shares was void. See *Financial Mirror*, number 250 (11–17 February 1998). This section is an application of the general principle of financial assistance under Cypriot law. Such a principle is embodied in section 53 of the Companies Law, Cap 113, of the Laws of Cyprus, 1959, and it is applicable to all corporate entities.

39 For the purposes of section 17(1), the term 'associate' in relation to a person acquiring or holding shares includes (a) the spouse or relatives of the first degree of kindred of that person, (b) any company of which that person is a director or has control, (c) any person who is a partner of that person and, in the case where that person is a company, any director or any person who has control over that company, any subsidiary of that company, and any director of any such subsidiary, and (d) any other person or persons whose interests, in the opinion of the Central Bank of Cyprus, are sufficiently interrelated with those of that person.

Restrictions on Foreign Participation in the Share Capital of Bank Registered in Cyprus

17-14 General Policy on Foreign Investment. The latest policy with regard to foreign direct investment in Cyprus was issued by the Central Bank of Cyprus in January 2000.[40] The Central Bank is the competent authority responsible for approving or rejecting any proposed foreign investment. The general principle is that the maximum allowable level of participation is predetermined in the banking sector whereas, in all other activities this level, if any, it is fixed after taking into account the particular characteristics of each individual case.

Investors who are citizens of EU member states may now acquire up to 100 per cent of the share capital of Cypriot companies listed on the Cyprus Stock Exchange.[41] In the banking sector, however, the threshold remains 50 per cent for all foreign investors in accordance with the Central Bank policy announced in July 1999 (see text, below).

The Central Bank reserves the right under the new policy and in accordance with the powers granted to it under the Exchange Control Law of Cyprus[42] to demand the gradual transfer abroad of any capital gain in case of liquidation of sizeable portfolio investments undertaken after the announcement of the new policy, to mitigate possible negative effects on the balance of payments and foreign exchange reserves.[43]

17-15 Participation of Foreigners in the Shareholding of Banks. The Central Bank of Cyprus decided in July 1999 that any foreigner may acquire up to 50 per cent of the issued share capital of a Cypriot bank quoted on the Cyprus Stock Exchange, provided that each foreign investor may not acquire more than 10 per cent of the share capital of the bank. This is the direct result of the Cypriot authorities allowing the flotation of up to 50 per cent of the issued share capital of Cypriot banks on the Athens Stock Exchange. Exceptions to the general rule are at the discretion of the Central Bank of Cyprus.

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40 Announcement by the Central Bank of Cyprus, *Exchange Control Liberalisation* (12 January 2000).

41 As a result of the harmonisation of Cypriot legislation and other regulations with the *acquis communautaire*, the Central Bank of Cyprus has announced additional liberalisation measures in respect of investments by non-residents of European Union member states in Cyprus and by Cypriots abroad. Under the new policy, all restrictions on the maximum allowable percentage of foreign participation as well as the minimum level of foreign investment in any enterprise in Cyprus have been lifted as from 7 January 2000 on any direct investments made by European Union citizens in all the sectors of the Cypriot economy, other than the banks. The new Central Bank policy does not, however, touch on limitations applicable under other Laws or regulations, such as those applicable to the acquisition of immovable property.

42 Exchange Control Law, Cap 199.

43 Announcement by the Central Bank of Cyprus, *Exchange Control Liberalisation* (12 January 2000).

Foreign participation in the case of the establishment of a new bank and/or of a bank not quoted on the Cyprus Stock Exchange is decided by the Central Bank of Cyprus after taking into account the particular characteristics of the application and may, on a case-by-case basis, reach 100 per cent of the shareholding of such a bank.

17-16 Participation of Cypriot Non-Residents. Foreign direct participation by Cypriot non-residents in a bank quoted on the Cyprus Stock Exchange also is subject to the policy of the Central Bank of Cyprus issued in July 1999.

The participation of Cypriot non-residents in the share capital of a newly established bank and/or a bank not quoted on the Stock Exchange also is at the discretion of the Central Bank (see text, above).

Cypriot Banks Operating Abroad

17-17 Overseas investments by residents of Cyprus involving the export of money from Cyprus require the prior approval of the Central Bank of Cyprus under the Exchange Control Law.[44] Although each application is considered on its merits, the general yardstick by which they are measured is the extent to which the proposed investment will benefit the Cyprus economy. It also is important that the country where the investment will take place allows the repatriation of capital and profits. Under the new policy of the Central Bank of Cyprus announced in January 2000,[45] citizens of Cyprus are allowed to undertake direct investment abroad without restriction as to the sector of the investment or the amount of foreign exchange involved. The transfer of capital abroad will be effected as soon as the Central Bank is satisfied that it is a genuine direct investment and that it does not involve a portfolio investment (eg, the purchase of foreign stocks or bonds) or deposits with foreign banks. Where the foreign exchange cost is substantial, the Central Bank reserves the right to take measures to mitigate the impact on the balance of payments.

A bank will be granted permission to operate abroad under the Exchange Control Law provided that the requirements stated above are met. In its application to the Central Bank of Cyprus, the applicant bank must state the reasons for expanding its business abroad, and the Central Bank of Cyprus must be satisfied that the opening and operating of a branch or subsidiary will be viable, based on a feasibility study which the applicant must submit together with the application.

The Central Bank of Cyprus has clarified in its announcement[46] that the term 'direct investment' means 'any investment undertaken to create, extend or maintain a lasting and long-term relationship with an enterprise in another country and implies

44 Exchange Control Law, Cap 199, of the Laws of Cyprus, 1960.

45 Announcement by the Central Bank of Cyprus, *Exchange Control Liberalisation* (12 January 2000).

46 Announcement by the Central Bank of Cyprus, *Exchange Control Liberalisation* (12 January 2000).

control or participation of the investor in the management of the enterprise to a significant degree'. Furthermore, a direct investment is considered to take place when the equity holding is more than 10 per cent of the share capital of the enterprise involved. An equity holding of less than 10 per cent is considered by the Central Bank to be a portfolio investment.

The Financial Services Sector

Legislation

17-18 A Financial Services Bill, the purpose of which is to consolidate in one piece of legislation the various legal provisions regulating financial services and the protection of both resident and non-resident investors, is pending before the House of Representatives. The draft Bill was proposed by the Central Bank of Cyprus and emphasises the role of the Central Bank as the licensing and regulatory authority for enterprises which are involved in the provision of financial services.

The draft Bill provides, *inter alia*, for transitional provisions whereby a person, who was engaged in the provision of financial services before the entry into force of the new Law, may apply for a licence under the new Law within the following six months. An International Financial Services Company applying for a licence under the new Law and awaiting approval thereof may continue to transact business as usual and may not be regarded, by reason only of so doing, as providing financial services in contravention of the Law.

Regulatory Power of the Central Bank of Cyprus

17-19 The Central Bank of Cyprus, assisted by the Ministry of Finance, is responsible for supervising the international business industry. International financial companies must comply with strict guidelines issued by the Central Bank so as to guarantee the high level of the services offered by the international business industry of Cyprus. Such guidelines are amended regularly in the light of economic developments.

The term 'international financial services company' (IFSC) is used to denote a foreign branch of a foreign company registered in Cyprus or an international business company incorporated in Cyprus or an international business partnership registered in Cyprus, whose main object is to provide international financial services to the public at large or to a smaller part of the public.[47] The term 'financial services' is widely defined by the Central Bank of Cyprus and means dealing in investments, managing investments, providing investment advice, and establishing and operating collective investment schemes, while the term 'investment' means shares, debentures, government and public securities, warrants, certificates representing securities, units in collective investment schemes, options, futures, and contracts for differences.

47 Central Bank of Cyprus, *A Guide to Prospective Applicants on the Establishment of Offshore Financial Services Companies* (September 1997), s A1.9.

The authorisation granted by the Central Bank of Cyprus is based on the 'fitness and properness' of the applicant who wishes to provide financial services. This test is determined to the extent possible by means of detailed questionnaires to be completed by all applicants and by professional interviews with the applicants by officials of the Central Bank of Cyprus (see text, below).

The Central Bank also will check that the applicant has soundly based and considered reasons for wishing to provide international financial services from within Cyprus. Normally, it is the policy of the Central Bank of Cyprus to consider as eligible to apply for the provision of financial services only branches or subsidiary companies of established overseas financial services firms which enjoy a good reputation internationally and which already operate in countries where, in the opinion of the Central Bank, there is adequate financial regulation.

In addition to the usual requirements relevant to all international business companies, applicants may be requested to give details regarding the following:

- Their past and current experience in the type and scale of financial services proposed to be carried out from Cyprus;
- The activities they propose to conduct from Cyprus;
- Their mode of operation, as well as their short and long-term business targets;
- Membership of any government-regulated or self-regulated professional associations or organisations; and
- Control of their overseas business by financial supervisory or government authorities.[48]

17-20 Moreover, once established, IFSCs are required to supply to the Central Bank such information about their activities and position as might be required to satisfy the Central Bank of their ability to meet their obligations towards their clients and creditors in general and of their adherence to sound financial business practices and standards. The number of international business companies providing financial services is growing rapidly and steadily under the supervision of the Central Bank of Cyprus.

Licensing of Banks

In General

17-21 The policy in respect of the grant of licences to carry on banking business is determined by the Central Bank, after consultation with the Minister of Finance.

48 Central Bank of Cyprus, *Cyprus, a Guide for Offshore Enterprises and Regional Offices* (January 1992).

Powers of the Central Bank of Cyprus

In General

17-22 The powers of the Central Bank over licensing of banks are applicable under the Banking Law at different stages of the process, ie, the application, the granting of the licence, and subsequently.

Powers of the Central Bank at the Stage of Application

17-23 According to section 4(1) of the Banking Law, a licence to carry on banking business will be issued only to a legal person established in Cyprus under the Companies Law[49] or under any other law or established in a country other than the Republic under comparable laws of the country concerned. Sub-section (2) provides that an application for a licence will be presented by or on behalf of the applicant to the Central Bank, together with the memorandum and articles of association or other instrument comprising or defining the constitution of the body corporate and any other documents and information as the Central Bank may require.

The Central Bank may, under the Banking Law, decide to grant a licence without any condition or subject to such conditions as it may consider proper to impose, or refuse to grant a licence,[50] provided that its decision is adequate and well-founded. Notwithstanding the above, the Central Bank may, at any time, amend, cancel, or revoke, either permanently or temporarily, any condition imposed on the licence, or attach any new conditions to the licence.[51]

Powers of the Central Bank When the Licence Has Been Granted

17-24 Section 30(1) of the Banking Law provides that the Central Bank may take the following measures where a bank fails to comply with any of the provisions of this Law, or of any Regulations made under this Law or with any conditions of its licence, or where, in the opinion of the Central Bank, the liquidity and character of its assets have been impaired or there is a risk that the ability of the bank to meet its obligations promptly may be impaired, or where such measures are considered necessary to safeguard the interests of depositors or creditors:

- Require the bank forthwith to take such action as the Central Bank may consider necessary to rectify the matter;
- Completely prohibit until further notice the acceptance of deposits, or the granting of credit facilities by the bank, or both;
- Consult with other banks with a view to determining the action to be taken;

49 Companies Law, Cap 113 of the Laws of Cyprus.
50 Banking Law, s 4(3).
51 Banking Law, s 4(4).

- Assume control of, and carry on in the bank's name, the business of the bank, for so long as the Central Bank may consider necessary, whereupon the bank will be obliged to provide the Central Bank with such facilities as the Central Bank may require for carrying on the business of the bank; and
- Revoke the licence of the bank.

The above measures can be taken cumulatively.[52]

17-25 Where the licence of a bank is revoked, the Central Bank must notify the bank in writing of such revocation and the bank shall, as from the date specified in the notice, cease to carry on banking business activity.[53] The revocation of a licence may not prejudice the enforcement of any right or claim by any person against the bank or by the bank against any person.[54]

Banking Secrecy

17-26 Section 29(1) of the Banking Law provides that no director, chief executive, manager, officer, employee, or agent of a bank and no person who has by any means access to the records of a bank, with regard to the account of any individual customer of that bank may, during the course of his employment or his professional relationship with the bank, as the case may be, or after the termination thereof, give, divulge, reveal, or use for his own benefit any information whatsoever regarding the account of any customer.

Section 29(2) of the Banking Law provides that section 29(1) may not apply where, *inter alia*:

- The information is given to the police under the provisions of any Law or to a public officer who is duly authorised under that Law to obtain that information or to a court in the investigation or prosecution of a criminal offence under any such Law;
- The provision of the information is necessary for reasons of public interest or for the protection of the interests of the bank; or
- The information is provided for the purpose of maintaining and operating the archive in accordance with section 41 (4) of the Banking Law.[55]

17-27 The main legislation regulating the principle of banking secrecy and the principle of transparency more generally is the Prevention and Suppression of Money

52 The Central Bank must, before proceeding under sub-section 1(a), furnish a report to the bank inviting its comments thereon within a specified period, which should not be less than three days from the date of the delivery of the report. The measures referred to in sub-section 1(b)–(e) of section 30 of the Banking Law are taken after consultation with the Minister of Finance.

53 Banking Law, s 31(1).

54 Banking Law, s 31(2).

55 Section 29(2) of the Banking Law has been amended by Law 94 (I) of 2000. A new exception has been created under section 29(2)(f)(i) to cover the need to disclose information to be used in the archive in an attempt to combat the issue of dishonoured cheques.

Laundering Activities Law ('Money Laundering Law'),[56] which allows for the disclosure of information (information being any kind of oral or written communication, including information filed in a computer) in case of a laundering offence. A court, on an application by the investigator, may issue an order for disclosure.[57] Such an order is addressed to the person who, according to the court's belief, possesses the information referred to in the application and invites him to deliver the information to the investigator, or other specified person, within seven days or within any other period the court may deem expedient.[58] The conditions[59] for the issue of such an order by a court are that:

- There is a reasonable ground for suspecting that a specified person has committed or has benefited from the commission of a predicate offence;
- There is a reasonable ground for suspecting that the information to which the application relates is likely to be, whether by itself or together with other information, of substantial value to the investigations for the purposes of which the application for disclosure has been submitted;
- The information does not fall within the category of privileged information;[60] and
- There is a reasonable ground for believing that it is in the public interest that the information be produced or disclosed, having regard to the benefit to the investigation likely to result from the disclosure or provision of the information and the circumstances under which the person in possession of the information holds it.

17-28 The order for disclosure will have effect despite any obligation of secrecy or other restriction on the disclosure of information imposed by law or otherwise.[61]

Insolvency

17-29 According to section 33 of the Banking Law, notwithstanding anything contained in the Companies Law in connection with the winding up of a company, the revocation of the licence of a bank under section 30(1)(e) of the Banking Law constitutes a ground for its winding up by the court on the application of the Central Bank. The appointment, in any case, of a liquidator of a bank other than the Official

56 Law 61 (I) of 1996, as amended by Law 25 (I) of 1997 and Law 41 (I) of 1998.

57 Money Laundering Law, s 45.

58 Money Laundering Law, s 46(1).

59 Money Laundering Law, s 46(2).

60 Privileged information is 'a communication between an advocate and a client for the purpose of obtaining professional legal advice or professional legal services in relation to legal proceedings, whether these have started or not, which would in any legal proceedings be protected from disclosure by virtue of the privilege of confidentiality under the Law in force at the relevant time. Provided that a communication between an advocate and a client for the purposes of committing a prescribed offence may not constitute privileged information'. Money Laundering Law, s 44(a).

61 Money Laundering Law, s 46(3).

Receiver may not be made without the court having previously heard the views of the Central Bank of Cyprus.

According to the Companies Law, on the making of a winding-up order, a copy of the order must be forwarded to the Registrar of Companies, who must make a minute thereof in his books.[62] When a winding-up order has been made, no action or proceeding may be continued or commenced against the company, except by leave of the court and subject to such terms as the court may impose.[63] An order for the winding up of a company will operate in favour of the creditors and the contributors of the company, as if made on the joint petition of a creditor and a contributor.[64]

Licensing of Foreign Banks

17-30 As a general principle, the laws of Cyprus do not draw a distinction between local companies and entities forming the so-called international business sector. Both kinds of entities are subject to the same Laws and regulations and only in exceptional cases will a piece of legislation provide specific provisions applicable exclusively to the international business sector. The provisions of the Banking Law (and other laws), as referred to, *inter alia*, above therefore apply equally to foreign banks licensed in Cyprus.[65]

Under the Exchange Control Law of Cyprus, investments in Cyprus by non-residents require the permission of the Central Bank of Cyprus, which is responsible for the administration of the Exchange Control legislation on behalf of the Ministry of Finance. Foreign banks which wish to expand their banking activities in Cyprus, as well as foreign banks which apply for permission to establish a locally incorporated legal entity in Cyprus, would therefore require the prior permission of the Central Bank of Cyprus under the provisions of the Exchange Control Law of Cyprus.[66]

The Central Bank of Cyprus, however, gives preference to applications received from existing foreign incorporated banks for the establishment of branches as opposed to the local incorporation of a banking subsidiary or associated company.[67]

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62 Companies Law, s 219.

63 Companies Law, s 220.

64 Companies Law, s 221.

65 The power granted to the Central Bank of Cyprus under section 37(1) of the Banking Law to waive the operation of any of the provisions of the Banking Law in relation to a foreign bank licensed in Cyprus has been abrogated by Law 74 (I) of 1999.

66 The Exchange Control Law does not distinguish between Cypriot nationals and foreigners, but between residents and non-residents of Cyprus. Thus, for exchange control purposes, it is important to determine the residential status of an individual or a body corporate. According to section 44(2) of the Exchange Control Law, the Central Bank of Cyprus may determine the residential status of persons. The residential status of physical persons is normally determined by reference to the place where they live and work, while the residential status of legal entities is normally determined by reference to the place of their incorporation.

67 Central Bank of Cyprus, *A Guide to Prospective Applicant Banks on the Establishment of International Banking Units, Administered Banking Units, and Representative Offices in Cyprus* (September 1999).

Foreign Bank Operations and Financial Services Companies

General Policy of the Central Bank of Cyprus

17-31 The Central Bank of Cyprus welcomes applications from banks licensed in jurisdictions which, in its opinion, exercise proper licensing and banking supervision and subscribe to the principles embodied in the Concordat,[68] the Supplement to the Concordat,[69] and the Minimum Standards Paper,[70] all issued by the Basle Committee on Banking Supervision. In addition, the prospective applicant bank must be an institution enjoying a good reputation internationally and must have an established track record of growth and profitable operation.

In accordance with the provision of the Banking Law, applications for a licence must be made to the Central Bank of Cyprus. Applications should be supported by relevant information and documents as prescribed from time to time by the Central Bank.[71]

International Bank Representative Offices

17-32 International bank representative offices are not considered to carry on banking business or the business of accepting deposits and do not, therefore, require a licence from the Ministry of Finance. An institution which is entitled under the laws of another country to carry on business which substantially corresponds to banking business must obtain the prior approval of the Central Bank of Cyprus to establish a Representative Office in Cyprus. In granting its permission, the Central Bank requires the Office to observe the following conditions:

- No banking business may be carried out;
- The Office must be used exclusively to facilitate liaison activities between its head office or other branches abroad and non-resident customers;
- The Central Bank may at any time request information regarding the activities of the Office; and
- All expenses must be covered from external sources.

17-33 The Central Bank of Cyprus always obtains a Letter of Authorisation which enables it to exchange information with the applicant's home banking supervisory authorities.

Once they obtain the Central Bank's permission, International Bank Representative Offices are required to establish an administrative office in Cyprus. An annual fee

68 The Concordat sets out principles for the supervision of banks' foreign establishments.
69 The Supplement to the Concordat has been established to ensure that adequate information flows between banking supervisory authorities.
70 The Minimum Standards Paper sets out minimum standards for the supervision of international banking groups and their cross-border establishments.
71 Banking Law, s 4(2).

of US $5,000 will be payable to the Central Bank of Cyprus as reimbursement to the latter for the cost of its supervisory function.[72]

International Banking Units

17-34 International banking units (IBUs) establishing businesses in Cyprus must comply with, *inter alia*, several provisions. IBUs, whether branches of foreign banks or locally incorporated legal entities, must be licensed under the provisions of the Banking Law.

As a rule, only branches or subsidiaries of banks enjoying a good reputation internationally and established in countries where there are adequate banking supervision, as well as lenders of last resort facilities, will be considered as eligible for licences under the Banking Law. Where an IBU is a subsidiary of a foreign bank, the parent bank is expected to provide an appropriate letter of comfort, as well as minutes of its board of directors resolving that it would establish an IBU in Cyprus and grant a letter of comfort.

Applicant banks are required to submit to the Central Bank of Cyprus a Letter of Authorisation, which enables the latter to exchange information with the applicant bank's home banking supervisory authorities.[73]

IBUs are expected to operate as fully-fledged units, and not merely as 'brass-plate' operations of a foreign bank. Except with special permission from the Central Bank, IBUs must operate wholly 'offshore', which implies that all their dealings must be with non-residents and denominated in currencies other than the Cyprus pound.[74]

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72 Central Bank of Cyprus, *A Guide to Prospective Applicant Banks on the Establishment of International Banking Units, Administered Banking Units, and Representative Offices in Cyprus* (September 1999), s D14.1.

73 Central Bank of Cyprus, *A Guide to Prospective Applicant Banks on the Establishment of International Banking Units, Administered Banking Units, and Representative Offices in Cyprus* (September 1999), s A.1.1. In this respect, the Central Bank of Cyprus approaches directly the applicant bank's home licensing and banking supervisory authority and obtains its written consent, as well as an undertaking that it will exercise consolidated supervision over the global activities of the applicant bank, including the operations proposed to be carried out by the international banking unit from within Cyprus.

74 International banking units are expected to set as their primary objective the generation of new banking business, particularly from customers abroad. Transactions and deals with non-residents and in currencies other than the Cyprus pound are free of restrictions. As stipulated in the banking business licence issued to them, however, international banking units are not permitted to deal with residents or in Cyprus pounds. As an exception to this rule, international banking units may grant loans or guarantees in foreign currencies to residents, provided that the resident parties involved obtain a relevant Exchange Control permit from the Central Bank of Cyprus. See Circular OFC/1 (latest edition), issued by the Central Bank of Cyprus, which is addressed to all Cypriot international banking units and which sets out in detail the permissible operations of international banking units from within Cyprus. The net income earned from transactions with residents is theoretically subject to the full rate of corporate tax, but the Minister of Finance has the power to exempt an international banking unit from full tax liability if satisfied that a specific transaction contributes substantially towards the economic development of Cyprus. Central Bank of Cyprus, *Cyprus, a Guide for Offshore Enterprises and Regional Offices* (January 1992).

IBUs are not expected to comply with the provisions of the Central Bank of Cyprus Law or Regulations, such as the maintenance of normal liquidity ratios, reserves with the Central Bank, and capital ratios, but they will be required to supply to the Central Bank of Cyprus such information about their activities as may be requested, to satisfy the Central Bank of their ability to meet their obligations as they fall due and of their adherence generally to sound banking practices. IBUs must each pay an annual fee of US $15,000 to the Central Bank of Cyprus as reimbursement to the latter for the cost of its supervisory function.

Successful applicants are granted a banking business licence, to which is attached a number of conditions. Although these conditions have been largely standardised, they may vary, depending on the IBU's legal form (ie, branch or banking subsidiary) and on the applicant's financial standing and international reputation.[75]

Administered Banking Units

17-35 Applications for a licence to operate an administered banking unit (ABU) must be made in writing by the bank concerned and addressed to the controller of banks, who is the Governor of the Central Bank of Cyprus. Applications should be supported by relevant information and documents as prescribed from time to time by the Central Bank of Cyprus (ie, information on the applicant bank, information on the proposed 'offshore' operations from within Cyprus, letter of comfort, and letter of authorisation).

ABUs are required to carry on banking business in their own name, but their day-to-day administration must be carried out on their behalf by another bank (hereinafter referred to as the 'administering bank') which is already licensed by the Central Bank of Cyprus to operate in or from within Cyprus.

ABUs are expected to operate as if they had a full physical presence in Cyprus and are, therefore, subject to the same regulations as IBUs. Like IBUs, an ABU's books and records should, therefore, be kept in Cyprus (see text, below). Moreover, ABUs are required to operate wholly on an 'offshore' basis, and their dealings are required to be with non-residents of Cyprus and denominated in currencies other than the Cyprus pound.[76]

ABUs must enter into a written management agreement with an administering bank. This agreement, which is subject to the prior written approval of the Central Bank of Cyprus, should provide, *inter alia*, for the apportionment of responsibilities between the ABU and the administering bank, details regarding premises, staff,

75 Central Bank of Cyprus, *A Guide to Prospective Applicant Banks on the Establishment of International Banking Units, Administered Banking Units, and Representative Offices in Cyprus* (September 1999).

76 They also are subject to the same exceptions as IBUs in their dealings with residents of Cyprus. Circular number OFC/1, which is addressed to all Cyprus IBUs, also is applicable to ABUs.

fees, and other administrative matters. An annual fee of US $10,000 is payable by each ABU to the Central Bank of Cyprus.[77]

International Financial Services Companies

Application for the Establishment of an International Financial Services Company

17-36 Applications for an International Financial Services Company (IFSC) licence must be supported by relevant information and documents as prescribed from time to time by the Central Bank of Cyprus. In addition to being 'fit and proper', an applicant must satisfy certain criteria of eligibility.[78] The Central Bank of Cyprus would normally consider as eligible to apply to provide 'offshore' financial services from within Cyprus only branches or subsidiary companies of established overseas financial services firms which enjoy a good reputation internationally and which already operate in countries where, in the opinion of the Central Bank of Cyprus, there is adequate financial regulation (see text, above). The Central Bank would, however, consider on an exceptional basis applications by persons, whether natural or legal, who do not already have a legal relationship with an established overseas firm but who propose to establish a legal or other close business association with one or more such firms within a specified time, normally 12 months, of the IFSC's establishment in Cyprus.

In the event that an applicant is not eligible under the above-mentioned criteria, the Central Bank of Cyprus will nevertheless consider the application provided that the applicant undertakes that the proposed IFSC will only provide financial services to:

- Its beneficial shareholders and other companies belonging to its own group of companies and will not offer financial services to the public at large; and
- A restricted group of persons and not to the public at large[79] who are defined for the purpose of the Regulations.

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77 Central Bank of Cyprus, *A Guide to Prospective Applicant Banks on the Establishment of International Banking Units*, *Administered Banking Units*, *and Representative Offices in Cyprus* (September 1999), s A3.1.

78 Central Bank of Cyprus, *A Guide to Prospective Applicants on the Establishment of Offshore Financial Services Companies* (September 1997).

79 The Central Bank of Cyprus requires the restricted group normally to consist of experienced and professional investors. 'Experienced investor' is defined by the Central Bank of Cyprus as 'a natural or legal person who frequently enters into investment transactions, whether on their own account or on account of another person, with or through the agency of another person who already provides financial services, being transactions of substantial size or of substantial size in relation to the person's total wealth and whose nature as well as risks involved in entering into such transactions, the investor can reasonably be expected to understand'. 'Professional investor' is defined as 'a natural person who himself provides financial services to the public'. Central Bank of Cyprus, *A Guide to Prospective Applicants on the Establishment of Offshore Financial Services Companies* (September 1997), s A7.1.

17-37 Depending on the form that the IFSC will take and the nature of the 'offshore' financial services to be offered by it, the Central Bank of Cyprus will require to be furnished with a Letter of Comfort and/or extracts from minutes in support of an IFSC's operations from within Cyprus from:

- The head office of the IFSC if the IFSC is to take the form of an international branch registered in Cyprus;
- The IFSC's immediate holding company if the IFSC is to be incorporated as an international subsidiary in Cyprus;
- The IFSC's overseas associate entity if the IFSC is to be incorporated as an international company (or partnership) in Cyprus, associated with an overseas financial services entity; and
- An established overseas financial services firm with which the applicant is to enter into a close business relationship in any other case.[80]

17-38 IFSCs must have fully-fledged offices in Cyprus and must employ personnel who have financial expertise and background so that they can discharge the 'fitness and properness' test. In fact, only where such personnel are to be utilised will the Central Bank of Cyprus grant the necessary financial services licence.

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80 The Central Bank of Cyprus also requires to be provided with various documents to be submitted in a formal application for the establishment of an international financial services company. A questionnaire, completed and signed by two directors or other duly authorised individuals of the legal person intending to establish and beneficially own an international financial services company in Cyprus (or by the natural persons submitting an application to the Central Bank of Cyprus for the establishment of an IFSC) must be submitted. A further questionnaire, completed by every controlling shareholder of an applicant company, as well as every proposed executive and employee (eg, director, manager, or consultant) to be employed by the proposed international financial services company for the purpose of advising clients or arranging or carrying out transactions with or on behalf of clients in the course of the provision of financial services or who will be responsible for handling client's assets, also must be submitted. The Central Bank of Cyprus also will require a letter of authorisation from the principal beneficial shareholders of the proposed company or their duly authorised representatives in Cyprus, enabling it to seek from and exchange information with third parties on the content and purpose of an application. Furthermore, full particulars of the established overseas financial services firms, together with full particulars of the overseas financial authorities responsible for their regulation, must be communicated to the Central Bank, which may approach them for the purpose of obtaining references and/or requiring the letter of comfort, without disclosing the names of the company's individual clients and associates. With the letter of authorisation, the Central Bank of Cyprus also will be authorised, once an application is approved, to obtain information from any appropriate banking or financial supervisory authority, without disclosing the names of the company's individual clients and associates. Where necessary, the Central Bank may request from the established overseas financial services firms a legally binding Letter of Guarantee. Central Bank of Cyprus, *A Guide to Prospective Applicants on the Establishment of Offshore Financial Services Companies* (September 1997), s A1.2.

Central Bank Permit Granted for the Establishment of International Financial Services Companies

17-39 IFSCs are issued an Exchange Control Law permit which incorporates a number of 'special' conditions in addition to the ones applicable to any international business companies. They may be requested, if appropriate, *inter alia*, to:

- Amend the objects or any other clause of their Memorandum and articles of association to reflect the special or limited nature of the proposed financial services;
- Obtain the Central Bank's written approval before entering into any business association with an overseas financial services firm;
- Refrain from holding or handling directly any of their client's money or assets but use instead the services of overseas trustee or financial services firms which are themselves regulated in their respective country of incorporation;
- Obtain the Central Bank's approval prior to entering into any advertising commitment; and
- Submit details of the persons to be employed for final approval by the Central Bank of Cyprus.[81]

Regulatory and Supervisory Rules of Established Banks and Financial Services Companies

Regulatory and Supervisory Rules for Banks

Supervisory Authority

17-40 The Central Bank of Cyprus is responsible for the supervision of banks to ensure the orderly functioning of the banking system.[82] It has the power to grant, refuse, or revoke authorisation. Every bank is obliged, when required by the Central Bank of Cyprus, to make available for examination by a duly authorised official of the Central Bank its liquidity and other assets, books or records, accounts, and other documents, including those relating to the granting of loans and other credit facilities as well as the reports obtained by the bank regarding the business and financial position of debtors.[83]

Any information obtained by the Central Bank, other than information available to the public, must be kept secret and used only for the purposes of the Central Bank of Cyprus or of the Banking Law.[84] However, such information may be used by the Central Bank for the computation or publication of statistical aggregates.[85]

81 Central Bank of Cyprus, *Cyprus, a Guide for Offshore Enterprises and Regional Offices* (January 1992).

82 Banking Law, s 26(1).

83 Banking Law, s 26(2).

84 Banking Law, s 26(3).

85 Banking Law, s 26(4).

Notwithstanding the provisions of section 26, the Central Bank of Cyprus may at its own discretion provide to recognised banking supervisory authorities in other countries any information in its possession which:

- In the opinion of the Central Bank will enable such authorities to exercise functions corresponding to those of the Central Bank of Cyprus under the Banking Law; and
- Is related to the affairs of a bank incorporated in that country or of a bank incorporated in Cyprus which has or proposes to establish in that country a branch, a representative office, or a subsidiary.[86]

17-41 The Central Bank of Cyprus may not, however, divulge any of this information which relates to any individual deposit account.

Duty to Report

17-42 Banks must submit to the Central Bank of Cyprus information relating to:

- The establishment or closing of a subsidiary or a branch;
- The change of their name;
- Any amendment of their memorandum and articles of association;
- Their shareholding in another company if such shareholding exceeds 10 per cent of the share capital of that company;
- The disposal of the whole or any part of their business by amalgamation or otherwise;
- The composition of the administrative board and the management; and
- The appointment, removal, or resignation of their auditors.

17-43 According to section 25 of the Banking Law, every bank must submit to the Central Bank of Cyprus within 15 days of the end of each month, or within such longer period as the Central Bank may determine, a certified statement of its assets and liabilities for the month ended in a form which the Central Bank shall prescribe. Banks also are under an obligation to submit periodically such other information as the Central Bank of Cyprus may require and within such time as may be specified by the Central Bank.[87]

Auditors and Submission of Accounts

17-44 Appointment of an Auditor. Every bank must appoint an auditor. An approved auditor is a person qualified under section 155 of the Companies Law to act as an auditor of a company and requires the express authorisation of the Central Bank of Cyprus to exercise his duties.

86 Banking Law, s 27(2).
87 Banking Law, s 25(2).

In case of failure to appoint an approved auditor, the Central Bank may appoint such auditor and fix his remuneration to be paid by the bank concerned.[88]

17-45 Submission of Accounts. Banks must, within four months of the end of each financial year, submit to the Central Bank of Cyprus a copy of the balance sheet and profit and loss account for the year ended in the form prescribed by the Central Bank, duly certified by an approved auditor together with a signed copy of the auditor's report in the form prescribed by the Central Bank.[89]

IBUs are required to maintain their accounting system as well as all official books, records, documents, and correspondence relating to their banking business in the English language.

17-46 Publication of Accounts. A bank incorporated in Cyprus must publish, within six months of the end of each financial year, the balance sheet and profit and loss account for the year ended together with the auditors' report.[90]

A bank other than a bank incorporated in Cyprus must publish, in such manner and form as the Central Bank may determine, the balance sheet and profit and loss account for each financial year together with the auditors' report.[91]

17-47 Auditors and the Central Bank. The Central Bank of Cyprus must, from time to time and at least once a year, arrange trilateral meetings with each bank and its auditors to discuss matters relevant to the Central Bank's supervisory responsibilities which arise in the course of the audit of the said bank, including relevant aspects of the bank's business, its accounting and control systems, and its annual balance sheet and profit-and-loss account.[92]

The Central Bank may, if it considers it necessary, arrange bilateral meetings with the auditors of a bank[93] and, in that case, no duty of confidentiality to which an auditor of a bank may be subject will be regarded as contravened by reason of his communicating in good faith to the Central Bank of Cyprus any information or opinion which is relevant to the Central Bank's functions and responsibilities under the Banking Law.[94] In preparing their report on the annual accounts of a bank, auditors are required to report directly to the Central Bank of Cyprus the following:

- Any instance where, in their opinion, the operations of an IBU have not been in compliance with the conditions attached to its licence;
- Whether the IBU's internal control system is, in their opinion, adequate; and

88 Banking Law, s 24(2).
89 Banking Law, s 24(1).
90 Banking Law, s 24(3).
91 Banking Law, s 24(4).
92 Banking Law, s 28(1).
93 Banking Law, s 28(2).
94 Banking Law, s 28(3).

- Whether the information which passes from the IBU to its head office or parent bank is, in their opinion, both adequate and accurate.[95]

The above also applies to banks other than IBUs.

Administrative Powers

17-48 Section 42, as amended by Law 94 (I) of 2000, provides that, where the Central Bank of Cyprus, in exercising its duties of control and supervision of the banks in accordance with the Banking Law or with the Regulations issued thereunder and its powers to collect information and entry and of inspection under sections 25 and 26 of the Banking Law, ascertains that any bank has violated or failed to comply with any of the Guidelines or Circulars, violated or failed to comply, within a specified time limit or within a reasonable time, with any request or notification legally submitted or addressed to it or, while complying with any such guidelines, request, or notification of the Central Bank of Cyprus or with any provision under the Banking Law or Regulation issued thereunder, knowingly or negligently provided or submitted any misleading, inaccurate, or incomplete information or data, the Governor of the Central Bank, after calling the bank to state its defence, has the power to impose for each and every contravention an administrative fine ranging from CY £1,000 to CY £10,000, depending on the severity of the contravention.

In the case of a continuing contravention, the Governor of the Central Bank is additionally empowered to impose a further administrative fine, ranging from CY £100 to CY £500, depending on the severity of the contravention, for each day during which the contravention continues.[96]

Regulatory and Supervisory Rules for International Financial Services Companies

In General

17-49 Section 38 of the Banking Law provides that sections 25, 26, and 42 of the Banking Law will apply to designated financial institutions and that the term 'bank' in these sections will be deemed to include any designated financial institution.

95 Central Bank of Cyprus, *A Guide to Prospective Applicant Banks on the Establishment of International Banking Units*, *Administered Banking Units and Representative Offices in Cyprus* (September 1999), s A1.3.

96 Section 43(1) of the Banking Law provides that the infringement of certain provisions of the Banking Law is an offence punishable by imprisonment not exceeding two years or by a fine not exceeding CY £50,000 or by both and, in case of a continuing offence, by a further fine not exceeding CY £1,000 for each day during which the offence continues. Section 43(2) provides that the infringement of sections 24, 25, and 26 of the Banking Law, *inter alia*, is not punishable by imprisonment. No prosecution under the Banking Law can be instituted, however, except by or with the consent of the Attorney-General of the Republic of Cyprus (section 44 of the Banking Law).

Designated financial institutions must, therefore, submit any returns the Central Bank of Cyprus may require under section 25 (see text, above) and keep their records and books available for inspection by the Central Bank under section 26, and they are subject to administrative fines under section 42 in case of failure to comply with the requirements of sections 25 and 26.

Pursuant to the Banking Law, the Central Bank of Cyprus is the authority responsible for designating the said financial institutions, under the definition of 'designated financial institution' as provided in the Banking Law.

Duty to Report

17-50 In anticipation of Cyprus' full membership of the EU and the accession process, the Central Bank of Cyprus has been collecting statistical information annually so as to evaluate the contribution of the international business sector to the Cypriot economy. The Central Bank, in its capacity as the financial services supervisory and regulatory authority and in accordance with the powers granted to it by section 25 of the Banking Law, has for this purpose prepared various returns to be filed annually by each IFSC, depending on its activity and in accordance with its Exchange Control Law permit.

Such annual reports must be filed within the course of such months following the year end, as the Central Bank of Cyprus may prescribe, and the Central Bank may consider taking regulatory action against any IFSC not complying with the conditions attached to its permit and failing to file the said returns. This regulatory action may take the form of the amendment of the Exchange Control Law permit or its revocation in certain cases.

Auditors and Submission of Accounts

17-51 As previously noted, IFSCs are international business companies, which have been granted a Central Bank of Cyprus permit for exchange control purposes to which special conditions have been attached for the purpose of providing financial services. IFSCs are, therefore, subject to the provisions of the Companies Law[97] and, as such, they must appoint an auditor and prepare financial statements of the company for each year ended to be received by the shareholders of the company at the following Annual General Meeting of the company.

IFSCs must then file their annual financial statements with the relevant Cypriot authorities, including the Central Bank of Cyprus in accordance with their Exchange Control Law permit; failure to comply with this requirement may result in the Central Bank's permit being withdrawn.

97 Companies Law, ss 141–157, regulating the accounts and audit of Cypriot incorporated companies.

International Supervision

17-52 Cyprus subscribes to the principles embodied in the 'Concordat' and the 'Minimum Standards' Paper issued by the Basle Committee on Banking Supervision.

Although there are no bilateral or multilateral agreements between Cyprus and other countries relating to bank regulation and supervision, the Central Bank of Cyprus is in the process of drafting and signing memoranda of understanding with various countries which will undoubtedly contribute to the promotion of the international convergence of banking supervision.

Money Laundering in the Financial Services Sector

In General

17-53 Efforts to combat money laundering in the Cypriot financial sector have, to a large extent, concentrated on the deposit-taking procedures, where the launderer's activities are most likely to be uncovered. Cash payment has, therefore, been subject to an increasing number of enquiries from banking and credit institutions in recent years, which has led criminals to seek alternative means to convert the illegally earned cash or to mix it with legitimate cash earnings before it enters the financial market.

It is generally accepted that the tightening of controls in the banks has led to a search by money launderers for alternative ways of disguising the criminal origin of their funds and that most money laundering offences nowadays do not involve cash transactions. This is true particularly for financial and investment businesses, which may find themselves being used at the layering[98] and integration[99] stages of money laundering.[100]

The liquidity of many investment products offered by the credit and financial institutions is, therefore, likely to attract sophisticated launderers by allowing them to effect a substantial number of transactions worldwide in a minimum amount of time, thereby mixing lawful and illicit proceeds and integrating them into the legitimate economy. Furthermore, a growing trend for financial services is the order and the provision of such services using means (such as post, telephone, or computer) which limit or avoid direct contact between the supplier and the purchaser.

98 'Layering' involves separating illicit proceeds from their source by creating complex layers of financial transactions designed to disguise the audit trail and provide anonymity.

99 'Integration' is the provision of apparent legitimacy to criminally derived wealth.

100 The first stage of money laundering is the physical disposal of the initial proceeds derived from illegal activity. Central Bank Guidance Note to International Financial Services Companies, International Trustee Services Companies, International Collective Investment Schemes, and Their Managers or Trustees as Appropriate (13 January 2000), OFC/1, second issue.

As a result, and following an international trend, new measures aimed at combating and tackling money laundering both at the international and the national levels have been adopted and transposed into Cypriot domestic legislation. The issue of money laundering has been at the top of the agenda of the Cypriot Government for the past decade. In May 1996, Cyprus enacted modern legislation aiming to combat money laundering (The Prevention and Suppression of Money Laundering Activities Law, hereinafter referred to as 'the Money Laundering Law') as part of its efforts to ensure transparency in transactions in the booming international business sector.

In light of the current EU harmonisation process, Cyprus has implemented in its national legislation the general framework of Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering, by enacting measures in the Money Laundering Law that go beyond the minimum requirements of the Directive.

The 1991 anti-money laundering Directive[101] was a landmark in the fight against criminal money and its potentially highly damaging effect on the financial system. The Directive is based on a wide coverage of the financial sector. It requires financial firms to know their customers, to keep appropriate records, and to establish anti-money laundering programmes. It also requires banking secrecy rules to be suspended whenever necessary, and any suspicion of money laundering to be reported to the authorities. Amendments to the Directive have recently been proposed[102] and, in particular, the definition of 'credit and financial institutions' has been extended specifically to cover certain activities, such as those of *bureaux de change* and money remittance offices or investment firms, and thereby remove any doubt as to the existence of criminal acts in these activities. The definition of 'criminal activity' has also been amended to cover not only drug trafficking but also all organised crime and illegal activities affecting the financial interests of the EU, as the basis of the prohibition of money laundering. These amendments are already covered in the Money Laundering Law, which has been recognised by the EU institutions as a model piece of legislation.

The Money Laundering Law

In General

17-54 Structure of the Law. The Money Laundering Law is divided into nine parts, some of which are concerned with procedural matters applicable to all kinds of money laundering activity as a criminal offence, eg, confiscation orders, interim

101 OJ L 166, 28 June 1991, at p 77.

102 Community Preparatory Act Document 599PC0352, Proposal for a European Parliament and Council Directive amending the Council Directive 91/308/EEC of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering, 31 January 2000.

orders (Parts II and III), and other measures, such as orders for the disclosure of information (Part V), or summary inquiry (Part VI). Of particular interest are the parts of the Law regulating the international co-operation, the Unit and Advisory Authority for Combating Money Laundering, and special provisions applicable to 'relevant financial business'.

'Money laundering', as referred to in the 1991 Directive, is defined according to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted on 19 December 1988 in Vienna ('the Vienna Convention'). In accordance with the Recitals of the 1991 Directive,[103] the Cypriot Money Laundering Law had anticipated the move of the EU institutions in so far as it already covers offences such as premeditated murder, arm and art trafficking, or terrorism (commonly referred to as 'predicate offences'), as well as any laundering activity whose purpose is to conceal in any manner the real nature of the proceeds generated from the above offences, including those in the financial services sector (referred to as 'laundering offences').

17-55 Laundering Offences. Under the Money Laundering Law, every person who knows, or ought to have known, that any kind of property constitutes proceeds of money laundering activity and (a) converts or transfers or removes such property, for the purpose of concealing or disguising its illicit origin or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions; (b) conceals or disguises the true nature, source, location, disposition or movement of and rights in relation to the property or ownership of this property; (c) acquires, possesses, or uses such property; (d) participates, associates, or co-operates in, conspires to commit or attempts to commit, and aids and abets and provides counselling or advice for the commission of any of the offences referred to above; or (e) provides information in relation to investigations that are carried out into laundering offences for the purpose of enabling the person who acquired a benefit from the commission of a predicate offence to retain the proceeds or the control of the proceeds from the commission of the offence, commits an offence punishable by 14 years' imprisonment or a pecuniary penalty or both in the case of a person who knows that the property is the proceeds of a predicate offence, or by five years' imprisonment or a pecuniary penalty or both in the case of a person who ought to have known.[104]

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103 The Directive provides that, 'since money laundering occurs not only in relation to the proceeds of drug-related offences but also in relation to the proceeds of other criminal activities (such as organised crime and terrorism), the member states should, within the meaning of their legislation, extend the effects of the Directive to include the proceeds of such activities, to the extent that they are likely to result in laundering operations justifying sanctions on that basis'.

104 Money Laundering Law, s 4.

It is a defence under section 26 of the Money Laundering Law, in the course of criminal proceedings against a person in respect of assisting another to commit a laundering offence, that this person intended to disclose to a police officer or to the Unit for Combating Money Laundering ('the Unit'), as defined in Part VII of the Money Laundering Law, this person's suspicion or belief that an agreement or arrangement related to the proceeds of a predicate offence and that his failure to make the disclosure was based on reasonable grounds (any such disclosure would not be treated as a breach of any restriction on the disclosure of information imposed by contract).

In the case of employees of persons whose activities are supervised by the Central Bank of Cyprus, such as financial services and banking activities, the Money Laundering Law recognises that the disclosure may be made to a competent person (eg, a Money Laundering Compliance Officer) in accordance with internal procedures the employer wishes to establish for the purposes of such disclosure, and that these disclosures shall have the same effect as disclosures or intended disclosures to a police officer or the Unit.[105]

Relevant Financial Business

17-56 The Money Laundering Law places additional administrative requirements on all institutions engaged in 'relevant financial business',[106] which is defined to include the following activities:

- Accepting deposits from the public;
- Lending money to the public;
- Engaging in finance leasing, including hire purchase financing;
- Engaging in money transmission services;
- Issuing and administering means of payment (eg, credit cards, travellers' cheques, and bankers' drafts);
- Issuing guarantees and commitments;
- Trading on one's own account or on account of customers in (a) stocks or securities, including cheques, bills of exchange, bonds, and certificates of deposits, (b) foreign exchange, (c) financial futures and options, (d) exchange and interest rate instruments, and (e) transferable instruments;
- Participating in share issues and providing related services;
- Offering consultancy services to enterprises concerning their capital structure, industrial strategy, and related issues, including services in the areas of mergers and acquisitions of businesses;

105 Central Bank Guidance Note to International Financial Services Companies, International Trustee Services Companies, International Collective Investment Schemes, and Their Managers or Trustees as Appropriate (13 January 2000), OFC/1, second issue.
106 Money Laundering Law, s 61.

- Engaging in money broking;
- Offering investment services, including dealing in investments, managing investments, giving investment advice, and establishing and operating collective investment schemes;[107]
- Offering safe custody services; and
- Offering custody and trustee services in relation to stocks.

17-57 The above list of activities indicates that all banking, credit, financial, and investment institutions fall within the ambit of relevant financial business and must therefore apply special measures for the prevention of money laundering under the Law.

Procedures to Prevent Money Laundering

17-58 It is illegal[108]to carry out relevant financial business in or from within Cyprus, form a business relationship, or carry out a one-off transaction with or on behalf of another, unless that person:

- Applies the following procedures in relation to that business, relationship, or transaction: (a) customer identification procedure, (b) record keeping procedure in relation to customers' identity and their transactions, (c) procedure for internal reporting to a competent person (eg, Money Laundering Compliance Officer), and (d) such other procedures for internal control and communication as may be appropriate for the purposes of forestalling and preventing money laundering;
- Takes appropriate measures from time to time for the purpose of informing employees whose duties include the handling of relevant financial business about the above procedures and the legislation relating to money laundering; and
- Provides, from time to time, training for his employees in the recognition and handling of transactions carried out by or on behalf of any person who is or appears to be engaged in money laundering offences.

17-59 Any person who contravenes the provisions of this section will be guilty of an offence punishable by two years' imprisonment or a pecuniary penalty of CY £2,000 or both. In determining compliance with section 58 of the Law, a Cypriot court may take into account any relevant supervisory or regulatory guidance issued by the supervisory authority concerned and, where no guidance applies, any other relevant instructions issued by the supervisory authority.

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107 For the purpose of this section, the term 'investment' includes long-term insurance contracts, whether or not associated with investment schemes.

108 Money Laundering Law, s 58.

Regulations and Other Instructions Issued by the Central Bank of Cyprus

Supervisory Authority

17-60 The Money Laundering Law designates the Central Bank of Cyprus as the supervisory authority for all persons licensed to carry on banking business in or from within Cyprus. In addition, the Council of Ministers, in accordance with the power granted to it by section 60(1)(b) of the Money Laundering Law, designated the Central Bank as the supervisory authority for all persons authorised to carry on international financial services activities from within Cyprus.[109]

Under the Money Laundering Law, it is the principal duty of a supervisory authority (currently the Central Bank of Cyprus) to assess and supervise compliance by persons falling within its area of supervisory responsibility and, for this purpose, the Central Bank of Cyprus is authorised to issue directions, circulars, or guidance notes to be addressed to bodies it supervises in Cyprus. Such documents issued by the Central Bank of Cyprus focus on provisions of the Law which are of great importance to banking institutions and to financial services providers and supply a practical interpretation of the requirements of the Law to the intent that good financial practices are established.

Where the Central Bank of Cyprus is of the opinion that a person falling within its supervisory responsibility has failed to comply with the provisions of the Law, it is under an obligation to refer the matter to the Attorney General. Furthermore, where the Central Bank possesses information and is of the opinion that any person subject to its supervision may have been engaged in a money laundering offence it shall, as soon as is reasonable practicable, transmit the information to the Unit.[110]

Guidance Notes Issued by the Central Bank of Cyprus

17-61 Customer Identification. Section 58 of the Money Laundering Law does not specify what may or may not represent adequate evidence of identity, and the Central Bank has set out in a Guidance Note the practices to which the various banking and financial services institutions should comply with the requirements of the Law in this respect.

The need for the 'know-your-client' process is essential in the financial sector, to the extent that those in the sector should establish to their satisfaction that they are dealing with a person (natural or legal) that actually exists and identify those persons duly authorised to undertake investment transactions. The Guidance Note sets out what constitutes effective and adequate identity verification for each type of person (personal clients, partnerships and unincorporated business clients,

109 Money Laundering Law, s 60.

110 Central Bank Guidance Note to International Financial Services Companies, International Trustee Services Companies, International Collective Investment Schemes, and Their Managers or Trustees as Appropriate (13 January 2000), OFC/1, second issue.

corporate clients, and trustee and nominee clients) and provides that whenever a business relationship is to be established or a one-off transaction or series of linked transactions involving CY £8,000 or more is undertaken, the identification procedures must be followed.

In the case of a corporate client, the principal requirement is to look behind the corporate entity to identify the ultimate beneficial owners of the company's business and assets and thereby pierce the corporate veil.[111]

17-62 Record Keeping Procedures. Sections 58 and 66 of the Money Laundering Law require, and it is further emphasised in this Guidance Note, that all financial services providers retain records concerning client identification and details of transactions for use as evidence in any possible investigation into money laundering. This is an essential element of the audit trail procedures that the Law seeks to establish.

17-63 Internal Reporting and Systems of Control. The Guidance Note requires that entities providing banking and financial services appoint a Money Laundering Compliance Officer from among the members of their senior management to be able to command the necessary authority. The duties of this officer include, *inter alia*, the receipt, validation, and evaluation of information from the employees of the entity concerning suspicious transactions. The Money Laundering Compliance Officer is the person in charge of notifying the Unit by filing a written report with the Unit in case of suspicions and remains the first point of contact with the Unit throughout the investigation.

The Money Laundering Compliance Officer also is primarily responsible to the Central Bank of Cyprus for implementing the various Guidance Notes as well as other instructions or recommendations issued by the Central Bank from time to time on the prevention of the criminal use of the financial system for the purpose of money laundering.[112]

17-64 Recognition of Suspicious Transactions. Financial services providers and banking institutions are expected under the Guidance Note to pay special attention to all complex and unusually large transactions. The Central Bank of Cyprus has distributed to all the entities concerned an extensive list of examples of suspicious transactions comprising of warning signs and characteristic behaviour patterns of money laundering.

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111 Central Bank Guidance Note to International Financial Services Companies, International Trustee Services Companies, International Collective Investment Schemes, and Their Managers or Trustees as Appropriate (13 January 2000), OFC/1, second issue.

112 The duties of the Money Laundering Compliance Officer have recently been clarified by the Central Bank of Cyprus in its Guidance Note to International Financial Services Companies, International Trustee Services Companies, International Collective Investment Schemes, and Their Managers or Trustees as Appropriate (13 January 2000), OFC/1, second issue.

The Central Bank advises that, although the types of money laundering are unlimited, a suspicious transaction will often be one which is inconsistent with a client's known legitimate business or personal activities or with the normal business for that type of client. It recommends that the first key to recognition, therefore, is knowing enough about the client's business to recognise that a transaction is unusual.[113] The Money Laundering Law requires that such knowledge or suspicion of money laundering should be promptly reported to a Police Officer or to the Unit.[114]

17-65 Education and Training. The Guidance Note provides that staff of banks and financial services companies also must be aware of their own personal statutory obligations. All relevant staff should be educated in the importance of the 'know your customer' requirements for money laundering prevention purposes. The Central Bank of Cyprus requires that training in this respect should cover not only the need to know the true identity of the client but also, where a business relationship is being established, the need to know enough about the type of business activities expected in relation to that client. Banks and financial services providers and their senior management are expected to establish a programme of continuous training for all levels of their staff.

It also will be necessary, in the opinion of the Central Bank of Cyprus, to make arrangements for refresher training at regular intervals to ensure that staff do not forget their responsibilities.[115]

Supervisory Measures

17-66 Banking Sector. Since 1990, all banks in Cyprus, whether domestic or international, have been required to submit to the Central Bank of Cyprus a monthly statement with the following information:

- All cash deposits from customers in Cyprus pounds in excess of CY £10,000 and in foreign currencies in excess of US $10,000 or their equivalent;
- All unusual fund transfers effected by non-residents in excess of US $10,000 or their equivalent;
- All their customers' incoming and outgoing transfers in excess of US $500,000 or their equivalent; and

113 Central Bank Guidance Note to International Financial Services Companies, International Trustee Services Companies, International Collective Investment Schemes, and Their Managers or Trustees as Appropriate (13 January 2000), OFC/1, second issue.

114 Money Laundering Law, s 27.

115 Central Bank Guidance Note to International Financial Services Companies, International Trustee Services Companies, International Collective Investment Schemes, and Their Managers or Trustees as Appropriate (13 January 2000), OFC/1, second issue.

- The total turnover of customers' accounts whose cumulative annual inward and outward transfers exceed US $2 million.[116]

17-67 The Central Bank of Cyprus also discharges its obligations under the Money Laundering Law by carrying out on-site examinations at regular intervals to evaluate the banks' compliance with the Guidance Notes and implement corrective measures in case of failure to comply with the Guidance Notes.

17-68 Financial Services Sector. International business companies providing financial services are required by the Central Bank of Cyprus to:

- Divulge the names of their beneficial owners to the Central Bank;
- Submit good bank references on behalf of their beneficial owners from banks located in their home country;
- Prepare and submit annual audited accounts to the Central Bank;
- File with the Central Bank a confidential annual return which provides information on the company's directors and other officers; and
- Obtain temporary residence/employment permits for their expatriate employees.[117]

International Co-Operation in the Banking and Financial Sectors

17-69 It is emphasised in the recitals of the 1991 Directive[118] that the effectiveness of efforts to eliminate money laundering is particularly dependent on the close coordination and harmonisation of national implementation measures. In certain EU member states, however, the financial intelligence units combating fraud are prevented by their legal status from exchanging information with their counterparts in other member states. The European Commission has therefore called for increased cooperation in the field of money laundering through the intermediary of the Contact Committee as set out in article 13 of the Directive.

Money laundering also must be combated by penal means and within the framework of international cooperation among judicial and law enforcement authorities, as has been undertaken in the field of drugs by the Vienna Convention and more generally in relation to all criminal activities by the Council of Europe Convention on Laundering, Tracing, Seizure, and Confiscation of Proceeds of Crime, opened for signature on 8 November 1990 in Strasbourg ('the Council of Europe Convention').

An entire part of the Money Laundering Law has been dedicated to international cooperation. Under the Law, an external order issued by a foreign jurisdiction

116 Central Bank of Cyprus, *Anti Money Laundering Measures in the Banking and International Business Sectors* (February 1999).

117 The above measures are intended to combat and eliminate the abuse of the sector by criminals.

118 OJ L 166, 28 June 1991, at p 77.

will be enforceable by the Cypriot courts on registration and will be binding in Cyprus.[119] Moreover, Cyprus has ratified both the Vienna Convention and the Council of Europe Convention, thereby showing its willingness to combat all criminal activities within the framework of international cooperation among judicial and Law enforcement authorities. In this respect, the Unit for Combating Money Laundering responsible for gathering and evaluating information relevant to laundering offences as well as conducting investigations on alleged laundering offences has been established in accordance with the Law.

Furthermore, the Council of Ministers has appointed an Advisory Authority for Combating Money Laundering which is composed of the relevant regulatory bodies and associations of professionals in Cyprus. The Advisory Authority is responsible, *inter alia*, for promoting Cyprus internationally as a country which complies with all the conventions, resolutions, and decisions of international bodies in respect of combating laundering offences.[120]

119 Money Laundering Law, s 38.
120 Part VII of the Money Laundering Law.

CHAPTER 18

Insurance Law

Antonis Glykis

Introduction

The Law and the Regulatory Bodies

Applicable Law in Cyprus

18-1 The English legal system, practice, and procedure which applied in Cyprus during the period of British rule have continued since 1960, when Cyprus became an independent state. Section 29(1)(c) of the Courts of Justice Law of 1960[1] provides that the Common Law and the principles of equity apply in Cyprus, provided that they do not conflict with the Constitution of the Republic or with laws passed by the House of Representatives.

The Insurance Legislation

18-2 The first insurance legislation in Cyprus was introduced by the Insurance Companies Law of 1967 and the Insurance Companies Regulations of 1969. They aimed at regulating the establishment, operation, and supervision of insurance companies in Cyprus and at protecting the rights and interests of the insured.

The Insurance Companies Law was amended in 1969 by Law 85 of 1969, in 1976 by Law 21 of 1976, and in 1980 by Law 32 of 1980. In 1984 and 1990, new Insurance Companies Laws and Regulations were introduced to consolidate and update existing legislation. The new laws and regulations became operative on 4 January 1991. The Insurance Companies Laws 1984–1990 were amended by Law 47 (I) of 1998 (hereinafter they are collectively called 'the Insurance Law').

Superintendent of Insurance and the Insurance Advisory Board

18-3 The head supervisory authority is the Superintendent of Insurance Companies, who is a public officer appointed by the Council of Ministers. The Superintendent is granted considerable power. According to section 8 of the Insurance Companies Laws, he has the power to issue the licence which is a requisite for the establishment of an insurance company and, under section 1, to renew or cancel such a licence.

1 Law 14 of 1960.

Section 21 of the Insurance Companies Laws 1984–1998 provides for the submission to the Superintendent of Insurance of a return, showing the assets invested in accordance with section 20 of the Insurance Companies Laws 1984–1998, and the Superintendent is entitled to take any steps necessary for the inspection or verification of the assets invested or for obtaining the particulars necessary to establish that the requirements of that section have been complied with.

Insurance companies must deposit annually with the Registrar of Insurance Companies a revenue account, a balance sheet, and a profit and loss account or, in the case of a company not trading for profit, an income and expenditure account. Under section 28 of the Insurance Companies Laws 1984–1998, the Superintendent will review the aforementioned documents and, if any of them appears to him to be inaccurate or incomplete in any respect, he must require the company to correct the accounts.

In the case of a company of doubtful solvency which may be wound up by the court, the Superintendent has the power, under section 37, to require the company to furnish explanations, information, accounts, balance sheets, abstracts, and statements which may be necessary to determine whether the company is insolvent. The Superintendent also may appoint persons to investigate the affairs of the company.

According to sections 42 and 43, any appointment by an insurance company of a managing director, chief executive, or controller of the company must be notified to and be approved by the Superintendent of Insurance. Part IX of the Insurance Companies Laws 1984–1998 gives the Superintendent of Insurance a power of intervention and inspection of companies' books and papers. The Superintendent may require a company to produce its books and papers, and may apply to the court for the issue of a warrant to enter the premises of the company and take possession of any books and papers.

According to section 5 of the Insurance Companies Laws 1984–1998, the Minister of Finance may appoint an Insurance Advisory Board consisting of seven members, ie, three members of the public service and four persons representing the interests of the employers, the employees, and the insurance companies. The functions of the Advisory Board are to advise the Minister generally on the operation of the Insurance Laws and on any regulations made thereunder and on insurance matters in general.

Market Structure

In General

18-4 In Cyprus, there is a well-established insurance industry, with all types of risk accepted. All insurance business, except for the social insurance scheme which is operated by the State, is written in the private sector.

According to the Insurance Association of Cyprus, in 1999, there were 79 insurance companies, including 'offshore' and 'offshore captives', were registered in 1999 with the Superintendent of Insurance, many of which were incorporated abroad and represented well-known multinational insurers. The Cypriot market maintains good links with major reinsurance markets such as London, Munich, and Zurich.

Total Premium Income

18-5 The total premium income written in Cyprus by all licensed offices reached approximately CY £436.3 million in 1999, compared with CY £204.4 million written in 1998, representing an increase of 113.4 per cent.

Premiums written in respect of general business transacted during 1999 represented 77.6 per cent of the total premium income, and life premiums accounted for 22.4 per cent of the total. The CY £436.3 million of general and life business premium income was shared among 41 insurance companies.

Register of Investments

18-6 With regard to the investment of assets which insurance companies are required to make under section 20 of the Insurance Companies Laws 1984–1998, the amount of assets invested locally and abroad by insurance companies operating in Cyprus reached, as at 31 December 1998, CY £434 million compared with CY £427 million in the previous year.

Fundamental Principles of Insurance Law

Meaning of Insurance

18-7 The statutes dealing with the regulation of insurance business, of which the Insurance Companies Laws 1984–1998 are current, have never contained a definition of insurance. It has been suggested that a contract of insurance is any contract whereby one party assumes the risk of an uncertain event, which is not within his control, happening at a future time in which event the other party has an interest, and under which contract the first party is bound to pay money or provide its equivalent if the uncertain event occurs. It would follow that anyone who regularly enters into such contracts as the party bearing the risks is carrying on insurance business for the purposes of the statute regulating such business.[2]

The Insurance Law defines an insurance company as a company carrying insurance business of all or any of the classes specified in sub-section 3 of the Insurance Law, namely:

- Life insurance;

2 Birds, *Modern Insurance Law* (2nd ed, 1988), at pp 8 and 9.

- Industrial insurance;
- Bond investments;
- Sinking funds;
- Motor vehicle insurance;
- Accident insurance;
- Marine aviation and transit insurance;
- Employer's liability insurance; and
- Miscellaneous insurance.

Basic Elements of the Contract

Parties

18-8 In General. The parties to an insurance contract are the insurer of the one part and the insured of the other part.

18-9 The Insurer. According to the Insurance Companies Laws 1984–1998, insurers, as a general rule, must be companies registered in accordance with the provisions of the Companies Laws, Cap 113, and having obtained a licence from the Superintendent of Insurance under the Insurance Companies Laws 1984–1998. In some cases, insurance business may be transacted through agents or brokers. Under section 2 of the Insurance Companies Laws 1984–1998, a broker is a person or a body of persons, corporate or unincorporated, authorised by an association of underwriters to place insurance business with members of the association.

There are certain statutory duties with which the insurer must comply and which are specified in the Insurance Companies Laws 1984–1998. According to section 17, an insurance company must deposit with the Central Bank of Cyprus, either in cash or in approved securities estimated at the market value of the securities on the day of deposit, one or more of the following sums applicable to the class or classes of insurance business carried on by such company:

- CY £30,000 in respect of long-term business and motor vehicle insurance business; and
- CY £30,000 in respect of any one or more classes of insurance business, other than long-term business and motor vehicle insurance business.

18-10 Under section 36(2) of the Insurance Companies Laws 1984–1998, an insurance company will be deemed to possess the required margin of solvency if:

- In the case of a company carrying on general business, the value of its assets exceeds the amount of its liabilities by CY £100,000 or 16 per cent of the general premium income of the company in its last financial year, whichever is the greater amount; and
- In the case of a company carrying on only long-term business, its liabilities under unmatured life policies do not exceed the amount of its life assurance fund, its liabilities under unmatured industrial assurance policies do not exceed the

amount of its insurance, its liabilities under unmatured bond investment policies do not exceed the amount of its bond investment fund, and its liabilities under unmatured sinking fund policies do not exceed the amount of the fund maintained in respect of its sinking fund business.

18-11 Under section 20(1) of the Insurance Companies Laws 1984–1998, every insurance company, within six months of the expiration of its financial year, must invest in approved investment assets not less than the sum of:

- The amount of its liabilities to holders of local long-term insurance policies in respect of matured claims;
- The amount of its liabilities to holders of long-term insurance policies in respect of unmatured policies as determined by an actuary; and
- An amount equal to 70 per cent of the yearly gross premium income, less the premium paid for local reinsurance received from such companies; in respect of any insurance business other than long-term insurance and marine, aviation, and transit insurance business, such amount will be 50 per cent of such premiums.[3]

18-12 Section 25 of the Insurance Companies Laws 1984–1998 provides that, at the expiration of each financial year, every insurance company must prepare a revenue account, a balance sheet, and a profit-and-loss account or, in the case of a company not trading for profit, an income and expenditure account. According to section 29, the accounts and balance sheets must be audited. An insurance company which carries on insurance business of a class that may be prescribed must prepare an annual statement of business of that class. Under section 28, every account, balance sheet or statement of business must be deposited with the Superintendent within six months of the close of the period to which the accounts, balance sheet, or statement relates.

18-13 The Insured. Any person who is capable of contracting may be insured under a contract of insurance. Thus, an infant may enter into a contract of insurance if it is for his benefit. The insured is under a duty to disclose to the insurer, prior to the conclusion of the contract, all material facts within his knowledge which the insurer does not or is not deemed to know.

Insurable Interest

18-14 According to the English Common Law applicable in Cyprus, an insurable interest is a basic requirement of any contract of insurance. It follows that every contract of insurance requires an insurable interest to support it; otherwise, it is

3 The definition of an approved investment is contained in section 20(2) of the Insurance Companies Laws 1984–1998.

invalid. An attempt to define insurable interest was made in the case of *Lucena v Graufurd*,[4] where Judge Lawrence stated, *inter alia*:

> . . . interest does not necessarily imply a right to the whole or part of a thing, nor necessarily and exclusively that which may be the subject of privation, but having some relation to or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as, to produce a damage, detriment or prejudice to the person insuring.[5]

18-15 Certain statutes contain their own definition of insurable interest. In the Marine Insurance Act 1906, which is applicable in Cyprus due to the absence of any local legislation, every person has an insurable interest who is interested in a marine adventure. In particular, a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safe or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof. In certain kinds of insurance, eg, liability insurance and fidelity or solvency insurance, the very nature of the insurance implies the existence of an insurable interest, while other kinds of insurance, eg, personal accident insurance, are in practice effected by the insured, for the most part in respect of his own person or property.

The question of insurable interest becomes important when the insured, for his own benefit, effects insurance on the person or property of another.[6] In the case of personal accident insurance, the policy may be effected by the insured against the loss which he may suffer by reason of an accident to a third person. In such a case, the existence of the insurable interest is questionable.

However, a solution to the question of whether there is an insurable interest is found in section 4(5) of Cap 333, which is identical to section 36(4) of the English Road Traffic Act 1930 and which reads as follows:

> Notwithstanding anything in any Law contained, a person issuing a policy under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

18-16 In the English case of *McCormick v National Motor and Accident Insurance Union Ltd*,[7] the phrase 'notwithstanding anything in any Law contained' was

4 *Lucena v Graufurd* (1806) 2 BOS & PNR 269, HL.
5 *Lucena v Graufurd* (1806) 2 BOS & PNR 269, HL, at p 302.
6 Ivamy, *General Principles of Insurance Law* (2nd ed), at p 21.
7 *McCormick v National Motor and Accident Insurance Union Ltd* (1934) 49 L1 L Rep 361 CA.

interpreted to mean that contracts of motor vehicle insurance are excluded from the need to show an insurable interest.[8]

As a general rule, although the insured must have some interest in the subject matter to entitle him to effect an insurance in respect of it, it is not necessary that he should specify in the contract, or even disclose to the insurers, either the nature or the extent of his interest.[9]

Exceptionally, a specific description of the insurable interest is required. This is the case where there is an express condition to this effect, or the insurance is of prospective profits or against consequential loss, or the interest is material to the risk.[10] The insurable interest must have a pecuniary value and must be a real interest. However, a right to future possession, or a future interest, also is insurable. It must exist at the time of the loss. Thus, in the case of fire insurance, the insured must show that, at the time of the loss, he had an insurable interest in the object destroyed.[11]

Formation

18-17 In General. As in the case of any other contract, a contract of insurance requires offer, acceptance, consideration, and an intention to create legal relations.[12] There must be a clear agreement as to the distinctive features of the particular contract.

The parties therefore must be ascertained; the insurers must have agreed to insure the particular insured; and the insured must have agreed to the particular insurance. Moreover, the contract must fix the period of insurance, the sum to be insured, and the premium to be paid.[13]

18-18 Offer. Although an offer to enter into an insurance contract may be made either by the prospective insured or by the insurer, in practice, it is usually made by the insured completing a proposal form. To be considered as complete and communicated, the offer contained in the proposal form must be forwarded to the insurer. The contents of proposal forms vary according to the nature of the insurance and the practices of insurance companies. However, all proposal forms contain questions as to:

- The description of the proposed insured;
- The risk to be insured;

8 Iacovides, *Problems of the Compulsory Motor Vehicle Insurance in Greece and Cyprus* (1st ed), at p 32.

9 Ivamy, *General Principles of Insurance Law* (2nd ed), at p 23; *MacKenzie v Whitworth* (1875), L R 10 Exch 142.

10 Ivamy, *General Principles of Insurance Law* (2nd ed), at p 24.

11 *Sadlers' Co v Badcock* (1743), 2 Atk 554; Birds, *Modern Insurance Law* (2nd ed, 1988), at p 53.

12 Birds, *Modern Insurance Law* (2nd ed, 1988), at p 53.

13 Ivamy, *General Principles of Insurance Law* (2nd ed), at p 61.

- The circumstances affecting the risk; and
- The history of the proposed insured.[14]

18-19 Acceptance. The insurer may accept the offer as made, or he may accept it with qualifications, in which case the acceptance may amount to a counter-offer. As a general rule of the law of contract, the acceptance of an offer is not effective until communicated to the offeror, and this rule also applies in the case of an insurance contract. The insurer may communicate the acceptance of a proposal made by the prospective insured by:

- A formal acceptance;
- The issue of a policy; or
- The acceptance of the premium.

Void and Voidable Contracts

18-20 Void Contract. A contract of insurance is void if it is illegal, and this is the case when:

- The insured does not posses the insurable interest required;
- The contract has been entered into to achieve a purpose which is illegal or contrary to public policy; and
- A contract is vitiated by the unlawful use of insured property.[15]

18-21 In some cases, the validity of a contract of insurance may be affected by a mistake. For example, where there is no *consensus ad idem*, no contractual obligations are created.[16] The question as to what sort of mistake would render a contract void was considered in *Bell v Lever Bros*,[17] where it was stated that only a fundamental common mistake affecting the subject matter of the contract would render a contract void.

As far as insurance contracts are concerned, there are three categories of cases where a common mistake by the insurer and the insured will render the contract void, as follows:

- The insured property does not exist;
- The person whose life has been insured is already dead; and
- A compromise has been reached in relation to claims arising out of an insurance policy, or an assignment of a policy has taken place and such policy was void or inapplicable, whereas the parties had a different impression.[18]

14 Ivamy, *General Principles of Insurance Law* (2nd ed), at p 65.

15 Birds, *Modern Insurance Law* (2nd ed, 1988), at p 72.

16 Charalambides, *Legal Aspects of Insurance in Cyprus* (1st ed, 1991), at p 4/27.

17 *Bell v Lever Bros* (1932) AC 161.

18 Charalambides, *Legal Aspects of Insurance in Cyprus* (1st ed, 1991), at p 4/28.

18-22 Voidable Contract. A contract of insurance is voidable at the option of the insurer where the insured is guilty of fraud, non-disclosure, or misrepresentation, or of a breach of a term of the contract which constitutes a warranty.

Premiums

18-23 In *Lewis v Norwich Union Fire Ins Co*,[19] the premium was defined as the consideration given by the insured in return for the insurer's undertaking to cover the risks insured against in the policy of insurance.[20] The amount of the premium as a matter of contract depends on the insurer's estimate of the risk. Most insurance companies in Cyprus issue tables of premiums showing the rate charged by them for each class of risk undertaken. The premium is fixed by the insurance companies, and must be agreed to by the proposed assured.

No general rule requires the actual payment of the premium before the insurer is at risk[21] although, particularly in life insurance, this will be required as a term of the policy. The premium, by agreement, may be payable by instalments as, for instance, where it is a lump sum payable for an insurance extending over a period of years. An insured is basically entitled to a return of premium where there has been a total failure of consideration. This is the case where the policy is:

- Never concluded;
- Cancelled *ab initio*;
- Void or voidable *ab initio*; or
- Illegal.

Disclosure and Misrepresentation

18-24 A representation may establish or render a contract voidable at the option of the person to whom the representation was made if it is:

- Substantially false;
- Material to the risk; or
- An operative inducement to the contract.[22]

18-25 The basic principles of disclosure are stated in the leading case of *Carter v Bohm*:

> Insurance is a contract on speculation. The special facts, on which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds

19 *Lewis v Norwich Union Fire Ins Co* (1916) AC 509, at p 519.
20 Birds, *Modern Insurance Law* (2nd ed, 1988), at p 121.
21 *American Home Assurance Co and Others v Christou*, Civil Appeal 9546 of 23 September 1998.
22 *MacGillivray and Parkington on Insurance Law* (8th ed, 1988), at p 216.

> on the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.[23]

18-26 Thus, the insured has a duty to disclose to the insurer at the time of making or remaking the contract of insurance all the facts which are material to the risk. Whether a fact is material is a matter of fact.[24] A fact is material for the purposes of both non-disclosure and misrepresentation if it is one which would influence the judgment of a reasonable or prudent insurer in deciding whether or not to accept the risk or what premium to charge.[25] Section 10(3)(b) of the Motor Vehicle (Third Party Insurance) Law[26] defines 'material fact' as a fact 'of such a nature as to influence the judgment of a prudent insurer in determining whether he will accept the risk, and if so, at what premium and on what conditions'.

For an insurer to obtain the benefit of section 10(5), he must prove that the policy in question was obtained by non-disclosure or misstatement, ie, but for that non-disclosure or misstatement, the contract which was obtained would not have been obtained.[27] The misrepresentation must be of a fact known or which ought reasonably to have been known by the insured at the time he answers the questions in the proposal form.[28] The burden of proving that the proposer has made a misstatement in the proposal form lies on the insurance company.[29]

The above principles were adopted by the District Court of Nicosia in *Commercial Union Assurance* (*Cyprus*) *Ltd v Costas Stavrides*.[30] Although a contract may be voidable on the ground of a positive misrepresentation with regard to a material fact, only some categories of contracts are voidable on the ground that a material fact was not disclosed. In an insurance contract, the parties have an overriding duty to disclose all the material facts for the reason that a contract of insurance is a contract of *uberrima fides*.[31] For the purposes of the Insurance Companies Law, non-disclosure may be defined as the intentional or unintentional failure of one party to the contract to disclose to the other party a fact which:

- Is known to him;
- The other party does not know; and

23 *Carter v Bohm* (1766) 3 Burr 1905.
24 *Zurich Insurance Co v Morisson* (1942) 1 All ER 529.
25 Birds, *Modern Insurance Law* (2nd ed, 1988), at p 87.
26 Motor Vehicle (Third Party Insurance) Law, Law 96(I) of 2000.
27 *Zurich Insurance Co v Morisson* (1942) 1 All ER 529, at p 533.
28 *Whitwell v Autocar Fire and Accident Insurance Co Ltd* (1927) Ll L Rep 318, Ch D; *Joel v Law Union and Crown Insurance Co* (1908) 2 KB 863.
29 *Adams v London Insurance Co Ltd* (1932) 43 LL L Rep 56.
30 *Commercial Union Assurance (Cyprus) Ltd v Costas Stavrides* (1981) JSC 1-2, at p 276.
31 *Paneuropean Insurance Co v Electric Leisure Cruises Ltd*, Civil Appeal 9539 of 21 May 1998.

- If disclosed to the other party, would influence him not to enter into the contract or, if he had entered into the contract, to have done so on more favourable terms.[32]

Warranties and Conditions

18-27 A warranty is a term of an insurance contract on breach of which the insurer can repudiate the contract. Warranties must be strictly complied with. The basic characteristics of a warranty are that it must be a term of the contract; it must be material to the risk; and the person who gives a warranty must comply with it. A breach releases the insurer from his responsibilities, even if the loss is not the result of the breach or the breach was waived before the loss occurred. In *Klitos Mavrides v Cannon Insurance Ltd*,[33] it was stated that:

> The proposal, by an express agreement, is made part of the insurance agreement and forms the basis of that contract. That means that the truth of the statements contained in the proposal are made a condition precedent to the liability of the insurers. The answers contained in the proposal constitute a warranty, in that it is expressly agreed to be so, and a breach of warranty avoids the contract.[34]

18-28 A representation may be equitably and substantially answered, but a warranty must be strictly complied with. A warranty in a contract of insurance is a condition or contingency and, unless that be performed, there is no contract. It is immaterial for what purpose the warranty is introduced, but, being inserted, the contract does not exist unless it be liberally complied with.[35]

Cancellation

18-29 Many non-life policies contain a condition entitling either party to cancel them on giving notice to the other party. However, a clause permitting immediate cancellation would be valid. Life insurance policies do not contain cancellation clauses of such a kind, but they commonly permit the insured to surrender the policy after a certain number of years so that the insured then receives a lump sum, the surrender value; or they provide for the policy to become paid up so that no more premiums are due, but the benefits accruing on death are reduced to the appropriate sum in relation to the premiums actually paid.

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32 Charalambides, *Legal Aspects of Insurance in Cyprus* (1st ed, 1991), at p 4/32.
33 *Klitos Mavrides v Cannon Insurance Ltd* (
34 *D Hahn v Hartley* (1786) I TR 343, at p 345.
35 Ivamy, *General Principles of Insurance Law* (2nd ed), at pp 198 and 199.

Where an insurer alleges that it was induced to issue the policy by reason of fraud, misrepresentation, or non-disclosure on the part of the insured, it is entitled to apply to the court, on discovering the facts, for an order that the policy be delivered up to be cancelled. The right of cancellation, whether on the ground of fraud, misrepresentation, or non-disclosure, is based on the fact that the policy is thereby voidable *ab initio*. The power of the court to declare the contract void and to order cancellation of the policy only exists where the contract is voidable *ab initio* by reason of a defect existing when the contract was made. Similarly, where the insured alleges that he was induced to enter into the contract contained in the policy by similar conduct on the part of the insurer or its agents, he is entitled to apply to the court for an order rescinding the contract.[36]

Interpretation of Insurance Contracts

18-30 The basic rules applicable to the interpretation of an insurance policy are the following:

- The intention of the parties must prevail;
- The whole of the policy must be looked at;
- The written words will be given more effect than the printed words;
- The policy must be construed in accordance with the ordinary laws of grammar;
- The ordinary meaning of the words will be adopted;
- The meaning of a particular word may be limited by the context;
- The words of the policy must be taken to mean what they say;
- The words of the policy, if possible, must be construed liberally;
- In case of ambiguity, the reasonable construction is to be preferred;
- In case of ambiguity, the *contra proferentem*[37] rule will be applied;
- Where the words are repugnant to each other, the court will exhaust every means to reconcile the inconsistencies;
- An express term overrides any implied term which is inconsistent; and
- Where a matter left uncertain in the policy afterwards becomes ascertained, the ascertained part will be treated as if it had been inserted in the original policy.[38]

18-31 The words of the policy, if possible, must be construed liberally, so as to give effect to the intention of the parties. The words of the policy are not to be extended beyond their ordinary meaning to comprehend a case which is within their object and which the parties would probably have desired to include, if it had occurred to them, to give effect to an intention which is not expressed.

36 Ivamy, *General Principles of Insurance Law* (2nd ed), at pp 198 and 199.
37 *Paneuropean Insurance Co v Glyki*, Civil Appeal 9860 of 22 September 1998.
38 Ivamy, *General Principles of Insurance Law* (2nd ed), at p 291.

Special Types of Insurance

Insurance Encompassed by the Insurance Law

18-32 The Insurance Law encompasses life insurance,[39] industrial insurance,[40] bond investment,[41] and sinking funds.[42]

Motor Vehicle Insurance

In General

18-33 Motor vehicle insurance is the business of effecting insurance against damage to, or arising out of or in connection with the use of, a motor vehicle including third-party risks. The Motor Vehicles (Third Party Insurance) Law, Cap 333, has been replaced by the Motor Vehicles (Third Party Insurance) Law, Law 96(I) of 2000. Reference will be made to the old Law and the new Law below.

Motor Vehicles (Third Party Insurance) Law

18-34 According to the Motor Vehicles (Third Party Insurance) Law, a policy for the purposes of this Law must be one which:

- Is issued by an insurer;
- Insures such person or persons, or classes of persons, as may be specified in the policy in respect of any liability which may be incurred in respect of the death of or bodily injury to any person caused by or arising out of the use on the road of a motor vehicle covered by the policy;

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39 Life insurance business means the issue of, or the undertaking of liability under, policies of insurance on human life, or the granting of annuities on human life, but it does not include industrial insurance.

40 Industrial insurance is defined as the business of effecting insurance on human life, premiums in respect of which are payable, at intervals not exceeding two months in each case, to collectors sent by the insurer to each owner of a policy, to his residence or place of work.

41 Bond investment is the business of issuing bond certificates by which the company, in return for subscriptions payable at periodical intervals of not more than six months, contracts to pay the bond holder a sum of money at some future date, not being life insurance business, industrial insurance business, or sinking-fund business. Under section 58 of the Insurance Companies Laws 1984–1998, an insurance company which carries on bond investment business is not allowed to give the holder of any policy issued after the commencement of the relevant statute any advantage dependent on lot or chance.

42 Sinking fund means the business of effecting contracts of insurance where one party to such a contract assumes the obligation to pay, after the expiration of a certain period or during a specified period, a certain sum or sums of money to a specified person in return for the payment or the promise of payment from time to time of a certain sum of money by the other party to the contract.

- Insures such person or persons in respect of any liability arising by virtue of the provisions of the Law in respect of the payment of any expenses incurred for emergency treatment; or
- Insures such person or persons in respect of any liability for any damage to property caused by or arising out of the use on the road of a motor vehicle covered by a policy.

Such policy is not required to provide cover in respect of damage to:

- Property in excess of CY £50,000 for any accident or sequence of accidents arising out of a single incident;
- Any property asset incurred during the loading or unloading or transportation by, in, or on a motor vehicle; or
- Any property asset which belongs to or is in the possession or custody or under the control of the insured or any member of his household.

18-35 According to section 3(1) of the Motor Vehicles (Third Party Insurance) Law, no person may use, cause, or permit any other person to use a motor vehicle on a road unless there is in force in relation to the use of that motor vehicle by such person or such other person, as the case may be, such a policy in respect of third party risks as is provided in the Law. Section 3(2) provides that any person acting in contravention of section 3 is liable to imprisonment not exceeding two years or a fine not exceeding CY £1,000 or both. A person convicted of an offence under this section will be disqualified[43] from holding or obtaining a driving licence.

According to section 4(3), as amended by Law 158 of 1987, motor vehicle insurance does not cover the liability of an employer to an employee in respect of death or bodily injury arising out of and in the course of his employment[44] and any contractual liability.

Section 10 of the Motor Vehicles (Third Party Insurance) Law provides that, if a certificate of insurance has been issued in favour of a person, a judgment against him obtained in respect of any liability which is compulsorily insurable must be satisfied by the insurer, whether or not the latter has the right to avoid or cancel the policy. The obligation of the insurer includes the payment to the person entitled to the benefit of such judgment of:

- Any sum payable in respect of the liability;
- Costs; and
- Interest on the sum payable on the judgment.

43 *Nicosia Police and Djemal Ahmet*, 3 RSCC 50; *Eleftheriou v The Police* (1992) 2 CLR 300; *Elias Poullis v The Police*, Civil Appeal 6835 of 25 January 2000.

44 Compulsory Employer's Liability Insurance Law 1989, Law 174 of 1989.

18-36 According to section 10(2) of the Motor Vehicles (Third Party Insurance) Law, as amended,[45] the insurer is not liable to pay any sum if:

- The insurer was not given notice of the proceedings against the insured before or within seven days of their commencement;
- In the case of a judgment which concerns damage to property, the insurer was not given notice, by the person in favour of whom the judgment was issued within six months of the date of the creation of the claim in relation to which the judgment was issued, of his intention to make a claim or the insurer was not given notice so as to have a reasonable time to inspect the relevant damage before it was repaired;
- Execution of a judgment has been stayed pending an appeal;
- The insured's policy was cancelled before the relevant event, by mutual consent or under a term in the policy, and the certificate of insurance was surrendered or the insured made a statutory declaration that it was lost or destroyed within 14 days of the cancellation or within the same period the insurer commenced proceedings in respect of the failure to surrender the certificate; or
- The insurer, within three months of the commencement of the proceedings against the insured, obtains a declaration by the court that the policy was obtained by non-disclosure or misrepresentation of a material fact and has given notice of the action for a declaration and the particulars of the non-disclosure or misrepresentation within seven days of its being commenced.

18-37 Section 11 of the Motor Vehicles (Third Party Insurance) Law provides that, if the insured goes bankrupt or enters into a composition or arrangement with his creditors or if a company goes into liquidation, administration, or receivership, the insured's liability in respect of compulsory insurance to the third person, notwithstanding anything contained in any Law to the contrary, shall be transferred to and vest in the third party to whom the liability was so incurred.

Law 96 (I) of 2000

18-38 The Motor Vehicles (Third Party Insurance) Law, Law 96 (I) of 2000 ('the New Law'), harmonises the obligatory insurance of motor vehicles with the EU position, modernises the legislation, and opens up the way for the accession of Cyprus to the Multi-Guarantee Agreement.

The New Law is based to a large extent on the Old Law, which has been repealed. The differences between the Old Law and the New Law fall into three categories, as follows:

- Provisions introduced as a result of the harmonization with the Directive of the EU and the Multi-Guarantee Agreement;

45 In this case, the Motor Insurers' Fund has no obligation to compensate the victim, but it has a discretion to do so on an *ex gratia* basis, if the victim has sustained permanent bodily injury or died and provided that it can be proved that the unknown driver was liable for the accident.

- Provisions clarifying the order of the Old Law; and
- Improvements in the wording of the order of the Old Law which were found as necessary without any difference in their meaning.

18-39 The most important changes brought about by the New Law are the following.

Section 2 contains new definitions of the terms 'motor vehicle' and 'usual place of parking of motor vehicles', as stated in the Directive. The terms 'Multi-Guarantee Agreement', 'Consultation of the Offices', and 'Agreement of Joint Type' also are also introduced and explained.

In section 3, 'Obligatory Insurance against a Third Party — Torts and Penalties', a new provision has been added whereby it is an adequate defence to any charge brought against a person who appears to be violating the provisions of section 3 if it is proved in court that he was:

- Using a motor vehicle which did not belong to him and he was not in possession of it by renting or borrowing it;
- Driving the motor vehicle during his employment; and
- Not aware, nor had any reason to believe, that insurance cover did not exist in relation to the motor vehicle.

18-40 Section 4, 'Presumptions which must be satisfied by the insurance', has added the provision that the insurance must also provide cover outside Cyprus, in any other state which has already signed the Multi Guarantee Agreement. The insurance will provide cover for the member states who are parties to the Multi-Guarantee Agreement in relation to any liability which may arise against the person using the motor vehicle on the soil of any member state according to the legislation providing for the existing obligatory insurance against civil liability which arises from the use of a motor vehicle in the state where the event giving rise to such a liability occurs.

The amounts in relation to the cover which will be offered to the member states who are parties to the Multi-Guarantee Agreement will be in accordance either with the legislation in force on the Obligatory Insurance against Civil Liability which arises from the use of a motor vehicle in the state where the event giving rise to such a liability occurs or with the legislation on Obligatory Insurance which will be applied according to the New Law, whichever is higher.

Under section 4, the insurance must cover the driver against any possible liability in relation to the death or bodily injury of a person. In this article, the definition of 'a person' was added, which includes:

- Persons who are being in pursuance of a contract of employment;
- Persons who are being carried as fare payers;
- Members of the household of the insured; and

- Persons who are in the motor vehicle in breach of any law or regulation exempting the persons who are being carried under the circumstances referred to section 14(3) of the Law.

18-41 In section 4(2), relating to loss or damage which does not need to be covered, the following vital changes were made:

- The minimum cover for damage to property was increased from CY £50,000 to CY £60,000 for each claim, not each incident; and
- The minimum cover for bodily injury or death was reduced from an unlimited amount to CY £2 million for each claim, not each incident.

By section 4(3), the exception relating to liability for death or bodily injury, which arises as a result and during the course of the employment of a person by the insured, will only apply in cases where such liability is covered by the insurance issued pursuant to the Obligatory Insurance under the Compulsory Employers' Liability Insurance Law.[46] The Law will be amended shortly to exempt the liability from the obligatory cover. Under the same section, the following exceptions were added by way of clarification:

- Liability for a person as a passenger in a motor vehicle; and
- Liability which arises from a deliberate and planned act or omission which is considered to be a felony according to the criminal law and which cannot be considered to be an accidental event.

18-42 Section 14, 'Obligation of the insurers to satisfy court judgments', is a new formulation of section 10(1) of the Old Law, and it includes new provisions concerning this obligation, as follows:

- Insurers are obliged to satisfy court judgments which have been obtained against any person, even if he is not covered by insurance, except where liability is excluded; and
- The driver's liability will be covered, even in cases where he does not hold a licence authorising him to drive the motor vehicle.[47]

18-43 The insurer who becomes responsible for paying any amount under these provisions has the right to recover such an amount from the insured. Where the insurer becomes liable to pay, under section 14, any amount relating to the liability of a person who is not covered by insurance, he is entitled to recover such amount from:

- Such a person; or
- Any other person who is covered by the insurance, according to the terms of which the liability would be covered if the insurance provided cover to any

46 Law 174 of 1989, amended by Law 63 (I) of 1997.

47 Term of the insurance which purports to limit the cover in relation to the possession or otherwise of a driving licence will be treated as void in relation to the driver's liability to third parties.

person, and who provoked or permitted the use of the motor vehicle which created the liability.

18-44 The term 'exempted liability' referred to in section 14 means the liability in relation to the death or bodily injury or damage to the property of any person who, at the time of the use which caused the liability, is being carried voluntarily in or on the motor vehicle and knows or has reason to believe that the motor vehicle was stolen or was illegally possessed and taking into consideration that:

- This person was not a person who knew or had any reason to believe that the motor vehicle was stolen or was illegally possessed only after the commencement of the journey; and
- It would not be reasonable to expect such a person to disembark from the motor vehicle.

18-45 In the New Law, a new part has been introduced, in sections 27 to 35, which relates to the Motor Insurers Fund (until now the Fund was covered by the Insurance Laws). These sections provide that:

- Members of the Fund comprise all the insurance companies who operate a department for motor vehicle liability in Cyprus;
- There is a binding agreement between the Minister of Finance and the Fund; and
- According to the agreement with the Minister, the Fund undertakes the obligation to pay, in certain cases and under certain circumstances, compensation to third parties including persons who were injured or died as a result of the liability of unknown drivers and who are not in a position to obtain compensation from any other source.

18-46 The sections also provide for the rights of the Fund pursuant to subrogation, the procedure for payment of compensation from the Fund, the procedure for settlement in case of difference arising between a third party and the Fund, and the procedure for submission of claims in relation to the liability of unknown drivers.

Section 3(2) creates a new category of motor vehicle exempted from obligatory insurance, as follows:

> . . . any motor vehicle which may be used as a machine and as a tool of trade and which at the time of use when the liability was created was stationary on the ground and was being used as a machine or a tool of trade.

18-47 Section 4(5) specifies that the insurance, to be valid, must be issued and delivered as an insurance certificate.

Under section 5, the insurance certificate will be considered as delivered when it has been:

- Personally received by the insured or his authorised representative;
- Sent by post; or
- Sent by telefax or e-mail.

18-48 Section 15 provides that the insurer is obliged to pay the amount according to a court judgment only if before, or within seven days of, the commencement of proceedings the insurer was given notice in writing of the date of the filing of the writ. In addition, notice to examine the damage must be given in writing.

18-49 Finally, the penalties provided by the New Law are stricter than those provided by the Old Law.

The Motor Insurers' Fund

18-50 After the coming into force of the Motor Vehicles (Third Party Insurance) Law, a great number of owners and drivers of vehicles did not have the required cover. Consequently, some victims of road accidents received no compensation. Section 55 of the Insurance Companies Law of 1967, which came into force in 1969, gave the Minister of Finance the power to establish a fund that would cover such cases. In 1969, the Motor Insurers' Fund was set up, modelled on the Motor Insurers' Bureau of England, and was registered with the Registrar of Companies as a company limited by guarantee whose members were insurance companies which carried on motor insurance business in Cyprus.

On 22 April 1969, the Minister of Finance and the President of the Motor Insurers' Fund signed an agreement, known as the Principal Agreement, by virtue of which the Motor Insurers' Fund has undertaken to indemnify victims of road accidents, who otherwise would receive no compensation, in the following cases:

- An uninsured driver;
- Ineffective insurance, ie, the policy was void or voidable; and
- An unknown driver.[48]

18-51 On 18 July 1972, a Supplementary Agreement was signed, providing that the Motor Insurers' Fund could be called on to pay compensation in the case of insolvency of the insurer. Before the signing of the Supplementary Agreement a Protocol was signed, providing for the payment to the Motor Insurers' Fund by its members of one per cent of the gross premiums received. This percentage was increased to three per cent and then reduced to two per cent.

Insurance companies have the right to impose terms, excluding particular drivers from cover totally or allowing them to be included, but only subject to certain conditions being fulfilled. Where the insurance policy is void or voidable because the insured has violated any of the conditions of the policy, the Motor Insurers' Fund is obliged to pay compensation. To avoid the possibility that insurance companies would include many conditions in their contracts and so refer numerous

48 In this case, the Motor Insurers' Fund has no obligation to compensate the victim, but it has a discretion to do so on an *ex gratia* basis if the victim has sustained permanent bodily injury or died and provided that it can be proved that the unknown driver was liable for the accident.

cases to the Motor Insurers' Fund, an Internal Agreement was signed on 6 March 1969 between the Motor Insurers' Fund and its members.

Clause 7 of the Principal Agreement specifies the conditions precedent to the liability of the Motor Insurers' Fund, namely:

- The applicant or his lawyer must give to the insurer or, if no effective policy exists, to the Motor Insurers' Fund, a notice in writing sent by registered mail, within seven days from the commencement of court proceedings;
- Where the claim concerns personal injuries and damage to property or only damage to property, the applicant or his lawyer must give, in addition to the notice specified above, a special notice immediately after the accident and before the vehicle is repaired;
- A copy of the writ of summons or the statement of claim must be given to the insurer or the Motor Insurers' Fund; and
- If a judgment is issued against an uninsured driver and the sum awarded by the judgment is paid by the Motor Insurers' Fund on behalf of the plaintiff, the applicant must assign to Motor Insurers' Fund any judgment obtained by him against the Motor Insurers' Fund.

Fire Insurance

18-52 Fire insurance business means the issue of, or the undertaking of liability under, policies of insurance against loss or damage by or incidental to fire.

Accident Insurance

18-53 Accident insurance business is the issue of, or the undertaking of liability under, policies of insurance on the happening of personal accidents, whether fatal or not, disease, or sickness.

Marine, Aviation, and Transit Insurance

18-54 Marine, aviation, and transit insurance is the business of effecting and carrying out, otherwise than incidentally to another class of insurance business, contracts of insurance:

- On vessels or aircraft, or on the machinery, tackle, furniture, or equipment of vessels or aircraft;
- On goods, merchandise, or property of any description whatever on board vessels or aircraft;
- On the freight of, or any other interest in or relating to, vessels or aircraft;
- Against damage arising out of or in connection with the use of vessels or aircraft, including third-party risks;
- Against risks incidental to the construction, repair, or docking of vessels, including third-party risks;

- Against transit risks (whether the transit is by sea, inland water, land, or air, or partly one and partly another), including risks incidental to transit insured from the commencement of transit to the ultimate destination covered by the insurance, but not including risks the insurance of which is motor-vehicle insurance business; and
- Against any other risks the insurance of which is customarily undertaken in conjunction with or as incidental to any business referred to in the foregoing paragraphs of this definition.

18-55 There is no law in Cyprus concerning marine insurance. However, the English Marine Insurance Act 1906 is applicable. In recent years, the Supreme Court of Cyprus, in its Admiralty jurisdiction, has dealt with a considerable number of marine insurance claims, and has awarded large sums as damages.

Employers' Liability Insurance

18-56 Employers' liability insurance business is the issue of, or the undertaking of liability under, policies insuring employers against liability to pay compensation or damages to workmen in their employment, but does not include any business carried on as incidental to marine, aviation, and transit insurance.

The compulsory employers' liability insurance business is regulated by the Compulsory Employers' Liability Insurance Law,[49] which is modelled on the Motor Vehicles (Third Party Insurance) Law, Cap 333.

According to section 3 of the Compulsory Employers' Liability Insurance Law, employers' liability insurance is not compulsory if the employer is the Republic of Cyprus, the employer belongs to a category expressly exempted from compulsory employers' liability insurance by the Council of Ministers, or the nature of the employment is such as is prescribed by Part II of the First Schedule to the Social Insurance Law.[50]

Compulsory employers' liability insurance also covers Cypriot employees working outside Cyprus for any employer, not necessarily Cypriot companies or foreign or international companies which are registered in Cyprus.

Section 17 of the Compulsory Employers' Liability Insurance Law provides for the establishment of a fund similar to the Motor Insurers' Fund, the object of which will be to satisfy any claims with regard to:

- Any risks which are not covered by an insurance, whether wholly or partially;
- A void policy; and
- The insolvency of the insurance company.

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49 Law 174 of 1989, as amended by section 6 of the Compulsory Employers' Liability Insurance (Amendment) Law, Law 63(1) of 1997, in force from 1 November 1997.

50 Social Insurance Laws 1980–1995.

18-57 Any condition in the insurance policy which seeks to impose a restriction on the insurance cover of the insured person (ie, the employer) in relation to the number, age, sex, physical or mental condition, nationality, level of education, training, or the capacity of employees, or the place, time, duration, the means of protection, or the nature of the work of the employees or their remuneration, or any discriminatory term towards employees will not be valid in terms of the employer's liability.[51]

Miscellaneous Insurance

18-58 Miscellaneous insurance is the business of effecting contracts of insurance which is not principally or wholly related to any of the other classes of insurance business specified in section 3(1). Within the scope of miscellaneous insurance business fall private liability insurance, professional liability insurance, public liability insurance and pollution liability insurance, medical insurance, and travellers' insurance. Medical and travellers' insurance are well known in Cyprus, whereas the other kinds of insurance are newly introduced to the Cypriot insurance industry and are not in common use.

Social Insurance

18-59 Social insurance in Cyprus is regulated by the Social Insurance Laws of 1980–1995. In Cyprus, there is a Social Insurance Scheme which is exclusively operated by the State. The Scheme covers all employed and self-employed persons, except for foreign employees of international companies registered in Cyprus. Foreigners who are employed by Cypriot companies or individuals are covered by the Social Insurance Scheme.

The contribution payable in relation to an employee is 16.6 per cent of his insurable earnings, of which 6.3 per cent is paid by the employee, 6.3 per cent by the employer, and four per cent by the Social Insurance Fund.[52] In the case of a self-employed person, the sum payable as contribution is 15.6 per cent of his insurable earnings, of which 11.6 per cent is paid by the self-employed person and four per cent by the Social Insurance Fund.[53] According to section 22 of the Social Insurance Laws 1980–1995, the benefits provided by the Social Insurance Scheme are:

- Sickness benefit;
- Unemployment benefit;
- Old age pension;
- Invalidity benefit;
- Widow's benefit;

51 Compulsory Employers' Liability Insurance (Amendment) Law, Law 63 (1) of 1997, s 7(2).
52 Social Insurance Laws 1980–1995, as amended by Law 98 (1) of 1992, s 5.
53 Social Insurance Laws 1980–1995, as amended by Law 98 (1) of 1992, s 13.

- Orphan's benefit;
- Matrimonial benefit;
- Childbirth benefit;
- Funeral benefit; and
- Missing person's benefit.[54]

Insurance Market

In General

18-60 The incorporation of an insurance company, branch, or subsidiary is governed by the Insurance Companies Laws of 1984–1998 and the Companies Law, Cap 113.

Establishment of an Insurance Company

18-61 An insurance company must be incorporated, like any other company, in accordance with the provisions of the Companies Laws, Cap 113. Prior to commencing incorporation, an application must be filed with the Registrar of Companies for approval of the company's name. Once approval of the name has been obtained, the following documents must be submitted to the Registrar of Companies:

- The memorandum and articles of association;[55]
- A list of the directors and the secretary's name;[56] and
- The address of the company's registered office, which will be the place at which all official notices are served.

18-62 Following its registration with the Registrar of Companies, an insurance company must apply to the Superintendent of Insurance for a licence. The application must be made in the form provided by the Insurance Companies Regulations and be accompanied by the prescribed fee. According to section 8 of the Insurance Companies Laws 1984–1998, the Superintendent of Insurance shall issue a licence if he is satisfied that:

- The company has a paid-up share capital of not less than CY £200,000;
- The margin of solvency of the company is not such that the company is deemed under section 36 of the Insurance Laws 1984–1998 to be unable to pay its debts;

54 'Missing person' refers to persons who have been missing since the Turkish invasion of 1974 and for whom there is no positive information as to their whereabouts.

55 The memorandum must state, *inter alia*, the company's name and objects, and the number and the value of the shares authorised to be issued. The articles of association contain the rules which govern the company's internal procedures and functions.

56 A minimum of one director is required.

- The class of insurance business for which the application is made will be conducted by the applicant in accordance with sound insurance principles;
- The company is reinsured, or has made arrangements for its reinsurance, by another insurance or reinsurance company in respect of policies issued or to be issued thereby or that it is justifiable not to be reinsured or to make arrangements for its reinsurance;
- The name of the company is not identical with that of an existing licensee under or of a company which was lawfully carrying on insurance business in Cyprus, unless such licensee or company is being or is about to be wound up or dissolved, or is ceasing or is about to cease to carry on insurance business in Cyprus, and consents to the licensing of the applicant under the name in question; and
- The company complies with the provisions of section 9 of the Insurance Companies Laws 1984–1998, which provides that the Superintendent of Insurance will not grant a licence to a company if any director, controller, manager, or any principal of the company, provided for in section 30, does not satisfy such standards and requirements as may be prescribed.

18-63 According to section 17 of the Insurance Companies Laws 1984–1998, every insurance company must deposit with the Central Bank of Cyprus the sum of CY £30,000 in respect of each class of insurance business. Section 17(2) provides that the deposit may be made in two equal instalments, of which the first must be paid before the application for a licence is made and the second within six months of the date of the licence. The application to the Superintendent must be accompanied by the following:

- A business plan, reflecting the company's intended operations during the first three years, including information relating to the administrative structure of the company's head office and its branches, the approximate number of agents and/or intermediaries to be appointed, and the average commission which will be paid in each case, as well as such information as would normally be contained in a revenue account;
- A specification, in terms of section 3(1) of the Insurance Companies Laws 1984–1998, showing the classes of insurance business which the company intends to carry on; and
- Specimens of policy contracts which the company is proposing to adopt in carrying on the different classes of insurance business, as well as copies of any other standard forms relating thereto.

18-64 Once satisfied that the application is complete, the Superintendent will issue a licence to the company, which also will be published in the *Official Gazette*. The licence remains in force for a period of one year from the date of issue and is renewable from year to year on payment of the prescribed fee.

Establishment of a Branch

18-65 A foreign insurance company which wishes to open a branch in Cyprus must first apply to the Central Bank of Cyprus for permission. The application must contain information as to the registered address, description of its main activities, the name of the registered legal owners and of the beneficial owners, if any, and it must be accompanied by a bank reference for each shareholder. Once permission is granted, the branch must, as in the case of any other branch, within one month of establishment of the place of business, be registered with the Registrar of Companies under sections 347 *et seq* of the Companies Law which, under section 56 of the Insurance Companies Laws 1984–1998, also apply to an insurance company incorporated or constituted outside Cyprus which carries on business in Cyprus. The following documents must be delivered to the Registrar for registration:

- A certified copy of the memorandum and articles of association, or the charter or other instrument defining the constitution of the company;
- The particulars of the directors and secretary of the company; and
- The name and address of at least one person resident in Cyprus who is authorised to accept service of notices on behalf of the company.

18-66 Where the required documents are not in Greek, a translation must be filed. An overseas company is required to file the annual accounts published in the company's own country, or a Greek translation of those accounts if they are not in Greek. After the branch has been registered with the Registrar of Companies, an application must be filed with the Superintendent of Insurance for a licence. The same procedure is to be followed as applies in the case of the establishment of an insurance company.

However, section 8(3) of the Insurance Companies Laws 1984–1998 provides that the Superintendent of Insurance, with the approval of the Minister of Finance, may waive the solvency margin requirement for a period not exceeding six months if he is satisfied from information furnished by the applicant company that the company is otherwise solvent and that, in the case of a company whose head office is in another country, it has complied with the insurance laws of that country.

Establishment of a Subsidiary Company

18-67 For the establishment of a subsidiary, the same procedure must be followed as applies in the case of the establishment of a branch.

Establishment of an International Insurance Company

18-68 To obtain an international status, an insurance company must comply with the following requirements:

- Its shares must belong, directly or indirectly, exclusively to aliens; and
- Its income must be derived from sources abroad, ie, it must be exclusively engaged in business carried on outside Cyprus.

18-69 The registration procedure for an international insurance company is similar to that applicable in the case of a local insurance company, except that the prior approval of the Central Bank of Cyprus is required. Approval will be granted if the Central Bank receives satisfactory bank references for each shareholder.

Establishment of a Captive Insurance Company

In General

18-70 A captive insurance company has been defined as a limited company which is formed as a wholly owned insurance subsidiary of an organisation not in the insurance business and which has as its primary function the insuring of some of the exposures and risks of its parent's affiliates. A captive also may be formed by a group of individuals or companies where they have a common interest in insuring the same risk. It also is possible for a captive to operate as a reinsurer, with the result that a conventional insurer may insure part of the risk while the captive reinsures the balance. Captives also are formed to insure a specific risk of the parent where cover either is not available from conventional insurers or is available but is prohibitively expensive.

It must not be forgotten that, while a captive clearly renders valuable service to the parent, it should also operate as an income-generating company whose aim is the creation of profit. At the same time, the most important benefit to the parent will undoubtedly be a tremendous reduction in the cost of obtaining the desired insurance cover. There are various types of captive insurance companies. The following are the more important categories:

- The pure or open market captive, underwriting only the risks of the parent company or its subsidiaries;
- The multiple parent captive, being owned by a number of companies and insuring the risks of all parents in the group;
- The domestic or international captive, being a captive formed in the country of domicile of the parent;[57]
- The industry captive, being a multiple captive formed by parent companies operating in the same industry for the purpose of insuring risks common to them all; and
- The protection and indemnity club, representing a specific category of captives which are generally formed by ship owners for the purpose of self-insuring risks related to their ships and shipping activities.[58]

57 This form of captive insurance company may suffer the disadvantage of being subject to heavy taxation and high capitalisation. The majority of captives are located 'offshore' where there is a low tax charge and an environment relatively free from legislative restraints.

58 Protection and indemnity clubs are registered as companies limited by guarantee, but they take the form of mutual insurance associations, with their operations conducted by contracted management companies.

Establishment of a Local Captive Insurance Company

18-71 The registration procedure for a local captive insurance company is the same as for all Cypriot insurance companies. The Minister of Finance, however, is empowered to grant exemptions from these regulations where they are inappropriate or unduly onerous to the captive insurance company. The Council of Ministers has the authority to exempt a captive insurance company from the provisions of the Insurance Companies Laws 1984–1998, provided that the company complies with any conditions or terms that the appropriate authorities in Cyprus deem it necessary to impose. The conditions currently being imposed are as follows:

- The minimum subscription by way of share capital is CY £10,000 instead of the normal CY £200,000 stipulated in the Insurance Companies Laws 1984–1998;
- There must be full compliance with the provisions of the Insurance Companies Laws 1984–1998 as to the filing of accounts and other relevant documents;
- The Superintendent of Insurance must be satisfied that there is adequate cover to meet the claims of any individuals or third parties, and that their claims will rank in priority to the claims of any other company within the group;
- The captive must not obtain any finance from local sources;
- All local expenses for the captive must be paid from funds imported from external sources; and
- The captive must advise the Central Bank of Cyprus annually of the funds imported into the country from external sources.

18-72 The application to the Superintendent must be accompanied by the documents required for the establishment of an insurance company, as noted above. Once satisfied that the application is complete, the Superintendent of Insurance will issue a licence to the Company, with publication in the *Official Gazette*. Captive insurance companies, like all Cypriot insurance companies, should submit to the Superintendent of Insurance copies of their audited revenue accounts, profit-and-loss account, balance sheet, and various other financial statements, which may include an auditor's report and a directors' report. In Cyprus captives enjoy favourable treatment, as the Superintendent of Insurance will usually permit their statements to be modified in relation to the nature of the specific captive's activities and, in many cases, the submission of annual accounts alone will suffice.

Establishment of an International Captive Insurance Company

18-73 The majority of captives in Cyprus are international insurance companies, and the procedures relating to the registration of international companies are well stated in detail elsewhere.

Establishment of a Branch or Subsidiary of a Cypriot Insurance Company Abroad

18-74 **The Exchange Control Law**. When a Cypriot resident, whether individual or body corporate, wishes to invest in a business in another country, in most cases

this presupposes that currency must be exported from Cyprus. According to the Exchange Control Law,[59] Cypriot residents are not allowed, without the approval of the Central Bank, to invest outside Cyprus or to borrow from sources outside the country and generally to deal with non-residents.[60]

According to section 24 of the Exchange Control Law, the exportation of notes, gold, postal orders, insurance policies, certificates of titles, and securities is prohibited, except with the permission of the Financial Secretary.

18-75 Application by a Cypriot Insurance Company to Set Up a Branch or Subsidiary outside Cyprus. A Cypriot local insurance company wishing to open a branch or subsidiary in any other country must apply to the Central Bank of Cyprus for permission. Although each application is considered on its merits, the general yardstick by which such applications are measured is the extent to which the proposed investment will be of benefit to the Cypriot economy.

The application must state particulars of the proposed investment, the country of the investment, the amount which needs to be exported, and whether the investor will need a loan from a Cypriot bank or a bank abroad for financing its participation. If part of the amount to be invested will be obtained by way of loan from a bank outside Cyprus, an application needs to be made to the Central Bank of Cyprus for permission to enter into such a loan agreement. The application must contain the following information:

- Name and address of the lender;
- Purpose for which the loan is required;
- Amount and currency involved;
- Period for which the loan is required;
- Interest rate payable, as well as any other charges and fees;
- Method of repayment;
- Source of repayment; and
- Security offered.

18-76 Provided that the permission of the Central Bank of Cyprus has been obtained, the Superintendent of Insurance has no objection to the establishment of a branch or subsidiary of a local insurance company abroad. The new establishment must comply with the requirements set by the insurance supervisory authority in the country of establishment.

59 Exchange Control Law, Cap 199, Laws of Cyprus.
60 Announcement by the Central Bank of Cyprus of 12 January 2000.

Taxation

Taxation of Local Insurance Companies

In General

18-77 All companies other than international companies are taxed at the rate of 20 per cent on up to CY £100,000 of taxable profits, and 25 per cent on taxable profits in excess of CY £100,000. The Income Tax (Amendment) Law 1987[61] has changed the method of calculating the taxable profits of insurance companies.

General Insurance Business

18-78 For general insurance business, the taxable profit is determined by deducting from the total of gross premiums interest, commissions and other income, returned premiums, reinsurance, net claims, unearned premiums and other expenses, including commissions, and allowances provided under the Income Tax Law. Cypriot branches of foreign insurance companies are allowed to deduct head office expenses, which must not exceed 3 per cent of the Cypriot net premium income.

Life Insurance Business

18-79 The taxable profit from life business is determined by deducting from the total of gross premiums and net investment income the reinsurance cost, net claims, redemptions and other expenses, including commissions, and allowances provided under the Income Tax Law and transfers to the life fund during the year. Cypriot branches of foreign insurance companies are allowed to deduct head office expenses, which must not exceed two per cent of the Cypriot net premium income.

Where the tax payable is less than three per cent of the net premiums, the difference is treated as advance corporation tax. The advance corporation tax is carried forward and set off against tax payable in future years.

Taxation of International Insurance Companies

18-80 International insurance companies enjoy the favourable tax regime to which all international companies are entitled. The main tax incentives for international companies are:

- Income tax at 4.25 per cent;
- Tax exemption for branches whose management and control is outside Cyprus;
- No withholding tax on the dividends of international companies;

61 Income Tax (Amendment) Law, Law 162 of 1987.

- Foreign employees of international entities liable to income tax at 50 per cent of the normal rate if working in Cyprus and 10 per cent or nil if they are working outside Cyprus;
- Exemption from capital gains tax;
- Exemption from estate duty; and
- Exemption from social insurance contributions.

Taxation of International Captive Insurance Companies

18-81 International captives also are taxed at the rate of 4.25 per cent. The taxable profit of international captives, excluding life insurance companies, is calculated by deducting all expenses, including commissions, from the total of underwriting results, investment income, and all other income of a revenue nature.

A loss sustained in any particular financial year may be carried forward and set off against profits generated in subsequent years. No withholding tax is paid on dividends declared by an international captive, and there are extensive duty-free benefits available to both the company and its foreign employees. International captives are entitled to the tax incentives enjoyed by international companies, as stated above.

Competition Law and Insurance Law

Regulation

18-82 The most important legislation in Cyprus in the area of competition law is the Law for the Protection of Competition,[62] which came into force on 8 June 1990.

It was introduced as part of the general desire of the government to bring Cyprus closer to the European Union (EU). Indeed, by signing the Protocol for the enforcement of the second stage of the Association Agreement between Cyprus and the EU, Cyprus has undertaken the obligation to introduce legislation for the protection of competition within the letter and spirit of the Treaty of Rome. The main provisions of the Law for the Protection of Competition are translated from articles 81 and 82 (formerly 85 and 86) of the Treaty of Rome.

Section 8 of the Law for the Protection of Competition provides for the creation of a Competition Committee with power to punish infringements by ordering injunctions and imposing fines. The Competition Committee consists of seven members, five independent professionals, and two government officials. There is a

62 Law 207 of 1989, as amended by Law 111 (I) of 1999 and Law 87 (I) of 2000.

procedure for notification and application for exemption[63] and/or negative clearance,[64] as well as an informal procedure enabling individuals to report possible infringements to the Ministry of Commerce, Industry, and Tourism.

The most important provisions of the Law for the Protection of Competition are contained in sections 4, 5, and 6, which correspond to articles 81 and 82 of the Treaty of Rome. Section 4 provides that all agreements between undertakings which have as their object or effect the prevention, restriction, or distortion of competition within the common market, and in particular those which:

- Directly or indirectly fix purchase or selling prices or any other trading conditions;
- Limit or control production, markets, technical development, or investment;
- Share markets or sources of supply;
- Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

18-83 Section 4(2) provides that the agreements which are prohibited pursuant to this section are void *ab initio*. However, such an agreement, as an exception, may be allowed and considered valid and legally enforceable, either pursuant to a regulation or pursuant to a decision by the Competition Committee, provided the conditions set out in section 5 are met. These are that the agreement:

- Contributes, while allowing consumers a fair share of the resulting benefit, to improving the production or distribution of goods or to promoting technical or economic progress;
- Does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these activities; and
- Does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

18-84 According to section 6, the abuse of the dominant position of an undertaking is prohibited. Such abuse may consist of:

- Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- Limiting production, markets, or technical development to the prejudice of consumers;
- Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and

63 Law 207 of 1989, s 18.
64 Law 207 of 1989, s 16.

- Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or under commercial usage, have no connection with the subject of such contracts.

18-85 Section 7 enumerates the conduct which does not fall within the provisions of the Law for the Protection of Competition, such as:

- Undertakings or acts of the state;
- Undertakings or acts the objects of which are regulated by special legislation, to the extent covered by such legislation;
- Agreements which refer to the payments and the conditions of employment;
- Mergers; and
- Undertakings which intend to promote and secure exports, unless a regulation by the Council of Ministers otherwise provides.

Pricing Agreements

18-86 Section 76 of the Insurance Companies Laws 1984–1998 provides that the Council of Ministers, on the recommendation of the Minister made after consultation with the Insurance Advisory Board, may fix the rates or scales of rates which may be charged by insurance companies as premiums in respect of all or any classes of insurance business specified in section 3 and which are made compulsory by law.

As long as the regulations made thereunder are in force in respect of any class of insurance business, no insurance company may charge for any insurance within such class of insurance business a premium outside the fixed rate or scale of rates.

A determination of the premiums is made under regulation 38 of the Insurance Companies Regulations with regard to the premiums annually imposed by the companies under section 76 of the Insurance Companies Law 1984–1998 in respect of policies issued under the Motor Vehicles (Third Party Insurance) Law. The fixed premium rates and scales of premiums are contained in Tables I–VII of Part 2 of the Schedule annexed to the Regulations. As regards other classes of insurance, there are no fixed premium rates, and any agreement fixing the premiums would be illegal and against the provisions of Law 207 of 1989.

Pooling Arrangements

18-87 On 3 September 1990, the Cyprus High Risk Pool notified the Competition Committee regarding an agreement signed with 31 insurance companies which offer insurance cover in relation to taxis, buses, and motor vehicle hire. Companies which are members of the Pool share the risks in predetermined proportions.[65]

The object of the High Risk Pool is to offer insurance cover to vehicles for public use which are considered to be of high risk and to which the insurance companies

65 Decision 3 of 1991, *Official Gazette*, 7 June 1991.

are not in a position to offer adequate insurance cover. The High Risk Pool applied for a negative clearance or exemption from the provisions of the Law for the Protection of Competition.

The Competition Committee decided that the High Risk Pool is an agreement between undertakings which falls within the scope of section 4(1)(a) of the Law for the Protection of Competition and for this reason a negative clearance under section 16 could not apply. It stated that such an agreement between undertakings might amount to the prevention, restriction, or distortion of competition, particularly as regards the direct or indirect fixing of any trading conditions.

The Competition Committee also found that the exemptions stated in section 7 of the Law for the Protection of Competition do not apply. In particular, there is no law providing for the establishment of the High Risk Pool; nor are the activities of the High Risk Pool regulated by special legislation. It held that the mere fact that the premiums are fixed by the executive branch of government or the House of Representatives cannot be interpreted to mean that the establishment of the High Risk Pool is based on an agreement or act of the state or any special legislative provision.

However, the Competition Committee examined the application of the High Risk Pool under section 18 for an exemption, and it decided that an exemption should be granted because:

- The High Risk Pool provides a fair share of the benefits to the consumers and improves production and promotes economic progress;
- The High Risk Pool does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these activities, ie, the improvement of production and the promotion of economic progress;[66] and
- The High Risk Pool does not afford the undertakings concerned the possibility of eliminating competition in respect of the products in question.

18-88 The Competition Committee fixed the duration of the High Risk Pool at three years.

Insurance Mergers

18-89 Section 7 of the Law for the Protection of Competition exempts the mergers of undertakings from its provisions. Section 7(3) provides that a merger must be notified to the Competition Committee within three months of its creation. If the

66 The Competition Committee found that the only restriction indirectly imposed by virtue of legislation was the compulsory registration of any new insurance company as a member of the High Risk Pool and not as an independent company on receipt of the approval of the Superintendent of Insurance. This restriction was held to be necessary for the achievement of the above object.

notification does not take place within the specified time, the Competition Committee may impose a fine of between CY £100 and CY £1,000.

Consumer Protection

18-90 Adequate restrictions and obligations are imposed by the Insurance Companies Laws 1984–1998 on insurance companies, insurance agents, and brokers to protect the interests of the consumer. In particular, the Superintendent of Insurance plays a significant role in regulating, supervising, and ensuring compliance with the law.

The provisions enabling the Council of Ministers to determine the premium rates applicable to any class of business requiring compulsory insurance, combined with the provisions of the Law for the Protection of Competition, are beneficial to and protect the interests of the consumer.

Conclusion

18-91 The government's desire to bring Cyprus closer to the European Union is reflected in the continuous updating of existing legislation. Inevitably, this will include insurance law as efforts are made to harmonise the current legislation so that it is in line with European standards. Furthermore, the Central Bank of Cyprus has adopted a policy which aims at the harmonisation of the Cypriot economy with the economies of other European countries.

Within this framework, the Central Bank has forged a policy towards liberalisation of the exchange control restrictions. It is to be expected that this policy will further affect and promote foreign investment in Cyprus and inevitably will simplify the procedure for the participation of foreign insurers in the Cypriot market.

CHAPTER 19

Bankruptcy and Insolvency

Sotiris Pittas and Evelina Koudounari

Introduction

19-1 Bankruptcy is the process of declaring an individual, who has incurred debts, unable to pay those debts to use such assets as he has and pay as many of his creditors as possible.

Insolvency involves the procedure whereby a company, which has incurred debts, is wound up in a certain way, and its liquidator aims to settle the debts from the assets of the company. The difference between bankruptcy and insolvency lies in the debtor in question; the first involves natural persons and the second refers to legal persons.

Bankruptcy

In General

19-2 Bankruptcy is a form of universal succession by which the assets of an insolvent debtor are made available for his creditors. The law of bankruptcy has the purposes to:

- Make sure that the distribution of the available assets of the debtor among the creditors is fair and proportionate to the amounts of the claims; and
- Provide the debtor with an opportunity to make a fresh start, discharged from his liabilities.

19-3 The bankruptcy of a debtor is governed by the Bankruptcy Law, Cap 5. Bankruptcy procedure is regulated by the Bankruptcy Rules, Cap 6. The Cypriot courts have jurisdiction to adjudicate bankrupt any debtor who at the time when any act of bankruptcy was done or suffered by him was:

- Personally present in Cyprus;
- Ordinarily resident or had a place of residence in Cyprus;
- Carrying on business in Cyprus personally or by means of an agent or manager; or
- A member of a firm or partnership which carried on business in Cyprus.[1]

1 Bankruptcy Law, Cap 5, s 3(2).

19-4 The definition of a debtor given by section 3(2) of the Bankruptcy Law, Cap 5 gives jurisdiction to the Cypriot courts to adjudicate bankrupt Cypriots and foreigners residing in Cyprus.

A person still carries on business in Cyprus, even if he gives up the business and goes abroad, if he leaves unpaid trading debts behind him. Such debts include not only ordinary commercial debts, but also tax liabilities. A debtor commits an act of bankruptcy where:

- Within Cyprus or elsewhere, he transfers or pledges his property to any person in favour of all his creditors in general;
- Within Cyprus or elsewhere, he fraudulently transfers, donates, delivers, or grants his property or part of it;
- Within Cyprus or elsewhere, he transfers or pledges his property or part of it or mortgages his property, and this act would be, according to the Bankruptcy Law or any other law, void as a fraudulent preference if the debtor was declared as bankrupt;
- With intention to delay or cancel payment to his creditors, he commits one of the following acts: (a) departs or is prepared to depart from Cyprus or, while outside Cyprus, he remains out, (b) abandons his residence or is in any other way absent, or (c) is locked in his residence;
- An order for a writ of attachment of the debtor's movables is issued against him, providing for the sale of it;
- The debtor testifies in court and states his inability to pay his debts or files an application for self-bankruptcy;
- A creditor obtained a final judgment against the debtor or order for the payment of any amount and a notice of bankruptcy was served on the debtor;
- A debtor, while indebted to a creditor who was allowed to continue with bankruptcy proceedings, omits to pay or settle his debts in accordance with the court order; or
- He admits to any of his creditors that he is unable to meet his obligations or he puts off payment of his debts.[2]

19-5 Bankruptcy proceedings can only commence if the debtor has committed one of the acts of bankruptcy stated above. The commonest act of bankruptcy is the failure to comply with a bankruptcy notice.[3] Briefly, this means that the debtor has failed to comply with a notice, served on him by the creditor, to pay a judgment debt.[4]

2 Bankruptcy Law, Cap 5, s 3(1).
3 *In re Takis Economides*, Civil Appeal 9682 of 29 September 1997.
4 *Maria Kithreotou v Tsiaklis*, Petition 398/91, District Court of Nicosia, 6 November 1992.

Bankruptcy Proceedings

19-6 Bankruptcy proceedings start with the filing of a written bankruptcy petition to the court. The petition may be filed by a creditor having a provable debt or by the debtor himself. A creditor's petition must be filed within three months of the alleged act of bankruptcy. For a creditor to be eligible to file a bankruptcy petition,[5] the following requirements must be met:

- The debt due to the creditor applicant or, if two or more of the creditors apply to the court in one petition, the total debts owed to all the petitioners must add up to at least CY £500;[6]
- The debt is a liquidated sum payable either immediately or at a specified time;
- The act of bankruptcy involves an act which occurred at least three months prior to the filing of the petition; and
- The debtor is a resident of Cyprus or had his usual place of residence in Cyprus for the year before the filing of the petition or worked in Cyprus or carried on business in Cyprus through a representative.

19-7 A debtor's petition[7] for self-bankruptcy will only be valid if:

- The total amount of his debts exceeds CY £5,000; and
- Such debts are not secured and refer to liquidated sums payable immediately or on agreed dates.

19-8 The debtor's application must be supported by an affidavit sworn by him attaching an analytical list of his creditors, their addresses, the sums due to them, and the date when each debt was incurred and a full description of his assets.

On hearing the petition, the court must receive proof of the debt owed by the debtor to the creditor, proof of the service of the petition, and proof of the act which constituted a reason for bankruptcy (and, if more than one, at least one of those acts must constitute bankruptcy to the satisfaction of the court) before the court will issue the appropriate order. On the adjudication of the merits of the petition, the court will decide whether to accept or dismiss it. Should the court decide to accept the petition, it will issue a receiving order for the protection of the debtor's property. A receiving order requires the appointment of an official receiver who will control the debtor's financial affairs. The receiver will be a public officer who will be acting on behalf of the court and on behalf of the Ministry of Commerce, Industry, and Tourism.

If a receiving order is issued, it will be advertised in the *Official Gazette of the Republic of Cyprus* and two daily newspapers, stating the name, address, and description of the debtor, the date and the court which issued the order, and the date of the application. When the receiving order is issued against the debtor,

5 Bankruptcy Law, Cap 5, s 5.
6 Law 49 of 1985.
7 Bankruptcy Law, Cap 5, s 8.

he will proceed to provide an analytical statement of his affairs,[8] accompanied by a supporting affidavit listing his debts, the names, addresses and professions of his creditors, the securities held by his creditors, the dates when the securities were given, and any other information which may be relevant to the official receiver.

The debtor must do this within three days of the date of the issue of the receiving order, if the petition was filed by the debtor, or seven days if the petition was filed by a creditor. A general meeting (by law the first meeting) of the debtor's creditors will be convened within 14 days of the receiving order to give the creditors the opportunity to decide whether to accept a composition[9] or to make the debtor bankrupt. If the latter is adopted, the court will duly adjudge the creditor as bankrupt.[10] The debtor must be present at this meeting and must provide all the requested information essential for the purposes of convening the meeting.

After the filing of the written statement of affairs. a public examination[11] by the creditors and others follows. At the public examination, the debtor must appear in person and the statement of affairs forms the basis of the examination.

The effect of the bankruptcy order is the vesting of the debtor's property in the hands of the official receiver,[12] who will hold it until a trustee in bankruptcy is appointed. The trustee may be one of the creditors or the official receiver himself. The trustee will distribute the property among the creditors according to the rules of bankruptcy. Following the trustee's appointment, the trustee has the following powers[13] to deal with the bankrupt's property:

- Sell all or any part of the property by public auction or private contract, with power to transfer the whole of the property to any person or company or to sell it in parts;
- Give receipts for money received by him, which receipts shall discharge the person who pays the money from all responsibility arising from the application;
- Prove, rank, claim, and draw a dividend in respect of any debt due to the bankrupt; and
- Exercise any powers the capacity to exercise which is vested in the trustee under this law and execute any powers of attorney, deeds, and other instruments for the purpose of carrying into effect the provisions of this law.

19-9 Composition involves the proposal put forward by the debtor for the settlement of his debts or the scheme of arrangement for arranging his outstanding affairs, which must be submitted within four days of the date of submitting his statement of affairs or within a time specified by the official receiver. In such a case,

8 Bankruptcy Law, Cap 5, s 15.
9 Bankruptcy Law, Cap 5, s 16.
10 Bankruptcy Law, Cap 5, s 17.
11 Bankruptcy Law, Cap 5, ss 18 and 19.
12 *Michaelides v Demetriades* (1968) 1 CLR 211; *In Re Djeredjian* (1971) 1 CLR 360.
13 Bankruptcy Law, Cap 5, s 54.

the official receiver must convene a creditors' meeting after the mailing of the debtor's proposal to all the creditors to be in a position to decide on the debtor's proposal at the meeting. A majority of three-quarters of the creditors who had their debts proved is required for acceptance of the proposal. If the proposal is accepted, such acceptance will bind all the other creditors. The proposal, however, must still be approved by the court provided that all the conditions of the proposal are favourable, and this can only occur after the close of the public examination.

When a receiving order is issued against a debtor, the creditors at their first meeting must decide whether the debtor should be rendered bankrupt. If no decision is taken, or the proposal is not approved within 14 days of the day of the examination of the debtor, the court will declare the debtor bankrupt and his property will become available for distribution among the creditors.

Discharge

19-10 Once the public examination has been concluded, a bankrupt may apply at any time to the court for his discharge.[14] For the court to grant or refuse such an application, it must examine the official receiver's report relating to the debtor's conduct and his affairs (including the debtor's conduct during the bankruptcy period) and, if it is satisfied that such an order could be issued either absolutely or on conditions,[15] it can suspend or discharge the debtor accordingly. Absolute discharge means the release of the bankrupt from all provable debts and liabilities, but not from any unprovable liabilities such as claims for unliquidated damages.

The order of discharge will not discharge[16] the debtor from a debt owed under a written guarantee to the court or from a penalty or debt he is to be charged with following a claim by the Republic for any criminal offence in breach of any law unless the debtor obtains a discharge from the Council of Ministers with the signature of the appropriate Minister.

As a general rule, an undischarged bankrupt is prohibited from holding certain public offices.[17] According to section 41 of the Bankruptcy Law, Cap 5, the property of the bankrupt which is available for distribution[18] among his creditors includes the following:

- All property belonging to or vested in the bankrupt at the commencement of the bankruptcy or which may be acquired by or devolve on him before his discharge;

14 Bankruptcy Law, Cap 5, s 27A. *Tryfonos v Organismos Chrimatodotiseos Pangypriakis Ltd Official Receiver* (1999) 1 CLR 82.

15 *In re Shinorik Djeredjian* (1975) 10 JSC 1550.

16 Bankruptcy Law, Cap 5, s 30.

17 Bankruptcy Law, Cap 5, s 32.

18 *Michaelides v Demetriades* (1968) 1 CLR 211.

- The capacity to exercise and to take proceedings for all such powers in, over, or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge; and
- All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, provided that things in action other than debts due or accruing due to the bankrupt in the course of his trade or business will not be deemed goods within the meaning of this section.

19-11 However, the following property does not form part of the bankrupt's property which will be divided among his creditors:

- Property held by the bankrupt on trust for any other person; and
- All property which would be exempt from execution under any law for the time being in force in Cyprus.[19]

19-12 According to section 16 of the Civil Procedure Law, Cap 6, as amended by Law 51 (1) of 1999, the following property of the judgment debtor is exempt from execution:

- The necessary wearing apparel of the debtor and his family;
- The necessary baking and cooking utensils of the debtor and his family, the television, refrigerator, washing machine, cooker, radio, and any machinery used for the education of the children;
- The books, tools, and appliances which are necessary for the profession, art, industry, trade, or occupation of the debtor not exceeding in the whole the value of CY £3,000;
- One pair of neat cattle or one mule or one ass and, where the debtor is a farmer, alternatively to the foregoing provision, two horses or one horse or mule and any one of the aforesaid animals at the option of such debtor or alternatively to the foregoing, the tractor and all the other agricultural spare parts and equipment whose value is not higher than CY £5,000;
- Every article which is indispensable to the use of the exempted animals or the agricultural spare parts and equipment;
- The fodder required to feed the exempted animals for three months;
- Provisions for three months for the debtor and his family; and
- Where the debtor is a farmer, seed grains sufficient for sowing in respect of one year the extent of land normally cultivated by such debtor.

The Effects of Bankruptcy

19-13 The general effect of adjudication in bankruptcy is that the bankrupt's property becomes vested in the trustee for proportionate distribution among the

19 Bankruptcy Law, Cap 5, s 42.

creditors. The term 'property' comprises property which the bankrupt has at the commencement of bankruptcy[20] and property acquired between that time and his discharge.

The extent of the property which is to vest in the trustee is determined by reference to the date of the commencement of the bankruptcy. This is not the date of adjudication. The adjudication relates back for this purpose to the commencement which is the date of the act of bankruptcy on which the petition is based. Where more than one act has been proved, the bankruptcy commences on the date of the earliest act within three months of the receiving order.

Various transactions effected by a debtor before he commits an act of bankruptcy are voidable by the trustee.[21] The transactions in question are, broadly speaking, in two categories, ie, transactions such as voluntary conveyances, which tend to defraud creditors generally[22] and fraudulent preferences.[23]

A person commits a fraudulent preference when, being unable to pay his debts in full, he transfers property to one of his creditors with a view to giving such a creditor a preference over the other creditors. The effect of it will be that, provided that the transfer was made within three months of the presentation of the bankruptcy petition against the debtor, the debtor's trustee in bankruptcy may avoid the transaction and claim the property for the benefit of the creditors generally. The rights of a *bona fide* person who acquires title for value from the debtor/bankrupt or from a creditor of the bankrupt are not affected.

A secured creditor is entitled to sell the charged property of the bankrupt debtor despite the fact that there is an existing receiving order, but all other proceedings pending against the bankrupt/debtor cannot continue without the necessary leave of the competent court.[24]

Distribution of Assets

19-14 The order for distribution of the assets of the bankrupt[25] is as follows:

- First, the costs of the bankruptcy which, in broad terms, cover the following (a) Official Receiver's disbursements incurred for the protection of the property of the bankrupt, (b) Official Receiver's fees and expenses; (c) Special Administrator's (if any) fees, and (d) legal costs of the petitioning creditor approved by the court;

20 *Kotsapa v The Official Receiver and Registrar* (1966) 1 CLR 119.
21 *Papadakis v Stavrinakis* (1962) CLR 245.
22 Bankruptcy Law, Cap 5, s 46.
23 Bankruptcy Law, Cap 5, s 47.
24 *Demos Timvakis v Stavrou Kyriakou Kyriakoudi* (1995) 5 CLR 473.
25 Bankruptcy Law, Cap 5, ss 36 and 38.

- Second, the preferential debts;[26]
- Third, the charges secured by a floating charge which take second place to preferential creditors; and
- Fourth, the unsecured ordinary creditors.

Insolvency

In General

19-15 A company's life can be terminated by the winding up process. This process is effected by the liquidator, who must do the following:

- Settle the list of contributories;
- Collect the company's assets;
- Discharge the company's liabilities to its creditors; and
- Distribute the surplus (if any) to the contributories according to the rights attaching to their share of the company's capital.

19-16 According to the Cypriot Companies Law, Cap 113, and more specifically article 203, there are two methods of winding up, namely:

- A compulsory winding up by the court; and
- A voluntary winding up, which may be either a member's winding up or a creditor's winding up.

Winding Up by the Court

19-17 A company will be wound up following a court order in the following circumstances:

- The company has by special resolution resolved that it be wound up by the court;
- Default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;
- The company does not commence its business within a year from its incorporation or suspends its business for a whole year;
- The number of members is reduced, in the case of a private company, below two or, in the case of any other company, below seven;[27]

26 These debts rank equally between themselves so that, if the property of the bankrupt is not sufficient to pay them all in full, they will have to abate proportionally. The main preferential debts are (a) taxes and duties owed by the bankrupt at the date of the issue of the receiving order, (b) wages and salaries of employees of the bankrupt including social security contributions and redundancy fund contributions, (c) damages payable by the bankrupt to an injured employee in the course of his employment, (d) all accrued holiday remuneration of employees, and (e) outstanding rents due to the landlord of the premises of the bankrupt.

27 This circumstance is now not applicable due to an amendment of the Companies Laws, Cap 113, by Law 2 (1) of 2000, which provides that a company can be formed by only one shareholder.

- The company is unable to pay its debts; and
- The court is of opinion that it is just and equitable[28] that the company should be wound up.[29]

19-18 A company is unable to pay its debts[30] when one of the following situations[31] applies:

- A creditor to whom the company is indebted in a sum exceeding CY £500 has served on the company a demand in writing for the payment of the outstanding amount and within three weeks the company fails to pay the sum due;
- A judgment creditor has tried to enforce his judgment by execution on the company's property and the execution has failed to meet the debt; or
- The court is satisfied that the company is unable to pay its debts.

19-19 The persons eligible to file a petition requesting the winding up of a company are the company itself, the Official Receiver who can present a petition even after a voluntary winding up application has started, a contributory, and a creditor. A contributory is anyone who is liable to contribute to the assets of the company in case it is wound up. This term covers shareholders whose shares are partly paid and shareholders whose shares are fully paid. A contributory cannot petition[32] unless:

- The number of members is reduced below two;[33]
- He took his shares as an original allottee;
- Shares are transmitted from a deceased shareholder; or
- The contributory has held the shares for six out of the last 18 months.[34]

19-20 A contributory cannot petition unless he has an interest in the process, eg, it must be likely that there will be surplus assets. Thus, if the company is insolvent, a contributory cannot petition, though he can and has an interest if the membership is below the statutory minimum of two.

If a winding up order is made, the first step to be taken will be to appoint a liquidator to whom, as in all types of winding up, the administration of the company's affairs and property will pass. In contrast with an individual's trustee in bankruptcy, its property does not vest in him but the control and management of it and of the company's affairs do, and the board of directors, in effect, becomes *functus officio*.[35]

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28 *Karaoglaonian v Karaoglaonian* (1977) 4 JSC 488.
29 Companies Law, Cap 113, s 211, as amended by Law 2 (1) of 2000.
30 *In re Brikent Estates Co Ltd* (1981) 1 JSC 127.
31 Companies Law, Cap 113, s 212.
32 Companies Law, Cap 113, s 213.
33 This circumstance is abolished by the enactment of Law 2 (1) of 2000.
34 This is a precaution to prevent the purchase of shares with a view to an immediate wrecking operation in the company.
35 Companies Law, Cap 113, s 232.

A liquidator may be appointed before a final order is made, for at any time after the presentation of a winding up petition the court may appoint a provisional liquidator, normally the Official Receiver who is a public officer.[36] Not only will an official receiver normally be the provisional liquidator, but he will generally be the initial liquidator and will often remain so unless and until another liquidator is appointed.

When the court has made a winding up order, the official receiver may require officers, employees, and those who have taken part in the formation of the company to submit to him a statement as to the affairs of the company, verified by affidavit. It is his duty to investigate the causes of the failure and to make such report, if any, to the court as he thinks fit. He may apply to the court for the public examination of anyone who is or has been an officer, liquidator, administrator, receiver, or manager of the company or anyone else who has taken part in its promotion, formation or management and must do so, unless the court otherwise orders, if requested by one-half in value of the creditors or three-quarters in value of the members.[37]

On the making of the winding up order, the winding up is deemed to have commenced as from the date of the presentation of the petition or, if the order is made in respect of a company already in voluntary winding up, as from the date of the resolution to wind up voluntarily.

This back dating is very important since it can have the effect of invalidating property dispositions and executions of judgments, lawfully undertaken during the period between the presentation of the petition and the order. The functions of the liquidator in a winding up by the court are the same as those in a voluntary winding up, ie, to secure that the assets of the company are got in, realised, and distributed to the company's creditors and, if there is a surplus, it is distributed to the persons entitled to it. In a winding up by the court, the liquidator will often require the sanction of the court before entering into transactions as he will be acting as an officer of the court.

Voluntary Winding Up

19-21 This method of winding up is usually the most common. The directors decide that the company has no future and agree that it would be best if they terminated its existence. Voluntary windings up start with a resolution of the company; if the articles of association of the company provide for a fixed period for the duration of the company or specify that a certain event should occur for the winding up, only an ordinary resolution in a general meeting is needed. Otherwise, a special or an extraordinary resolution is necessary for the company's voluntary

36 Companies Law, Cap 113, s 222.
37 Companies Law, Cap 113, s 225.

winding up, stating that the company is unable to continue carrying on business due to its liabilities and it is advisable that it should be wound up.[38]

An extraordinary resolution is preferred because to pass it a three-quarters majority of votes is needed and the meeting can be convened on not less than 14 and not more than 21 days' notice, hence it is speedier when the company is insolvent. Each of these resolutions is subject to section 261 of the Companies Law, Cap 113, and the company should give notice of the resolution within 14 days after its passing by advertisement in the *Official Gazette*. A voluntary winding up is deemed to commence[39] on the passing of the resolution and, after the commencement of the winding up, the company must cease carrying on any business except that required for its beneficial winding up. Any transfer of shares, unless done with the approval of the liquidator, is considered to be void as it is an alteration in the status of the members.

Members' Winding Up

19-22 Prior to passing the resolution to wind up the company, the directors need to consider whether they can allow the voluntary winding up to proceed as a members' winding up instead of a creditors' winding up. For this to happen, according to section 266, the majority of the directors should make a statutory declaration at a directors' meeting to the effect that they have made a full inquiry into the company's affairs and they have come to the conclusion that the company will pay its debts in full, plus the equivalent interest for that period not exceeding 12 months from the commencement of the winding up as stated in the declaration. This declaration of the directors will not be effective unless:

- It is made within a period of five weeks prior to the date of the passing of the resolution for the winding up; and
- The declaration contains an analytical statement of the company's assets and liabilities at the closest possible date to the date of the declaration.

19-23 Any declaration which is made according to the above section must be in the belief that the company will indeed be in a position to pay its debts plus interest within the period specified in the declaration; otherwise, the directors making the declaration will be liable to fines and imprisonment.

If the professional liquidator is of the opinion that the company will not be able to meet its obligations and pay all its debts within the specified period, he must call a creditors' meeting[40] and supply them with full information and, from the date of the meeting, the winding up is converted from a members' voluntary winding up to a creditors' voluntary winding up.

38 Companies Law, Cap 113, s 261.
39 Companies Law, Cap 113, s 263.
40 Companies Law, Cap 113, s 271.

When the company is fully wound up,[41] the liquidator must make up an account of the winding up aiming to show how it was conducted and the company's property disposed of and must call a final meeting to put forward the account and providing any explanations in relation to it. Within one week after the meeting, the liquidator must send a copy of the account to the Registrar and make a report to him of the holding of the meeting.

Creditors' Winding Up

19-24 Under this heading, the company is considered to be insolvent and it is the creditors, in whose interests the winding up is undertaken, who have control of the procedure. If no declaration of solvency has been made (as referred to above), the company must summon a meeting of its creditors not later than the fourteenth day after the resolution for voluntary winding up is proposed. Notices should be mailed to the creditors not less than seven days before the date of the meeting and it must be advertised once in the *Official Gazette* and once in two daily newspapers circulating in the district where the registered office of the company or its principal place of business is situated. Furthermore, the directors of the company must prepare a statement of the company's affairs verified by an affidavit and put it forward at the creditors' meeting.[42]

At the meeting, the creditors and the company may nominate a liquidator[43] and, if he is accepted by them, he becomes the company's liquidator. It may be that, on application to the court by a director, creditor, or member, it directs that the nominee of the company will be the liquidator instead of or jointly with the creditors' nominee, or some other person is appointed instead of the creditors' nominee.

In a creditors' voluntary winding up or in a winding up by the court, the creditors may decide at their first or a subsequent meeting to establish a Committee of Inspection[44] and, in the case of a creditors' winding up, they may appoint not more than five members. If they proceed to appoint the five members, the company in the general meeting also may appoint five members.

The functions of a Committee of Inspection are, *inter alia*, to give the liquidator the opportunity of consulting the creditors and the members without having to convene formal creditors' and company meetings and provide additional means whereby the creditors and members can question the liquidator. The directors of the company must prepare a statement of the company's affairs, verified by affidavit, which must be presented at the creditors' meeting.

41 Companies Law, Cap 113, s 273.
42 Companies Law, Cap 113, s 276.
43 Companies Law, Cap 113, s 277.
44 Companies Law, Cap 113, s 278.

Winding Up Subject to Supervision of the Court

19-25 When a company has passed a resolution for its voluntary winding up, the court may issue an order that the voluntary winding up will continue subject to the supervision of the court,[45] and any creditors, contributories, or any others interested in the company may be at liberty to apply to the court, on such terms and conditions as the court thinks fair.

A petition for the voluntary winding up of a company which is subject to the supervision of the court will be considered to be a petition for the winding up of the company by the court and a winding up subject to the supervision of the court will be a winding up by the court.

Where an order is made for the winding up of a company subject to the supervision of the court, the court may order the appointment of an additional liquidator. A liquidator appointed in this way by the court will be no different from, and will have the same obligations and powers as, the liquidator appointed in a voluntary winding up. Such a liquidator will exercise all his powers without the intervention of the court in the same manner as if the company was being wound up voluntarily subject to any restrictions imposed by the court.

Dissolution

After Winding Up

19-26 In voluntary liquidation cases, once the liquidator has sent the final account and return to the Registrar, on the expiration of three months from their registration, the company is considered to be dissolved unless the court, on the liquidator's or any other interested party's application, orders the deferment of the dissolution date.

In a case where the winding up is made by the court, the liquidator, once it is obvious to him that the winding up is complete, must summon a final meeting of creditors to put forward his report on the winding up and for it to be considered whether he should be released. The liquidator must notify the court and the Registrar that the meeting was convened and of the decisions of the meeting. When the Registrar receives the notice he registers it and, within a period of three months, he directs a deferment and the company is dissolved at the end of the three-month period after the registration.[46]

In a case where the Official Receiver is the liquidator, the procedure followed is the same except that registration takes place from the notice of the Official Receiver that the winding up is complete. The Official Receiver may follow an alternative procedure and bring about an earlier dissolution if it appears to him that the

45 Companies Law, Cap 113, ss 293–297.
46 Companies Law, Cap 113, s 283.

realisable assets are insufficient to cover the costs of the winding up and that the affairs of the company do not require any further investigation. To do so he must first give at least 28 days' notice of his intention to proceed accordingly to the company's creditors and members and, with the giving of that notice, he ceases to be required to carry out any of his duties other than to apply to the Registrar for the earlier dissolution of the company. Following the registration of that notice, the company becomes dissolved at the end of the three months.

Effect of Winding Up

19-27 The issue of the winding-up order has the following effects:

- All actions against the company are automatically stayed,[47] and they cannot proceed without the necessary leave of the competent court;
- The company ceases to carry on business except with a view to a beneficial winding up;[48]
- The powers of the directors cease; and
- Employees of the company are automatically dismissed, though the liquidator may re-employ some of them until the winding up is completed.[49]

General Position of the Liquidator

In General

19-28 There is no clear definition of the role of the liquidator in the Companies Law, Cap 113. It has the character partly of a trustee, partly of an agent of the company, and partly of an officer of the company.

As a Trustee

19-29 A liquidator is clearly not a trustee because the property of the company does not automatically vest in him as does trust property in trustees, although the court under section 232 can make an order so vesting it. However, he takes over the powers of directors who equally, without being trustees, owe fiduciary duties to the company. His duty, like that of the directors, is owed to the company as a whole and not to individual shareholders. In addition, like a trustee, he cannot buy the company's property without leave of the court, or make a profit out of sales to the company.

The liquidator is in a more vulnerable position than a lay trustee because he is always paid to assume responsibility. He must exercise his duties with a high

47 *Courtis Omiros and Another v Iasonides* (1973) 12 JSC 1656.
48 For example, it may be necessary to carry on the company's business for a while to realise its assets at a better price.
49 Companies Law, Cap 113, ss 219–221 and 264–265.

standard of care and diligence. His only refuge is to apply to the court for guidance in every case of serious doubt or difficulty.

As an Agent

19-30 The liquidator can be described as an agent of the company in that he can make contracts on behalf of the company for winding up purposes.

He has the paid agent's obligations to bring reasonable skill to his duties.

As an Officer

19-31 It is not clear whether the liquidator is entitled to the protection of section 383 of the Companies Law, Cap 113, whereby the court can relieve any officer who, though negligent or in breach of trust, has acted honestly and reasonably and ought to be relieved.

The liquidator is subject to constant control by the court and any person aggrieved by an action or decision of a liquidator in a winding up may apply to the court. In the absence of fraud, there cannot be interference in the day-to-day administration of the liquidator or a questioning of the exercise by the liquidator in good faith of his discretion nor a holding of him accountable for an error of judgment.

Invalidation of a Charge or Debt

19-32 There are various provisions in the Companies Law, Cap 113, which may invalidate a charge granted by the company or any other disposition it has made or any debt which it has incurred.

According to section 301, any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property made or done by or against a company within six months before the commencement of its winding up will, in the event of the company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly.

On the question of fraudulent preference, the court looks at the dominant or real intention and not at the result. The onus is on those who claim to avoid the transaction to establish what the debtor really intended and that the real intention was to prefer. The onus is only discharged when the court, on review of all the circumstances, is satisfied that the dominant intention to prefer was present.

According to section 303, where a company is being wound up, a floating charge on the undertaking or property of the company created within 12 months of the commencement of the winding up will, unless it is proved that immediately after the creation of the charge the company was solvent, be invalid, except to the extent of any cash paid to the company at the time of or subsequently to the creation of and in consideration for the charge.

The onus of proving the company's solvency is on the debenture holder who seeks to support his floating charge. A company is not solvent if it cannot pay its debts as they become due.

If the liquidator can prove fraudulent trading against a director or other officer of the company, the court may order that person to be personally liable for the debt. The liquidator has the right to disclaim onerous property (eg, unprofitable contracts and unsaleable property).

Distribution of Assets

19-33 The order for distribution of the assets[50] in a compulsory winding up is as follows:

- First, the costs of the winding up;[51]
- Second, the preferential debts;[52]
- Third, the charges secured by a floating charge which take second place to preferential creditors;
- Fourth, the unsecured ordinary creditors; and
- Fifth, the deferred debts (eg, sums due to members such as dividends declared but not paid).

19-34 Any surplus will be distributed among the members according to their rights under the articles or the terms of issue of their shares.

Completion of Winding Up

19-35 In a compulsory winding up, once the liquidator has paid off the creditors, distributed the surplus (if any), and summoned a final meeting of the company's

50 Companies Law, Cap 113, s 300, as amended by Law 198/86 and Law 19/1990.

51 In broad terms, these cover the costs of getting in the assets, of the petition, and of making the statement of affairs, the liquidators' remuneration, and the expenses of the Committee of Inspection.

52 These debts rank equally between themselves so that if the property of the company is not sufficient to pay them all in full they will to have abate proportionally. The main preferential debts are (a) all local rates due from the company at the relevant date and having become due and payable within 12 months next before that date, (b) all government taxes and duties due from the company at the relevant date and having become due and payable within 12 months next before that date and in the case of assessed taxes not exceeding in the whole one year's assessment, (c) any sum payable by the company to any clerk and/or servant of the company as damages for personal injuries incurred during his or her employment and because of it (the case of a servant or clerk who also is a shareholder of the company is excluded save when the company is being wound up voluntarily or is being wound up for the purpose of reconstruction or of amalgamation with another company), (d) all accrued holiday remuneration becoming payable to any clerk or servant of the company save in the case of a servant or clerk who also is a shareholder of the company, and (e) social security contributions and redundancy fund contributions.

creditors, he may vacate office and obtain his release. Under section 260 of the Companies Law, Cap 113, the company is dissolved from the date of the issue of the order of the court for its dissolution. A copy of the order must, within 14 days from the date thereof, be forwarded by the liquidator to the Registrar of Companies, who shall make a minute of the dissolution of the company in his books.

In a voluntary winding up, the liquidator will call final meetings of the company's creditors for approval of his accounts. Within a week, he will file his accounts and a return of the meetings with the Registrar and, three months after the registration of the return the company, will be deemed to be dissolved.

Whether it is a compulsory or a voluntary liquidation, the court can restore the company to the Register within two years if, for example, further assets are discovered which should be distributed to creditors.[53]

Fraudulent Trading

19-36 Section 311 of the Companies Law, Cap 113, introduced the concept of fraudulent trading into insolvency proceedings. It created a civil liability for persons abusing the status of limited liability and created a criminal offence. The constituent elements of both civil and criminal liability were identical and the courts have found it difficult to permit a claim on civil liability in the absence of proof beyond reasonable doubt (the criminal standard of proof).

An application for fraudulent trading can only be made during the course of winding up a company and, therefore, only by the appointed liquidator, who brings it for the benefit of all creditors. The provision permits an action to be taken against any persons who are knowingly parties to the carrying on of the business. Accordingly, the provision is not limited to directors but covers other parties engaged in the carrying on of a business.

Any respondent against whom a successful fraudulent trading claim has been brought is liable to make such contributions to the company's assets as the court thinks proper. As a result of the requirement of the criminal standard of proof in civil fraudulent actions, such actions are very rare.

Fraudulent Transfers Avoidance

19-37 According to section 3 of the Fraudulent Transfers Avoidance Law, Cap 62, every gift, sale, pledge, mortgage, or other transfer or disposal of any movable or immovable property made by any person with intent to hinder or delay his creditors or any of them in recovering their debts from him will be deemed to be fraudulent and will be invalid as against such creditors. Notwithstanding any such gift, sale, pledge, mortgage, transfer, or disposal, the property purported to be transferred or

53 Companies Law, Cap 113, s 236.

otherwise dealt with may be seized and sold to satisfy any judgment debt[54] due from the person who made the gift, sale, pledge, mortgage, or other transfer or disposal.

Any application made under the provisions of the Fraudulent Transfers Avoidance Law to set aside a transfer or assignment of any property made to any parent, spouse, child, brother, or sister of the transferor or assignor otherwise than in exchange for any money or other property of equivalent value or for good consideration will place the burden of proof[55] on the transferor or assignor and on the person to whom the transfer or assignment was made that such transfer or assignment was made *bona fide* and not with intent to hinder or delay his creditors.

Any gift, sale, pledge, mortgage, or other transfer or disposal of any movable or immovable property which is made fraudulent with intent to hinder or delay the creditors or any of them in their recovery from a debtor, whether made before or after the commencement of an action or other proceedings wherein the right to recover the debt has been established, may be set aside by an order of the court on the application of any judgment creditors.

54 *Adamou v Kitchiou* (1978) 1 JSC 12; *Lymperopoulou v Christodoulou and Others* (1957) 22 CLR 184.

55 *Mailos v Constantinides* (1979) 1 JSC 242.

CHAPTER 20

Labour Law

Christophoros Christophi

Introduction

20-1 Cypriot labour law is an amalgam of Common Law and statute law. Primarily, the employment relationship is governed by ordinary contract law principles and supplemented by statutory rights and obligations where appropriate. Industrial relations in Cyprus are thus regulated by a number of statutes, the chief of which are the Termination of Employment Law[1] and the Annual Holiday with Payment Law.[2]

The former covers redundancy and the arbitrary dismissal of all employees, including public employees, and it was enacted in response to the recommendations of the International Labour Organisation (ILO).[3] In addition, Cyprus has ratified a number of ILO Conventions.[4]

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1 Law 24 of 1967, as amended.

2 Law 8 of 1967, as amended.

3 In particular, the Law seeks to enforce Recommendation 119 of June 1963 of the International Labour Organisation.

4 Convention 2, Unemployment Convention, 1919; Convention 11, Right of Association (Agriculture) Convention, 1921; Convention 15, Minimum Age (Trimmers and Stockers) Convention, 1921; Convention 16, Medical Examination of Young Persons (Sea) Convention, 1921; Convention 19, Equality of Treatment (Accident Compensation) Convention, 1925; Convention 23, Repatriation of Seamen Convention, 1926; Convention 29, Forced Labour Convention, 1930; Convention 44, Unemployment Provision Convention, 1934; Convention 45, Underground Work (Women) Convention, 1935; Convention 81, Labour Inspection Convention, 1947 (excluding Part II); Convention 87, Freedom of Association and Protection of the Right to Organise Convention, 1948; Convention 88, Employment Service Convention, 1948; Convention 89, Night Work (Women) Convention (revised), 1948; Convention 90, Night Work of Young Persons (Industry), Convention (revised), 1948; Convention 92, Accommodation of Crews Convention (revised), 1949; Convention 94, Labour Clauses (Public Contracts) Convention, 1949; Convention 95, Protection of Wages Convention, 1949; Convention 97, Migration for Employment (revised) Convention, 1949; Convention 98, Right to Organise and Collective Bargaining Convention, 1949; Convention 100, Equal Remuneration Convention, 1951; Convention 102, Social Security (Minimum Standards) Convention, 1952; Convention 105, Abolition of Forced Labour Convention, 1952; Convention 106, Weekly Rest (Commerce and Offices) Convention, 1957; Convention 111, Discrimination (Employment and Occupation) Convention, 1958; Convention 114, Fishermen's Articles of Agreement Convention, 1959; Convention 116, Final Articles Revision Convention, 1961; Convention 119, Guarding of Machinery Convention, 1963; Convention 121, Employment Injury/Benefits Convention, 1964;

Industrial Relations

In General

20-2 Industrial relations in Cyprus have been very satisfactory since independence. This is attributed to the responsible attitude of trade unions and employers' organisations, which became particularly evident during the period following the Turkish invasion and occupation of the northern part of the island. Industrial relations stability also may be attributed to the government's policy of:

- Seeking the active participation of workers and employers in the formulation and implementation of social and economic policies, through tripartite bodies;
- Keeping out of disputes and promoting the idea that labour-management relations are first and foremost the business of the parties themselves; and
- Effecting procedural agreements for the settlement of disputes.

20-3 A key characteristic of the industrial relations policy of successive governments is the attempt to maintain industrial peace through the development and preservation of sound industrial relations. In this respect, the Industrial Relations Service of the Ministry of Labour plays an instrumental role that is examined below.

Industrial Relations Service

20-4 The Industrial Relations Service of the Ministry of Labour and Social Insurance is responsible for policy administration. Its primary task is to provide mediation

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Convention 122, Employment Policy Convention, 1964; Convention 123, Minimum Age (Underground Work) Convention, 1965; Convention 124, Medical Examination of Young Persons (Underground Work) Convention, 1965; Convention 128, Invalidity, Old Age and Survivors Benefits Convention, 1967; Convention 135, Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking Convention 1971; Convention 138, Minimum Age for Admission to Employment Convention, 1973; Convention 141, Rural Workers Organisation Convention, 1975; Convention 142, Human Resources Development Convention, 1975; Convention 143, Migrant Workers (Supplementary Provision) Convention, 1975, Convention 144, Tripartite Consultation (International Labour Standards) Convention, 1976; Convention 147, Minimum Standards in Merchant Ships Convention, 1976; Convention 150, Labour Administration Convention, 1978; Convention 151, Labour Relations (Public Service) Convention, 1978; Convention 152, Occupational Safety and Health (Dock Work) Convention, 1979; Convention 154, Collective Bargaining Convention, 1981; Convention 155, Occupational Safety and Health Convention, 1981; Convention 158, Termination of Employment Convention, 1982; Convention 159, Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983; Convention 160, Labour Statistics Convention, 1985; Convention 162, Asbestos Convention, 1986; Convention 171, Night Work Convention, 1990; Convention 172, Working Conditions (Hotels, Restaurants, and Similar Establishments) 1991; and Convention 175, Part-time Work Convention, 1994.

and conciliation assistance, and to settle or prevent collective bargaining controversies. Under this broad spectrum the Industrial Relations Service's work involves:

- Collecting and publishing information on practices and developments in industrial relations;
- Offering assistance to industry for the establishment and operation of voluntary machinery for negotiation, consultation, and grievance settlement;
- Giving lectures to trade unions, employers' organisations, and government agencies; and
- Monitoring developments in important direct negotiations which seem likely to evolve into disputes.

20-5 The more usual form of mediation is intervention in a dispute after negotiations have reached a deadlock and the two sides have formally asked for the intervention of the Service. The Industrial Relations Service mediates in approximately 280 such cases annually, more than 90 per cent of which are resolved without a strike.

Industrial Relations Code

20-6 Although mediation has become practically the only way of providing help for the resolution of disputes, the two sides may still resort to arbitration, directly or after mediation. According to the procedural agreement now in force, arbitration as a last resort is mandatory in the case of disputes over rights.

If a dispute is submitted to arbitration, the Industrial Relations Service sees that a mutually acceptable arbitrator is appointed and assists him to carry out his task by providing facilities and information.

Industrial Relations Partners

Employers and Industrialists Federation

20-7 The Employers and Industrialists Federation (OEB) is a Pancyprian independent organisation representing the business community of Cyprus. It comprises the 40 main professional associations and 400 major individual enterprises in the manufacturing, services, construction, and agricultural sectors of the economy. The OEB is the acknowledged spokesman for the business community and is consulted as such by the government. The principal objectives of the OEB are to:

- Define and promote the system of private enterprise and free market economy which alone offers the best opportunities for growth with freedom of choice and action for the individual;
- Promote economic development and consequently achieve comprehensive social progress as quickly as economic conditions allow;
- Keep the balance of power between the business community, the Trade Unions, and other pressure groups which operate within Cyprus' pluralistic decision-making system;

- Safeguard and promote the interests of its members and the business community in general; and
- Ensure timely completion of the economic and institutional harmonisation of Cyprus with the *acquis communautaire* in view of the envisaged full membership to the European Union (EU).

20-8 The OEB was founded in 1960 by 19 pioneering businessmen. Today, its members come from all sectors of economic activity and employ more than 60 per cent of the work force in the private sector, a percentage which is among the highest in the world.

Trade Unions

History

20-9 Although the initial attempt to create trade unions in Cyprus goes back to 1915, serious efforts to establish trade union organisations in Cyprus began during 1920–1930. The outcome was the organisation of the workers and their enrolment in labour societies, labour clubs, and trade unions. During 1930–1940, an arduous struggle took place for the establishment and recognition of the trade unions. This decade coincided with the national emancipation and anticolonial insurrection of the Cypriot people in October 1931.

In the period 1932–1938, the mining industry developed rapidly due to the exploitation of the workers by foreign companies and the huge underground stocks of copper and iron. At the same time, the building industry expanded, as well as the alcohol, tobacco, and tanning industries. The labour force in 1938 was estimated at 8,000 workers.

Development

20-10 Despite the workers' persecutions, the imprisonments and the discharges from work inflicted by the British colonial regime, the working class continued its attempts to form workers' organisations. In 1931, the Nicosia Footwear Trade Union was established; this trade union enjoyed official recognition in 1932 immediately after the enactment of the Trade Unions Law. By the end of 1940, 62 more trade unions had been established and recognised, having a strength of 3,389 members.

The nascent trade union movement had to solve many serious problems, such as the hours of work (then amounting to 15 hours a day), the rates of wages (which did not exceed two shillings a day), the organisation of the workers, and the recognition of the trade unions. In addition, a continuous struggle was necessary for the abolition of the dictatorial laws and orders of the colonial government so that the Cypriot people, and particularly the workers, could acquire the rights of assembly and organisation, freedom of speech and the press, and the right to elect their local and communal authorities.

For the achievement of these targets, the unity of the working class and of all the small trade unions generally had to be maintained. The unification of the trade unions had been achieved in November 1941 when a trade union conference took place and a Pancyprian Trade Union Committee (PSE) was elected. The PSE was an administrative body which united all the trade unions participating in the Conference. The PSE led the trade union struggles of the workers of Cyprus until the beginning of 1946, when it was declared illegal by the British colonial government on the grounds that it was advancing anti-British propaganda. Its leaders were arrested and sentenced to terms of imprisonment from one to one and half years.

In January 1946, the remaining trade union leaders of the PSE established the Pancyprian Federation of Labour (PEO) in place of the illegal PSE, to continue its work. At the same time, the Cyprus Workers' Confederation (SEK) was established in Limassol. Thus, by the beginning of the 1950s, two trade union organisations, the PEO and the SEK, were playing a major role in the island's industrial relations, a situation that remains unchanged today. The first issues that concerned the trade union movement were:

- The official recognition of the trade unions;
- An increase in wages;
- The 44-hour week; and
- The improvement of conditions of work and other rights.

20-11 After independence in 1960, the Cypriot trade union movement became more organised and substantial. The white- and blue-collar labour forces increased spectacularly due to the development of industry, commerce, and services. Apart from the PEO and the SEK, many other trade unions and occupational organisations came into being, such as PASYDY, POED, OELMEK, OLTEK, ETYK, POAS, and DEOK.

Conflict between trade unions in Cyprus is rare. This unity became the principal cause of the successful establishment of joint action among the leadership of the PEO and the SEK and the other occupational organisations. In the spirit of united action, the PEO and the SEK submit joint claims and undertake, with other trade unions, common struggles.

Regulation

20-12 Trade unions in Cyprus are regulated by the Trade Unions Law.[5] The key provisions of the Law are that:

- No one can be sued for conspiracy if he was acting with another in the furtherance of a trade dispute;
- Inducement to break a contract in the furtherance of a trade dispute is not actionable;

5 Law 71 of 1965.

- No court has jurisdiction to hear a case against a registered trade union for a tort that was allegedly committed by the trade union or any of its officers; and
- Trade unions are under the obligation to have a secret ballot when considering strike action.

Right to Strike

20-13 Article 27 of the Constitution of the Republic of Cyprus safeguards the right to strike of every employee save for the exceptions explicitly stated therein. Thus, any persons employed in the army and police do not have the right to strike while the House of Representatives may legislate to prohibit the right to strike of public employees. It should be stressed, however, that article 27 limits the legislative interference to cases where the safety of the Republic, the constitutional order or public order, and security are in danger.[6]

Cyprus also has ratified the European Social Charter,[7] article 6 (4) of which recognises the right to strike, as well as the ILO Convention 87 and Convention 105[8] that contain similar rights. Special reference also should be made to the fact that Cyprus is a member of the Council of Europe and thus bound by the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the amending Protocols. The provisions of the Convention in relation to the right to strike are similar to article 27 of the Constitution.

The number of strikes is Cyprus is limited since the partners in industrial relations almost always find a way to agree on all issues relating to employment. Thus, it is no surprise that there are no decided cases on the matter of the right to strike since all the interested parties take it for granted that this right is fully safeguarded by the Constitution.

Employment Policy and Statistics

20-14 The employment policy and programmes of the Republic of Cyprus are designed and adopted within the framework of overall national economic and social policy as outlined in the government's Economic Development Plans. One of the basic objectives of the Plans is to encourage full, more productive use of human resources in conditions of full employment.

In 1997, Cyprus' economically active population was estimated at 306,700. In the same year, the gainfully employed population in Cyprus averaged 285,300, as against

6 Article 184 of the Constitution also should be mentioned, as it provides that the Council of Ministers may, in cases of war or other public danger that threatens the Republic, suspend the application of a number of articles of the Constitution, including article 27.

7 Law 64 of 1967 and Law 5 of 1975. Cyprus also has ratified the Revised Social Charter 1996, by Law 27 (III) of 2000.

8 Ratified by Law 17 of 1966.

284,700 in 1996. Wholesale and retail trade, restaurants, and hotels absorbed the largest part of the gainfully employed population (77,300 or 27.1 per cent) followed by community, social, and personal services (69,000 or 24.2 per cent), and manufacturing (40,600 persons or 14.2 per cent).

Registered unemployment increased to 10,424 persons, or 3.4 per cent of the economically active population in 1997, from 9,426 persons, or 3.1 per cent, in 1996. Of the total number of those registered as unemployed in 1997, 5,416, or 52 per cent, were females; persons under the age of 30 accounted for 2,704, or 25.9 per cent, of unemployment; newcomer labour amounted to 781, or 7.5 per cent, of those registered as unemployed; 2,062 persons or 19.8 per cent of the total unemployed, were college or university graduates. Of the total number of graduates of higher education for 1997, 73.3 per cent were unemployed for up to six months, 18.3 per cent were unemployed for six to 12 months, and 8.4 per cent were unemployed for more than 12 months. The number of vacancies notified at the District Employment Offices in 1997 totalled 14,490, as against 13,673 in 1996.

The disequilibria between supply and demand in the labour force continued during 1997, and there were labour shortages in the economy. According to the latest available data from the Department of Social Insurance, the number of foreign workers legally working in Cyprus in July 1998 was 18,241, compared to 16,799 persons on the same date in the previous year.

Government Training Schemes

Apprenticeship Training Scheme

20-15 The Apprenticeship Training Scheme was established in 1963 for the purpose of increasing the number of skilled workers in industry and upgrading their skills to increase productivity.

Under the Scheme, young apprentices in the age group 15–18 years attend, during working hours by agreement with their employers, theoretical instruction at the technical schools in their district once or twice a week. Moreover, during their employment, they receive on-the-job practical training by competent supervisors or foremen. Thus far, 6,824 persons have attended the Apprenticeship Training Scheme, of whom 286 were graduates of the academic year 1997–1998. To upgrade and improve the Apprenticeship Training Scheme, a number of measures either are being currently promoted or are expected to be promoted in the immediate future.

Scheme for Self-Employment of Tertiary Education Graduates

20-16 The basic objective of the Scheme for Self-Employment of Tertiary Education Graduates, which was established in 1983, is to create employment opportunities for unemployed or underemployed tertiary education graduates through the provision of financial incentives for self-employment.

More specifically, loan assistance is provided for projects proposed by interested tertiary education graduates, provided that certain basic criteria are met, in particular the viability of the project. The number of projects recommended to the Loan Commissioners in 1997 was 45, of which 23 were related to medical, dental, and paramedical services.

The Scheme has been revised recently to cover, *inter alia*, a wider range of economic activities and an increase in the amount of loans granted. In addition, a research study is in progress aiming at extending the understanding of some economic aspects of the education and training systems in Cyprus, concentrating on the tertiary level.

Workers' Safety, Health, and Welfare

In General

20-17 The workers' right to safe and healthy working conditions is safeguarded by appropriate legislation. The core of the legislation is the Safety and Health at Work Law,[9] which is in line with the provisions of ILO Convention 155 of 1981 on Occupational Safety and Health, as well as with the principles and most of the provisions of EU Directive 89/391/EEC (Framework Directive).

The Law covers all branches of economic activity and imposes duties on employers, self-employed persons, and employees, as well as on designers, manufacturers, importers, and suppliers of articles and substances for use at work. The scope of the Law goes beyond the protection of persons at work, and it provides for the protection of persons who may be affected by activities of other persons at work.

Enforcement of the legislation is imposed through inspections by qualified inspectors who make regular visits to workplaces to ensure continued compliance with all provisions of the Law and the Regulations made thereunder.

In addition, an important role in promoting safety and health at work is played by the Pancyprian Safety and Health Council, a tripartite advisory body whose terms of reference are to advise the Minister of Labour and Social Insurance on policies and measures necessary to ensure safety, health, and welfare at work and to promote safety consciousness at work, at the national and the enterprise level.

Moreover, the Factory Inspectorate, which is responsible for enforcing the legislation in the light of new information and standards on safety and health introduced by the European Union, reviews and updates current legislation and introduces new regulations.

Following the international trends and progress on issues relating to occupational safety and health, the Cypriot government promotes the active involvement of both employers and workers in securing a safe and healthy working environment by

9 Law 89 (I) of 1996.

introducing and implementing legislation for the establishment and operation of Safety Committees at the place of work.

Training Centre on Occupational Safety and Health

20-18 In the field of education in safety and health at work, the Training Centre on Occupational Safety and Health, established in 1990, is actively involved in organising and implementing programmes, seminars, and other training events. The aims and objectives of these activities are to promote the better understanding of the issues of occupational safety and health as well as to create awareness and a positive safety culture among employers and employees, engineers, managers, instructors, college and school teachers, safety representatives, and other people concerned.

Furthermore, the Training Centre prepares and edits training and information material on related topics of Health and Safety.

Care and Rehabilitation of the Disabled

20-19 Since January 1990, a service for the care and rehabilitation of the disabled has operated within the Department of Labour. Its main objective is to deal with the various issues concerning disabled persons and disabilities and to promote the equalisation of the rights and opportunities of disabled persons, with a view to their full participation in the economic and social life of the country. The service provides:

- Help and implements programmes for the vocational assessment and guidance, training and retraining, placement in employment in the open market, sheltered employment, and self-employment of disabled persons;
- Allowances to cover the special needs of severely disabled persons;
- Promotion and co-ordinates activities for the removal of physical and social barriers for the access of disabled persons to the environment and for their participation in cultural, religious, sporting, and other activities; and
- Assistance with technical aid and equipment to facilitate disabled persons' living and employment, and co-ordination of all relevant activities in the public sector.

Social Insurance

In General

20-20 In October 1980, a new Social Insurance Scheme was put into operation.[10] With some minor exceptions, the Scheme covers all employed and self-employed persons in the island. Non-employed persons may, under certain conditions, join the Scheme on a voluntary basis.

10 Social Insurance Law, Law 41 of 1980, as amended.

Contributions

20-21 The contribution to the Scheme in the case of employees is 16.6 per cent of their earnings up to a maximum of CY £1,495 per month. Of the 16.6 per cent, 6.3 per cent is paid by the employee himself, 6.3 per cent by the employer, and four per cent from the general revenues of the Republic. The contribution in respect of self-employed persons is 15.6 per cent of their income, 11.6 per cent paid by themselves, and four per cent from the general revenues of the Republic. In respect of voluntary contributors, the contribution is 13.5 per cent of their insurable income, 10 per cent paid by the voluntary contributor, and 3.5 per cent from the general revenues of the Republic.

For the purpose of assessing employees' contributions, gross earnings from work are taken into consideration. In the case of the self-employed, however, the law prescribes notional incomes which vary according to the occupational category. If, however, the self-employed person proves that his income is lower than the amount of the notional income prescribed, his contribution is assessed on that income.

Benefits

20-22 The Scheme provides the following benefits:

- Maternity allowance;
- Sickness benefit;
- Unemployment benefit;
- Old-age pension;
- Invalidity pension;
- Widow's pension;
- Orphan's benefit;
- Missing person's allowance;
- Marriage grant;
- Maternity grant;
- Funeral grant; and
- Benefits for employment accidents and occupational diseases, ie, injury benefit, disablement benefit, and death benefit.

20-23 Employees are entitled to all these benefits, but self-employed persons are not entitled to unemployment benefits and benefits for employment accidents. Voluntary contributors are not entitled to maternity allowance, sickness benefit, unemployment benefit, invalidity pension, and benefits for employment accidents.

All benefits, with the exception of marriage grants, maternity grants, and death grants, are composed of two parts, ie, the basic benefit and the supplementary benefit. The basic benefit is assessed on earnings of up to CY £60.70 a week, and the supplementary benefit on earnings of between CY £60.70 and CY £364 a week (1998 figures).

In addition to these cash benefits, the Scheme provides free medical treatment for victims of employment accidents and occupational diseases and for invalidity pensioners. The benefits provided under the Scheme also are payable outside Cyprus, with the exception of maternity allowance, unemployment benefit, sickness benefit, and injury benefit.

Non-Discrimination

20-24 The Social Insurance legislation provides equality of treatment for nationals and non-nationals. Non-nationals have the same rights and obligations under the Scheme as nationals.

Annual Holidays with Pay Scheme

20-25 Under the Annual Holidays with Payment Law,[11] the provision of annual holidays for all persons employed under a contract of service is mandatory.

Presently, the minimum period of annual leave provided under the legislation is three weeks, 15 working days for employees working a five-day week, and 18 working days for employees working a six-day week. To secure the minimum paid leave for their employees, employers contribute to the Central Holiday Fund at the rate of six per cent of their employees' wages up to a ceiling (of wages) of CY £1,577 per month. To be entitled to an annual holiday payment from the Fund, employees must have worked at least 13 weeks during the previous leave year (calendar year).

Employers whose arrangements regarding holidays with pay are more favourable than the provisions of the Law may be exempted from contributing to the Fund. In such cases, annual leave is granted directly by the employers to their employees. Where an employed person is, by virtue of any Law, collective agreement, custom, or otherwise, entitled to a longer period of holiday than three weeks, this right is guaranteed by the Annual Holidays with Pay legislation.

Industrial Disputes Court

20-26 The Industrial Disputes Court was established by the Annual Holidays with Payment Law.[12] The Industrial Disputes Court consists of a President who is appointed by the Supreme Court from a list of lawyers' with at least five years' experience, and two lay members, drawn from employers associations and trade

11 Law 8 of 1967, as amended.

12 Law 5 of 1973. Under the Annual Holidays with Payment Law (Law 8 of 1967), an Arbitration Court was established, but it was declared unconstitutional by the Supreme Court of Cyprus in 1975. The Supreme Court held that all the decisions of the Arbitration Court up to that time were invalid and of no effect.

unions, respectively, who are appointed by the President of the Court from a list of names submitted to the Minister of Labour. The President decides legal questions and his decision is binding on the other members. The Industrial Disputes Court also is under the obligation to give a fully reasoned decision after the hearing of a case.

According to section 12 of the Annual Holidays with Payment Law,[13] the Industrial Disputes Court has exclusive jurisdiction in all cases that arise out of industrial conflict, including all the cases where exclusive jurisdiction is granted to the Court by any Law or regulation. Thus, the Court is the appropriate tribunal to hear cases regarding unfair dismissal, annual holiday claims, claims concerning wages, and pregnancy-related issues.

The Court is not bound by rules of evidence. The procedural rules of the Court have recently been amended,[14] the major change being that now a decision of the Industrial Disputes Court can be appealed to the Supreme Court without leave from the Industrial Disputes Court. Any appeal to the Supreme Court lies on a point of law only.

The definition of the phrase a 'point of law' has been examined and clarified by the Supreme Court in a number of cases. In *Re Costas Hadjicostas*,[15] the Supreme Court held that what amounts to a pure question of law is perhaps easy to define but hard to apply to the particular circumstances of a case. The question of law raised, whatever its nature, must necessarily be one relevant to the facts of the case. A pure question of law cannot be one detached from the facts of the case for in those circumstances it would be an academic question of law. Thus, the Supreme Court continued, when an issue revolves around the application of the law to given facts, it raises a pure question of law. So long as the facts to which the court is required to apply the law are not called in question, the point is a legal one. It merely raises questions bearing on the interpretation and the scope of the law. Exploration of the ambit of the law is always a question of law.[16]

In light of the above, it is clear that the Industrial Disputes Court remains the sole arbiter of fact in all the cases before it. This function is extremely important as in most of the cases the conclusions of the Court on the facts of a case are decisive to its outcome.

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13 Law 5 of 1973, as amended by Law 79 (I) of 1996 and Law 26 (I) of 1997.

14 Procedure Rules for the Industrial Disputes Court 1999. The Rules were amended on 29 June 2000 with the adoption of the Industrial Disputes Court 1 of 2000 Procedure Rule, which established Industrial Disputes Court in every district of Cyprus. Previously, the Court sat only in Nicosia.

15 *Re Costas Hadjicostas*, Civil Application 21/84, 1 CLR 513, 28 August 1984.

16 *Re Costas Hadjicostas*, Civil Application 21/84, 1 CLR 513, 28 August 1984, at p 516, *per* Pikis J.

Termination of Employment

In General

20-27 The Termination of Employment Law[17] is composed of six Parts and four Schedules.

The First and Fourth Schedules set the basis of compensation for arbitrary dismissal and redundancy, respectively; the Second Schedule sets rules for the computation of the period of employment; and the Third Schedule deals with continuity of employment.

Definitions

20-28 Part I of the Law defines an employee as any person who works under a contract of service. Irrespective of this definition, the court may consider a person to be an employee without a contract if it believes that a relation of employer and employee exists.

For the definition of 'employer', the Law states that an employer means any person with whom the employee has entered into a contract or who is deemed by the Court to have the status of an employer and includes the government of Cyprus.

Finally, the Law defines 'wages' as remuneration paid to an employee in money as a result of his employment and include any allowance paid by the employer that is directly or indirectly related to the cost of living. Commissions and *ex-gratia* payments are excluded. Payment made in lieu of notice in the event of dismissal is included. Overtime is excluded unless the overtime is worked on a fixed regular basis.

Unfair Dismissal

20-29 Part II of the Law deals with unfair dismissal situations. The basic rule is that a dismissal is unfair if the employer terminates the employment for any reason other than the exceptions included in section 5 of the Law.

Before any employee can qualify for unfair dismissal compensation, he must be less than 65 years of age and must have been continuously employed by the employer for not less than 26 weeks, unless there is a written agreement that may extend the qualifying period of continuous employment up to 104 weeks.

In cases where a dismissal is declared unfair, the employer must compensate the employee. The compensation is calculated in accordance with the First Schedule of the Law. This provides compensation of not less than what the employee would

17 Law 24 of 1967, as amended by Law 17 of 1968, Law 67 of 1972, Law 6 of 1973, Law 1 of 1975, Law 18 of 1977, Law 30 of 1979, Law 57 of 1979, Law 82 of 1979, Law 92 of 1979, Law 54 of 1980, Law 12 of 1983, Law 167 of 1987, Law 37 of 1988, Law 18 of 1990, Law 203 of 1990, Law 52 of 1994, and Law 61 of 1994.

have received under the Fourth Schedule (dealing with redundancy payments) up to a maximum of two years' wages. Factors to be considered in the award are wages, length of service, loss of career prospects, circumstances of the dismissal, and the employee's age.

Fair Dismissal

20-30 Section 5 of Part II, as noted above, states the cases where termination of employment does not give rise to compensation. These are:

- The employee fails to carry out his work in a reasonably efficient manner;
- The employee becomes redundant within the meaning of Part IV of the Law;
- The termination is due to an act of God or *force majeure*;
- The contract is for a fixed term and has expired;
- The employee renders himself liable to dismissal without notice; or
- The contract of the employee is such that it is clear that the employer-employee relationship cannot reasonably be expected to continue.[18]

20-31 It also should be noted that a lawful termination by the employee, as a result of the conduct of the employer, may be considered as a constructive dismissal or termination by the employer within the meaning of the Law.

Burden of Proof

20-32 The Law is framed in such a way that it imposes the burden of proof on the employer. Thus, the onus of proof is on the employer to show that an employee was discharged for one of the reasons that permit summary dismissal. In the case of constructive dismissal, there is a rebuttable presumption that the employee has not lawfully terminated his employment.

Periods of Notice

20-33 Part III of the Law, which should be read together with the Second and Third Schedules, provides for the notice to which an employee will be entitled from his employer, except where summary dismissal is allowed, and it is based on the length of continuous service.

Employers are required by law to give a minimum notice period of one week to a worker who has been employed continuously for between 26 and 52 weeks, two weeks' notice for 52–104 weeks, and four weeks' notice for over 104 weeks.

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18 The employer-employee relationship cannot reasonably be expected to continue when the employee is guilty of gross misconduct; he commits a criminal offence in the course of his duties without the agreement of his employer; he is guilty of immoral behaviour in the course of his duties; or he repeatedly disregards works and other rules.

Notice provisions apply to redundancy cases as well. Notice time is paid by the employer who may require the employee to accept payment in lieu of notice. An employee who receives his pay in lieu of notice and finds another job keeps the pay but, if he leaves for another job while serving out his notice time with the old employer, he loses the rest of the pay for the period of notice.

The employee who has been continuously employed for 26 weeks or more is required to give to his employer a minimum notice of one week. However, on notice from his employer, an employee who wishes to seek other employment may have time off up to five hours a week during usual working hours without loss of pay.

Redundancy

In General

20-34 As noted above, redundancy is a potentially fair reason for dismissal. However, under the present legal system, the burden of proving a redundancy situation is on the employer. This position is different from that in other countries, for example, the United Kingdom, where there is a presumption that the dismissal of an employee was for redundancy unless proved otherwise.

It is a fundamental condition that an employee will only be allowed to receive compensation from the Redundancy Fund if he has worked for the employer for at least 104 weeks.[19] Furthermore, if the employee reached retirement age before the date of termination he is not entitled to any payment.[20]

Notification to Ministry of Labour

20-35 An important task that rests on the employer is the obligation to notify the Minister of Labour and Social Security about any proposed redundancies at least one month before they occur.[21] The notification should include:

- The number of employees affected;
- The specific department or departments of the business in which the affected employees work;
- The specialisation and if possible the names of the employees affected as well as their financial obligations; and
- The reasons for the redundancy.[22]

20-36 Once the notification is sent, the Ministry may contact the employer to see if there is any solution other than laying off personnel. If no solution is found, the employer may go ahead with the redundancies.

19 Section 16 (1) of the Law.
20 Termination of Employment Law, s 19(1).
21 Termination of Employment Law, s 21(1).
22 Termination of Employment Law, s 21(2).

Redundancy Procedure

20-37 When an employee is dismissed because of redundancy, a particular procedure should be followed. The employee files an application with the Redundancy Fund for compensation. The application is completed by the employer and the reasons leading to the termination of the contract of employment are stated. If the Fund accepts the reasons and pays the employee, that is the end of the matter.

If the Fund rejects the application, the employee files an action in the Industrial Disputes Court against the employer and the Redundancy Fund. From the Redundancy Fund, he will be claiming compensation for redundancy and, alternatively, damages for unfair dismissal against the employer. This is because, under the Termination of Employment Law, as seen above, any dismissal is considered to be *prima facie* unfair. If the court decides that there was no redundancy situation, this necessarily implies that the dismissal was unfair. Consequently, in these cases, the burden of proof is on the employer to prove that the dismissal was by reason of redundancy. To discharge this burden, the provisions of the Law are critical.

Justified Dismissal

20-38 Justified dismissal by reason of redundancy is covered by section 16 of the Law, which provides that dismissal for redundancy is justified only on the following grounds:

- The employer has ceased or intends to cease to operate the business where the employee is employed;
- Modernisation or any other change in the method of production or organisation that necessitates a reduction in the number of employees;
- Change in the products, the method of production, or the expertise required by employees;
- Abolition of a specific department;
- Credit difficulties;
- Lack of orders or raw materials; and
- Contraction in the volume of work or the business.

20-39 The employer must prove at least one of the above reasons. If redundancy is proved, the court will order the Redundancy Fund to pay the employee. Alternatively, the dismissal will be unfair and the employer liable to pay damages. The amount of damages depends, *inter alia*, on the number of years employed, in the same way as unfair dismissal. Any agreement between an employer and an employee to the effect that the latter will not claim any redundancy payment in return for a lump sum or any other benefit given to him is illegal and will have no effect.[23]

23 Termination of Employment Law, s 20A(1).

Sex Discrimination

In General

20-40 All forms of discrimination are prohibited by article 28 of the Constitution. Apart from article 28, however, a number of laws have been passed aiming at the elimination of sex discrimination.

The source of these laws has been certain international conventions, most notably the ILO Conventions, which the Republic of Cyprus has ratified. In addition, case law has offered some assistance towards the development of the law, albeit of limited impact.

History and Character of Antidiscrimination Law

20-41 Antidiscrimination law in Cyprus is human rights-oriented. Before Cyprus became independent, Great Britain extended the European Convention on Human Rights to it by the Declaration of 23 October 1953, under article 63(1) of the Convention, the so-called 'colonial clause'. When an agreement was reached in Zurich for the establishment of the Republic of Cyprus, the definition and protection of human rights were not included in the structure of that agreement but were provided for later, by the London Agreement, as a prerequisite to the establishment of the new state.[24]

The human rights contained in the Cypriot Constitution are set out in Part II (articles 6–35), entitled 'Fundamental Rights and Liberties'. They deal with political, civil, social, economic, and cultural rights, which are mainly based on the European Convention on Human Rights.

Article 28 of the Constitution

20-42 Article 28 of the Constitution covers a wide spectrum of discrimination, including sex discrimination. Paragraph 1 reads:

> All persons are equal before the law, administration and justice and are entitled to equal protection thereof and treatment thereby.

24 Article 5 of the Treaty of Establishment of the Republic of Cyprus provides as follows: 'The Republic of Cyprus shall ensure to everyone within its jurisdiction human rights and fundamental freedoms comparable to those set out in section 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950, and the Protocol to that Convention signed at Paris on 20th March, 1952 . . .'.

20-43 Paragraph 2[25] prohibits, unless there is express provision to the contrary in the Constitution of the Republic, any direct or indirect discrimination against any individual, whether or not a citizen of the Republic, on any ground[26] and especially on the following grounds:

- Community;
- Race;
- Religion;
- Language;
- Sex;
- Political or other convictions;[27]
- Nationality;[28] or
- Social descent, birth, colour, wealth, or social class.

20-44 The protection granted by article 28 stems from a number of International Conventions that the Republic of Cyprus has ratified.[29] More specifically, the concept of equality is derived from article 14 of the European Convention on Human Rights, articles 2, 3, 4, 23, 25, and 26 of the United Nations Covenant on Civil and Political Rights, and articles 2, 3, 7, and 10 of the United Nations Covenant on Economic, Social, and Cultural Rights.[30]

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25 Paragraph 2 of article 28 of the Constitution is based on article 14 of the European Convention on Human Rights and article 2 of the United Nations Covenant on Civil and Political Rights. The latter, however, '. . . creates an obligation to be implemented by the State and does not impose a constitutional duty as in Cyprus . . .'. Tornaritis, *Human Rights as Recognised and Protected by the Law of the Republic of Cyprus* (1974), at p 3.

26 *Gavris v the Republic*, 1 RSCC 88, at pp 94 and 95, *per* Fortshoff, P: '. . . Further, it need hardly be said that the Court does not countenance for a moment the possibility that assuming that, the Applicant is a mentally unbalanced person, his constitutional rights are to be respected any the less. Article 28 of the Constitution leaves no room for such a view . . .'.

27 *Elia and Another v The Republic*, 3 RSCC 1, at p 6, per Forsthoff, P: '. . . The Court . . . takes this opportunity of stressing that paragraph 2 of article 28 of the Constitution provides that every person shall enjoy all rights and liberties provided for in the Constitution without any direct or indirect discrimination against such person on the ground, *inter alia*, of "political or other convictions" . . .'.

28 Tornaritis, 'The Concept of Equality of Treatment and Absence of Discrimination', (1968) 5–6 *Cyprus Law Tribune*, at pp 9 and 10.

29 See the Universal Declaration of Human Rights of the United Nations, especially articles 1, 2, 7, 16, 23(2), and 25(2) and the European Social Charter and especially its article 8(1) and (2), which have been ratified by Law 203 of 1991 and Law 31 of 1988. However, paragraphs 3 and 4 of article 8, paragraph 3 of article 4 (recognition of the right of male and female workers to equal pay for work of equal value), and article 17 (the right of mothers and children to social and economic protection) of the Charter have not yet been ratified.

30 *Jacobs on the European Convention on Human Rights* (1975), at pp 188, 190, and 191.

Application of Article 28 of the Constitution

Context of Examination

20-45 It is essential to point out that that the development of the law in the area of sex discrimination was significantly hindered by procedural obstacles that had to be satisfied under article 146 of the Constitution. The result, from the point of view of the labour lawyer, is not satisfactory, even though positive signals are, from time to time, observed.

For the sake of convenience, the case law was broadly categorised into equal pay and equal treatment cases, even though not all the cases relate to employment. Some are mentioned, however, to demonstrate the philosophical background that guides the Cypriot courts.

Principles of Equal Pay

20-46 The case of *Jenny Xinari v The Republic of Cyprus*[31] was one of the first to reach the courts after independence. Until 1955, a husband and wife, both serving in the public service, were both entitled to be paid what was termed a 'cost-of-living allowance'. However, by the introduction in 1955 of General Order III/1.16(2), the payment of such an allowance was restricted to the officer drawing the higher of the two salaries only. The applicant was first appointed in the public service as a female clerical assistant in 1956. She subsequently married a public officer, whereupon the Accountant-General discontinued, with effect from that date, the payment to her of the cost-of-living allowance which she was receiving, she being in receipt of the lower salary.

Xinari alleged that the decision to deprive her of such allowance was null and void and of no effect. The court accepted this argument and held that:

- The notion of 'equal pay for equal work' was an integral part of the principle of equality safeguarded by article 28 of the Constitution; and
- To deprive either one of a married couple of the cost-of-living allowance which, though not part of a public officer's salary, was nevertheless part of his remuneration, would result in disparity in the remuneration of public officers doing the same work and would, *a fortiori*, in view of the provisions of section 2(1)(viii) of the Pensions Law, Cap 311, amount to discrimination contrary to article 28, and not, as General Order III/1.16 (2) stood, to a reasonable differentiation.

Similar Circumstances

20-47 The case of *Andreas Zenonos and Others v The Republic of Cyprus*[32] concerned a recourse made under article 146 of the Constitution by 21 ex-special

31 Jenny *Xinari v The Republic of Cyprus*, through the Accountant General 3 RSCC 1998.
32 *Andreas Zenonos and Others v The Republic of Cyprus*, through the Director of Personnel (1973) 3 CLR 437.

constables whereby they challenged the validity of the decision of the respondent not to pay to them the difference between the old and the revised[33] salary scales. The applicants were in the service of the Republic as special constables until 30 June 1968, when their service was terminated. On 10 January 1969, Law 2 of 1969 was enacted, whereby the salary of a special constable was increased from CY £30 to CY £38 monthly, with effect from 1 January 1968.

Apart from the question of retrospection of the Law, the court held that the argument of the applicants about inequality of treatment and discrimination failed because the object of article 28 of the Constitution is that only persons in similar circumstances are entitled to equal treatment. The idea of reasonable differentiation was repeated by the court, which held that there was a reasonable basis for differentiation between the applicants, whose services were lawfully terminated on 30 June 1968, some time before the enactment on 10 January 1969 of Law 2 of 69, and the other special constables who were in service on the date of the enactment of the Law. The court concluded that the decision complained of was not arbitrary; nor did it offend the principle of equality safeguarded by article 28 of the Constitution.

Reasonable Differentiation

20-48 In *Xenophon Tsinontas v Cyprus Land Development Corporation*,[34] the applicant accepted unconditionally an offer of appointment to the post of Technical Assistant Grade B in the respondent organisation. A year after his appointment, Tsinontas sought the retrospective readjustment of his salary on the ground that persons serving in a comparable position to himself, and who were doing essentially the same work, were better remunerated.

The recourse was dismissed on the ground, *inter alia*, that the notion of equality did not require the obliteration of differences in the remuneration of a class of public officers referable to the length of their service. It was further held that a public authority had discretion to make reasonable differentiation in this matter, provided always that officers assigned to similar duties were remunerated on the same salary scale.

The case of *Papadopoulou and Another v The Cyprus Broadcasting Corporation*[35] concerned the appointment of the applicants/appellants to the permanent posts of announcers and newsreaders (radio and television) with effect from 1 February 1983 on the salary scale of A8/A9. By letter dated 8 August 1983, they asked for their appointments to be made retrospective, at the latest from 31 December 1981 and

33 Police, Fire Brigade Services and Prisons (Revision of Salaries) Law 1969, Law 2 of 1969.
34 *Xenophon Tsinontas v Cyprus Land Development Corporation* (1987) 3 CLR 1766.
35 *Papadopoulou and Another v The Cyprus Broadcasting Corporation* (1987) 3 CLR 1685.

for placement on salary scale A10 to be accorded equal treatment with their male counterparts, who had been placed on scale A10. Stylianides, J said, *inter alia*, that:

> . . . Article 28 [of the Constitution] safeguards, *inter alia*, the principle of equality before the law and the administration and the notion of 'equal pay for equal work' in relation to public officers is an integral part of such principle (*Jenny Xinari and The Republic*, 3 RSCC 98, at p 100). The outmoded belief that a man, because of his role in society, should be paid more than a woman, even though his duties are the same, is contrary to modern thought and inconsistent with and contrary to our Constitution. a differential based on seniority on the totality of the circumstances of a case is permissible and does not infringe the principle of equality . . . .[36]

20-49 On the facts, however, the decision of the first instance judge was not disturbed, and the appeal failed on the grounds that the appellants:

- Did not possess a legitimate interest because they had voluntarily and unreservedly accepted the administrative acts of their appointment; and
- Were not discriminated against because their male counterparts had been appointed many years before.

20-50 The case of *Melpo Gregoriou v The Municipality of Nicosia*[37] was another typical case on the facts. The applicant was appointed on 1 January 1969 by the Municipality of Nicosia[38] to the position of Clerk (Grade B). During 1986, the salary of the applicant compared with that of a male counterpart was lower, with the result that she made an equal pay claim through her trade union. The Municipality rejected the claim, principally on the ground that the applicant could not challenge a decision that she had in the past accepted, the classical 'no legitimate interest' seen in the *Papadopoulou* case.

In the first instance decision, Stylianides J, in an innovative judgment, annulled the decision of the municipality. He referred extensively to the origins and rationale of the equal treatment principle. He said that the equality safeguarded by article 28 of the Constitution is an autonomous and fundamental right. He rejected the 'no legitimate interest' argument, holding that article 28 refers to an inalienable right which cannot be waived by the citizen. Thus, the municipality had violated the constitutional rights of the applicant, and the decision was set aside. This is the first case in which a Cypriot judge made reference to article 119 of the Treaty of Rome and Directives 75/117 and 76/207.

Even though it was stated that European Community Law was not applicable, it is clear that the court was influenced by European jurisprudence, and this is

36 *Papadopoulou and Another v The Cyprus Broadcasting Corporation* (1987) 3 CLR 1685, at pp 1691 and 1692.

37 *Melpo Gregoriou v The Municipality of Nicosia*, Legal Question 541 of 1986, 12 September 1991, not reported.

38 Municipalities have the status of public corporations.

emphasised in the decision. Finally, the court referred to the provisions of ILO Convention 100 (Concerning Equal Remuneration), 1951, which was not, however, in force at the time.[39]

Melpo Gregoriou was overruled by the full bench of the Supreme Court following an appeal by the municipality.[40] The five judges ruled that the decision of the municipality was not an executory administrative act and thus not amenable to review by the Supreme Court. The finding of the first instance court that article 28 safeguards an inalienable right which cannot be waived by the citizen was rejected since such an interpretation would render purposeless the 75-day time limit imposed by article 146 of the Constitution within which to challenge an administrative act. From the point of view of labour law, this is a regrettable development. However, it must not be forgotten that the decision was taken in the context of Administrative Law and, in this respect, it appears justified.

Equal Value Claims

20-51 An equal-pay-for-work-of-equal-value claim was pursued in the case of *Efthymiou and Others v Telecommunications Authority*.[41] The recourse was eventually rejected because the court endorsed the respondent's allegation that the work was not of equal value.

This decision must be highlighted for three reasons. First, there was a survey carried out by a committee appointed by the respondent to establish whether the work of equal value claim could be sustained. Second, the court accepted the findings in the report of the committee but no reference or comment is made in the judgment on these findings. Third, the court seems to imply that the onus of proof was on the applicants to show that their work was of equal value.

Equal Treatment

Test of Reasonableness

20-52 The case of *Mikrommatis and the Republic*[42] was decided soon after independence. The Supreme Constitutional Court (as it then was) held that the addition of income from the property of a married woman, for the purposes of income tax, to that of her husband was a reasonable restriction based on the intrinsic nature of the community of life existing between spouses, and did not

39 A decision on the same lines by the same judge was made in *Nitsa Zoukof and Others v The Republic of Cyprus*, 25 July 1990, not reported, concerning the rejection of a tender by the applicants for a school canteen. The rejection was based, *inter alia*, on the fact that the applicants were women and would have difficulty in dealing with male students. The court annulled the decision.

40 *Municipality of Nicosia v Melpo Gregoriou*, 26 April 1996, not yet reported.

41 *Efthymiou and Others v Telecommunications Authority*, 17 May 1996, not yet reported.

42 *Mikrommatis and the Republic*, 2 RSCC 125.

amount to discrimination on the ground of sex, while the addition of income from the wife's labour to that of her husband had no relation to the intrinsic nature of the bond of marriage, nor was it justified, and therefore it was discriminatory on the ground of sex.[43]

Furthermore, the Supreme Constitutional Court held, *inter alia*, that the principle of equality, provided in article 28 of the Constitution in the expressions 'equal before law' in paragraph 1 and 'discrimination' in paragraph 2, did not convey the notion of exact arithmetical equality, but only safeguarded against arbitrary discrimination, without excluding reasonable distinctions.[44]

The case of *Demetriades*[45] was a Revisional Jurisdiction Appeal that reversed the decision in *Mikrommatis* that the addition of income from the property of a married woman, for the purposes of income tax, to that of her husband, was a reasonable restriction and did not amount to a discrimination.

Demetriades, respondent in the appeal, had been assessed by the Commissioner of Income Tax to pay tax on the combined total of his income, received by way of salary, and the income of his wife, derived from the letting of shops and flats, for the years of assessment 1962–1968. The court held, by a 4:1 majority,[46] that the decision placed a married woman in a disadvantageous position *vis-à-vis* any married man in the same profession, occupation, trade, or business because a married woman was prevented from enjoying her income to the same extent as a married man. Such a differentiation was not a reasonable and justified distinction and, therefore, amounted to discrimination on the ground of sex contrary to article 28 of the Constitution. Interestingly, the court in this case made reference to *Defrenne*[47] on article 119 of the Treaty of Rome, as it then was, but on the question of prospective overruling.

Even though *Demetriades* did not expressly overrule *Mikrommatis*, this was done by the Supreme Court in the *Ioannides* case.[48] In that case, the Supreme Court

43 *Co-operative Grocery of Vasilia Ltd and Pirou and Others*, 4 RSCC 12; *In Re Tax Collection Law 31 of 1962 and Hjikyriakos and Sons Ltd*, 5 RSCC 22; *Panayides v The Republic and Another* (1965) 3 CLR 107; *Impalex Agencies Ltd v The Republic* (1970) 3 CLR 361.

44 This principle has been adopted and followed in a number of subsequent cases, including *Panayides v The Republic* (1965) 3 CLR 107; *Louca v The Republic* (1965) 3 CLR 383; *Impalex Agencies Ltd v the Republic* (1970) 3 CLR 361; *Republic* (*Ministry of Finance*) *v Nishian Arakian and Others* (1972) 3 CLR 294; *Proios and Another v Republic* (*Minister of Finance*) (1972) 3 CLR 698; *Dinos Kontos v The Republic of Cyprus, through the Permits Authority* (*licensing authority*), (1974) 3 CLR 112.

45 *Republic of Cyprus, through* (*1*) *The Minister of Finance* (*2*) *The Commissioner of Income Tax v Demetrios Demetriades* (1977) 3 CLR 213.

46 Judges Malachtos, Stavrinides, L Loizou, and Triantafillides P concurring, and Judge A Aloizou dissenting.

47 Case 43/75, *Defrenne v Societe Anonyme Belge de Navigation Aerienne* (*Sabena*) (1976) 2 CMLR 98, paras 69–75.

48 *Ioannides v The Republic* (1979) 3 CLR 295.

stated that the ruling in the *Mikrommatis* case, to the effect that the aggregation of the income of a wife from sources other than her own labour with that of her husband for income tax purposes was not unconstitutional (as not discriminating against the wife on the ground of sex), should be considered as wrongly decided and should be reversed. The Supreme Court held that, for married women living with their husbands, both income derived from practising any profession or carrying on any occupation, trade, or business and income derived from any other source such as dividends, interest, and rents should (for income tax purposes) be considered as separate income of the married woman and should not be added to the income of her husband as provided for by the relevant legislative provisions.

Another well-received case was *Christoforou*.[49] Here, it was held, *inter alia*, that the decision of the Council of Ministers to admit 25 male and 25 female students to the Pedagogical Academy of Cyprus, resulting in the admission of some male students who had not done as well as the respondents (all female) in the entrance examination, violated paragraphs 1 and 2 of article 28. Under paragraph 1 of article 28, the respondents were, in the court's opinion, entitled to equality of treatment by the administration as candidates for admission to the Academy; under paragraph 2, such treatment should not have been affected by direct or indirect discrimination against the respondents on the ground of their sex, unless there existed provision to the contrary in the Constitution.

Justification

20-53 The need for justification in cases of unequal treatment was emphasised in the case of *Theophanis Hjisavva*.[50]

Here, the Supreme Court ruled that article 28 of the Constitution is contravened by not affording equal treatment to the applicants and the interested party and by treating the interested party more favourably without sufficient grounds to justify such a course.

Unanswered Issues

20-54 The case of *Tomboli*[51] concerned regulations made under section 42 of the Inland Telecommunications Service Law, Cap 302, whereby the retirement age of the employees of the respondent was the 55th year for female employees and the 60th for male. The applicant argued, *inter alia*, that this was sex discrimination contrary to article 28 of the Constitution. Regrettably, the court did not address this question since the recourse was dismissed on the basis that the applicant had,

49 *Republic v Alexia Christoforou and Others* (1986) 3 CLR 1523; *Marina Christoforou v The Republic* (1986) 3 CLR 1868.

50 *Theophanis Hjisavva and Another v The Republic of Cyprus, through the Public Service Commission* (1967) 3 CLR 155.

51 *Maria Tomboli v The Cyprus Telecommunications Authority* (1980) 3 CLR 266.

in the past, unquestionably and unreservedly accepted the relevant regulation and thus possessed no legitimate interest to challenge the decision.

A similar case on the facts was *Charalambous*.[52] The male applicant challenged the decision of the Director of Social Security to reject his application for an old-age pension in his 63rd year as is the case for female employees. Unfortunately, once more, the recourse was rejected on technical grounds, and no reference was made by the Court to the substance. Specifically the challenged decision was held not to be an executory administrative act since at the time the application was made the applicant had not reached the pension age required by the Law.[53]

Sex Discrimination and Legislative Provisions

In General

20-55 Apart from article 28, Cyprus has ratified a number of international conventions and/or has passed a number of laws which aim at the abolition of sex discrimination.

However, it must be pointed out that article 28 is not limited to comparisons between a man and woman, but extends to comparisons between a man and a man and so on. Therefore, the ambit of article 28 is significantly wider than the laws that will be examined below, beginning with the principle of equal pay for work of equal value.

Equal Pay for Work of Equal Value

20-56 Convention 100. The principle of equal pay for work of equal value was incorporated in Cyprus law after the ratification of ILO Convention 100 (Concerning Equal Remuneration), 1951, by Law 213 of 1987. Article 1 of the Convention defines remuneration as including the ordinary, basic, or minimum wage or salary and any additional emoluments whatsoever, payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment. The term equal remuneration for male and female workers for work of equal value refers to rates of remuneration established without discrimination based on sex.

Article 2 provides that each member must, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for male and female workers for work of equal value.

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52 *Charalambous Constantinos v The Republic of Cyprus and Others*, 12 November 1993, not reported.

53 Social Security (Amendment) Law 1990, Law 17 of 1990.

According to article 2(2) of the Convention, members may apply the principle of equal pay for work of equal value by means of:

- National laws or regulations;
- Legally established or recognised machinery for wage determination;
- Collective agreements between employers and workers; or
- A combination of these three means.

20-57 Article 3 deals with methods of appraisal in instances of indirect discrimination, stating that, where members take action to give effect to the provisions of the Convention, measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed. Furthermore, the methods to be followed in this appraisal may be chosen by the authorities responsible for the determination of rates of remuneration or, where such rates are determined by collective agreements, by the parties thereto. Finally, it is noted that differential rates between workers which correspond, without regard to sex, to differences as determined by such objective appraisal, in the work to be performed will not be considered as being contrary to the principle of equal remuneration for male and female workers for work of equal value.

20-58 Implementation in Domestic Law. The machinery for implementing the provisions of the Convention was introduced by Law 158 of 1989, in force since 27 October 1992. Section 3(1) of the Law imposes the obligation on every employer to apply the principle of equal pay for work of equal value irrespective of the sex of the worker. It must be stressed, however, that, according to section 2 of the Law, equal work means work carried out by men and women which is like work or substantially like work. This echoes section 1(1) of the Equal Pay Act 1970 in England before its amendment, which referred to like work or work rated as equivalent.

If the employer breaches this fundamental obligation, he is guilty of a criminal offence and he could face a fine of up to CY £2,000. Equally important is section 4 of the Law, which suspends the effect of any contractual terms discriminating against women.

Any employee who files a complaint against an employer is protected by virtue of section 5 of the Law, which forbids the dismissal and/or discrimination against an employee who has complained or given evidence of a breach of the Law by the employer. Section 6 hands the supervision and enforcement of the Law to inspectors appointed by the Minister of Labour and Social Security. Regrettably, however, there is no provision in the Law for the adoption of any regulations, and this is a serious drawback.

As seen above, article 3 of the Convention requires members to take measures for the objective appraisal of jobs. In this respect, section 7 of the Law gives the Industrial Disputes Court the power to appoint a committee of experts to enable the Court to establish whether the work is work of equal value.

Finally, section 8 gives the right to the applicant to have recourse to the Industrial Disputes Court which, in the event that it is satisfied that there exists a discriminatory pay practice, may:

- Make a declaratory judgment;
- Give directions for the termination of discrimination; and
- Award compensation to cover damages and order the employer to pay the value of the discrimination from the date that the discriminatory practice arose.

20-59 Surprisingly, recourse under the Law is available only to women. A crucial antidiscriminatory statute is therefore inherently discriminatory.

Equal Treatment

20-60 Convention 111. Law 3 of 1968 incorporated ILO Convention 111 (Concerning Discrimination (Employment and Occupation)), 1958, in Cypriot legislation. As emerges from the title of the Convention, it only applies in cases of discrimination in employment. Article 1 of the Convention defines discrimination as including:

- Any distinction, exclusion, or preference made on the basis of race, colour, sex, religion, political opinion, national extraction, or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- Such other distinction, exclusion, or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

20-61 Furthermore, it is provided that any distinction, exclusion, or preference in respect of a particular job based on the inherent requirements thereof will not be deemed to be discrimination. For the purpose of the Convention, the terms 'employment' and 'occupation' include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Following article 2, each member for whom the Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

The manner of implementation of the above provisions lies in the hands of members, who must utilise methods appropriate to national conditions and practice to:

- Seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;
- Enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;

- Repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
- Pursue the policy in respect of employment under the direct control of a national authority;
- Ensure observance of the policy in the activities of vocational guidance, vocational training, and placement services under the direction of a national authority; and
- Indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

20-62 Unfortunately, no measures have been taken to implement these provisions at the time of writing this chapter.

Pregnancy

20-63 Law 100 (I) of 1997[54] replaced previous legislation for the protection of pregnant women.[55] The Law gives the right to the pregnant worker to 16 weeks' maternity leave. Nine of the 16 weeks must be taken during the period beginning at the second week before the week in which birth is expected.[56] The 16 weeks' period may, under certain circumstances, be extended in cases there is delay in delivery of the child.[57] Section 3(3) gives the right only to women for 14 weeks' maternity leave soon after she undertakes the care of a child under five years old for adoption.

Equally important is section 4 of the Law, which prohibits the dismissal or the giving of notice of dismissal to any female employee because of the fact of pregnancy. The protection is extended for a period of three months after the end of the period of maternity leave.[58]

Froso Apostolidou[59] is one reported case concerning the dismissal of a pregnant single woman on account of pregnancy. The employer was the ecclesiastical television station, and it argued that the behaviour of the applicant was contrary to Orthodox principles of life. The Industrial Disputes Court dismissed the allegations of the respondent-employer on the ground that the reason for dismissal was illegal. The Court further held that there was no breach of the contract of employment and that courts are guided in the interpretation of contracts of employment by legal principles and not religious convictions. Eventually, the Court awarded to the applicant damages in lieu of notice and compensation for unfair dismissal. An important parameter in this case is the fact that the applicant based her claim on the provisions of the Termination of Employment Law[60] for unfair dismissal and

54 Protection of Maternity Law 1997, Law 100 (I) of 1997.
55 Law 54 of 1987, as amended by Law 66 of 1988 and Law 48I (I) of 1994.
56 Law 100 (I) of 1997, s 3(1) and (2).
57 Law 100 (I) of 1997, s 3(5).
58 Law 100 (I) of 1997, s 4.
59 Case 32/93, *Froso Apostolidou v Radio and Television Station 'O LOGOS'*.
60 Law 24 of 1967, as amended.

not on the Protection of Pregnancy Law. This is because the latter does not provide for a right of recourse to the Industrial Disputes Courts.

Another important right is the right for one hour off per working day for a period of six months after delivery for child care and breast-feading,[61] time which is considered as normal working time and thus payable.[62] Two further measures aiming at the protection of pregnant women are a safeguard in relation to their health and safety[63] and the provision that they do not lose their seniority[64] for purposes of promotion.

Finally, section 8 of the Law gives the power to the Minister of Labour and Social Security to appoint the appropriate inspector who will supervise and enforce the provisions of the Law. This has not been done yet. The Law creates a criminal offence by virtue of section 9 by any employer who contravenes the provisions of the Law, punishable by a fine of up to CY £1,000.

International Conventions

20-64 Protection against sex discrimination also is granted by a number of other international conventions to which Cyprus has acceded.[65] Examples include the United Nations Covenant on Economic, Social, and Political Rights and the European Social Charter.

Remedies

20-65 The remedies available in Administrative Law are referred to in chapter 3 of this book.

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61 Law 100 (I) of 1997, s 5(1).

62 Law 100 (I) of 1997, s 5(2).

63 Law 100 (I) of 1997, s 6(1) and (2).

64 Law 100 (I) of 1997, s 7. Case C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés* (*CNAVTS*) *v Evelyne Thibault*, 30 April 1998, not yet reported.

65 Convention on the Political Rights of Women of the General Assembly of the United Nations of 20 December 1953 (approved by Law 107 of 1968); International Labour Organisation Convention 100 (Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value), 29 June 1951 (approved by Law 213 of 1987); United Nations Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (approved by Law 78 of 1985); International Labour Organisation Convention 45 (Underground Work (Women)) of 1935; International Labour Organisation Convention 89 (Night Work (Women)) (Revised), 1948 (approved by Law 56 of 1965) and Protocol of 1990, thereto, signed in Geneva on 26 June 1990 (approved by Law 33 (III) of 1993); United Nations Convention on the Nationality of Married Women of 20 February 1957; United Nations Convention on the Recovery Abroad of Maintenance of 20 June 1956 (approved by Law 50 of 1978); United Nations Convention for the Suppression of the Traffic in Women and Children of 30 September 1921 and its Amendment of 12 November 1947; United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others of 21 March 1950 (approved by Law 57 of 1983).

In relation to equal pay, as has been seen above, Law 158 of 1989 gives the prospective applicant a right of action in the Industrial Disputes Court. If successful, the Court may:

- Make a declaratory judgment;
- Give directions for the termination of discrimination; or
- Award compensation to cover damages and order the employer to pay the value of the discrimination from the date that the discriminatory practice arose.[66] Unfortunately, there are no reported cases.

20-66 Law 3 of 1968 incorporated ILO Convention 111, Concerning Discrimination (Employment and Occupation), 1958, into Cypriot legislation, but no other legislation has been passed so it remains idle and recourse is effectively barred. Therefore, in relation to pre-employment matters, there is, in essence, no protection and, consequently, no remedy.

Law 100 (I) of 1997 on pregnancy also is problematic. No regulations have been adopted so far, and there appear to be no reported cases, apart from *Froso Apostolidou* noted above.

As noted, the Equal Pay and Pregnancy Laws create criminal offences. This, however, is of no value to the victim in financial terms. It is true that a victim may initiate a private criminal prosecution against the employer but, even if she wins, which is very difficult,[67] there will be no practical benefit at the end. It appears that the criminal sanctions were introduced to show the willingness of the state to enforce the law but, unfortunately, no prosecution has been initiated.

Employment Conditions

Minimum Standards

20-67 The government has the power to fix minimum wages by Ministerial Orders. This power is given by section 3 of the Minimum Wages Law.[68] Thus far, the Orders issued cover the minimum wages of office clerks and shop assistants, which presently are CY £275 per month on engagement.

Working Hours

20-68 Most offices observe a 40-hour week from Monday to Friday. Office hours are from 8 am to 5:30 pm, with a 90-minute lunch break during the winter, and 8 am to 7 pm, with a three-hour break during the summer. Government offices

66 This conclusion was confirmed by the President of the Industrial Disputes Court, the Honourable K Kallis, Interview, 15 September 1998.

67 The burden of proof is heavy (beyond reasonable doubt), and no case has been tested so far.

68 Cap 183.

operate from 7:30 am to 2:30 pm from Monday to Friday. They also are open on Thursday afternoons from 3 pm to 6 pm.

Holidays

20-69 Minimum annual holiday entitlement is 15 days for employees on a five-day working week and 18 days for employees on a six-day working week. Any entitlements not taken during the year can be paid or carried forward for a maximum period of two years.

With respect to public holidays, there are no statutory provisions to indicate which days in the year are public holidays, except for Sunday. The public holidays given in the private sector are governed by collective agreements between employers and trade unions, and they usually follow the public holidays given in the public sector. In cases where the employer is not bound by a collective agreement, it is at his discretion to offer any of the public holidays given in the public sector.

Labour Skills

20-70 One of Cyprus' most valuable resources is its hard-working, skilled, well-qualified, versatile, and relatively inexpensive labour force. Despite the very low level of unemployment, a pool of well-qualified professional and secretarial staff fluent in English and other languages is readily available.

Employment of Foreigners

Non-Cypriots Employed by Local Employers

Work Permits

20-71 It is very difficult for a non-Cypriot to obtain a work permit to work in Cyprus for a local employer. For such a permit to be given, it must be shown that, because of qualifications and know-how, no Cypriots are readily available for that particular post.

The process is supervised by the Ministry of Labour through the local Labour Office. Work permits are usually given for six months, and they are renewable.

Social Security

20-72 A non-Cypriot working for a local employer will be part of the Social Security scheme, and the employer will be obliged to make Social Security deductions from the employee's salary and remit these deductions (six per cent on salary up to CY £926 per month), together with an equal amount, being the employer's contribution, to the Social Security authorities.

Non-Taxable Benefits

20-73 Apart from the deductions and allowances, the Income Tax Laws in Cyprus do not allow much scope for mitigating tax on employees (as opposed to self-employed persons, for whom there are a number of ways of mitigating tax). The most common method used takes the form of giving fringe benefits instead of salary but, even in this case, the advantages are rather limited as most fringe benefits will be taxable.

Non-Cypriots Employed by International Business Companies

Work Permits

20-74 In the case of non-Cypriots employed by international business companies, obtaining a work permit for the first six months is a simple procedure. Renewals are given annually thereafter, provided that the employee and employer comply with the regulations imposed by the Central Bank and Immigration authorities.

Social Security

20-75 Non-Cypriots employed by international business companies are not part of the Social Security scheme, and they are exempt from any contributions.

Other Benefits

20-76 Non-Cypriots employed by international business companies are entitled to import to Cyprus household electrical goods and other household equipment (with the exception of furniture), as well as one motor vehicle, completely free of import duty. Alternatively, these items can be purchased in Cyprus, again duty free.

Non-Cypriot Employees Rendering Salaried Services outside Cyprus and Receiving Salaries in Cyprus

20-77 Non-Cypriot employees rendering salaried services outside Cyprus and receiving salaries in Cyprus, irrespective of whether they are employed by an international legal entity, are not taxed if their salaries are paid through Cyprus. Otherwise, the rate applied is 10 per cent of the normal rates. In this case, the employee will be entitled to seven per cent deduction on salaried income.

In the case of an employee employed normally in Cyprus, who spends some of his time rendering his services outside Cyprus, no tax is levied on the part of his salary that relates to the time spent outside Cyprus, as long as the salary is paid through Cyprus.

Classification of Foreign Employees

In General

20-78 Foreign workers are divided into two classes, ie, 'executive' staff and 'non-executive' staff.

Executive Staff

20-79 The term 'executive' includes expatriates registered as directors or partners with the Registrar of Companies and Official Receiver. It also includes general managers of subsidiaries and branches of publicly quoted overseas companies, as well as departmental managers of international business companies operating from Cyprus for at least two years in accordance with the conditions and requirements of the Central Bank of Cyprus.

International business companies are allowed to employ a maximum of three executives, unless they persuade the Central Bank that a greater number is justified. An expatriate who wishes to be employed in an executive position must:

- Be at least 24 years old;
- Have the necessary qualifications; and
- Receive appropriate remuneration (the minimum acceptable annual salary for an executive is CY £12,000).

20-80 Expatriates employed in professional, administrative, managerial, technical, or clerical positions encompass 'non-executive' personnel.

Non-Executive Staff

20-81 'Non-executive' staff must be recruited from within Cyprus. If all formal procedures are followed, such as announcement of a position in the local press, and no suitable Cypriot candidates can be found, international business companies are allowed to employ expatriates for the position.

Temporary Residence and Employment Permits

20-82 The responsible authority for the first issue and subsequent renewals of Temporary Residence and Employment (TRE) permits granted to all expatriates employed by international business companies in Cyprus is the Migration Officer at the Ministry of Interior. The Migration Officer acts in consultation with:

- The service for international business companies at the Central Bank of Cyprus regarding the first TRE permits granted to expatriate executives as well as all renewals of TRE permits granted to all expatriates irrespective of their rank;
- The Labour Department at the Ministry of Labour and Social Insurance regarding the first TRE permits granted to expatriates employed in non-executive posts; and

- The Divisional Aliens section at District Police Headquarters regarding the first issue and renewal of TRE permits granted to expatriates employed in non-executive and, if the Migration Officer deems it necessary, other positions.

20-83 The above authorities provide advice to the Migration Officer who in turn takes their recommendations into consideration and replies to the applicants directly. Under the Aliens and Immigration legislation, any TRE permit:

- May be revoked by the Minister of the Interior, acting in his capacity as Chief Immigration Officer, if he deems it to be in the public interest; and
- Is considered automatically cancelled, if the conditions under which it was granted cease to exist.

20-84 International business companies should inform the Central Bank, the Migration Officer, and the Department of Customs as soon as any of their expatriate staff resign or are no longer in their employment.

CHAPTER 21

Intellectual Property

Christophoros Christophi

Introduction

21-1 In recent years, intellectual property protection in Cyprus has attracted much attention. This can be attributed mainly to the increasing importance of Cyprus as an international commercial centre, which has resulted in a greater awareness of the need to protect intellectual property rights.

The courts and authorities in Cyprus adhere strictly to the relevant provisions of the law so as to ensure the protection of intellectual property rights against piracy and infringement. The constant flow of judicial decisions and the widespread interest in the subject following the ubiquity of the new technologies have made 'intellectual property' an increasingly amorphous and fast developing area of law with the consequent difficulty in giving clear-cut and enduring definitions. In practice, intellectual property is usually divided into two main categories, as follows:

- Industrial property, ie, patents, industrial designs, geographical indications and designations of origin, plant and seed varieties, trade marks, service marks, and trade names; and
- Copyright and related rights.

Domestic Law

21-2 Intellectual property in Cyprus is regulated by statutory legislation and the general principles of Common Law, such as the torts of passing off and malicious falsehood as well as the breach of confidence action, which has its roots in equity. Whereas statute in the main creates proprietary rights prohibiting third parties from using and exploiting the subject protected by these rights, the relevant Common Law principles are primarily concerned with providing rights of action.

Moreover, these Common Law rights are supplementary and indeed complementary to statutory formal rights, resulting at times in some overlaps, as, for example, between trade mark law and the tort of passing off.

A more detailed treatment of the law of passing off, malicious falsehood, and breach of confidence as it applies in Cyprus is outside the scope of this chapter. It should, however, be emphasised that these rights of action under Common Law and equity principles play a significant role in intellectual property litigation in Cyprus.

The following statutes, some of which are modelled on their English counterparts, should be mentioned:

- The Patents Law, number 16 (I) of 1998, as amended by Law 21 (I) of 1999;
- The Trade Marks Law, Chapter 268, as amended by Law 63 of 1962, Law 69 of 1971, and Law 206 of 1990;
- The Partnerships and Trade Names Law, Chapter 116, as amended, and section 50 of the Companies Law, Chapter 113, as amended;
- The United Kingdom Designs (Protection) Law, Chapter 269, as amended;
- The Copyright Law, number 59 of 1976, as amended by Law 63 of 1977 and Law 18 (I) of 1993; and
- The Law for the Protection of the Commercial Exploitation of Cinematographic Films, Law 159 of 1990.

International Agreements

21-3 Cyprus is a party to a number of international agreements, which can be broken down into two broad categories, namely those which:

- Lay down minimum harmonised standards of protection; and
- Provide for reciprocal arrangements regarding application or examination procedures for the registration of intellectual property rights.

21-4 Below is a chronological list, by date of ratification, of the most important international agreements to which Cyprus is a party:

- The Berne Convention for the Protection of Literary and Artistic Works (Act of Paris 1971), Law 86 of 1979;
- The Paris Convention for the Protection of Industrial Property (Lisbon Act), Law 63 of 1965, and (Stockholm Act), Law 66 of 1983;
- The Convention Establishing the World Intellectual Property Organisation (WIPO), Law 36 of 1984;
- The Nairobi Treaty on the Protection of the Olympic Symbol, Law 9 of 1985;
- The Universal Copyright Convention, Law 151 of 1990;
- The Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of Their Phonograms, Law 21 (III) of 1992;
- The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), Law 16 (III) of 1995;
- The European Convention relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite, Law 29 (III) of 1995;
- The Geneva Trade Marks Law Treaty 1994, Law 12 (III) of 1996;
- The European Patent Convention 1973, Law 26 (III) of 1997; and
- The Patent Co-operation Treaty 1970, Law 27 (III) of 1997.

21-5 Concrete steps are under way to ratify a number of other important international conventions.[1]

This chapter is principally concerned with the five main areas of intellectual property law, namely:

- Patents;
- Trade marks and service marks;
- Designs;
- Trade names; and
- Copyright.

Patents

In General

21-6 In Cyprus, the registration of patents was regulated by the Patents Law, Cap 266. A new Patents Law was passed recently, however,[2] a main provision, which departs from the old Cap 266, is that an independent local authority for the registration of patents has been established.

The Law provides for a Register of Patents to be maintained to record the names and addresses of the patentees, as well as any other information which is considered necessary by the Registrar for the identification of the owner of the patent.

Patentability

21-7 Section 5 of Part III of the Law defines the instances where an invention may be patentable. It provides that an invention shall not be patentable unless it is new, involves an inventive step, and is capable of industrial application.[3] Sub-section (2) of section 5 excludes inventions that will not be regarded as inventions within the meaning of sub-section (1). The excluded categories are:

- Discoveries, scientific theories, or mathematical methods;
- Aesthetic creations;

1 These include the Madrid Agreement Concerning the International Registration of Marks of 14 April 1891, as last revised at Stockholm on 14 July 1967 and as amended on 28 September 1979, and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks adopted at Madrid on 27 June 1989; the UPOV Convention for the Protection of New Varieties of Plants of 2 December 1961, as last revised at Geneva on 19 March 1991; the Lisbon Agreement Concerning the Protection of Appellations of Origin and Indications of Source and their International Registration; and the Rome Convention for the Protection of Performers and Producers of Phonograms and Broadcasting Organisations of 26 October 1996.

2 Law 16 (I) of 1998.

3 Law 16 (I) of 1998, s 5(1).

- Schemes, rules, or methods for performing mental acts, playing games, or carrying on economic activities, and programmes for computers; and
- Presentations of information.

21-8 Sub-section (3) then provides that a patent will not be granted in respect of an invention, the exploitation of which would be contrary to public order or morality, provided that the exploitation will not be deemed to be so contrary merely because it is prohibited by the Law or the Regulations.

Novelty

21-9 Section 6 of the Law covers the crucial issue of novelty. Sub-section (1) states that an invention will be considered new if it does not form part of the state of the art. The 'state of the art' is defined in sub-section (2) of section 6 as meaning all matter which, before the date of filing or before the priority date where priority of the application for the grant of the patent for the invention is claimed, has been made available to the public (whether in Cyprus or elsewhere) in a written or other graphic form, by an oral description, by use, or in any other manner.[4]

Inventive Step and Industrial Application

21-10 Section 7 of the Law attempts to define what is an inventive step. An invention will be considered to involve an inventive step if, having regard to the state of the art as defined in sub-section (2) of section 6, it is not obvious to the judgement of an expert skilled in the art.

This formulation follows the structure of section 3 of the English Patents Act 1977, which states that '. . . an invention shall be taken to involve an inventive step if it is not obvious to a person skilled in the art'.

Given the similarity in the formulation, it is submitted that the legal test is the same in both jurisdictions, a conclusion which means that the decisions of the English courts on the matter will prove invaluable as persuasive authority when this issue arises in Cyprus. Since the interpretation of this sub-section is crucial, the approach of the English courts will be briefly examined.

What is clear is that, if an invention is obvious, it does not involve an inventive step. Obviousness and an inventive step are mutually exclusive. An invention cannot involve

4 Sub-section (3) of section 6 provides that the state of the art also comprises all matter contained in an application for another patent which has been registered or which is valid in Cyprus if such application or the patent granted as a result of the application has been published by or on behalf of the Office of the Registrar, provided that the date of filing or, where priority is claimed, the priority date of such application is earlier than the date referred to in sub-section (2) of section 6.

an inventive step and at the same time be obvious. It has long been established that the question of obviousness is a question of fact which was formerly left to the jury.[5]

However, how does one approach obviousness? Oliver LJ gave the classic formulation in *Windsurfing International Inc v Tabur Marine* (*Great Britain*) *Ltd*,[6] where he identified four steps.

The first was the identification of the inventive concept embodied in the patent in suit. Second, the court places itself in the shoes of the normally skilled but unimaginative addressee. Third, dressed with this mantle, the court must identify the differences between what was known and the new invention; fourth, the court must ask itself whether, viewed without any knowledge of the alleged invention, those differences constitute steps which would have been obvious to the skilled man or whether they required any degree of invention.

The second step relates to the definition of the 'expert skilled in the art'. Lord Reid, in *Technograph*, defined this person as follows:

> It is not disputed that the hypothetical addressee is a skilled technician who is well acquainted with workshop techniques who has carefully read the relevant literature. He is supposed to have an unlimited capacity to assimilate the contents of, it may be, scores of specifications but incapable of a scintilla of invention. When dealing with obviousness . . . it is permissible to make a 'mosaic' out of the relevant documents, but it must be a mosaic which can be put together by an unimaginative man with no inventive capacity.[7]

21-11 Another parameter prior to registration is that an invention must be capable of industrial application and will be considered as such if it can be made or used in any sector of industry.[8] The word 'industry' must be construed in the broadest sense of the term and, in particular, includes handicraft, agriculture, breeding of fish, and services.[9]

Protection against Infringement

21-12 One of the most important areas of the Patents Law is the protection against infringement.[10] Once a patent has been registered and a certificate of registration granted and published, any persons other than the patentee are expressly prohibited from manufacturing, selling, importing, or otherwise commercially exploiting

5 *Technograph Printed Circuits Ltd v Mills & Rockley* (*Electronics*) *Ltd* (1972) RPC 346.

6 *Windsurfing International Inc v Tabur Marine* (*Great Britain*) *Ltd* (1985) RPC 59, at pp 73 and 74.

7 *Technograph Printed Circuits Ltd v Mills & Rockley* (*Electronics*) *Ltd* (1972) RPC 346, at p 355.

8 Law 16 (I), s 8(1).

9 Law 16 (I) of 1998, s 8(2).

10 Law 16 (I) of 1998, Part XI, ss 60, 61, and 62.

either the patented product or the product obtained by a patented process. Currently, the time period for which the state agrees to prohibit third parties from using an invention is 20 years from the date of filing the application.[11]

In the event of infringement the patentee may commence an action in court seeking an injunction and/or damages. The most important grounds on which any action for infringement of a patent may be defended are that:

- The patent is not for an invention within the meaning of the law;
- The invention is not novel;
- The invention is obvious;
- The invention is not capable of industrial application;
- The invention belongs to a category of excluded subject matter, such as methods of treating humans and animals;
- The claims of the complete specification are ambiguous;
- The complete specification is insufficiently explicit; and
- The application for the patent was not in order.

Duration of Protection

21-13 The duration of the protection period depends on the payment of an annual renewal fee.

Patent rights can be sold by the patentee to anyone who is willing to buy them. In the case of patents, most licence arrangements take the form of a licence granted by the licensor to the licensee with a payment by the licensee to the licensor of a licence royalty either as a percentage of the net sales price or as a fixed sum per article processed or manufactured.

The Law provides for an application for a supplementary protection certificate for pharmaceutical products which was not available under the old law.[12] The certificate confers the same rights as the basic patent. The length of the period of protection offered by the certificate is calculated in relation to the period for which protection was lost due to the authorisation process, but it cannot exceed five years.

Trade Marks and Service Marks

In General

21-14 'Today the trade mark industry is a vital component of the whole structure of advertising and marketing that is such a strong feature of the commercial scene.'[13]

11 Law 16 (I) of 1998, s 26.
12 Law 16 (I) of 1998, Part VIII, ss 30–46.
13 Holyoak and Torremans, *Intellectual Property Law* (1995), at p 293.

The climax of the Cyprus Stock Exchange in 1999 and the exposure of more and more companies to the gaze of the public has led to an unprecedented volume of trade mark applications to the Registrar of Trade Marks Office as people come to understand more and more the value of protecting their intellectual property rights.

Registration

21-15 The registration and protection of marks in relation to goods and services is governed by the Trade Marks Law[14] and by the Regulations of 1951–1992.[15]

The international classification applies, whereby goods and services are categorised into 34 classes and eight classes, respectively.[16] The Register is divided into Parts A and B,[17] and marks are entered according to their distinctive nature.

For a trade mark to be registrable in Part A of the Register, it must contain or consist of at least one of the following essential particulars as laid down in the Law:

- The name of the company, individual, or firm, represented in a special or particular manner;
- The signature of the applicant for registration or some predecessor in his business;
- An invented word or invented words;
- A word or words having no direct reference to the character or quality of the goods or services and not being according to its ordinary signification a geographical name or a surname; and
- Any other distinctive mark.[18]

21-16 However, a name, signature, or word or words other than such as fall within the descriptions in the foregoing paragraphs will not be registrable except on evidence of distinctiveness.

For the purposes of section 11(1), 'distinctive' means adapted, in relation to the goods in respect of which a trade mark is registered or proposed to be registered,

14 Trade Marks Law, Cap 268, as amended by Law 63 of 1962, Law 69 of 1971, and Law 206 of 1990.

15 The Trade Marks Law and the Regulations are modelled on their English counterparts before the passing of the Trade Marks Act 1994. For a full analysis of the previous English law, see Blanco White and Jacob, *Kerly's Law of Trade Marks and Trade Names* (12th ed, 1986).

16 The classification is carried out in accordance with an international agreement, the Nice Classification (6th ed).

17 Trade Marks Law, s 3. The procedure for registration in Part B of the Register is the same as for Part A. The Registrar of Trade Marks, when examining an application for registration, has the power, instead of refusing an application for registration in Part A, to treat it, if the applicant agrees, as an application for registration in Part B. In practice, this is how most Part B applications come to be made.

18 Trade Marks Law, s 11(1).

to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods with which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.

The effect of section 11(3) of the Law[19] is that the Registrar, in considering an application for registration, must consider both its inherent adaptation to distinguish and the extent to which it is shown by evidence to be distinctive. Where a mark sought to be registered is considered to lack enough inherent distinctiveness to justify registration by itself, evidence of distinctiveness needs to be provided.

The Application for Registration

21-17 To register a mark, a lawyer licensed to practise in Cyprus must file with the Trade Marks Registrar on behalf of the applicant:

- A fully completed application containing all relevant details; and
- A form signed by the applicant authorising the lawyer to file the application.

21-18 On receipt of the application forms, the Registrar appoints a filing date and a number to the mark and conducts a search to establish the registrability of the mark. Where the mark is not registrable,[20] the Registrar may either object to such registration or impose conditions.[21]

The applicant has the right to present his case and his arguments prior to the Registrar's determination of the application. If the Registrar refuses the registration, the applicant may apply for judicial review of the decision under article 146 of the Constitution to the Supreme Court of Cyprus in its revisional jurisdiction.[22]

The Right to Oppose the Registration

21-19 When an application for registration of a trade mark has been accepted, whether absolutely or subject to conditions, the Registrar has the duty, as soon as may be after acceptance, to cause the application as accepted to be advertised in the prescribed manner, and the advertisement must set out all the conditions subject to which the application has been accepted.[23]

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19 Trade Marks Law, s 11(3), provides the following: 'In determining whether a trade mark is adapted to distinguish as aforesaid the Registrar may have regard to the extent to which: (a) the trade mark is inherently adapted to distinguish as aforesaid; and (b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact adapted to distinguish as aforesaid'.

20 For example, where a confusingly similar mark has been registered prior to the application in respect of the same class of goods or services.

21 Trade Marks Act, s 19.

22 Trade Marks Act, s 19.

23 Trade Marks Act, s 20(1).

The Registrar may cause an application to be advertised before acceptance if it is made under paragraph (e) of sub-section (1) of section 11[24] or in any other case where it appears to him that it is expedient by reason of any exceptional circumstances so to do. Where an application has been so advertised the Registrar may, if he thinks fit, advertise it again when it has been accepted but shall not be bound so to do.

Any person may, within the prescribed time from the date of the advertisement of an application, give notice to the Registrar of opposition to the registration.[25] The notice must be given in writing in the prescribed manner, and must include a statement of the grounds of opposition.[26]

After the filing of the opposition, the Registrar sends a copy of the notice to the applicant. Within the prescribed time after receipt thereof the applicant must file, in the prescribed manner, a counter-statement of the grounds on which he relies for his application and, if he does not do so, he will be deemed to have abandoned his application.[27]

If the applicant files such a counter-statement, the Registrar must furnish a copy to the persons giving notice of opposition and, after hearing the parties, if so required, and considering the evidence, must decide whether, and subject to what conditions, if any, registration is to be permitted.[28] The decision of the Registrar is subject to appeal to the Supreme Court in its revisional jurisdiction.[29]

Prohibition of Registration on Certain Grounds

21-20 Section 13 of the Trade Marks Law states that it will not be lawful to register as a trade mark or part of a trade mark any matter the use of which would, by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design.[30]

Furthermore, the Trade Marks Law provides that no trade mark shall be registered in respect of any goods or description of goods or services that is identical with a trade mark belonging to a different proprietor and already on the register in respect

24 Section 11(1)(e) of the Trade Marks Act provides that a trade mark 'shall not be registrable under the provisions of this paragraph except on evidence of its distinctiveness'.

25 Trade Marks Act, s 20(2).

26 Trade Marks Act, s 20(3).

27 Trade Marks Act, s 20(4).

28 Trade Marks Act, s 20(5).

29 Trade Marks Act, s 20(6).

30 Courts in Cyprus consistently follow the decisions of English courts on the interpretation of these provisions. *York Trailer Holdings Ltd v Registrar of Trade Marks* (1982) 1 All ER 257, is often cited and endorsed as far as the interpretation of section 13 is concerned.

of the same goods or description of goods or services or that so nearly resembles such a trade mark as to be likely to deceive or cause confusion.[31]

In case of honest concurrent use, or of other special circumstances which in the opinion of the Court or the Registrar make it proper so to do, the Court or the Registrar may permit the registration of trade marks that are identical or nearly resemble each other in respect of the same goods or description of goods or services by more than one proprietor subject to such conditions, if any, as the Court or the Registrar, as the case may be, may think it right to impose.[32]

It is evident from the above provisions that the onus is on the applicant to satisfy the Registrar that the trade mark applied for is not reasonably likely to deceive or cause confusion, so that refusal to register does not involve the conclusion that the resemblance is such that either an infringement or a passing off action would succeed.

Protection against Infringement

21-21 Section 6[33] of the Trade Marks Law covers the issue of infringement of trade marks that are registered in Part A of the register. It provides as follows:

> Subject to the provisions of this section, and of sections 9 and 10, the registration (whether before or after the commencement of this Law) of a person in Part A of the register as proprietor of a trade mark in respect of any goods shall, if valid, give or be deemed to have given to that person the exclusive right to the use of the trade mark in relation to those goods and, without prejudice to the generality of the foregoing words that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion in the course of trade in relation to any goods in respect of which it is registered and in such manner as to render the use of the mark likely to be taken either (a) as being used as a trade mark; or (b) in a case in which the use is use on the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.

21-22 The reading of section 6 leads to the following two important conclusions. First, the monopoly right is granted in relation to certain goods or services or both.

31 Trade Marks Law, s 14(1).
32 Trade Marks Law, s 14(2).
33 Section 6 of the Trade Marks Law is identical to section 4 of the English Trade Marks Act of 1938.

In other words, the Trade Marks Law does not grant exclusivity of the trade mark as such but attaches the exclusivity to a particular description of goods or services.

Second, actual use by the proprietor of a trade mark registered in Part A of the register is not a necessary pre-requisite for the institution of an action for its infringement.[34]

If a person infringes the registered mark of another person and refuses and/or fails to stop after the infringement has been drawn to his attention, a civil action can be brought to restrain infringement. The relief usually sought in an action for infringement is an injunction restraining the further use of the mark by the unauthorised party or an inquiry as to damages. If the infringement is on a large scale, the court may order the delivery up of the spurious marks for destruction or order the defendant to tender an account of the profits made through the sale of goods or the provision of services in respect of which the proprietor's trade mark was infringed.

Where a plaintiff is seeking an injunction to restrain infringement of a registered mark, there is no onus on the plaintiff to prove anything except that the mark is registered. The registration of his mark is proved by the production of the Registrar's certificate of registration. The most common defences in an action for infringement are:

- The plaintiff has no title;
- The registration is for other reasons invalid;
- There is no infringement;
- The plaintiff is debarred from suing the defendant for all or part of the relief he seeks by an agreement or some personal estoppel or because the mark is deceptive or his business is fraudulent; or
- The plaintiff's registration is in Part B, and the use complained of is not likely to deceive or cause confusion.

Duration of Registration and Protection

21-23 Trade marks and service marks are registered for an initial period of seven years which may be renewed on application for 14 years periodically.[35]

Assignment

21-24 Section 24 of the Trade Marks Law allows the assignment of a registered trade mark on the transfer of a business either with the entire or the remainder of the goodwill. A registered mark is assignable and in respect of either all or some of the goods or services.

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34 This flows not only from section 6(1)(b) of the Trade Marks Law but also from section 2, which defines a trade mark as a 'mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without indication of the identity of that person'.

35 Trade Marks Law, s 22.

Section 26 provides that the registered proprietor of a mark has the power to assign it and give effectual receipts for any consideration for an assignment thereof. According to section 24(3) of the Trade Marks Law, an unregistered mark also is assignable as a registered mark provided that at the time of its assignment the unregistered mark is used in the same business as the registered mark and is assigned at the same time and to the same person as the registered mark.

Licensing

21-25 Section 28 of the Trade Marks Law contains provisions for the registration of persons other than the proprietor as users of registered marks and provides that where this is done the mark is to be treated as still used only by the proprietor.

As regards licensing of unregistered marks, it appears that it is permissible as if the marks were registered.

Registrar's Discretion

21-26 In a series of judgments, the Supreme Court has consistently shown that it will not intervene or quash any Registrar's decisions as long as the Registrar has taken into account all the relevant facts and his decision was not based on a false evaluation of the law, or taken in excess and/or in abuse of his authority. As a result a decision cannot be appealed if it was reasonable within the ambit of the discretionary power of the Registrar.[36]

Designs

21-27 The legal framework that regulated designs after the independence of Cyprus was the United Kingdom Designs (Protection) Law, Cap 269. The Law was passed on 14 August 1936 and, in essence, it provided that a design would be protected in Cyprus if it was first registered in the United Kingdom.

The registered proprietor of any design registered in the United Kingdom enjoyed the same privileges and rights in Cyprus as if the registration in the United Kingdom was issued with an extension to Cyprus.[37]

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36 *Beecham Group Ltd v Republic* (1982) 3 CLR 633; *White Horse Distillers Ltd v El Greco Distillers and Others* (1987) 3 CLR 531; *S C Johnson and Son Inc v Registrar of Trade Marks* (1989) 3 CLR 1 (This case concerned a recourse against the refusal of the Registrar to accept registration of a trade mark in Part B of the Register. The Supreme Court held that the Registrar is the official responsible for the protection of the registered owner and of the public at large and the Court is very reluctant to intervene if the Registrar's discretion has been exercised reasonably and within the ambit of the Law.).

37 Christophi, 'Cyprus', *International Business and Investment Guide* (1998), at p 115.

However, the Law was ruled unconstitutional in Civil Appeal 7768.[38] The Supreme Court held, by a majority of two to one, that the provisions of the United Kingdom Designs (Protection) Law recognised privileges and rights on the basis of the exercise of executive authority by the administrative organs of another state which could not survive after the establishment of the Republic, and the adoption of the Constitution. Thus, the Law was unconstitutional.

The effect of the decision was to render the United Kingdom Designs (Protection) Law unenforceable and, therefore, designs become unregulated and incapable of protection by registration. There is, however, a draft bill in the House of Representatives which is expected to become law at the end of 2000. The bill, which has not yet taken a final shape, will harmonise the protection of designs with the standards of the European Union.

Trade Names

Registration

21-28 Trade names may be registered in Cyprus under the provisions of the Partnerships and Trade Names Law.[39] Registration of a trade name is begun by sending to the Registrar of Companies, within one month of the date on which the business in Cyprus is commenced, an application containing the following particulars:

- The business name;
- The general nature of the business;
- The principal place of business in Cyprus;
- The date of commencement of the business; and
- The name, residence, and nationality of the applicant.

21-29 The Registrar may refuse to register a business name which is comparatively similar to an existing one or is considered to be misleading or confusing. After the name is entered in the register, it is published in the *Official Gazette*.

In the event of misuse of the business name by a third party, no statutory remedies are provided and the only redress is an action for passing off.[40] The available remedies are damages and/or an injunction.

Once registered, a trade name remains on the register until an application for removal is filed by the trader. Section 57 of the Partnerships and Trade Names Law provides that, where a firm, individual, or corporation has registered a trade name and ceases to carry on business, the Registrar must be informed within

38 *Eureka Ltd v Unilever Plc* (1994) 1 CLR 124.
39 Partnerships and Trade Names Law, Cap 116.
40 Civil Wrongs Law, Cap 148, s 35.

one month after the business has ceased to trade. The Registrar will then remove the trade name from the register.

Generally, the rights in a trade name pass with the goodwill of the business as a whole and cannot be assigned.

Copyright

21-30 Copyrights in Cyprus are regulated by the Right of Intellectual Property Law.[41] The protection afforded by the Law covers the following:

- Physical persons who are citizens of Cyprus or ordinarily resident in Cyprus;
- Legal persons registered under the laws of Cyprus;
- Foreigners ordinarily but not necessarily permanently resident in Cyprus; and
- Cypriot international business companies.

21-31 Although no protection is afforded to works whose authors are not citizens of or habitual residents in Cyprus, or which are not first published in Cyprus, section 18 of the Right of Intellectual Property Law extends the protection to works of non-Cypriot origin by providing that the Law applies to works which would be eligible for protection by virtue of international treaties or conventions binding Cyprus. Such treaties are, for example, the Berne Convention and the Universal Copyright Convention.

The Right of Intellectual Property Law provides remedies for copyright infringement. Section 14 of Law 18 of 1993 sets out a range of offences committed by those who infringe copyright. Penalties include fines or imprisonment for a term of up to three years. The court, in criminal proceedings, may order copies of the work in the possession of the alleged offender, which appear to be infringing copies, to be destroyed or delivered to the owner of the copyright regardless of whether the alleged offender is finally convicted or not.

In addition to the above remedies, the Right of Intellectual Property Law provides that infringement is actionable *per se* independently of any contractual remedies which may be available by virtue of the copyright contract. Section 13 sets out the civil remedies which may be sought in the event of copyright infringement. They fall into two categories, namely:

- Preventive;[42] and
- Compensatory.[43]

41 Law 59 of 1976, as amended by Law 63 of 1977 and Law 18 of 1993.

42 The preventive remedies are the power of search and seizure of infringing material and anticipatory injunctions.

43 The compensatory remedies are the award of damages to the plaintiff and orders for destruction or delivery up of the infringing copies and the equipment by which copies are produced, and accounts.

21-32 The term of protection is the life of the author and 50 years after his death. However, there are shorter terms prescribed for certain types of works. The copyright for cinematographic work or a television work is 50 years after the work has been made available to the public. The term of protection of photographs and works of applied art is 25 years from the making of the work.

The ambit of intellectual property rights was extensively discussed by the Supreme Court in *Costas Socratous v Gruppo Editoriale Fabrri-Bompiani and Others*.[44] The appellant, a Cypriot writer, alleged that the respondent, an Italian writer, violated the copyright in a book that the appellant wrote in 1960. The respondent's book was published in 1980.

The first instance court found that there was no copyright infringement, primarily on the ground that the two works were not similar. On appeal a number of issues were scrutinised for the first time by the Supreme Court. The judgment acquires significance in the sense that an analytical presentation of the main findings of the Supreme Court will helpfully demonstrate how intellectual property rights are interpreted in Cyprus.

The first matter of contention was the interpretation of the originality requirement in section 3(2) of the Intellectual Property Law. Section 3(2) states that no copyright will subsist in a literary, musical, or artistic work unless it is of an original character and has been reduced to writing, audio-recorded, recorded in any way by electronic or other means, or has otherwise been reduced to some material form.

The Supreme Court reviewed English and Greek decisions on this matter and endorsed the position that there is no copyright in an idea, as such, however original, as an idea does not fall within any of the categories of protected works but, once an idea has been reduced to a form of expression that attracts copyright, the idea indirectly will receive a measure of protection.

The Court also endorsed Chief Justice Davinson's dictum in *Wham-O Manufacturing & Co*[45] that, in cases where the author uses pre-existing subject matter in his work, 'the question of novelty is immaterial where the author has produced the result without reference to any pre-existing subject matter because he has not copied. Where, however, the author has made use of such pre-existing subject matter, it has to be determined whether he has exercised such independent skill and labour to justify copyright protection for the result.'

The next legal issue that was dealt with concerned the intention (*animus furandi*) of the alleged infringer. The Supreme Court approved the position that, if defendants do not know that copyright subsists in work that is infringed, they are excused

44 *Costas Socratous v Gruppo Editoriale Fabrri-Bompiani and Others*, Civil Appeal 8821, 26 September 1997.

45 Wham-O Manufacturing & Co (1985) RPC 127, New Zealand Appeal Court, at p 160.

from paying damages. They may be subjected, though, to other remedies, such as an injunction or an account of any profit that they have made out of the infringement.[46]

Another issue was the amount that must be copied in order to infringe the copyright. The court accepted that it is not quantity, but value that is always looked to.[47] Quantity is not the determinant factor.

On the question of expert evidence in intellectual property cases, the Supreme Court held that expert evidence may be called to point out coincidences, similarities or identical omissions with a view to establishing copying, but it is not proper for an expert witness to state, as a matter of opinion, that the work was copied from another. That is a question for the judge.[48]

Copyright violation usually takes the form of copying the work or a substantial part of it; thus, an important question in copyright cases is to decide whether copying has taken place or not. The answer is that there must be sufficient objective similarity between the two works and a causal connection between them, such as would make it proper to infer derivation of the one from the other.[49] Other factors that are taken into account are the surrounding circumstances of each case, especially the occurrence in both the plaintiff's and defendant's works of the same errors or idiosyncrasies in style.[50]

Even though the question of whether the infringer had access to the copyrighted work was not discussed in depth, the court accepted the proposition that 'a man may pirate work of the very existence of which he is unaware'[51] and that the burden of proof shifts to the defendant to prove that he was unaware of the work if substantial similarity is proved.[52]

Finally, the court held that, in examining copyright violations, the question of quality or airworthiness of the work is not an issue. The court's role is not to judge the work from the aesthetic point of view but from an objective one. The quality or style of the work is irrelevant.[53]

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46 *Media Law* (3rd ed, 1992) at p 257.

47 *Bramewell v Halcomb* (1836) 3 My & Cr 737, at p 738, *per* Lord Cottenham. The court cited with the approval *Landbroke (Football) Ltd v William Hill (Football) Ltd* (1964) 1 All ER 465; *Independent Television Publications Ltd v Time Ourt Ltd* (1984) FSR 64; and *Geographia v Penguin Books Ltd* (1985) FSR 208.

48 Copinger and Skone, *James on Copyright* (12th ed, 1980), para 670, at p 292.

49 *Clerk and Lindsell on Torts* (16th ed, 1989), paras 28–33, at p 1563.

50 Copinger and Skone, *James on Copyright* (12th ed, 1980), para 460, at pp 177 and 178.

51 *Clerk and Lindsell on Torts* (16th ed, 1989), paras 28–34, at p 1564.

52 *Francis Day & Hunter Ltd v Bron* (1963) 1 Ch 587.

53 Copinger and Skone, *James on Copyright* (12th ed, 1980), para152, at p 59.

Conclusion

21-33 Intellectual property law in Cyprus as it stands today has room for much improvement. It has not been possible to examine in detail all the different areas of intellectual property law in this chapter, with the result that the inadequacies of the law have not been displayed.

Practical experience in the field of intellectual property indicates that the current regime is not the best possible.[54] In particular, two areas of concern for reform are the Trade Marks Law, so as to bring it in line with European Union Law and international developments, and the adoption of a new Design Law.

54 This is especially true with the emerging importance of the internet and issues such as domain name disputes, copyright violations, and image and design rights.

CHAPTER 22

Franchising

Andreas Neocleous and Elias Neocleous

Introduction

In General

22-1 Cyprus is a small market which only in the last decade has been transformed into the European model of modern consumerism; its economy, which was previously based on agricultural production, turned successfully to manufacturing and the provision of services after Cyprus' independence in 1960.[1] It is hardly surprising, therefore, that franchising is a relatively new concept for Cyprus and that there are no laws specific to this sphere of commerce.

Cyprus' population and its limited spending on consumer goods during the economy's rebound period after 1974 accounts, of course, for the fact that Cyprus now finds itself lagging behind Europe in commercial franchising. The boom in Cyprus' economy, however, has substantially raised the population's standard of living, and retail opportunities are fast expanding.

Furthermore, Cyprus offers additional benefits, such as fiscal advantages and other safeguards and incentives relating to the protection of foreign investment, afforded not only by international law but also by the Constitution. The domestic laws of Cyprus also make it an ideal location for international franchisers. The expansion of the franchising industry also is bound to benefit the country, by enhancing its commercial development and complementing its reputation as a leading services centre, quite apart from the increase in the Gross Domestic Product. There is, therefore, a powerful need for Cyprus to develop its own laws specific to franchising.

Specific Legislation and Precedents

22-2 As might be expected, no franchise-specific legislation is in force; nor is it contemplated. Franchising in Cyprus has not been the subject of any articles or comments by jurists; nor have franchise-specific issues been litigated, although general legal issues involved in franchising agreements have come before the courts.

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1 Andreas Neocleous, Colota, and Elias Neocleous, *International Franchising Law*; Adams and Prichard Jones, *Franchising* (3rd ed); Gramatidis and Campbell (eds), *International Franchising*.

What Is a Franchise?

In General

22-3 In simple terms, a franchise is a licence given to a manufacturer, distributor, or trader to enable him to manufacture or sell a named product or service in a particular area for a stated period. The holder of the licence (the franchisee) usually pays the grantor of the licence (the franchiser) a royalty on sales, often with a lump sum as an advance against royalties. The franchiser also may supply the franchisee with a brand identity, as well as finance and technical expertise. Franchises are common in fast-food business, petrol stations, and travel agencies.[2]

A franchise contract in the European Union (EU) must comply with Regulation 2790/1999, in force from 1 June 2000, which replaces the previous Block Exemption Regulation 4087/88. The new Regulation differs from the old in that it no longer contains a set of black, white, and grey clauses. What exists now is a broad principle of exemption which applies to all vertical agreements where the supplier has a market share of under 30 per cent, unless certain serious restrictions listed in the Regulation are included.

As regards the international sphere, UNIDROIT, an international organisation which has devoted much attention to franchising,[3] is in the process of preparing model franchise legislation. This is a welcome development for the franchising community, and its international utility should not be underestimated. The legislation can be prepared by the foremost experts in the field, free from the pressure to which national legislatures must often submit.[4]

Types of Franchising

22-4 Arrangements with international soft drink, beer, cosmetics, and chemical manufacturers have long been in operation and have proved successful. These industries also use Cypriot production facilities for exports to the region. In addition, the development of Cyprus as an international business centre means that a combination of its double tax treaties with more than 40 countries and its tax concessions and other incentives offer a good environment for the establishment of licensing intermediary companies.

With regard to master franchise agreements, the more logical conclusion to be drawn from the Central Bank's rather strict policy towards exchange control allowances is that such agreements, involving a single licence for royalty payments abroad, are to be favoured.

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2 *Oxford Dictionary of Law* (4th ed., 1997).

3 In 1999, UNIDROIT published the *Unidroit Guide to International Market Franchise Arrangements*.

4 Peters, *International Business Lawyer*, vol 28, no 4, at p 180.

Franchising has not been preferred by local retailers; the more popular method of doing business in this sector is by opening branches in Cyprus' various towns because of the convenience of operating such branches in view of Cyprus' small size.

Financing a Franchise

In General

22-5 With regard to the financing of a franchise operation in Cyprus, it must be stressed that banks do not consider such a venture in a particularly favourable light merely because a well-known franchise is involved. The small number of franchises operating in Cyprus mean that banks, being conservative in their attitude towards financing, have little experience to form a more positive approach towards prospective franchisees. In reality, participation of at least 30 per cent by the entrepreneur seeking a loan is usually required.

Security

22-6 It is in negotiating this percentage that the 'successful story' of an international franchise might slightly tip the scales towards a more flexible ratio between equity and loan capital if there is adequate security. Security may take the form of charges on the business assets (floating charges), personal guarantees, mortgaging of personal property, and assignment of life insurance policies to the bank. Where transferable licensing rights are involved in a venture, loans are granted on condition that the transfer takes place only with the bank's approval.

Exchange Control

22-7 Exchange control policy is developed and implemented by the Minister of Finance, but the Central Bank of Cyprus applies the relevant legislation.[5] There have been calls for exchange control deregulation from the local business community, as well as from government officials, especially in view of Cyprus' objective of joining the EU. It is expected that exchange control restrictions will be gradually abolished.

An investment in Cyprus by a non-resident requires the prior approval of the Central Bank. The same applies to the registration of international business companies (IBCs). Once these permits are granted, repatriation of capital, profits, dividends, and interest is allowed as a matter of course, and IBCs may transact all operations, free of any exchange control, through the maintenance and operation of external accounts.

5 Exchange Control Law, Cap 199, as amended, and Regulations.

On the sale of property, non-residents are allowed to transfer abroad the amount originally paid from external funds for the acquisition of the property, with the remainder being released in accordance with the regulations governing the operation of blocked accounts. Funds on blocked accounts may be released abroad at the rate of CY £10,000 *per annum*, plus the whole of the interest earned during the year.

Credit terms on imports extending beyond 200 days from the date of shipment require specific approval, which is normally granted, whereas repayment of imports is not normally allowed. Prior approval also is needed in the case of exports from Cyprus where credit terms in excess of six months from shipment are sought.

Royalties and Service Fees

22-8 Borrowing outside Cyprus also requires approval, and this is normally given if the Central Bank is satisfied as to the purpose of the loan and that the interest payable will be charged at a rate that is not excessive by normal commercial standards.

Approval from the Central Bank is required where funds are to be remitted abroad in the form of royalties or service fees, except where they emanate, of course, from an international business entity. Franchise agreements are not considered as a separate category requiring specific consideration. Rather, a franchise agreement is viewed as a royalty contract, where rights to a trade mark or trade name are bought, or as a service agreement which includes the provision of services in the form of technical advice and know-how.

Since the payment of royalties or fees constitutes a central feature of franchise agreements, it is important to bring such agreements to the attention of the Central Bank prior to any final commitment so that preliminary approval is granted. In cases where the Central Bank takes a negative stand, re-negotiation is always possible and, therefore, delays are avoided.

The granting of a permit depends on the amount to be remitted abroad; for most agreements, royalties ranging from three to five per cent of gross sales or net profits are considered reasonable, although higher percentages may be allowed in special cases. The underlying consideration in determining what is reasonable generally corresponds to the criteria for permission for direct investment. More specifically, where royalties relate to a manufacturing project, relevant considerations include whether the product is a new product not currently manufactured in Cyprus and whether markets for exports are already secured. The nature of the product also is a factor; if it is considered to be a high technology product which otherwise could not be locally produced, it is viewed in a more flexible way.

In the services sector, it is considered, for example, whether the proposed project involves the provision of services already supplied by Cypriot entrepreneurs. In cases where foreign participation in the form of direct investment in a joint venture

is already permitted, additional permits for royalties are not normally granted. Terms limiting or excluding exports to certain markets may must be deleted, depending on the particular manufacturing project under consideration. It should be stressed, however, that each case is considered on its own merits.

The Central Bank consults the Ministry of Commerce, Industry, and Tourism or the appropriate governmental department. The observations and possible objections of the Cypriot business community are indirectly reflected in the Central Bank's decisions since, eg, the Employers' and Industrialists' Federation put forward their views at meetings with the Ministry. A permit is granted for a specific period sufficient for a project to develop and demonstrate its viability, and such permit may be renewed.

Administrative Act

In General

22-9 The Central Bank's decision regarding permits is considered an administrative act which may be reviewed by the Supreme Court. However, there have been no successful appeals against a decision by the Central Bank, and the underlying principle is that the Supreme Court is hesitant to interfere. In *York International Securities v The Central Bank of Cyprus*,[6] the Supreme Court stated that:

> . . . the administrative organ has a very wide discretion as it covers a matter of fiscal policy, and an administrative court always is cautious and slow to interfere with its exercise of discretion.

22-10 In any event, the grounds for an annulment of such a decision are that the exercise of the administrative body's discretion was:

- Wrong as a matter of law;
- An abuse of its power; or
- A result of a misconception of fact.

Frustration

22-11 What may be of relevance here is the positive rule relating to the doctrine of frustration as elaborated in English law and as provided in the Contract Law, which reads as follows:

> A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.[7]

6 *York International Securities v The Central Bank of Cyprus* (1987) 3 CLR 933.
7 Contract Law, Cap 149, s 56(2).

22-12 It has been held in a number of cases that the rule, in its unqualified language, does not leave the matter to be determined according to the intention of the parties and, therefore, it differs from the Common Law to a large extent. However, the English doctrine is followed in that section 56(2) of the Contract Law only applies to an impossibility which destroys the foundation of the contract, the proper test being:

> If the literal words of the contract were to be enforced in the changed circumstances, would this involve a significant or radical change from the obligation originally undertaken?[8]

22-13 Furthermore, the impossibility of performance must be due to changes in circumstances beyond the control of the parties.[9] It should be noted that, where section 56(2) applies, the dissolution of the contract occurs automatically and does not depend on the choice or election of either party.

If section 56(2) applies, the legal foundation for restitution under section 65 of the Contract Law is provided. Section 65 reads as follows:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

22-14 The basis of section 65 is the doctrine of *restitutio in integrum*, and the Supreme Court has held in the *Kier* case that 'retention money provided for in a contract as a guarantee for any failure by the contractor' was recoverable. The Supreme Court also has endorsed the view that section 65 is 'compensatory in principle' and for 'the prevention of unjust enrichment' and found, therefore, that it may, depending on the circumstances of a case, determine the exact value of the advantage received by the one party and accordingly award compensation for its value to the other, despite any contractual provision as to the value.[10]

Furthermore, it appears that, where work is done or services are performed under an agreement which is in fact void, *quantum meruit* compensation is recoverable, ie, the court will award a reasonable sum of remuneration for the work actually done or the services performed.

Contingent Contracts

22-15 Where the parties choose to include a term in the agreement, making it subject to the obtaining of the relevant permit, they would be entering into a

8 *Cyprus Cinema & Theatre Co Ltd v Christopoulos Karmiotis* (1967) 1 CLR 42.
9 *Kier* (*Cyprus*) *v Trenco Construction* (1981) 1 CLR 30.
10 *Cyprus Import Corporation Ltd v Kaisis* (1974) 10 JSC 1234.

contingent contract, as defined in section 31 of the Contract Law, which would become void at the point of the Central Bank's refusal to permit the exchange transaction. Section 32 reads as follows:

> Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.

22-16 Whether these provisions would have an effect on a franchise agreement entered into prior to the refusal of the Central Bank to issue a permit for remittance of funds abroad, or where a permit is revoked or renewal is refused, is not quite certain. Decided cases go both ways, depending on their facts, but it appears that impossibility in relation to a contract between commercial parties should be understood in a commercial sense and, where the commercial practical purpose of a contract is defeated by orders of government or administrative decisions, acts, or omissions, section 56(2) applies. The above discussion may be academic, however, as in most international franchise agreements there would be a choice of law clause, stipulating the law of the franchiser's country.

Choice of Law

22-17 Although no cases concerning choice of law clauses are reported in Cyprus, it has been held that principles of private international law are part of the law of Cyprus, in so far as they form part of the Common Law in England.[11]

In the absence of satisfactory evidence of foreign law, Cyprus law prevails.[12]

Impact of Exchange Control Restrictions

22-18 The impact of exchange control restrictions on contracts also should be considered in the light of the Exchange Control Law, as amended by Law 53 of 1972, although the relevant provisions therein have not been fully considered by the Supreme Court. Section 35(1) of the Exchange Control Law reads as follows:

> It shall be an implied condition in any contract that, where, by virtue of this Law, the permission or consent of the Central Bank is at the time of the contract required for the performance of any term thereof that term shall not be performed except insofar as the permission or consent is given or is not required.
>
> Provided that this subsection shall not apply insofar as it is shown to be inconsistent with the intention of the parties that it should apply whether by reason of their having contemplated the performance of this law or for any other reason.

11 *Kochino v Irfan* (1977) 11 JSC 1780.
12 *Georgiades and Son v Kaminaras* (1958) 23 CLR 236.

22-19 In *Neoptolemos Spyropoulos v Transvania Holland NV Amsterdam*,[13] the Supreme Court stated that the failure to make express reference to the obtaining of a consent or permission of the Central Bank does not render a contract void or illegal but merely suspends the performance of a term until such consent or permission is obtained. Section 35(1), however, would invalidate a contract where the parties are shown to have contemplated the performance of the term violating the law, despite the provision.

Section 4(1) of the Fourth Schedule to the Exchange Control Law provides:

> In any proceedings in a prescribed court and in any arbitration proceedings, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Central Bank, and of that permission not having been given or having been revoked.

22-20 The Supreme Court and all District Courts are 'prescribed courts' under the Rules of Court and, indeed, judgments in foreign currency or the equivalent in Cyprus pounds have been given.[14] Section 1 of the Fourth Schedule to the Exchange Control Law provides, however, that payments under judgments are to be made following the permission of the Central Bank, which is normally readily granted.

It should be stressed that it is always advisable to sign a franchise agreement following consultation with the Central Bank and to insert a contract term which envisages the Central Bank's powers by carefully specifying their effect on the life of the contract and stating where liabilities would lie, thus avoiding the effect of section 32 of the Contract Law, while not offending section 35(1) of the Exchange Control Law.

Finally, an individual or corporation violating the provisions of the Exchange Control Law may incur penal sanctions in the form of imprisonment or a fine.

Competition Law

In General

22-21 Traditionally, the laws enacted in Cyprus have followed legislation enacted in the United Kingdom and, more recently, various forms of legislation enacted in Greece, or they attempt to codify the Common Law. No laws, however, have been passed in Cyprus regarding franchising and competition issues, although related Common Law principles, such as the restraint of trade doctrine and the tort of passing off, form part of Cypriot law. It should be noted that, although decisions by United Kingdom courts do not bind Cypriot courts, they may be cited and, indeed, may play an important persuasive role, particularly in matters involving competition issues.

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13 *Neoptolemos Spyropoulos v Transvania Holland NV Amsterdam* (1979) 1 CLR 421.
14 *Costas Panayi v Yiannakis Polykarpou* (1982) 2 JSC 454.

The most important legislation is the Protection of Competition Law,[15] which came into force on 8 June 1990. The introduction of the Law is part of the government's attempt to bring Cyprus closer to the EU. Indeed, by the signing of the Protocol for the enforcement of the second stage of the Association Agreement between Cyprus and the EU, Cyprus has undertaken the 'legal obligation' to introduce legislation for the protection of competition within the 'letter and spirit' of the Treaty of Rome.

Protection of Competition Law

22-22 The Protection of Competition Law is based on the Competition Law introduced in Greece prior to its entry into the EU. In effect, its main provisions are a reproduction of articles 81 and 82 of the European Community (EC) Treaty (formerly articles 85 and 86 of the Treaty of Rome).

Practice and Procedure

22-23 The Protection of Competition Law provides for the creation of a Competition Committee which has authority to enforce provisions by ordering injunctions and imposing fines to punish infringements. As far as franchising is concerned, the Competition Committee also may put forward recommendations to the Council of Ministers for the issue of Regulations relating to activities which come within the ambit of competition policy and need further clarification. At the moment, however, the Competition Committee has no plans to make recommendations concerning franchising or distribution agreements.

The Competition Committee presently consists of seven members, ie, five independent professionals and two government officials. The Committee has held numerous sessions and issued approximately 100 decisions, summaries of which appear in the *Official Gazette*. The Committee is assisted in its work by the Consumer Protection Authority of the Ministry of Trade, Industry, and Tourism responsible for consumer protection.

There is a procedure for notification and application for exemption and/or negative clearance, as well as an informal procedure enabling individuals to report possible infringements to the Ministry of Commerce Industry and Tourism. Indeed, the Competition Committee has examined several cases of its own motion.

The Competition Committee may impose a fine of between CY £20 and CY £500 for each day that the parties to an agreement declared void continue to act on it. Although the Committee has the additional power to couple an annulment with a fine of up to 10 per cent of the gross income of an entity during the year of the infringement or the previous year, it has not done so as yet. In cases where an entity

15 Law 207 of 1989, as amended by Law 111 (1) of 1999 and Law 87 (1) of 2000.

refuses or neglects to provide information or provides misleading information, intentionally or negligently, to the Competition Committee, the Committee may impose a fine of between CY £100 and CY £2,000.

There is a set form to be submitted for the notification of agreements, and a request for exemption and/or negative clearance must be submitted within a reasonable time from the date of the entering into force of the agreement.

An important feature of the Protection of Competition Law is that it grants exclusive jurisdiction to the Competition Committee in applying its provisions. This means that, unlike articles 81 and 82 of the EC Treaty (with which sections 4 and 5 of the Cypriot Law correspond), sections 4 and 5 may not be enforced by a Cypriot court in deciding the validity of an agreement before it; therefore, unlike the situation in EU countries, a party to a contract in dispute may not rely on sections 4 and 5 to avoid liability under a contract declared void. The scope of the Protection of Competition Law is thus greatly reduced. If a dispute arises, the party claiming that the agreement is void may refer the case to the Competition Committee, which will accept jurisdiction only if the agreement does not fall within the *de minimis* rule.

The parties involved have a right to appeal to the Supreme Court (in its revisional jurisdiction) to annul a decision of the Competition Committee. A case at the Supreme Court has upheld the Competition Committee's decision. The judges have emphasised the Competition Committee's role as a legitimate administrative organ and rejected the claim that its decisions were unconstitutional. The Supreme court also clearly ruled that the Committee is neither a court nor a judicial committee, nor does it exercise a judicial function.[16]

A new Bill,[17] which amends the Protection of Competition Law, is under consideration. The Bill provides for the upgrading of the Competition Committee which will consist of five members, a Chairman and four other members who will be appointed by the Council of Ministers on the recommendation of the Minister of Commerce, Industry, and Tourism. The term of office of the Chairman and the members of the Committee will be reduced to five years and may be renewed only once.

The Bill introduces the post of a Chairman who will devote all his time to the functions of the Committee and who will be a person of high repute and calibre (eg, a judge or a former judge).

It is envisaged that the Committee which will have its own secretariat, the members of which will be civil servants, will develop into an important institution, making an important contribution to the proper functioning of the Cypriot economy.

16 *Re Charalambous* (1991) 1 CLR 677.
17 *Official Gazette*, Number 3419, part 6, 14 July 2000.

Criminal Liability

22-24 Where the Competition Committee finds that a legal or physical person continues to infringe sections 4 and 5 of Law 207 of 1989, the violator may be prosecuted for a criminal offence punishable with imprisonment for up to one year, a fine, or both.

The same sanctions apply to the criminal offence of providing false, inaccurate, and insufficient information intentionally and with the aim of misleading the Competition Committee. They also apply to the criminal offence of infringing the 'confidentiality requirement' of the proceedings for personal benefit.

Substantive Law

22-25 There has been no franchise case before the Competition Committee. It is interesting to note that only one distribution case has been reported. This is due to the fact that the Protection of Competition Law is quite new and, despite the Competition Committee's efforts, remains relatively unknown in Cyprus.

Thus, it is not clear how the Competition Committee will approach the various competition matters that normally arise in a franchise agreement. However, two interesting points which emerge from cases dealing with other issues are worth noting:

- The Competition Committee closely follows the reasoning of the European Court of Justice. Thus, in the case of franchising agreements, it is hoped that the relatively liberal view of the Court of Justice on such agreements will be preferred by the Competition Committee.
- The Competition Committee has ruled against any form of price fixing. This might be relevant to franchising agreements, and a careful drafting of price control provisions in franchise agreements is advisable.

22-26 A much closer look, however, must be given to a decision of the Committee,[18] regarding an exclusive distribution agreement for car filters between two local companies, ie, the manufacturers and the wholesalers. This agreement was reported to the Committee through the informal complaint of a competitor importer (a distributor of car filters and other car spare parts).

Interestingly, the Committee found that the written agreement between the parties, which, *inter alia*, granted rebates at 20 per cent of the price to the distributor and mentioned the possibility of channelling all sales of the manufacturer in the local market through the distributor, did not specifically exclude future cooperation of the manufacturer with other wholesalers, but such a term could be logically implied from the general meaning of the agreement. It also found that in fact the parties occupied 50 per cent of the Cypriot market for filters, thus viewing the market for local and imported filters as one.

18 Case 6/1993, 30 December 1993 (summary published in *Official Gazette*, Number 2853).

In its reasoning, the Committee expressly stated the view that the 'Rule of Reason', as expanded by the European Court of Justice, is to be followed in Cyprus in deciding whether an agreement falls within the ambit of the prohibitive provision in section 4(1) of the Law. It examined whether this agreement could be exempt under sections 4(3) and 5 of the Law. In reviewing the agreement, the Committee made express reference to the EU Block Exemptions regarding exclusive distribution and purchase agreements, although it was made clear that the issue at hand was not to be judged according to the provisions of the exemptions.

In deciding whether the agreement satisfies the three conditions in section 5, the Committee came to the conclusion that it does by pointing to the following general considerations:

- The agreement contributes to the improvement of production and distribution of filters. The unhindered and improved offer of goods and the production of new improved goods are benefits which flow or may flow from the enforcement of the agreement. Although the Committee recognised that one of the important benefits to the consumer would be the achievement of low prices, it took into consideration the fact that the prices are anyway held at a certain level by relevant regulations of the Ministry of Commerce, Industry, and Tourism.
- This general category of agreements has been excluded by the above EU exemptions.
- The European Commission has lately granted several exemptions where the reasoning on whether the three conditions were met was likewise of a general nature.

22-27 Therefore, the Committee, by combining the effect of the sections, allowed the agreement and found that there was no breach of section 4 of the Law. It also found that there was no breach of section 6 (abuse of dominant position), although it did not give any reasoning for this conclusion.

Although the Competition Committee has closely followed the decisions of the European Court of Justice, it is not wise to predict its approach to franchise-related issues, as the underlying consideration is the avoidance of market partitioning along national frontiers within Europe. This consideration, of course, will not apply *per se* in Cyprus. This point was not taken up in the above distribution case.

Treaty of Rome

22-28 Sections 4, 5, and 6 of the Protection of Competition Law correspond to articles 81 and 82 of the EC Treaty. Section 4 reads as follows:

> 1. All agreements between undertakings, which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. The agreements prohibited pursuant to this section are void *ab initio*.

3. As an exception, an agreement between undertakings falling within the ambit of section 4(1) may be allowed and considered valid and legally enforceable either pursuant to a Regulation or pursuant to a decision by the Committee provided the conditions set in the following section exist.

22-29 Section 5 provides:

1. An agreement between undertakings or a category of agreements falling within the ambit of section 4(1) may be allowed and considered valid and enforceable provided the following conditions apply, conjunctively:

(a) It contributes, while allowing consumers a fair share of the resulting benefit, to improving the production or distribution of goods or to promoting technical or economic progress;

(b) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(c) it does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

22-30 Section 6 reads:

The abuse of the dominant position of an undertaking is prohibited. Such abuse may, in particular, consist of:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets, or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Passing Off

22-31 The tort of passing off, a part of the English Common Law, is codified in Cyprus by section 35 of the Civil Wrongs Law,[19] which reads as follows:

> Any person who by imitating the name, description, sign, or label, or otherwise causes or attempts to cause any goods to be mistaken for the goods of another person, so as to be likely to lead an ordinary purchaser to believe that he is purchasing the goods of such other person, shall commit a civil wrong against such other person.
>
> Provided that no person shall commit a civil wrong by reason only that he uses his own name in connection with the sale of any goods.

22-32 Section 35 does not expressly cover situations where a person attempts to take advantage of an enterprise's goodwill and good name by identifying his own business activities with that enterprise. This constitutes, however, an aspect of passing off (the passing-off of a business) as known at Common Law in England, and the Supreme Court of Cyprus has held that section 35 'not only reproduces the corresponding English tort, but has the same range of application as this tort finds in England'.[20]

The Supreme Court has held that section 35 covers the passing off of a business in a case involving the services offered by a private educational institution.[21] The Supreme Court has outlined the elements of the tort by holding that, to succeed in a passing-off action, the plaintiff must prove:

- A right to the use of the mark to the exclusion of the defendant and established by reference to the association of the mark with the products of the plaintiff;[22]
- Imitation or copying of the mark of the plaintiff by the defendant in the process of manufacture or sale of the products;

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19 Civil Wrongs Law, Cap 148.

20 *Addidas v Jonitexo Ltd* (1987) 1 CLR 383.

21 *Papachrysostomou v Papachrysostomou* (1992) 1 JSC 389.

22 The accrual of such right depends on the nexus between the mark and the product it brands. The association must be strong enough for the mark to be of itself suggestive of the origin of the goods. The means of forging the association are not limited in a specific way. Whether the necessary link between the mark and the product exists is a question of fact. Evidence of the user, the length of use, and the reactions of the purchasing public are highly relevant to the determination of the issue.

- Likelihood of confusion on the part of the ordinary purchaser arising from the imitation of the mark;[23] and
- Damage resulting from such likelihood of confusion.[24]

22-33 It also has been made clear that the judge has full discretion in deciding on the degree of similarity of the relevant features of the products or businesses under consideration.

Thus, the Supreme Court is reluctant to reverse the decision of a court of first instance, except 'in clear cut cases where it may be demonstrated that the relevant discretion of the trial judge was erroneously exercised'.[25]

The Supreme Court also has ruled on whether it is material for the plaintiff in a passing-off action to establish exclusivity. In *Hadjikyriacos Co v United Biscuits (UK) Ltd*,[26] it was held that it is enough for the plaintiff to show that he is one of those who are entitled to use the brand and who consequently suffers damage from its misuse.

The Supreme Court also has pointed out the need to show that the plaintiff's goods are somehow associated with the Cypriot market, either through their international reputation or through any form of connection with the Cypriot market.[27]

The usual remedy sought in passing-off actions is an injunction restraining the defendant from carrying on the offensive conduct. Interim injunctions may be speedily granted on an *ex parte* application (without prior notice being given to the offender), pending the final hearing of the case. To grant an interlocutory injunction, the court must be satisfied that there are serious questions to be tried at the hearing of the action, that there is a probability that the plaintiffs are entitled to relief, and that, unless an interlocutory injunction is granted, it will be difficult or impossible to do complete justice at a later stage.[28]

Apart from an injunction, an inquiry as to damages is, of course, available as well as an order by the court in an appropriate case for the delivery or destruction on oath of the imitating goods or, at the plaintiff's option, an account of profits.

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23 The law is not concerned with the scrupulous purchaser, but with the ordinary purchaser who is apt to be swayed by images. The question, which is one of fact, is not whether an ordinary purchaser can distinguish, on account of differences in the marks, between the rival products, but whether the association between the products of the plaintiff and the part of the mark imitated is so strong as to create a likelihood of confusing the ordinary purchaser about the origin of the products of the defendants.

24 When, because of the imitation, the ordinary purchaser is likely to be confused about the origin of the goods, damage is presumed to occur in the absence of evidence to the contrary.

25 *Papachrysostomou v Papachrysostomou* (1992) 1 JSC 389, at p 390.

26 *Hadjikyriacos Co v United Biscuits (UK) Ltd* (1979) 1 CLR 689.

27 *Louis Vuitton v Dermosak Ltd* (1992) 1 JSC 1453.

28 Courts of Justice Law, Law 14 of 1960, s 32.

Restraint of Trade

22-34 The English Common Law doctrine of restraint of trade has been codified in Cyprus by section 27 of the Contract Law, which reads:

> (1) Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.
>
> (2)(a) One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or any person deriving title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business,
>
> (b) Partners may, on or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding subsection,
>
> (c) Partners may agree that one or all of them will not carry on any business other than that of the partnership during the continuance of the partnership.[29]

22-35 Although there are no reported cases relating to section 27, it should be borne in mind that, in interpreting section 27, Cypriot courts will apply English Common Law principles.

Intellectual and Industrial Property Rights

In General

22-36 Intellectual property rights involved in franchising are protected in Cyprus by statutory provisions and contractual terms contained in the franchise agreement itself which would serve to prohibit the franchisee from copying or using the franchiser's rights during and after the term of the agreement.

Trade Marks

In General

22-37 The registration and protection of trade marks in relation to goods is governed by the Trade Marks Law.[30] The registration and protection is for an initial

29 Contract Law, Cap 149, s 27.
30 Trade Marks Law, Cap 268.

period of seven years, which may be renewed on application for periods of 14 years at a time. Service marks also may be registered in Cyprus.

Infringement

22-38 Under the Trade Marks Law, the proprietor of a trade mark is given '. . . the exclusive right to the use of that trade mark in relation to those goods for which it is registered. That right is deemed to be infringed by any person who, not being the proprietor or a registered user, uses a mark identical with the registered mark or so nearly resembling it as to be likely to deceive or cause confusion in the course of trade in relation to any goods in respect of which it is registered . . .'.[31]

The relief usually sought for infringement is an injunction restraining the further use of the trade mark by the unauthorised party and an enquiry as to damages. In *Big Star Textillien v Dimitris Dimitriou*,[32] the Supreme Court granted an injunction restraining the respondents from infringing the applicants' trade mark, having decided that all the conditions for the grant of an injunction were present. Those conditions are:

- The existence of a serious issue to be tried;
- The fact that the applicants have shown that there exists a probability of success on the merits of the case at the hearing; and
- Unless an interim order is granted, it will be difficult or impossible to do complete justice at a later stage.

22-39 Moreover, if the infringement is substantial, the court may order the delivery up of the spurious marks for destruction, or the defendant may be ordered to tender an account of the profits made through the sale of the goods infringing the proprietor's trade mark.

The defences to infringement are simply that the respective marks are not confusingly similar or that the goods in respect of which the alleged infringement is taking place are not covered by the registration. It should be noted that, in an action for infringement, the burden of proof lies on the proprietor of the registered trade mark to establish that the resemblance between his trade mark and that used by the defendant is deceptive.

A foreign trade mark proprietor of a trade mark registered in Cyprus can bring proceedings against a third party for infringement, having joined the licensee as a party to the action and having given security for costs.

No proceedings may be instituted under the Trade Marks Law in cases of infringement of an unregistered trade mark, but the tort of passing off could offer relief. It also should be noted that the Trade Marks Law and the Merchandise Marks Law[33]

31 Trade Marks Law, Cap 228, s 6.
32 *Big Star Textillien v Dimitris Dimitriou*, District Court of Limassol (1989) (unreported).
33 Merchandise Marks Law, Cap 265.

provide that certain acts, such as the forging or falsification of trade marks and the application of any false trade description to goods, are punishable by a fine and/or imprisonment.

Patents

In General

22-40 In Cyprus, the registration of patents was originally regulated by the Patents Law.[34] A new Patents Law[35] came into force on 1 April 1998. The new Law departs from the old to a considerable extent. First, it provides for the establishment of an independent local authority for the registration of patents, thereby separating the registration of a patent in Cyprus from the registration of the same patent in the United Kingdom.

This enables not only English patents, but also patents granted under the European Patent Convention or under the International Co-operation Treaty, to be recognised in Cyprus on registration. Second, the new Law requires the patent to be published in the *Official Gazette*, thereby giving any person the right to object to it. Third, a Register of Patents is to be maintained to record the names and addresses of the patentees as well as any other information which is considered necessary by the Registrar for the identification of the owner of the patent. Finally, the new Law requires the annual renewal of patents registered in Cyprus.

Protection against Infringement

22-41 Once a patent has been registered and a certificate of registration granted and published, anyone other than the patentee is expressly prohibited from manufacturing, selling, importing, or otherwise commercially exploiting either the patented product or the product obtained by a patented process. In the event of infringement, the patentee may commence an action in court seeking an injunction and/or damages.

The most important grounds on which either an action for the infringement of a patent may be defended or a patent may be invoked are that the:

- Patent is not for an invention within the meaning of the Law;
- Invention was not novel;
- Invention was obvious;
- Invention is not capable of industrial application;
- Invention belongs to a category of excluded subject matter, such as methods of treating humans and animals;
- Claims of the complete specification are ambiguous;

34 Patents Law, Cap 266.
35 Law 16 (1) of 1998.

- Complete specification is insufficiently explicit; and
- Application for the patent was not in order.

Duration of Protection and Exhaustion of Rights

22-42 According to section 26 of the new Law, the duration of protection is 20 years from the date of registering the application. It should be noted that the duration of protection depends on the payment of an annual renewal fee.

The new Law also is in line with the latest EU case law, limiting the rights granted to patent owners. For example, once a product has been put on the market by the patent owner or with his express consent, he can neither restrict the use or the resale of the product nor prevent private acts which do not substantially affect the financial benefit of the right holder, ie, acts done for non-commercial purposes.

Assignment and Compulsory Licensing

22-43 Patent rights can be sold by the patentee to anyone who is willing to buy them. Compulsory licensing constitutes a major achievement of the new Law on the road towards the EU.

An application for a compulsory licence can now be filed with the Registrar at any time after the expiration of four years from the date on which the patent was granted (or after some other period prescribed by the Registrar). When making its decision, the Patent Office must consider the need to work inventions as well as the need for the inventor to receive reasonable remuneration.

Designs

In General

22-44 The law regulating designs is the United Kingdom Designs (Protection) Law.[36] Under the Law, the registered proprietor of any design registered in the United Kingdom enjoys in Cyprus the same privileges and rights as though the certificate of registration in the United Kingdom had been issued with an extension to Cyprus.

As in the case of trade marks, protection depends on registration in the United Kingdom. When a registration certificate is issued, the proprietor of the registered design acquires an exclusive right. As with patents, the right given is a right to stop other persons, and it includes a right to prevent both manufacture and importation of articles bearing the registered design or a design substantially the same.

If the design is infringed, the registered proprietor may commence an action in court seeking an injunction and/or damages. Section 3 of the Law provides that the

36 United Kingdom Designs (Protection) Law, Cap 269.

innocent infringer of a design, who at the date of the infringement was not aware, nor had any reasonable means of making himself aware of the existence of the registration of a design will not be liable for damages; the remedy of injunction, however, would still be available.

Duration and Protection

22-45 Registration and protection of designs lasts for five years from the original date of application. It may be extended for two further five-year periods on payment of a fee.

Assignment and Licensing

22-46 Any person registered as the proprietor of a registered design has the power to assign it and to give effectual receipts for any consideration in respect of such assignment.

The registered proprietor of a registered design also may grant licences to use the design and give effectual receipts for any consideration. Due to the lack of any special provisions as to the form of licences of registered designs, the granting of licences may be verbal or in writing. Licences may be registered.

Trade Names

22-47 Trade names may be registered in Cyprus under the Law on Partnerships and Trade Names.[37] According to the Law, registration of a trade name may be effected by sending to the Registrar of Companies, within one month of the date the business is commenced, an application containing the following particulars:

- The business name;
- The general nature of the business; and
- The date of the commencement of the business and the name, corporate or otherwise, residence, and nationality of the applicant.

22-48 The Registrar may refuse to register a business name which is comparatively similar to an existing one, or includes the word 'Imperial', 'National', 'Corporation', 'Commonwealth', or 'Co-operative', or is considered to be misleading or confusing. In the event of infringement of the business name by a third party, no statutory remedies are provided and the only remedy lies in the law of passing off.

As far as international franchising arrangements in respect of trade names are concerned, the franchise agreement would normally allow the franchisee to use the franchiser's trade name in a manner prescribed by the franchiser and would also prohibit him from using it otherwise than in connection with the franchise. It also

37 Law on Partnerships and Trade Names, Cap 116.

would be advisable for the franchiser to include a term in the franchise agreement to the effect that the franchisee is bound immediately to cancel the registration of the trade name in the event of the franchise agreement being terminated for whatever reason. Such cancellation of the registration is possible by virtue of section 57 of the Law, which describes the procedure for the removal of trade names from the register.

Know-How and Goodwill

22-49 One of the most important and valuable rights granted in any franchising arrangement is access to the know-how and confidential information relating to the franchiser's business or operation, including marketing procedures, staff training, and pricing policies, as well as the goodwill and reputation established by the quality, consistency, and expertise of his products and services.

The goodwill of a business in Cyprus is protected by the law of passing off. In respect of confidential information and know-how, the best way of protection is contractual, through the franchise agreement itself, since the law of copyright does not normally cover this aspect.

Subject to limitations posed by the Competition Law, the franchise agreement must make it clear that all information, including know-how information (such as advertising schemes or novel ideas reduced to practical technical procedures) which the franchiser discloses to the franchisee during the term of the agreement, will not be disclosed, copied, or reproduced without the prior consent of the franchiser. Moreover, the franchise agreement should contain a term to the effect that the information supplied to the franchisee is the property of the franchiser and is licensed to the franchisee solely for the purpose of carrying out the franchise business.

Further protection would be available under the copyright law in those cases where the confidential information or know-how bears an original, distinctive representation of the franchise business, such as an operation manual, slogans, and publicity materials, and is therefore capable of coming under the provisions of the copyright law. Moreover, the registration procedure in respect of intellectual property rights described above would offer additional protection to the extent that the confidential information and know-how is noted in drawings or consists of a software program and is thus capable of being registered.

Copyright

22-50 The law of copyright in Cyprus[38] is another potential tool that can be used to offer protection for the intellectual property rights of the franchise business together with the other forms of protection as outlined above.

38 The Right of Intellectual Property Law, Law 59 of 1976, as amended by Law 63 of 1977 and Law 18 of 1993.

For example, literary and artistic copyright is capable of protecting many aspects of the franchise business, such as the design of products decoration, uniform of staff, insignia, or other logos and layout plans, irrespective of the fact that such designs or marks may be capable of registration as marks or designs.

Taxation

In General

22-51 Since 1 January 1991, Cyprus has used the 'classical' system of taxation under which corporate income is subject to corporation tax and also to withholding tax on distribution by way of dividends.

The corporation tax is based on 'taxable trading profit', which is the accounting profit as disclosed by the company's income statement, as adjusted for tax purposes. The corporate tax rate is 20 per cent in respect of profits up to the first CY £100,000 and 25 per cent on profits in excess of this amount. Cyprus-incorporated IBCs, ie, companies totally owned by non-residents and conducting their business activities outside Cyprus, are subject to tax on their taxable profits at the rate of 4.25 per cent. Royalties and service fees are taxable as trading income on an accrual basis.

Deductibility of Franchising Activities

22-52 Under section 2 of the Income Tax Law, any expenditure incurred wholly and exclusively for the purposes of the trade may be deducted as long as it is not of a capital nature or specified in the law as non-allowable. Royalties and service fees are deductible in full, as there are no generally applicable rules limiting deductibility, and they would come under the general ambit of section 2 above as 'outgoings and expenses wholly and exclusively incurred in the production of the income'.

In cases where royalties are paid to related parties, they must be at arm's length. There are no official rules or legal provisions as to the meaning of this requirement, which is examined by the authorities on a case-by-case basis. When the taxpayer involved in such transactions is an IBC, the authorities normally interpret this requirement leniently.

Capital expenditure for the acquisition of goodwill, trade marks, and copyrights does not qualify for relief. There is, however, a specific provision in section 11 of the Income Tax Law which provides for the allowance of capital expenditure on scientific research, patents, and patent rights, provided that the following requirements are met:

- The expenditure has been incurred for the use and benefit of a trade or business;
- The expenditure will be spread over the life of the patent or patent right in a reasonable manner; and
- Any income or royalties received from the sale of such patents or patent rights will be subject to tax.

Licensing

22-53 The domestic tax system of Cyprus and its laws, coupled with the wide network of double-taxation treaties which Cyprus has concluded with more than 40 countries, provides opportunities for effective tax planning involving the crossborder routing of royalties, which is the usual income derived from intellectual and industrial property rights.

There are two distinct situations which should be noted for the purposes of franchising. The first case is where a Cypriot entity is used as the licensee of intellectual property rights granted by a foreign franchiser and these rights are to be exercised within Cyprus. This would normally involve the payment of royalties to the franchiser by the Cypriot entity. The second case is where Cypriot entities, both 'offshore and onshore', are used in international tax structures to channel royalty income from countries with which Cyprus has concluded a double tax treaty to the head licensers.

No tax is withheld when royalty income is payable by a resident corporation or individual in Cyprus to his head licenser who also is a resident corporation or individual in Cyprus.

Franchising Aspects

22-54 Under section 30 of the Income Tax Law, royalties derived from sources within Cyprus are subject to a 10 per cent rate of withholding tax when payable to foreign franchisers. Royalties are not deemed to derive from sources within the Republic when the relevant rights are granted for use outside the Republic. There are two qualifications to this statement. First, the withholding tax will be zero or reduced when the franchiser is located in a country which has entered into a double tax treaty with Cyprus. Second, foreign franchisers in treaty countries will be able to claim the reduced or zero withholding tax rate in Cyprus only if they do not have a permanent business or establishment in Cyprus.

In the event that the franchiser is located in a non-treaty country, the 10 per cent royalty withholding tax must be paid to the Cypriot tax authorities, as a condition precedent for obtaining exchange control permission for remittance. A tax Clearance Form, stating that no tax needs to be paid or that all necessary taxes have been paid, needs to be forwarded to the Central Bank.

Intermediary Licensing Companies

22-55 The purpose of using an intermediary licensing company is to centralise a group's control over the intellectual property rights of its member companies and to reduce or avoid foreign taxation on royalty income. The particular tax advantages of intermediary companies are the following:

- Tax-deductible royalty payments may be routed from high tax countries to low tax jurisdictions subject to nil or reduced royalty withholding tax rates by virtue of applicable tax treaties; and

- Tax may be avoided altogether in the home country of the parent where overseas income is subject to an exemption system, or where taxation on the royalty income in the hands of the licensing company is successfully deferred until this is paid back to its parent company in the form of dividends.

22-56 Cypriot IBCs can be ideal conduit vehicles for the receipt of royalty income and the payment of such income to the ultimate beneficial owner, for the following reasons:

- The reduced withholding taxes which are normally levied abroad on royalties paid to Cypriot companies pursuant to the double tax treaties negotiated by Cyprus;
- There is no Cypriot withholding tax on the payment of royalties by IBCs to any non-resident; and
- Only a 10 per cent spread of the total royalties receivable will be taxable at the 4.25 per cent rate applicable in the case of Cypriot IBCs.

Anti-Avoidance Legislation

22-57 The international tax planning advantages of intermediary licensing entities are being eroded by the growing introduction of anti-avoidance legislation which, by the use of 'substance over form' or 'abuse of legal forms' provisions, may treat an intermediary company as a mere sham or may rectify for tax purposes the transaction between the intermediary and the taxpayer.

Limitation-of-benefits provisions aiming at countering the avoidance of taxation by conduit companies also are being introduced in double-taxation treaties. These anti-treaty shopping clauses restrict relief from withholding taxes or other benefits to *bona fide* residents of the treaty partner state. Moreover, they disallow treaty benefits to conduit companies which are principally used for the purpose of obtaining treaty relief.

Some of the double-taxation treaties entered into by Cyprus contain 'limitation of benefits' or 'excluded persons' articles which exclude Cypriot IBCs from benefiting from some or all of the relevant treaty provisions. In particular, the treaties with France and the United Kingdom prevent Cyprus IBCs from claiming the treaty reduced rates of withholding tax on dividends, royalties, and interest payments, while the treaties with the United States and Canada exclude Cypriot IBCs from all of the provisions of the treaty.

Generally, there may be two ways of circumventing the effects of the limitation-of-benefits provisions in respect of royalty payments, subject of course to any transfer pricing regulations in the country of source.

The first would involve a Cypriot IBC licensing rights to the United Kingdom or France, for example, and then electing to have the 10 per cent spread of the royalties received that must remain in Cyprus, according to Cyprus revenue practice, taxed at standard Cypriot corporate tax rates. It is submitted that, in this case, the limitation-of-benefits provision in the Cyprus–United Kingdom double-taxation

treaty is not applicable, and the Cypriot licensing entity may be able to claim the zero-rate United Kingdom or French withholding tax on royalty payments from the United Kingdom or France to Cyprus.

The second way of circumventing the effect of the limitation-of-benefits provisions would be through the use of a Cyprus 'onshore' licensing company, all the shares of which are *bona fide* and beneficially held by Cypriot residents; such a company would, of course, be taxed at standard Cypriot tax rates (20 or 25 per cent) and, therefore, would not come within the ambit of 'excluded persons' provisions, as these apply solely to Cyprus IBCs. Only the treaty with the United States would not provide treaty relief to the licensing operations of such an onshore company since article 26 of that treaty provides that substantial parts of the royalty income that the Cypriot company receives may not be used directly or indirectly to meet liabilities of non-residents of the United States or Cyprus.

However, despite the fact that the use of Cypriot onshore companies receiving royalty income from the United States and paying out such income to third parties is restricted, article 26(2) of the treaty states that the limitation-of-benefits article does not apply if the principal purpose of the structure is not to obtain benefits under the tax treaty. It lies beyond the scope of the present chapter to examine in detail the way that the Cypriot onshore company should operate in order that treaty relief be obtained. Suffice to say that careful tax planning and creating a commercially justifiable structure could maximise tax benefits and savings.

CHAPTER 23

Trusts

Elias A Neocleous

Introduction

23-1 A trust is not a legal person, like an individual or a company, capable of owning property. For there to be a trust, property must be subject to a trust, so the property will be vested in a trustee or trustees. The trust property cannot be used as part of the trustee's property whether on death, since his interest ceases then, or on divorce or bankruptcy; the trust property constitutes an independent fund available only for the beneficiaries or for charitable or other permitted purposes.

The trustee-beneficiary relationship is the foundation of the trust. The arrangement between the settlor and the trustees under the trust instrument (which will expressly give the trustees, as an incident of their holding and managing the trust fund, the power to pay themselves out of the fund for their services and expenses) confers extensive enforceable rights on the beneficiaries, though they neither provide consideration for the arrangement nor are parties to it.

The trust concept thus overcomes the weakness of the contract concept since, in Common Law, to enforce a contract, a person must be a party to it and provide consideration for the other party's promise. Moreover, persons as yet unborn or unascertained may come to have rights under a trust for their benefit.

There is no statutory definition of the trust which can be used as a major premise from which rules relating to the trust can be deduced. It has been the courts that, over the years, have developed the rules relating to the trust, so all one can do is provide a description of the trust, which reflects those rules and which enables people in a general way to know what is meant when talking about a trust. To this end, when the Hague Trust Convention[1] was prepared, article 2 stated:

> For the purposes of this convention, the term 'trust' refers to the legal relationships created *inter vivos* or on death by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

1 Hague Convention on the Law Applicable to Trusts and Their Recognition (1984). See also the definition set out in Underhill and Hayton, *The Law of Trusts and Trustees* (14th ed), at p 3: '. . . A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que* trust) of whom he may himself be one, and any of whom may enforce the obligation . . .'.

A trust has the following characteristics:

(a) the assets constitute a separate fund and are not a part of the trustee's own estate;

(b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

(c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed on him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee himself may have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.[2]

Trust Law

23-2 Cyprus has inherited its trust law from England so that the doctrines of equity on which trust law is based have long formed part of the Cypriot legal system. In 1955, Cyprus enacted its own statute, the Trustee Law of 1955,[3] which was the basic statute that covered some of the principal aspects of the trust relationship. Thus, up to the date of independence in 1960, Cyprus trust law was to be found in its own domestic law and in the doctrines of equity and case law in England.

The strength of the English principles was enforced by the promulgation of section 29 of the Cyprus Court of Justice Law.[4] In terms of this legislation, the civil and criminal courts were expressly instructed to adhere to the Common Law and equity principles, 'save in so far as other provision has been or shall be made by any law and so long as not inconsistent with the Constitution'.

Indeed, in cases where Cypriot law has not made provision for a specific legal point, the courts of the island have held that reliance may be placed on the Common Law or the law of equity.[5]

2 'Cyprus', *International Trust Precedents*; 'Cyprus', *Offshore Trusts*; Andreas Neocleous, 'Cyprus — An Ideal Jurisdiction for Trusts', *Cyprus Law Review* (1987), vol 4; Elias Neocleous, 'Asset Protection Planning and Cyprus International Trusts', *Cyprus Law Review* (1994).

3 Trustee Law, Cap 193.

4 Law 14 of 1960.

5 *Solomos Stylianou v The Police* (1962) CLR 152; *A Mouzouris and Another v Xylophagou Plantations Ltd* (1977) 1 CLR 287, at p 300.

Types of Trusts

In General

23-3 Trusts may be divided into two main classes according to whether their object is to benefit private individuals (private trusts) or certain public purposes (charitable trusts). Private trusts are enforceable at the instance of beneficiaries. Charitable trusts are 'public' in the sense that they are generally enforced at the suit of the Attorney General acting on behalf of the state.

Trusts also may be classified into many other categories such as fixed trusts and discretionary trusts. A fixed trust is one in which the share or interest of the beneficiaries is specified in the instrument. A discretionary trust is one in which the trustees hold the trust property on trust for such member or members of a class of beneficiaries as they shall in their absolute discretion determine.

Private Trusts

Express Private Trusts

23-4 An express trust is a trust which is expressly created by the person who imposes it. It may be imposed in any manner: by deed, by writing, by will, or (except in certain cases) merely orally. Whatever the method of creation, however, the creator must make his intention absolutely plain.[6] It has thus been laid down that for a trust to arise there must be three 'certainties'. There must be certainty of words, certainty of subject matter, and certainty of objects. Certainty of words means that the words used must show a clear intention that a trust shall arise.

Thus, if X gives Y a ring and says, 'I charge you to hold this ring in trust for Z', X has plainly imposed a trust. There must be certainty of subject matter. This requirement speaks for itself: if the subject matter to be held in trust is indeterminate, the courts cannot enforce the trust. Thus, if A, by his will, were to direct his executor to hold 'some portion of my property' in trust for B, the trust would fail.

There must be certainty of objects. Thus, if a man were to give a picture to another on the understanding that it should be held in trust for someone who should be subsequently named, and if the donor were to die without disclosing a name, there would be no express trust and the picture would 'revert' to the donor's estate by operation of law.[7]

Besides being 'certain', the trust must be 'completely constituted'. This may be brought about in three ways. The creator of the trust may declare himself trustee, he may impose the trust in his will, or he may convey the trust property to trustees. Where the last of the above methods is adopted, the trust will not be 'completely constituted' until the creator of the trust has done all in his power (according to

6 *Re Hamilton* (1895) 2 Ch 370.
7 *McPhail v Doulton* (1971) AC 424.

the nature of the property concerned) to vest the trust property in the person or persons who are to hold it as trustee or trustees.

An attempted transfer will not surface for 'there is no equity to perfect an imperfect gift'.[8] Thus, if the property concerned is land, there must be a deed of conveyance: if it consists of shares, there must be a valid transfer. Until the trust is thus 'completely constituted' by transfer it will normally be ineffectual. There is, however, one important exception to the above rule. If the creator of the trust has agreed to convey the property for valuable consideration, equity, which 'looks on that as done which ought to be done', will enforce the transfer of the property in due course, and thus render the trust 'completely constituted'.

Resulting Trusts

23-5 A resulting trust is one form of implied trust (see text, below), ie, one which arises from the implied as opposed to the express intention of the creator of the trust. Without expressly creating a trust, people sometimes act in a way which shows that they presumably intended to do so. Human activities being infinitely various, obviously no exhaustive list can be given of trusts which arise in this way. The following constitute examples of resulting trusts. Where a man settles property on trustees in a way which makes no provision for the exhaustion of the entire interest in the property, the unexhausted interest will 'revert' to him.

Another example is where A (otherwise than by way of loan) supplies money for B to purchase property, B will, in the absence of evidence of a contrary intention, be presumed to hold the property on a resulting trust in favour of A. This presumption may, however, sometimes be counterbalanced by a contrary presumption called the presumption of advancement. This arises where a husband or a father advances money for a purchase by his wife or child. In this case, it is presumed that the advance is intended as a gift, so that no resulting trust in favour of the donor arises. The presumption of advancement, like the presumption of a resulting trust, may of course be rebutted by evidence of a contrary intention. It should be noted that the presumption extends to cover the case of a person in the place of a parent (in *loco parentis*) who supplies money for someone whom he treats as his child. Grandparents or godparents, for instance, may often be in this position.

Other examples of resulting trusts are cases where a trust fails either because there are no beneficiaries or there is a lack of certainty as to the identity of the beneficiaries, or as to the amount of trust property to be distributed to each beneficiary, and the trustees then hold the property on trust for the creator.

8 *Per* Turner LJ, in *Milroy v Lord* (1862) 4 De 6F & J 264, at p 274.

Constructive Trusts

23-6 Constructive trusts are imposed by law quite independently of anyone's intention. An example of a case where a trust of this type arises is where property held in trust is conveyed by trustees to someone who has notice of the trust; equity protects the rights of the beneficiaries and treats the stranger as a constructive trustee, whether or not he consents to act as such. A further example of a constructive trust is provided by the rule in *Keech v Sandford*,[9] where it was held that equity will not permit a trustee to acquire a benefit for himself by reason of his fiduciary position; if he does acquire such a benefit, he holds whatever he acquires in trust for the beneficiaries. *Keech v Sandford*, therefore, illustrates the general principle that a constructive trust will always arise in such a case.

Furthermore, a person who is not a trustee may, where he obtains information which enables him to make a personal profit — which information he would not have had, had he not been acting for the trust — be forced to account for such profit to the beneficiaries as being held by him constructively in trust for them.[10] Constructive trusts are therefore used by the courts as remedial devices to correct unjust enrichment and redress wrongs.[11]

Implied Trusts

23-7 These are trusts which arise from the implied intention of a settlor and take the form of resulting or constructive trusts. Cypriot courts have followed the authorities of English cases[12] on implied or non-express trusts. In *Pentaukas v Pentaukas*,[13] the Supreme Court of Cyprus cited with approval the following passage from *Gissing v Gissing*:

> A resulting, implied or constructive trust is created by a transaction between the trustee and the *cestui que* trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the *cestui que* trust a beneficial interest in the land acquired. Also, he will be so held to have conducted

9 *Keech v Sandford* (1726); (1558–1774) All ER 230.

10 *Boardman v Phipps* (1967) 2 AC 46.

11 In *Akis Gregoriou v Christina Stavrou Christophorou* (1995) 1 CLR 248, the then President of the Supreme Court, Stylianides, stated, at p 271: '. . . The constructive trust does not arise from express and/or implied intention of the parties, but arises as a matter of consciousness and fairness, whenever the system of equity encompasses a certain act or series of acts, not just with legality, but with attribution of liability. Unjust enrichment is an example of a constructive trust . . . '.

12 *Gissing v Gissing* (1970) 2 All ER 780; *Falkoner and Falkoner* (1970) 1 WLR 1333; *Heseltine v Heseltine* (1971) 1 All ER 952; *Cooke v Head* (1972) 2 All ER 952; *Williams & Glyn's Bank v Boland* (1979) 2 WLR 550; *Dennis v McDonald* (1981) 2 All ER 632; *Grant v Edwards* (1986) 2 All ER 426.

13 *Pentaukas v Pentaukas* (1991) 1 CLR 547, at p 553.

> himself if by his words or conduct he has induced the beneficiary to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

23-8 In the context of the matrimonial home and equitable interests with respect to land ownership, Cypriot courts have followed English equity principles and have held that the existence of trusts may be implied when spouses or couples in cohabitation have made a joint contribution to the setting up of a house for common use.[14]

If cohabitation is terminated and the object of the enterprise is frustrated, equity requires a fair apportionment according to the contribution, direct or indirect, of each to the acquisition of the property.[15] Equitable interests in land arising out of implied trusts are expressly exempted from the registration provisions of section 4 of the Immovable Property (Tenure, Registration and Valuation) Law.[16]

Charitable Trusts

23-9 No comprehensive definition of a legal 'charity' has been provided either by statute or by the courts. The meaning is, however, not the same as the popular meaning and it must be determined by reference to the relevant case law. At Common Law, the classification of charitable purposes which is most often quoted is the one made by Lord Macnaghten, in *Income Tax Special Purposes Commissioners v Pemsel*.[17] According to this classification, charitable trusts comprise trusts for:

- The relief of poverty;
- The advancement of education;
- The advancement of religion; and
- Other purposes beneficial to the community.

23-10 Under Cypriot law, the relevant legislation which governs the protection of charities is the Charities Law.[18] The classification of charitable purposes as enunciated by Lord Macnaghten, above, forms part of the law applicable to charities in Cyprus by virtue of section 15 of the Charities Law.

This section makes specific reference to the applicability of English law relating to charitable trusts to proceedings under the Cypriot Charities Law. In addition, the Charities Law makes particular reference to the specific 'purposes' which are

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14 *Miltiadous v Miltiadous* (1982) 1 CLR 797; *Theodoulou v Theodoulou* (1987) 1 CLR 101.

15 *Stylianou v Papacleovoulou* (1982) 1 CLR 542; *Odysseos v Pieris Estates and Others* (1982) 1 CLR 557; *Boustani v Linmare Shipping Co* (1984) 1 CLR 354; *Pentaukas v Pentaukas* (1991) 1 CLR 547; *Costantinou v Demosthenous* (1992) 1 CLR 621; *Orphanides v Orphanides*, *Civil Appeal 9755*, 30 January 1998; *Stylianou v Stylianou*, Civil Appeal 9214, 29 October 1999.

16 Immovable Property (Tenure, Registration and Valuation) Law, Cap 224.

17 *Income Tax Special Purposes Commissioners v Pemsel* (1891) AC 531.

18 Charities Law, Cap 41.

permitted by law to constitute a charitable trust in Cyprus. More specifically, section 2 of the Charities Law provides that a charitable trust can be set up for educational, literary, scientific, or public charitable purposes.

Charitable trusts are accorded a number of concessions over other trusts in terms of enforcement, perpetuity, and taxation. The reason for such treatment emanates from the public benefit which accrues to the community at large from these trusts. Under the current tax regime, a trust set up for charitable purposes in Cyprus, which has been duly authorised by the Council of Ministers, is exempted from taxation.[19] With respect to the applicable perpetuity periods, it must be noted that the perpetuity periods of Cyprus trusts are not governed by the English statutory provisions of 1964 as these were enacted after the independence of Cyprus.

The position, therefore, is that the old English equity principles are applicable to the effect that no trusts, with the exception of charitable trusts, may continue in perpetuity. Trusts endure for either the period of the life or lives in being, plus 21 years, or, where there is no life in being, merely for 21 years. Furthermore, the accumulation period of a trust may be extended to include the entire perpetuity period.

It is important to note that the 'charitable' status of a trust is not restricted just to domestic or local trusts set up in Cyprus, but it may be accredited to 'international trusts' set up in Cyprus pursuant to the International Trusts Law.[20] The Law contains specific provisions for the creation of charitable trusts provided that such trusts have as their main purposes the relief of poverty, the advancement of education, the advancement of religion, or other purposes beneficial to the public in general.

Legal proceedings in respect of charitable trusts may only be taken by the Attorney General. The Attorney General will be a party to all proceedings brought under the Charities Law. In certain cases, it may be possible for the proceedings to be instituted by the trustees of the charity, if authorised in writing by the Attorney General.[21] Such cases would involve an application to the Supreme Court of Cyprus for directions or for the sale or disposition of property belonging to the trust.

Trustees

In General

23-11 The law governing trusteeship was originally evolved in the English Court of Chancery. Much of it is now contained in the Trustee Law of 1955.[22]

19 Law 58 of 1961, s 8.
20 Law 69 of 1992, *post*.
21 Charities Law, s 14(3).
22 Trustee Law of 1955, Cap 193.

Appointment and Discharge

23-12 Trustees are normally appointed in the instrument which creates the trust. There is no general rule as to the number to be appointed, although it is unusual to appoint a single individual as a sole trustee. The mere fact of appointment does not oblige a trustee to take office. He may refuse to do so, either expressly or by implication, as by refraining from entering on his duties.

If all the trustees appointed under a particular instrument refuse to act, their duties devolve on the person who created the trust, or on his personal representatives. Where one of a number of trustees dies, his duties devolve on the rest. Where a sole surviving trustee dies, his personal representatives can exercise his powers. The court has special powers of discharging trustees and of sanctioning the appointment of new trustees to replace them.[23] These powers are not, however, normally invoked because certain provisions of sections 35 and 38 of the Trustee Law usually render such an application unnecessary.

Under the provisions of section 35, a trustee may be replaced by a new trustee in certain circumstances, eg, if he remains abroad for over a year. The section provides that this replacement may be effected by the persons (if any) nominated in the instrument creating the trust to appoint new trustees. Where there are no such persons, the power of replacement falls on the other trustees. Section 38 provides that a trustee who wishes to retire may obtain his discharge (without any need for replacement) so long as two conditions are satisfied, namely:

- He must obtain the consent of his co-trustees and of any person who is empowered to appoint trustees; and
- On the discharge of the retiring trustee there must remain either at least two trustees or a trust corporation to perform the duties of the trust.

Duties

23-13 Trustees have two cardinal duties. First, they must administer the trust property prudently. Second, they must comply strictly with all the terms of the trust.[24]

For instance, trustees may invest trust assets either in investments authorised by the trust deed or in those authorised by law. The latter have been defined as investments 'in any securities in which trustees in England are for the time being

23 Trustee Law, s 40.

24 In Hanbury and Martin, *Modern Equity* (13th ed), at p 457, it is stated: '. . . In the performance of his office, a trustee must act exclusively in the interest of the trust. He stands to gain nothing from his work, unless special provision in the form of a clause authorising remuneration is made. He is required to observe the highest standards of integrity, and a reasonable standard of business efficiency in the management of the affairs of the trust; and he is subjected to onerous personal liability if he fails to reach the standards set. Nor may he compete in business with the trust; or be in a position in which his personal interests conflict with those of the trust. He may thus be forced to forgo opportunities which would be available to him if he were not a trustee . . .'.

authorised by the law of England to invest trust funds'. Power to invest in specific investments also may be authorised by order of a competent court.

If all possible beneficiaries (both present and future) are of full age and capacity, they can together authorise the trustees to deal with the trust property in any manner desired. Otherwise, the trustees have no power to vary the trusts whatever the circumstances, although on behalf of certain specified classes of beneficiaries (mostly persons under incapacity, such as infancy or unsoundness of mind) the court has jurisdiction under the general law to sanction the variation or revocation of trust dispositions where it is satisfied that such variation or revocation is of benefit to the person or persons concerned.

On the question of variation of a Cypriot trust, the position in Cyprus closely mirrors the one existing in England prior to the Variation of Trusts Act of 1958. Cypriot courts, therefore, enjoy the same inherent powers to vary trusts as those relied on by the English courts prior to the introduction of that statute.

Moreover, trustees as fiduciaries may not place themselves where their fiduciary duties and their private interests may conflict and are prevented from obtaining any profit from their fiduciary relationship unless duly authorised. They are liable to account to their principal for any such profit. It is immaterial that the principal could not otherwise have obtained the profit, that the trustee acted honestly and in his principal's best interest, that the principal benefited from the trustee's actions, and that the profit was obtained through the use of the trustee's own assets and resulted from the trustee's personal skills.

As a general rule, trustees may not delegate their duties. Section 23 of the Trustee Law, however, sets out a list of exceptions to this rule. These exceptions include, for instance, the right to employ a solicitor, a banker, or a stockbroker to effect transactions in connection with the trust property. The charges of these agents are paid out of the trust estate. Trustees must keep accounts and the Trustee Law authorises them to have these accounts audited once in three years at the expense of the trust estate although, in practice, an audit is unusual.

Their Liabilities

23-14 In the absence of express authorisation in the instrument, if any, which creates the trust or by the court, trustees have no right to be paid for their services. They are, however, entitled to be reimbursed out of the trust funds for any expenses properly incurred in the performance of their duties. The *Keech v Sandford*[25] line of cases makes it clear that, unless permitted by law, by the terms of the trust, or with the express approval of the court, a trustee should not profit directly or

25 *Keech v Sandford* 1726 (1558–1774) All ER 230. In this case, it was decided that a trustee could not renew a lease for his own benefit. This principle has been reinforced and extended in subsequent cases. Consequently, a trustee's entitlement to remuneration is always strictly construed against the trustee and not in such trustee's favour.

indirectly from his trusteeship (or cause or permit others to profit directly or indirectly from such trusteeship) nor enter on his account into transactions *vis-à-vis* the trust out of self-interest.

Any action by the trustees which is in excess of their powers or contravenes the terms of the trust instrument constitutes a 'breach of trust', and a trustee will be personally liable to the full extent of any loss resulting therefrom. A trustee who has been held liable for breach of trust has a right to be indemnified by any beneficiary who has directly instigated the breach, to the extent to which he has benefited therefrom, and has a right of contribution from his co-trustee (if any). By section 58 of the Trustee Law, the court has power to relieve a trustee from personal liability for breach of trust when he has acted honestly and reasonably and ought fairly to be excused for the breach; the scope of this statutory protection is, however, uncertain (in particular, it is problematic how far it will avail a professional trustee).

Beneficiaries

23-15 The principal right of beneficiaries is their right to the enjoyment of the interest in the trust property to which they are entitled under the terms of the trust. In the case of a private trust, the beneficiaries have a right to force the trustees, by action if necessary, to administer the property according to the terms of the trust. In the case of a breach of trust, the following rights are available to beneficiaries:

- They may bring a personal action against the trustees;
- They may be able to follow the trust property itself or to claim anything into which it has been converted; and
- They may be able to institute criminal proceedings against the trustees.

23-16 The personal action requires no comment. Being an action against the trustees in person, it has the disadvantage that if they are men of straw or are already seriously in debt, beneficiaries may get little or nothing from them.

Equity has always permitted beneficiaries to 'follow the trust property'. In this respect, they are unlike people whose rights are based on the Common Law, who can usually only claim damages for their infringement. If the trustee has mixed trust money with his own or has made a purchase partly with his own and partly with trust moneys, if the mixed fund can be traced, the beneficiaries will have first charge on the traced assets as security for their claim. Tracing ends when no traceable product of a trust can be found or is found in a *bona fide* purchase for value without notice or in someone who makes out a defence of innocent change of position.

International Trusts Law

In General

23-17 The International Trusts Law[26] is not a self-contained statute, but rather a law which builds on the existing statutory base.

This has the effect that the general principles of trust law, as found in the Common Law and statutes of Cyprus, continue to apply unless and to the extent that the existing law is overridden by a specific provision of the International Trusts Law. The Law defines an international trust as being a trust in respect of which:

- The settlor is not a permanent resident of Cyprus;
- No beneficiary (other than a charity) is a permanent resident of Cyprus;
- The trust property does not include any real property situated in Cyprus; and
- At all times, there is at least one trustee resident in Cyprus.

23-18 A trust will still qualify as an international trust even if the settlor or the local trustee or a beneficiary (or any combination of those) is a Cypriot international business company or partnership.

An international trust may remain in force for up to 100 years notwithstanding any statutory provision of Cyprus or any other country to the contrary. The rule against perpetuities does not apply to purpose and charitable trusts which may continue to be in force without limitations. The income of an international trust can be accumulated for the entire duration of the trust.

Section 7 of the International Trusts Law contains a definition of charitable trusts. It additionally provides that purpose trusts, ie, trusts which are not necessarily only for established charitable objects or for the benefit of ascertained individuals, are enforceable either by the settlor (or his personal representatives) or by the person named in the trust instrument as having the right to enforce the trust. Such a person also may be a beneficiary under the trust. The trustees of an international trust have extensive investment powers which must be exercised with the prudence and diligence of the reasonable person.

The Cyprus courts have powers to vary the terms of an international trust on the lines of the English Variation of Trusts Act 1958. More specifically, the courts, on application, may amend or repeal the terms of the international trust or the powers of the trustees to manage the trust if they are satisfied that the proposed arrangement will be in the interest of the person on whose behalf the application is made and no substantial prejudice is caused to the interests of any other interested party.

Section 9 of the International Trusts Law provides that the law applicable to an international trust can be expressly changed to a foreign law provided that the new law recognizes the validity of the trust and the respective interests of the beneficiaries;

26 Law 69 of 1992.

a trust established in a foreign jurisdiction may, by its terms, select Cypriot law provided that the foreign law itself recognises such a change.

International trusts are exempt from the duty of registration under the provisions of any law. There is, however, a fixed stamp duty of CY £250 payable on the creation of the trust.

Section 12 of the International Trusts Law provides that the income and the profits of an international trust derived or deemed to be derived from a source outside Cyprus are completely exempt from income tax or any other tax imposed in Cyprus, such as capital gains or special contribution. The property of the trust is not subject to estate duty. Therefore, trust income, such as royalties, interest, or dividends received from an international business company, is exempt from income tax in the hands of the trustees, and the beneficiaries of an international trust also are exempt from payment of income tax in respect of any monies they receive from the trustees.

An international trust may be allowed to participate in local business and investments in accordance with the laws and regulations in force for the time being which govern foreign investments in Cyprus. In such a case, all income arising out of local sources will be subject to tax at the normal rates.

International Trusts and Asset Protection Planning

23-19 Section 3 of the International Trusts Law contains specific provisions which allow the Cypriot international trust to be used as an asset protection vehicle.

Section 3(a) of the International Trusts Law provides that an international trust can be validly created by any non-resident of Cyprus and that a settlor shall be deemed to have the capacity to transfer property assuming that, at the time of the transfer, he is of full age and sound mind under the law of his domicile. Section 3(a) also states that no foreign law relating to inheritance or succession will invalidate the trust or affect in any manner any transfer or disposition relating to the creation of such trust.

This section should be read together with section 9 — the 'power to determine the proper law of the trust' section — which states that the proper law of the trust may be changed to or from the laws of the Republic of Cyprus assuming that the new proper law would recognise the validity of the trust and the respective interests of the beneficiaries.

The combined effect of these provisions is to render the Cypriot international trust immune, or at least to a large extent immune, from forced heirship and 'claw back' rules, especially in those cases where the settlor is domiciled in a civil law jurisdiction which has forced heirship rules applicable on death. Section 3(b) states that:

> . . . a Cyprus International Trust is not void or voidable in the case of the settlor's bankruptcy or liquidation or in any proceedings at the suit of the creditors of the settlor notwithstanding any contrary provisions of the law of the Republic or of any other country and notwithstanding further that

> the trust is voluntary and without valuable consideration being given for the same or is for the benefit of the settlor or his family unless it is proven to the satisfaction of the court that the International Trust was made with the intent to defraud the creditors of the settlor at the time of the transfer of his property in the trust . . . .

23-20 There are two points which should be noted in respect of this section. First, the Statute of Elizabeth, based on a United Kingdom court case of 1571, which basically cuts through arrangements made to hide assets from future creditors, is expressly negated in Cyprus.

In addition, a Cyprus international trust may not be set aside by the settlor's creditors unless there exists, at the time of the setting up of the trust and transferring property to it, an intention to defraud creditors. Although there is no case law on this point, it is respectfully submitted that the net result of the subsection is to invalidate a Cypriot international trust only in those cases where there are current or pending claims against the settlor at the time he sets up the trust.

The law, therefore, does not shield settlors from creditors who have claims on the assets prior to the trust being settled or where there are contingent claims. Subsequent creditors, ie, those who may entertain a claim in respect of future dealings are, however, clearly excluded from the ambit of the provision. On the basis of judgments reached in cases dealing with the Fraudulent Transfer Avoidance Law,[27] such as *Andreas Mailos v Constantinides*,[28] it may be stated that the post-transfer insolvency of the settlor is of no relevance to the fraudulent transfer issue.

What appears to be the key element is whether, at the time of the transfer, the settlor had sufficient property to meet all his liabilities, the property to be transferred to the trust not being included. If this test is satisfied, and assuming that the settlor did not anticipate bankruptcy at the time of the setting up of the trust and transferring property to it, an intention to defraud cannot be proved.

The burden of proving that the settlor intended or intends to defraud creditors lies with the person alleging such intention while the relevant standard of proof to be discharged is the civil one. The Cypriot international trust may be set aside only when a creditor and not any other person, for example, members of the family of the settlor, has been defrauded by the setting up of such trust.

In the Cypriot International Trusts Law, the word 'creditor' in section 4(b) is not defined, leaving open the question of whether a Cypriot court would regard it as including not only creditors with liquidated claims at the time of the transfer of assets to the trustees but also creditors with claims which, at that time, were contingent on the happening of some future event or a fulfilment of some future condition.

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27 Fraudulent Transfer Avoidance Law, Cap 62.

28 *Andreas Mailos v Constantinides* (1979) 1 SC 242; *Evantha Cotsapa v The Officer Receiver and Registrar*, Trustee in Bankruptcy (1966) 1 CLR 119.

Retention of control or enjoyment of a benefit under a trust does not affect the validity of the trust or any transfer to it.

Section 3(c) of the International Trusts Law states that a claim against a trustee of a Cypriot international trust pursuant to the provisions of section 3(b) above must be filed within a period of two years from the date of transfer of property to the trust. The lapse of two years from the date of the transfer of the assets is considered to be conclusive as far as the validity of the trust is concerned, and no action can be entertained against the trustees of the trust after the lapse of this period.

Cyprus enacted in 1976 the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,[29] according to which judgments obtained in courts of countries which are signatories to the Convention may be enforced in Cyprus, provided that certain criteria are met.

Section 1 of the Convention makes it clear that the provisions of the Convention do not apply to decisions concerning the capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses, maintenance obligations, questions of succession, and questions of bankruptcy, including those relating to the validity of acts of the debtor. In view of the above, together with the contents of section 3(b) of the Cyprus International Trusts Law, it may be seen that the possible enforcement of a foreign decree of bankruptcy in Cyprus, as well as the enforcement of any other foreign judgment obtained in respect of the settlor's property, has effectively been negated. As has already been shown, the aggrieved party in these circumstances may obtain relief only by bringing an action against the trustees of the trust within the two year period and would have to discharge the onerous burden of proving intention to defraud.

Moreover, being a foreign plaintiff, he would have to provide security for costs pursuant to Order 60 of the Cypriot Rules of Court. In another area, Cyprus has a distinct advantage over many other Commonwealth countries, in particular the Caribbean Islands and Bermuda, in that it is not a party to the arrangements set out in section 426(4) and (5) of the United Kingdom Insolvency Act 1986, in terms of which United Kingdom courts and the courts of certain other jurisdictions[30] are required to assist each other in insolvency cases.

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29 Law 11 of 1976. It should be noted that article 21 of this Convention states that decisions rendered in one contracting state will not be recognised or enforced in another contracting state, in accordance with the provisions of the Convention, unless the two states, being parties to the Convention, have concluded a supplementary agreement to this effect. Despite the fact that Cyprus ratified the Convention on 12 March 1976 by Law 11 of 1976, the Cypriot government has not entered into a supplementary agreement with any contracting State to the Convention and consequently the Convention cannot be utilised as a system for the registration of foreign judgments.

30 Listed in Statutory Instrument 1988, Number 2067 of 1986.

Rights of Beneficiaries to Trust Information

23-21 Section 11 of the International Trusts Law entitles beneficiaries of international trusts to compel disclosure of any document or information relative to or forming part of the accounts of the international trust.

The statutory right of disclosure contained in section 11 is actually narrower than the equitable duty of trustees to provide trust information to beneficiaries as it actually refers only to 'any document or information relating to or forming part of the accounts of the international trust' and not to any other trust documentation, such as the terms of the trust, particulars of the trust property, and how it is invested. This represents the position under the general trust law which is by no means superseded, but is rather supplemented, by the International Trust Law.

Section 11 does not address the issue of who is a 'beneficiary' entitled to trust information nor whether a discretionary beneficiary would qualify for these purposes. Undoubtedly, beneficiaries qualify if they have fixed interests. In general, beneficiaries under fixed trusts have a right to receive and inspect accounts, as well as a right to be provided with copies of trust documents.

The information rights of discretionary beneficiaries are less clear as section 11 does not give an automatic right to call for accounts. Subject to the circumstances of a particular trust, information rights would arise in respect of discretionary beneficiaries from the time the trustees have exercised their discretion to distribute.

The right to receive information under section 11 also is available to a charity named as a beneficiary in the trust instrument provided that the trust is a charitable trust, as defined by section 8 of the International Trust Law.

Section 11 prevents trustees, government officials, and officers of the Central Bank of Cyprus from disclosing any information to third parties unless specifically authorised by a Cypriot court. A Cypriot court should issue an order for disclosure only if the disclosure of information in question is of paramount importance to the outcome of the case. The Law does not impose any criminal sanctions for improper disclosure but it does impose a duty on the trustees to take positive action to protect the confidentiality of trust information, in a way similar to general trust principles.

The statutory and equitable duties of confidentiality are subject to the following general qualifications:

- A court order sanctioning the disclosure;
- Trust information should be disclosed if disclosure is in the public interest or under compulsion of law;[31] and

31 For example, the Prevention and Suppression of Money Laundering Activities Law, Law 61 (I) of 1996, as amended, by Law 25 (I) of 1997 and Law 41 (I) of 1998, empowers courts to issue orders for the disclosure of information where there exist reasonable grounds for suspecting that a 'predicate' or 'laundering' offence has been committed.

- Trustees are entitled to disclose trust information subject to any provision in the trust instrument where they *bona fide* believe that disclosure is necessary in carrying out their fiduciary duties or exercising their powers, and such disclosure will not prejudice the trust, ie, the interests of the beneficiaries.[32]

23-22 Confidentiality rules may be adjusted by express provisions in the trust instruments which commonly prevent disclosure to beneficiaries ('non-disclosure clauses') or even provide for the automatic exclusion of beneficiaries in the event of their bringing an action against the trust ('exclusion' and 'no challenge' clauses). Such clauses cannot, obviously, prevent trustees from disclosing information under compulsion of law, but trustees are generally advised to obtain court approval if they consider making a disclosure in breach of the said clauses for any of the reasons set out above.

Trust Companies

In General

23-23 There are three types of trust (or trustee) companies which can be incorporated in Cyprus and act as trustees of Cyprus international trusts or offshore trusts: first, what can be referred to as a 'local trust company'; second, what can be referred to as an 'international private trustee company'; and third, the 'international professional trustee company'.

A local trust company is not required to hold a 'trust license' to render trustee services to the public at large. It is required, however, to inform the Central Bank of Cyprus that it acts as a trustee and that the trust's settlor and beneficiaries are non-residents of Cyprus. Only then can it be granted the required permit to operate external bank accounts in the name of the trust pursuant to the Exchange Control Law34 of Cyprus.[33] Such a company is liable to corporate tax in Cyprus at the rate of 25 per cent on its trustee management fees.

Private Trustee Company

23-24 A private trustee company can be defined as a company which usually acts as the trustee of a single trust or one of a restricted number of trusts. The private trustee's share capital may be entirely held by one or more of the beneficiaries of the trust or by the settlor of the trust or the settlor and one or more of the beneficiaries.

An international business private trustee company is required to disclose to the Central Bank of Cyprus the fact that it intends to act as a private trustee company

32 Trustees are, however, advised, when in doubt, to apply to the court for directions.
33 Cap 199.

in relation to specifically named trusts, but it is not required to hold a 'trustee licence'. The Exchange Control Law permit will then be issued by the Central Bank of Cyprus on the condition that the said company's memorandum will be altered to the effect that the company is prevented from acting as a professional trustee.

Professional Trustee Company

23-25 A corporate entity or partnership which intends to offer international trustee services to the public at large on a professional basis or which intends to make representations or advertise that it carries on trust business, that it is interested in doing so, or that it is qualified or authorised by law or practice to carry on such business, must obtain the prior authorisation of the Central Bank of Cyprus under the Exchange Control Law.

Trust business is the establishing, undertaking, executing, and administering of trusts as a business, trade, or profession. An application for a licence to conduct international trust business must be made to the Central Bank of Cyprus and must contain the following information:

- A statement setting out the nature and scale of the trust business proposed to be carried out and proposed arrangements for its operations;
- Completion of certain detailed questionnaires by the applicant including information on the applicant's professional expertise and current business affairs; and
- A 'letter of authorisation' from the principal beneficial shareholders of the applicant, in the case of a legal person, enabling the Central Bank of Cyprus to seek information from and exchange information with third parties in general, as well as banking, supervisory, or regulatory authorities, on the content and purpose of the application.

23-26 The granting of a trust licence lies in the discretion of the Central Bank, which does not apply any rigid criteria for the purposes of the processing of each application but rather deals with each application on its own merits. The basic test applied by the Central Bank of Cyprus in determining whether a trust licence should be granted is a 'fit and proper' test, ie, an applicant, whether physical or legal, intending to act as a professional trustee must be, in the opinion of the Central Bank of Cyprus, a 'fit and proper person' to be involved in the provision of international trustee services.

Successful applicants are issued with a 'trust licence' which incorporates a number of conditions. These conditions can vary depending on the nature of the trustee services to be provided, but the following are the most common:

- The trust company must submit annually to the Central Bank of Cyprus the number of trusts and total value of trust assets under administration;
- The company may not act as trustee of a collective investment scheme without the prior approval of the Central Bank of Cyprus; and
- The company must, at all times, keep property and records relating to the trusts of which it is a trustee duly separate from its own property and records.

Cypriot Offshore Trusts

23-27 Trusts which would otherwise be classed as international trusts (see *ante*) but fail to so qualify because they do not comply with any one of the requirements of the Cyprus International Trusts Law, such as, for example, the requirement to appoint one Cypriot trustee, would fall into the category of 'offshore trusts'.

Such offshore trusts do, however, receive the same treatment as international trusts under the Exchange Control Law and the Income Tax Law to the extent that they are free from any exchange control restrictions and are exempt from any income tax or capital gains tax. Offshore trusts are, in fact, free from any other regulatory supervision, and the only reporting requirement that they need to comply with is the need to obtain the Central Bank of Cyprus' permit in the event of the appointment of any Cypriot as trustee at any time during the duration of the trust. It should also be noted that offshore trusts can hold immovable property in Cyprus subject to obtaining the required permit from the Council of Ministers.

Taxation

23-28 Trusts, as such, are not taxable in Cyprus, but the beneficiaries are taxable through the trustees. Cypriot tax authorities treat 'local trusts'[34] as transparent vehicles for income tax purposes. Provided that no local profit is included, no Cypriot taxation will be levied on the income, capital, or distribution of Cyprus offshore trusts. It should be noted that dividends and/or other types of income received from an underlying Cypriot international business company will not be regarded as Cypriot source income for the purposes of the Cypriot Income Tax Laws.[35]

As far as international trusts are concerned, the International Trusts Law provides that the income and profits of an international trust derived or deemed to be derived from a source outside Cyprus are completely exempt from income tax or any other tax imposed in Cyprus, such as capital gains or special contribution (see text, above). An international business company which acts as a trustee of a Cypriot international trust is liable to tax at the rate of 4.25 per cent on its trustee management fee.

In the event that the international business trustee company carries on business on behalf of a Cypriot international trust, the 4.25 per cent tax will be avoided as the profits of the said international business company will be considered to be the profits of the Cyprus international trust and thus be tax-exempt pursuant to the provisions of the International Trusts Law.

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34 A 'local trust' is a trust under the terms of which either the settlor or any of the beneficiaries is a Cypriot.

35 Income Tax Laws, Law 58 of 1961, as amended.

Cypriot Trusts and Double-Taxation Treaties

23-29 A Cypriot trust may be a 'person' or a 'body of persons' according to the personal scope article of a bilateral agreement for the avoidance of double taxation. There can be no doubt that the trustee, whether an individual or a corporate trustee, is a person falling within the personal scope article. The next question is whether the trustee or the trust is tax resident in Cyprus.

Article 4 is the typical model article of the Organisation for Economic Co-operation and Development (OECD) Model Agreement for the Avoidance of Double Taxation governing residence and defines the term as meaning any person who, under the laws of Cyprus, is liable to tax therein by reason of his domicile, residence, place of management, or any other criterion of a similar nature.

A trust is exempt from Cypriot tax under the Cypriot International Trusts Law and, therefore, as an entity, an international trust or an offshore trust cannot really be considered to be liable to Cypriot tax. However, certainly the trustee is liable to Cypriot tax even in respect only of his remuneration if not on all income receivable in his capacity as trustee.

The next question is whether the income receivable by the Cypriot trustee can benefit from the protection of a bilateral agreement for the avoidance of double taxation. In many of the bilateral agreements for the avoidance of double taxation entered into by Cyprus, the relevant articles may only state that income will be taxable where the recipient is resident. For example, article 11(1) of the Cyprus–Austria agreement for the avoidance of double taxation states that interest arising in (Austria) and paid to a resident of (Cyprus) shall be taxable only in (Cyprus), while most of the bilateral agreements for the avoidance of double taxation with the Eastern European countries also refer to residents of a contracting state without adding the requirement that they be beneficial owners of the income.

It should be noted, however, that there are many bilateral agreements for the avoidance of double taxation which require the recipient to be the beneficial owner of the income if relief is to be obtained. Indeed, this requirement also is contained in the OECD Model Agreement for the Avoidance of Double Taxation.

The Commentary to the OECD Model Agreement for the Avoidance of Double Taxation states that withholding tax limitation will not apply when an intermediary, such as an agent or nominee, is interposed between the beneficiary and the payer. A trustee cannot be considered to be a mere agent or nominee and is regarded as the legal owner of income receivable by the trust.

Many Civil Law countries whose legal systems do not endorse the principles of equity and, in particular, the division between legal and beneficial ownership, may accept that the legal right to receive income in its own name would be a sufficient criterion for any benefits under bilateral agreements for the avoidance of double taxation to be accorded to the trustee.

CHAPTER 24

Private International Law

Andreas Neocleous, Maria Koundourou, and Michaella Tsikkini

Introduction

24-1 Private international law, or the conflict of laws, comes into play in cases containing a foreign element, ie, cases arising abroad either wholly or in part. This foreign element makes it necessary to have recourse to another system of law, regardless of where the action is being brought. Private international law seeks, therefore, to provide answers to the following questions:

- Has the court in which the action is being brought jurisdiction to entertain the claim; and
- If so, by what system of law should the case be determined?[1]

24-2 Cyprus is a Common Law jurisdiction and, although quite important areas of substantive law have been codified, English Common Law principles are applied by the courts where there is no specific Cypriot legislation or case law on the point.

The Courts of Justice Law[2] not only determines the composition of and the powers vested in and exercised by the Cypriot courts, but also provides for their jurisdiction. Section 29(1)(c) of the Law provides that the courts of Cyprus will apply 'the Common Law and the doctrines of equity save in so far as other provision has been or shall be made by any law made or becoming applicable under the Constitution or any law saved under paragraph (b) of this section in so far as they are not inconsistent with, or contrary to, the Constitution'. Paragraph (b) states that the courts are obliged to apply 'the laws that were preserved in operation by article 188 of the Constitution unless other provision was made or will be made in accordance with any law applied or enacted in accordance with the Constitution'.

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1 Historically, the first notions of conflict of laws arose when Emperor Caracallas granted the *civitas romana* to all subjects of the Roman Empire, in 313 BC. As a result, conflicts materialised between the legal systems of the subject states and the Roman Law. Similar effects came about later with the grant of British citizenship to all subjects of the British Empire. In addition, the right of the Patriarch in Byzantine times to legislate in parallel with the Emperor on matters of family and personal status created the so-called 'canon' law of the Greek Orthodox Church, which in many aspects conflicted with the legislation laid down by the Emperor.

2 Law 14 of 1960.

It has been firmly established by case law, such as by the Supreme Court in *Kochino v Irfan*,[3] that principles of Private International Law form part of the law of Cyprus in so far as they form part of the Common Law of England.[4] This chapter will therefore refer to Cypriot law and, where no Cypriot authority or legislation exists on the particular matter, to the principles of the Common Law of England.

Evidence of Foreign Law

24-3 In *Royal Bank of Scotland plc v Geodrill Co Ltd and Others*,[5] the Supreme Court of Cyprus specifically held that a party which argues that a foreign law is applicable to its case must first plead the foreign law and then provide expert evidence of it to the satisfaction of the court. Should the defendant fail to carry out either of these obligations, Cyprus law will prevail.

The court adopted as the necessary standard of expertise that required by the courts of England, namely, practical experience of the particular legal system in question, subject to the proviso that the court must apply common sense when hearing the witness and can reject his evidence if it is, for example, absurd or inconsistent. The principles in this case have recently been confirmed by another Supreme Court ruling in *SAT Vision Ltd v Interamerican Property and Casualty Ins Co*.[6]

The Principle of Forum Non Conveniens

In General

24-4 The doctrine of *forum non conveniens*, meaning 'an inappropriate forum', relates to cases in which the court is asked to grant a stay of proceedings and/or leave to serve outside the jurisdiction.

The court will generally need to be satisfied that a continuation of the proceedings in hand would be, for whatever reasons, vexatious or oppressive. It has been established by case law that the courts of Cyprus are vested with a discretion to refuse to exercise jurisdiction in an appropriate case.

Stay of Proceedings

24-5 The courts of Cyprus can stay proceedings on the basis that Cyprus is an inappropriate forum, ie, a *forum non conveniens*. There must be another forum to

3 *Kochino v Irfan* (1977) 11 JSC 1780.
4 *Patiki v Patiki*, 20 CLR Part 1, 45.
5 *Royal Bank of Scotland plc v Geodrill Co Ltd and Others* (1993) 1 JSC 753; *Letco Co Ltd and Another v Socrates Z Eliades and Others* (1991) 1 JSC 435; *Georghiades and Son v Kaminaras* (1958) 23 CLR 276.
6 *SAT Vision Ltd v Interamerican Property and Casualty Ins Co*, Civil Appeal 9598, 29 October 1999.

whose jurisdiction the defendant is amenable and which is clearly or distinctly more appropriate than the Cypriot forum.

The Supreme Court of Cyprus, in *Shehata v Ellias*,[7] adopted the principles put forward by Lord Goff in *Spiliada Maritime Corporation v Consulex Ltd*,[8] a leading case on the question of forum non conveniens. Lord Goff stated that the court may grant a stay of proceedings if it is satisfied that some 'other tribunal having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice, exists'. The burden of proof lies on the defendant to show not only that England is not the appropriate forum, but that there exists another forum which is clearly or distinctly more appropriate than England.

In relation to cases where the parties have knowingly agreed that disputes arising from their contract will be referred to arbitration or to a foreign tribunal or be determined according to the law of a foreign country, the Supreme Court of Cyprus, in *Petrou (No 2) v Zim Israel Navigation Co Ltd and Others*,[9] held that, as a general principle, the court will insist on the parties honouring their bargain. The court will, however, consider whether strong and convincing reasons have been put forward for displacing this *prima facie* presumption so as to entitle the parties to take advantage of the jurisdiction of the Cypriot court.[10]

In *CTC v Zim Israel*,[11] the Supreme Court of Cyprus, following the judgment delivered in the Cypriot case of *Guendjian v Societe Tunisienne de Banque*,[12] reached the conclusion that, in order to justify a stay of proceedings, there are two conditions, namely:

- The defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable and in which justice can be done between the parties at substantially less inconvenience and expense; and
- The stay may not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the Cypriot court.

24-6 In essence, when deciding whether or not to grant a stay of proceedings, the Cypriot courts are faced with a balancing act, weighing all the relevant factors concerning both plaintiff and defendant in order to determine objectively in which forum the case can be tried more suitably in the interests of the parties and for the ends of justice.

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7 *Shehata v Ellias* (1995) 1 JSC 621.

8 Spiliada *Maritime Corporation v Consulex Ltd (1986)* (1986) 3 All ER 843.

9 *Petrou (No 2) v Zim Israel Navigation Co Ltd and Others* 1 JSC 113.

10 *Cyprus Phassouri Plantations Co Ltd v Adriatica di Navigazione* (1983) 1 CLR 949.

11 *CTC v Zim Israel*, Civil Appeal 55/97, 21 July 1999.

12 *Guendjian v Societe Tunisienne de Banque* (1983) 1 CLR 588.

Writ Out of the Jurisdiction

24-7 Section 3 of the Civil Procedure Law[13] provides that 'the court may order that a writ of summons may be served out of Cyprus whenever it appears to the court that the cause of action has arisen on any breach or alleged breach in Cyprus of any contract wherever made, or in respect of any property subject to the Laws of Cyprus, or that the cause of action has arisen in Cyprus, and that, in any of the cases aforesaid, the action is one which cannot be tried elsewhere than in Cyprus or can be more conveniently tried in Cyprus than elsewhere', ie, Cyprus must be shown to be the *forum conveniens*.

The case of *Abdu Ali Altobeiqui v M/V Nada G and Another*[14] is an example of the Cypriot court refusing to grant service of a writ out of the jurisdiction. Among the judge's reasons were the following:

- The parties had agreed that a foreign law should govern their contract;
- The defendants were foreigners and residents abroad, and Cyprus had no connection with the case; and
- The circumstances did not justify the expense and inconvenience that the defendants would suffer if the case were heard in Cyprus.

Application of Foreign Law – The Doctrine of Renvoi

24-8 Where the rules relating to choice of law in Cyprus dictate that a particular case is to be governed by the law of a foreign country, the court is faced with a choice. It can choose either to apply only the domestic (or internal) law[15] of the foreign system, or the whole of its law, including its private international law.[16] The difficulty with the second approach is that the foreign system's rules on conflict of laws may require the court to revert back (or make *a renvoi*) to the law of Cyprus.[17]

Should this situation arise, the court can do one of two things. Firstly, it can choose to 'accept the *renvoi*' by applying the Cypriot law. This is called the theory of 'partial' or 'single' *renvoi*,[18] but it is not the current doctrine of the English courts. Secondly (and this approach seems to represent the present doctrine of the English courts), the court can decide the case by applying the whole law of the foreign

13 Cap 6 of the Laws of Cyprus.

14 *Abdu Ali Altobeiqui v M/V Nada G and Another* (1985) 1 CLR 543.

15 In other words, this involves treating the case as a purely domestic one arising in the foreign country, and thereby disregarding any elements, such as the nationality of those concerned, which make it necessary to apply private international law.

16 In *Re Ross* (1930) 1 Ch 377, at p 402, this view was preferred after a comprehensive review of the authorities.

17 *Halsbury's Laws of England* (3rd ed), vol 8, at p 313.

18 Dicey and Morris, *The Conflict of Laws* (11th ed, 1987), at p 75.

country concerned. Thus, the court will look at the rules on conflict of laws applicable in the foreign system and decide whether, according to that system, it should apply the domestic law of the foreign country or the domestic law of its own country. This is called the theory of 'total' or 'double' *renvoi*.[19]

The question of *renvoi* was considered *per curiam* by the Cypriot court in *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou*,[20] in which the English authorities and Common Law approach were cited.

Exclusion of Foreign Law

24-9 There are certain exceptional situations in which an English court will refuse to apply the law of a foreign country, even though the English rules as to choice of law demand that the case is governed by the law of that country. This would be the case, firstly, where the results of such application would be contrary to the fundamental public policy of English law.[21]

The question of what constitutes public policy in Cyprus for the purpose of the exclusion of foreign law was one of the issues to be settled in *Pilavachi & Co Ltd v International Chemical Co Ltd*.[22] In that case, the Supreme Court of Cyprus approved the English cases on the matter and the following suggestion of Professor Cheshire 'as to the probable classification of cases in which the English court will refuse to enforce a foreign acquired right on the ground that its enforcement would conflict with the overriding principles of English public policy: (a) where the fundamental concepts of English justice are disregarded, (b) where the English concepts of morality are infringed, (c) where a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers, and (d) where a foreign law or status offends the English concepts of human liberty and freedom of action'.

Secondly, it is a well-settled rule that an English court will not enforce foreign penal or tax laws.[23] These are areas on which only the state government of the country concerned can fairly determine. It is submitted by Dicey that this prohibition is part of a wider principle that an English court will not enforce any rules of a foreign country 'which are enforced as an assertion of the authority of central or local government'.[24]

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19 Dicey and Morris, *The Conflict of Laws* (11 ed, 1987), at p 76.

20 *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou* (1971) 1 CLR 437.

21 Thus, in the case of *Dynamit A G v Rio Tinto Co* (1918) AC 260, the court refused to enforce a contract involving trade with the enemy. See also *Rousillon v Rousillon* (1822) 14 Ch 351.

22 *Pilavachi & Co Ltd v International Chemical Co Ltd* (1965) 1 CLR 97.

23 *Willliams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* (1986) AC 368, at p 428, *per* Lord Templeman.

24 Dicey and Morris, *The Conflict of Laws* (11th ed, 1987), at p 106.

Lastly, English courts will not look into the correctness, validity or otherwise of what are referred to as 'acts of state' of another country. By this is meant acts carried out in the exercise of foreign policy.[25]

Domicile

In General

24-10 In English and Cypriot private international law, matters of personal status are referred to the law of the person's country of domicile, or *lex domicilii*, this being the place where he intends to reside permanently. This is in contrast to Continental private international law, under which such matters are referred to the law of his nationality or *lex patriae*.

The Notion of Domicile in Cyprus

24-11 In Cypriot private international law, following that of England, an individual's personal status is for the most part governed by his *lex domicilii*.[26] In practical terms, a person's domicile is his permanent home.[27] What is meant in this context by a person's permanent home is the place in which he intends to reside permanently, whether or not he is at that moment residing in it.

Everyone acquires at birth what is termed a 'domicile of origin'. For a legitimate child, this is the domicile of his father;[28] for an illegitimate child (or a child whose father is dead at the time when it is born), it is the domicile of his mother;[29] for a foundling, it is the country in which he is found.[30] An infant's domicile changes according to the domicile of the person on whom it is dependent.[31]

A domicile of origin can never be lost, but it can be replaced during lifetime by a 'domicile of choice'. This will happen when the individual takes up residence in

25 *Salaman v Secretary of State for India* (1906) 1 KB 613 (CA); *Johnstone v Pedlar* (1921) 2 AC 262, at p 290.

26 *Christakis Michael Christopoulou and Others v Maria Marianthi Christopoulou* (1971) 1 CLR 437.

27 *Whicker v Hume* (1858) 7 HLC 124, at p 160; *Winans v Att-Gen* (1904) AC 287, at p 288.

28 *Forbes v Forbes* (1854) Kay 341; *Udny v Udny* (1869) LR 1 Sc & Div 441. These cases were cited and approved by the Cypriot court in *Edward George Bailie v Panayiota Edward George Bailie* (*otherwise Panayiota Petrou*) *and Stavros N Philippou* (1966) 1 CLR 283.

29 *Udny v Udny* (1869) LR 1 Sc & Div 441; *Re Grove* (1888) 40 Ch D 216 (CA).

30 *Solomon v Solomon* (1912) 29 WN (NSW) 68; *Smith v Smith* (1962) (3) SA 930.

31 *Edward George Bailie v Panayiota Edward George Bailie* (*otherwise Panayiota Petrou*) *and Stavros N Philippou* (1966) 1 CLR 283.

another country,[32] with the intention of permanently residing there,[33] and the onus of proving this lies on those who assert that the domicile of origin has been superseded. The Cyprus court, in *Papasavvas v Johnstone*,[34] held, applying these principles, that the respondent in that case had abandoned her domicile of origin, England, and had become domiciled in Cyprus. The judge held that 'abandonment of a given domicile requires (a) an intention to cease to reside permanently, or indefinitely in a given country, and (b) cessation of actual residence in that country'. Residence *per se* is not sufficient.

If the domicile of choice is abandoned, the domicile of origin will be revived by operation of law, unless and until another domicile of choice is acquired.[35] This principle was expressly cited by the Cypriot court in the leading Cypriot case on domicile, *Christopoulou v Christopoulou*.[36] This ensures that any person has, at all times, a domicile, whether or not he has a permanent home.[37] Furthermore, it is now an established rule that a person cannot have more than one domicile for the same purpose at any point in time.[38]

In deciding, for the purposes of English choice of law, where a person has his domicile, the English courts will apply only the principles of English law, and they will disregard any foreign legislation on the subject.[39]

The basic English principles have been codified under Cypriot law in sections 6–13 of Cap 195. In *Christopoulou v Christopoulou*,[40] as in previous cases,[41] the court cited and applied the leading English cases and Common Law principles as authority for the law in Cyprus.

Contract

In General

24-12 The law of contract concerns duties which arise out of an agreement between two parties. The courts, when determining claims arising out of a contract,

32 *Bell v Kennedy* (1868) LR 1 Sc & Div 307, at p 319 (HL); *Winans v Att-Gen* (1904) AC 287 (HL).

33 *Bell v Kennedy* (1868) LR 1 Sc & Div 307, at p 319 (HL); *Winans v Att-Gen* (1904) AC 287 (HL).

34 *Papasavvas v Johnstone* (1984) 1 CLR 38.

35 *Udny v Udny* (1869) LR 1 Sc & Div 441; *Harrison v Harrison* (1953) 1 WLR 865.

36 *Christopoulou v Christopoulou* (1971) 1 CLR 437.

37 *Bell v Kennedy* (1868) LR 1 Sc & Div 307, at p 319 (HL); *Udny v Udny* (1869) LR 1 Sc & Div 441.

38 *Bell v Kennedy* [1868] LR 1 Sc & Div 307, at 319 (HL).

39 *Hamilton v Dallas* (1875) 1 Ch D 257; *Re Askew*, *Marjoribanks v Askew* (1930) 2 Ch 259, at p 266.

40 *Christopoulou v Christopoulou* (1971) 1 CLR 437.

41 *Bailie v Bailie and Philippou* (1966) 1 CLR 283; *Simonds v Simonds and Harbottle* (1969) 1 CLR 596.

will be faced with issues such as the capacity of the parties, formalities regarding the making of the contract and the essential validity of the contract as regards its objects. The law which will be applied in the determination of issues such as these is termed 'the proper law of the contract'.

Determination of the Proper Law

24-13 While, strictly speaking, the law by which a contract is governed depends on the question that is being raised in the proceedings,[42] in the vast majority of cases there is one principal law which governs most elements of the contract. This is the law which the parties intended to apply,[43] and it is termed 'the proper law of the contract', or the *lex causae*. The proper law is discerned as follows:

- Where the parties have expressly chosen the law by which they wish their contract to be governed, this will be the proper law;[44]
- Where no express choice has been made in words, the intention is to be inferred from the terms of the contract and the surrounding circumstances;[45] and
- Where no express choice has been made, and the intention cannot be inferred, the proper law will be the law with which the transaction has its closest and most real connection.[46]

24-14 This means of determining the proper law was applied and endorsed in the Cyprus cases of *Geto Trading Ltd v M/V Vladimir Vaslyayer*[47] and *Economides v M/V Cometa*.[48]

In the leading English case dealing with express choice of law, *Vita Food Products Inc v Unus Shipping Co Ltd*,[49] the principles of which have been adopted by the Cypriot courts, Lord Wright stated that the parties' express intention should be conclusive, provided it is '*bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy'. In the Cypriot case of *Mitsui & Co v Rockwell Marine*,[50] it was held that the presumption that the contract of

42 Cheshire and North, *Private International Law* (8th ed, 1970), at p 197.

43 *South African Breweries v King* (1899) 2 Ch 173, at p 199; *Rex v International Trustee* (1937) AC 500.

44 *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC).

45 *Pick v Manufacturers' Life Insurance Co* (1958) 2 Lloyd's Rep 93; *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* (1970) AC 583; *The Stolt Marmaro* (1985) 2 Lloyd's Rep 428 (CA).

46 *Rossano v Manufacturers' Life Insurance Co* (1963) 2 QB 352; *Armadora Occidental SA v Horace Mann Insurance Co* (1977) 1 WLR 1098 (CA); *Monterosso Shipping Co Ltd v International Transport Workers Federation* (1982) ICR 675.

47 *Geto Trading Ltd v M/V Vladimir Vaslyayer*, Judgments of the Cypriot Courts, August 1998 (vol 8), at p 75.

48 *Economides v M/V Cometa* (1986) 1 CLR 443.

49 *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC), at p 290.

50 *Mitsui & Co v Rockwell Marine* (1989) 1 CLR 112.

affreightment was to be governed by the law of the vessel's flag was rebutted by the parties' express stipulation in the bill of lading of the law which should govern their contract.

In order to infer the parties' intention where no express choice has been made, the court will have regard to matters such as the language in which the contract is written,[51] the currency to be used in performance of the contract,[52] and the country in which the parties are resident.[53] Where the parties have expressly stipulated that arbitration will take place in a particular country or that the courts of a particular country will have jurisdiction over the contract, there is a strong presumption that the parties intended the law of that country to be the law governing the contract.[54]

The court, in discerning the law with which the contract is most closely connected under (iii), will have regard to all the surrounding circumstances,[55] and in particular to matters such as the country in which performance is to take place,[56] the country in which the parties are resident,[57] and the type of contract in question.[58]

The proper law must always be discerned with reference to the parties' intention, or the connection of the transaction with a particular legal system, as it stands at the time of the making of the contract. The parties are free, however, to stipulate that they wish any changes in the law to apply to their contract.[59]

Scope of the Proper Law

24-15 As a general rule, the proper law of the contract will govern most aspects of and obligations under the contract unless otherwise indicated by the parties. They are free to stipulate that they wish different issues under the contract to be governed by different systems of law,[60] although this is not very common.

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51 *The Leon XIII* (1883) 8 P 121 (CA); *The Adriatic* (1931) P 241; *The Njegos* (1936) P 90.

52 *Keiner v Keiner* (1952) 1 All ER 643; *Rossano v Manufacturers' Life Insurance Co* (1963) 2 QB 352.

53 *Jacobs v Credit Lyonnais* (1884) 12 QBD 589, CA; *Keiner v Keiner* (1952) 1 All ER 643.

54 *Hamlyn & Co v Talisker Distillery* (1894) AC 202 (HL); *Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd* (1927) 43 TLR 541, at p 542.

55 *The Assunzione* (1954) P 150 (1954) 1 All ER 278 (CA); *Mauroux v Sociedade Commercial Abel Pereira Da Fonseca SARL* (1972) 2 All ER 1085, at p 1089, (1972) 1 WLR 962, at p 966.

56 *Re Missouri SS Co* (1889) 42 Ch D 321, at p 341, CA; *Hansen v Dixon* (1906) 96 LT 32; *Benaim & Co v Debono* (1924) AC 514, at p 520 (PC).

57 *Jacobs v Credit Lyonnais* (1884) 12 QBD 589 (CA).

58 *Re United Railways of the Havana and Regla Warehouses Ltd* (1960) Ch 52, at p 91, (1959) 1 All ER 214, at p 233 (CA); *Tomkinson v First Pennsylvania Banking and Trust Co* (1961) AC 1007, (1960) 2 All ER 332 (HL).

59 *Rossano v Manufacturers' Life Insurance Co* (1963) 2 QB 352.

60 *Hamlyn & Co v Talisker Distillery* (1894) AC 202 (HL).

Thus the proper law governs matters such as formation,[61] validity,[62] and performance.[63] Interpretation of the contract is determined by reference to the rules of construction of the proper law,[64] and the proper law also is used to resolve the question of whether or not the contract has been validly discharged.[65]

The doctrine of *renvoi* has no application in the area of contract law.[66] The presumption is that the parties intended only the domestic rules of the proper law to apply, and not its rules as to private international law. This principle was applied in the Cypriot case of *Carpantina SA v The Firm P Ioannou and Co (1942)*.[67]

It is further presumed that, where the parties stipulate a system of law to govern their contract, their intention is to apply that system of law as it stands from time to time, ie, inclusive of any subsequent amendments and variations that occur before performance takes place.[68] However, where particular provisions of a system of law are simply incorporated into the contract to govern particular issues, these provisions apply as they stand at the date of incorporation, regardless of any subsequent changes.[69]

It is important to note, however, that a contract will, in general, be treated as invalid by the English courts if performance of it is illegal under the *lex loci solutionis*, ie, the country in which performance is to take place.[70] This is an exception to the general rule that the legality of a contract is governed by the proper law.[71]

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61 *Albeko Shuhmaschinen Att-Gen v Kamborian Shoe Machine Co Ltd* (1961) III LJo 519.

62 *Jones v Oceanic Steam Navigation Co Ltd* (1924) 2 KB 730; *Jacobs v Credit Lyonnais* (1884) 12 QBD 589 (CA).

63 *Jacobs v Credit Lyonnais* (1884) 12 QBD 589 (CA); *Bonython v Commonwealth of Australia* (1951) AC 201 (PC) *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* (1934) AC 122, at p 151 (HL).

64 *The Industrie* (1894) P 58 (CA); *Mowbray, Robinson & Co v Rosser* (1922) 91 LJKB 524, (CA); *Equitable Trust Co of New York v Henderson* (1930) 47 TLR 90.

65 *Ralli v Dennistoun* (1851) 6 Exch 483; *R v International Trustee for the Protection of Bondholders* (1937) AC 500, (1937) 2 All ER 164 (HL); *Tomkinson v First Pennsylvania Banking and Trust Co* (1961) AC 1007, (1960) 2 All ER 332 (HL).

66 *Re United Railways of the Havana and Regla Warehouses Ltd* (1960) Ch 52, at p 91, (1959) 1 All ER 214, at 233 (CA); *affd sub nom Tomkinson v First Pennsylvania Banking and Trust Co* (1961) AC 1007, (1960) 2 All ER 332 (HL); *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC).

67 *Carpantina SA v The Firm P Ioannou and Co (1942)* 18 CLR 30.

68 *Re Chesterman's Trusts, Mott v Browning* (1923) 2 Ch 466, at p 478 (CA); *Kahler v Midland Bank Ltd* (1950) AC 24, at p 56, (1949) 2 All ER 621 at p 641, at p 642, (HL); *Rossano v Manufacturers' Life Insurance Co* (1963) 2 QB 352, at p 362, (1962) 2 All ER 214 at p 219.

69 *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277, at p 286, (1939) 1 All ER 513, at pp 518 and 519 (PC).

70 *Ralli Bros v Compania Naviera Scota y Aznar* (1920) 1 KB 614, (1920) 2 KB 287, at pp 291 and 300 (CA); *Foster v Driscoll* (1929) 1 KB 470, 520 (CA); *Montreal Trust Co v Stanrock Uranium Mines Ltd* (1965) 53 DLR (2d) 594.

71 Dicey and Morris, *The Conflict of Laws* (11th ed, 1987), at p 1218.

Matters of procedure relating to remedies under the contract are generally governed not by the proper law, but by the *lex fori*,[72] ie, the law of the country in which the action is brought. For example, in the Cypriot case of *Hassanein v The Ship Hellenic Island and Another*,[73] the question of the creation of a maritime lien was considered to be procedural and therefore governed by the *lex fori*. The same conclusion was reached by the Cypriot court in *Nordic Bank v Ship Seagull*[74] in relation to the determination of the order of priorities in distributing the proceeds of sale of a ship.

Lastly, as stated above, a contract which is contrary to Cypriot public policy will not be enforced by the Cypriot courts.

Tort

In General

24-16 The central question which falls to be determined in private international law as far as torts, or civil wrongs, are concerned is, where a plaintiff brings an action in Cyprus in respect of a tort which was committed outside the Republic, do the Cypriot courts have jurisdiction to try the case and, if so, which law should they apply?

Torts Committed in Cyprus

24-17 Section 3 of the Civil Wrongs Law[75] states that 'The matters in this Law hereinafter enumerated shall be civil wrongs, and subject to the provisions of this Law, a person who shall suffer any injury or damage by reason of any civil wrong committed in the Republic or within three miles of the coast thereof, measured from low water mark, shall be entitled to recover from the person committing or liable for such civil wrong the remedies which the court has power to grant'. This accords with the law in England that, when a tort takes place in England, the courts will apply English domestic law, subject to the defendant's right to invoke a defence available to him under a foreign contract with the plaintiff.

It was confirmed by the Supreme Court of Cyprus in *Georghiades and Son v Kaminaras*[76] that, in previous cases such as *Vassiliou v Vassiliou*[77] and *The Universal Advertising and Publishing Agency and Others v Panayiotis Vouros*,[78] the Cypriot courts had enlarged the scope of section 3 and, as a result, not only the

72 *Halsbury's Laws of England* (4th ed), vol 8, at p 424.

73 *Hassanein v The Ship Hellenic Island and Another* (1989) 1 CLR 406.

74 *Nordic Bank v Ship Seagull* (1989) 1 CLR 420.

75 Cap 148 of the Laws of Cyprus.

76 *Georghiades and Son v Kaminaras* (1958) 23 CLR 276.

77 *Vassiliou v Vassiliou*, 16 CLR 69.

78 *The Universal Advertising and Publishing Agency and Others v Panayiotis Vouros*, 19 CLR 87.

torts specified in the Civil Wrongs Law but also those left out and recognised by Common Law, unless clearly excluded by some legislation, were actionable in the courts of the Republic.

Torts Committed Abroad

In General

24-18 In the landmark case in the Supreme Court of Cyprus of *Jupiter Electrical (Overseas) Ltd and Another v Christides*,[79] the issue which fell to be decided was whether or not section 3 of the Civil Wrongs Law excluded the application of English Private International Law in relation to torts specified in that Law and committed abroad. The Supreme Court held that this is not the case and that section 3 is not a provision which excludes the application of English Private International Law under section 29(1)(c) of the Courts of Justice Law in Cyprus. The only effect of section 3 is what is stated therein; it is not a provision which is either exhaustive or exclusive.

The court went on to hold that in the present case the court had jurisdiction to examine whether the respondent would be entitled to sue the appellant in respect of a civil wrong committed abroad. In accordance with the general rule in English Private International Law, discussed below, the respondent could do so only if he could establish that the event which caused him the injuries was actionable as a civil wrong both according to Cyprus law, the *lex fori*, and according to the law of Libya, the country where the tort was committed. The judge found that no satisfactory reason had been shown to exist as to why this general rule should not be applied.

The General Rule

24-19 The general rule in English Private International Law was enunciated in the landmark decision of Willes J, in *Phillips v Eyre*,[80] where he established that, 'in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. Secondly, the act must not have been justifiable by the law of the place where it was done'.

The wrong must, therefore, be one that would be actionable by the *lex fori*, ie, the country where the action is being brought, had it been committed there, and also actionable under the *lex loci delicti*, the law of the place where the wrong was committed.

While the liability under the foreign law must be civil liability, there is no requirement that it be classified as a tort. It could, for example, be proprietary,

79 *Jupiter Electrical (Overseas) Ltd and Another v Christide* (1975) 6 JSC 787.
80 *Phillips v Eyre* (1870) LR 6 QB 1.

contractual, or otherwise. The right that the plaintiff claims has been violated must be a right that exists and that he can be shown to have acquired, under the *lex fori* and the *lex loci delicti*.

It was held in *Coupland v Arabian Gulf Oil Co*[81] that, once liability is established, the law under which the case will be tried will be the *lex fori*, to the extent that it accords with the rights available under the *lex loci delicti*. This case was cited and approved by the Cypriot Supreme Court in *Safarino v Stavrinou* (*1991*).[82] When applying the *lex fori*, the court can take into acount rules of conduct existing under the foreign law, such as traffic or safety regulations, as evidence of the defendant's liability.[83]

Where a plaintiff who is the victim of a tort has a remedy under a contract with the defendant, he may frame his action as a contractual one, whether or not an alternative remedy lies in tort. The plaintiff is entitled so to frame his action in cases where an action in tort would fail because the two conditions laid down in the general rule cannot be satisfied.[84]

The Proper Plaintiff and the Proper Defendant

24-20 Civil liability in the *lex fori* and in the *lex loci delicti* must exist between the actual parties who are involved in the action. If, under the foreign law, the claim for the wrong could only have been brought by someone other than the plaintiff, the plaintiff is prevented from successfully suing in the *lex fori*. Likewise, if the proper plaintiff under the foreign law cannot show that he has an equivalent right to sue under the *lex fori*, he will not be able to pursue his claim.

The corresponding rule is, of course, that the defendant in the case must be the proper defendant, ie, the claimant must show that, under the foreign law, as well as under the *lex fori*, the wrong committed would have given him a right to sue the particular defendant whom he is now suing.[85]

Exception to the General Rule

24-21 A particular issue may, however, be governed in exceptional cases by the law of the country most closely connected, in relation to that issue, to the wrong committed and to the parties involved. This is an exception to the general rule stated above. Its purpose is to make the law more flexible and to enable justice to be done in cases where application of the general rule would lead to injustice.

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81 *Coupland v Arabian Gulf Oil Co* (1983) 1 WLR 1151, at p 1154 (CA).

82 *Safarino v Stavrinou* (*1991*) 1 JSC 1059.

83 *The Halley* (1868) LR 2 PC 193, at pp 203 *et seq*.

84 *Matthews v Kuwait Bechtel Corp* (1959) 2 QB 57, (1959) 2 All ER 345 (CA).

85 *The Mary Moxham* (1876) 1 P 107 (CA); *Church of Scientology of California v Commissioner of Police* (1976) 120 SJ 690 (CA).

In the leading case of *Boys v Chaplin*,[86] Lord Wilberforce held that the court must consider whether or not there exist 'clear and satisfactory grounds' to justify disapplication of the general rule in the determination of that particular issue. In that case, such grounds were found to exist as both parties, not only one, were permanent residents of England and not of Malta, the country where the wrong had taken place.

The question of how far the tort was actionable in Malta was therefore held to be irrelevant in the present case. This is not to say, however, that exercise of the exception will always result in application of either the *lex fori* or the *lex loci delicti*. The exception can operate, in theory, to disapply both the *lex fori* and the *lex loci delicti* in favour of some other law, if the facts of the case so demand.

Determination of the Lex Loci Delicti

24-22 It can often be difficult to determine the country in which the tort was committed. For example, the defendant may have administered a harmful drug to the plaintiff in one country, and the plaintiff may have suffered the harmful effects in a different country. Where was the wrong committed?

One view is that the *lex loci delicti* is the place where the defendant acted.[87] Another view is that the wrong was committed in the place where the effect of the tort, ie, the harm, is produced.[88] A third view (and this is the modern approach in England[89]) is to consider as a whole all the events which make up the tort and try to determine where in substance the cause of action arose.[90] In *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*,[91] this test was stated to be applicable regardless of the type of tort in question. A good example of the application of this test is *Bata v Bata*.[92] In that case, defamatory letters had been written in Switzerland and posted to England; it was held that, since publication is the material element in the tort of libel, the country where the tort was committed was England.

Defences and Matters of Procedure

24-23 As regards defences, the defendant is entitled to avail himself of any defence which exists under either the *lex fori* or the *lex loci delicti*, irrespective of whether

86 *Boys v Chaplin* (1971) AC 356.

87 *Anderson v Nobels Explosive* (1906) 12 OLR 644 (Canada); *Beck v Willard Chocolate Co Ltd* (1924) 2 DLR 1140 (Canada).

88 *Bata v Bata* (1948) WN 366; *Pindling v National Broadcasting Corp* (1984) 14 DLR 4th 391 (Canada).

89 *Distillers Co Ltd v Thompson* (1971) AC 458 (PC); *Castree v E R Squibb & Sons Ltd* (1970) 1 WLR 1248 (CA).

90 Dicey and Morris, *The Conflict of Laws* (11th ed, 1987), at p 1385.

91 *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* (1990) 1 QB 391, (1991) 3 All ER 303.

92 *Bata v Bata* (1948) WN 366, 92 Sol Jo 574.

the defence exists in both these legal systems.[93] This rule applies to Common Law and statutory defences but not to procedural defences, to which only the *lex fori* is relevant.

In relation to any matters which are considered as procedural, as opposed to substantive, the court will apply only the *lex fori* and will disregard the *lex loci delicti*. The law in respect of damages, for example, is partly substantive and partly procedural. Therefore, matters such as quantification or assessment of damages, which are procedural, will be governed solely by the law of the country where the action is brought.[94]

Property

In General

24-24 Matters relating to proprietary interests involve questions such as whether the Cypriot courts possess jurisdiction to determine whether a particular assignment or transfer of property which took place abroad, or which involves property abroad, is effective.

This section deals with the problems that may occur as a result of transactions made *inter vivos*, relating to proprietary interests. Transactions in the administration and distribution of the estate of a deceased are considered in the following section, entitled Succession. In both cases, however, the paramount consideration is the nature of the property and whether it is movable or immovable.

Movable or Immovable Property

24-25 The first thing a court needs to do when faced with a case on private international law which involves property is to determine whether the property in question is movable or immovable. Different legal systems may have different rules as to whether property is movable or not.

In order to provide for convenience and to avoid complications in the law, it is a general and almost universal principle that the law which governs this classification is the *lex situs*, ie, the law in which the property is situated. This rule was enunciated by the Supreme Court of Cyprus in *Kochino v Irfan*.[95] Triantafyllides P approved the principle as stated by Dicey and Morris[96] that 'the question whether interests in property are interests in movables or immovables must be determined in accordance with the *lex situs*'.

93 *Boys v Chaplin* (1971) AC 356, at p 405.
94 *Coupland v Arabian Gulf Oil Co* (1983) 1 WLR 1136, at p 1149.
95 *Kochino v Irfan* (1977) 11 JSC 1780.
96 Dicey and Morris, *The Conflict of Laws* (11th ed, 1987), at p 31.

The question of where the property is situated and what, therefore, is the *lex situs* is one to be determined by the courts of the country in which the action is brought.[97] For example, under Cypriot law, the *lex situs* of negotiable instruments or documents of title, such as bills of lading, is the place in which the instrument is to be found.

In Cyprus, the Immovable Property Law, Cap 224, provides in section 2(a) that immovable property is to include matters such as 'land; buildings and other erections, structures or fixtures affixed to any land or to any building or other erection or structure; privileges, liberties, easements and any other rights and advantages whatsoever appertaining or reputed to appertain to any land or to any building or to any other erection or structure; an undivided share in any property hereinbefore set out'.

On the other hand, matters such as pledges, negotiable instruments, and documents of title form in Cyprus, as in most of the world, part of what is classified as movable property.

Jurisdiction as to Foreign Immovables

In General

24-26 As a general rule, the courts of Cyprus have no jurisdiction to entertain any action involving the determination of ownership or possession of immovable property situated outside Cyprus. The leading Cypriot judgment on this matter is that of the Supreme Court in *Ioannides v Kritikou*.[98] At first instance, the plaintiff had claimed the sum of CY £250, which he had paid to the defendant as a deposit for the lease of an apartment situated in England. The trial judge held that, as the action involved an issue relating to immovable property which was situated abroad, the court had no jurisdiction to try the case.

On appeal, the effect of section 21(2) of the Courts of Justice Law[99] was examined. The wording of this section is that 'where the action relates to the partition or sale of any immovable property or any other matter relating to immovable property, the District Court in the district in which the immovable property is situated shall have jurisdiction to try the case'.

The Supreme Court held that the effect of this section is to preclude the Cypriot courts from having jurisdiction to try a case involving an issue concerning property situated abroad. It was held that the issue of jurisdiction in this area is to be determined solely by the provisions of the Courts of Justice Law, and not according to English principles. The court further held that the words 'any other matter

97 *Rossano v Manufacturers' Life Insurance Co* (1963) 2 QB 352, at pp 379 and 380, (1962) 2 All ER 214, at p 230.
98 *Ioannides v Kritikou* (1992) 1 JSC 828.
99 Law 14 of 1960 of the Laws of Cyprus.

relating to immovable property' are not to be interpreted according to the *ejusdem generis* rule, but are to be taken to include any issue whatsoever relating to immovable property.

Section 21(2) of the Courts of Justice Law further provides that, 'for the purposes of this paragraph, provided that all interested parties are Cypriots, "district" includes the Sovereign Base Areas'. The Sovereign Base Areas are those to be found in the districts of Akrotiri and Dhekelia.

Amendment to Section 21(2) — Cases Where the Action Is Based on Contract

24-27 In December 1992, section 21(2) was amended[100] and has, as a result, been supplemented by the following:

> . . . a claim for rent arrears arising out of a tenancy agreement relating to immovable property, or a claim for payment of damages arising out of the breach of a sale or lease agreement or out of any contract involving immovable property, can be brought in the District Court as provided in paragraph 1 of this section.

24-28 Paragraph 1 of the section provides that the District Court shall have jurisdiction at first instance to hear and try any action provided, *inter alia*, that:

- The cause of action has arisen, in whole or in part, within its district;
- The defendant, during the period in which the action is being brought, resides or carries on a business within its district; or
- All the parties being Cypriots, either the cause of action has arisen, in whole or in part, within the Sovereign Base Areas or the defendant resides or carries on a business within the Areas.

24-29 The effect of this amendment was examined in *Yiannakas v Pittarides*,[101] where it was held that the new supplement establishes an exception to the general principle stated in *Ioannides v Kritikou*[102] that, under no circumstances, can a Cypriot court exercise jurisdiction over foreign immovables. The result is that, in claims arising out of a contract relating to immovable property situated outside Cyprus, the Cypriot courts will have jurisdiction to try the case provided that any one of the three requirements in section 21(1) of the Courts of Justice Law exists.

In this case, where the facts were almost identical to those in *Ioannides v Kritikou*,[103] the Nicosia District Court found that it had jurisdiction to try the case and to order the defendant to pay his outstanding debt to the plaintiff because the action was based on a lease agreement relating to immovable property in England,

100 The Courts of Justice (Amendment) (Number 3), Law of 1992, 102 (I) of 1992.
101 Judgments of the Cypriot Courts, July 1995 (vol 7), at p 420.
102 *Yiannakas v Pittarides* (1992) 1 JSC 828.
103 *Ioannides v Kritikou* (1992) 1 JSC 828.

and the defendant, during the period in which the action was being brought, was resident in the district of Nicosia, thereby satisfying sub-paragraph (b) of section 21(1).

If the provisions of section 21(1) are satisfied, therefore, it appears that cases involving a contract relating to foreign immovables can be tried by the relevant District Court.

Immovables

24-30 It is a general and almost universal rule that all questions appertaining to the creation, transfer, extent, and extinction of interests in immovable property are to be referred to the *lex situs*.[104] If this were not so, the decision would not stand in the country in which the property is situated and as such would be ineffective. For example, it would be illogical and useless for a Cypriot court to grant proprietary rights to a litigant in respect of property in South Africa when this right would not be recognised and would, therefore, not be given effect to by the courts of South Africa.

The *lex situs* means the law that would be applied in the same circumstances by a court in the *situs*.[105] The law which the *situs* would apply may be the domestic law of the *situs* or, under the conflict of law rules of the *situs*, the domestic law of some other country. Thus, the theory of total *renvoi* comes into play.

Movables

In General

24-31 The law relating to the validity of the assignment and transfer, *inter vivos*, of movable property affects tangible movables, such as goods and chattels, and intangible movables, such as shares, goodwill, or debts.

Tangible movables are referred to in legal terms as 'choses in possession', and intangible movables as 'choses in action'.

Choses in Possession

24-32 Matters relating to the transfer or assignment of choses in possession, such as validity, capacity, and formalities, are governed by the law in which the chose is to be found, ie, the *lex situs*.[106] This is for the same reasons of logic and convenience as apply to immovable property. The validity of the sale of a car,

104 *Nelson v Bridport* (1846) 8 Beav 547.
105 *Re Ross* (1930) 1 Ch 377; *Re Duke of Wellington* (1947) Ch 506, (1947) 2 All ER 854.
106 *Cammell v Sewell* (1860) 5 H & N 728; *Bank voor Handel en Scheepvaart NV v Slatford* (1953) 1 QB 248.

therefore, will be governed by the law of the country in which the car is situated at the time of the making of the transaction.

Where the chose is in transit at the time of the making of the transaction, it cannot be said to have a *situs*. In cases where documents of title have been issued in respect of the goods, the relevant law will be that of the country in which the transaction takes place, ie, the country in which the document of title is situated.[107] This will be the case, for example, where goods being shipped are represented by a bill of lading. Where no document of title has been issued in respect of the property, the applicable law should be the proper law of the contract between the parties, ascertained in accordance with the principles set out earlier in this chapter.

Choses in Action

24-33 Matters concerning the transfer or assignment of bare choses in action not represented by a document of title are governed either by the proper law of the debt[108] or by the law governing the creation of the chose.[109]

There is, however, a conflict of opinion on this matter in England, and no authority on it in Cyprus. It remains to be seen, therefore, which approach will be authoritatively adopted.

Succession

In General

24-34 The law of succession refers to those rules regulating the winding up or administration of the estate of a deceased, and the distribution of his assets in accordance with his will or, if he has died without making a will, the relevant rules of intestacy. In continental systems, on a person's death his estate passes automatically to his heirs or legatees, and it is their duty to administer and distribute it.

In England and Cyprus, however, authority to deal with the estate of a deceased has to be granted by the court or the Probate Registry. Persons who receive such authority are known as 'personal representatives'. Personal representatives nominated in the deceased's will are called 'executors'. Where no nomination has been made, certain persons are entitled to apply to the court for authority to be 'administrators' of the estate of the deceased.

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107 *Alcock v Smith* (1892) 1 Ch 238; *Embiricos v Anglo-Austrian Bank* (1905) 1 KB 677.

108 This is the law of the place in which the debt is properly recoverable, ie, the law where the debtor resides; *Re Russian Bank for Foreign Trade* (1933) Ch 745.

109 Dicey and Morris, *The Conflict of Laws* (11th ed, 1987), at p 958. Thus, for example, the assignability of shares would be governed by the proper law of the contract under which the rights in the shares were created.

Administration of Estates

Governing Law

24-35 'The administration of a deceased person's assets is governed wholly by the law of the country from which the personal representative derives his authority to collect them.'[110]

In Cyprus, the Administration of Estates Law[111] states, firstly, that an executor will have the powers and duties given to and imposed upon him by the Common Law and the doctrines of equity as applied in England, save in so far as other provision is made by any law of the Republic, and, secondly, that a person given authority to administer an estate will have the same rights and liabilities as if he were the executor of the deceased.

Cypriot Personal Representatives

24-36 Under Common Law principles, applicable in Cyprus by virtue of the Administration of Estates Law, a personal representative is automatically vested with all the deceased's property situated in Cyprus at the time of his death, whether movable or immovable.[112]

Foreign Personal Representatives

24-37 The general rule is that authority to administer the estate of a deceased person which has been granted outside Cyprus is not enforceable within Cyprus. This is because the personal representative has not been granted authority by the court or the Probate Registry in Cyprus.

However, section 3 of the Probates (Re-Sealing) Law[113] provides that, 'where a Court of Probate in the United Kingdom or in any British Dominion or in any member country of the Commonwealth has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters of administration so granted may, on being produced to, and a copy thereof deposited with, a District Court, be sealed with the seal of that court, and thereupon shall be of the like force and effect, and have the same operation, in the Republic of Cyprus as if granted by that Court'.

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110 Dicey and Morris, *The Conflict of Laws* (11th ed, 1987), at p 993; *Preston v Melville* (1841) 8 Cl & F 1; *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240 (Canada).

111 Cap 189 of the Laws of Cyprus, s 31.

112 Cap 189 of the Laws of Cyprus, ss 25, 31, 41, and 48.

113 Cap 192 of the Laws of Cyprus.

Distribution of Estates

Jurisdiction and Choice of Law

24-38 A Cypriot court will have jurisdiction to determine matters relating to the succession of the estate of a deceased, provided that there is before the court some person possessing a grant of representation duly administered by a court in Cyprus, or sealed by a court in Cyprus in accordance with section 3 of the Probate (Re-Sealing) Law.

Section 5 of the Wills and Succession Law[114] provides that 'this Law shall regulate (a) the succession to the estate[115] of all persons domiciled in the Republic and (b) the succession to immovable property of all persons not domiciled in the Republic'.

In the leading Cypriot judgment of *Kochino v Irfan*,[116] the Supreme Court held that 'the notion of "estate" cannot be treated as including immovable property outside Cyprus'. The reason is that, in Cyprus, English Private International Law is applicable, and therefore the judge cited with approval the principle of scission as set out by Cheshire,[117] that 'the devolution of immovables on death is governed by the *lex situs*, and not by the law of the domicile of the deceased, as is the case with movables'.

The judge held that the principle of unity of succession adopted by most foreign countries, according to which matters relating to succession are governed by the personal law of the deceased, irrespective of whether the property is movable or immovable, is not applicable in England, and therefore not in Cyprus.

These principles also have been approved more recently by the Supreme Court in *Christopher John Young v Derek Sidney Hopkins*,[118] where it was held that the formal validity of a will, so far as it extends to immovables, is governed by the *lex situs*.[119] It was further held that the relaxation of this rule in England, brought about by the Wills Act 1963, has no application in Cyprus.

In *Athens Academy v Panayiotou*,[120] the Supreme Court of Cyprus confirmed that, under the Wills and Succession Law, the Cypriot courts have jurisdiction to determine matters of succession relating to movables, even if situated abroad, if the deceased's domicile at the time of his death was Cyprus.[121]

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114 Cap 195 of the Laws of Cyprus.

115 'Estate' is defined in section 2 of Cap 195 as 'the movable property and immovable property of which a person dies possessed'.

116 *Kochino v Irfan* (1977) 11 JSC 1780.

117 Cheshire, *Private International Law* (9th Edn), at p 513.

118 *Christopher John Young v Derek Sidney Hopkins* (1987) 2 JSC 549.

119 *In the Matter of the Estate of Cleanthes Koumi v Varda and Shiakou* Civil Appeal 4930, 27 October 1975.

120 *Athens Academy v Panayiotou* (1994) 1 JSC 472.

121 Section 13 of the Wills and Succession Law provides that 'no person can for the purpose of succession to movable property have more than one domicile'.

Therefore, the effect of the Wills and Succession Law is that the Cypriot courts can determine succession to immovables situated in the Republic, and succession to movables only if the deceased died domiciled in the Republic. Consequently, with regard to succession, Cypriot courts will follow:

- The decision of any court of the country where the deceased's immovables are situated, irrespective of where he had his domicile; and
- The decision of any court of the domicile of the deceased with regard to his movables, irrespective of where they are situated.

24-39 Issues regarding succession include matters such as the order of descent or distribution where the deceased dies intestate, the formal and essential validity of the will, and the testator's capacity and powers of disposition where the deceased dies testate.[122]

Renvoi

24-40 The law of the *situs* (in relation to immovables) and the law of the domicile of the deceased (in relation to movables) means not only the domestic law of that country, but whatever law that country would apply in the same circumstances. This may, therefore, include the private international law principles of that country. Consequently, the doctrine of *renvoi* is applicable in matters of succession.

Bankruptcy

Jurisdiction of Cypriot Courts

24-41 Cypriot courts have jurisdiction to adjudicate bankrupt any debtor who, at the time when any act of bankruptcy was done or suffered by him and who committed any one or more of the acts of bankruptcy as defined in section 3(1) of the Bankruptcy Law,[123] either in Cyprus or elsewhere,[124] met one of the following conditions:

- Was personally present in Cyprus;
- Ordinarily resided or had a place of residence in Cyprus;
- Was carrying on business in Cyprus personally or by means of an agent or manager; or
- Was a member of a firm or partnership which carried on business in Cyprus.

24-42 According to section 3(1) of the Bankruptcy Law, an act of bankruptcy is committed by a debtor subject to the jurisdiction of the Cypriot courts if and only if:

- In Cyprus or elsewhere, he makes a conveyance or assignment of his property to any person for the benefit of his creditors generally;

122 *Kochino v Irfan* (1977) 11 JSC 1780.

123 Cap 5 of the Laws of Cyprus.

124 Bankruptcy Law, s 3(2).

- In Cyprus or elsewhere, he makes a fraudulent conveyance, gift, delivery, or transfer of his property or of any part thereof, or makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any law be void as a fraudulent preference if he were adjudged bankrupt;
- With intent to defeat or delay his creditors he does any of the following things, ie, departs or makes preparations for departing from Cyprus or, being out of Cyprus, remains out of Cyprus, or departs from his dwelling house, or otherwise absents himself, or begins to keep house;
- Execution against him has been levied by seizure of his goods under process in an action in any court, and the goods seized have either been sold or held by the sheriff for 21 days;
- He files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself;
- He fails to comply with a bankruptcy notice issued by a judgment creditor requiring him to pay the judgment debt; or
- He gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

Foreign Adjudication of Bankruptcy

24-43 The jurisdiction of the Cypriot courts to adjudicate a debtor bankrupt on the petition of a creditor or on the petition of the debtor is not excluded by the fact that the debtor has already been adjudicated bankrupt by the court of a foreign country.

Cypriot law does not recognise the principle of 'unity of bankruptcy', according to which all creditors must have recourse to the courts of the debtor's domicile or of his principal place of business and no other court has jurisdiction to adjudicate him bankrupt. The fact that the debtor has been made bankrupt is a reason for the court in its discretion not to exercise jurisdiction, although little weight will be given to this factor if the foreign adjudication was obtained by the debtor on his own petition.

Universal Effect of Assignment of Bankrupt's Property to the Trustee

24-44 An assignment of a bankrupt's property to the trustee in bankruptcy under section 71 of the Bankruptcy Law is, or operates as, an assignment of the bankrupt's immovable and movable property, whether situated in Cyprus or elsewhere.

Section 71 expresses the principle that a Cypriot adjudication in bankruptcy purports to have a universal effect as an assignment. Thus, Cypriot law, while not admitting of the unity of bankruptcy, does admit the doctrine the doctrine of universality so far as Cypriot bankruptcies are concerned.

Restraining Creditors from Suing Abroad

24-45 The Cypriot courts in certain circumstances restrain a creditor from taking proceedings abroad to recover a debt due from the bankrupt, in order to maintain an equal distribution of the assets among the creditors generally. They have the power to issue an injunction to restrain a creditor resident in Cyprus from suing abroad, but they will not restrain a creditor resident abroad from suing abroad.

Choice of Law

24-46 The administration of the property of a bankrupt under the Bankruptcy Law is governed entirely by Cypriot law.

In a Cypriot bankruptcy, a creditor, whatever his nationality or domicile, can prove in accordance with the ordinary rules of Cypriot bankruptcy law any debt which is due to him from the bankrupt, no matter whether the debt is governed by Cypriot law or by foreign law.

Effect of Cypriot Bankruptcy as Discharge of Debts

24-47 A discharge from any debt or liability under a Cypriot bankruptcy is a discharge therefrom in Cyprus, irrespective of the proper law of the contract or debt.

Foreign Bankruptcies

24-48 Cypriot courts will recognise that the courts of a foreign country have jurisdiction over a debtor if:

- He was domiciled in that country at the time of the presentation of the petition; or
- He submitted to the jurisdiction of its courts whether by presenting the petition himself or by appearing in the proceedings.

24-49 An assignment of a bankrupt's property to the representative of his creditors under the bankruptcy law of any foreign country whose courts have jurisdiction over him is, or operates as, an assignment of the movables, but not the immovables, of the bankrupt situated in Cyprus.

Where a debtor has been made bankrupt in more than one country, and under the bankruptcy law of each country there has been an assignment of the bankrupt's property, effect will be given in Cyprus to the assignment which is earliest in date.

Effect in Cyprus of Foreign Bankruptcy as a Discharge of Debts

24-50 A discharge from any debt or liability under the bankruptcy law of a foreign country is a discharge therefrom in Cyprus if, and only if, it is a discharge under the proper law of the contract.

Corporations

Status

24-51 The existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognised in Cyprus.[125]

Domicile

24-52 The domicile of a corporation is in the country under whose law it is incorporated. The domicile of a corporation is independent of the domicile or domiciles of the persons who are its members.

Residence

24-53 A corporation is resident in the country where its central management and control is exercised. If the exercise of central management and control is divided between two or more countries, the corporation is resident in each of those countries.

Capacity and Internal Management

24-54 The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the transaction in question.

All matters concerning the constitution of a corporation are governed by the law of the place of incorporation.

Effect of a Foreign Winding-Up Order

24-55 The authority of a liquidator appointed under the law of the place of incorporation is recognised in Cyprus.

Winding-Up of Overseas Companies

24-56 Where a company incorporated outside Cyprus was or has been carrying on business in Cyprus, it may be wound up by the Cypriot courts under the provisions of the Companies Law[126] notwithstanding that it has been dissolved or has otherwise ceased to exist as a company under or by virtue of the laws of the country in which it was incorporated.[127]

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125 *Letco Co Ltd v Socrates Eliades* (1991) 1 JSC 435.

126 Cap 113 of the Laws of Cyprus.

127 Law 9 of 1968, amending section 362 of the Companies Law, Cap 113.

Family

In General

24-57 In Cyprus it is the Family Courts which have jurisdiction to hear matters concerning marriage, divorce, custody, and maintenance and questions such as whether grounds for divorce have been proved will generally be determined according to Cypriot law.

Jurisdiction of Cypriot Courts

24-58 Until 1989, jurisdiction to try family matters in Cyprus lay exclusively with the Ecclesiastical Tribunal of the Greek Orthodox Church, by virtue of article 111 of the Constitution. The position was altered in 1989 by the amendment of Article 111 and the enactment of the Family Courts Law,[128] by which the Family Courts of Cyprus were established. Article 111 was amended by the First Amendment of the Constitution Law,[129] and it now provides that the Family Courts have jurisdiction to entertain actions relating to family matters, provided that both parties are members of the Greek Orthodox Church or of a religious group.[130]

The effect of article 111, as amended, was examined in *Demetriou v Demetriou, née Balewski*.[131] The case involved a petition to set aside a maintenance order. The Family Court at first instance refused to entertain the claim, on the basis that it had no jurisdiction to do so because the petitioner's wife, from whom he was separated, was German and a citizen of The Netherlands.

On appeal, the petitioner alleged that his wife had become a member of the Greek Orthodox Church through her marriage to him, and that therefore the Family Courts of Cyprus had jurisdiction under article 111 of the Constitution.

The court held, however, that on a proper interpretation of article 111, both parties must be not only members of the Greek Orthodox Church but also citizens of the Republic of Cyprus in accordance with article 2(1) of the Constitution.

The judge held that, as the respondent was not a citizen of the Republic, jurisdiction lay only with the President of the District Court of the district in which the petitioner was resident, in accordance with the provisions of sections 21(1)A and 22(2) of the Courts of Justice Law.[132] These sections deal with family cases in which the Family Courts have no jurisdiction. Their effect is to grant, in all such cases, exclusive

128 Law 23 of 1990.

129 Law 95 of 1989.

130 Such religious groups in Cyprus are the Maronite and Latin communities, both of which belong to the Catholic Church, and the Armenian community, belonging to the Armenian Church.

131 *Demetriou v Demetriou, née Balewski* (1991) 1 JSC 1153.

132 Law 14 of 1960.

jurisdiction to the President of the District Court of the district in which any of the parties resides or, if neither of the parties is resident in Cyprus, in the district in which the plaintiff elects.

The jurisdiction of the Family Courts is dealt with under the Family Courts Law,[133] as well as under article 111 of the Constitution. Section 11(1) of the Family Courts Law was recently amended by the Family Courts (Amendment) Law 1998[134] to simplify the question of jurisdiction in family matters. The section now provides that 'the Family Courts have jurisdiction to exercise the powers granted to them by article 111 of the Constitution and by any other law'. Section 11(2) provides that the Family Courts have in particular the power to entertain cases concerning:

- The dissolution of any religious marriage which was celebrated according to the canons and rites of the Greek Orthodox Church;
- The dissolution of any religious marriage of any other faith, provided that such dissolution does not come within the jurisdiction of the Family Courts over the religious groups;[135]
- The dissolution of any civil marriage;
- Family matters in court proceedings instituted under the provisions of bilateral or multilateral treaties to which Cyprus is a signatory; and
- Matters of parental support, maintenance, acknowledgement of paternity, adoption, property relations between spouses, and any other conjugal or family dispute, provided that the parties or one of them are resident in Cyprus.

24-59 Section 11(3) defines 'residence' as any continuous period of stay in excess of three months.

The effect of this amendment is greatly to extend the jurisdiction of the Family Courts and to remove the jurisdiction of the President of the District Court under sections 21(1)A and 22(2) of the Courts of Justice Law.[136]

Validity of a Marriage

24-60 The general rule is that the validity of a marriage is governed by the *lex loci celebrationis*, ie, the law of the place where the marriage was celebrated. In *Hallak v Hallak*,[137] the Cypriot court held that, if a marriage is attacked as being formally invalid, the question whether this is so must be tested according to the requirements

133 Law 23 of 1990.

134 Law 26 (I) of 1998.

135 Such religious groups in Cyprus are the Maronite and Latin communities, both of which belong to the Catholic Church, and the Armenian community, belonging to the Armenian Church.

136 Law 14 of 1960.

137 (1979) 1 CLR 6.

of the *lex loci celebrationis*. In Cyprus, the validity of a civil marriage is governed by the Civil Marriage Law,[138] which provides, *inter alia*, that:

- There must be an agreement between the parties;
- The parties must have attained the age of 18; and
- The parties must have contractual capacity and may not be already married.

24-61 The requirements for a valid religious marriage are set out in detail in section 220 of the Charter of the Most Holy Church of Cyprus.

This general rule of the *lex loci celebrationis*, however, applies in Cyprus only in so far as the parties do not come under the provisions of article 111 of the Constitution. Where the parties are both citizens of the Republic and members of the Greek Orthodox Church or the church of a religious group,[139] the validity of a marriage is governed solely by the formalities laid down by the respective church.

In *Papasavvas v Johnstone*,[140] the court stated the rule as follows:

> . . . by way of exception to the rule of private international law, laying down that a marriage conducted in accordance with the formalities of the *lex loci celebrationis* is regarded as formally valid everywhere, the marriage of Greek-Cypriots affected by the provisions of article 111 of the Constitution is invalid, irrespective of where it is celebrated, unless conducted in accordance with the canons and rites of the Greek Orthodox Church.

24-62 It also was held in *Neophytou v Neophytou*[141] that, under article 111 of the Constitution and on the authority of *Metaxas v Mitas*,[142] the validity of a marriage 'is a matter of personal status coming within the exclusive competence of the Church to which the parties belong in accordance with Article 111.1 of the Constitution'.

As regards religious groups, in *Hjijovanni v Hjijovanni*,[143] where the parties were both Maronites and domiciled in Cyprus, it was held that the marriage was void because a religious ceremony had not been carried out in accordance with the requirements of the Maronite Church.

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138 Law 21 of 1990.

139 Such religious groups in Cyprus are the Maronite and Latin communities, both of which belong to the Catholic Church, and the Armenian community, belonging to the Armenian Church.

140 *Papasavvas v Johnstone* (1984) 1 CLR 38.

141 *Neophytou v Neophytou* (1979) 1 CLR 685.

142 *Metaxas v Mitas* (1977) 1 CLR 1.

143 *Hjijovanni v Hjijovanni* (1969) 1 CLR 207.

In the *Hjijovanni* case, the judge held that, where article 111 is inapplicable, it is the provisions of English Private International Law which apply in relation to validity, and he cited as applicable the following:

> Formal validity of a marriage depends solely upon the *lex loci celebrationis*; essential validity is a matter for the personal law of the parties.[144] Capacity to marry is governed by the law of each party's antenuptial domicile.[145]

24-63 Where article 111 applies, all matters of validity depend on the rites and canons of the Church.

Divorce

24-64 The jurisdiction of the Cypriot courts to hear divorce cases has been already discussed. In hearing a petition for divorce, the courts in Cyprus will apply Cypriot law.[146] Under Cypriot law, the grounds for divorce are set out in section 225 of the Charter of the Greek Orthodox Church of Cyprus and in the First Amendment of article 111 of the Constitution.[147] The grounds include the irretrievable breakdown of relations between the spouses, desertion, and behaviour which is immoral, disgraceful, or otherwise inexcusable.

In *Tooley v Tooley*,[148] involving a petition for the dissolution of the marriage between a Greek-Cypriot and a British citizen, it was held that the following questions must be answered in order to determine the petition:

- The existence of jurisdiction to entertain the proceedings in view of the fact that the respondent was domiciled in the United Kingdom;
- The validity of the marriage; and, jurisdiction and validity having been established; and
- The adequacy of the evidence to support the grounds for divorce.

Custody and Maintenance

24-65 Once the question of jurisdiction has been determined, the courts will apply Cypriot family law to matters concerning children. Such matters are governed principally by the Relations of Parents and Children Law,[149] which gives the courts power to adjudicate on questions such as custody and maintenance. The paramount consideration in all cases must be the interests and welfare of the children involved.

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144 Cheshire and North, *Private International Law* (7th ed), at p 289.
145 Dicey and Morris, *The Conflict of Laws* (8th ed, 1987), at p 254, rule 31.
146 Excepted is the question of the validity of the marriage.
147 Law 95 of 1989.
148 *Tooley v Tooley* (1984) 1 CLR 279.
149 Law 216 of 1990, as amended by Law 60(1) of 1995.

In the *Kalfopoulou*[150] case, the fact that the children did not want to go to Greece to live with their mother but wanted to remain with their grandmother in Cyprus was an important factor in the court's decision to refuse leave to the mother to take the children out of the jurisdiction. In *Makrides v Makrides*,[151] the Supreme Court allowed the mother to take the children to Greece, where she had secured employment, as it considered that it would be detrimental to the welfare of the minors involved if, at a very early stage in their lives, they were separated from their mother and their half-sisters.

Maintenance orders between spouses are generally governed by the Property Relations Between Spouses and Other Related Matters Law.[152] This Law deals with issues such as the circumstances in which maintenance can be claimed and in which the court can refuse to grant maintenance, and how much maintenance should be paid.

The Maintenance Orders (Facilities for Enforcement) Law,[153] which reproduces the provisions of section 12 of the English Maintenance Orders (Facilities for Enforcement) Act 1920, allows for the reciprocal enforcement of maintenance orders between the courts of Cyprus and the courts of England or Ireland.[154]

The section further provides that the Cypriot courts can make a provisional maintenance order against a person resident in England or Ireland which can be confirmed by the courts of England or Ireland or remitted to the Cypriot courts, and vice versa. Confirmation of a provisional order does not affect any right of the court in question to vary or rescind that order. Cyprus also is a signatory to various international conventions concerning matters such as the guardianship and kidnapping of children.

Enforcement of Foreign Judgments and Arbitration Awards

24-66 An extremely significant aspect of private international law is the question whether a judgment obtained abroad will be recognised and enforced by the courts in Cyprus.

It is generally determined by the criteria set out in various statutes and, where the judgment is not covered by statute, by the principles of Common Law.

150 *In the Matter of Konstantinos and Eleni Loizou, minors, and in the Matter of the Application of Aspasia Kalfopoulou*, Application 100/97, 21 January 1998.

151 *Makrides v Makrides* (1976) 8 JSC 1294.

152 Law 232 of 1991.

153 Cap 16 of the Laws of Cyprus.

154 *The Attorney-General of the Republic v Panayiotis Christou* (1962) 1 CLR 129.

International Treaties and Conventions

In General

24-67 Cyprus is a signatory to numerous international conventions and treaties which contain elements of private international law.

Bilateral Treaties and Conventions

24-68 Bilateral treaties and conventions to which Cyprus is signatory include:

- Convention between the Republic of Cyprus and the People's Republic of Bulgaria on Legal Assistance in Matters of Civil and Criminal Law;[155]
- Agreement between the Republic of Cyprus and the Czechoslovak Socialist Republic on Legal Assistance in Civil and Criminal Matters;[156]
- Convention between the Republic of Cyprus and the German Democratic Republic on Legal Assistance in Civil, Family, Labour, and Criminal Matters;[157]
- Convention between the Republic of Cyprus and the Republic of Greece on Legal Co-operation in Matters of Civil, Family, Commercial, and Criminal Law;[158]
- Convention between the Republic of Cyprus and the Hungarian People's Republic on Legal Assistance in Civil and Criminal Matters;[159]
- Treaty between the Republic of Cyprus and the People's Republic of China on Judicial Assistance in Civil, Commercial, and Criminal Matters;[160]
- Agreement between the Republic of Cyprus and the Arab Republic of Egypt for the provision of Judicial and Legal Aid in Matters of Civil and Criminal Law;[161]
- Agreement between the Republic of Cyprus and the Syrian Arab Republic on Legal Assistance in Civil and Criminal Matters;[162]
- Treaty between the Republic of Cyprus and the Union of Soviet Socialist Republics on Legal Assistance in Civil and Criminal Matters;[163]
- Agreement between the Republic of Cyprus and the Socialist Federal Republic of Yugoslavia on Legal Assistance in Civil and Criminal Matters;[164] and

155 Law 18 of 1984.

156 Law 68 of 1982.

157 Law 5 of 1984. After the unification of the two German states, the fate of this agreement is uncertain as the Federal Republic of Germany has yet to ratify it.

158 Law 55 of 1984.

159 Law 7 of 1983.

160 Law 19 (III) of 1995.

161 Law 32 (III) of 1992. This Agreement was amended by Law 14 (III) of 1996.

162 Law 160 of 1986.

163 Law 172 of 1986. Since the dissolution of the Union of Soviet Socialist Republics, the Treaty has been ratified by the Russian Federation, Ukraine, and Belarus.

164 Law 179 of 1986. Since the dissolution of the Socialist Federal Republic of Yugoslavia, only Serbia and Montenegro have ratified the Agreement.

- Agreement between the Republic of Cyprus and the Republic of Poland on Legal Assistance in Civil and Criminal Matters.[165]

Multilateral Treaties and Conventions

24-69 Multilateral treaties and conventions to which Cyprus is signatory include:

- Convention on Certain Questions relating to the Conflict of Nationality Laws (UN);[166]
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (UN);[167]
- Convention on the Recovery Abroad of Maintenance (UN);[168]
- The European Convention on Information on Foreign Law (CE);[169]
- Convention on the Taking of Evidence Abroad in Civil and Commercial Matters;[170]
- Hague Convention on the Recognition of Divorces and Legal Separations;[171]
- Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol thereto;[172]
- Convention providing a Uniform Law on the Form of an International Will;[173]
- Convention on the Legal Status of Children born out of Wedlock (CE);[174]
- European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children;[175]
- Statute of the Hague Conference on Private International Law (revised text);[176]
- International Convention for the Unification of Certain Rules concerning Civil Jurisdiction in Matters of Collision;[177]
- European Convention on Certain International Aspects of Bankruptcy;[178]
- Convention on the Civil Aspects of International Child Abduction;[179] and
- Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption.[180]

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165 Law 10 (III) of 1997.
166 Ministry of Foreign Affairs File 433/71; 179 League of Nations Treaty Series 89.
167 Law 84 of 1979.
168 Law 50 of 1978.
169 Law 5 of 1969; Additional Protocol, 15 March 1978, Law 22 of 1979.
170 Law 67 of 1982.
171 Law 63 of 1982.
172 Law 11 of 1976.
173 Law 22 of 1980.
174 Law 50 of 1979.
175 Law 36 of 1986.
176 Law 178 of 1986.
177 Law 31 (III) of 1993.
178 Law 36 (III) of 1993.
179 Law 11 (III) of 1994.
180 Law 26 (III) of 1994.

CHAPTER 25

Accession to the European Union

Markus Zalewski and Andreas Thoma

Introduction

25-1 Cyprus has always had a European vocation. Following the official opening of European Union (EU) accession negotiations on 30 March 1998, Cyprus is seeking to fulfil this vocation by 1 January 2003.

When the European Economic Community (EEC), as it was then referred to, was founded in 1957, it comprised only six member states (Belgium, France, Germany, Italy, Luxembourg, and The Netherlands). Since then, there have been four enlargements; at present, the EU has 15 member states. The latest wave of enlargement would include countries from central and eastern Europe, Cyprus, Malta, and Turkey, thereby bringing the number of member states to 28.

Enlargement is a historical milestone for the EU. After the enlargement process is completed, it is expected that the EU will have 100 million to 150 million new citizens. The central characteristic of the new composition of the EU will be the cultural diversity between the present member states and the prospective ones.

This, however, is by no means a disadvantage for an enlarged EU as it could act as a source of dynamism and creativity, thereby making the EU more influential in world affairs. Enlargement also is expected to improve the economic growth and prosperity within the EU. If one draws a parallel between the present situation and the economic circumstances prevailing in Greece, Spain, and Portugal prior to their accession to the EEC, these former applicant countries differed substantially from the existing member states at the time. Nevertheless, their accession has assisted in improving their economic performance as well as the economic growth of the EU as a whole.

The idea of EU enlargement can also be conceptualised as a means of promoting peace and security in Europe. The Kosovo experience has strengthened the need to secure peace and amity among the various European states. The tenets underlying the EU's economic order, such as the single market, the free movement of goods, services, people, and capital, and economic and monetary union, are conducive to creating mutual understanding between all the participants and neutralising the potential for conflict and aggression.

Legal Basis for Accession

Accession Criteria

25-2 The legal basis and the conditions for enlargement of the EU are set out in article 49 of the Treaty on European Union, as amended, which states that:

> Any European State which respects the principles set out in article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.
>
> The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all contracting States in accordance with their respective constitutional requirements.

25-3 The common constitutional principles enshrined in article 6 of the Treaty on European Union are liberty, democracy, and respect for human rights and fundamental freedoms and the rule of law. On the basis of the general Treaty provisions for enlargement, the European Council at its meetings in Copenhagen and Madrid went on to provide further clarification of the political and economic criteria which an applicant state must fulfil to qualify for EU membership. The so-called 'Copenhagen criteria' require an applicant country to create and maintain:

- Stable institutions, guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities;
- A functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union;
- The ability to take on the obligations of membership, including adherence to the aims of political, economic, and monetary union; and
- The conditions for its integration through the adjustment of its administrative structures, ensuring that EU legislation transposed into national legislation is implemented effectively through appropriate administrative and judicial structures.

25-4 Since the Copenhagen summit in June 1993, the European Commission would appear to have introduced a fifth criterion which concerns the capacity of applicant states, mainly in terms of administrative infrastructure (structures and procedures), to comply effectively with the obligations they assume to accede to the Union.

Accession Procedure

25-5 At the Helsinki European Council summit in December 1999, it was reaffirmed that the accession process would include all 13 candidate states, including Turkey,

within a single framework. In the negotiations, each applicant will be judged on its own merits. This principle applies both to the opening of the 31 chapters making up the existing body of EU law and policies and to the conduct of negotiations.

The chosen approach allows all the candidate states to participate in the accession process on an equal footing. It is clear from the Helsinki summit conclusions that compliance with the political criteria laid down at the Copenhagen European Council meeting remains the main prerequisite for the opening of accession negotiations and constitutes the legal basis for accession to the Union.

Having a single accession framework and a level playing field for all applicant countries, however, only guarantees equality of opportunity and does not make joining the Union a foregone conclusion. On a number of occasions the General Affairs Council and the European Commission have confirmed that each applicant state would proceed at its own pace, depending on its degree of preparedness and the complexity of the issues to be resolved ('principle of differentiation').

The degree of preparedness is established by a process known as *acquis*[1] screening whereby the national legal order of each applicant is systematically reviewed for its compatibility with the existing body of EU law and practice.

In concrete terms, screening meetings focus on two distinct fundamental questions, ie, whether the applicant accepts the existing *acquis communautaire* in the chapter in question and, if so, whether it possesses the required capacity in terms of legislation and infrastructure to implement the *acquis* in an effective manner.

There are a number of stages to go through before substantive accession negotiations can commence in respect of specific chapters, where screening has been completed and applicant countries have submitted their position papers, stating whether they seek transitional arrangements for the application or transposition of the *acquis communautaire*, in which form, and in what time limits.

First, each country's position paper is scrutinised by the European Commission's Directorate-General for Enlargement. Once the Commission has formed its opinion, its recommendations in the form of draft common positions are passed to the Committee of Permanent Representatives of the member states. The Committee examines the draft common positions provided by the Commission with a view to arriving at common positions of the European Union.

When member states have agreed on an EU common position, the Council of the European Union meets with ministerial representatives and chief negotiators of each applicant country in a bilateral Conference on Accession and discusses what

1 The body of European Union law and practice, also known as the *acquis communautaire*, comprises Community acts, the case law of the European Court of Justice, informal administrative practice of the European civil service, and political declarations. In other words, it denotes the rights and obligations of the European Union system and its institutional framework.

the EU finds acceptable or unacceptable in the applicants' 'offers'. The EU strategy for these negotiations follows the principle 'nothing is agreed until all is agreed'.

Final agreements on specific dossiers will, therefore, not be struck until closer to the actual accession date. This negotiating stance is based on the argument that EU legislation is bound to be changed before the applicant countries join the Union and that, therefore, the applicants' progress towards meeting the requirements of membership must be monitored on an ongoing basis, culminating in a final decisive assessment immediately prior to the next date of enlargement.

Accession Treaty

25-6 Once the negotiations are completed and the candidate states have fully adopted the *acquis*, the results of the negotiations are incorporated in a draft accession treaty which is sent for approval to all member states. At this stage, unanimity by all EU member states is required, giving each of them the power to veto the accession of any or all of the applicant states regardless of any given candidate's readiness to join. One may, therefore, take the view that the completion of the negotiations and the adoption of the *acquis* is merely a preparatory stage, and that the decisive steps towards entry into the EU commence with the member states' examination of each candidate's case and the respective draft accession treaty.

Thereafter, the accession treaty is submitted to the Council for approval and the European Parliament for assent. After signature, the accession treaty is submitted to the member states and the applicant country in question for ratification, involving in some cases the holding of a referendum. On ratification by all parties, the accession treaty takes effect, and the applicant becomes a member state.

Key Actors

The European Council

25-7 The European Council consists of the Heads of State or Government of the 15 member states and the President of the European Commission. The members of the European Council are assisted by the foreign ministers of the member states and by another member of the Commission. The European Council is hosted by and takes place in the member state holding the Presidency of the Council.

In accordance with article 4 of the Treaty on European Union, the principal role of the European Council is to provide the Union with the necessary impetus for its development and to define the general political guidelines thereof. Although decisions of great political importance are taken at the level of the European Council, such decisions have no force of law by themselves. The interaction and participation of the other EU institutions are required for the implementation of the conclusions of a summit of the European Council.

One item which appears regularly on the agenda of the European Council is that of the enlargement of the European Union. The role of the European Council has been determinative in this subject matter, particularly in deciding the procedure which is to be followed for the accession of new states and the criteria which these candidates must adhere to.

The European Parliament

25-8 The 626-member European Parliament is the only institution of the European Union which is directly elected by the citizens of the Union. As a Community institution, the European Parliament's powers are broadly based, ranging from legislator to that of supervisor and litigant for its prerogatives.

Apart from the three-fold role which the European Parliament performs as a Community institution, it has a significant part to play in the enlargement process. The Parliament is kept informed of the progress of the negotiations between the candidate states and the Commission. Additionally, the European Parliament takes a keen interest in the whole process through joint parliamentary committees with each applicant state.

The meetings of these committees permit the European Parliament to follow closely the progress of the accession negotiations and the readiness of each candidate. At the same time it provides the parliaments of the candidate states with the opportunity to work closely with their counterparts at European Union level and reap the attendant benefits from such experience. Once the negotiations are completed and an accession treaty is drafted for each prospective new member, these treaties must be submitted to the European Parliament for its assent.

In regard to the current accession negotiations, the European Parliament has voiced the concern that, despite the improvements introduced by the Amsterdam Treaty, the EU's institutional framework remains inadequate to prevent enlargement from jeopardising the effective functioning of the Union.[2]

The European Commission — the Directorate-General for Enlargement

25-9 The Commission, sometimes also referred to as the 'civil service' of the EU, represents one of the key players in the EU arena. It consists of 20 Commissioners drawn from the 15 member states, appointed to their posts not to represent their home countries, but to promote the interests of the EU as a whole.

In addition to its power to act as the generator of legislative proposals, the Commission acts as the EU executive body and guardian of the Treaties and therefore embodies, to a large extent, the personality of the EU. The Commission

2 European Parliament, *Fact Sheet* 6.3.1, 'The Problems posed by Enlargement of the Union' (1999).

serves as the motor of European integration, ensuring that the EU attains its goal of an ever closer union among the peoples of Europe.

In addition, the Commission is entrusted with an important responsibility in respect of EU membership applications. The Commission acts as the EU's main interlocutor during the negotiations with candidate states, except when particularly sensitive or difficult matters call for an inter-ministerial resolution of any differences arising. It is the body responsible for the *acquis* screening with the applicants.

Through the implementation of accession partnerships and various other programmes ('Phare',[3] environment and transport investment support, and agricultural and rural development assistance), the Commission seeks to enhance the progress of the accession process. Commission officials are in close contact with their counterparts in the applicant states as a means of assisting them during their preparation for accession and also for finding, at an early stage, solutions to problems arising during the negotiations. The Commission also is under an obligation to produce regular reports on the outcome of the (pre-) accession negotiations and on the progress being achieved by each applicant state.

With a view to providing a focus on the pace and quality standard of the negotiations, a Task Force for the Accession Negotiations was set up at the beginning of 1998. With the arrival of the Prodi Commission, however, this Task Force was merged with the services responsible for pre-accession matters in the new Directorate-General for Enlargement.

This new Directorate-General is divided into specific teams, each responsible for the conduct of negotiations and screening exercises with every applicant state. During the screening meetings with candidates, each of the 'Enlargement Teams' is assisted in its work by units of other Directorates-General, which have particular knowledge of the subject-matter under examination.

According to the Commission's 'Work Programme for 2000',[4] negotiations will proceed in step with the state of preparation of the candidates. During this work programme, the Commission seeks to achieve enhanced financial support for the candidate countries through the 'Phare' programme, ISPA[5] (structural funding for the environment and transport), and SAPARD[6] (agricultural funding). It also will present its communication strategy to ensure a broad understanding and acceptance of enlargement both within the existing member states and in the candidate countries.

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3 'Phare' is the acronym standing for *Pologne*, *Hongrie*, *Assistance à la Réstructuration Economique*.

4 COM (2000) 155, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions.

5 ISPA is the acronym denoting Pre-accession Instrument for Structural Policies.

6 SAPARD is the acronym standing for Special Accession Programme for Agriculture and Rural Development.

The preceding discussion reveals the centrality of the Commission to the Union as a whole and particularly in the area of enlargement. The Commission can be seen as the linking factor between the EU and the candidate states during the pre-accession period. It fulfils the role of an 'EU ambassador', as well as that of a support mechanism for the applicants to ensure the smooth running of the pre-accession process and the preparation of the candidate states for accession.

The Council of the European Union

25-10 The Council of the EU consists of a representative of each member state at ministerial level who is authorised to commit the government of that state.[7] The work of the Council ranges over the entire spectrum of matters affecting the Union. For this reason, the Council divides its work into several specialised subject-based councils.

Enlargement issues are considered by the General Affairs Council, with the Foreign Minister of each member state being its chief representative on this Council. The rotating Presidency of the Council puts forward the negotiating positions agreed in the General Affairs Council and chairs negotiating sessions at the level of ministers or their deputies. Technically, the Presidency negotiates with the applicant states on behalf of the member states.

For its part, each candidate state has appointed a Chief Negotiator, with a supporting team of experts. As stated above, the Commission proposes common negotiating positions for the EU for each chapter relating to matters of Community competence. The Council Presidency, in close liaison with the member states and the Commission, makes proposals for such positions on the chapters concerning the Common Foreign and Security Policy and Co-operation in Justice and Home Affairs.

Member States

25-11 Although most of the negotiating work is undertaken by the Commission, member states themselves have a role to play in the accession process. Previous experience has shown that direct consultations between the applicants and the member states were sought to find a resolution in matters of great political sensitivity, or when the deadline for concluding the negotiations approached.

Furthermore, once the accession treaties on the outcome of the negotiations are complete, each member state will need to ratify these treaties, which in most cases requires an Act of Parliament and sometimes even a referendum. The debates in national parliaments during the ratification process will provide an opportunity for representatives of the people in each member state to express their views on enlargement in general and the case of the relevant applicant state in particular.

7 European Community Treaty, art 203.

Some commentators[8] believe that there may be potential disruption by member states in certain areas, where vested national interests conflict with an enlarged Union.

It is submitted that the Commission should counter such tendencies by stepping up its communication and public information efforts and driving home the message of the costs of 'non-enlargement'.

Other Applicant States

25-12 Initially, the only countries which were on course to form part of the first wave of enlargement were Cyprus, the Czech Republic, Estonia, Hungary, Poland, and Slovenia. These 'Luxembourg Six' were viewed as a 'block', and their accession to the EU was likely to take place as a group rather than on an individual basis.

Following the Helsinki meeting of the European Council, the 'enlargement scene' changed by the summit's decision to start substantive accession negotiations with six more candidate countries. It also was resolved at Helsinki to adopt a differentiated approach in that each applicant will proceed at its own pace and according to merit. This arrangement introduces a competitive element in the accession process. This also will be reflected in the Commission's regular reports on the progress of the candidates which, commencing with the third report, are set to include performance 'scoreboards'.

In the present context it should finally not be forgotten that as a contracting state each applicant will have to ratify the relevant accession treaty in accordance with its respective constitutional requirements. That the outcome of the ratification process on the part of the candidate country is not always a foregone conclusion and must be carefully managed by the applicant's government has been shown in the previous round of enlargement where in a referendum a majority of Norwegian voters rejected the prospect of joining the Union.

Enlargement Policy Instruments

In General

25-13 The EU has certain legal, financial, and political mechanisms at its disposal to implement its policy on enlargement. The instruments applicable to Cyprus and the process needed to put them into effect are of particular interest in the present context.

There are, of course, other important devices, such as the Europe Agreements and their financial arm, the 'Phare' programme, and the Commission's Agenda 2000

8 Vassallo, 'The Prospect of Enlargement', in Glöckner *et al*, *Guide to European Union Policies* (1998), at p 344.

communication.[9] These, for the most part, concern the economic and political transformation of the central and eastern European applicant states and are, therefore, outside the scope of this chapter.

Association Agreement

25-14 Concluded in December 1972, the Association Agreement, in conjunction with the 1987 Protocol, provided for the establishment of a full customs union between Cyprus and the Union, entailing the abolition of trade barriers in dealings with EU member states and the adoption of the Union's Common Customs Tariff for imports from third countries.

Apart from these trade-related aspects, it is particularly the so-called accompanying policies on the approximation of laws, competition, state aid, and taxation which have brought Cyprus closer to the Union. In addition, the bodies created by the Association Agreement and subsequent related instruments, ie, the Association Council and the Joint Parliamentary Committee, play an important role in the ongoing monitoring of Cyprus' progress in harmonising its domestic legal system with established Community law and practice.

Pre-Accession Strategy

In General

25-15 The pre-accession strategy supplements the Association Agreement in the case of Cyprus and the Europe Agreements as far as the central and eastern European applicants are concerned.

It forms the basis and framework for the candidate countries to work closely with the EU within a defined programme in their preparation for accession and familiarise themselves with Union policies and procedures. The pre-accession strategy comprises two principal instruments, ie, the Accession Partnerships in conjunction with the National Programmes for the Adoption of the Acquis and Community financial assistance.

Accession Partnership

25-16 The Accession Partnership constitutes the cornerstone of the pre-accession strategy and accordingly lasts until the accession of the candidate country concerned to the Union. Partnerships involve the pooling of all forms of Union assistance to applicant states within a single framework for the purpose of implementing national programmes to prepare the candidates for accession.

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9 Communication of the Commission to the European Parliament, 'Agenda 2000', COM (97) 2000 final of 15 July 1997.

For each applicant country, the Accession Partnership sets out the short- and medium-term priority areas in which progress needs to be made and outlines the ways in which the EU will support the prospective member in this. Each country's Accession Partnership is implemented by its own National Programme for the Adoption of the Acquis. The Programme fleshes out how the applicant endeavours to meet the priorities and objectives of its Accession Partnership by setting deadlines and indicating human and financial resources to be expended.

The Commission intends to review each Accession Partnership on a regular basis in the light of the individual performance of candidate countries, tangible progress in implementing the National Programme for the Adoption of the Acquis, as well as changing overall requirements.

Community Financial Assistance

25-17 The second strand of the pre-accession strategy consists of mobilising all financial resources available to the EU for preparing the candidate countries for accession, principally through the 'Phare' programme, but also through co-financing with international financial institutions, such as the European Investment Bank, the European Bank for Reconstruction and Development, and the World Bank.

In accordance with the conclusions of the Luxembourg and Berlin European Council meetings, pre-accession aid is being increased substantially and made available through the 'Phare' programme[10] and ISPA[11] and SAPARD[12] instruments.

All Accession Partnerships contain a conditionality clause, rendering pre-accession aid subject to compliance with the Europe Agreements and Association Agreements, respectively, progress in the fulfilment of the Copenhagen criteria, and timely and effective implementation of National Programmes for the Adoption of the Acquis. It is finally intended that, after the accession of the first new member states, available pre-accession funds will be re-allocated to the remaining applicant states.[13]

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10 The programme has two priority objectives approved by the Luxembourg European Council, ie, the improvement of administrative and legal capabilities (30 per cent) and investment linked to the adoption and application of the Community *acquis* (70 per cent). See General Report on the Activities of the EU 1999, point 606.

11 See Council Regulation (EC) Number 1267/1999 of 21 June 1999, establishing an Instrument for Structural Policies for Pre-accession, OJ L 161, 26 June 1999, at p 73.

12 See Council Regulation (EC) number 1268/99 of 21 June 1999 on Community support for pre-accession measures for agriculture and rural development in the applicant countries of central and eastern Europe in the pre-accession period, OJ L 161, 26 June 1999, at p 87, and the Commission Communication on the financial management of SAPARD of 26 January 2000.

13 European Commission, *EU Enlargement — A Historic Opportunity* (1999), at p 20.

Shaping an Accession Strategy for Cyprus

The European Union–Cyprus Customs Union

25-18 Cyprus' bid for EU membership has come a long way to reach the current stage of finding itself among the front runners of applicant countries. The Association Agreement, which was signed as early as 1972, envisaged the gradual abolition of all barriers to trade and the establishment of a customs union in two stages. The first phase, which ended on 31 December 1997, provided for:

- The reduction of Cypriot customs duties and quantitative restrictions on industrial products and 43 agricultural products, with the exception of petroleum products and 15 product categories deemed sensitive;
- The adoption by Cyprus of the Community's Common Customs Tariff; and
- The implementation of accompanying policies on competition, state aids, taxation, and the approximation of laws designed to align Cyprus with the *acquis communautaire*.[14]

25-19 In the opinion of the European Commission,[15] the first phase has been implemented satisfactorily. In its report of 4 November 1998 on progress towards accession, the Commission highlighted the following achievements in relation to the first phase for the completion of the customs union with Cyprus:

- The abolition of all customs duties on manufactured products originating in the Community and referred to in the Protocol concerning the second stage of the Association Agreement;
- The abolition of all quantitative restrictions; and
- The full alignment of the Cypriot customs tariff with the Community's Common Customs Tariff in respect of manufactured products originating in third countries.

25-20 The second phase of the Customs Union Agreement, which started on 1 January 1998 and is due to last until 2002 or 2003, aims to:

- Establish the free and unrestricted movement of industrial and agricultural products; and
- Adopt the remaining accompanying policies required to complete the customs union.

25-21 The advent of a full customs union between Cyprus and the EU would, therefore, appear certain, regardless of if and when current membership negotiations will be successfully concluded.

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14 In view of the latter objective, some 20 expert working groups were established in the relevant ministries who, having studied the *acquis* and compared it with the existing body of Cypriot law, made specific recommendations for legislative action.

15 European Commission, Regular Report 1998 from the Commission on Cyprus's Progress towards Accession, 4 November 1998, *Bulletin of the European Union*, Supplement 15/98, at p 6.

The Road to Opening Accession Negotiations

25-22 On 4 July 1990, Cyprus applied for full membership of the Community. In June 1993, the Commission of the European Communities delivered a favourable opinion on Cyprus' eligibility for membership, which stance was endorsed by the General Affairs Council in October 1993. In March 1995, the Council decided that Cyprus' accession negotiations with the EU should commence six months after the conclusion of the inter-governmental conference revising the Treaty on European Union.

The so-called 'structured dialogue' between EU and Cypriot officials at various levels, ranging from Heads of Government to ministerial representatives, was initiated in June 1995, and it has served as a valuable framework for the exchange of views and examination of Cyprus' progress in assimilating EU legislation and policies. In accordance with the conclusions of the Luxembourg European Council meeting on 12 and 13 December 1997, the accession process was launched on 30 March 1998.

In the spring of 1998, bilateral intergovernmental conferences were convened with the Czech Republic, Estonia, Hungary, Poland, Slovenia, and Cyprus to negotiate the conditions for their entry into the Union and the necessary Treaty adjustments. Cyprus successfully completed the *acquis* screening, after 37 meetings, in June 1999.

On the basis of the negotiating positions presented by the 'Luxembourg Six' on the first seven chapters screened, on 5 October 1998, the General Affairs Council of the EU decided to proceed to substantive negotiations.

The Specific Pre-Accession Strategy for Cyprus

Initial Pre-Accession Strategy

25-23 The European Council meeting in Luxembourg was of the opinion that Cyprus' case for membership was different from that of the other leading applicants in that it did not need to make the transition to a market economy and would therefore not require an Accession Partnership funded under the 'Phare' programme. Instead, the European Council decided on a specific pre-accession strategy for Cyprus based on:

- Cyprus' participation in certain targeted projects with a view to boosting its judicial and administrative capacity especially in the then-Third Pillar areas;
- Cyprus' inclusion in certain Community programmes and agencies, such as the training and education programmes 'Leonardo', 'Socrates', and 'Youth for Europe' and the cultural programmes 'Kaleidoscope', 'Ariane', and 'Raphael'; and
- The increased use of technical assistance to align itself as far as possible with the EU's internal market and related policies provided by the EU's Technical Assistance Information Exchange Office.

25-24 Following on from the Luxembourg summit, other facets have been added to the pre-accession strategy, ie, Cyprus' participation in EU programmes on audio-visual media ('Media II') and energy ('Save II'), co-operation in scientific research, and technological development under the Fourth Framework Programme and support for the continued harmonisation of Cyprus' legislation with the *acquis communautaire*.

Cyprus' Accession Partnership

25-25 On 13 October 1999, the European Commission[16] decided to revise Cyprus' existing pre-accession strategy by aligning its enlargement policy instruments and thus including Cyprus in the overall Accession Partnership framework already applied to the central and eastern European applicant countries.

This Commission initiative was sanctioned by the Council, which decided that the revised pre-accession strategy be based on three strands.[17] Apart from Cyprus' participation in certain Community programmes (see text, above) and the newly established Accession Partnership, there would be financial support made available for priority operations to prepare for accession as defined in the Accession Partnership.

The legal basis of Cyprus' Accession Partnership is Council Regulation (EC) Number 555/2000, in conjunction with the Council Decision of 20 March 2000. This Regulation places Cyprus on an equal footing with all the other candidate countries as far as the overall strategy framework for accession is concerned.

Following the 1999 Regular Report from the Commission on Cyprus' Progress towards Accession, Cyprus also was requested to draw up its National Programme for the Adoption of the Acquis, setting out a timetable for achieving priorities and intermediate objectives under the Partnership and allocates administrative structures and financial resources. The Council instruments establishing the Partnership place a particular emphasis on promoting joint activities between the Greek–Cypriot and the Turkish–Cypriot communities on the island.

Apart from the political criteria, the Council has set Cyprus short-term objectives in relation to economic and monetary policy, the internal market, the sectoral policy areas of agriculture, fisheries, transport and the environment, employment and social affairs, and justice and home affairs, as well as in relation to administrative and judicial capacity to implement the *acquis* and manage and control EU funds.

16 Com (1999) 500 and Composite Paper 1999 — Reports on Progress towards Accession by each of the Candidate Countries, *Bulletin of the European Union*, Supplement 2/99, at p 9; Com (1999) 522.

17 Council Regulation (EC) Number 555/2000 of 13 March 2000 on the implementation of operations in the framework of the pre-accession strategy for the Republic of Cyprus and the Republic of Malta, art 1, OJ L 68, 16 March 2000, at p 3, in conjunction with the Council Decision of 20 March 2000, on the principles, priorities, intermediate objectives, and conditions contained in the Accession Partnership with the Republic of Cyprus, OJ L 78, 29 March 2000, at p 10.

For the medium-term and in addition to the priority areas already mentioned, the Accession Partnership highlights the need for tangible progress in respect of energy policy and economic and social cohesion.

Pre-Accession Financial Assistance for Cyprus

25-26 Until the coming into effect of the Accession Partnership in April 2000, Cyprus' financial relations with the EU were governed by four bilateral Financial Protocols signed within the framework of the Association Agreement.

In accordance with the terms of these facilities, the EU had provided Cyprus with financial aid in the forms of grants, risk capital, and subsidised loans from the European Investment Bank. The aim of these financial instruments was to provide partial funding for projects and measures contributing to the economic and social development of the island in preparation for EU membership.

Council Regulation (EC) Number 555/2000 has replaced the Financial Protocols and has come into effect for an initial period of five years, expiring on 31 December 2004. The Accession Partnership instrument established by the Regulation serves the purpose of concentrating Community assistance on accession priorities and objectives identified specifically for Cyprus. Accordingly, under the terms of the Accession Partnership, Community assistance is conditional on, *inter alia*, Cyprus taking further steps towards satisfying the Copenhagen criteria and implementing its National Programme for the Adoption of the Acquis on time.[18]

Cyprus' Progress towards Accession — An Interim Assessment

The Process of Substantive Negotiations

25-27 Substantive negotiations on chapters already screened commenced about five months after the start of the *acquis* screening process. With regard to Cyprus, the *acquis* screening was concluded in June 1999. During the seventh bilateral meeting of the Conference on Accession at deputy level on 6 April 2000, Cyprus provisionally closed a further four chapters, bringing the overall tally up to 15 chapters.[19]

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18 Annex to Council Decision of 20 March 2000, on the principles, priorities, intermediate objectives, and conditions contained in the Accession Partnership with the Republic of Cyprus, OJ L 78, 29 March 2000, at paragraph 5.

19 This performance has given Cyprus the provisional lead in the accession negotiations. At the time of the Portuguese Presidency, the following chapters still had to be opened or remained open for further negotiation: free movement of persons, financial control, financial and budgetary provisions, regional policy and structural investments, co-operation in justice and home affairs, agriculture, free movement of goods, competition policy, energy, transport, free movement of capital, environment, freedom to provide services, and taxation. For regular updates on the progress achieved, see the Web pages of the Office of the Chief Negotiator and Co-ordinator of the Harmonisation Process of Cyprus with the EU at www.cyprus-eu.org.cy/eng/04_negotiation_procedure/substantive_negotiations.htm.

In the view of the European Commission, the accession negotiations with Cyprus are continuing at a satisfactory speed.[20] During December 1999, Cyprus submitted its six remaining position papers relating to chapters, which are expected to be negotiated during the second half of 2000 at the very latest. However, the unspoken consensus among all parties involved is that the arduous part of Cyprus' journey on the road to accession still lies ahead, when the accession convoy gets fully immersed in the critical issues, such as agriculture, the environment, the free movement of persons and capital, and the freedom to provide services.

As regards legal practitioners in Cyprus, they are chiefly concerned about the requisite changes to the international business regime, the challenges faced by the shipping sector, and the imminent transition from a protected to a liberalised environment in the areas of telecommunications and financial services.[21]

The European Commission's Regular Progress Reports

25-28 In terms of the Copenhagen criteria, the European Commission's 1999 Regular Report held that Cyprus fully meets the political and economic criteria.[22] It is, however, with regard to Cyprus' ability to assume the obligations of membership that the Commission sees room for improvement.

In its 1998 Regular Report, the Commission identified the internal market field, especially the international business and financial services sectors, maritime transport, telecommunications, and justice and home affairs as areas of particular concern.[23] In its 1999 follow-up report, the Commission notes that Cyprus still must transpose a substantial amount of legislation with deadlines set very close to Cyprus' target date for accession, jeopardising the capability to demonstrate effective application of the *acquis*.[24]

The environment, social policy, and justice and home affairs were singled out as areas where significant efforts have yet to be undertaken, especially in view of the

20 Press Release on 'Relations EU/Cyprus' (22 March 2000), Rapid Reference Number MEMO/00/16.

21 Neocleous, 'The Offshore Regime and Cyprus' Accession to the European Union', *Cyprus Business Guide* (1999), at p 17; Laulhé, 'Progress towards Tax Harmonisation in Cyprus', *European Legal Business* (March/April 2000), at p 49; *European Union/Cyprus*: *Tax Offshore Companies to Facilitate Accession to the European Union*?, European Report Number 2502 (20 May 2000), at p 6; Matthew, 'Offshore Tax Breaks to Go', *Cyprus Mail* (18 May 2000), at p 1; Malaos, 'The Challenges and Implications of Cyprus' Accession to the European Union', 57 *Accountancy Cyprus* (December 1999), at pp 35 and 36.

22 Composite Paper 1999 — Reports on Progress towards Accession by Each of the Candidate Countries, *Bulletin of the European Union*, Supplement 2/99, at p 19, and General Report on the Activities of the European Union 1999, point 591.

23 *Bulletin of the European Union*, Supplement 15/98, at p 32.

24 *Bulletin of the European Union*, Supplement 2/99, at p 20.

knock-on effects of delays in the adoption of legislation on effective enforcement and/or implementation.[25] As far as administrative capacity for implementation is concerned, institutional and infrastructural arrangements in the areas of telecommunications, free movement of goods, and maritime transport were found either still missing or wanting.[26]

Meanwhile, the Commission continues to develop its benchmarks, and the next regular report on the progress of the prospective member states is, therefore, expected to include a performance scoreboard modelled on the Single Market scoreboard of the Internal Market Directorate-General.

What Kind of European Union Might Cyprus Be Joining?

25-29 Apart from its historical and economic value, enlargement is of paramount political importance to the EU. The proposed enlargement calls for a restructuring of the existing institutional framework of the EU as explained in the European Commission's Agenda 2000 communication.[27] The present institutional structure was designed for a Community of six members and therefore cannot be operative for a Union which might eventually comprise 27 or 28, plus 'x', member states.

During the intergovernmental conference revising the Maastricht Treaty, member states refrained from addressing this matter in depth and decided to postpone the final resolution of all related issues until the following intergovernmental conference. As a result, the Treaty of Amsterdam contains only a Protocol and declarations on the institutional aspects of the accession of new states to the EU.[28] One of the ideas for restructuring the institutional framework of the EU focuses on trading off a reduction in the number of Commissioners nominated by the larger member states for changes in their voting powers in the Council.

There also are proposals being put forward for the introduction of Deputy Commissioners to cater for the increase in the number of member states. These are all controversial matters which touch on the extent to which member states will be represented, and thereby exert influence, in the EU. Hence, these issues will have to be scrutinised in depth not only by existing member states, but also by the candidate countries, as the new entrants may find themselves joining a Union quite different from what it presently represents and is known for.

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25 *Bulletin of the European Union*, Supplement 2/99, at p 38.
26 *Bulletin of the European Union*, Supplement 2/99, at p 38.
27 Communication of the Commission to the European Parliament, 'Agenda 2000', COM (97) 2000 final of 15 July 1997.
28 European Parliament, Briefing Number 15, The Institutional Aspects of Enlargement of the EU (June 1999).

Pointers to the Future

25-30 Although the Commission and other EU bodies have set the accession process as their top political priority and appear increasingly concerned about quantifying the performance of the candidate countries, 'league tables' and target accession dates should not become ends in themselves and operate to the detriment of the qualitative criteria for accession.[29]

It is submitted that, irrespective of if and when Cyprus will join the EU, the process of preparing itself for accession has so far been healthy and refreshing. The prospect of membership has served Cyprus as a powerful incentive to modernise its legal system and institutions, a long overdue and painful process, which without the likely reward of membership would not have been put in train and would not have prompted the necessary forces into action.

Therefore, apart from the speedy adoption of established Community law and practice, quality and precision in satisfying the membership criteria are of paramount importance for Cyprus and, indeed, any other candidate state willing to take advantage of the window of opportunity for change. The EU would, therefore, seem right in insisting that nominal harmonisation is to be avoided and that partial membership is not on offer. For an enlarged EU to be operative, and for future members to take full advantage of the opportunities presented, there is a need for all members, old and new, to exercise their Community rights fully and discharge their obligations without opt-outs or derogations. There is everything still to play for.

29 For further reading on the challenges posed by enlargement, see European Commission, *European Union Enlargement — A Historic Opportunity* (1999); European Parliament, Briefing Number 1, *Cyprus and Membership of the European Union* (October 1999); Nicolaides, Boean, Bollen, and Pezaros, *A Guide to the Enlargement of the European Union (II) — A Review of the Process, Negotiations, Policy Reforms and Enforcement Capacity* (1999); Vassallo, 'The Prospect of Enlargement', in Glöckner *et al*, *Guide to European Union Policies* (1998), at pp 343–365.

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