Id-Dritt

VOLUME XVIII

A Publication
of the
Law Students' Society
of the
University of Malta

2002

GħSL
The Law Students' Society
Ghaqda Studenti tal-Liġi

Id-Dritt

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First published in 2002
by Mireva Publications of
(Mireva and logo are Registered Trade Marks. [Malta] Reg. No. 17998.)
Mons Carmelo Zammit Street, Msida, Malta. MSD 06.
website: www.mireva.com
email: info@mireva.com
Published for The Law Students' Society of the University of Malta (GħSL)
Correspondence relating to this publication should be forwarded to
The Secretary,
The Law Students' Society of the University of Malta (GħSL),
The University of Malta,
Msida MSD 06,
Malta.

Typeset and paged on
MirevaTimesRomanM 10/12 by
MirevaSet, Msida, Malta.
Produced by Evan Cumbo.
Section drawings by Lida Sherafatmand
Cover design by Evan Cumbo.
Cover line drawing by David Borg Carbott.
Printed and bound by
Gutenberg Press
Gudja Road, Tarxien, Malta. PLA 19

International Standard Book Number

1-870579-96-8

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Law Students' Society of the University of Malta
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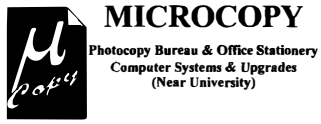
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I can say, if 19,000 children were dying every day in New York or Washington or London you'd call it a holocaust, but because it's Chad or Tanzania and Mozambique you don't even call it a crisis!

Bono, lead singer — U2

The Editorial Board of *Id-Dritt*
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Għaqda Studenti tal-Liġi (GħSL)

Law Students' Society of the University of Malta

President's Address

It is with great pride that the Law Students' Society of the University of Malta (GħSL) has this year published another edition of its law journal *Id-Dritt*. This publication has over the years achieved a great reputation amongst law students and legal professionals alike and is considered to be one of the few local publications that sheds light on contemporary legal issues. The success enjoyed by *Id-Dritt* is greatly owed to the high academic standard and legal interest of its articles.

Whilst maintaining its traditionally elevated standards, we have strived to make this publication more appealing to today's reader. Primarily, one may appreciate the new presentation which should make its reading even more enjoyable. Secondly, several important contemporary legal issues are being tackled in this year's edition.

This edition of *Id-Dritt* would not have been published had it not been for the great dedication and hard work of the editor, Nicholas Valenzia, and his team. The most sincere gratitude and acknowledgement of the Law Students' Society (GħSL) goes to them.

Paul Micallef Grimaud
President (GħSL)
University of Malta
March 2002

Editorial Note

George Said
former Editor of *Id-Dritt*

It gives me great pleasure to finally introduce Volume XVIII of *Id-Dritt*.

This somewhat delayed edition was published after a number of obstacles had to be overcome by the Law Students' Society of the University of Malta (GħSL) and by two different editorial boards.

A particular complication arose due to the fact that my colleague and co-editor James Bannister, and myself both completed our LL D course and opted to pursue post-graduate studies overseas before the publication was completed. Consequently, the project was handed over to a new but very able editorial board headed by Nicholas Valenzia. This team was burdened with two ardent tasks. Firstly, it had to redesign the edition so as to appropriately accommodate two sets of contributions collected by both the previous board and the new one. Secondly, since many legal commentaries might have a short shelf life, the new team had to ensure that the articles collected by my board would still be valid for publication.

In spite of these problems, the project has had a successful outcome, and this gives me personal satisfaction due to the fact that I was privileged to have formed part of the team which virtually resurrected *Id-Dritt* after an absence of nine years.

I would like to thank every person who in some way or another contributed towards this volume of *Id-Dritt*. Firstly I would like to thank HE Prof. Guido De Marco who has always been an ardent supporter of this project. I would also like to thank my colleague, James Bannister, whose assistance towards this publication was invaluable, and all those who aided in the financing of this issue, in particular Dr Alec Mizzi, himself a former editor of *Id-Dritt*.

Finally, my congratulations go to the new Editorial Board. I am proud to have formed part of the Editorial Board of *Id-Dritt*, a publication which year after year is gaining more esteem and respect within the Maltese legal circle.

George Said
(Editor 2000-2001)
Southampton
March 2002

Editorial Note

The revamped Edition of *Id-Dritt*, has finally been published. This year we have decided to change the format of this publication. Primarily, we have decided to emphasize that *Id-Dritt*, the publication of the Law Students' Society of the University of Malta, better known as Għaqda Studenti tal-Liġi, carries contributions by lecturers, legal professionals, and students alike.

The above reflects the aim of the Editorial Board, which relates to the publishing of an edition having a broader perspective. Only in this way could the duty that Għaqda Studenti tal-Liġi (GħSL) has towards students, professionals and the profession in general be fulfilled.

Volume XVIII is only the first step in what we would wish to be an ongoing project. We want to create a platform for the law student's expression, where the student can present his thoughts and ideas regarding a subject, and these would be in turn presented together with those of established practitioners. This year's publication features several contributions by students who were in their final year of studies, and who have now obtained their degree and warrant.

This publication would not have been published without the help of its former editor, George Said, and that of the executive committee of Għaqda Studenti tal-Liġi for 2000-2001. Their help and suggestions were of great value.

I would also like to thank the members of the executive committee for this year, especially David Borg Carbott, whose patience never failed.

I would also like to thank the sponsors of *Id-Dritt*. Our heartfelt gratitude goes to Professor Ian Refalo, Evan Cumbo of Mireva Publications, the President of Għaqda Studenti tal-Liġi Paul Micallef Grimaud, and Lida Sherafatmand. Through their advice, assistance and encouragement they have contributed in no small way towards the publication of *Id-Dritt*.

Nicholas Valenzia
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GħSL (University of Malta)
March 2002

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Vice-Editor
GħSL (University of Malta)
March 2002

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Vice-Editor
GħSL (University of Malta)
March 2002

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Public Law

1 Keeping One's Word: The Protection of Legitimate Expectations in Administrative Law

Peter Grech, LL D

A review of Maltese Administrative Law cases does not reveal anything like a plethora of cases where the central issue is the failure of the public authorities to 'keep their word'. Such cases are, for some reason which I will not venture to discover in this article, rather hard to come by.

This is not to say that such issues are unknown to our Courts.

Over the years our Courts have in fact been called upon to decide disputes relating to the unilateral changing of street levels,[1] the refusal to respect a contractual right to use a theatre on alleged grounds of public order,[2] the unwelcome amendment or revocation of building permits[3] or driving licenses,[4] and a number of disputes as to the binding implications of particular authorizations especially in the field of import licensing.[5]

On some occasions our Courts have tended to approach these issues from the point of view of the application of 'principles of justice'[6] but they have also favoured an adaptation of the law of contract involving the reading of implied contractual obligations into administrative authorizations or decisions communicated to third parties and holding that the Administration is obliged to respect such implied agreements or pay damages in default.

It is noteworthy that in the *Francesco Camilleri v. Lorenzo Gatt noe*[7] decision, a case about the alteration of street levels, the Court decided the issue on the basis of French and Italian writings and judgements and made reference both to the notion of a tacit 'contract' between the public authorities and the owners of property abutting on a public street and to the legitimate expectation (*legittima speranza*) which the construction of a public street at a certain level gives rise to.

The following extract from that judgement is of particular interest:

> *Atteso che nel silenzio di una legge che impone tale obbligo, questo si potrebbe bene desumere da un' accordo tacito che interviene tra il governo ed i privati, quando ilprimo, aprendo una strada, permette a questi ultimi d' innalzare le loro costruzioni lungo la stessa, aprirvi porte e finestre e scaricarvi le acque piovane; per cui eglino nutrono la legitima speranza di non essere disturbati nel godimento.*

It is also significant that in the same judgement the Court set aside the position expressed in a British judgement to the effect that the change in road levels would only give rise to the payment of compensation if it were undertaken 'wrongfully, arbitrarily, negligently and oppressively'. The reason given in the judgement is that the particular British decision was 'apparently' based on a specific law (*ma tale decisione sembra basata su uno statuto speciale, ivi citato*).

This approach, based on notions of justice and an adaptation of the law of contract, has over the years provided protection against some arbitrary or over zealous decisions by the Administration but one problematic aspect of applying a 'contract' test rather than a 'fairness' test in public law is that the notion of contract becomes one of doubtful assistance where specific rights cannot be read into the position of the plaintiff, such as in the case of exercise of powers of a 'prerogative' nature,[8] or where the effects of a change in the Administration's

1 Vide *Carmelo Micallef v. Direttur tax-Xogħolijiet*, (Court of Appeal 28th February 2001) quoting *Francesco Camilleri v. Lorenzo Gatt noe*, (Vol. XVIII, ii. 171, 17th May 1902), *Carmelo Micallef v. Brigadier John Belle McCance noe*, (Vol. XXXVIII. ii. 637, 7th February 1953) and *P. L. Constantino Fenech v. Camillo Gatt noe et*, (Vol. XVIII. ii. 164), *Mgr. Can. Dr Luca Zammit v. Col. J. W. Sill noe*, (Vol. XXI. i. 247), *Giuseppe Xuereb et v. Perit Carmelo Micallef noe*, (Vol. XXXVII. ii. 753), and *Antonio Camilleri v. Perit Carmelo Micallef*, (Vol. XXXIV. 1. 66).

2 *P. L. Francesco Azzopardi v. Emilia Malfiggiani et*, (First Hall Civil Court 5th June 1902).

3 *John Lowell v. Dr Carmelo Caruana noe*, (Civil Court First Hall, 14th August 1972), and *Mary Grech v. Ministru għall-Iżvilupp ta' l-Infrastruttura et*, (Court of Appeal 29th January 1993 and Civil Court First Hall 4th August 1989).

4 *Pace v. De Gray*, (Court of Appeal, 25th April 1969).

5 *Emmanuel Zahra v. Chief Government Medical Officer*, (Court of Appeal 23rd September 1993).

6 *Vide Mary Grech v. Ministru għall-Iżvilupp ta' l-Infrastruttura et*, (Court of Appeal 29th January 1993 and Civil Court First Hall 4th August 1989).

7 Civil Court First Hall, (Vol. XVIII, ii. 171, 17th May 1902) per Mr Justice G. Pullicino.

8 In English common law the exercise of prerogative powers has been subject to judicial review since *R. v. Criminal Injuries Compensation Board, ex parte Lain*, [1967], 2 QB 864.

policies are unfair without being in breach of such 'rights' of third parties.

The private law notion of contract may indeed match uneasily in a number of public law relationships where there is in fact no real 'contract' to be found or implied and where the private person's right may not extend to the conferment of a benefit but may be limited to a right to a hearing before a change of policy is implemented.

It is also relevant that the classification of acts of the Administration as 'contracts' with those effected by them may tend towards denying the flexibility required for the governance of a State in an increasingly demanding and rapidly changing national and international environment.

Such changes may often lead to situations, which are not uncommon, where public authorities find themselves unable to deliver on the promises which they had made. This is not necessarily the result of any policy intended, as Francis Bacon, rather cynically, remarked many centuries ago, to 'hold men's hearts by hopes when it can not by satisfaction' but, as Lord Justice Schiemann noted in a recent England and Wales Court of Appeal decision,[9] such a breach of promise may be due to circumstances where

> Seen from the point of view of administrators focusing on the problem immediately before their eyes a promise seems reasonable or will at least reduce the need to worry further in the immediate future about the promisee. But when they, or their superiors, focus on a wider background it appears that the making of the promise was unwise or that, in any event, its fulfilment seems too difficult.

This is not to say that lack of proper foresight is acceptable, but one cannot ignore the fact that it is nevertheless a practically unavoidable reality where administrators are called upon to take decisions in an environment where problems are increasingly multifarious and their solutions subject to various legal, political, international and budgetary constraints which are subject to rapid change.

It is also of the essence of the democratic system that the Administration must be able to retain flexibility in decisions about the use and allocation of resources and a legal system based on an implied obligation to perpetuate the 'status quo' is bound to run into conflict with the essentials of democracy, not to mention the economic interests of the country as a whole.

The Administration's flexibility requirements however still have to co-exist with the private person's right to the protection of the certainty of the law and a suitable balance has therefore to be sought between the Administration's need to be able to change and adapt its policies and the private person's right to protection against capricious or conspicuously unfair policy changes often resulting from bad administration.

Ensuring Fairness

The doctrine of 'legitimate expectation' is intended to protect private persons against capricious changes in the Administration's policies which although being 'legal' in that they do not go against any express provision of the law, are nevertheless unfair in that they imply a breach of promise amounting to an abuse of power. The concept of 'legitimate expectation' implies that, subject to statute, if a policy or a decision is made which confers a benefit then that policy will not be changed without granting the person concerned a reasonable opportunity to make representations and, where the expectation relates to a substantive benefit, without giving due consideration to the promise which was made and to the effects of failing to honour it for reasons of public interest.

The rule that a public authority should not frustrate a person's legitimate expectation is, in fact, an aspect of the rule that a public authority must act fairly and reasonably. As stated above, the rule operates both with regard to procedural rights and with regard to substantive rights and it draws upon the principle of good administration which prima facie requires public authorities to adhere to their promises.

As stated in the England and Wales Court of Appeal decision in *R. v. North and East Devon Health Authority ex parte Pamela Coughlan and Secretary of State for Health, Intervenor and Royal College of Nursing, Intervenor*,[10]

> The court's task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or an extant promise.

As a result of the need to protect the individual against unfair treatment the doctrine of legitimate expectation has been developed and expounded upon in various common law jurisdictions in a manner which Mr Justice Kelly sitting in the High Court of Ireland in the case of *Glencar Exploration PLC v. Mayo County Council*[11] even described as not being easily reconcilable with one another.

Protecting 'Legitimate Expectations'

In English Law the doctrine of 'legitimate expectation' was first expounded by Lord Denning in the case of *Schmidt v. Secretary of State for Home Affairs*[12] in 1969.

9 London Borough of Newham and Manik Bibi and Ataya Al-Nashed, *R. v. [2001] EWCA*, Civ 607, (26th April 2001).
10 [1999] EWCA Civ (16 July 1999).
11 [1998] IEHC 137 (20 August 1998).
12 (1969) 2 Ch 149 at 170-71.

That case concerned the decision of the Secretary of State for Home Affairs not to grant a number of foreign students the right to stay in the United Kingdom for the purpose of continuing their studies without granting the students a hearing. In that case although the application was turned down since the students did not have a right to stay one day more than what was originally permitted, Lord Denning stated that if a person had a right, interest or legitimate expectation he could claim a right to be heard whenever a public authority has by promise or by conduct created a 'legitimate expectation' that a hearing will be given.

In practice, the theory extends the protection granted by the rules of natural justice to legitimate expectations (as distinct from rights) of persons affected by the exercise of power by the Administration. As devised by Lord Denning it was

> a device that permitted the Courts to invalidate decisions made without hearing a person who had a reasonable expectation, but no legal right, to the continuation of a benefit, privilege or state of affairs. It therefore helped to protect a person from the disappointment and often the injustice, that arises from the unexpected termination by a government official of a state of affairs that otherwise seemed likely to continue.[13]

The Irish Courts had apparently not applied the doctrine until 1988 when Chief Justice Findlay presiding over the Supreme Court of Ireland in the case of *Webb v. Ireland*[14] stated that

> It would appear that the doctrine of 'legitimate expectation', sometimes described as 'reasonable expectation', has not in those terms been the subject matter of any decisions of our Courts. However, the doctrine connoted by such expressions is but an aspect of the well recognized concept of promissory estoppel (which has been frequently applied in our Courts), whereby a promise or representation as to intention may in certain circumstances be held binding on the representor or promissor. The nature and extent of that doctrine in circumstances such as those of this case has been expressed as follows by Lord Denning MR in *Amalgamated Property Company v. Texas Bank*, [1982], QB84, 122:
>
> 'Where the parties to a transaction proceed on the basis of an underlying assumption – either of law or of fact – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Courts will give the other such remedy as the equity of the case demands'.

In a 1993 case, before the High Court of Ireland,[15] Costello J. after reviewing various authorities in the United Kingdom and in Australia defined the practical effects of the doctrine of legitimate expectation in Ireland as follows:

I can summarize the legal principles which I think are to be derived from the authorities to which I have referred and which are relevant for the purposes of this case as follows:

1. There is a duty on a Minister who is exercising a discretionary power which may affect rights or interests to adopt fair procedures in the exercise of the power. Where a member of the public has a legitimate expectation arising from the Minister's works and/or conduct that
   (a) he will be given a hearing before a decision adverse to his interests will be taken, or
   (b) that he will obtain a benefit from the exercise of the power, then the Minister also has a duty to act fairly towards him and this may involve a duty to give him a fair hearing before a decision adverse to his interests is taken. There would then arise a correlative right to a fair hearing which, if denied, will justify the Court in quashing the decision.
2. The existence of a legitimate expectation that a benefit will be conferred does not in itself give rise to any legal or equitable right to the benefit itself which can be enforced by an Order of Mandamus or otherwise. However, in cases involving public authorities, other than cases involving the exercise of statutory discretionary powers, an equitable right to the benefit may arise from the application of the principles of promissory estoppel to which effect will be given by appropriate Court order.
3. In cases involving the exercise of a discretionary statutory power, the only legitimate expectation relating to the conferring of a benefit that can be inferred from words or conduct is a conditional one, namely, that a benefit will be conferred provided that at the time the Minister considers that it is a proper exercise of the statutory power in the light of current policy to grant it. Such a conditional expectation cannot give rise to an enforceable right to the benefit should it later be refused by the Minister in the public interest.
4. In cases involving the exercise of a discretionary statutory power in which an explicit assurance has been given which gives rise to an expectation that a benefit will be conferred no enforceable equitable or legal right to the benefit can arise. No promissory estoppel can arise because the Minister cannot estop either himself or his successors from exercising a discretionary power in the manner prescribed by Parliament at the time it is being exercised.

The Main Issues in Litigation

How do the Courts go about determining 'legitimate expectation' cases?

In the recent England and Wales Court of Appeal (Civil Division) decision in the case of *London Borough of Newham*

[13] As per McHugh J., High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh*, (1995) 128 ALR 353.
[14] [1988] IR 353.
[15] *Tara Prospecting Limited and Another v. Minister for Energy*, Ireland and the Attorney General, [1993], ILRM 771.

And Manik Bibi And Ataya Al-Nashed, R. v.[16] Lord Justice Schiemann, Lord Justice Sedley and Mr Justice Blackburne define the questions to be asked and answered in the determination of such cases as the following:

> In all 'legitimate expectation' cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.

The Court then went on to define the first question ('To what has the public authority committed itself?') as a question of analyzing the evidence in order to determine whether the public authority has said or done anything which can legitimately be considered to have generated an expectation. If it results that no expectation was 'legitimately' generated, as would probably be the case when a promise was made without lawful authority, the case would stop there.

Finding answers to the second and third questions ('Whether the authority has acted or proposes to act unlawfully in relation to its commitment?' and 'What should the Court do?') is a more complicated matter involving the definition of the 'measuring rods' to be used in order to define whether a certain course of action constitutes an abuse of power and the definition of the judicial reaction once such abuse is identified.

As Professor Craig states in his *Administrative Law*[17] there are often tensions between several values in these cases and one often has to decide which good to attain and which good to forego. There are, on one hand, administrative and democratic gains in allowing the Administration the flexibility of coming to different conclusions about the allocation of its resources in the future whilst on the other hand there is value in holding the Administration to the promises which it made, thereby encouraging responsible public administration and allowing people to plan their lives sensibly.

It is therefore very difficult to come to wide-ranging formulations applicable to all cases in determining whether the Administration has acted unlawfully

As stated by the England and Wales Court of Appeal in the quoted Newham[18] decision:

> history shows that wide-ranging formulations, while capable of producing a just result in the individual case, are seen later to have needlessly constricted the development of the law. Thus it was the view of this court in Coughlan[19] that a principle, apparently earlier embraced by this court in *R. v. Secretary of State for the Home Department, ex parte Hargreaves*,[20] to the effect that the court would only enforce expectations as to procedure as opposed to expectations of a substantive benefit, was wrongly framed.

One question which often arises is that as to whether a plaintiff must prove that he or she has relied upon a promise in order to be able to demand judicial review on the grounds of breach of a legitimate expectation.

In the England and Wales Court of Appeal decision of *R. v. Secretary of State for Education and Employment, ex parte Heather Charis Begbie*[21] it was held that reliance, though potentially relevant in most cases, is not essential. However, Mr. Justice Peter Gibson, giving the leading judgement, also stated that:

> it would be wrong to understate the significance of reliance in this area of the law. It is very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation.

This is also broadly in agreement with what Professor Craig has proposed in this regard in his *Administrative Law*[22]

> Detrimental reliance will normally be required in order for the claimant to show that it would be unlawful to go back on a representation. This is in accord with policy, since if the individual has suffered no hardship there is no reason based on legal certainty to hold the agency to its representation. It should not, however, be necessary to show any monetary loss, or anything equivalent thereto.

Professor Craig however also gives the following example of a case where reliance is not essential:

> Where an agency seeks to depart from an established policy in relation to a particular person, detrimental reliance should not be required. Consistency of treatment and equality are at stake in such cases, and these values should be protected irrespective of whether there has been any reliance as such.

The case of *R. (On the application of Zeqiri) v. Secretary of State for the Home Department*[23] is a good illustration of reference to 'detrimental reliance' in 'legitimate expectation' cases. It was an immigration case filed by a Kosovar seeking asylum in the United Kingdom which had been pending

16 [2001] EWCA Civ 607 (26th April, 2001).
17 P. P. Craig, *Administrative Law*, 4e. Ch. 19.
18 At 7 above.
19 *R v. North and East Devon Health Authority, ex parte Pamela Coughlan and Secretary of State for Health, Intervenor and Royal College of Nursing*, Intervenor, [1999], EWCA, Civ (16th July 1999).
20 [1997], 1 W. L. R. 906.
21 2000, 1, W. L. R. 1115.
22 As at 14 above p. 619.
23 [2001], All ER (D) 121 (Mar) (Lord Phillips, MR, Kennedy and Dyson, LJJ).

a final decision in another test case[24] which was destined for the House of Lords. The issue in the test case was identical to that in Zeqiri, namely, whether the applicant's claim for asylum should be decided in the United Kingdom or in Germany. It was assumed all along that if it was held in the test case that the claim should be decided in the United Kingdom then the same result would follow in Zeqiri. Eventually when the decision was given in the test case it was decided that the application for asylum should be decided in the United Kingdom. The Secretary of State submitted, however, that, by reason of a change of circumstances in Germany, it was open to him to proceed on the basis that Zeqiri's claim for asylum should be determined in Germany. The England and Wales Court of Appeal however held that to be unfair in the circumstances of that case. It seems that the court proceeded on the basis that Zeqiri had a 'legitimate expectation' to the effect that, in circumstances similar to those of the test case, his application for asylum would be determined in the United Kingdom and concluded that change of position or reliance on the part of Zeqiri did not need to be shown. The Master of the Rolls delivering the substantive judgement said:

> Mr Gill[25] submitted that the period that the appellant spent 'in limbo', awaiting the progression of [the test case] to the House of Lords has involved further hardship. The prolonged period of uncertainty as to his fate will have caused him mental stress and he will have been forced to subsist without the benefits of those whose claim to asylum has been recognized... I consider that this hardship is material to the question of whether it would now be fair for the Secretary of State to remove the appellant to Germany on the basis that the decision for which he has been waiting is of no relevance to his case. It is unfair for the Secretary of State to change tack at this late stage.[26]

This decision was reversed by virtue of a House of Lords judgement of the 24 January 2002[27] on the basis of a disagreement as to whether a 'legitimate expectation' had in fact been created to the effect that following the decision of the Court of Appeal, Mr Zeqiri's application for asylum would be considered on its merits.

The following passage from the House of Lords judgement illustrates the point made by that Court and throws further light on the application of the 'legitimate expectation' doctrine:

> 44. It is well established that conduct by an officer of state equivalent to a breach of contract or breach of representation may be an abuse of power for which judicial review is the appropriate remedy: see Lord Templeman in *R. v. Inland Revenue Commissioners, Ex p Preston*, [1985] AC 835, 866-867. This particular form of the more general concept of abuse of power has been characterized as the denial of a legitimate expectation. In considering the expectations which may legitimately arise from statements to taxpayers by the Inland Revenue, Bingham LJ said that they must be 'clear, unambiguous and devoid of relevant qualification': see *R. v. Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd.*, [1990] 1 WLR 1545, 1569G. Mr Gill said that while it might be appropriate in the case of dealings between the Revenue and sophisticated tax advisers to insist upon a high degree of clarity in the alleged representation, this need not necessarily be required in other cases. Kosovar refugees cannot be expected to check the small print. In principle I agree that an alleged representation must be construed in the context in which it is made. The question is not whether it would have founded an estoppel in private law but the broader question of whether, as Simon Brown LJ said in *R. v. Inland Revenue Commissioners, Ex p Unilever PLC*, [1996] STC 681, 695B, a public authority acting contrary to the representation would be acting 'with conspicuous unfairness' and in that sense abusing its power.
>
> 45. In the present case what is relied upon is not a representation directly to the applicants but one which is said to arise out of the conduct of adversarial litigation and was made to the applicant's legal representatives. The question is therefore what would have been understood by a lawyer rather than an unaided Kosovar refugee.'

As has already been stated a central issue to be examined in cases based on the alleged breach of a 'legitimate expectation' is that as to whether in going back on its promise the Administration has acted in a manner 'so unfair as to amount to an abuse of power'.[28] In this regard, although it is not the case that each unfulfilled promise constitutes an abuse of power, when the Administration adopts a course of action in breach of a previous promise without even considering the breach of the promise as being a relevant consideration the decision would amount to such an abuse of power.[29]

Seeking the Appropriate Reaction

The third and last question, regarding the appropriate judicial reaction once the Court finds that a breach of a legitimate expectation amounted to an abuse of power, raises the

[24] *R v. Secretary of State for the Home Department, ex parte Besnik Gashi*, [1999], INLR 276.
[25] Counsel to the applicant.
[26] In paragraph 68 of the judgment.
[27] [2002], UKHL 3.
[28] *Vide R. v. Inland Revenue Commissioners ex parte Unilever*, [1996] S. T. C. 681.
[29] *Vide* also Coughlan decision quoted at 16 above.

problem as to whether the Court can order the fulfilment of the promise (as in the case of a breach of contract) or whether it may simply annul the administrative decision in question and send the matter back to the public authority concerned for reconsideration.

In the United Kingdom it would appear that the general rule in Administrative Law cases is that the Courts will not order specific performance where to do so would be to assume functions constitutionally vested in the Executive. This is also the position which appears to result from the wording of article 469A of the Maltese Code of Organization and Civil Procedure which regulates judicial review.[30]

One particularly strong argument in favour of reference for reconsideration rather than ordering specific performance is that based on the fact that in considering judicial review cases the Court often concentrates on particular aspects relating to the legality of the decision and in so doing it usually has before it only part of the relevant material upon which the decision on the merits is made.

As Lord Bingham said in *R. v. Cambridge Health Authority, ex parte B*:[31]

> ...it would be totally unrealistic to require the authority to come to the court with its accounts and seek to demonstrate that if this treatment were provided for B then there would be a patient, C, who would have to go without treatment. No major authority could run its financial affairs in a way which would permit such a demonstration.

In the Newham[32] decision, which was about entitlement to public housing, it was held by the Court that:

> In an area such as the provision of housing at public expense where decisions are informed by social and political value judgements as to priorities of expenditure the court will start with a recognition that such invidious choices are essentially political rather than judicial. In our judgement the appropriate body to make that choice in the context of the present case is the authority. However, it must do so in the light of the 'legitimate expectations' of the respondents.

The Australian decision of *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh*,[33] also discusses the extent to which one can demand that a legitimate expectation be fulfilled:

> The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way.
>
> That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law... But, if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.

These *dicta* demonstrate that although there are cases, mostly in the field of legitimate expectations to substantive benefits, where there can only be one lawful answer to the question whether the Administration should be obliged to honour its promise, it would be very risky to assume that this will always be the case.

International Treaties

The Australian decision in Teoh is particularly important with regard to the question as to whether an international treaty to which the State is a party but which has not yet been incorporated into national law can give rise to a 'legitimate expectation' to the effect that the Executive will take the provisions of the Treaty into consideration in the execution of its functions.

As is the case in Malta[34] the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been incorporated into national law. This principle has its foundation in the proposition that in the Australian constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law falls within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into Australian municipal law cannot operate as a direct source of individual rights and obligations under that law. This is also substantively the position emerging from Malta's Ratification of Treaties Act.[35]

Nevertheless, the High Court of Australia held that:

30 The wording of Article 469A only entitles the Court to 'enquire into the validity of any administrative act or declare such act null, invalid or without effect'.

31 [1995], 2 All E. R. 129.

32 As at 7 above.

33 As at 10 above.

34 Vide Ratification of Treaties Act, 1983 (Cap 304). The cases cited in Teoh in support of this are *Chow Hung Ching v. The King*, (1948), 77 CLR 449 at 478; *Bradley v. The Commonwealth*, (1973), 128 CLR 557 at 582; *Simsek v. Macphee*, (1982), 148 CLR 636 at 641-642; *Koowarta v. Bjelke-Petersen*, (1982), 153 CLR 168 at 211-212, 224-225; *Kioa v. West*, (1985), 159 CLR 550 at 570; *Dietrich v. The Queen*, (1992), 177 CLR 292 at 305; *J. H. Rayner Ltd. v. Dept. of Trade*, (1990), 2 AC 418 at 500. The position also corresponds with that in the Unitd Kingdom at common law *vide Thakrar v. Secretary of State for the Home Department*, (1974), 2 All E. R. 261

35 1983, Cap 304 Laws of Malta.

> by ratifying the Convention[36] Australia has given a solemn undertaking to the world at large that it will: 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies' make 'the best interests of the child a primary consideration

and that it had thus given rise to a legitimate expectation, in the absence of statutory indications to the contrary, to the effect that the said provisions of the Convention on the Rights of the Child would be taken into account when Australian authorities came to consider whether to grant resident status and whether to deport Mr Teoh, a Malaysian citizen previously convicted of drug offences in Australia, from Australia to the detriment of his children.

It is relevant to note in this regard that in its decision in *Kavanagh v. Governor of Mountjoy Prison*[37] the High Court of Ireland affirmed that the decision in Teoh was only concerned with procedural fairness and that it could not be invoked in order to demand the quashing of a conviction by the Irish Courts on the basis of a decision of the Human Rights Committee established under the International Covenant on Civil and Political Rights. In that case the High Court of Ireland also held that:

> Even if the Covenant is part of Irish domestic law, the subject of international law is the State and not the individual: See O'Laighleis (1960) IR at 124. Such matters as are raised by the Applicant are not justifiable at the suit of an individual.

In the United Kingdom the decision in Teoh, founding a 'legitimate expectation on the terms of a treaty was approved obiter in *R. v. Home Secretary ex parte Ahmed*,[38] but H. W. R. Wade & C. F. Forsyth point out in the eight edition of their *Administrative Law* that the principle has not since been adopted.[39]

A Possible Maltese Development?

Can the doctrine of legitimate expectation as outlined above adopted by a Maltese Court as a basis for deciding an Administrative Law case?

As stated above, the Maltese Courts have been rather inclined to apply references to an adaptation of the law of contract where expectations of citizens are frustrated by actions of the Administration but cases may arise where the Courts would be confronted with a situation where the public law test of 'fairness' would be more appropriate than an adaptation of the private law of contract which may be inapplicable *in casu*. Indeed the search for a 'just' solution has also been an underlying factor in Maltese decisions and we have had cases such as the Mary Grech[40] decision where the sole consideration was the application of 'principles of justice' a concept much akin to the notion of 'fairness'.

The affinity between British Common Law and Maltese Administrative Law has clearly survived Malta's independence even though one can argue that Maltese legislative interventions on judicial review in 1981[41] and in 1995[42] and the incorporation of the European Convention on Human Rights into Maltese law long before this was incorporated into British law have marked some significant departures.

In his introduction to *Cases in Administrative Law* Professor Ian Refalo, reviewing the development of Maltese Administrative law states that:

> The most important of these developments has been, perhaps, the rule that British Common Law is a source of Maltese Administrative Law. The principle has been affirmed in a number of cases; what is perhaps even more significant is that there is no case where the principle has been rejected or declared not to apply.

As recently as the 19th November 2001 Mr Justice Filletti in the judgement of the First Hall of the Civil Court *Frank Pace et v. Kummissarju tal-Pulizija et* stated that:

> *fejn l-atti jew azzjonijiet amministrattivi m'humiex regolati bil-liġi Maltija, allura r-regoli tad-dritt amministrattiv applikabbli jsibu fonti fid-dritt amministrattiv Ingliż, ara – John Lowell et noe v. Onor. Clo. Caruana noe, Prim Awla tal-Qorti Ċivili, 14 ta' Awissu 1972, u Onor. Prim Ministru v. Sr. L. Dunkin noe – Qorti Ċivili, 26 ta' Ġunju 1980.*

Article 469A of the Code of Organization and Civil Procedure entitles the Courts to:

> enquire into the validity of any administrative act or declare such act null, invalid or without effect only in the following cases:
> 1(b)
> (ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural re-

36 Art. 3.1 of the United Nations Convention on the Rights of the Child.
37 [2001], IEHC 77 (29th June 2001).
38 [1999], COD 69 (Lord Woolf MR).
39 Footnote 68 at page 498 quoting *R v. DPP ex parte Kebilene*, [1999], 3 WLR 175 (DC) holding that the ratification of the European Convention on Human Rights did not found a legitimate expectation that it would be followed, and *R. v. Home Secretary ex parte Behluli*, [1998], COD 328 holding that there was no legitimate expectation that asylum applicants would be dealt with in accordance with the Dublin Convention. Wade and Forsyth also refer to *R. v. Uxbridge Magistrates' Court ex parte Adimi* which held that asylum seekers had a legitimate expectation that they would not be prosecuted for using false documents contrary to Article 31 of the UN Convention Relating to the Status of Refugees.
40 As at 3 and 6 above.
41 Act VIII of 1981.
42 Act XXIV of 1995.

quirements in performing the administrative act or in its prior deliberations thereon; or

(iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or

(iv) when the administrative act is otherwise contrary to law.

Given that the doctrine of 'legitimate expectation' is about extending the protection of the principles of natural justice, about preventing the abuse of a public authority's power by ensuring that promises are treated as 'relevant considerations' and that any exercise of power that is abusive is generally considered as an illegality, the article provides a sufficient legal basis for the application of the doctrine of legitimate expectation in Maltese law within our system of judicial review.

This basis in law, authorities and jurisprudence provides fertile ground for the development of the doctrine of legitimate expectation, already established in the Courts of other countries with a 'common law' Anglo-American tradition in Administrative law such as the United Kingdom, Australia and Ireland, in Maltese law. In this regard one must not ignore the experience acquired by our Courts in interpreting the Articles on the Fundamental Rights and Freedoms of the Individual in Chapter IV of the Constitution of Malta, and the European Convention on Human Rights. That experience can also enable our Courts to make a substantial contribution towards defining the extent of review of Administrative acts for 'fairness', in line with the case law of the European Court of Human Rights and of the European Court of Justice and with the benefit of the discrete Maltese tendency to look at both British and Continental ways.

2 Just Satisfaction under the Convention
Is There a Southern Dimension?*

Giovanni Bonello, Judge of the European Court of Human Rights

Introduction

When the European Court of Human Rights finds a violation of any protected right, the Convention relies on 'just satisfaction' to re-establish the equilibrium disturbed by the national authorities through the agency of that violation. The Court, mindful of its supranational character and desirous to intrude as minimally as possible in the sphere of national sovereignty, has deliberately imposed on itself a self-discipline that is mostly manifest in how far it will go in ordering the offending state to redress the wrong inflicted

From its early days the Court determined never to order violating states any acts of specific performance, but to limit itself to a declaratory judgement that the Convention has been violated, followed occasionally, but not always, by an order to the state to pay a sum of money to the victim by way of compensation. The Court does not declare laws or administrative acts which it finds in breach of the Convention to be null, nor does it enjoin a *restitutio in integrum*, even in cases where this would be factually possible. In the final analysis, the applicant can at best, expect a certificate of having been a victim of a human rights abuse, and a payment of a sum of money to cover real damages, moral damages and reimbursement of costs.

The process by which the offending law, and the administrative action or inaction are rectified in the domestic arena are no direct concern of the Court. A political process, entrusted to the workings and monitoring of the Committee of Ministers of the Council of Europe, sees to that.

It is hardly short of a platitude that, by their very nature, human rights are the common heritage of all mankind. The Universal Declaration of Human Rights (1948) starts by referring to the 'equal and inalienable rights of all members of the human family' as the foundation of freedom, justice and peace in the world. And the European Convention of Human Rights aims at securing to 'everyone' within the jurisdiction the rights and freedoms listed therein.

In theory it would amount to an offensive contradiction in terms to speak of a southern or northern perspective of human rights. Objectively, the moment the Court acknowledged that a western perception or enforcement of human rights can be different from an eastern one, or that different criteria should govern the application of human rights depending on which geographical area is at issue, the whole philosophical fabric of human rights would be nullified. The values enshrined in Art. 14 of the Convention that, in the enjoyment of fundamental rights any discrimination based on race, colour or national origin is impermissible, would be infringed, and not by some rogue state, but by the Court itself. In fact, one of the unwritten functions of the Court I perceive to be the harmonization of the enforcement of the Convention throughout all member states, aiming at a substantial, rather than a fictitious, uniformity in the application of the Convention.

Judge Rozakis's intervention focused on how the Court attempts to face the challenges posed by the occasionally huge differences that exist between Convention states in matters, among others, of cultural sensibilities, historical traditions, religious beliefs, national economic wealth, and conflicting legal systems. It is well to launch any discussion asserting the universal primacy of human rights, and that they should be enjoyed even-handedly across the continents; the Convention protects Europe from the Atlantic to the Urals, from the polar regions to the south Mediterranean.

The Court will always keep in mind as a long term objective a homogeneous interpretation and enforcement of the Convention throughout the whole of Europe; but it would be slow, at the same time, to ride roughshod over sensitive issues by imposing its own world-views when these jar stridently with deeply-felt sectional convictions and aspirations. It is easy to feel good about the international bonding brought about by a common human rights practice. But how is the Court to cope with single issues that, at the present stage of European fragmentation, evoke the most diverse evaluations in different societies? Take abortion, an issue which spans the whole gamut of legal experience. Abortion, a universally controversial subject, ranges from a protected fundamental right in the USA, to a decriminalized practice in many Con-

* Delivered on 15th December 2001 during a seminar on 'The European Convention on Human Rights: A Southern Perspective'. This seminar was organized by GhSL and ELSA (European Law Students' Association).

vention states, to a criminal offence in some others, like Ireland and Malta. You cannot have a wider spectrum than that. In the name of standardization, how would the Court deal with such temperamentally-charged issues?

My remit is to explore if the profound divergences underlying European thought, often reflected in conflictual values, have left an imprint in the application of Art. 41 (formerly Art. 50) which deals with just satisfaction. Can it be said that the Court's case-law evidences different criteria, attributable either to the victim's or to the violating state's geographical identity? Are there a first and a second Europe? We have to keep in mind that the Court is the sum-total of 41 individual judges, of whom 31 are from the north and central Europe, 24 from the older democracies and 17 from the newer ones. They sit in delicately calibrated formations which strive towards a fair balance between all the different personal backgrounds. However, except for Judge Rozakis, from Greece, Senior Vice-President, all the other seven officials of the Court come from the old democracies from north and central Europe.

How Others See Us

Let me say from the outset that I consider the European Convention and the European Court of Human Rights to be the greatest single contribution to the assertion of human rights, in the whole span of history. Their success has been astounding, their benefits bountiful, their achievements inspiring. Any criticism I may make or borrow from human rights literature should always be perceived keeping in mind the unqualified respect I have for this hallowed institution. Every giant has its Achilles's heel. The Court, in my view, has Articles 6 and 41.

In fact these are two areas in the Court's case-law that, more than any other, have attracted consistent and widespread criticism in legal circles: its unsteady, and perhaps irrational waverings as to which 'civil rights and obligations' attract the guarantees of Article 6 (fair hearing) together with the wayward manner in which 'just satisfaction' is awarded or denied, and the methods used to asses it. This bane has perplexed the Court since its earliest days.

Criticisms against the way Strasburg awards 'just satisfaction' after a finding of a violation have received what is possibly the most damning expression in the very recent report by the English and Scottish Law Commission on damages under the Human Rights Act, 1998.[1] It would not be practicable to summarize here that voluminous report; one can only try to reproduce its main heads.

The report opens by referring to the 'Absence of clear principles in the Strasburg case-law' as to when damages should be awarded and how they should be measured. This lack of transparency and coherence is attributed to various reasons, among which is the fact that the Court does not, differently from British courts, apply a strict doctrine of precedent: 'apparently irreconcilable inconsistencies sometimes result'. The fact is that within Europe there are very diverse traditions as to the calculation of compensation. While the UK, German and Dutch systems have detailed rules governing the assessment of damages, other systems proceed empirically 'swayed by considerations of fairness' which give the judge a degree of 'unstructured discretion to adjust the award as he or she deems fit'.

Another reason for the lack of clear and precise rules as to the award and the liquidation of damages stems from the fact that the Court is an international tribunal, that has to digest a heavy mix of legal systems, always careful to strike a viable balance 'between exercising moral leadership in the field of human rights law' and, at the same time, 'ensuring that it does not... alienate the support for the European Court of Human Rights in particular states'. Judges are drawn from different backgrounds and diverse jurisdictions, and have varied experiences in awarding damages. Inevitably their views as to the proper levels of compensation will differ, sometimes very widely. When it comes to moral damages, in Strasburg quaintly called non-pecuniary damages, their assessment, as Lord Carnwath observed, is inevitably 'something of a jury exercise'. That was not meant as a compliment.

A jurist, recently summarized the position thus: 'It is rare to find a reasoned decision articulating principles on which a remedy is afforded. One former judge of the ECHR privately states 'We have no principles'. Another judge responds 'we have principles; we just do not apply them".[2]

Two other commentators warned against wasting time attempting to identify principles that do not exist.[3] This is echoed by other authorities, who commiserate with domestic courts 'largely frustrated in their search for principles'.[4] The English and Scottish report singles out my dissenting opinion in *Nikolova v. Bulgaria*[5] for 'the vigour of the language' by which I distanced myself from the Court's failure to give any reasons why it refused to grant damages after finding a violation of fundamental rights. The report concludes, that 'the Strasburg Court's explanations of its awards for just satisfaction are often perfunctory or non-existent'

1 CM 4853, October 2000.
2 Dinah Shelton, *Remedies in International Human Rights Law*, 2000, p. 1.
3 Lester & Pannick, *Human Rights Law and Practice*, 1999, para. 2.8.4.
4 Grosz, Beaston, and Duffy, *The 1998 Act and the European Convention*, 2000, para. 6.21.
5 25 March 1999.

'The inconsistencies of the Court's jurisprudence on Article 41 make it extremely difficult, even for informed legal advisers to manage their expectations [those of prospective litigants] by being able to advise with confidence on the possible outcome'.[6]

Offensive as it may sound, Jean-François Flauss recently described the liquidation of damages by the Strasburg Court as, at best, empirical, a sort of do-it-yourself (bricolage).[7]

One of the major ideals of the Court – of any court really – is the attainment of legal certainty. In this particular field of just satisfaction, none currently exists. Rights are not automatically armed with remedies. Remedies often have the trappings of princely largess. Lord Devlin famously said 'The discretion of the judge is the first instrument of tyranny'.[8] I do not know whether it is the first. It certainly is not a pleasant one.

Reimbursements of Costs

This is one of the provinces of just satisfaction in which the unfettered discretion of the Court manifests itself most. The idiosyncrasies and the weaknesses, of the system speak out loudly.

Costs of legal proceedings fall naturally into two categories – those costs incurred in the domestic jurisdiction, and those incurred in the Strasburg organs. While the first present no major difficulties, the second are fraught with surprises and underscore dramatically a north/south divide.

Legal Costs in the Domestic Jurisdiction

As the Convention makes it imperative that the applicant should have exhausted unsuccessfully all domestic remedies, it is normal that the applicant, before forwarding his complaint to Strasburg, would have incurred costs and expenses. It is only in exceptional cases when no form of remedy is available in the domestic jurisdiction that the applicant's legal costs start in the Strasburg Court. Of course, the fact that the domestic system offers no internal remedy to redress the alleged violation, in itself constitutes an autonomous breach of the Convention, which requires that every fundamental right should be fortified by a remedy in case of breach (Art. 13).

As for domestic legal costs whose reimbursement is claimed by the applicant, the Court will only check that they were 'actually and necessarily incurred' and were 'reasonable as to quantum'.[9] Costs will be considered necessary if they were incurred by the applicant to prevent or to redress the breach identified by the Court.[10] The Court usually allows all the costs of the domestic jurisdiction which have not been disputed by the government, even when they are higher than the legal costs current in other Convention states. In general the Court allows in favour of the applicant, fees and costs in line with domestic scales and practices.

Legal Costs in the Strasburg Jurisdiction

Here we are squarely within the Strasburg minefield where huge discrepancies in the taxing of legal costs and fees can be identified. In principle – though subject to various exceptions – I believe it is fair to say that some northern law practices fare infinitely better than southern ones.

The underlying, though silent principle seems to be that the Court will award lawyers appearing in Strasburg a fee comparable to that due when appearing before the highest court of the respondent state, occasionally with a bonus for such extras as whether a hearing was held or not, how complex the case was, the necessity of more than one lawyer and the number of violations found.

Having said that, I believe that it is safe to claim that the Court often awards fortunes in favour of northern lawyers, when, in substantially similar cases, their southern colleagues are awarded risible amounts.

The first Maltese case in Strasburg, *Demicoli v. Malta*[11] came up for hearing at virtually the same time as *The Observer* and *The Sunday Times* applications against the UK. At issue in all these cases were serious matters affecting freedom of the press and the right to a fair trial. In the Maltese case the Court was called upon, in addition, to overturn a formal resolution passed by Parliament and a judgement of the Constitutional Court. As the common-law institute of breach of parliamentary privilege was at stake, the judgement in the Maltese case was bound to reverberate in the UK and Ireland, where identical systems were in place. The Court decided the applications within a few weeks of each other. For five levels of jurisdiction it awarded the Maltese lawyers a fee of LM5,000.00 (from which LM1,800.00 travelling expenses had to be deducted) and the English lawyers a cumulative fee of £200,000.

The trend of awarding high fees to some UK lawyers, and denying the same fees to southern ones, started very early on. In 1962, in the UK case of Young, James and Webster regarding the dismissal of workers who failed to join closed-shop trade unions, the costs of the British lawyers were assessed at £65,000.[12] Since then, the Court has rarely let British lawyers down.

6 Liberty's pleadings in *Kingsley v. UK*, pending.
7 'La reparation due en cas de violation de CEDH', in *Journal des tribunaux droit Europeen*, 1996, No. 25, p. 15.
8 *Report of the Committee on Evidence in Identification*, HMSO, London, 1976.
9 *Minelli v. Switzerland*, 25 March 1983, A 62.
10 *Scozzari & Giunta v. Italy*, 3 July 2000, § 257.
11 27 August 1991, A. 210.
12 18 October 1982, A 55, p. 8.

I will not bore you with details, and acknowledge that it is often difficult to be sure that one is comparing like with like. But a few examples may be enlightening.

Selmouni v. France was a watershed case, in which the Court redesigned its thinking about torture. The costs awarded to the French legal team were *c.* 113,000 FF.[13] In *Aydin v. Turkey*, a rather more 'routine' torture case, the British defence lawyers were awarded 300% more – 340,000 FF.[14] In two Right to Life cases (Art. 2), the Turkish lawyer in the Ogur case got the equivalent of £3,000[15] while the British lawyer in the Caciki case got £20,000.[16]

Even more obvious were the cases of *Gregoriades v. Greece*[17] and *Bowman v. UK*,[18] both Art. 10 violations. In the Greek case the legal fees were *c.* 15,000 FF. In the British case, *c.* 250,000 FF – over fifteen times more.

Compare also two cases in which the central issue was unlawful telephone tapping: *Halford v. UK*[19] and *Kruslin v. France*.[20] In the French case the French lawyers' fees were taxed at 20,000 FF. A minimal award, compared with the UK case, in which the British lawyers were awarded 250,000 FF.

Two further examples to illuminate this subject. The Court quite often refuses to award damages, declaring that the finding of a violation shall, in itself, constitute just satisfaction. This finding of violation, doubling also as compensation, is presumably made when the Court, from the moral high ground on which it sits, would find it uncomfortable to reward with a prize a particularly undeserving applicant. I say presumably, because very rarely, if ever, does the Court explain why it reaches this conclusion. However, two British cases in which the Court refused to go further than merely finding a violation and in which it rejected the claims for material and moral damages, all the same rewarded the lawyers with fees of £35,000[21] and £45,000[22] respectively.

The high legal fees taxed in favour of northern lawyers defending applicants against southern states, bring about another unsavoury bye-product – the lawyer often ends up getting more than the victim he or she has defended. The relatives of Mahmet Kaya who disappeared – presumably killed – during police custody, got £17,500, while their British lawyers got £22,000.[23] Mrs Sukran Aydin, who was raped and savaged by the security forces, was fortunate to get £25,000, but her British lawyers were more fortunate still; they got £34,360.[24] Lest you think there is an element of racial discrimination, let me refer you to the recent case of *Hatton and seven others v. UK* which dealt with the high level of noise round Heathrow airport at night. Each of the victims was compensated with £4,000, but the Court awarded the victims' lawyers a fee of £70,000.[25] I, for one, find myself quite uncomfortable with a situation in which the pain and suffering of the close relatives of a person assassinated by security forces during detention, are valued less then the exertions of a lawyer on their behalf.

Of course, it is quite easy to reduce these issues to exercises in bewilderment. The reality, however, is much more complex than that. Fees charges by northern lawyers in domestic litigation, as compared to those of their southern colleagues, are, in general, substantially higher. They usually relate to current levels of income in each particular country. Lawyers who habitually charge 'northern' fees will be unwilling to act in Strasburg for less. This places the Court in a dilemma. Must it tell the applicants to scout around for the cheapest lawyer on the market because the court will not sanction the reimbursement of a high fee? Can it tell an applicant in a Greek case not to engage an English lawyer? What happens if the Court awards a British lawyer a 'Greek' fee? The problem, in my view, appears quite insurmountable. If the Court awarded British lawyers 'Maltese' fees, they would obviously desert the Strasburg venue. If it awards Maltese lawyers, in cases against the Maltese state, 'British' fees, it would disturb profoundly the social, political and financial realities of the Maltese economy.

Now, while I recognize the objective difficulties that underlie the north/south divide in the matter of legal fees taxed by the Court, I nonetheless find other related situations quite unexplainable. To the best of my knowledge, two cases are on record in which the applicants were professional lawyers

13 28 July 1999.
14 24 September 1997.
15 *Ogur v. Turkey*, 20 May 1999.
16 *Çakici v. Turkey,* 8 July 1999.
17 Rec. 1997-VII, No. 57.
18 Rec. 1998-I, No. 63.
19 Rec. 1997-III, No. 39.
20 A 176-A.
21 *D. v. UK*, Rec. 1999-III, No. 39.
22 *Chahal v. UK*, Rec. 1996-V, No. 22.
23 *Mahmet Kaya v. Turkey*, 28 March 2000.
24 *Aydin v. Turkey*, 25 September 1997.
25 2 October 2001.

who chose to defend themselves in Strasburg proceedings: Dr Joe Brincat who successfully sued Italy[26] and Dr K. F. who sued Germany.[27] They both claimed lawyer's fees for conducting their own defence. The Court rejected Dr Brincat's claim for professional fees, but granted Dr K. F.'s, taxing 10,000 DM in his favour. Both cases related to unlawful detention. The German lawyer complained of being deprived of his liberty for 45 minutes over the statutory period allowed to the police. Dr Brincat's claim, also endorsed by the Court, related, not to an illegal detention of 45 minutes, but in excess of three weeks.

The problem has no easy short-term solution. Perhaps it is too early, in view of the dramatic discrepancies between the economies of the various Convention states, to aspire to anything like a common European scale.

Non-Pecuniary Loss

This is another area in which grave contradictions, inconsistencies and obscurities arise. Having established a violation, the Court faces the dilemma of whether to grant moral damages or not, and, if so, to what extent.

The case-law of the Court has had various occasions to subdivide the diverse heads under which moral damages may be granted. In general it is safe to say that ideally they should constitute a *restitutio in integrum* for physical and mental suffering resulting from a violation of Convention rights. Compensation has been, and may be, awarded in case the violation found has caused anxiety[28] inconvenience[29] frustration[30] loss of reputation[31] loss of family relationship[32] feeling of injustice,[33] sensation of isolation, confusion and neglect[34] and psychological harm.[35]

The Court has, on principle, also accepted that 'by reason of its very nature, non-pecuniary damage of the kind alleged cannot always be the object of concrete proof. However it is reasonable to assume that persons… may suffer distress and anxiety'.[36] It is difficult to comprehend why this very useful and reasonable presumption of suffering has sometimes been relied on, but more often not.

The overriding principle seems to be that both the award and the extent of compensation for moral damages stem from the virtually absolute discretionary powers of the Court. The other side of the coin is that awards quite often have no verifiable foundation other than 'an equitable basis'.[37]

The exercise of the Court's discretionary powers in the granting or not of moral damages brings about a situation of uncertainty, and maybe arbitrariness. In what seem to be very similar circumstances, the Court awards moral damages in one case and denies them in another. Some examples, limited to Art. 5 (freedom from unlawful detention) will suffice:

When the Court found detention to be in breach of Art. 5 §1, moral damages were awarded in *Van der Leer v. Netherlands*[38] and denied in *Ciulla v. Italy*.[39]

In applications in which the breach consisted in failing to bring the detained person promptly before a judicial authority (Art. 5 §3), moral damages were awarded in some cases[40] but denied in others.[41]

In cases where the Court held that domestic proceedings for reviewing the lawfulness of the detention had been defective or failed the test of promptness, (Art. 5 §4) compensation was withheld in some cases[42] and liquidated in others.[43]

The Court's finding that the domestic system did not have in place a remedy to test the legality of detention (Art. 5 §4) was followed by an award of moral damages in some cases[44] but not in others.[45]

It is difficult to reconcile the reasonings behind the award of moral damages for illegal detention. In a French case, in

26 26 November 1992, A 249-A.
27 27 November 1997, Rec. 1997-VII.
28 *Lopez Ostra v. Spain*, 1995, A 2, p. 277.
29 *Olson v. Switzerland*, No. 2, 1994, A 17 p. 134.
30 *Van der Leer v. Netherlands*, 1990, A 12, p. 267.
31 *Salik v. Turkey*, 1998, 26, p. 662.
32 *H. v. UK*, 1998 A 136-B.
33 *Ringeisen v. Germany*, 22 June 1972, A 15.
34 *Artico v. Italy*, 13 May 1980 A 37, §. 47.
35 *Aydin v. Turkey*, 25 September 1997, § 131.
36 *Abdullaziz, Cabales, Balkandali v. UK*, 1985, A 94, p. 96.
37 *Guzzardi v. Italy*, 6 November 1990, A 39, § 114; *Silver et v. UK*, 24 October 1983, A 67, § 9.
38 A 170, 21 February 1990.
39 A 148, 22 February 1998.
40 *Huber v. Switzerland*, A 188, 23 October 1990.
41 *Duinhof & Duijf v. Netherlands*, A 79, 22 May 1974.
42 *Koendjbiharje v. Netherlands*, A 185, 25 October 1990.
43 *De Jong et v. Netherlands*, A 77, 22 May 1984.
44 *Weeks v. UK*, A 14, 5 October 1988.
45 Thynne, Wilson & Gunnell, A 190, 25 October 1990.

which the deprivation of liberty lasted eleven hours, the amount granted the victim was 60,000 FF in all (*c.* LM360.00 per hour).[46] In the Maltese case *T.W. v. Malta*, the Court also found that the applicant's detention had been illegal, but awarded the applicant no moral damages at all, though in this case the unlawful detention lasted nineteen days, not eleven hours.[47]

This litany could go on almost endlessly. When the breach consisted in the lack of access to a court, Strasburg occasionally grants compensation,[48] and occasionally refuses it.[49] If certainty of the law is a fundamental value to which each legal system should aspire, it is a value that occasionally tends to be glaringly absent. Even when the violation consists in undue delay in terminating civil disputes where the issues are generally quite straightforward, surprises are never absent. On the same day the Court gave two judgements in length of proceedings cases regarding deaths in car accidents. In *Casciaroli v. Italy* it awarded Lit 60,000,000[50] while in *Tusa v. Italy*, it only awarded Lit. 10,000,000, though the proceedings had lasted two years longer.[51] Today, it must be said, the sums awarded appear more standardized.

While the Court can be quite ungenerous with awards of moral damages, a swing in the opposite direction can sometimes be detected in some 'length of civil proceedings' cases. In an application regarding the eviction of an 'illegal' tenant in which the court proceedings lasted almost fourteen years, the Court awarded the illegal tenant moral damages for the delay – although he had clearly benefited from that delay, both by hanging on to his illegal occupation of his residence for may years, and by not paying any rent in the very long interval.[52]

Coming closer to the southern dimension, I would exclude outright any overt or covert determination to treat differently similar cases which arise in different geographical areas. The problem, in my view, is neither racial, ethnic or geopolitical. It is part of the general inability, in the particular province of just satisfaction, to fix clear standards and abide by them. The Court candidly admitted the inconsistencies in its approach to moral damages in *Nikolova v. Bulgaria*.[53] Steps have been taken internally to overview these problems and seek solutions.

Even allowing for the very different indexes of economic well-being between various Convention states which obviously have to be factored into the equation, the discrepancies between some awards appear unconvincing. *Aydin v. Turkey*[54] and *Selmouni v. France*[55] both related to particularly repulsive cases of torture during police detention, which, in Mrs Aydin's case included rape. The Court awarded Selmouni almost double the amount granted to Mrs Aydin, although the Court expressly emphasized that it took into account the extraordinarily terrifying ordeal Mrs Aydin had to go through.

But then this disturbing inconsistency appears even between two French cases. In *Tomasi v. France*, the issue included torture and the length of detention on remand and trial, and the award was 700,000 FF.[56] In Selmouni the award was substantially less: 500,000 FF. In a way Mrs Aydin was particularly lucky. In another case in which the Court found torture, only 100,000 FF were awarded.[57]

Subtly linked with the determination of moral damages is the question of what weight, if any, is to be given to the racial or ethnic background of the complaint. As far as I am aware, the Court has never acknowledged the existence of particular situations of ethnicity, like that of the Kurdish people in Turkey, nor has it ever declared that the several violations of fundamental rights the Kurds have been found to be victims of, have anything to do with their Kurdish origin. All suggestions that they are treated differently from other Turkish citizens because of a different ethnic origin, have always been disregarded by the Court. Not a single application by Kurdish applicants based on discrimination arising from their different ethnic origin, has ever been entertained by the Court. Their misfortunes and misadventures are always, unrealistically in my view, attributed to other reasons or to no reason at all.

The same could be said about gypsies, with the complex uniqueness of their life-style which should call for solutions diverse from other non-nomad populations. Their applications have, so far, received no sympathy at all from the Court. Not one of their actions claiming intrusive violations of the

46 *Quinn v. France*, 22 March 1995, A 311.
47 19 April 1999.
48 *Skarby v. Sweden*, A 180, 28 June 1990.
49 *Boden v. Sweden*, A 125, 27 October 1987.
50 27 February 1992.
51 27 February 1992.
52 *Di Mauro v. Italy*, 28 July 1999.
53 25 March 1999.
54 25 September 1997.
55 28 July 1999.
56 A 241-A.
57 *Tekin v. Turkey*, Rec. 1998-IV, No. 7.

state into their way of life, into their cultural imperatives, has been successful. For the Court it is as if gypsy problems do not call for different solutions. The Court found against gypsies who had parked their caravans in unauthorized sites, even when the authorities had failed in the duty imposed on them by law to provide legal camping sites for gypsies.

In a recent revolutionary decision, the Court defined impermissible discrimination not only in the classical sense of treating equals unequally. It went one fearless step further: impermissible discrimination is also treating unequals equally. The Court said: 'The right not to be discriminated against ... is also violated when states, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different'.[58] Unfortunately this brave new world found little echo in gypsy scenarios. Here national authorities persist in treating in a similar manner peoples (like gypsies) who have intrinsically different needs and features, as if they were sedentary Europeans races with traditional cultures.

One particular country in the southern area has been exemplary – and rightly in my view – penalized by the Court for repeated violations of the same fundamental right. Our good neighbour Italy has an evident problem of court delays in civil cases, fortunately unknown in Malta. The Court has recently expressly established that the Italian breach is so widespread, long-standing and intractable that, what in similar circumstances in other Convention states would be an individual violation, in Italian cases amounts to 'an administrative practice'.[59] Although you will not, I believe, find it expressly stated in any judgement, it is easily noticeable that moral damages for delays in civil proceedings are markedly higher against Italy than other awards in carbon-copy cases against other Convention states. 'Perhaps' commented a jurist, 'larger awards are deemed necessary [against Italy] to exert pressure for change'.[60] And that is certainly one of the functions of the Court, when an abusive system of conduct becomes so widespread as to be formally recognized as 'an administrative practice'.

Less explainable is the fact that the Court, though expressly requested to, has failed to acknowledge the existence of an 'administrative practice' in the far more serious cases of violations of the right to life and the prohibition of torture in states in which a consistent sequence of such violations have been registered. The Court has also expressly refused, though requested, to award punitive damages for particularly heinous violations by states which have repeatedly been found to be relapsers in the same infringements. At best, in the exemplary case of *Askoy v. Turkey*, in which the applicant was killed by security forces after he had lodged his complaint in Strasburg, the Court stated that in view of the extremely serious violations of the Convention suffered by Mr Ziki Askoy and the anxiety and distress that these undoubtedly caused to his father (who continued with the application after his son's death), 'the Court has decided to award the full amounts of compensation sought as regards pecuniary and non-pecuniary damages'.[61] For the Court to award a damage claim in its fullness, does not happen often..

It is equally difficult to reconcile the extent of the award of moral damages for pain and suffering in another case in which the applicant's son had wantonly been killed by the security forces of the state, with the case of *Halford v. UK* in which the applicant's phone had been tapped by the police. In the latter case the Court felt bound to place on record that there was no evidence that the stress the applicant suffered from was directly attributable to the interception of her calls, rather than to her other conflicts with the Merseyside police. All the same the Court awarded her £10,000 for moral damages.[62] The parents of the young man murdered cold-bloodedly by the security police got slightly less.[63]

Pecuniary Loss

In general the liquidation of pecuniary loss suffered by the victim of a human rights violation does not raise as many difficulties as that of moral damages. Proved *lucrum cessans* and *damnum emergens* constitute the basis of that head of compensation. Thus the case-law of the Court has taken into account medical expenses, loss of pension rights, reimbursement of fines paid, loss of past and future earnings, payment of the value of unlawfully expropriated effects, loss of interests, loss due to inflation etc.

But a few problems do occasionally arise, as, for example, the just valuation of property, the causal link between the violation and the damages, loss of opportunities and the quantum of proof required to establish real damages.

An early classic was the case of *Sporrong and Lonroth v. Sweden*[64] which concerned an official order that froze building permits on the applicants' property and was left in force for a considerably long time. The applicant submitted one

[58] *Thlimmenos v. Greece*, 6 April 2000.
[59] *Bottazzi v. Italy*, 28 July 1999.
[60] Dinah Shelton, *Remedies in International Human Rights Law*, 1999, p. 220.
[61] 1996, EHRR 553.
[62] 1997, 24 EHHR 523.
[63] *Ogur v. Turkey*, 20 May 1999.
[64] A 88, 18 December 1984.

way of calculating the losses, the respondent state a radically different one. The Court rejected both methods and made an assessment on an equitable basis, the workings of which were not disclosed. That propelled the Court right away into the grey areas of unfettered discretion. It must be recognized that the Court has neither the structures in place, nor the expertise, to determine complex matters of valuation of property, or of dealing with expert evidence. The Court had intended to neutralize this weakness in property compensation proceedings, by appointing its own expert valuers. The results, however, have hardly been any more encouraging. In a Greek case, as the fees due to the experts were proportional to the amount they assessed, the respondent government accused the experts of being 'scandalously favourable' to the applicants in their valuation.[65]

A complex issue from the legal standpoint relates to what Strasburg case-law refers to as 'speculative losses'. The Court, often, refuses to make an award of pecuniary losses where there is some uncertainty whether the applicant would all the same have suffered the loss if the violation had not occurred. In some cases, mostly related to illegal detention and to the breach of the fair hearing guarantees in civil and criminal proceedings, the Court often dismisses the claim with the formula that it is 'unwilling to speculate' what the outcome of the domestic court proceedings would have been had the breach not occurred, and denies damages, placing the onus of proof on the applicant and resorting to the strictest of causation tests.

This failure to award any damages, in my view, brings about an extremely serious situation. Had the result of the finding of a breach of the fair hearing guarantees automatically resulted in the re-opening of the vitiated domestic proceedings, then one could perhaps understand this reluctance to grant compensation. But, as it is, the Court only finds that the applicant has not received a fair hearing, and stops there. He neither gets a re-hearing from the Strasburg Court (which is not a court of appeal), nor is his case reopened in the domestic court. Nor is he awarded any compensation. In effect, he is told he is a victim, that he did not receive a fair hearing, and that this is the end of the matter. One then asks what the scope of the Strasburg proceedings is, if they neither redress in any manner the violation by procuring a rehearing of the tainted proceedings, nor by ordering any form of compensation.

The problem is compounded by the fact that in some other cases, however, when the outcome of the domestic proceedings would have been equally uncertain, the Court that was unwilling to speculate on the outcome, equally awarded damages, but under the heading of 'loss of opportunities'. This trend is notable in some UK cases, though not exclusively so.[66]

The report by the English and Scottish Law Commission highlights the state of uncertainty when no compensation is granted because of the Court's unwillingness to speculate, and when compensation is granted as 'loss of opportunities': 'There are numerous cases falling on either side of the line. It is impossible to reconcile these decisions... One can only guess that in some cases the Court feels sympathy towards certain applicants based on particular circumstances, and will go out of its way to award damages, despite [the absence of] the usual requirement of a clear causal link'. (§ 3.66, 3.69)

I would certainly agree 'that it is impossible to reconcile these decisions', but would suggest that it is possible to come to an equitable conclusion by reconciling the two extremes. In my view, when a causal link between the violation and the loss suffered has not been sufficiently established, it would be inconsequential to award material damages. However, as it is to be presumed that the applicant has suffered a sense of frustration, anxiety, stress and dismay through the unlawful detention or through his participation in unfair court proceedings, then, if the breach can be considered to have had an impact on the applicant, compensation for that pain and suffering, correlative in amount the matter at stake, ought to be ordered under the head of non-pecuniary or moral damages.

A final set of observations concerning material damages. The Court does not seem to have been too consistent with its response to the failure of the applicant or his lawyers to provide detailed proof of the material loss suffered. The Rules of Court specify that it is the duty of the applicant to satisfy the Court with itemized particulars of all the claims, otherwise the Court may dismiss the claim (Rule 60 §2).

However, the Court's reaction to a failure by the applicant to produce this justification of material damages has ranged from the excessively tolerant to the downright draconian. When an applicant fails to quantify his material damages, the Court has at least four options open to it: it may, at any stage of the proceedings before the finding of a violation, request him or her to furnish any information it deems lacking (Rule 60 §3). It may, in the judgement finding a violation, declare that the issue of just satisfaction is not yet ready for determination and invite the parties to substantiate their claims. Thirdly, it may, in the absence of precise data in the case-file, proceed to liquidate the amount of pecuniary damages, using its discretionary powers 'on an equitable basis'.[67] Or, fourthly, it may dismiss the case outright.

[65] *Papamichaloupulos v. Greece*, A 330-B, 31 October 1995.

[66] *Weeks v. UK*, A 143-A, 5 October 1988; *H v. UK*, A 136-B, 9 June, 1988; but see also *De Geouffre de la Pradelle v. France*, A 253-B, 16 December 1992; *Goddi v. Italy*, A 76 9 April 1984; *Delta v. France*, A 191-A, 19 December 1990.

[67] As it did, for example, in *Doustaly v. France*, Rec. 18998-II, 70, 23 April 1998; *Allenet de Ribemont v. France*, A 308, 10 February 1995; *Heintrich v. France*, A 320-AQ, 8 June 1995; *Gaygusuz v. Austria*, Rec. 1996-IV, 14, 16 September 1996.

I have in mind some disturbing cases, like that of a young victim who was killed during police detention, employed at the time of his death and the breadwinner of the household. His family's lawyers failed to come up with evidence of what his earnings had been. The Court dismissed any claim for material loss suffered by his survivors, and awarded zero pecuniary compensation.[68] It would have been so easy for the Court to asses the material damages suffered, basing itself on the minimum wage current in the country at that time.

This has repeatedly occurred in Turkish applications. In the Gerger case, the applicant had been convicted and had spent one year and nine months in prison in violation of the Convention; he had also actually paid a fine imposed on him, equally in violation of the Convention. The Court established that his rights had been infringed, but did not award him any compensation for material damages, as it considered he had failed to supply evidence in support of his claims for loss.[69] In the Gulec case, which concerned the unlawful killing of the applicant's son who was a high school student and worked after school, the Court equally refused any compensation for material damages, as these had not been proved.[70]

It is in the area of just satisfaction that the judgements of the Court can best exercise that institution's three major functions: that of reinstating the victim of the violation, that of censuring the culprit state, and that of discharging its pedagogical responsibilities. These are core obligations that the Court mostly, but not invariably, manages to fulfil.

[68] *Ogur v. Turkey*, 20 May 1999.
[69] 8 July 1999.
[70] 19 February 1996, Rec. 1998-IV, 80.

3 Freedom of Forming Political Parties and its Restrictions*

Riza Türmen, Judge of the European Court of Human Rights

The Court's jurisprudence on the dissolution of political parties is not a very large one. It contains only four cases with Refah Partisi (RP) case not being definitive yet. However, the importance of the Court's judgements is not proportionate with the number of cases as they address to fundamental issues such as relationship between democracy and human rights and clarifies the Court's understanding about democracy.

On the other hand, the Court's judgements on political parties bear a special importance in respect of the respondent States. In view of the serious implications of dissolution of a political party, almost all the member States adopted special procedures for such an act. In fact in all four cases the Court has decided the political parties are dissolved by the Constitutional Court of the respondent State. The Court's judgements have inevitable consequences for the Constitution of the respondent State and constitute a ruling on the compatibility of its constitution with the democratic principles which the Court upholds.

Let us briefly examine the Strasburg organs' decisions regarding dissolution of political parties.

1. German Communist Party (KPD) v. Germany (1957)

The Constitutional Court of the FRG by its decision of 17 August 1956 dissolved the German Communist Party (KPD) and declared it a prohibited party.

The party applied to the Commission of Human Rights against this decision. The Commission in its report expressed the view that the aim of the KPD was to establish a communist system by means of a proletarian revolution and to establish the dictatorship of the proletariat. In the proceedings before the Constitutional Court it had shown that it still adhered to these principles. Even if it should be found that KPD was trying to seize power only through constitutional methods, this did not mean that it had renounced these principles.[1] The Commission then decided that Article 17 of the Convention (engaging in any activity aimed at the destruction of the rights and freedoms set forth in the Convention) was applicable and that the application was inadmissible.

It is clear from the above-mentioned words, that the Commission's decision was based on the aims pursued by the KPD rather than its actual activities.

The Commission ex officio examined applicability of Article 17 and did not join it to the merits. This gave way to a number of criticisms.

One criticism is that Article 17 does not have an independent character. It should have been examined only in conjunction with another article of the Convention.

Another criticism is that the Commission by not joining decision of admissibility to the merits avoided the examination of the facts. However, the question of applicability of Article 17 is in fact a decision on the merits of the case which requires an examination of the facts.[2]

2. United Communist Party of Turkey (TBKP) v. Turkey

(Court's judgement of 30 January 1998)

The Constitutional court of Turkey dissolved TBKP on two grounds: the word 'Communist' in the name of the Party and reference in its programme to two nations in Turkey that is, Turkish and Kurdish nations. The Constitutional Court reached the conclusion that by referring to two separate nations, TBKP sought to promote division of the Turkish nation and to create minorities thus posing a threat to the territorial integrity of the State.

The Strasburg Court in its judgement, first elaborated on the principles of democracy and the importance of political

* Delivered on 15th December 2001 during a seminar on 'The European Convention on Human Rights: A Southern Perspective'. This seminar was organized by GhSL and ELSA (European Law Students' Association).

1 *KPD v. FRG*, No. 250/57, 1YB 222 (1957).

2 P. van Dijk & G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 1998, Kluwer Law International, The Hague, pp. 751-2.

parties in a democracy; It started by saying that 'there can be no democracy without pluralism' and goes on '(free expression of the opinion of the people) is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population'.

'Democracy is without doubt a fundamental feature of the European public order... Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it'.[3] The Court then examined TBKP's case and applied its principles to this case.

1. The Court considers one of the principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. To judge by its programme, that was indeed the TBKP's objective in this area. That distinguishes the present case from those referred to by the Government.
2. Admittedly, it cannot be ruled out that a party's political programme may conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the programme must be compared with the party's actions and the positions it defends. In the present case, the TBKP's programme could hardly have been belied by any practical action it took, since it was dissolved immediately after being formed and accordingly did not even have time to take any action. It was thus penalized for conduct relating solely to the exercise of freedom of expression.[4]

With these considerations, the Court found there is a violation of Article 11 of the Convention.

3. Socialist Party (SP) v. Turkey (25 May 1998)

The Constitutional Court of Turkey in 1998 dismissed the first application of the Public Prosecutor to dissolve the party as unfounded. However in 1991, the Public Prosecutor applied to the Constitutional Court for a second time for an order dissolving the SP. The request was based on SP's election publications as well as oral statements of its chairman. The Constitutional Court found that the SP's statements concerning Kurdish national and cultural rights were intended to create minorities and ultimately, the establishment of Kurdish-Turkish federation and this would be to the detriment of the unity of the Turkish nation and the territorial integrity of the Turkish State.

The Strasburg Court, in its judgement, first of all, found no trace of any incitement to use violence or infringe the rules of democracy.

Then, the Court noted that, the statement put forward a political programme with the essential aim being the establishment, in accordance with democratic rules, of a federal system in which Turks and Kurds would be represented on an equal footing and on a voluntary basis. In the Court's view, the fact that such a programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do not harm democracy itself.[5]

The Court, in conclusion, decided that there was a violation of Article 11 of the Convention.

4. Freedom and Democracy Party (ÖZDEP) v. Turkey (8 December 1999)

In 1993, the Public Prosecutor of the Court of Cassation applied to the Turkish Constitutional Court for the dissolution of ÖZDEP. While the Constitutional Court proceedings were still pending, founding members decided to dissolve the party.

Nevertheless, the Constitutional Court went on with its examination of the case. The Constitutional Court observed that ÖZDEP's programme was based on the assumption that there was a separate Kurdish people in Turkey. In its programme it was also called for a right of self-determination for the Kurds and supported their right to wage a war of independence. This stance was similar to that of a terrorist organization and constituted in itself an incitement to insurrection.

The Constitutional Court dissolved the party on the ground that the Party' programme undermined the territorial integrity of the State and unity of the nation.

The Strasburg Court, in its judgement, found nothing in ÖZDEP's programme that can be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles. The Court noted that the Party's programme presented a political project whose aim is in essence the establishment – in accordance with democratic rules of 'a social order encompassing the Turkish and Kurdish peoples'. The Court, then reiterated the principles contained in its two previous judgements and then went on saying:

3 *The United Communist Party of Turkey and Others v. Turkey*, judgement of 30 January 1998, *Reports of Judgements and Decisions*, 1998-I, paras. 43, 45.
4 Ibid., paras. 57, 58.
5 *Socialist Party and Others v. Turkey*, judgement of 25 May 1998, *Reports of Judgements and Decisions*, 1998-III, paras. 46, 47.

> The Court has already noted that the relevant passages in ÖZDEP's programme, though voicing criticism and demands, do not in its view call into question the need to comply with the principles and rules of democracy.
>
> The Court takes into account the background of cases before it, in particular the difficulties associated with the fight against terrorism. In that connection, the Government have affirmed that ÖZDEP bears a share of the responsibility for the problems caused by terrorism in Turkey. The Government nonetheless fail to explain how that could be so as ÖZDEP scarcely had time to take any significant action. It was formed on 19 October 1992, the first application for it to be dissolved was made on 29 January 1993 and it was dissolved, initially at a meeting of its founding members on 30 April 1993 and then by the Constitutional Court on 14 July 1993. Any danger there may have been could have come only from ÖZDEP's programme, but there, too, the Government have not established in any convincing manner how, despite their declared attachment to democracy and peaceful solutions, the passages in issue in ÖZDEP's programme could be regarded as having exacerbated terrorism in Turkey.'[6]

With these views the Court found a violation of Article 11.

5. *Welfare Party (RP) v. Turkey (31 July 2001)*

This case is not conclusive. On 10 July 2001 the former section 4 of the Court decided by 4 votes to 3 that the dissolution of RP by the Turkish Constitutional Court does not constitute a violation of the Convention (Article 11).

The applicant requested that the case be referred to the Grand Chamber of the Court in accordance with Article 43 of the Convention. This request was accepted by the panel of five judges. Consequently, the case will now be examined by the Grand Chamber of the Court.

RP case can be distinguished from three other Turkish political party cases in a number of respects: First, three political parties which were dissolved were all marginal parties not represented in the Turkish Parliament and with little or no influence on the Turkish public opinion in general. RP became the largest political Party in the 1995 general elections receiving 20% of the votes and winning 158 seats in the Grand National Assembly. In June 1996, RP came to power by forming a coalition Government.

Secondly, the time span between the establishment and dissolution of the three political parties was very short.

TBKP formed on 4 June 1990, dissolved on 16 July 1991. The Socialist Party formed on 1 February 1988, dissolved on 10 July 1992. ÖZDEP formed on 10 October 1992, dissolved on 30 April 1993.

Whereas RP existed for a long time. It was founded on 19 July 1983 and was dissolved on 16 January 1998, after almost 15 years of existence.

So, it was possible to make a better assessment of RP's activities compared to other three parties.

Thirdly, the three parties were dissolved by the Turkish Constitutional Court on the ground that they constituted a threat to the territorial integrity of the country. In RP case, it was dissolved because it was found to be not in compliance with the principles of laicism and democracy.

Fourthly, all three political parties were dissolved mainly on the basis of their programmes. An exception is Socialist Party which was dissolved for its election publications and oral statements of its chairman at public meeting. RP on the other hand, was dissolved for the 13 statements made by its chairman, Mr Erbakan or by its vice chairmen or by its members of Parliament.

The Constitutional Court decided that the impugned speeches demonstrated that RP had become 'centre of activities contrary to the principles of laicism' – a condition of dissolution in Articles 101 and 103 of the Law on Political Parties.

The former Fourth Section of the Court, in its judgement of 31 July 2001, expressed its basic approach to the case in the following manner:

> The Court takes the view that a political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite recourse to violence, or propose a policy which does not comply with one or more of the rules of democracy or is aimed at the destruction of democracy and infringement of the rights and freedoms afforded under democracy cannot lay claim to the protection of the Convention against penalties imposed for those reasons.[7]

Then the Court examined the grounds for dissolution contained in the Constitutional Court's decision, in three main categories.

a. Statements concerning plurality of legal systems.

According to this point of view, as advocated by RP's leaders, the society would be divided into religious communities and each community would be governed by its own religious laws. Each individual would have to choose his or her community. The Court found out that such a model of the society is not compatible with the Convention system for two reasons:

6 *Freedom and Democracy Party v. Turkey*, judgement of 8 December 1999, *Reports*, 1999 VIII, para. 46.
7 *Refah Partisi (The Welfare Party) and Others v. Turkey*, (not published), p. 16, para. 47.

Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organizer of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its abovementioned functions, but static rules of law imposed by the religion concerned.

Secondly, such a system would infringe the principle of non-discrimination. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention.

b. Statements concerning introduction of sharia (Islamic law)

The Court found that Sharia, which reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism or constant evolution of public freedoms have no place in it. As such, it is difficult to reconcile Sharia with the fundamental principles of democracy. It particularly diverges from Convention values with regard to criminal law, legal status of women and the way it intervenes in all spheres of private and public life.

c. Statements concerning Jihad (Holy war)

The RP leadership in their statements alluded to the possibility of recourse to force in order to overcome various obstacles for gaining power. The Court expressed the opinion that while it is true that RP did not, in government documents, calls for the use of force, they did not take prompt practical steps to distance themselves from those members of the party, who had publicly referred to the possibility of using force to achieve their aims.

The Court concluded that these remarks of RP leaders formed a whole and gave a fairly clear picture of a model of State and society organized according to religious rules.[8]

Then the Court examined the nature of the threat posed by RP. It took into consideration that RP's aims were not illusory but achievable, because its chances of coming to power by itself were quite high as it was the largest political party.

The Court finally reached the conclusion that, in view of the expressed intention of RP's leadership of setting up a plurality of legal systems and introducing sharia and its ambiguous stance with regard to the use of force to gain power, a State may reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime.[9]

Consequently, the Court found no violation of Article 11 of the Convention.

Three judges who did not agree with the majority, wrote a dissenting opinion. Their main points of disagreement can be summarized as follows:

a. The principles underlined in the previous three judgements on the dissolution of political parties in Turkey are not fully brought out in the RP judgement.
b. There was nothing in the programme of the RP to indicate that it was other than democratic or that it was seeking to achieve its objectives by undemocratic means.
c. There is no compelling or convincing evidence to suggest that RP took any steps to realize political aims incompatible with the Convention or to pose a threat to the legal and democratic order.

Conclusion

The findings of the Human Rights Court common in all these cases can be summarized in four main areas.

Firstly, the Human Rights Court rejected the Turkish Government's argument that Article 11 did not apply to political parties. In the view of the Curt, 'political parties are a form of association essential to the proper functioning of democracy.' Bearing in mind the importance of democracy in the Convention system, the Court held 'there can be no doubt that political parties come within the scope of Article 11.' As the Court observed in the TBKP case, the dissolution of political parties 'affect both freedom of association and, consequently, democracy in the State concerned.'

Secondly, the Human Rights Court ruled that in political party cases, the exceptions set out in the second paragraph of Article 11 are 'to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association.' In this regard, the contracting parties have only a limited margin of appreciation which is ultimately subject to rigorous supervision of the Human Rights Court; Radical measures, such as dissolving a party may only be applied in most serious cases.

Thirdly, the Court emphasized the pluralistic nature of democracy. According to the Court, the fact that the programme or political projects of a political party are deemed

> incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy.

The Court concluded that

> it is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do not harm democracy itself.

[8] Ibid., pp. 20-3.
[9] Ibid, pp. 24-5.

Fourthly, the Court is of the opinion that the programme of a political party or the statements of its leaders may conceal objectives and intentions different from those they proclaim. To verify that, the content of the programme or statements must be compared with the actions of the party and its leaders and the positions they defend taken as a whole.

It is to be noted that in five cases (German Communist Party and four cases of Turkish political parties) of political parties decided by the Strasburg organs, the common guiding principle is democracy.

In the United Communist Party judgement, the Court expresses the view that 'Democracy is without doubt a fundamental feature of the European public order'.

> The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it (para. 45).

In the Socialist Party judgement, the Court expresses the opinion that 'having analyzed Mr Perincek's (Party chairman) statements, the Court finds nothing in them that can be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles (para. 46).

> It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do not harm democracy itself (para. 47).
>
> In the German Communist Party case, the Commission in its report declared that the objective of the party (to establish a Communist society by means of a proletarian revolution)' was incompatible with the Convention because it would involve the suppression of a number of rights and freedoms that the Convention guaranteed.

The Welfare Party (RP) judgement is also based on the same principle. The Court, in its judgement, concluded that the overall project that RP proposes is not compatible with the principles of democracy (para. 81).

In conclusion, in all five cases the principle that is applied by the Strasburg organs is the same. However, results are different due to different circumstances. In the TBKP judgement, the Court underlines this fact. 'TBKP was clearly different from the German Communist Party' because 'it satisfied the requirements of democracy'. Similarly, in the RP case, one can draw the conclusion that RP was different from three other Turkish political parties, because it did not satisfy the requirements of democracy.

In Article 10 (freedom of expression) and Article 11 (freedom of assembly and association), the Strasburg organs examine the case, from the point of means and aims. The means must be peaceful that is, should not constitute a call for the use of violence, and also the aim must be compatible with democratic principles.

However, a distinction should be made in this respect between freedom of establishing a political party and other freedoms. With regard to the political parties, the aim of the party carries more weight. than the means, since once a political party comes to power either by democratic elections or by other means, it has the possibility to achieve its goals. History has taught us the lesson that a political party that wins the votes of the majority, may use or rather abuse its power to destroy democracy.

The Strasburg organs are also aware of this danger. In the German Communist Party case, the Commission stated that 'even if it (the Communist Party) sought power by solely constitutional methods, recourse to a dictatorship was incompatible with the Convention'.

In the three Turkish political parties cases, this question did not arise as the Court found that both the means and aims of the parties were compatible with the Convention.

However, in the RP case, this distinction plays an important role. In respect of whether RP leadership has called for violence or not, the judgement is rather ambiguous. It does not clearly state that the Party leadership advocated violence, in spite of the fact that its President, Mr Erbakan, said in one of his statements that they would come to power anyway. The question is whether it will be realized with or without blood. The distinction between means and aim becomes clearer when the judgement expresses the view that RP constitutes a serious threat to democracy in Turkey because it was the largest political party and had the possibility to come to power whereby it would be able to fulfil its objectives which, as the Court determined, were not compatible with democracy.

RP case, when it becomes decisive, together with other decisions of the Strasburg organs on the dissolution of the political parties, will be important to determine the parameter of democracy on which the Court's judgements are based.


E-Commerce

4 Aspects of European Regulation of e-commerce

Michael Frendo, LL D, LL M (Exon.), MP

I What is e-commerce?

Electronic commerce has been defined as 'any form of business transaction in which the parties interact electronically rather than by physical exchanges or direct physical contact'.[1] The world of electronic commerce revolves on buying and selling goods and services and carrying out supportive transactions such as customer service and aftercare.[2] It all happens in a spatial vacuum: not physically on any territory but in cyberspace.

Electronic commerce developed first as a business-to-business phenomenon but has, over the years, become increasingly oriented towards business-to-consumer – electronic retailing, a category that has grown with the advent of the World Wide Web (www). 'There are now shopping malls over the Internet offering all manner of consumer goods from cakes to wine to computers and motor cars' providing 'an unprecedented opportunity for organizations of any size to reach a global customer base'[3] over the world wide web.

As it has been aptly put, 'Electronic commerce has implications for many facets of our economic and social life because it has the potential to fundamentally change the way commercial transactions, the business of government, the delivery of services and a host of other interactions are conducted, raising issues at the heart of policies directed at the regulation of traditional practices and procedures.'[4] How will these changes impact upon the law, both nationally and internationally?

The pace is indeed breathtaking. According to the 1997 OECD Discussion Paper Dismantling the Barriers to Global Electronic Commerce, electronic commerce was predicted by most analysts to increase by a factor of ten by the year 2000.[5] Early last month, the *Financial Times* reported a US research company as stating that the volume of business transacted over the net will this year reach $180 billion.[6] Notwithstanding this the electronic commerce market still remains relatively small in comparison to other types of commerce[7] That is still a fraction of what can, and will undoubtedly, be achieved.

II The Regulation of e-commerce

The law must therefore follow fast on the heels of technological progress. It has to move quickly to regulate, to ensure fairness, to set the parameters, to combine justice and legal certainty, the foundations of a healthy and vibrant framework for commerce.

The further internationalization of business through electronic commerce raises new questions, gives new dimensions, to contractual legal relationships which span across more than one legal system.

Where did the transaction take place? What law regulates its formalities and its substantive clauses? What choice-of-law rules apply? Who has jurisdiction over the matter? What tax regime is to apply to the transaction and to the operating companies? Many of the questions are common to those raised by other legal relationships spanning over more than

1 Source: *Internet Business*, Interest Verlag, Germany Augsburg 1997, from website: www.kite.tsa.de/e_com_index.html. As a matter of fact this definition is actually sourced from another author, David Kosiur, 'Understanding Electronic Commerce', 1997

2 Kosiur, op cit.

3 Dorianne Mallia, Electronic Commerce over the Internet, 1998, Dissertation for B.Com. (Hons) Management, University of Malta, unpublished, at p. 12

4 Electronic Commerce: Building The Legal Framework Report of the Electronic Commerce Expert Group to the Attorney General of the Commonwealth of Australia, 31 March 1998 hereinafter referred to as 'The Australia Report (fn. 6)'

5 Ibid.

6 According to ActivMedia, in Jean Eaglesham, op. cit. supra.

7 The OECD paper cited supra indicated that even a tenfold increase in 2000 would only make e-commerce world-wide as big as the size of mail order catalogue sales in the United States today in 1997.

one legal system. That is the realm of Private International Law or Conflicts of Law. The 'old' rules are being asked to answer to these new situations as cyberspace becomes a new reality for business.

The boundaries of electronic commerce are not defined by geography or national borders, but rather by the information technology and the coverage of computer and telecommunications networks. Electronic commerce operates in a fuzzy international environment that magnifies the problems that Conflicts of Law practitioners are familiar with, and further to that, adds the practical difficulty of applying Conflicts of Law rules to new technologies which have a bearing on the fundamentals of contractual regulation.

With e-commerce we need to understand how the technology functions in order to be able to apply legal principles, to find out, for example, how offer and acceptance are carried out, and, additionally we need to find answers to situations which, in cyberspace, lose all sense of defined territoriality, in order to be able to answer, for example the fundamental questions in international contract law disputes: Who has jurisdiction? What law applies?

As Johnson & Post[8] point out:

> Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location. The rise of the global computer network is destroying the link between geographical location and
>
> (1) the power of the local government to assert control over online behaviour;
>
> (2) the effects of online behaviour on individuals or things;
>
> (3) the legitimacy of the efforts of a local sovereign to enforce rules applicable to global phenomena; and
>
> (4) the ability of physical location to give notice of which sets of rules apply.

All of these, and other, legal issues revolve around the new testing ground of e-commerce as electronic commerce moves slowly, but inexorably, from the peripheral to the mainstream, as the market grows from one which is still essentially business to business to the wider additional market of business to consumer.

As in anything else, technology provides a medium which can be well-used or, instead, abused. The electronic age makes it more and more easy to set up 'fly-by-night' operations which defraud customers of their money, with companies closing down a web-site and opening others on new servers in other jurisdictions before being found out. The cyberspace environment of e-commerce makes it increasingly easier to present sophisticated 'virtual' realities behind which, however, there may be, literally, absolutely nothing.

The law needs to counter this vulnerability with tools which are effective and render it increasingly more and more difficult to carry out e-fraud, in order to protect the honest business operator and ordinary consumers. The European Union is striving to respond to the need to regulate this new aspect of doing business across frontiers, although some critics state that its progress is too slow and that events will overtake its current pace.

In this short paper I shall consider some of the aspects of the European Union regulation of the electronic commerce sector.

III The European Commission's Communication

The European Union affords us an important example of the legal aspects of electronic commerce, because it is building up the legal framework to ensure that electronic commerce is regulated in a way that it can function within, and indeed enhance, the Single European Market.

In its first Communication on Electronic Commerce[9] two years ago, the European Commission stated with vigour that

> the pace and the extent to which Europe will benefit from electronic commerce greatly depends on having up-to-date legislation that fully meets the needs of business and consumers.

It therefore set itself a target

> to implement the appropriate regulatory framework by the year 2000.[10]

One needs to build trust and confidence:

> For electronic commerce to develop, both consumers and businesses must be confident that their transaction will not be intercepted or modified, that the seller and the buyer are who they say they are, and that transaction mechanisms are available, legal and secure.[11]

There is need for certainty and peace of mind with regard to crucial issues in a transaction:

> the identity and solvency of suppliers,
>
> their actual physical location,
>
> the integrity of information,
>
> the protection of privacy and personal data,
>
> the enforcement of contracts at a distance,

[8] Johnston, D. & Post, D., 'Law and Borders — The Rise of Law in Cyberspace', 48 Stan. L. Rev. 1367, 1369-70 (1996)

[9] A European Initiative in Electronic Commerce, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions COM(97)157.

[10] ibid.

[11] ibid.

the reliability of payments,
the recourse for errors or fraud,
the possible abuses of dominant position[12]

With the exception of the last element mentioned, that of abuse of a dominant position which relates to the Competition regime within the European Union, all the other elements mentioned are of universal application[13] and their effective legal regulation is required to ensure the success of electronic commerce world-wide. The following are some of the points raised by the Communication.

The Country of Origin Rule

The European Commission realized that it should not resort to over-regulation. Free movement of electronic commerce within the European Union could be achieved by mutual recognition of national rules so that companies engaged in cross-border business would operate under the law of their country of origin (home country control). Only where such recognition does not suffice to remove obstacles to trade, would the Community intervene. The 'country of origin' rule means that a company operating in any member state of the European Union would be able to operate anywhere within the Union's territory as long as it complies with the regulations of the country in which it is based.

The rule is not absolute and the Community may intervene to temper it with measures which, for example, would render consumers safer and with practically more secure and effective legal protection, something that is increasingly needed in e-commerce where you buy without physically examining your purchase.

Marketing of Financial Services

Member States apply divergent restrictions to the marketing of particular financial services to protect the public interest, causing a fragmentation of the Single Market for financial services, including financial services provided electronically.

Formation and the Performance of Contracts

The rules governing the formation and the performance of contracts in some Member States are not appropriate for an electronic commerce environment. They therefore generate harmful uncertainties relating to the validity and enforceability of electronic contracts. Examples include the requirements for written documents, for hand written signatures, or judicial rules of evidence that do not take into account electronic documents.

Consumer Protection

As has already been indicated, consumer protection is a paramount preoccupation of the electronic dimension. The easier it is to defraud the consumer, the more important becomes the legal need to protect him or her. E-commerce places the consumer in a situation of even greater vulnerability ironically commensurate to the ease, and comfort of the facilities it affords. The law needs to retain that ease and comfort of operation while safeguarding the consumer in his or her relations of quasi-anonymous commercial operators. If a dispute arises, in which Court has jurisdiction over the issue? Do you have the right to return the product if the law of your jurisdiction allows this but the law of country where the purchaser is established doe not give you such a right?

Electronic Payment Systems

Electronic commerce needs sound, user-friendly, efficient and secure electronic payment systems requiring an appropriate supervisory framework for the issuance of electronic money.

Fraudulent Use and Counterfeiting

Fraudulent use and counterfeiting, a truly serious concern for means of electronic payments, is not punishable throughout all the Member States of the European Union.[14] Regulation must cover all non-cash means of payment and improve the security of new payment systems.

Data Security and Privacy

Data Security and Privacy is a must. Strong encryption will ensure the confidentiality of both sensitive commercial and of personal data. The EU not only seeks to remove barriers to use and importation of encryption technologies and products within its territory but also has a policy to seek such removal of trade barriers for encryption products at international level.[15]

Digital Signatures

Digital signatures also require a common legal framework encompassing the legal recognition of digital signatures in the Single Market and the setting up of minimum criteria for certification authorities. World-wide agreements on digital signatures are also required. This is crucial to building the

[12] ibid.
[13] The Competition regulatory model of the EU has also been adopted by various countries.
[14] Indeed it is punishable in only a minority of the member states of the European Union.
[15] The OECD Cryptography Guidelines are a positive measure to strike international consensus on this matter.

confidence on the system for people to use it freely without hesitation.

Privacy

Safeguarding the right to privacy of the individual and of the commercial company is crucial to the success of e-commerce. The EU has a Framework Directive on the protection of personal data generically addressing this issue. There may be need for specific legislation on certain aspects which are triggered by electronic commerce.

Protecting Intellectual Property

The protection of copyright and related rights is considered by all as essential for the development of electronic trade. The legal protection needs to focus on online communications, reproduction and distribution of protected material, and also protection against the circumvention of anti-copy devices and electronic management systems.[16] In the open environment of the electronic market place, the owner has greater difficulty in controlling abuse and legitimate use.

A Clear and Neutral Tax Environment

Tax obligations have to be clear, transparent and predictable. No extra burden should be placed on these new activities when compared with traditional commerce.[17]

Tax evasion is even more enticing in electronic commerce operating in an environment of speed, potential untraceability and anonymity. The revenue interests of government and the need to avoid market distortions and to protect the law-abiding businessmen and women requires legal regulation which address these fears.

Indirect taxation, particularly the widespread VAT system, applies to electronic commerce transactions and enforcement of this taxation also remains an important issue. The territorial concepts which underlie direct taxation systems ('residence' and the 'source' of income) also need to be examined in the light of commercial and technological developments.

The ruling concept for the European Union is that indirect taxation in relation to electronic commerce should result in the jurisdiction where consumption takes place. This was stated in the Commission Communication on Electronic Commerce and Indirect Taxation last year, and accepted by the July 1998 ECOFIN Council.[18]

A transaction that results in a product being placed at the disposal of the recipient in digital form via an electronic network is to be treated, for VAT purposes, as a transaction of services. These electronically delivered products may also be delivered by more conventional means in a tangible form and, according to their characteristics, be treated for VAT purposes either as a sale of services or of goods. Products currently treated as goods, such as supplies of music or video on disc or cassette may be subject to customs duties at importation. However products that, in their tangible form are treated for VAT purposes as goods are treated as services when they are delivered by electronic means. To my mind, software would fall under the latter category.

IV Aspects of the EU Acquis Communitaire in Electronic Commerce

i. Directive on Certain Aspects of Electronic Commerce in the Internal Market

The European Union has followed its initial Commission Communication with a set of Directives, Proposals and Drafts the very latest being the Amended Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market.[19] This Amended proposal refers to the original proposal for a Directive which the Commission had published on the 18th of November of last year.[20]

The proposed directive (and the proposed amendments) deals with the regulation of information service providers, commercial communications, electronic contracts, liability of intermediaries and other matters.

It provides for commercial communication to be clearly identifiable as such and for unsolicited commercial communication by electronic mail to be 'clearly and unequivocally identifiable as such as soon as it is received by the recipient'.[21]

16 The two WIPO, the World Intellectual Property Organization, international treaties adopted in December 1996 – the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty – are essential to stimulate and facilitate electronic commerce internationally. The EU shall aim for their early entry into force. Moreover, a successful outcome of the present WIPO negotiations on the legal protection of the substantial investment made in databases will constitute a further milestone in facilitating electronic commerce world-wide. (Communication, ibid.)

17 See below at fn. 18, Communication on this matter. The idea of a 'bit-tax' was discarded.

18 COM(98) 374 final. http://www.ispo.cec.be/ecommerce/legal. htm#ecommerce. The position adopted at the OECD's Ottawa conference is in line with the Commission's Communication.

19 COM (1999) 427 final, September 1999.

20 COM (1998) 586 final, 18.11.1998.

21 Article 7.

With regard to electronic contracts, the proposed Directive lays down that there should be legislation in all Member States 'which allows contracts to be concluded electronically'.[22] It does allow for exceptions such as contracts requiring a notary or which have to be registered with a public authority for validity, or governing family law or succession.

It also provides for explanations on how a contract is to be concluded to appear electronically to the non-professional contractor. Like the UNCITRAL rules, it lays down its own rules on when a contract is concluded, such as when a user clicks on an icon: the contract is 'concluded when the recipient of the service has received from the service provider, electronically, an acknowledgement of receipt of the recipient's acceptance.'[23]

The Service Provider is obliged to immediately send an acknowledgement of receipt and that acknowledgement of receipt is deemed to have been received by the recipient when the recipient of the service is able to access it.[24]

This is a simplified version of the original draft which considered a contract to be concluded only when the recipient of the service, is able to access the acknowledgement and sends his or her own CONFIRMATION of receipt of the acknowledgement of receipt.[25]

ii. Electronic Signatures

Another area which the EU is covering relates to electronic signatures. Electronic signatures allow someone receiving data received over electronic networks to determine the origin of the data (identity) and to verify whether the data has been altered or not (integrity). The data is accompanied by a certificate, issued by a certification service provider, which allows the recipient of a message to check the identity of the sender.[26] Electronic signature therefore is a term which is used to refer to a range of technologies intended to ensure the security and certainty of electronic commerce, and in particular one of these technologies, namely digital signatures.[27]

The latest document is the Common Position adopted by the Council on 28th June 1999 with a view of adopting Directive 1999/---/EC of the European Parliament and the Council.[28]

The proposed Directive recognizes that electronic commerce 'necessitates electronic signatures and related services allowing data authentication'[29] and the need to have common rules relating to legal recognition of electronic signatures and accreditation of certificate-service providers in the Member States.

It does not seek to interfere with the parties' willingness to accept electronic signatures or to harmonize national rules concerning contract law: what it tries to achieve is a regulation of electronic signatures which raises the level of confidence in the use of electronic commerce and grants legal recognition to such signatures subject to the Directive's rules ensuring that they can be used as evidence in legal proceedings throughout the EU.

The Directive is aimed therefore simply

> to facilitate the use of electronic signatures and to contribute to their legal recognition.[30]

It therefore creates a legal framework for both electronic signatures and for certificate-service-providers, that is, entities or persons who issue certificates or provide other services in relation to electronic signatures.

The main aspects of the proposed Directive are:

* *Essential requirements*: an electronic signature meeting the requirements of the Directive is to be legally recognized and effective throughout the whole of the territory of the European Union.
* *Legal recognition*: The Directive distinguishes between an electronic signature and an advanced electronic signature. An electronic signature is data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication. An advanced electronic signature also meets the following requisites:
  - Uniquely linked to the signatory
  - Capable of identifying the signatory
  - Created using means that the signatory can keep in his sole control

  And
  - Linked to the data to which it relates in such a way that any subsequent change of the data is detectable.

22 Art 9.
23 Art 11 as amended.
24 Art 11 (1) (a) and (b) as amended.
25 Art 11 (1) (b) This was safer for the consumer but more cumbersome.
26 Commission Communication Date: 13 May 1998 Electronic commerce: Commission proposes electronic signatures Directive.
27 Australian Attorney General report, op.cit. supra.
28 Common Position EC No 28/1999.
29 ibid.
30 Article 1.

An electronic signature cannot be legally discriminated against solely on the grounds that it is in electronic form.

However if the signature is an advanced electronic signature based on a qualified certificate and created by a secure-signature-creation device (defined in the Directive) then, throughout the Union, such advanced electronic signature shall:

- be deemed to satisfy the requirements of a signature in the same manner as a handwritten signature and
- is admissible as evidence in legal proceedings.

If a certificate and the service provider meet certain essential requirements, electronic signatures based on their service would benefit from an automatic assumption that they were legally recognized in the same manner as hand-written signatures. Furthermore they could be used as evidence in legal proceedings.

* *Certification*: Certification services can be offered without prior authorization: the market forces themselves will ensure that high levels of security to satisfy consumers' concerns are provided. Member States are free, however, to set up voluntary accreditation schemes for certification service providers in order to indicate special security measures or levels. On the other hand, Certification service providers wishing users of their certificates to benefit from a legal recognition of signatures based on their certificates, however, must fulfil certain essential requirements. The Directive lists these requirements.
* *International dimension*: To facilitate electronic commerce at world level; the proposal includes mechanisms for co-operation with third countries on mutual recognition of certificates on the basis of bilateral and multilateral agreements.[31]

iii. Directive on Distance Selling

This Directive,[32] which was enacted in 1997 with a deadline for its implementation by all the member states which expires in the mid-next year, provides for additional protection for consumers with regard to distance selling such as is electronic commerce.

According to the Directive, prior to the conclusion of any distance contract, the consumer must be provided with clear and comprehensible information concerning:

* the identity and possibly the address of the supplier;
* the characteristics of the goods or services and their price;
* delivery costs;
* the arrangements for payment, delivery or performance;
* the existence of a right of withdrawal;
* the period for which the offer or the price remains valid and the minimum duration of the contract, where applicable;
* the cost of using the means of distance communication.

The consumer must receive written confirmation or confirmation in another durable medium (electronic mail) at the time of performance of the contract.

The following information must also be given in writing:

- arrangements for exercising the right of withdrawal;
- place to which the consumer may address complaints;
- information relating to after-sales service;
- conditions under which the contract may be rescinded.

The consumer has the right of withdrawal. Where the supplier has met his obligations relating to the provision of information, the consumer has at least seven working days to cancel the contract without penalty. Where the supplier has failed to meet his obligations as regards information, this period is extended to three months.

Where unsolicited goods are supplied, the consumer's failure to reply does not constitute consent.

iv. Directive on Distance Marketing of Financial Services

The European Commission has recently published its amended proposal for a Directive aimed at establishing a clear regulatory framework for the marketing of financial services at a distance within the Single Market.[33] This follows the 'maximum harmonization' approach, and has replaced a two week 'warming up period' before the conclusion of the contract with an obligation on the supplier to provide a comprehensive set of information elements and by introducing a general right of withdrawal.

The aim of the proposed Directive is to ensure a high level of protection for consumers of retail financial services (insurance, banking and investment services) marketed by mail,

[31] As in fn. 44. On 23 November 1998, the United Nations Commission on International Trade Law, also published the *Draft Uniform Rules on Electronic Signatures*. On 23 November 1998, the United Nations Commission on International Trade Law, made the Draft Uniform Rules on Electronic Signatures publicly available: http://www.un.or.at/uncitral/english/sessions/ wg_ec/wp-79.htm .

[32] European Parliament and Council Directive 97/7/EC of 17 February 1997 on the protection of consumers in respect of distance contracts. *Official Journal* L 144, 04.06.1997.

[33] Amended Commission proposal for regulatory framework for distance selling of financial services, 26 July 1999, following a proposal of 14 October 1998.

by telephone, by fax or by electronic means such as the Internet. Suppliers of financial services would be able offer their products throughout the Single Market, without the hindrance of having to comply with different national consumer protection laws on distance sales.

The consumer has a general right of withdrawal, without penalty and without giving any reason. Member States would be free to set the 'cooling-off' period between 14 and 30 days depending on the financial service offered. Those Member States which opted for the maximum period would nonetheless be obliged to accept the supply of financial services from other Member States with shorter withdrawal periods. Some financial services have been exempted from the withdrawal right (foreign exchange services, trade in securities, certain short term non-life insurance products, certain types of property loan) on the grounds that such a right would be incompatible with their correct functioning.

v. The Brussels and Rome Conventions

The Commission has already issued a proposed Council Regulation which will amend and substitute the existing norms in the Brussels Convention on Jurisdiction and on Recognition and Enforcement of Judgements. The Brussels Convention gives special attention to Consumer Contracts and affords the consumer the facility to sue in his own State of residence rendering legal proceedings more possible and effective.

The Commission has noted that the wording related to consumer contracts has given rise to anxieties among those looking to develop electronic commerce.

These concerns relate primarily to the fact that companies engaging in electronic commerce will have to contend with potential litigation in every Member State, or will have to specify that their products or services are not intended for consumers domiciled in certain Member States.

One such concern relates to the perceived problems with the notion of 'directing activities' towards specific markets, which is considered difficult to comprehend in the Internet world.

In order to further clarify the legal implications and requirements of electronic commerce, in particular in respect of jurisdiction and applicable law as a result of the development of trans-border electronic commerce, the Commission is currently organizing hearings, with the participation of regulators, legislators, consumers, industry and other interested parties.

Similarly the same preoccupation relates to the Rome Convention on the Law of Contracts[34] which also considers consumer contracts. The preoccupations were recently voiced in an article in the influential paper, *European Voice*, published in Brussels referring to the hearings to be held in November on the proposed Commission legislative drafts.

Peter Chapman writes that

> The hearings concern Commission plans to amend the EU's rule book to add changes already agreed to the Brussels conventions governing consumer's ability to seek legal redress in contractual disputes in their own courts (of residence) and proposals to amend the Rome convention which governs the law in such cases.[35]

The Rome and Brussels convention rules will, firms fear, change the concept of the country of origin principle and constrain e-commerce firms to conform not only to the rule in their country of origin but also to the rules in the countries where their customers are based.

V Choice of Law and Jurisdiction

Everyone involved in electronic commerce agreements should pay particular attention to the issues of jurisdiction and choice of law. The advice, commonly given by lawyers to their clients world-wide, to ensure that contracts include a freely agreed choice of jurisdiction and choice of law clause become even more important for cyberspace.

Over the internet, the difficulties of arriving at the proper law of the contract, at the jurisdiction and legal system with the closest connection, multiply as one operates in an intangible environment.

A written choice of law clause and a written choice of jurisdiction clause therefore becomes more and more important. This does not mean that States will not be able to override such choice in the interest of public policy: that is the ultimate safeguard. One example of that relates to consumer contracts: there is an increasing consensus internationally at the level of the EU, OECD, WTO and others that the facilitation of e-commerce contract regulation should not be at the expense of the consumer who needs to remain protected as a matter of public interest.

VI Festina Lente

The Roman maxim of Festina Lente comes to mind in the way the international community should handle the legal regulation of e-commerce. To hurry slowly: to make rapid changes carefully and wisely. Although international business and not law is the driver in the industry, the lack of the necessary legal

[34] 1980.

[35] *European Voice*, Volume 5, 9-15 September 1999, at p. 3.

framework would seriously hamper the sector in its development.

The regulation of e-commerce must develop in an international dimension: e-commerce was born as a global reality. The European Union's regulation of electronic commerce can serve as a model for the regulation of this sector on a regional and global level. The EU cannot afford to carry out the setting up of this legal framework at a leisurely pace. The International Telecommunications Union Telecom '99 in Geneva has shown that the advent of broadband technologies to the office and to the home further strengthens the technological environment for the development of e-commerce. The legal environment must match this without delay.

5 Defective Goods and Services Purchased Online
The Extent of Protection Afforded to the Consumer Under Maltese Law

Brigitte Zammit , BA, LL D

Each and every one of us plays the role of a consumer in our daily life. The advent of the Internet offers us a new way of shopping, irrespective of our geographic location or that of the seller. Today an Internet consumer may go online twenty-four hours a day to shop for practically any good or service, and conclude transactions even where sensitive data is involved. From books and compact discs to software products or pharmaceuticals, and increasingly even financial or insurance services – you name it, it will probably be available online.

Although such e-consumers recognize the benefits that they may gain by being able to buy goods and services from online businesses world-wide however, they harbour high expectations of receiving adequate consumer protection under the law.[1] In view of this, not only has the Maltese Consumer Protection Act been revamped by means of the 2000 amendments; the newly-enacted Maltese E-Commerce Act 2000 further lays down provisions that supplement these rules and applies them within the e-commerce scenario.

This article starts out by briefly setting the context of consumer protection legislation within the e-commerce scenario and then focuses on the extent to which such legislation in Malta protects the online consumer when the latter purchases goods or services that later reveal themselves to be defective.

The Raison d'Être and Scope of Consumer Protection Law as Applicable to Online Transactions

In line with the E-Commerce Directive, the Maltese E-Commerce Act defines a consumer as any 'natural' person who acts 'for purposes outside his or her trade, business or profession'.[2] A person usually acts in such capacity when he or she buys goods or services from a business.[3]

Any discussion concerning consumer contracts usually starts off from the premise that the consumer is in a weaker bargaining position than the supplier. Very often the consumer has no say in the drafting of the contract and finds himself in a position where he or she must either decide to accept the contract as it is or else remain without the good or service in question.[4] This is especially relevant in the case of standard form contracts, which can today be performed with greater ease over the Internet.[5] A typical example would be the online purchase of airline tickets.[6] Thus, although the general principle remains that the parties should be free to contract, this rule cannot remain so rigid within the realm of consumer contracts.

Within the realm of consumer contracts the Maltese Consumer Affairs Act and regulations enacted thereunder today protects all areas of consumer protection including advertising, product liability and, as from September 2001, even distance selling. This whole body of legislation also applies to online consumer transactions, in the same way as all existing consumer-related Directives under EU law, which constitute the source of our current consumer legislation, are applicable to online transactions by virtue of Recital 11 of the E-Commerce Directive. The Maltese E-Commerce Act further empowers the Minister of Communications to regulate on specific consumer-related issues within the e-commerce realm.[7]

Implied Contractual Terms of Quality and Remedies for Breach Thereof

The global and virtual nature of the Internet creates new concerns regarding the way in which contractual terms and conditions may adequately be displayed. A clickable icon or hyper-

1 Simon Lowe & Thomas Limouzin-Lamothe, *Formation and Proof of Electronic Agreements in France*, [1999] ICCLR Special Issue, p. 37; Reuters, *Europeans Uninterested in Shopping Online*, 22. 2. 2000 at http://home. cnet. com/category/0-1007-200-1554830. html.

2 E-Commerce Act, Section 2.

3 Julia Hörnle, *Consumer Protection and the Internet,* http://pittance.ccls.edu

4 Stephen Weatherill & Geraint Howells, *Consumer Protection Law*, (Dartmouth Publishing Co. 1995), ch. 1, p. 20.

5 Michael Chissick & Alistair Kelman, *Electronic Commerce: Law and Practice*, (Sweet & Maxwell, 2000) p. 92; Olivier Hance, *Internet e la Legge*, (McGraw-Hill, 1997) p. 128:
Tali contratti sono già molto frequenti su Internet: le condizioni generali di vendita sono inserite su dei server e la sola scelta lasciata all'utente, contraente potenziale, è quella di accettarle o di non stipulare il contratto!

6 One of many examples is British Airways (http://www.britishairways.com), which allows passengers to book their seat online.

7 E-Commerce Act, Section 25 (1) (a) (iv).

link on the site usually serves this purpose, so long as it is visible and easily accessible to the consumer before the contract is formed.[8]

Express terms may however sometimes be too cumbersome and commercially unrealistic to incorporate in a contract.[9] Most developed legal systems, including Malta, have consequently identified the terms that should be implied into contracts for the provision of goods or services independently of negotiation between the parties.[10]

Existing rules on implied terms clearly also apply to easily definable goods or services supplied via the Internet. The problem arises in the case of information products, such as customized package software, supplied as discrete packages via Internet download.[11] Computer software is unfortunately by its very nature susceptible to contain minor 'bugs'.[12] Not only is it impossible to test even the simplest program in an exhaustive fashion; it is further to be expected that every piece of software will contain errors that may only materialize when a particular, and perhaps unrepeatable, set of circumstances occurs.[13] In such cases should the traditional implied terms still be applied? It has been suggested that in such cases the implied terms should still, as a minimum, cover delivery and quality but the content of such terms may have to be different from normal implied terms relating to conventional goods or services.[14]

The Maltese Consumer Affairs Act provides for implied terms of quality on the basis of conformity with description and fitness for purpose.[15] Yet these provisions of the Act only relate to 'goods', defined in section 72 as any tangible movable item of property, and to consumer contracts of sale. Section 60 further deems a product to be defective if it fails to provide the safety that a person is entitled to expect, considering, among other things, the use to which such product could reasonably be expected to have been put.[16] If on coming into force this Part of the Act[17] will be deemed applicable to digitized products, then even online suppliers will be held liable as producers if the latter or the importer cannot be identified and the person injured by the defective product has conformed to the provisions of section 59 (2).

The consumer is moreover afforded an action for damages under section 61, including damages amounting to damage to or loss or destruction of any item of property other than the defective product itself.[18] Thus if as a result of defective software the consumer's hardware has been damaged, and such hardware is of a type ordinarily intended[19] and so used for private use or consumption by the consumer, the latter has an action for damages. It is important to note that a producer may not contract out of such liability in any manner whatsoever.[20] Such action is furthermore without prejudice to any rights that the consumer may have under any other law,[21] as for example the *actio redhibitoria* and *actio estimatoria* remedies available under the Civil Code.

The applicability or otherwise of these provisions of the Act is however not as straightforward as it may prima facie seem to be. In a clear-cut case, as for example where a Web site indicates a shirt on sale as being 100% cotton, there would not be any problem; it is obvious that such a shirt must conform to the description and be 100% cotton. Problems may however arise in the case of digital information products, not only as a result of their inherent versatility,[22] but also because what may seem to be a contract of sale in their regard may actually constitute a mere licence agreement.[23]

Digital information products are not easily classifiable as either goods or services.[24] This classification is nonetheless important in that the provisions of the Consumer Affairs Act relating to product liability do not apply to services, although such an extension had originally been proposed by the drafters. The definition of 'products' on its part is wide in scope, including in its indicative list intangibles such as electricity and gas. Although some authors describe digitized products as dematerialized versions of goods,[25] it is arguable whether the Maltese courts would deem such products to

8 Hörnle, op. cit.; Chissick & Kelman, op. cit. p. 93.
9 Chris Reed, *Internet Law*, (Butterworths 2000) p. 183.
10 Weatherill & Howells, op. cit. p. 26.
11 Reed, op. cit. p. 183.
12 That is, defects. Ian J. Lloyd, *Information Technology Law*, (Butterworths 2000) p. 213; Chissick & Kelman, op. cit. p. 102.
13 Lloyd, Ibid. p. 193.
14 Reed, op. cit. p. 183.
15 Consumer Affairs Act, section 73 (1).
16 Section 60 (1) (b).
17 Part VII.
18 Ibid., section 61 (b).
19 Ibid., section 61 (b) (i).
20 Ibid., section 68.
21 Ibid., section 69.
22 Reed op. cit. p. 185.
23 Hörnle, op. cit.
24 Reed, op. cit. p. 182.
25 Chissick & Kelman, op. cit, p. 100.

fall within the scope of the said definition of a product or whether such products would be deemed to have a hybrid nature, and consequently qualify both as a good and as a service.

English law is drafted in similar terms to the Consumer Affairs Act. A reference to the situation as developing in this jurisdiction is therefore relevant to this article. The English courts have described a software program as:

> instructions or commands that tell the hardware what to do… A program in machine readable form must be contained on a machine readable medium, such as… disks.[26]

While the disk itself would clearly fall within the statute law definition of 'goods', the actual program would not, even though it may be classified as a product.[27] This may arguably be extended to software programs downloaded directly via the Internet.

The next question concerns the quality terms that are to be implied into contracts involving such products. In the *St Albans* case cited above Sir Iain Glidewell LJ, held that in the absence of any express terms as to quality or fitness for purpose, a contract for the transfer into a computer of a program intended by both parties to instruct or enable the computer to achieve specified functions is subject to an implied term that the program will be 'reasonably fit for achieving the intended purpose'.[28] Given the inherently versatile nature of software products however, the problem as to whether any precise purpose can be stipulated in regard to digital information products subsists.[29]

Another problem referred to above relates to the fact that the downloading of software from the Internet might not even classify as a sale in the first place, but rather as a licence.[30] The implied conditions as to description, satisfactory quality and fitness for purpose would consequently not apply since the purchaser will not become owner of the information but merely a licensee thereof. Should he therefore receive merely a limited protection against interferences by the third party having a right to use the product?[31] In many cases the issue as to whether or not the scope of such use rights should extend beyond mere right of common use of the information by the purchaser will be settled by express licence terms.[32] Where no such express licence exists, some foreign courts have sought construe an implied licence to resolve the matter.[33]

The greatest challenge to the courts in this area is that of determining standards for software and other digitized products. Given that software products will almost inevitably have bugs,[34] it must be determined whether such defects are to be deemed to constitute a breach of section 73 of the Maltese Consumer Affairs Act, which sets out the terms of quality that are to be ensured by traders when selling goods to consumers. English courts appear to measure quality of software on a case-by-case basis.[35] Thus while in the landmark *Saphena* case[36] the English Court of Appeal held that 'no buyer should expect a supplier to get his programs right first time', in the *St Albans* case it came out stricter against the software supplier and awarded damages to the consumer plaintiff. In Malta too it will eventually be up to the courts to imply into e-commerce agreements such terms that seek to ensure the protection of consumer interests but at the same time create legal certainty for the online merchant.

Remedies Afforded by the Distance Selling Regulations 2001[37]

In addition to the legal protection described above, further legal remedies may be sought by an aggrieved online consumer under the Distance Selling Regulations 2001, modelled on the EC Directive on Distance Contracts.[38] These Regulations are particularly relevant within the online scenario, where it is easier for fraudulent sellers to succeed because consumers have less time to consider their choices.[39]

The consumer's right of withdrawal provided by these Regulations is an important right especially on the Internet, where the consumer may easily have second thoughts as soon

26 Sir Iain Glidewell in *St Albans City and District Council v. International Computers Limited*. [1996] 4 All E. R. 481.
27 Ibid.
28 Peter Sinnett, 'St Albans and the Millenium Time Bomb', *Computers and Law*, Vol. 7. Issue 5 (Dec. 1996/Jan. 1997) p. 8.
29 Reed, 'Internet Contracting', *Computers and the Law*, Vol. 9 (February/March 1999) p. 37.
30 Reed op. cit. at footnote 12, p. 184.
31 Ibid.
32 Ibid.
33 *Trumpet Software Pty Ltd v. OzE-mail Pty Ltd*., [1996] 34 IPR 481 where the Australian Federal Court suggested that such an implied licence could allow the licencee to make any use of the information that does not infringe upon the owner's right to exploit the information product commercially.
34 Chissick & Kelman, op. cit. p. 102; Ian J. Lloyd, op. cit, p. 213.
35 Chissick & Kelman, op. cit. p. 103.
36 *Saphena Computing Ltd. v. Allied Collection Agencies Ltd*., [1995] F. S. R. 616.
37 Legal Notice 186 of 2001.
38 Directive EC/97/7, OJ L 144, 4. 6. 1997; This Directive has been complemented by a draft Directive on the Distance Marketing of Financial Services, 14. 10. 1998, COM (1998) 468 final, at http://europa.eu.int/comm/dg15/en/index.htm
39 Ibid.

as he submits the order. Regulation 6 thus gives the consumer the right to withdraw from such a contract within 15 days from the day he receives the goods[40] or, in the case of services, from the day of conclusion of the contract.[41] This applies provided the supplier satisfies his obligations under Regulation 5 to provide the consumer with written confirmation of details relating to the supplier.[42] This 15-day period may extend to up to 3 months if the supplier does not comply with the said information requirements. The consumer may make such withdrawal without any need to give reasons and without incurring any penalty.[43] The sole costs that the consumer must bear are ones involved in returning the goods. Moreover, if the consumer has already paid the price of the goods, totally or partially, he is to be reimbursed with this sum within 30 days.[44]

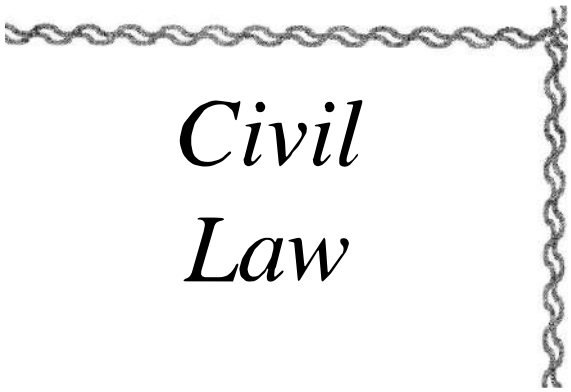
It is very interesting to note that in this regard Maltese law thus affords the consumer a wider protection than the Directive, which only allows the consumer a 7 working day period of withdrawal.[45]

Under both the Directive and the Maltese Regulations however this right of the consumer to withdraw from a contract does not apply to contracts where such right would be unfair and disproportionate towards the supplier. These contracts, listed in Article 6 (3) of the Directive and Regulation 6 (5) (d) of the Maltese Regulations respectively, include contracts for the supply of software that has already been unsealed by the purchaser or ones for the supply of goods clearly personalized to the consumer.[46] Nonetheless consumers will arguably still have a right to withdraw from a contract of digital supply of information against immediate payment via the Internet unless such information is packaged in the form of a video recording, computer software or any of the above categories.[47]

Conclusion

Needless to say this article has merely considered one aspect of consumer protection law, which is today widespread in scope and covers numerous issues. In this context Maltese legislation today seeks to provide adequate legal protection on all such issues to both aggrieved online consumers and ones in conventional transactions alike.

40 Regulation 6 (1) (a).
41 Regulation 6 (1) (b).
42 Regulation 4 lists the content of such information.
43 Article 6 (1).
44 Article 6 (2).
45 Dir. EC/97/7, Article 6.
46 Clive Davies, 'Electronic Commerce – Practical Implications of Internet Legislation', *Tolley's Communications Law Journal*, Vol. 3, No. 3, 1998.
47 Reed, op. cit. at footnote 12, p. 258.


Civil
Law

6 Administrator in the Condominium Act

Stefan Zrinzo Azzopardi, BA, LL D.

The Condominium Act introduces an innovative method of administration in the buildings defined as condominia by the same Act. This Act introduces the appointment of an administrator for the common parts of the condominium. The nature of the administrator has been discussed by several authors and they have proposed various theories in this regard.

Salis opines that the administrator is

> *un mandatario dei proprietari dell'edificio e conserva tale sua qualità anche quando la sua nomina viene fatta dall'autorità giudiziaria su istanza di qualcuno dei propietari, avendo l'assemblea omesso di deliberare al riguardo.*[1]

The Appointment of the Administrator

Section 15 provides that

> when there are more than three condomini, the meeting of the condomini shall appoint an administrator.

This section demands that in the cases when the condominium is made up of four condomini or more, then the condomini must appoint an administrator at the meeting of the condomini. The provision in section 15(1) is not of a facultative nature for it is using the word 'shall' and not 'may' as in the case of regulations in section 24.

The law here uses the phrase 'more than three condomini'. This is to be interpreted that there must be more than three units rather than more than three condomini. The reason is that there may be a condominium made up of three units and one unit is co-owned by more than one condominus, and thus both of them would be condomini. Yet the legislator, when drafting the section, had in mind a situation whereby there is one condominus per unit.

In the cases when the condominium is made up of less than four units, then the administration of the condominium will be held jointly, even though the condomini in such a case may opt to appoint an administrator. Whereas in the case of a condominium made up of more than three units the appointment of the administrator is compulsory, in other cases, namely condominia having three or less units, the appointment of the administrator is of a facultative nature.[2]

In the case that the condomini do not agree on the appointment of the administrator then the law provides for the referral of the matter to arbitration. Such a referral should be made either by one more condomini and the arbitrator will appoint the administrator himself. Thus the law is providing for another situation wherein the arbitrator will substitute the will of the meeting of the condomini.[3]

Once the condomini appoint the administrator, the administrator must inform the Land Registrar of his appointment within fifteen days from the date of the appointment. The law also provides that any condominus may inform the Land Registrar of such appointment of the administrator.[4]

The administrator is considered as the mandatory of the condomini, that is the person who executes the will of the condomini as expressed in a decision of the meeting. It is questionable whether he must accept the appointment in order that this form of mandate can come into effect in the same way as in the case of mandate in the Civil Code.[5]

Salis notes that the law does not require that the person nominated as administrator formally accepts the appointment.[6] The fact that the administrator commences to execute the duties of administrator, is a tacit manner of showing his acceptance. In the case that he does not accept, he is duty bound to inform the condomini in order to convene another meeting so that another administrator can be appointed. Until that day however, the person appointed, notwithstanding his lack of acceptance, will still be deemed to be the administrator of the condominium.

Who may be Appointed as Administrator?

The law does not lay down any limitations with regards to who may be appointed as an administrator. It seems that since

1 Salis, L., *Il Condominio negli Edifici*, (1956) p. 251.
2 Corte di Cassazzione 03.01.1966, n. 24.
3 Section 15(1) Condominium Act.
4 Section 15(6) and 15(7) Condominium Act.
5 Section 1856(2) Chapter 16 of the Laws of Malta 'The contract is not perfected until the mandatory has accepted the mandate'.

the administrator is to be considered as a mandatory of the owners then the limitations with regards to mandate in the Civil Code should apply.[7]

The administrator may be a condominus or else a person who is a third party to the condominium. For example, the condomini may appoint an accountant or an advocate or a person who presents himself to render the services of an administrator. The condomini may also appoint a company to act as administrator.[8] In Italy, a considerable number of companies have been formed in order to render the services of administration in condominia. At first there was a dispute whether the administrator could be a moral person other than a physical person. Case law[9] and commentaries by various authors however, have resolved the matter.

The Tribunal of Milan has noted that the law does not put forward any incompatibility.[10] Thus, the only means possible to create an incompatibility is by having a regulation that controls the appointment of the administrator by the condomini.

One notes that there cannot be a contract binding the condomini that the administration of the condominium or the appointment of the administrator is limited to one or some of the condomini.[11] Such an agreement would be null and void. Furthermore, under Maltese law it would be considered as contrary to law since the provisions of section 15 are considered by section 3 of the Act to be public policy provisions.

The Functions of the Administrator

Section 16 lays down the functions of the administrator, yet the list given in this section is not an exhaustive one since it provides that 'the functions of the administrator shall include'. The reason being that there are various duties of the administrator which were already discussed in relation to the convocation and conduction of the meetings of the condomini.

Salis[12] notes that the functions of the administrator may be considered to be the contents of the contract of mandate that arises between the condomini and the administrator once the administrator is appointed by the meeting of the condomini. Thus, the appointment of the administrator is a mandate with a number of duties specifically identified by the law.

The functions listed are:

1. to execute the decisions of the meeting of the condomini and to ensure the observance of the rules regulating the condominium.[13] It has been held that since the administrator is a mandatory of the condomini, he is to execute all the decisions with the diligence of a *bonus pater familias*.[14]

   The diligence of the administrator changes in accordance to whether the duties will be carried out gratuitously or for a remuneration. The Civil Code[15] and Maltese case law[16] have pointed out that in the case when the mandate is carried out for a fee, the level of diligence increases to that of *culpa levis in abstracto*.

   The administrator must always carry out the decisions of the meeting so long as they are not against the law, such as in the case of introducing an innovation without the necessary development permits.[17]
   De Tilla opines that:

   L'obbligo dell'amministratore di curare l'osservanza del regolamento di condominio si riferisce non solo alle parti dell'edificio comuni a tutti i partecipanti e, come tali, inscuscettibili di proprietà separate, ma riguarda anche la vigilanza sulla regolarità dei servizzi comuni, anche per quanto attiene alle interferenze con i singoli appartamenti. Riguarda, altresi, sia il potere di eseguire verifiche e di impartire le necessarie provvidenze intese a mantenere integra la parità del godimento dei beni comuni da parte di tutti i condomini, sia il contrasto dell'uso delle parti esclusive con le regole fissate nel regolamento. Non riguarda, in fine, i rapporti personali tra i condomini.[18]

6 Salis, L. 'Condominio: nomina dell'amministratore e accettazzione', *Rivista Giuridica dell' Edilizia*, 1986. I. 545.
7 Section 1869 et Seq. Chapter 16 of the Laws of Malta.
8 Murra, R. 'Sulla nomina di una società commerciale ad amministrare di un condominio,' *Giustizia Civile*, 1989. I. 2486.
9 Tribunale di Roma 31.05.1989, c. Condominio Faloria II.
10 Tribunale di Milano 27.01.1977.
11 Cass. 19.10.1961, n. 226.
12 Salis, L., op. cit. *Rivista Giuridica dell'Edilizia*, 1986. I. 545.
13 Section 16(1)(a) Condominium Act.
14 Cass. 08.10.1963, n. 2668.
15 Section 1874 Chapter 16 of the Laws of Malta: '(1)A mandatory is answerable not only for fraud, but also for negligence in carrying out the mandate. (2) Nevertheless, such liability in respect of negligence is enforced less rigorously against a person whose mandate is gratuitous than against one receiving a remuneration.
16 *Borg noe v. Calascione*, Qorti Tal-Kummerċ 25.05.1961, Vol. XLV-III-814.
17 De Tilla, M., 'Attribuzioni e Rapprezentanza dell'Amministratore del Condominio', *Giustizia Civile*, 1994. II. 133.
18 De Tilla, M., 'La legitimazzione dell'amministratore di condominio per l'osservanza del regolamento e la validità ed opponibilità delle clausole che limitano l'uso delle parti di proprietà esclusiva', *Giustizia Civile*, 1989. I. 1370.

2. to regulate the use of the common parts and the performance of services in the common interest, in such a way that all the condomini are assured the maximum benefit possible.[19] It has been held by the Court of Cassation[20] that in the case when a common part is used in turn by the condomini, the administrator may hold the keys of such an area in order to assure that all the condomini would have the chance of making use of it.
3. to apportion the costs in terms of subsection 11(1).[21] Section 11(1) reads that the expenses are to be divided according to a valuation of each separate unit within the condominium, unless otherwise agreed. This excludes the apportionment in the case of a common part or service that serves the condomini in an unequal measure as provided for in section 11(2) of the Condominium Act. Thus, an amendment is necessary in order that a reference can be made to subsection (2) of section 11.
4. to collect the contributions from the condomini.[22] Once the condomini at the meeting agree on the estimates for expenditure on maintenance, the administrator may apportion the expenses and proceed with the collection of the funds due. The amount becomes due as from the date of the decision of the meeting even though the apportionment is not yet carried out.[23] The administrator, does not need a new approval of the meeting in order to institute legal action if a condominus does not pay his share.[24]
5. subject to the approval of the meeting, to set up and maintain a floating fund to which the condomini shall contribute their share.[25]
6. to perform such acts as are necessary for the preservation and protection of the common parts.[26] This paragraph is not to be interpreted in a restrictive manner, that is, the administrator's power is limited to the carrying out acts of maintenance of the common parts and services. The Italian courts have interpreted the paragraph to include the duty of the administrator to file possessory actions in the case that any of the common parts are invaded by third parties or a condominus.[27]
7. in the case that a condominus, or a third party to the condominium, carry out works that affect the enjoyment of the condominium by the condomini, then the administrator may file an action in order that those works are stopped or removed.[28]
8. to render accounts to the condomini at such intervals as the meeting shall decide or as may be established in the rules regulating the condominium.[29] Since the administrator is a mandatory, it is natural that he would be duty-bound to render accounts to the condomini at specific intervals. The Court of Cassation held that the rendering of accounts need not be in a strict manner as would be necessary in the case of a limited liability company.[30] They must be made in a manner that the condomini may understand what funds the administrator spent and received.
9. to claim or receive monies or interest[31]
10. to take necessary steps to have in force an adequate insurance of the condominium when the condomini so agree.[32] Prior to the recent amendments, this section read that the administrator was to take the necessary steps to insure the block. This section, prior to the amendments, charged the administrator with the duty to insure the building, yet the law now charges the administrator with such a duty only if the condomini agree about such an insurance.

    Under Italian law, this function of the administrator is not specifically identified. In fact, authors disagree whether the administrator may enter into a contract of insurance on behalf of the condominium without a particular decision to that effect. The Tribunale di Roma has held that the administrator may insure the condominium without a decision of the meeting of the condomini since the insurance contract is a means of preserving the condominium.[33]

19 Section 16(1)(b) Condominium Act.
20 Cass. 23.07.1983, n. 5076.
21 Section 16(1)(c) Condominium Act.
22 Section 16(1)(c) Condominium Act.
23 Cass. 29.10.1975, n. 3655.
24 Cass. 11.11.1992, n. 12125.
25 Section 16(1)(c) Condominium Act.
26 Section 16(1)(d) Condominium Act.
27 Cass. 11.11.1986, n. 6593.
28 Cass. 08.03.1986, n. 1552.
29 Section 16(1)(e) Condominium Act.
30 Cass. 25.07.1977, n. 3309.
31 Section 16(1)(f) Condominium Act.
32 Section 14(5) Condominium Act.
33 Tribunale di Roma, 11.08.1988.

11. to perform such other acts which are ancillary or conducive to the proper management of the condominium.[34] This provision may give rise to a wide interpretation and thus increase considerably the powers and duties of the administrator. It may also be considered to give discretion to the administrator, for he can decide what is ancillary or conducive to the proper management and what is not.
12. the administrator is also the person who will take care of the records of the meeting of the condomini. He is to keep a register of the addresses of the condomini, the minutes of the meetings, a register recording the notices sent to the condomini and a copy of all the notices, decisions as well as directives.[35]

Representation by the Administrator

The administrator, in all matters relating to the common parts of the condominium, represents all the condomini and may sue third parties to the condominium or the condomini themselves. On the other hand, he may also be sued by the third parties or the condomini in relation to the common parts of the condominium.[36]

The Court of Cassation has held that

La rapprezentanza in giudizio del condominio spetta inderogabilmente a norma dell'articolo 1131, all amministratore nominato all'assemblea dei condomini, nei limiti delle attribuzioni indicate dalla legge o dei maggiori poteri conferitigli dal regolamento o dall'assemblea, restando in facoltà del singolo condomino di intervenire nella lite solo ad adiuvandum come portatore di un interesse proprio.[37]

The representation of the condominium and the condomini by the administrator is limited by the provisions of section 16. In the case that the administrator files an action that is beyond his duties as listed by the law, then he would need a decision of the meeting of the condomini in order to file the action or to represent the condomini in an action filed against him.[38]

The administrator, in the case of a law-suit relating to the common parts, may be sued on behalf of the condomini.[39] Thus, in the case that a contractor or a servicing company carries out works in the common parts such as maintenance or redecoration and the company does not receive payment, the action for the payment of the works would be filed against the administrator and not against all the condomini as in the case of property that is held in co-ownership. In the case of a judgement that is passed against the administrator, the judgement is enforceable against all the condomini unless the matter concerned a number of condomini.[40]

The law also provides that any lawful order issued by any authority concerning the common parts, shall be addressed to the administrator.[41] If the condomini decide to carry out an innovation, and the innovation is not carried out with the necessary development permits, then the order by the competent authority would be addressed to the administrator and not the individual condomini. Thus, for all intents and purposes of the law, in such cases, the administrator would be responsible for such breaches of the law even if the works were not executed by him.

In the case that the administrator is served with a writ of summons or a judicial act that goes beyond his functions, then he must inform the condomini immediately and convene a meeting to discuss the matter.[42] In the case that the administrator fails to carry out such a duty he would be responsible in damages.[43]

The necessity of convening a meeting in this case, unlike the other cases, is that the condominus cannot defend an action that goes beyond his powers. In this case, the action would fall outside the scope of his mandate and thus if the mandatory were to defend the action he would be acting ultra vires.

Review of the Administrator's Decisions

The law states that the measures that are taken by the administrator within the limits of his functions are binding on all the condomini.[44] The law further provides that a condominus may appeal against a measure taken by the administrator to the meeting of the condomini. The condominus may also refer the matter to arbitration.

34 Section 16(1)(h) Condominium Act.
35 Section 16(2) Condominium Act.
36 Section 17(1) Condominium Act.
37 Cass. 08.08.1989, n. 3646.
38 Cass. 11.11.1992, n. 12125.
39 Section 17(2) Condominium Act.
40 Salis, L., 'Condanna nelle spese di lite ed obbligo dei condomini interessati.' *Rivista Giuridica dell' Edilizia*, 1965. I. 716.
41 ibid.
42 Section 17(3) Condominium Act.
43 Section 17(4) Condominium Act.
44 Section 19 Condominium Act.

The Court of Cassation has held that in the case when the administrator acts beyond his powers, the condominus may either appeal to the meeting or else he may file an application to the judicial authority.[45] The condominus need not appeal to the meeting first and then file the application. The application may be filed without the deliberation of the meeting.

The Rights of the Administrator

The administrator has a right to be reimbursed with the monies spent by him in the course of his administration and furthermore, if the condomini so decide, he is entitled to a fee. Since the administrator is a mandatory of the condomini,

> the mandator must repay to the mandatory the advances and expenses made or incurred by him in the carrying out of the mandate.[46]

The Court of Cassation has upheld this reasoning and held that the administrator has a right to interest as from the date he made the disbursements, in the case that he has to pay funds on behalf of the condominium which have not been collected from the condomini.[47]

The law provides that

> the fees due to the administrator shall be determined by the meeting of the condomini.[48]

Furthermore, the law notes that one of the functions of the meeting is

> to determine any remuneration that may be due.[49]

It seems that the post of administrator is not necessarily an onerous one and there is the possibility that, like the case of mandate, the post may be held gratuitously. In fact, the law uses the words, 'any remuneration that may be due'.

The Court of Cassation has held that the decision whether the post of administrator is of a gratuitous nature or not depends on the regulations of the condominium, in their absence, the deliberations of the meeting of the condomini.[50] If the regulations provide for the appointment and reimbursement of the administrator, the appointment would be considered as an act of ordinary administration of the condominium and thus the notice of meeting need not indicate that the meeting will decide on the appointment of the administrator.[51]

The remuneration and its extent depends on various factors, namely:

1. the extent of the administrator's duties;
2. size of the condominium;
3. whether the administrator is a condominus or not;
4. whether he or she is a professional administrator.

Terzago opines that the compensation must be calculated in accordance to article 1709 of the Italian Civil Code which states that:

> *Il mandato si presume oneroso. La misura del compenso, se non è stabilita dalle parti, è determinata in base alle tariffe professionali o agli usi; in mancanza è determinata dal giudice.*[52]

The Court of Cassation has held that when the judge is deciding on the *quantum* of compensation, he must be guided by the following principles:[53]

1. the extent of the service which was rendered;
2. the sum must be proportional to the services which were rendered; and
3. reference must be made to the current rates which are paid for such services.

Under Maltese law, unlike Italian law, mandate is presumed to be gratuitous. Thus, if the parties do not agree upon a form of remuneration, the mandate would be deemed to be gratuitous. Since administrator is considered as a mandatory, it is important that the meeting indicates clearly that the administrator will be paid. If no agreement is entered into between the administrator and the condomini on the remuneration and if the regulations of the condominium do not provide for such remuneration, then the administrator may not file a claim against the condomini for payment.

Termination of Appointment

Once the administrator is appointed, he will continue in office for a period of two years and his appointment is terminated on the date that another administrator is appointed.[54] Accordino opines that if another administrator is not nominated after the passage of the two year period, that may be considered as a tacit acceptance of the existing administrator.[55] The tacit confirmation does not occur in the case when the administrator is suspended from his duties.

[45] Cass. 08.03.1977, n. 960.
[46] Section 1881 Chapter 16 of the Laws of Malta.
[47] Cass. 24.03.1981 n. 1720.
[48] Section 15(9) Condominium Act.
[49] Section 21(a) Condominium Act.
[50] Cass. 09.01.1967, n. 89.
[51] Cass. 12.01.1978, n. 124.
[52] Terzago, G., *Il Condominio*, (1998) p. 435.
[53] Cass. 13.02.1970, n. 352.
[54] Section 15(2) Condominium Act.
[55] Accordino, G., Brevi Note in Materia di Nomina e Conferma dell'Amministratore di Condominio Archivio di Locazione e Condomino 186. I. 165.

The administrator may opt to resign from his office prior to the passage of the term of two years. In such a case, the administrator must convoke a meeting in order to discuss his resignation and the appointment of another administrator. If the condomini do not decide on the matter at the meeting, the administrator may refer the matter to arbitration and in that case, the administrator will be appointed by the arbitrator.

The condomini may decide to remove the administrator by means of a decision of the meeting that is approved by two-thirds of the condomini who are present at a validly constituted meeting.[56] The removal of the administrator may also occur by referring the matter to arbitration in the cases when he does not render his accounts or there is a serious suspicion that the administrator has acted irregularly or in the case that the administrator fails to perform his duties.[57]

The law provides that, on termination, the administrator must return the registers to the new administrator.[58] Borselli notes that the administrator, on termination of his appointment, must return the documents to the condomini or to the new administrator himself and he cannot ask the condomini to collect the documents from him.[59] Furthermore, if the dismissed administrator does not return the documents within a reasonable time, he would be liable to damages.

The administrator shall inform the Land Registrar of such termination of his appointment within fifteen days.[60] Any condominus may inform the Land Registrar about such termination in the case that the dismissed administrator fails to do so.[61]

[56] Section 21(7)(a) Condominium Act.
[57] Section 15(4) Condominium Act.
[58] Section 16(3) Condominium Act.
[59] Borselli, E., Amministratori di condominio indesiderabili, Nuova Rassegna, 1974 p. 1279.
[60] Section 15(6) Condominium Act.
[61] Section 15(7) Condominium Act.

7 Does the '*non cumul*' Rule Exist in our Civil Law?

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This article has three objectives. The first is to assess the significance and field of operation of the rule of *non cumul* in comparative law of tort. The second is to review certain Maltese judgments to establish whether our courts apply this rule. The third is to highlight the bad effects of the prevailing lack of clarity and to argue in favour of reform. To the uninitiated, this may seem a fairly arcane topic with few practical implications. However I aim to show that it lies at the heart of certain thorny dilemmas faced by advocates when instituting court proceedings for civil damages.

'Non cumul' in Comparative Law of Tort

The rule itself is easy to define. There are certain factual situations which give rise to an overlap of contractual and tortious responsibility, so that the plaintiff would appear to have the choice whether to institute an action for damages under tort or under contract. Massimo Bianca[1] gives two examples: a surgeon who conducts an operation carelessly and incompetently and the buyer of a home appliance containing a latent defect, which provokes a fire damaging the buyer's apartment. In the first case, the patient has suffered an infringement not only of his contractual right to the diligent execution of professional services, but also of his right qua citizen not to have his health endangered by the negligent activities of others.[2] In the second, the buyer would appear to have a right of action for damages in tort in addition to his contractual right to take action to remedy the effects of the seller's breach of his warranty against latent defects. In these situations of concurrent responsibility, it is a general principle of French law that the plaintiff has no option but to take a position on the contractual terrain and take action on the basis of breach of contract. This rule is applied very strictly, so as to restrict the plaintiff in such cases to legal action of a contractual character and to exclude any possibility of listing both contractual and tortious claims in the writ.[3] Moreover in these situations, even if the contractual remedy is no longer available because of prescription, the plaintiff may still not exercise the action in tort.[4]

The *raison d'être* of the rule of *non cumul* largely derives from the importance which French law gives to the autonomy of the will of the contracting parties. After all, the contract may clearly state whether the parties should or should not have a choice of action in the event of concurrent responsibility between contract and tort. In such cases jurists[5] agree that it is the contract that will determine the matter. However the contract itself is usually silent about this issue in the standard case of *non cumul*. In this case it is assumed that the parties must have intended to exclude the possibility of an action in tort since they chose to regulate the relationship between them by means of a specific contractual regime, which supersedes the more generic protection of tort law. Similar rules also apply to a different, albeit comparable, situation: where one of the parties to a contract has committed actions that, while they do not constitute a breach of contract, would normally constitute a tort. Here too, the principle of respect for the will of the contracting parties leads French authors to conclude that the availability of an action in tort depends on the reasons for which the parties have omitted to include specific contractual provisions regulating the situation. If they have done so because they specifically intended to exclude the possibility of both contractual and non-contractual remedies, then an action for damages in tort will not be allowed. If, however, the omission of the parties derives from their understanding that the situation is already catered for in terms of general legal principles, then a remedy in tort will be available.[6] Analogously, the rule of *non cumul* is justified as a necessary outcome of the intentions of

1 Massimo Bianca, C., (1994), *Diritto Civile Vol. V*, Dott. A. Giuffrè Editore, Milano.

2 It should be kept in mind that the Italian Constitution speaks of the right of citizens to healthcare.

3 In fact, Mazeaud & Chabas argue that it would be preferable to speak of the rule of choice of action instead of *non cumul*. See Chabas, F., (1998), *Leçons de Droit Civil*, (Leon, H., Mazeaud, J., Chabas, F.), Montchrestien, Paris.

4 See Nicholas, B., (1996), *The French Law of Contract*, OUP, Oxford, p. 173.

5 Chabas, F., ibid, p. 403.

6 Thus Mazeaud & Chabas, ibid, argue that in a contract of sale of a shop, the buyer need not include a clause obliging the seller to avoid spreading malicious rumours after the sale that aim to prevent potential buyers from buying from the shop. A seller who acts in this way

the parties, who have freely decided that their relationship will be regulated by a contractual regime.

It is important to note that this rule appears to be specific to French law of tort. If one looks at English and Italian law, it is clear that this rule is not applicable. As Cane[7] observes, explicitly contrasting English and French law:

> As a general rule, English law allows concurrent liability in contract and tort. This means that if D's conduct constitutes both a tort against P and breach of contract between P and D, P may choose to sue D either in tort or in contract (or in both) in respect of that conduct.[8]

Cane justifies the English position as more flexible and reasonable than the unduly formalistic French approach. He also argues that a judicial preference for an action based on contract law can no longer be justified on the grounds that contracts are the product of the free choices of the parties. Many of the legal effects of contracts arise regardless of the choices of the contracting parties.

Italian authors make similar points. Thus Massimo Bianca[9] notes that there is no objective incompatibility between the specific protection of the parties' interests which contract law provides and the more generic protection provided by the law of tort. Torrente[10] adds that the parties who enter into a contract certainly do not intend to thereby renounce to the general protection of their primary rights under tort law. There is therefore no reason to deny the possibility of concurrent liability. The injured party should be permitted to choose to act either via contract or via tort and the judge is obliged to respect this choice. Moreover, the exercise of one of these actions does not constitute an implicit renunciation of the other, although once compensation for damages is obtained through one action the other will lapse.[11] Finally, in these cases, the plaintiff is also permitted to sue for damages without stating whether he is acting on the basis of tort or breach of contract. The judge would have the discretion to determine which type of action is being exercised.

One should also note that German law follows the English and Italian approach and accepts concurrent liability. The origins of this approach have been traced to Roman law, which also, it seems, permitted the plaintiff to choose between tort and contract in such cases.[12]

Maltese Court Decisions

Court decisions are an indispensable guide in order to determine whether the rule of *non cumul* exists in our law. After all in France this rule was developed by the courts, since the Code Napoleon, like our civil code, is silent on this issue. One could argue that this rule exists in our law since Maltese law of obligations is closely modelled on French law and we also give primary importance to the autonomy of the will of the contracting parties.[13] However, it is equally possible to assert that *non cumul* does not apply in Malta, since our civil law is ultimately based on Roman law, which apparently did not recognize this rule (cf. *supra*). In the absence of statutory regulation, it remains possible to argue that our position has continued to be regulated by Roman law.[14] In the face of these

would be incurring tortious responsibility in line with general principles and the buyer can therefore sue the seller for damages in tort despite the existence of a contract between them. By contrast, if the parties to a contract of deposit stipulate that the depositary is only liable in *culpa lata* for his custody of the thing deposited with him, then the depositor may not institute the ordinary action for damages in tort on the basis of the *culpa laevis* of the depositary. In the latter case it is clear that the contracting parties have specifically excluded the possibility of an action in terms of general principles of tort.

7 Cane, P. (1996), *Tort Law and Economic Interests*, Clarendon Press, Oxford.

8 Ibid, p. 311

9 Bianca, M., op. cit., p. 552

10 Torrente, A. & Sclesinger, P., (1997), *Manuale di Diritto Privato*, Dott. A. Giuffrè Editore, Milan, p. 663.

11 If the exercise of one of these actions is no longer possible due to prescription, the plaintiff may still exercise the other. Italian case decisions have therefore accepted the possibility of making an action in tort against the seller of a thing containing a latent defect, despite the fact that the time limit for the exercise of the contractual action for breach of the warranty against latent defects had expired. This is because the purpose of the action in tort is not to obtain the economic advantage deriving from adequate performance of the contract, but to obtain the compensation to which the buyer is entitled for the injury which she has personally suffered. Bianca, M., op. cit., p. 554.

12 Massimo Bianca quotes a passage from the *Digest* attributed to Ulpian: *Proculus ait, si medicus servum imperite seceurit, vel ex locato vel ex lege Aquilia competere actionem*, Bianca, M., op. cit., pp. 552-3. (Translation: 'Proculus states that if a medical doctor has negligently performed his professional services in regard to a slave, he can be sued either on the basis of *locatio conductio* or of the *lex Aquilia*').

13 Mallia, T., (2000), 'Pre-Contractual Liability in Malta', *Law & Practice*, Vol. 1, No. 1, p. 26.

14 On this point, it is worth quoting the opinion of Judge Paolo Debono, cited by the Court of Appeal in the leading case of *Cassar Desain v. Forbes*:

> the precept of the Code de Rohan that, whenever a dispute cannot be decided by the provisions of the Municipal law, regard must be had to the (Roman) common law, has never in civil cases been repealed and is still applied.

He adds that

> the common law to which the Code refers, is less that which is derived from the *Corpus Juris* than that which was modified by the Canon law as expounded by the writers and accepted by usage in the Courts.

See the decision of the Court of Appeal delivered on the 7th January 1935 in *Marquis James Cassar Desain v. James Louis Forbes, CBE, nomine*, cited in Gulia, Wallace Ph., *Governmental Liability in Malta*, (1974), University Press, Malta.

conflicting arguments, it is the courts that should provide authoritative guidance. Yet while we do have a few case decisions that apparently apply this rule, they do so in a confusing and inconsistent way. Three separate approaches can be identified in our case decisions.

The 'Consequentialist' Approach of Vassallo v. Mizzi

An important case in this context is *Mary Vassallo v. Giovanni Mizzi et.*, decided by the Civil Court on the 9th April 1949 (Vol. XXXIII. II. 379).[15] In this case, the plaintiff had leased a dwelling house from the defendant. Part of the roof of this house was unsupported by regular beams (*xorok*). This created an aperture in the roof, which was provisionally covered by a wooden plank. Defendant neglected to repair the roof although this was his legal obligation as lessor and plaintiff claimed that she had often requested him to do so. Subsequently, plaintiff suffered a theft of money and some valuables from the house and it was proven that the thieves had gained access to the property through the roof aperture. She therefore sued defendant for compensation for the damages she had suffered as a result of his negligence. In its judgment, the court observed that it was unclear from the writ of summons whether the negligence being attributed to defendant was based on tort or on breach of contract. After reviewing the differences between contract and tort, the court concluded that the plaintiff had intended to request contractual damages, as:

> *L-apertura fis-saqaf allegata tal-kamra mikrija mhix inkonċiljabbli mal-prevedibbilità ta' dak li seta' jiġri u ġara, ċjoè s-serq; u l-istess nuqqas ta' riparazzjoni, tant bħala obbligu tallokatur li jitnissel mill-kuntratt tal-lokazzjoni, kemm bħala traskuraġni tiegħu allegata non ostanti l-insistenzi tal-attriċi biex jirriperah, huma vjolazzjoni tal-kuntratt, li kellha bħala konsegwenza diretta s-serq li fil-fatt ġara; u skond il-ġurisprudenza, meta l-fattijiet kolpużi li jsorġu fl-okkażjoni ta' kuntratt ikunu prevedibbili meta dak il-ftehim iseħħ, u huma l-konsegwenza diretta tal-vjolazzjoni tal-kuntratt, l-azzjoni eżerċitata ma tistax tkun dik tal-ħtija akwiljana, iżda dik tal-ħtija kontrattwali.*[16]

Up to this stage, the court's reasoning might be interpreted as a fairly straightforward application of the rule of *non cumul*. After all, the court made a prima facie assessment of plaintiff's claim to establish whether it could fall under the law of contract and found that it could. This being the case, it held[17] that it had no option but to consider the claim as being of a contractual nature. However, this reasoning bears closer investigation in view of the nature of the test used to determine that the action could fall under the law of contract. Here two criteria were mentioned: firstly that the damages caused were a direct consequence of the violation of the contract and secondly that these damages were foreseeable at the time when the contract was made. Actually both these criteria are usually required under Maltese law for the court to find that damages are payable to compensate for breach of contract.[18] They appear to be irrelevant to the task of determining whether the action stems from a breach of contract in the first place.

The significance of this objection can be grasped if we consider the case where a breach of contract causes damages that were not foreseeable at the time when the contract was originally made. If we apply the test used in *Vassallo v. Mizzi*, then we would have to conclude that any action for compensation of such damages could not be based on breach of contract. An action in tort would therefore have to be made.[19] However it is equally clear that, if the courts are to apply the rule of *non cumul*, they may not allow an action in tort to be made by one contracting party against the other for compensation of the damages arising from an act which constitutes a breach of their contract. After all the rule of *non cumul*, as it exists in France, compels the plaintiff to take action for breach of contract in these cases of concurrent responsibility, even if the contractual action is prescribed. Indeed, French authors admit that this rule tends to work against the victims who have suffered damages.[20] Moreover, it is a basic principle of French

[15] All case decisions cited in this paper are taken from the *Kollezzjoni Deċiżjonijiet tal-Qrati Superjuri ta' Malta*, published by Legal (Publishing) Enterprises. Volume and page numbers are listed in brackets after each case. All the Civil court decisions mentioned in this paper were delivered by the First Hall of the Civil court, a fact which I deem it superfluous to mention in my citations.

[16] Ibid., p. 381

[17] The court referred to previous court decisions that reached the same conclusions. However I have been unable to trace these decisions, as they were not cited in the judgment.

[18] These principles are contained in sections 1136 and 1137 of our Civil Code. Section 1136 states that

> The debtor shall only be liable for such damages as were or could have been foreseen at the time of the agreement, unless the non-performance of the obligation was due to fraud on his part.

Section 1137 adds

> Even where the non-performance of the obligation is due to fraud on the part of the debtor, the compensation in respect of the loss sustained by the creditor, and of the profit of which he was deprived, shall only include such damages as are the immediate and direct consequence of the non-performance.

Cf. Nicholas, B., op. cit., pp. 224-32

[19] The possibility of making an action in tort in certain cases of negligent breach of contract may be deduced a contrario from the wording of the quoted extract from the judgment.

[20] '*Puisqu'elle leur a refusè de pouvoir opter pour les règles qu'elles auraient intérêt à invoquer*', Chabas, F., op. cit., p. 404.

and Maltese civil law that the question whether contractual responsibility has been incurred is treated separately from the rules which establish whether and to which extent the damages caused by the act which gives rise to contractual responsibility can be compensated.[21] Thus, if the rule applied by the court in *Vassallo v. Mizzi* was that of *non cumul*, then we would have to conclude that the test proposed by the court for determining whether contractual responsibility exists was incorrect, insofar as:

a. it failed to distinguish the issue of the existence of contractual responsibility from the rules establishing the quantum of damages compensated and
b. it implied that one contracting party could sometimes make an action in tort against the other party for the damages arising from a breach of their contract, although this is precisely what the rule of *non cumul* forbids and although this would effectively circumvent section 1136 of the Civil Code.[22]

It may be objected, however, that the court in this case had no desire to apply the rule of *non cumul*. After all the judgment contained no reference to French doctrine or jurisprudence. Other interpretations might be available which better explain the court's reasoning. What if the court believed that the *non cumul* rule does not apply to Malta and was simply trying to find the most appropriate remedy for the plaintiff, given that there was concurrent liability and that she had not clearly identified the nature of her claim for damages? If that were so, then the court's decision to treat the case as one of breach of contract rather than tort would simply be based on its desire to interpret the plaintiff's claim in the manner which was most favourable to her. The test proposed by the court is consistent with this interpretation, as the two limbs of this test constitute, as has been observed, the legal requirements which contractual damages must fulfil to be compensated. However, this interpretation is contradicted by the words used in the judgment, which stated that the court in such cases has no discretion as the claim cannot be considered as one of tort and also by the outcome of *Vassallo v. Mizzi*. In fact the final outcome of this case was actually negative for the plaintiff as the court rejected her claim for damages, partly on the grounds that she had failed to convincingly prove his fault and partly (and highly significantly) since, '*del resto, la kien hemm dak il-mezzu bejt flok ix-xriek, ma kienx ordinarjament previdibbili għal Michelangelo Mizzi li minnu seta' jsir serq*'.[23]

At first sight this comment, which forms part of the *ratio decidendi* of this case, appears rather puzzling. Having initially decided, for classification purposes, that the possibility that the aperture in the roof of the leased property could have facilitated the theft was 'not incompatible' with the principle that the damages claimed must have been foreseeable at the time of the making of the contract of lease, the court now cheerfully observes that in this case, however, the theft was not 'ordinarily' foreseeable by the parties! In order to make sense of this final comment, it is necessary to infer that the court is proposing a two-stage test in cases of concurrent liability. In order to determine whether the claim is for breach of contract, it will undertake a preliminary review of the facts of the case in order to establish whether the damages could conceivably have been

a. directly caused by the breach of contract and
b. foreseeable at the time of making of the contract.

If the facts as stated in the writ of summons permit this interpretation, then the case must be classified as breach of contract. At this stage, the plaintiff must actually prove that the facts were in reality a direct consequence of the breach of contract and were truly foreseeable at the time when the contract was made. However this two-stage test appears highly artificial and unworkable. How, in practice, can one distinguish between a preliminary review of the facts that concludes that the damages caused could have been foreseeable at the time when the contract was made and a definitive assessment of the facts that concludes that the damages caused were foreseeable at that time?

To understand why the court attempted to construct this two-stage test, it is important to highlight another undesirable consequence of its misplaced reliance on the legal criteria governing the payment of contractual damages in order to classify the action as based on contract or on tort. An action satisfying these criteria must *ipso facto* be one where the court believes the damages plaintiff suffered should, according to the law, be compensated. Therefore, if these criteria are used to classify the action, the case ought, logically, to be decided in favour of the plaintiff whenever an action for damages is classified as arising from a breach of contract. The preliminary classification of an action as contractual would necessarily imply that the court is also accepting that the defendant is liable to pay damages for breach of contract. Clearly the court evolved the two-stage test in an attempt to wriggle out

[21] This is why the writ of summons in such cases normally contains two separate requests: firstly that the defendant be declared responsible for the damage caused and secondly that the actual damages s/he is liable to pay be quantified and the defendant condemned to pay them. On this point Nicholas has a very interesting discussion. See Nicholas, B., op. cit., pp. 211-13.

[22] Section 1136 restricts the damages payable for a negligent breach of contract to those that were foreseeable at the time when the contract was made. Note that the case being considered here is different from the issue, discussed further on, as to whether a third party to a contract may sue one of the contracting parties in tort for an act which constitutes a breach of contract.

[23] *Vassallo v. Mizzi*, op. cit., p. 382.

of these implications of its position, which would have greatly reduced its discretion by making it impossible for it to both classify an action as contractual in nature and also to find that damages could not be awarded.[24] In terms of this test, it is clear that not every classification of an action as one for contractual damages must lead to the defendant being found liable to pay damages in compensation.

In any event, the rejection of the plaintiff's claim partly on the strength of one of the special rules of contractual responsibility puts paid to any notion that the court's categorization of the claim as one of breach of contract was motivated by the desire to find the most favourable solution for the plaintiff. The court's position in this case cannot be assimilated to either the Italian or the French position. If an Italian court had decided this issue, it would – unlike the Maltese court – have considered itself free to find that the action was one of tort although the damages arose from an act which also constituted a breach of contract. If a French court was faced with this case, it would have considered the action as being contractual not because of the nature of the damage caused, as the Maltese court argued, but simply because it allegedly arose from an act which constituted a breach of contract. The reasoning of the Maltese court appears close to the French position, with the difference that the French courts first apply a classificatory principle and then deduce its logical consequences, while the Maltese court tried, by artificial and unworkable criteria, to deduce the classificatory principle from its consequences.[25]

The implications of this judgment can be better understood if we look at a more recent case that applied the same 'consequentialist' reasoning. In fact, *Vassallo v. Mizzi* was cited in *Pauline Fenech v. Emmanuel Baldacchino noe*, decided by the Civil Court on the 20th March 1992 (LXXVI. III. 568). In this case, the plaintiff had bought a villa from the defendant. When the contract of sale was finalized, the defendant failed to deliver to her all the keys of the property, leaving another set of keys in the hands of third parties. She claimed that when she visited the villa after the sale, she found some furniture missing and on a subsequent visit she encountered some persons inside the villa who assaulted her and robbed her of a sum amounting to LM45,000.00. She therefore sued the plaintiff to obtain compensation for the damages she had sustained. In his statement of defence, the defendant argued that the alleged theft was purely a figment of the plaintiff's imagination.

In this case too, it was unclear from the writ of summons whether the alleged liability of the defendant derived from tort or breach of contract and the court again used its discretion to ascertain the legal basis of the action. After reviewing the facts of the case, the court held that the action was contractual in nature, being based on the claim that the defendant's non-delivery of all the keys of the villa constituted a breach of his contractual obligation to ensure the defendant's peaceful possession of the property. The court discarded the possibility of an action based on tort for various reasons, which were primarily:

1. At no stage did the plaintiff allege that defendant was guilty of any criminal misbehaviour in her regard, either in his own name or in complicity with others.
2. Neither did plaintiff claim that defendant intentionally or fraudulently refrained from performing his contractual obligations towards her.
3. According to our case decisions, when the damages arising from a breach of contract were foreseeable at the time when this contract was finalized and are a direct consequence of the breach, the resulting action for compensation of these damages can only be contractual in nature and cannot be based on tort.

The third reason for considering plaintiff's claim as contractual is subject to the same criticism which has been directed at *Vassallo v. Mizzi*, from which it was explicitly derived. However the other two reasons are also misleading and merit further investigation. Indeed, the argument that the action could not be based on tort because the defendant had not been simultaneously accused of committing a criminal offence could only hold water if there existed a general principle limiting the right to claim civil damages in tort to those instances when the tortious act also allegedly constitutes a criminal offence. Yet this is clearly incorrect, because it is universally accepted that the civil and the criminal actions are independent of one another.[26] Secondly, it is also irrelevant for the purposes of classifying an action under contract or tort whether the defendant acted fraudulently or negligently. After all, a breach of contract may be committed intentionally and our law recognizes the

[24] Which is what the court decided in this case.

[25] The consequences being whether or not damages could be compensated in this case. For an original discussion of the role of consequentialist reasoning in judicial decision-making, see the chapter on 'Reason, Intent and the Logic of Consequence' in Rosen, L., *The Anthropology of Justice: Law as Culture in Islamic Society*, (1996), University Press, Cambridge, pp. 39-57.

[26] Thus Caruana Galizia observes

> The concept of tort or delict in civil law is different from that of crime... very often, though not always, a crime is at the same time a tort or a quasi-tort; but even then the two actions which are given rise to, the penal action and the civil action, must be kept distinct... the two actions are instituted, dealt with and judged upon separately and independently one from the other.

Caruana Galizia, V., (rev. Ganado, J. M.), *Notes on Civil Law Laws III Year*, (1978), University Press, Malta, p. 310.

existence of a category of quasi-tort,[27] which consists precisely of unjust acts which are negligently committed. Since it is possible to commit either a tort or a breach of contract either negligently or intentionally, it is clear that the intentional element cannot be the criterion by which claims are classified as contractual or tortious. Yet the court's reference to the intentional element in this context is significant, as it reveals how closely it followed in the footsteps of *Vassallo v. Mizzi* in relying on the rules concerning the quantification of damages to establish responsibility and how, in the process, it was led up a blind alley. In fact our law provides that in cases of fraudulent breach of contract, the damages awarded to the creditor are all the damages which are the immediate and direct consequence of the debtor's non-performance, not limited by the requirement that they should have been foreseeable at the moment of conclusion of the contract.[28] This contrasts with the case of a negligent breach of contract, when the damages awarded are restricted by the requirement that they must have been foreseeable at the moment of conclusion of the contract. In *Fenech v. Baldacchino*, it seems that the court imported this distinction between fraudulent and negligent breach of contract from the field of quantification of damages and tried to use it to determine whether the action was based on contract or tort. In the process, the court came close to considering an intentional breach of contract as being a kind of tort, observing:

> *Konsegwentament ma hemm xejn fl-atti li jista' jissuġġerixxi illi l-attriċi qed titlob xi risarċiment ta' danni 'ex delictu' jew 'quasi delictu', in kwantu wkoll ma jirriżultax... li l-attriċi qed timputa lill-konvenut li hu naqas li jadempixxi l-obbligazzjoni-jiet tiegħu kontrattwali b'dolo u bil-ħsieb li attwalment jarrekalha danni.*[29]

The court did not consider the possibility that the defendant's carelessness in neglecting to deliver all the keys of the villa to the plaintiff might constitute a quasi-tort. Its failure to consider this option, which could have materially influenced its judgment, was a result of its over-reliance on the rules regulating the quantification of contractual damages, which led it to misrepresent the true nature of the distinction between contract and tort as based on whether the defendant had acted negligently or intentionally.

Even when it came to determine whether and to what extent damages were payable, the court in *Fenech v. Baldacchino* faced the same obstacles which had been encountered in *Vassallo v. Mizzi* and tried to surmount them by similar strategies. Once again, the difficulty was that the court had apparently already decided that damages were payable, since it had held that the damages caused were foreseeable in order to justify its classification of the claim as contractual. The court overcame this difficulty partly by holding that plaintiff had failed to provide adequate proof that she had really suffered the damages she claimed and partly by arguing that since the damages she allegedly suffered were foreseeable at the time when the contract of sale was finalized, she should also have foreseen and taken steps to protect herself from the eventual theft of her property.[30] However, this latter argument lacks a secure legal basis as the general rule in cases of liability for negligent breach of contract is that the defendant is liable for all foreseeable damages which are an immediate and direct consequence of his actions. Moreover, the court was clearly unhappy with its own line of argument, since at a later point in the judgment it pointed out that it was impossible for the defendant to have actually foreseen the theft![31]

These shifting and inconsistent criteria can all be seen as attempts to compensate for the 'original sin' committed in *Vassallo v. Mizzi* and repeated in *Fenech v. Baldacchino*, of relying on the rules regulating the payment of contractual damages for the logically prior task of determining whether the action made should/must be considered as contractual in origin. In both cases, the court found against the plaintiff. In *Vassallo v. Mizzi* the court had to invent an artificial two-stage test of foreseeability to arrive at this conclusion. In *Fenech v. Baldacchino*, the court evoked this test and tried to give it weight by evolving additional criteria, which also appeared to lack a secure legal basis. In both cases, a French court would probably have arrived at the same conclusion, but it would simply have held that the presence of a contractual element requires the case to be classified as contractual in nature, leaving the court free to conclude that the damages caused could not be compensated as they were not foreseeable at the time when the contract was concluded. This is clearly a more logical and consistent approach. The same could be said for the Italian approach, which would probably have allowed the court to find that the plaintiff's action was based on tort in either of these cases.

27 See sections 1031, 1032 and 1033 of our Civil Code.

28 In terms of section 1136 of our Civil Code, op. cit. cf. Nicholas, B., (op. cit., p. 229) for French law of contract

> The debtor, therefore, whose fault does not amount to dol is liable for such direct damage as was foreseeable; the debtor who is guilty of dol is liable for all direct damage, whether foreseeable or not.

29 See *Fenech v. Baldaccino*, op. cit., pp. 572-73.

30 Ideally by not turning up at the villa carrying LM45,000.00 in her hands a few days after she became aware that third parties had access to the property!

31 Op. cit., p. 575.

(Mis-)Applying the Principle of Subsidiarity

Other Maltese judgments also seem to apply the rule of *non cumul*, without however invoking the consequentialist reasoning of *Vassallo v. Mizzi*. In this regard, an intriguing judgment was delivered only a month before *Fenech v. Baldacchino* in *Anthony Vella noe v. Alan Clifford Jones*, decided by the Civil Court on the 28th February 1992 (LXXVI. III. 542). In this case, the defendant had entered into a *konvenju*[32] agreement to buy an apartment belonging to the plaintiff. He claimed that on the strength of this agreement defendant had given him specific instructions to buy tiles of a certain type and to perform certain repairs to the property. After he had allegedly incurred expenses amounting to LM796.00, defendant failed to honour the *konvenju*, since he did not take action to finalize the contract of sale within the time period in which the *konvenju* could have been enforced. Plaintiff therefore claimed that defendant had incurred a pre-contractual liability to compensate him for the expenses he had made.[33] Defendant objected that key facts alleged by the plaintiff were untrue and that his claim had no legal basis.

In its judgment, the court observed that plaintiff had not taken any action to enforce the *konvenju* within the period in which he was legally entitled to do so.[34] Therefore:

> *Hu ovvju li dan kien ir-rimedju li kien miftuħ lill-attur nomine biex jikkawtela d-drittijiet tiegħu li l-liġi tagħtih biex jarġina kull telf jew danni riżultanti mill-allegata inadempjenza tal-konvenut. Il-Qorti ma tarax taħt liema figura legali l-attur nomine jista' javvanza pretensjoni għall-kundanna ta' danni pre-kontrattwali meta, ex admissis, ma użufruwiex mir-rimedju li l-liġi stess tagħtih ex contractu.*[35]

Thus the court reasoned that once a contractual action to enforce the *konvenju* was available and had not been utilized by plaintiff, he could not now sue for pre-contractual damages. This is an interesting statement, for a number of reasons. Firstly, because it implies that pre-contractual liability in Maltese law is founded on tort and not on contractual grounds.[36] Secondly, because it might appear to be a very direct application of the doctrine of *non cumul*. It is worth pointing out that in this case the court made no reference to the test developed in *Vassallo v. Mizzi*. Instead of asking whether the damages caused to the plaintiff were foreseeable at the time when the *konvenju* was finalized, the court simply noted that an unutilized contractual remedy had been available. The mere existence of this contractual remedy which had not been availed of and despite the fact that it was no longer available to plaintiff, was held to preclude him from making an action for damages in tort. This appears to be almost identical to the French position. Finally, however, a margin of doubt remains whether the court was applying the rule of *non cumul* in its entirety or some other principle. After all, the court might have meant to imply that pre-contractual liability is based on quasi-contractual grounds, in which case the principle applied could not be that of *non cumul*.[37] Moreover, the quoted extract might be read to imply that it is the fact that plaintiff had not initially attempted to utilize the contractual remedy, not its mere existence, which prevented him from exercising the action in tort.

This interpretation is suggested by another case, which could also be considered as relating to concurrent responsibility: *Frederick Frendo noe v. Godwin Abela noe et*, decided by the Court of Appeal on the 24th October 1989 (LXXII. II. 601). In this case, plaintiff had entered into a contract with the Cargo Handling Company, represented by the defendant Godwin Abela; in terms of which this company engaged to unload merchandise from his ship, the *Veliko Tirnovo*. The company had in turn subcontracted part of the work to the second defendant, a certain Meli, who had to supply the heavy equipment needed to unload the merchandise. It seems that the delivery of this heavy equipment was delayed. In consequence the stevedores (*burdnara*) requested an increased payment, over and above their official tariff, from the plaintiff, arguing that the workers had to take an excessive amount of time in order to unload the merchandise. They brought their claim before the Port Disputes Board, which ordered the plaintiff to pay an additional sum of LM343.20 to the stevedores. The plaintiff in turn sought to recover these additional expenses by suing both Meli as well as the Cargo Handling Company (as represented by Godwin Abela) for the damages caused to him by their delay in unloading the ship. The

32 The colloquial term for a written document containing a unilateral promise to sell, together with a unilateral promise to buy immovable property.

33 Since he had initially expressed the desire to buy the property and then failed to appear on the final contract after plaintiff had incurred these expenses.

34 It is unclear from the judgment whether this refers to the legally stipulated period of three months from the day on which the agreement could have been enforced, (see section 1357(2), Civil Code) or to a conventional period stipulated by the parties.

35 *Vella v. Jones*, op. cit., p. 544.

36 In fact, in the above-quoted extract, the court explicitly contrasted pre-contractual liability to a contractually based remedy. This is a significant contribution to the debate on the juridical basis of pre-contractual liability, on which see Mallia, T., op. cit., and Xuereb, G., 'A Comparative Study of the Theory of Precontractual Responsibility', in *Id-Dritt*, published by the Għaqda Studenti tal-Liġi.

37 As this principle only operates in the case of concurrent liability between contractual and tortious responsibility. The overlap between contractual and quasi-contractual responsibility is governed by the principle of subsidiarity, discussed further on in this paper.

case came before the Commercial Court, which decided that plaintiff's action against the Cargo Handling Company, which was based on breach of contract, was time-barred in terms of section 45(b) of the Ports Ordinance (1962). As regards his action against the second defendant, (Meli), the court held that the plaintiff had no right of action against him, because there was no contractual link between them; Meli being a subcontractor of the Cargo Handling Company and not of the plaintiff.

Plaintiff appealed, arguing *inter alia* that his claim for damages from Meli was based on tort and not on contract. Therefore it was not necessary for him to establish a contractual connection with Meli in order to sue him for damages and his action was not time-barred in terms of the Ports Ordinance. However the Court of Appeal rejected this argument, observing that:

1. appellant had based his claim purely on contractual grounds in his writ of summons;
2. given that there was no contractual link, the action for damages should not and could not have been made in the first place against the defendant Meli; and
3. since Meli had entered into a contract with the Cargo Handling Company and since the plaintiff's right of action against the Cargo Handling Company, with which he really had a contractual tie, had expired through prescription, it is inconceivable that he should have retained the same right of action in regard to Meli, with whom he had no legal relationship whatsoever.

Clearly the court in this case applied a principle which was similar to that applied in *Vella v. Jones*. In both cases, the existence of an action for breach of contract which was not availed of was held to prevent plaintiff from making an action for damages in tort. Yet is this principle the same as the rule of *non cumul*? Doubts may arise due to the particular facts of this case as well as the way in which the court expressed its judgment. Significantly in this case the contractual action was exercisable against one person, while the claim in tort was directed against another. In all the other cases of concurrent responsibility which have been reviewed, the contractual and tortious actions overlapped because they were potentially exercisable in regard to the same person. Admittedly, some authors argue that concurrent liability can also arise when the act which causes damage is imputable to more than one person on different legal grounds.[38] However, the justification of the *non cumul* rule lies, as has been observed, in the fact that the particular parties involved had previously decided to regulate their relationship by means of a contract. This justification is missing where, as in this case, there is no previous contractual relationship between the plaintiff and the person being sued in tort. Thus it is unlikely that the French courts would have extended the application of the rule of *non cumul* to a case like *Frendo v. Abela*.

These doubts are reinforced by the way in which the court chose to describe the principle it was applying. In denying the plaintiff the right to take action in tort against the second defendant, the court highlighted the fact that his contractual action against the first defendant had expired through prescription. This fact should not be taken into account if the court is applying the rule of *non cumul*. The court's duty should be limited to ascertaining whether or not a contractual action was originally available to the plaintiff. If this was the case, then he cannot be permitted to make an action in tort, whether the contractual action was still available or was time-barred. Moreover, the court also stressed that in this case the action in tort could not be availed of in the first place.[39] This curious expression seems to have no foundation in the *non cumul* rule, since this rule completely and permanently prevents the plaintiff from taking action in tort once a concurrent contractual liability exists.

One way of explaining the court's approach would argue that it relied heavily on precedents found in English law. In fact there exist various comparable cases in which the English courts have denied the possibility of making a claim in tort and this on the strength, not of the principle of *non cumul*, but of the doctrine of privity of contract. The central argument is that in cases where X, a party to a contract with Y, has subcontracted the performance of some or all of his contractual duties to another person, Z, then this subcontract is a *res inter alios acta* to the original contracting party Y, who is not a party to the subcontract and cannot benefit from it. Y cannot therefore be allowed to sue Z in tort, as this would mean that one is effectively allowing him to circumvent the doctrine of privity of contract.[40] One should note, however, that although the English courts used to argue in this way in the

[38] Massimo Bianca gives the example of the theft of valuables contained in a safe deposit box at a bank, which was perpetrated with the complicity of the guards employed by a security agency. The contractual responsibility of the bank towards its clients who have been the victims of this theft does not eliminate the responsibility in tort of the thieves and the security agency, which is directly responsible towards the bank and the depositors for the criminal activities of its employees. Bianca, M., op. cit., p. 551 fn.

[39] The precise wording of the judgment is '*L-azzjoni fl-ewwel lok għalhekk kif konċepita ma kellhiex u ma setgħetx issir kontra l-konvenut Meli*' *Frendo v. Abela*, op. cit., p. 613

[40] 'In a nutshell, the essential question usually is whether it is permissible, or legitimate, for the courts to impose tort liability on parties who are (or one of whom is) involved in some contractual relationships, not necessarily with each other, in such a way that the tort liability may be added to the burdens or obligations created by the contract', Atiyah, P. S., (1995), *An Introduction to the Law of Contract*, University Press, Oxford, p. 373.

nineteenth century, a much more flexible approach has prevailed since the celebrated decision of the House of Lords in *Donoghue v. Stevenson*.[41] While the English case-law on this issue is too complex and convoluted to be examined in great depth here, the prevailing approach now is that Y can sue Z in tort for compensation of the damages suffered by him, provided that:

1. Z is entitled to benefit from any clause limiting or exempting him from liability in the original contract between X and Y; and
2. Y can only sue for compensation in cases where he or his property have suffered direct physical damage and not where his loss is of a purely economic nature.

Both these provisos shed light on the decision in *Frendo v. Abela*. Concerning the first proviso, a significant judgment was delivered in 1975 by the Privy Council in the Eurymedon case. This judgment over-ruled previous decisions and accepted that in cases of damage to property consigned by the sea, the existence of a clause in the bill of lading exempting third parties such as stevedores from liability for damages, also exempted these third parties from being sued in tort by the buyer of the damaged property.[42] The facts of this English case are analogous to the Maltese one, as in both instances the contractual link which existed between the plaintiff and another party was held to preclude him from exercising an action in tort against a third party. Yet, it is clear that the Eurymedon case was decided on different grounds from *Frendo v. Abela*, as the key issue in this case concerned the efficacy of an exemption clause specifically included in a contract *vis-à-vis* third parties to that contract. By contrast, there was no such exemption clause in the Maltese case and the only reason why the contractual action for damages was denied to the plaintiff was due to the expiration of a legally (and not contractually) imposed period of forfeiture.[43]

Similarly as regards the second proviso, although a superficial reading of the English judgments might conclude that they justify the approach of the Maltese court, deeper analysis shows that they do not. In fact the justification for excluding compensation for pure economic loss under English tort law is that

> a claim for economic loss is often a claim based on a lost expectation, rather than any other kind of loss.[44]

To use the words of continental lawyers, it is because economic loss represents the positive interest which a party to a contract has in seeing it fulfilled more than his negative interest not to have entered into a contract at all, that English courts are wary of granting damages which represent pure economic loss in tort. Thus, in the case of *Simaan General Contracting Co. v. Pilkington Glass*,[45] the right to claim damages in tort was denied to a building contractor who tried to sue the suppliers of glass to his subcontractor on the grounds that this glass was the wrong colour according to the contract and had to be replaced at his cost. The reason for the court's decision was that the loss caused to plaintiff by defendant's carelessness was not physical injury to his person or physical damage to his property, but simply the economic loss resulting from the non-fulfilment by the defendant of his contractual obligations. This decision is superficially similar to *Frendo v. Abela*, as the plaintiff in the Maltese case sued the defendant Meli for compensation of the purely financial loss caused to him by Meli's delay in performing his obligations under his subcontract with the Cargo Handling Company. In reality, however, the damages claimed in the Maltese cases were not the purely economic loss reflecting plaintiff's expectations under the contract. They were the expenses directly caused to the plaintiff as a result of an award by a quasi-judicial body (the Ports Disputes Board), which he would not have incurred had defendant been diligent in performing his obligations. Consequently, these expenses appear more similar to physical damage to property than they do to pure economic loss and this is probably how an English court would regard them. In any case, it would certainly be incorrect for a Maltese court to argue that compensation for such expenses cannot be claimed in tort, since the 'expenses which the latter (the person responsible) may have been compelled to incur in consequence of the damage',[46] are specifically mentioned in our Civil Code as being damages for which the plaintiff is entitled to sue for compensation in tort!

[41] Delivered in 1932. In that case, the consumer who suffered injuries from drinking a bottle of ginger beer allegedly containing a snail was allowed to sue the manufacturer for compensation directly in tort. This action was allowed despite the fact that there was no contractual linkage between the consumer and the manufacturer, since it was her friend who had bought the bottle of ginger beer and since this had been bought from a dealer and not directly from the manufacturer. See Atiyah, ibid., p. 374.

[42] This case is discussed at length by Atiyah, ibid., pp. 99-100.

[43] In reality, this English judgment is an application of the principle, accepted by the French courts, that the parties to a contract may decide to exclude liability in tort. See the first page of this paper for a discussion of this principle.

[44] Atiyah, op. cit., p. 380.

[45] Decided by the Court of Appeal in 1988. Note however that an earlier decision in the Junior Books case allowed an owner of property to sue a sub-contractor directly for the negligent construction of a floor, which meant that the floor had to be re-laid. See Atiyah, ibid., pp. 382-83.

[46] See section 1045 (1) of the Civil Code.

This analysis leads to one firm conclusion. If the principle applied in *Frendo v. Abela* was the principle of privity of contract as understood by the English courts, then the court construed the English position in an unduly rigid way reminiscent of nineteenth century English case-law. A contemporary English court would probably have allowed plaintiff to sue the defendant Meli for damages in tort. However, there are serious objections to accepting that our courts have relied on the English doctrine of privity of contract. After all our Civil Code, which was based on the French Code Napoleon, contains various provisions concerning the relative effect of contracts, which is the Continental analogue to privity of contract. Surely it is to these provisions[47] and to the approach of the French courts that we must look for guidance in interpreting *Frendo v. Abela*? Unfortunately however, the French approach, while probably correct in terms of our Civil Code, does not offer any support for the position adopted by our Court of Appeal in this case. The French courts would not have prevented the plaintiff in *Frendo v. Abela* from taking action against the defendant Meli on the basis of the doctrine of relativity of contract. This is because, firstly, the plaintiff might not have been considered as a third party wholly extraneous to the contract between Cargo Handling Company and Meli. Secondly, even if he had been so considered, the French courts accept that that the principle of contractual relativity does not prevent a third party from suing a contracting party in tort for compensation of the damages caused to him as a result of the non-performance or misperformance of the contract by one of the parties to it.[48]

Both these points require elucidation. To take the second one first, it is clear that the French courts, unlike the English, never apply the principle of relativity of the contractual tie to preclude the plaintiff from exercising an action in tort against one of the parties to a contract to which he is not a party,[49] to obtain compensation for the damages caused to him by the failure of that party to perform her obligations under this contract. This is because they consider that the defendant's failure to perform her contractual duty may constitute a fault in regard to the (third party) plaintiff which is independent of her fault in failing to perform her contractual obligations towards the other contracting party. This principle of the independence of the two faults means that the French courts, again unlike the English ones,[50] will not consider a contractual exemption clause as preventing one party to a contract from exercising an action in tort against a third party to that contract, who has subcontracted to perform the duties of the other contracting party.[51] Consequently, had the French courts considered the plaintiff in *Frendo v. Abela* as a third party in relation to the subcontract between Meli and Cargo Handling company, then they would also have held that the principle of contractual relativity does not prevent him from suing Meli in tort.

It is, however, likely that the French courts would not have considered the plaintiff in this case as being really a third party in regard to the subcontract in question. This is because in French law, the particular successor (*ayant cause à titre particulier*), who has bought or otherwise acquired property under a contract is

> allowed to enforce rights which, while they have no 'real' character can be said to be accessory to the thing acquired.[52]

Thus, in cases where an object is sold to one person who resells it to another, who in turn resells it, the latest buyer is allowed to sue the original supplier or any subsequent seller for breach of the warranty of latent defects or that of peaceful possession. The same position, according to Caruana Galizia, obtains in Maltese law, being based on the principle that the rights transferred to one's successor in title over a thing include actions which one may exercise against third parties in regard to the thing transferred.[53] In various decisions, the French *Cour de Cassation* had extended the application of

47 That is sections 998-1001 of the Civil Code. The similarity between Maltese and French law is very close in this area. The key principle is expressed in French law by article 1165 of the Code Civile, which states

> *Les conventions n'ont d'effet qu'entre les parties contractante; elle ne nuisent point au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121*. (Chabas, F., op. cit., p. 868).

In Maltese law, we have section 1001 of our Civil Code, which is almost a word for word translation.

> Contracts shall only be operative as between the contracting parties, and shall not be of prejudice or advantage to third parties except in the cases established by law.

48 In various judgments, the *Cour de cassation* has observed that 'a failure to discharge a contractual obligation can constitute in relation to a third party a fault which entails liability, when this fault has an existence which is independent of the contract'. Quoted in Nicholas, B., op. cit., p. 171. He mentions a case in which the defendant had entered into a contract with the state to incarcerate German prisoners of war. His negligent performance of his contractual duties allowed some prisoners to escape and these stole three sheep belonging to plaintiff. The defendant was held liable to compensate plaintiff in tort for the loss he had suffered.

49 Unlike the case where both actions are available against the same person.

50 Compare the decision delivered in the Eurymedon case, *supra*.

51 See Nicholas, B., op. cit., pp. 171-72.

52 Ibid., pp. 172-73.

53 In his notes, Caruana Galizia points out that in cases of breach of the warranty of peaceful possession

> More advantageous is the direct action which doctrine more commonly attributes to the purchaser, by means of which he may turn against former sellers '*omisso medio*'... because the immediate author transfers to the person claiming under him, together with the

this principle to cases where subcontracts have been made, so that:

> The principle was stated to be that where a debtor (in the wide French sense of the term) has sub-contracted the performance of his obligation, the creditor's claim against this substitute debtor is necessarily in contract and is subject to the 'double limit' that it cannot exceed either the extent of the creditor's rights under his contract with the primary debtor or the extent of the substitute debtor's liability under his contract with the primary debtor...The principle thus stated is not confined to contracts resulting in a transfer of property, but is capable of applying to any contract in which the primary debtor sub-contracts the performance of his obligation or part of it.[54]

This principle was applied in a remarkable case in which the plaintiff had given some slides to a photographic studio for enlargement. This studio, in turn, subcontracted the work to the defendant, who lost the slides. Plaintiff was not allowed to sue the defendant in tort, as the court held that he could exercise a contractual action for damages directly against the subcontractor and the rule of *non cumul* forbids the exercise of the action for damages in tort when a contractual action is available against the same person.[55] One should, however, note that a recent decision of the *Cour de Cassation* has approached the issue differently; holding that the action of a house owner against the subcontractor of his building contractor for compensation of the damages caused to him by defects in the plumbing was based on tort and could not be deemed to be of a contractual nature.[56] While there thus exists a conflict in the French judgments, it is however certain that:

1. no French court is prepared to consider the principle of contractual relativity as an obstacle to the exercise of an action in tort by a plaintiff who is a third party to the subcontract against a party to the subcontract;
2. some decisions hold that in certain circumstances an action in contract may also be exercised by this third party plaintiff; and
3. the only application French courts make of the *non cumul* rule in these cases is to prohibit this third party plaintiff from exercising the action in tort against a party to the subcontract, where a contractual action was held to be available to him against this party.

These judgments thus confirm my earlier observation that the rule of *non cumul*, as applied in France, does not apply where the contractual and tortious actions are exercisable against different persons. They prove beyond any doubt that the decision in *Frendo v. Abela* does not conform to the French understanding of either the rule of *non cumul*, or the principle of relativity of contract. In fact, the judgment in this case held that neither an action in tort, nor one in contract was available to the plaintiff against the subcontractor Meli, thus contradicting all of the French judgments that have been cited.[57] At the same time, they confirm how difficult it is to decipher the reasoning of our Court of Appeal in this case. If neither the rule of *non cumul*, nor the principle of relativity of contract, in both its French and English manifestations, can explain this judgment, then which legal principles could it be founded on?

A closer parallel to the principle invoked by the court in both *Frendo v. Abela* and *Vella v. Jones*, may lie outside the law of tort altogether, in the rules governing the exercise of the quasi-contractual remedy of the *actio de in rem verso*. French, Italian and Maltese judgments constantly repeat that this *actio* is a subsidiary action, which may only be utilized if no action ex contractu is available to the plaintiff.[58] This principle of subsidiarity is similar to the rule of *non cumul*.

thing, all the actions which may belong to him against third parties with regard to the thing itself.

See Caruana Galizia, V., 'Sale', *Civil Law Notes*, University Press, Malta, p. 557. An analogous case is perhaps to be found in the interpretation our courts have given to section 1638 of the Civil Code. This concerns the liability of the contractor and the architect under a contract of works in cases where the building they have built is in danger of falling to ruin, or actually does fall to ruin, owing to a defect in the construction. Our courts have held that the right to sue the contractor and the architect in terms of this section does not only belong to the employer but is also transferred to each of his particular successors. See in this regard *Michelangelo Bond v. Carmelo Mangion et.* (LXXV. II. 385); but note that the principle in this case is justified not so much by referring to the theory of accessory rights as to considerations of public policy. In France the basis of this principle is sometimes traced to article 1122 of the Code Civile, which states, '*On est censé avoir stipulé pour soi et pour ses héritiers et ayants cause, à moins que le contraire ne soit exprimé ou ne résulte de la nature de la convention*.' Chabas, F., op. cit., p. 870. The Maltese Civil Code also states, in section 998,

> Every person shall be deemed to have promised or stipulated for himself, for his heirs and for the persons claiming through or under him, unless the contrary is expressly established by law, or agreed upon between the parties, or appears from the nature of the agreement.

54 Nicholas, B., op. cit., p. 174.

55 See the judgment of the Cassation of the 8th March 1988, cited in Nicholas, B., ibid.

56 The decision was given by the Cassation on the 12th July 1991. See Chabas, F., op. cit., pp. 882-83.

57 In *Frendo v. Abela*, the court mentioned that plaintiff seemed to be claiming contractual damages from the third party Meli as part of its argument for dismissing his action as legally unfounded!

58 For a learned and interesting discussion of the *actio de in rem verso* in comparative law, see Zwiegert, K. & Kotz, H. (1998), *An Introduction to Comparative Law*, University Press, Oxford, pp. 537-65. One should also note that our case decisions are divided as to whether the availability of an action in tort or quasi-tort would also prevent the making of the quasi-contractual action. In *Scicluna v. Watson*

In either case, the courts do not permit recourse to be had to the action for damages, whether in tort or in quasi-contract, if the plaintiff could previously have utilized a contractual action for damages, which he allowed to lapse through prescription. Like the rule of *non cumul*, the principle of subsidiarity is not meant to allow the plaintiff to circumvent the law of prescription. However the principle of subsidiarity, being based on equity, is less rigidly applied than the rule of *non cumul*. There exist, in fact, a series of cases in which both the French and the Maltese courts have permitted the plaintiff to exercise the *actio de in rem verso* despite the fact that he could have exercised a contractual action for damages against another party, if he proves to the court's satisfaction that the contractual action was bound to be unsuccessful in compensating him for the damages he sustained. The leading case in Malta is *Said v. Testaferrata Bonnici*, decided by the Civil Court on the 16th June 1936 (XXIX. II. 1105).[59] In this case, Said, the plaintiff, had supplied Pace with wood, beams and paint for improving a tenement he leased which belonged to Testaferrata Bonnici. These materials were utilized for this purpose. Subsequently Pace was declared insolvent and it became clear that although Said could exercise a contractual action against him for payment, this action could not result in his receiving adequate financial compensation. Consequently, the court permitted Said to exercise the *actio de in rem verso* against Testaferrata Bonnici to obtain compensation on the basis of unjustified enrichment.

It is worth pointing out that the factual situation in *Said v. Testaferrata Bonnici* was comparable to that of *Frendo v. Abela* since in both cases the plaintiff could initially have exercised a contractual action against one person and the point at issue was whether this precluded him from exercising another action (in tort or quasi-contract) against another person. The comparison becomes even closer when we consider certain French cases where the plaintiff was allowed to exercise the quasi-contractual action after he had unsuccessfully attempted to exercise his contractual action for damages. Thus, Mazeaud & Chabas[60] cite the case of a building contractor who was employed by the buyer of a house to carry out certain structural improvements to the property. Subsequently, the buyer having been declared insolvent, he did not pay either the price of the house he had bought to the seller nor the cost of the repairs he had commissioned to the contractor. The contractor initially sued the buyer of the house ex contractu for his fees. However, this action was not successful because the buyer was insolvent. Subsequently, the French court allowed the contractor to exercise the *actio de in rem verso* against the seller of the house, who had meanwhile successfully rescinded the contract of sale and recovered possession of the house together with the structural improvements.

At this point, the circle closes and it becomes clear why the court in *Frendo v. Abela* referred to the plaintiff's action in tort against the second defendant as one which he could only exercise after having first sued the first defendant for breach of contract. The principle being applied here appears to be the principle of subsidiarity and not the rule of *non cumul*, as this principle permits the plaintiff to institute the quasi-contractual action against a third party after he has initially and unsuccessfully, attempted to sue another person for breach of contract. By contrast the rule of *non cumul* would probably, as has been seen, not apply to this situation where the actions in contract and in tort are exercisable against different persons. Moreover, if it did apply, it would permanently prevent the plaintiff from making the action in tort against the third party, as this would be considered to be the logical effect of the mere existence of a contractual action, whether this action had been successfully exercised or not. This is not the stance adopted in *Frendo v. Abela*, where the judgment implied that the plaintiff might have been allowed to exercise the action *ex quasi delicto* against a third party (Meli) had he initially sued the first defendant (Abela *nomine*) for breach of contract and had this contractual action been unsuccessful due to a cause such as the insolvency of the defendant. Finally, the judgment qualified this statement by asserting that this action in tort could, however, never be availed of in a situation where the plaintiff had allowed the contractual action to become time-barred through the operation of prescription. This distinction, which centres on whether or not the contractual action was time-barred, makes sense in the context of the principle of subsidiarity. As has been seen, this principle allows the plaintiff to exercise the *actio de in rem verso* if she proves that her contractual action would have been unsuccessful but not if the reason why the contractual action cannot be successfully exercised is due to her inactivity, which allowed the contractual action to become time-barred through the operation of prescription. The distinction makes no sense in the light of the principle of *non cumul*, which applies regardless of whether the contractual action was time-barred or not.

(XVIII. I. 26) and *Mattocks v. McKeon* (LXXIII. IV. 1019) the courts took a more liberal view, while in *Buttigieg v. Bartolo* (XXVI-II. II. 355) and *Bugeja v. Micallef* (XXXIV. II. 784) they argued that the quasi-contractual action could not be made in these instances.

[59] Reference should also be made to *Tonna v. Cachia Zammit* (XXXV. I. 805), where a contractor of works who had been employed by one co-owner was granted the right to exercise the *actio de in rem verso* against the others, despite the fact that he possessed a contractual right of action only against his employer.

[60] See Chabas, F., op. cit., pp. 830-31.

The conclusion appears inescapable. The court in *Frendo v. Abela* applied the principle of subsidiarity, which plays a restricted role in regard to the quasi-contract of unjustified enrichment, as a general principle operative in the separate and unrelated domain of tort law. In so doing, it ignored the fact that this principle has no basis in our law of tort and that a different principle, that of *non cumul*, already governs this field in French law. The judgment in *Vella v. Jones* can also be construed along the same lines.[61] This application of the principle of subsidiarity to situations of concurrent liability between contract and tort appears to be incorrect, because this principle is founded on a different basis from the rule of *non cumul*. While the rule of *non cumul* is rooted in the respect shown by French law to the autonomous will of the contracting parties, the principle of subsidiarity is based on the idea that the *actio de in rem verso*, being an equitable remedy, should only be allowed as a last resort. Moreover, the legal effects of subsidiarity are different from those of *non cumul*. In *Frendo v. Abela*, the rule of *non cumul* would still have allowed the plaintiff to recover the damages he sustained from the person who was effectively responsible for causing them. This seems a more just and logical outcome than effectively refusing compensation on the strength of a misplaced reliance on the principle of subsidiarity.

Adopting the Italian Approach?

If the judgments previously considered seem to apply the *non cumul* rule, albeit for the wrong reasons (*Vassallo v. Mizzi*), or in the wrong way (*Frendo v. Abela*), the final judgment to be reviewed is one which seems to have gone in the opposite direction. This was given in *Saviour Farrugia nomine v. Emanuel Zahra, Tarcisio Galea and Anthony Montebello*, decided by the Civil Court on the 31st October 1996 (LXXX. III. 1321). In this case plaintiff, Telemalta Corporation, had entered into a contract with defendants Emanuel Zahra and Tarcisio Galea, in terms of which they had to carry our certain excavation work, involving the digging of certain trenches. According to the contract, defendants were allowed to subcontract this work to third parties. Subsequently defendants subcontracted with A. Montebello Ltd., which agreed to perform the work. In the course of the excavations, a cable belonging to Telemalta Corporation itself was exposed and damaged, costing the Corporation LM485.00 to repair. After it paid the defendants Zahra and Galea for the work they had carried out, the Corporation proceeded to sue them, together with Montebello to recover the damages it had suffered. In their defence, Zahra and Galea pleaded that they were not responsible for the damage caused, since they had subcontracted the work and were not even aware of the damage. Defendant Anthony Montebello pleaded that the damage was not imputable to him, since he had no legal relationship with the plaintiff, for whom he had not carried out any work on a personal basis.[62]

In its judgment, the court considered whether the payment plaintiff made to the defendants Zahra and Galea constituted an obstacle to his claim. It held that it did not, since

> *il-fatt li l-atturi ħallsu lil Tarcisio Constructions Limited mingħajr ma naqqsulhom xejn, bl-ebda mod ma jissinifika li huma ma kellhomx dritt li jipproċedu kontra l-konvenuti ex delicto għal xi ħsara li dawn kienu għamlu. Infatti... dan kien il-mod korrett kif kellhom jimxu l-atturi fis-sens illi kellhom iħallsu lil dak li kien imqabbad bit-tender għall-prezz ta' xogħlu, imbagħad imexxu ġudizzjarjament biex jitħallsu tad-danni li kienu ġew lilhom ikkaġunati.*[63]

Since it had classified plaintiff's action as based on tort, the court proceeded to examine whether this action could succeed against any of the defendants. As regards the defendant Montebello, the court observed that it was the company A. Montebello Ltd. and not the defendant personally which had subcontracted to carry out the work. Apparently implying that it was possible for a legal person, such as a company, to be held responsible for committing a tort, the court held that even if this possibility did not exist and plaintiff had therefore correctly sued Montebello personally,[64] plaintiff nevertheless had

61 Depending on how one interprets the court's statement in that case that an action for pre-contractual damages could not be made once the plaintiff had not utilized the contractual action which was available to him. If one reads this statement to mean that pre-contractual liability is based on tort and that the plaintiff could only have sued in tort had he first, unsuccessfully, tried to exercise the contractual action, then the court's position in *Vella v. Jones* is identical to that adopted in *Frendo v. Abela*. However, if one reads this statement to mean that pre-contractual liability is based on quasi-contract, then the judgment is a straightforward and correct application of the principle of subsidiarity.

62 He also pleaded that since the Magistrate's court had held that his actions did not constitute a criminal contravention, he could not be found liable to pay civil damages. However, the Civil court rejected this argument, since the civil and criminal actions are independent of one another.

63 *Farrugia nomine v. Zahra et*, op. cit., p. 1324.

64 That this was the correct approach is suggested by the case of *Anthony Bugeja v. Carmelo Agius et* (LXXV. II. 418). In that case, the Court of Appeal held that while no moral person can commit a tort, all the physical persons who participate, via acts of commission or omission, in torts or quasi-torts are liable in damages. The plaintiff in this case was therefore allowed to personally sue every member of the governing committee of a band club for compensation of the damages caused to him by an explosion resulting from an illegal activity that took place in the club premises.

to prove that Montebello was personally responsible for causing the damage complained of, in line with the general principles of tort law. As this proof had not been made, defendant Montebello could not be held liable in tort. As regards defendants Zahra and Galea, the court made reference to the principles of indirect responsibility in tort so as to establish whether they could be held liable for having subcontracted with Montebello Ltd. In terms of section 1037 of the Civil Code, to succeed in his suit the plaintiff had to prove that these defendants had employed a person 'who is incompetent, or whom he has not reasonable grounds to consider competent.'[65] As the plaintiff had not proved either of these criteria of incompetence, the court also refused his claim for damages against defendants Zahra and Galea.

The decision in *Farrugia v. Zahra* contrasts with that given in *Frendo v. Abela* and with various French judgments. In *Frendo v. Abela*, the court had not allowed one contracting party to sue the subcontractor of the other contracting party in tort. This was permitted in this case. In *Frendo v. Abela*, the court had held that the only action available to the plaintiff was a contractual action against the other contracting party. In this case the court allowed the plaintiff to sue the other contracting party in tort. While the French judgments previously discussed had held that the plaintiff had a contractual action for damages directly against the subcontractor, the court in this case held that the plaintiff could only sue the subcontractor in tort.

This judgment could be interpreted as a clear statement that the *non cumul* rule does not apply in Maltese law. After all, the judge classified the plaintiff's action as tortious without considering that he might have been trying to sue defendants Zahra and Galea for breach of contract. Indeed, plaintiff might not have suffered damage had these defendants chosen a different method to give effect to their contractual obligations towards him. On the other hand, one might argue that the contractual responsibility of the defendants did not arise in this case and there was therefore no overlap between their liability in tort and in contract. If there were no concurrent responsibility, this judgment could have no relevance to the issue under discussion. To settle this question, it is necessary to determine whether the plaintiff could have sued any of the defendants for breach of contract or whether there were any special factors that excluded their contractual responsibility.

The first point to be considered is whether the act or omission that caused the damage to plaintiff's property constituted a breach of any of the defendants' contractual obligations. This is by no means clear in this case, as defendants Zahra and Galea could object that they had carried out the excavation work that they had contracted with Telemalta Corporation to do, as proved by the fact that this Corporation had paid them for it. The fact that in the course of the work a cable belonging to Telemalta itself was exposed and damaged did not mean that they had not diligently performed their duties under the contract, since this contract had not expressly imposed on them a duty to protect the plaintiff's property while carrying out the excavation work. While this argument may appear to be sound, it is important to note that it does not conform to the approach adopted by French and Italian courts to this issue and that their approach has strong persuasive authority, since it is based on legal provisions that also exist in our Civil Code. In fact French courts have held that the obligations arising under a contract are not limited to those explicitly agreed upon between the parties, but also include implied accessory duties, since contracts in French law also have effect in regard to: '*toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation*'.[66] The French courts have therefore accepted that in various cases duties of protection, which they term '*obligations de sécurité*', may oblige one party to a contract to protect the person or the property of other contracting parties. They have thus held that a building contractor who performs construction works is bound by a duty of protection not to cause any damage to the property that belongs to his client.[67] This principle would appear to apply to *Farrugia v. Zahra*, as this case also dealt with a contract of works (*locatio operas*) and as our Civil Code, in section 993, also provides that contracts are binding; 'not only in regard to the matter therein expressed, but also in regard to any consequence which, by equity, custom or law, is incidental to the obligation, according to its nature'. Consequently there would appear to have been nothing to prevent the court from following the lead of the French judgments and concluding that defendants Zahra and Galea were in breach of their implied contractual duty to protect the property of the plaintiff, Telemalta Corporation and that plaintiff could therefore exercise a contractual action for damages against them.

The argument that a concurrent contractual liability existed in *Farrugia v. Zahra* gains added reinforcement from the

[65] This section was interpreted by the Court of Appeal in *Dr Joseph R. Grech v. Commissioner of Police* (LXXII. II. 199) In that case the court held that this section presents two alternative tests of incompetence: purely objective incompetence at the moment when the person is employed and a more subjective test, which requires that the specific employer in question did not have reasonable grounds to consider the particular employee involved as incompetent.

[66] According to article 1135 of the Code Civil. See Chabas, F., op. cit., pp. 396-401.

[67] Ibid, p. 400.

views of Italian scholars like Di Majo or Massimo Bianca. Both authors note that the existence of these ancillary contractual '*obligations de sécurité*', which they term '*obblighi di protezione*', has also been accepted in Italy. Di Majo argues that the recognition of this category of obligations reflects the fluidity of the boundary between contractual and extra-contractual responsibility, since these obligations impose duties to protect the person or the property of the contracting parties that are not expressly mentioned in the contract.[68] Massimo Bianca provides an alternative juridical basis for these obligations, arguing that these '*obblighi di protezione*' do not constitute a separate category of obligations, but should rather be seen as emerging from the general rule that all obligations must be performed with the diligence of a *bonus paterfamilias*.[69] Thus, my duty to take care of the property of my creditor would emerge from my legally defined duty to diligently perform my contractual obligations.[70] This approach could also conceivably have been adopted by our Civil Court in *Farrugia v. Zahra*, since the Maltese Civil Code also contains the general rule requiring the diligence of a *bonus paterfamilias* in the performance of a contractual obligation.[71]

This review of French and Italian law suggests that *Farrugia v. Zahra* might well have been classified as a case of breach of contract, had the court been so inclined. However there are various other objections to this thesis. One of these stems from the fact that defendants Zahra and Galea had subcontracted the performance of their contractual obligation to A. Montebello Ltd. Since they were allowed to subcontract in terms of the original contract and since it was the subcontractor who actually caused the damage, it might be thought that these defendants could not be found liable for breaching their contract with the plaintiff. This argument, while tempting, would be wrong. Our courts have on various occasions held that the fact that the contractor in a contract of works has subcontracted the performance of his obligation to a third party does not exempt him from his responsibility towards his employer for the diligent performance of his contractual obligations.[72] This is also the opinion of Caruana Galizia, who argues that where the contractor has subcontracted the execution of the work, 'the contractor, evidently, does not thereby deprive himself of the quality of a contractor and is not discharged from his obligations, unless the employer acknowledges the sub-contractor'.[73] It seems that the acknowledgement to which Caruana Galizia is referring is an express acknowledgement of a specific subcontractor, which cannot be inferred from the fact that the contract of works in this case allowed the contractor to subcontract the performance of his contractual obligations. This continuing contractual responsibility of the contractor for the fault of his subcontractor is in line with the judgment in *Frendo v. Abela*. It conforms to various other cases in which our courts have held that a party who assumes a contractual obligation knowing that its performance depends on a third party will remain responsible for the performance of this obligation.[74]

Other critics would accept that the facts in *Farrugia vs Zahra* constituted a breach of contract and that defendants Zahra and Galea were not exempted from their contractual responsibility to protect Telemalta Corporation's property simply because they had subcontracted the performance of their duties to a third party. However they would object that since plaintiff had paid these defendants for their work, this prevented him from suing them for breach of contract. Alternatively, they might claim that in this case the rules for compensation of contractual damages did not permit the plaintiff

68 Di Majo, A., (1997), *La Responsabilità Contrattuale*, G. Giappichelli Editore, Torino, pp. 91-92.

69 Bianca, M., (1994), *Diritto Civile Vol. IV*, Dott. A. Giuffrè Editore, Milano, pp. 93-95.

70 The Italian courts have even accepted that my contractual duty to protect the person or property of my creditor also entitles third parties to the contract to exercise a contractual right of action for compensation against me. In this way these third parties may obtain compensation for any damage to their person which results from my non-compliance with these obligations of protection. Cf. Di Majo, op. cit., pp. 184-190.

71 See sections 1032 and 1132 of our Civil Code.

72 See, for instance, *Joseph Zarb v. Carmelo Agius* (XLI. II. 892), where the principle was stated to be

Jekk l-opra, li kienet oġġett ta' l-appalt, ġiet eżegwita minn persuna oħra bħala subappaltatur, l-appaltatur jibqa' responsabbli lejn l-appaltant għall-eżekuzzjoni ta' l-appalt, anki apparti mill-fatt li l-materjal ħażin ikun fornieh hu.

This principle was quoted approvingly and applied in *Emanuel Abela v. Perit Arkitett Fred Valentino et.* (LXXXII. II. 1202).

73 See Caruana Galizia, V., rev. Ganado, Prof. J. M., (1987), 'The Contract of Letting and Hiring', *Notes on Civil Law Vol. III*, University Press, Malta, p. 765. This is a different case from that mentioned in fn. 53 of this paper.

74 This principle was stated in these terms in *John Falzon v. Silvio Mifsud* (XLIV. I. 329)

jekk l-obligat jassumi l-obligazzjoni meta kien jaf li l-eżekuzzjoni tagħha kienet tiddependi mill-fatt tat-terz, mingħajr ma jistipula ebda klawsola ta' eżoneru, fil-fatt hu jkun qiegħed iwiegħed il-fatt tiegħu, u mhux il-fatt tat-terz; għax assuma obligazzjoni li tabilfors kienet tikkomprendi l-fatt tat-terz.

It was cited in *Albert Farrugia v. Michael Attard pro et noe* (LXXXII. II. 52), where the court held that a contractual obligation to repair a car includes an obligation to compensate for the damages caused by the delay in repairing the car, even if this was due to the delay of the third party who supplied the parts.

to recover the damages he suffered from the defendant.[75] However, as discussed earlier in this paper,[76] each of these objections is beside the point. If the court had applied the *non cumul* rule and if the act of the defendants constituted a breach of contract, then the plaintiff could not have been permitted to sue them in tort even though he could not obtain compensation by exercising the contractual action. This occurred in the other Maltese cases reviewed in this paper, where although plaintiff could not exercise the contractual action, the court nevertheless held that the fact that this action had been available to him at some point prevented him from exercising the action in tort.

Thus it seems clear that if one accepts that defendants Zahra and Galea were in prima facie breach of their contractual obligations, then the court's decision to allow the plaintiff to sue them in tort implies that the rule of *non cumul* is not followed in Maltese law. At this stage, however, two clarifications must be made to my argument. Firstly it might be thought that the argument is rather weak, since it hinges on the possibility that the court in this case might have found that a contractual action for breach of defendants' duties of protection existed under Maltese law. If this possibility did not really exist, then there would have been no overlap between defendants' contractual and tortious responsibilities and the court's decision could have no relevance to the issue of *non cumul*. However this objection misses the point. It is not the court's decision that a contractual action was not available which is being attacked, but rather the fact that the court did not even consider whether or not a contractual action was available to the plaintiff, in addition to his action in tort. It is submitted that the court would have been compelled to consider and pronounce itself on this issue if the rule of *non cumul* had existed in our system. How else could the court decide whether to allow the action in tort, if not by first ascertaining whether there was a concurrent contractual responsibility?[77] Secondly, doubts may arise concerning the practical relevance of this discussion. These will be silenced if one considers that in this case the court's decision, had it applied the rule of *non cumul*, could easily have been the opposite of what it was. It will be recalled that the primary reason why the court refused the plaintiff's action in *Farrugia v. Zahra* was that he had failed to prove the fault of the defendants according to the rules of tort. However, if the court had concluded that the defendants were in breach of their contractual obligations, then the onus of proof would have shifted to them and it is the defendants who would have had to show why they were not at fault for the breach. Had they failed to exculpate themselves by providing additional proof, they would have been held responsible to compensate plaintiff for the damage caused to his cable. The practical point of this debate is clear.

The conclusion is that the Civil Court in this case adopted an approach which contrasts dramatically with the other judgments which have been reviewed. This approach appears to be similar to that adopted by the Italian courts, since it makes no reference to the rule of *non cumul* and seems to accept that in cases of concurrent responsibility the court may freely decide whether to classify the action as contractual or tortious.

Conclusion

This review of Maltese judgments has revealed three different approaches to the rule of *non cumul*. These can be summarized as

a. a 'consequentialist' interpretation of the rule that uses the criteria governing the payment of contractual damages to determine when plaintiff's action is contractual;
b. an alternative interpretation that construes the rule in terms of the principle of subsidiarity of the *actio de in rem verso*; and
c. a rejection of the rule which reflects the Italian approach.

In response to the question that inspired this paper, one can therefore say that while the Maltese courts do not expressly refer to the rule of *non cumul*, they have sometimes stated similar principles to deal with situations of concurrent liability. Yet although these principles may have similar effects, they are couched in a different form than the *non cumul* rule and may also have very different effects. Overall the Maltese position is characterized by the uncertainty resulting from the courts' reliance on shifting and occasionally contradictory principles. This is clearly an unsatisfactory situation and it would appear preferable if our courts were to articulate and consistently adhere to a clear position by either adopting the rule in full or rejecting it. If the Maltese courts were to consistently reject the rule, then this would clearly benefit the plaintiff, allowing him/her the choice whether to act in tort or in contract depending on which type of action appears most favourable. This would appear to be equitable, although it might be difficult to reconcile this position with a strict interpretation of the theory of the autonomy of the will of the

[75] It might perhaps be argued that these rules do not cover a situation where the plaintiff, who accepts to pay the defendant in full for the adequate performance of his contractual duties also wishes to bring an action for damages against this defendant.

[76] Refer to the discussion of the judgments given in *Vassallo v. Mizzi* and *Fenech v. Baldacchino*, in section headed 'The "Consequentialist" Approach of *Vassallo v. Mizzi*', of this paper.

[77] Indeed, if there had been no concurrent contractual responsibility, the court would have been obliged to ascertain the reasons for this. If the parties had specifically excluded their contractual responsibility, then this might also affect their responsibility in tort. On this see Mazeaud, op. cit. in section headed '*'Non cumul'* in Comparative Law of Tort' of this paper.

contracting parties. If on the other hand our courts were to accept this rule *in toto*, then this would also benefit the plaintiff, while ensuring that the criteria followed by our courts are logical and knowable in advance.

The practical effects of either of these approaches may also be gauged from the impact each would have had on the cases reviewed in this paper. Rejecting the *non cumul* rule, while consistent with the court's approach in *Farrugia v. Zahra*, would probably also have left the outcome unaffected in *Vassallo v. Mizzi* and *Fenech v. Baldacchino*. In each of these cases the plaintiff failed to provide adequate proof of his claim and the need to prove the case would still have existed if his claim had been classified as tortious. The decision in *Frendo v. Abela*, which was criticized as unduly restrictive, is the only decision which would have been overturned had our courts adopted the Italian approach and rejected the rule in question. Again, accepting the rule would have left the decisions in *Vassallo v. Mizzi* and *Fenech v. Baldacchino* unaffected, while it would probably have overturned the decisions in *Frendo v. Abela* and *Farrugia v. Zahra*, which were both criticized in this paper.

Leaving the *non cumul* rule in a state of suspended animation may produce other, more insidious, effects. As *Farrugia v. Zahra* shows, leaving the classification of an action to the arbitrary discretion of the court may encourage the court to classify the action as one of tort in a case which might otherwise have been categorized as a breach of contract. This reduces the court's motivation to develop our law of contract, by exploring whether implicit contractual duties of protection can exist in our civil law. Our law of tort may also be suffering from the effect of the misleading principle developed in *Vassallo v. Mizzi*, which classifies an action as contractual if its facts satisfy the legal criteria for compensation of contractual damages. This influenced the court in *Fenech v. Baldacchino* to go a step further and import the distinction between fraudulent and negligent breach of contract in order to classify the action as contractual or tortious. In that case the court went so far as to imply that a fraudulent breach of contract is a kind of tort! This clearly distorts the relationship between contract and tort.

In this light, it is interesting to consider the recent decision by the Court of Appeal in the case of *Victor Shaw et noe v. John Aquilina noe*, delivered on the 27th March 1996 (LXXX. II. 623). In this case, the first court seems to have implicitly referred to the rules regulating the payment of contractual damages in order to interpret the rules regulating the payment of damages in tort, despite the significant differences that exist between these two sets of rules. Since 1962, in fact, Maltese tort legislation has made no distinction between the negligent and intentional causing of damage, insofar as the liability of the offender to compensate the victim both for *damnum emergens* and for *lucrum cessans* is concerned.[78] By contrast, as has already been observed,[79] the rules regulating the payment of contractual damages distinguish between fraudulent (or intentional) and negligent breach of contract and it is only in the former case that they permit unrestricted compensation of all the damages directly caused by the breach. In *Shaw v. Aquilina*, the first court held that in the case of a quasi-tort consisting of the negligent omission of due maintenance of electrical equipment, the damages payable to the victim could only be 'restricted real damages', excluding *lucrum cessans*. In a statement that was quoted approvingly by the Court of Appeal,[80] the first court justified this stance by pointing out, *inter alia*, that in this case defendant had not committed the damage intentionally. While various explanations can be given for the court's approach,[81] they are not mutually exclusive and it does not seem too far-fetched to argue that the court was also (unduly) influenced by the rules governing the payment of contractual damages. After all there appears to be little basis in our present law of tort for the a priori exclusion of compensation for damages consisting in *lucrum cessans* whenever the offender has acted negligently. This interpretation of the rules of

78 On this see Caruana Galizia, (1978), op. cit., p. 316A.

79 See note number 18 in this paper.

80 But one should note that the judgment ofthe Court of Appeal was confined to the assessment of damages, as plaintiff did not appeal from that part of the first court's judgment that established defendant's responsibility in quasi-tort.

81 The first court's approach can also be explained by noting that it based its decision on the fact that the defendant was liable for committing a quasi-tort on section 1031 of our Civil Code. This section, unlike section 1033, does not expressly mention that the act or omission constituting the tort or quasi-tort must be in breach of a legally imposed duty. Section 1031 states that the offender will only be liable for 'the damage' which he causes, unlike section 1033, which states that he will be liable for 'any damage'. Thus, section 1031 seems to offer a lower level of compensation to the victim than section 1033. Alternatively, one can explain the court's approach as based on obsolete legal principles. This explanation is suggested by the date of the case decision cited in the judgment, which stated that the damages that can be compensated where damage is negligently caused are limited to the *damnum emergens*. The case was *Luigi Gusman v. Dr Paolo Boffa*, decided by the Civil Court on the 27th February 1935 (XXIX. II. 368). In 1935, Maltese statutes specifically excluded the possibility of compensation of *lucrum cessans* in cases where damage is negligently caused. However, they were amended in 1938 to allow compensation of *lucrum cessans* in these cases too, up to a limit of £1,200. In 1962, even this limit was removed. On this see Cini, J. A., (1997) 'Traditional and New Approaches to the Problem of the Assessment of Damages in Fatal and Personal Injury Claims', LL D dissertation, (unpublished).

tortious liability becomes more comprehensible if it is seen as yet another import from the law of contract, following in the trail of *Fenech v. Baldacchino*.

Finally it should be observed that the bad effects of the present lack of clarity concerning *non cumul* go beyond a lack of legal certainty, possible denials of justice and the distorted development of both our tort and our contract law. This situation is constantly creating difficulties for practising lawyers who have to draft writs or other written pleadings. To fully understand these difficulties, it is important to note one critical characteristic of our court judgments which operates whenever there is a case of concurrent liability and it is unclear whether the claim should best be treated under tort or contract. In these cases, the judgment almost invariably describes the decision to classify the action under one category or the other as a search for and discovery of the real intentions of the plaintiff, who is treated as the only authority able to classify his action. This means, firstly, that in a case where plaintiff has specifically requested damages for tort or for breach of contract, the court usually feels bound by this request and does not consider itself free to re-classify the case in the way that is most favourable to his claim. Given the prevailing uncertainty as to whether we follow the rule of *non cumul* and how we are to interpret this rule, it is obvious that difficulties will arise whenever there is any hint of a possible situation of concurrent liability. In this situation, filing an action asking specifically for compensation based on tort can expose a client to the risk of having his claim refused on the grounds that he should have sued for breach of contract, at least 'initially'.[82] Clearly the same situation can happen in reverse, when a client sues specifically on the basis of breach of contract, only to be told that his action might have succeeded had he sued for damages in tort.

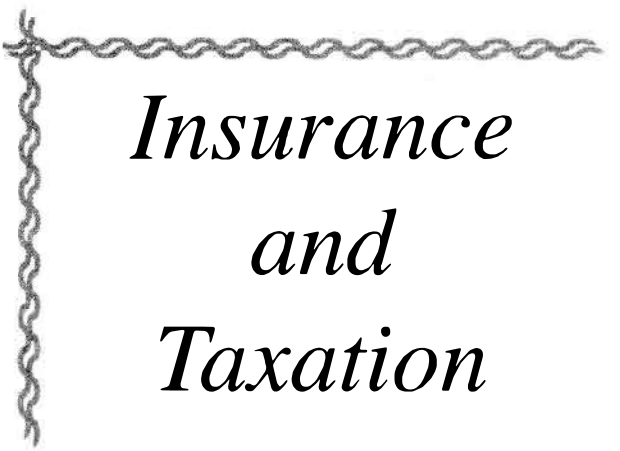
The client may prefer to hedge his bets by requesting damages on both tortious and contractual grounds, perhaps by making one claim subsidiary to the other. However, the rule of *non cumul* would prevent him from making such claims and he may also encounter another obstacle, which is that the courts do not always admit that situations of concurrent liability have arisen. The claim in tort may be viewed as legally incompatible with the claim in contract, requiring that two separate actions be filed. In this context, it is not surprising that most clients prefer not to commit themselves and simply make a claim for damages, without further specifying the legal basis of their claim. This might seem to be the best solution, because it leaves the final decision as to the legal classification of the claim in the hands of the judge, who will presumably exercise his discretion in a way that is favourable to the plaintiff. However, the judge may still conceive of his role as being that of discerning the plaintiff's (unstated) intentions to ascertain the legal basis of his claim and not that of exercising his personal discretion in the interests of the plaintiff. In that event, it is possible that the judge will classify the action in a manner prejudicial to plaintiff's claim.[83] Here too, therefore the situation would be vastly improved if we had a definitive pronouncement clearly establishing whether or not we possess the rule of *non cumul* in our civil law.

The conclusion can be stated succinctly. The lack of clear guidelines to handle situations of concurrent liability is producing various harmful effects on both our substantive and procedural law. It is helping to create situations in which citizens are denied access to justice. We need to reform our system, if necessary by *ad hoc* legislation, to ensure that these situations do not continue to multiply.

[82] As in *Frendo v. Abela*, op. cit.

[83] On this point, Bianca, M., (op. cit., p. 555) observes

Se l'attore chiede il risarcimento del danno sofferto adducendo entrambi i fatti e senza offrire elementi per l'ulteriore specificazione della domanda, il giudice determina a sua scelta il tipo dell'azione esercitata... Il potere di scelta del giudice deve tuttavia ammettersi anche se implica una decisione riservata all'autonomia della parte.



Insurance and Taxation

8 Malta Retirement Funds

Anton Felice, LL D

The Malta Financial Services Centre gave details earlier this year of draft legislation which if approved by Government could be an important building block in the development of private pensions in Malta. The Malta Retirement Funds Bill, as it is appropriately called, attracted much interest amongst practitioners in the financial services industry. But apart from this, there has been very little media commentary of what the proposed legislation has to offer.

The proposed Act goes beyond the provision of retirement schemes for domestic purposes. Indeed when it was first drawn up, the Draft Law was called the Malta International Retirement Funds Act. The idea has been that of creating the legal framework to attract international companies offering retirement benefit packages and schemes to expatriates and companies employing them.

International Needs

Schemes offered in high-tax countries may give some tax benefits, but suffer from the lack of flexibility inherent in national pension legislation. With more and more individuals and companies basing themselves internationally, there is a growing market place for cross-frontier pension provision, and this is the market, which the MFSC had in mind when it originally launched this project.

Individuals, like expatriate executives, professionals or entertainers, in a number of situations, can benefit from cross-border pension investment.

Consider some of the dilemmas these or similar types of global wanderers have to face when planning their own pension provision.

Firstly, their contributions to eligible national plans are often tax-exempt but only if they are resident in that country. As these global wanderers locate to non-resident status, they lose this tax privilege.

Secondly, their contributions to eligible national plans are often tax-exempt up to a maximum limit. As their earnings exceed this amount they are liable to pay tax.

Thirdly, offshore investment is often the only practicable route, because it preserves the flexibility of not committing oneself to any particular high-tax jurisdiction at time of retirement. Assuming that the income they are going to receive in retirement is not going to be taxed at source, it gives them the flexibility to decide, where to locate their retirement when they stop working.

A number of countries have already poised themselves to capitalize on the potential of this growing market for international retirement business. Among these are Luxembourg with its Law on Pension Funds of June 1999, and the Isle of Man with its Retirement Benefits Schemes Act which came into force in June 2000. Competitive alternatives for the provision of supplementary pensions to expatriates can also be found in Jersey and Bermuda.

A Regime which also Caters for Local Requirements

The Bill also caters for local requirements. No matter whether one is a global wanderer or a sedentary islander, one would be extremely careful about the security of his chosen retirement product, and he will no doubt plan to maximize his income in retirement.

This is why the proposed law, because of its general and comprehensive approach, lends itself well to domestic use, and this is welcome to many of us, and to the international organizations, which guard against domestic ring fencing.

This is achieved because the Draft Law applies equally to international and domestic use. It provides the legal framework for the regulation and supervision by MFSC of private retirement schemes, and does so without discriminating between local or overseas schemes.

But in so doing it does not pre-empt any of the tasks assigned to the National Commission for Welfare Reform established in 1999. That Commission had been asked to examine the social security system in Malta and its sustainability, and to make recommendations on possible reform. Its focus was the basic State Pension and it is therefore an inquiry into the First Tier or State Pension provision in our Islands.

Governments in other countries have gone the route of statutory provision of occupational pension plans by employers, or the alternative route of voluntary provision, while trying to limit exclusions from these plans as much as possible.

The draft legislation is not concerned with these developments, because this has not been its remit. The Bill is rather

intended to encourage Maltese and international employers to develop retirement benefit schemes in Malta, creating additional employment opportunities and complementing other financial services initiatives in Malta.

Background to the New Law

To varying degrees, most retired persons rely on some combination of the three pillars of retirement income: (i) government programmes, (ii) employer pension schemes, and (iii) private savings.

The Bill is intended to develop and encourage funded second and, to some extent, third pillar retirement benefit arrangements. Second pillar retirement benefit arrangements are those schemes which are arranged between an employer and his employees. Third pillar arrangements involve a contributor who invests in a retirement scheme for his own benefit (for example, a top-up arrangement).

Overview of the Bill

The Bill defines and provides a regulatory scheme for:

- The arrangement pursuant to which an employer or contributor promises the employee or beneficiary retirement benefits (called a scheme). The law would require such an arrangement or scheme to be registered. Registered schemes could also be used by employees to top up their existing pensions, or by the self-employed;
- The types of funds (called Retirement Funds) that are required to be used as investment vehicles by a registered scheme; and
- The types of service providers that may provide services in connection with a registered scheme or Retirement Fund (the principal ones being Registered Administrators and Registered Asset Managers).

The Bill makes provisions for the regulation of retirement schemes. The legislation is intended to cover schemes which provide benefits to residents of Malta as well as to non-residents. It is divided into three parts:

Part I contains the basic definitions: Retirement benefits are defined as a pension or other benefits that are payable to a beneficiary after retirement, permanent invalidity or death. A retirement scheme is one which stipulates that no benefit can be paid before the beneficiary attains the age of 50 or after 70, except in those cases where a payment is in respect of a permanent invalidity.

Part II contains the essential requirements for Retirement Funds and registered schemes. The legislation requires that the benefits provided in such schemes would be funded through the use of one or more Retirement Funds, and that the administrator and asset managers of such Funds will also be registered and regulated by the MFSC. The MFSC also has a role in monitoring the ongoing compliance of registered schemes and Retirement Funds with the Bill's requirements. This part of the Bill also contains various powers to prescribe detailed requirements, including provisions relating to the advertising and promotion of schemes and Retirement Funds, the spread of investments to be included in a Fund, and the extent to which investments and loans may be made by or to contributors.

Part III of the Bill contains general provisions describing the powers of the Minister and the MFSC, and the various penalties for non-compliance.

Retirement Scheme Structures

At the outset, an employer who wishes to provide a retirement scheme to his employees or a certain segment of them, will have to establish a Retirement Scheme. This is a contract under which the employer agrees to pay contributions for the purpose of building a fund from which retirement benefits would be available to the employees. This contract or scheme also involves nominating a person as Administrator for the operation of the Scheme on a day-to-day basis.

Types of Retirement Schemes

A Scheme may be either a defined benefit scheme, or a defined contribution scheme.

A defined benefit scheme is primarily intended for the provision of fixed or determinable benefits. Defined benefit schemes are normally based on a combination of years of service in a retirement scheme and the level of earnings attained at or near retirement. In such a funded scheme, contributions by the employer, employee or both, will be set at levels deemed necessary to fund the defined level of benefit and to cover expenses.

On the other hand, defined contribution schemes are determined by returns or gains that are received on the invested contributions. Contribution levels may be set initially so as to achieve a desired pension after allowing for the expected investment return and for charges. Contributions may be defined in relation to a percentage of salary, or a fixed amount per month or a single payment payable from time to time. The accumulated sum is used at retirement to provide the retirement benefit to the contributor or his dependants.

Retirement Funds

A principal purpose of a Scheme is to provide benefits to the beneficiaries of the Scheme at the moment of their retirement. The law must therefore ensure that the contributions that are paid to it are kept separate from the funds of the employer. This is achieved by requiring that these be invested in one or more Retirement Funds.

A Retirement Fund is a separate company, and is therefore set apart from the employer's assets. This is important because the segregation of assets ensures that the retirement rights of employees are protected in the event of the employer's insolvency, even in the case of insufficient funding, provided that the Retirement Fund has sufficient ranking amongst the employer's creditors. The proposed Law further provides that the creditors of an employer may not enforce their rights over the employer's interest in the Scheme; nor may such creditors attach or subject such interest to any precautionary or executive warrant. Moreover any agreement that is made whereby the employer transfers or charges his interest in the Scheme is void.

A Retirement Fund is required to be established as an investment company with fixed or variable share capital under the Companies Act 1995, for the principal purpose of holding and investing the contributions made by one or more Schemes or Overseas Retirement Plans.

A retirement fund may in turn invest its assets in all forms of financial instruments or immovable property. Directives may naturally impose prudential requirements as to the proportion of resources that may be placed in any one investment or the diversification of the scheme's assets. Moreover the new law restricts the investment of the Fund's resources in contributor-related assets. This prevents the plough-back of money to the employer or his affiliates.

Registration Requirements

The Fund, any Malta-based scheme, the Administrator and the Asset Manager can all be individually registered with the MFSC. Where a Scheme is set up from scratch, it is anticipated that a single composite registration process will in practice be operated. However, the structure is a flexible one and may be used in other situations.

For instance, where an Overseas Retirement Plan sets up a Retirement Fund, only the Fund, its Administrator and any Asset Manager will need to be registered. Where a new Administrator is appointed to a Scheme, only the new Administrator needs registration. Moreover if a Retirement Fund chooses to manage its own investments, it will not need to appoint and register an Asset Manager.

Investment Services Act Requirements

A Malta-based Asset Manager will also normally need to be licensed under the Investment Services Act 1994. An Asset Manager based outside Malta will not need an ISA license, where the MFSC is satisfied that the Asset Manager is subject to an adequate level of regulatory supervision in its country of establishment.

Currently, an Administrator who acts as a custodian or as an administrator in relation to investments or a collective investment scheme is also required to be licensed under the ISA. The ISA is, however, being amended to remove pure administration services from the list of licensable activities, and to substitute a requirement for the recognition of such administrators by the ISA.

Any other service provider carrying on ISA-licensable activities will also need to obtain an appropriate license.

Third Pillar Retirement Schemes

You will have noticed that for the sake of simplicity, we have used the term employer interchangeably with contributor, and understood the employee to be at the same time the beneficiary. This is what will normally happen.

However, a Retirement Plan may have as its contributors both employer and employees. Furthermore, it may be tailored for use outside an employment relationship. When this happens, the distinction between contributor and beneficiary fades away, as they both become one and the same person. Similarly the thin line between Occupational Pension Plans and Personal Pension arrangements also fades. The draft legislation will therefore regulate all these retirement vehicles, but not pure collective investment schemes or life insurance, because in each of these latter cases the principal purpose is not that of providing retirement benefits. Moreover, a scheme which provides for the payment of retirement benefits to five or fewer beneficiaries is excluded from regulation under the proposed legislation.

This would mean that existing collective investment schemes which are principally intended for the provision of retirement benefits, within the meaning of the law, will pass through transitional arrangements until they are converted into appropriate Retirement Schemes.

It also means that the regulatory and supervisory framework that has been assumed for Retirement Schemes under the proposed law, has a common point of departure with Collective Investment Schemes as presently regulated under the Investment Services Act. The aim here has been to provide consistency and harmonize the regulatory and supervisory approach of this new law with other financial legislation, particularly the ISA. There could, of course, be an unfortunate trade-off in all this because in the international market for retirement products, competition will require lean and swift regulatory and approval systems, somehow different from the stricter domestic standards.

Regulatory Requirements

As we have seen, defined benefit schemes promise the beneficiary a predefined level of retirement benefits, conditional on that individual's years of service and some measure of earnings. Contributions by the employer (and usually the beneficiary) are based on actuarial estimates, which means that

usually the employer's contribution can vary from year to year according to the performance of the Fund.

On the other hand, in defined contribution schemes, contributors pay a certain level of contributions, with no explicit commitment for a certain level of pension benefits at retirement. The pension paid at retirement will depend on the level of contributions, the rate of return accrued on the fund and the costs involved in converting the final fund into an annuity.

In both cases, the employer is the guarantor of the pension scheme he has set up. However, in defined contribution plans, the employer's obligation goes no further than his contribution, whilst in defined benefit plans, the obligation is tied to the promised benefit, and must guarantee sufficiency of funds at the moment of retirement.

Reliance on private retirement schemes calls for an adequate regulatory framework. This is a precondition for maintaining the confidence of beneficiaries, both at international and domestic level. Indeed, where retirement benefits are concerned, the non-payment of present or future benefits can seriously affect the lives of would-be beneficiaries and harm the image of Malta on an international level.

The Draft Law therefore requires that Retirement Benefit Schemes should be registered with the MFSC, and registration will cover both the Fund itself, the proposed Retirement Scheme, its Administrator and Asset Manager. Moreover, if the Scheme is to qualify for special tax treatment, it will have to comply with requirements laid out by the CIR. The new law also introduces innovative concepts by placing a duty on Fund Directors, Administrators, Auditors and Actuaries to blow the whistle wherever they have a reasonable cause to believe there is a compliance failure.

Another decisive supervisory tool lies within the post of the Retirement Scheme Administrator and the Retirement Fund Administrator.

The Draft Law provides that both the Retirement Scheme and Fund have to be managed externally by a Registered Administrator. This would generally be a company holding an investment services license of the appropriate category.

A scheme administrator has a number of duties. These would typically include:

- Investing all contributions in retirement funds according to the terms of the Scheme document,
- Ensuring that the scheme collects all payments that are owed to it by its contributors,
- ensuring that all disbursements are effected in accordance with the Scheme document; and
- maintaining accurate records.

On the other hand, the Retirement Fund Administrator manages the Fund and is responsible for ensuring compliance with all statutory and contractual obligations; it is his duty to arrange for the necessary financial control of the Fund, and he must provide for the audit and actuarial examination of the Fund. It is the Fund Administrator who carries the overall day-to-day responsibility for the Fund, and it is for this reason that substantial civil and criminal penalties are imposed on him in the event of a breach of duty.

The primary goal of the proposed Law is to protect beneficiaries from the effect of the Scheme's insolvency. The issue of adequate funding of plans is particularly acute in defined benefit schemes. By contrast, defined contribution schemes are in theory always technically funded, although in practice they may not be so, especially where there is misappropriation, misuse, or improper estimates of funds. Restrictions on investments in the employer's own business also provide important safeguards.

Adequate Funding

The purpose of subsidiary regulation under various provisions of the Law are to require a prudent approach to the funding of schemes; proper technical and investment decisions, and to reduce the possibility of improper funding.

At the same time, we are well aware that a healthy Fund can sometimes find itself under funded without its viability being affected. The situation may arise in the case of a sudden and significant fall in the value of assets.

In such a situation, the proposed law adopts a more stringent approach wherever a defined benefit scheme is the object of an employment relationship. The proposed law here requires that such occupational defined benefit schemes should be subject to a technical funding requirement. Simply stated, it is a duty of the Scheme Administrator and Actuary to ensure that the value of the Scheme's investments in Funds, after deduction of all liabilities, is not substantially less than the value of its future retirement payments towards its beneficiaries. This is a rule which permeates throughout the regulation of private retirement schemes and stands out as a major distinguishing feature from the present Pay-as-You-Go State Pension system.

Where it is likely that the Funding Requirement will not be met (or worse still, where a deficit materializes), then the law will oblige the Scheme Administrator to levy additional contributions in order to remedy this shortfall.

Flexible Design and Full Transparency

Whilst as we have seen there is a need for adequate regulation, the Draft Law therefore takes the view that it should not unduly dictate the content of a Retirement Scheme. Benefits should very much correspond to what is promised in the Plan, with however a very important requirement in the form of a compulsory disclosure procedure for beneficiaries and contributors to enable them to monitor, either directly or indirectly, the Fund's management at all times.

Under the disclosure rules, we can for instance envisage that both employers and employees will have access to the following data prior to joining a Scheme and while they are members of it:

- The Retirement Scheme, including a full statement of the nature of the retirement benefit promise; Detailed contributions payable, Scheme benefits and how those benefits are secured; Details of the registered administrator, The criteria governing the valuation of assets and liabilities; The rules governing admissible costs and expenses; A general statement of the powers to make scheme amendments; The application of funds in the event of winding-up; A statement of the beneficiary's rights to further information and how this can be obtained.
- The Audited Accounts
- A Report providing information as is sufficient to enable an informed judgment on the development of the Fund and its financial performance.

Beneficiary's Right of Redress

The right of redress that is available to a beneficiary, whether current or future. An employee who is a beneficiary under an occupational retirement scheme is strictly speaking a third party to the contractual relationship between his employer and the Fund. As such his rights of action against the Scheme are indirect and unclear.

Such a situation is unsatisfactory, and the proposed law therefore provides that a Retirement Scheme, when duly notified to a beneficiary, operates as a binding arrangement between the Retirement Scheme and the said beneficiary, unless the latter opposes it within two months for a valid reason.

Of course, this right of redress is in addition to the beneficiary's right of action against his employer for breach of contract, whenever retirement rights are assumed under an employment relationship.

Tax Treatment

Saving through a retirement scheme means tying one's money up for a long period. Many countries have adopted a fiscal policy which provides incentives for individuals to overcome their natural reluctance to save. More significantly, tax advantages can make it more favourable for an individual to tie up his savings until retirement when he could otherwise invest in alternative savings vehicles where his money would be accessible whenever he wants it. The rationale is that if people do not give themselves an adequate income at retirement, they will put pressure on State Pensions at the expense of taxpayers in general.

It is not the purpose of this article to go into any detail regarding tax treatment. However we have already highlighted the fact that tax considerations will exert a powerful influence over demand of Maltese schemes by expatriates. Indeed whilst we have no control over the taxation of contributions from abroad, consideration will have to be given to the right level of tax that will be payable on investment income accruing to the Fund, and on the retirement benefits paid at source to retired beneficiaries.

Concerning domestic tax treatment, we are already aware of the arguments for tax incentives, and for the repeal of the present disincentive in the claw-back provision under the Social Security Act. These are issues that are beyond this article, but I expect that they will be raised for policy decision.

The tax system itself is an important, though not the only incentive for many people to save in a retirement scheme. Tax incentives should therefore be linked to Schemes which satisfy certain fundamental requirements, that have to be identified in the light of public policy. Minimum requirements would include the portability of such schemes as well as their affordability. Portability implies that an employee would be able to change employment without forfeiting his retirement benefits.

Affordability implies that charges have to be kept low and that there should not be high initial fixed costs that in effect tie an individual to a particular and possibly inefficient and uncompetitive fund management organization.

9 Maltese VAT Legislation and the EU Transitional VAT Regime

Damien Fiott BA, LL D

Background

Until January 1, 1993, border controls had served as a collection point for value added tax (VAT) on the importation of goods into individual Member States of the European Community. The abolition of border controls on the movement of goods within the European Community necessitated a new mechanism to enable Member States of destination to continue to collect the relevant VAT. However, Member States came to accept that individuals who travelled to another Member State and acquired goods which they transported back to their 'home' Member State, should only pay VAT in the Member State in which the goods were purchased. Accordingly, the transitional VAT regime has been described as a hybrid system on account of the fact that while the bulk of intra-Community trade in goods is effected between VAT-registered traders and, as such, continues to be taxed in the Member State of destination, goods purchased by individuals for private consumption are, as a rule, subject to VAT in the Member State of origin.

Although the Maltese Value Added Tax Act[1] (the 'Act') embraces the basic concepts of EU VAT law, it will require a number of amendments in view of Malta's prospective accession to EU membership. The major point of divergence between the Act and the Sixth VAT Directive[2] (the 'Directive'), which is the main source of our law, is the absence from the former of the provisions of the Directive that have introduced with effect from January 1, 1993 the transitional VAT regime referred to above that is meant to operate until the origin principle of taxation is fully developed.[3] The most significant amendments to the Act will consist in the introduction of provisions to embrace the single-market concept, in particular, the introduction of provisions to regulate two new concepts of intra-Community trade obtaining under the transitional VAT regime, namely, intra-Community acquisitions and intra-Community supplies, so far treated under our law as imports and exports respectively. The concept of 'imports' and 'exports' will thus be limited to goods entering and leaving Malta from or to a non-Member State.

Identification of Taxable Persons

A main consequence of the application of the concept of intra-Community trade will be that both Maltese businesses and the Maltese VAT authorities must be able to ascertain the tax status of the parties involved in intra-Community transactions. Maltese businesses and VAT authorities will be able to make use of the EU VAT identification system, known as VIES (VAT Information Exchange System): Each taxable person should be able to obtain from the Maltese VAT authorities a confirmation of the VAT numbers of all the VAT registered persons throughout the EU. New rules will therefore be required to set up and regulate a Maltese VAT database, in respect of which, the local VAT authorities will be responsible to maintain and make available to other Member States, up-to-date information on all VAT identification numbers issued in Malta.

The VAT identification number is the key entitling a person effecting an intra-Community supply to qualify for an exemption with a right to a deduction of input tax that is attributable to that supply. In fact, it is the supplier who will be required to prove his entitlement to the exemption: first, he must ascertain the tax status of the purchaser, which must be a taxable person or a non-taxable legal person required to account for VAT on such acquisition – this is ascertained by simply obtaining the VAT number of the purchaser, hence the importance of the Community-wide identification numbers database; second, the supplier must be able to prove that

1 Act XXIII, 1998; Cap 406 of the Laws of Malta

2 Sixth Council Directive of 17 May 1977 (Directive 77/388/EEC) contains the core provisions of EU VAT legislation. This Directive provides for the harmonization of laws of the Member States relating to turnover taxes, provides for a common system of VAT and for a uniform basis of assessment.

At the time of writing, EU VAT legislation is based on the destination principle of taxation, that is, VAT is charged in the place where the goods and services are consumed. The original duration of the transitional period was of four years, commencing on January 1993 and ending in December 1996. However, the term has been renewed pending the Commission's proposal for the adoption of a definitive VAT system based on the 'origin principle of taxation' whereby VAT is charged in the place where the goods and services originate.

the goods have been transported to another Member State by either of the parties to the transaction.

Intra-Community Transactions

An intra-Community transaction simultaneously generates two taxable transactions: an exempt intra-Community supply in one Member State is followed by a corresponding taxable intra-Community acquisition in the Member State of destination, in the same way that an export is followed by an import. With certain exceptions, intra-Community supplies are exempt with credit in the same way as exports while intra-Community acquisitions are taxable supplies replacing the taxation at the border that otherwise applies to imports.

Intra-Community supplies

In the Member State of departure of goods, the taxable person making the supply will be exempted from VAT provided that the goods are dispatched or transported by or on behalf of the vendor or the person acquiring the goods, out of the territory of the Member State of departure but within the EU; and, provided that the intra-Community supply is made to another taxable person or a non-taxable legal person in a Member State other than that of the departure of the dispatch or transport of the goods.

Only the Member State of departure will be able to determine whether a supply has been made and whether the conditions necessary for an exemption have been fulfilled. This means that neither the Member State of departure nor the supplier will be required to ensure, in order that the supply can qualify for an exemption, that the acquisition made in the Member State of destination is in fact taxed as an acquisition. Similarly, the supplier will not be concerned with the use to be made of the goods supplied. Furthermore, it is the Member State of destination that will be required to ensure that the goods acquired will be subject to taxation and to ensure the proper exercise of the right to a deduction of the input tax by the purchaser.

Intra-Community acquisitions

Intra-community acquisitions made in Malta will attract tax in Malta and in the same way as an importation. Thus, the destination principle already embraced in our Act will be retained – VAT will still be imposed on goods that are destined for consumption in Malta. However, the Act would have to be amended to introduce the necessary abolition of import procedures for goods entering our country from an EU Member State. In fact, VAT on supplies acquired from a Member-State will no longer be due at the point of physical entry of goods in Malta but will be accounted for in the purchaser's VAT return. The incorporation of the input tax paid on intra-Community acquisitions within the domestic VAT return represents a major step towards offering a similar treatment to intra-Community and domestic transactions. VAT incurred in respect of intra-Community acquisitions will be deductible in the same way as it is deductible in respect of imports.

The Member State of destination is required to classify the transaction in accordance with its domestic VAT legislation in order to establish whether it consists of an intra-Community acquisition or otherwise, irrespective of the classification attributed to such transaction by the Member State of origin. This 'disconnection' of the classification of transactions is indispensable in restraining non-taxation. In other words, a transaction may constitute a taxable acquisition in the Member State of destination even if it not treated as a supply in the Member State of origin.

Special Arrangements

As indicated above, the transitional VAT regime is a hybrid VAT system because whereas the destination principle applies with regard to trade between taxable persons, the origin principle has been 'allowed' to apply in the case of individuals who purchase goods for personal consumption from another Member State. However, the application of the origin principle coupled with the persistence of differences in the VAT rates across Member States has created concern about distortion in trade. For this reason, the Directive provides for special arrangements with respect to certain transactions which were feared to trigger a surge in acquisitions made in Member States having low VAT rates to the detriment of Member State with higher rates.

'Distance Selling'

An individual who buys goods for personal consumption in another Member State and transports those goods to his home Member State, will only be subject to VAT in the Member State where the goods are acquired. By way of exception, the distance selling regime requires suppliers who arrange for goods to be delivered to the customer in another Member State (that is, distance selling) to register for VAT in such other Member State where the value of the sales exceed a certain threshold. The distance selling regime partly reinstates the destination principle of taxation in order to prevent distortions in trade which would arise if customers were able to choose to buy from those Member States having lower VAT rates ('rate shopping') without the inconvenience and expense of actually travelling to such Member State.

'New Means of Transport'

As stated earlier, the general rule under the transitional VAT regime is that if a consumer buys goods for his private consumption in another Member State and transports them to his 'home' Member State that consumer will be charged VAT in

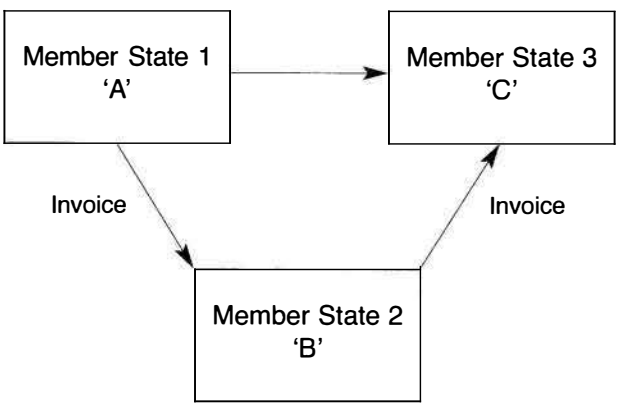
the country of purchase. However, the transitional VAT regime provides for an exception in the case of acquisitions of new means of transport. As a new means of transport represents a major purchase for the average individual and is, by definition readily transportable, a special provision has been introduced to avoid possible distortions in trade which would be caused if individuals were allowed to buy cars in Member States at the VAT rate applicable therein. For this reason, purchases of new means of transport will attract VAT at the rate applicable in the country of destination.

Some Further Implications of the Transitional Regime

Although the purpose of removing tax barriers is to provide an adequate framework for the proper functioning of the internal market, the tax treatment of intra-Community transactions and the procedures connected therewith might cause certain problems to the Maltese VAT authorities and businesses in general. Apart from the expected initial 'teething' troubles that businesses encounter when faced with a new tax scenario (amending accounting records and systems, determining acquisition events and a host of other matters), there are some potential problematic issues:

a. The retention of zero-rating on intra-Community supplies (deduction of input tax as in the case of exports) coupled with the removal of border controls effectively means that the supply to another Member State will have to be verified in other ways.
b. Unlike the case of payment of VAT on imports, VAT on intra-Community acquisitions becomes payable upon the filing of the relative VAT return and therefore becomes payable some time after the lapse of the tax period during which the acquisitions are made. This tax deferral might create a cash-flow problem for the Maltese government.
c. In case of an intra-Community transaction, where a purchaser fails to furnish his VAT number to the supplier, the latter would charge VAT at his domestic rate but the purchaser would still be liable to account for VAT on the acquisition. In such a case, it may be difficult to recover the overseas VAT once paid. Conversely, a local supplier should verify the VAT number of the overseas purchaser and must prove that the goods have actually been dispatched to the purchaser in the acquiring Member State. Otherwise the local supplier faces the risk of becoming liable to pay VAT locally.
d. Owing to the fact that VAT is no longer imposed and collected at customs point, the risk of fraud might become inherent in the system. This could easily create problems for the local VAT authorities.
e. The collation of statistical information and the setting-up and maintenance of the mandatory VAT identification database could create further administrative burdens to the local VAT authorities.
f. The removal of fiscal barriers might result in a relaxation of border controls to the prejudice of controls on the movement of illicit goods.

Finally, local businesses and the local VAT authorities will have to get accustomed to the concept of 'triangular transactions', so far alien to the Act. Triangulation occurs when the movement of goods between Member States does not follow the invoicing route. The following is a typical example: a taxable person 'C' in Member State 3 orders goods from a taxable person 'B' in Member State 2 who himself forwards the order to taxable person 'A' in Member State 1. ('A', 'B' and 'C' are taxable persons registered for VAT in their respective Member States). However, the goods are directly transported from Member State 1 to Member State 3 as illustrated hereunder:



In such a case, the transitional VAT regime provides that the intra-Community supply from Member State 1 to Member State 2 would be exempt with a right to deduction (that is, exempt with credit); 'B', in order to avoid having to register in Member State 3, issues an invoice to 'C' notifying him that he is required to account for VAT himself on the acquisition.

Commercial Law

10 The Increased Accountability of Foundations: A Natural Consequence of Statutory Regulation

George Vella

The concept of foundations in Malta has by now become widespread, with the number of foundations increasing considerably. A foundation consists in the creation of a fund destined to be used, under the supervision of administrators, for the attainment of a specific purpose. Foundations are entities which have a separate juridical personality from that of the founder and the Board of Administrators. This principle has been considered and developed by our local Courts over the years in a number of judgements.

In the judgement *Padre Giuseppe Cauchi noe v. Salvatore Cilia et*,[1] delivered by the Court of Appeal on the 1st October 1926, the Court indirectly implied that a foundation is an entity having a separate juridical personality. In fact, in this particular case the Court stated that the administration of the foundation should be conducted as a distinct personality. In a subsequent judgement, *Saċerdot Nazzarèno Curmi et noe v. L-Illu. u Rev. Mons. Kan. Giuseppe dei Marchesi Depiro noe et*,[2] also delivered by the Court of Appeal on the 12th February 1936, the Court held that Maltese Laws recognizes certain entities as being moral persons having a separate juridical personality. A more direct reference to foundations as being moral persons having a separate juridical personality was made in the judgement *Dottor Enrico Cauchi v. Giuseppe Pullicino*, delivered by the Court of Appeal on the 30th January 1939.[3]

A person within the context of any legal system has a number of rights and obligations pertinent to it and foundations are not an exception. This is proved by the fact that they are recognized as being moral persons with a separate juridical personality. Once a foundation is an operative moral person within the context of society the natural consequence is that such foundations are to be regulated by statute, like any other person. Even though this is the most logical perspective to be given to foundations, to date, most of these entities are not regulated by statute.

There are certain foundations which are regulated by statute and these are ecclesiastical foundations regulated by the Canon Code. It is only public and private foundations which are not regulated in any manner other than by the constitutive instrument creating them. Once ecclesiastical foundations are regulated by statute it is evident that foundations in themselves need to and can be regulated by law.

Why do foundations need to be statutorily regulated? Simplistically put foundations need to be statutorily regulated due to the question of accountability. The very nature of foundations and the purpose for which they are created show that the fiduciary element is intrinsic to the set up of these entities. This fiduciary element can be safeguarded only through increased accountability, which can be ensured only through specific legislation.

The authorities have noted the fact that due to the increase in operative foundations, statutory regulation is no longer an option but it is a must. In view of this fact, by virtue of Legal Notice No. 308/91, a Permanent Law Reform Commission was set up for the specific purpose of drawing up a report and subsequent draft of a law regulating foundations. This Draft has in fact been drawn up and currently it is pending before Parliament awaiting to be enacted into law. It must be noted that this Draft refers specifically to public foundations and not to private foundations. This article in fact, refers specifically to public foundations.

Since the Draft is aimed at increasing the accountability of foundations, the first step towards this end is the more pronounced publicity of these entities.

To date, foundations are created by means of a constitutive act an instrument must be drawn up by means of a public deed *ad validitatem*. The same constitutive instrument which must then be registered in the Public Registry by means of a note of enrolment in accordance with the Notarial Profession and Notarial Archives Act. Foundations also entail an act of endowment, which act generally takes the form of a testamentary disposition. The testamentary disposition also necessarily requires the intervention of a notary and the will containing such disposition is also registered in the

1 *Kollezzjoni ta' Deċizjonijiet tal-Qrati Superjuri ta' Malta*, Vol. XXVI, i, 554.
2 *Kollezzjoni ta' Deċizjonijiet tal-Qrati Superjuri ta' Malta*, Vol. XXIX, i, 475.
3 *Kollezzjoni ta' Deċizjonijiet tal-Qrati Superjuri ta' Malta*, Vol. XXX, i, 289.

Public Registry or the Registry of the Second Hall Civil Court as the case may be.

By means of the requirement of the public deed *ad validitatem*, public faith is attested to foundations, and the consequent requirement of registration in the Public Registry ensures a certain degree of publicity resulting in the accountability of foundations. Even though there is this element of solemnity, statutory regulation is required in order to increase the accountability of foundations, an accountability which as it stands today, is not enough to safeguard against abuse.

In the Draft put forth by the Permanent Law Reform Commission, the first element pertinent to foundations is that foundations are set up either by a public deed or by a will. This requirement *ad validitatem*, already existent today, shall become a statutory element and it shall become a statutory obligation, without which the foundation would not be valid at law. The element of registration too is sought to be enshrined within a law, but the Draft proposes a different form of registration from that applicable today.

The constitutive instrument of the foundation, due to its very nature, is of a public character and once it is registered in the Public Registry, it becomes susceptible to public scrutiny. However the degree of public scrutiny to which foundations are subjected today is not enough to ensure their accountability. It must be kept in mind that all documents of a public character are registered in the Public Registry in accordance with the law and the constitutive instruments of foundations are not distinguished from other such documents. Therefore if the exact details of the foundation are not known, the element of publicity sought to be acquired by registration is lost.

The only solution available for increased publicity and a consequent increase in the accountability of foundations, is by the creation of a Registry pertinent specifically to foundations. In this manner, all the constitutive instruments of foundations shall be registered in this Registry and all the information pertinent to them, both as to their creation and operation, shall be localized in one specialized unit.[4]

Why is the element of publicity of the constitutive instrument of a foundation so important? The constitutive instrument of a foundation contains the basic elements on which the foundation is created, namely the purpose for which the foundation has been constituted, the powers and duties of the Board of Administrators, the mode of operation of the foundation and the factors which could give rise to the termination of the foundation. These are but some of the elements which refer directly to the accountability of the foundation, therefore it is necessary that they be known to the public and be easily susceptible to public scrutiny. Adequate and facilitated public scrutiny does not only enable the verification of the legality of the foundation, but it is a fundamental element to the increase of the accountability of foundations.

Registration of the constitutive instruments shall serve as a verification process since they shall become susceptible to the scrutiny of a superior statutory organ. In fact, the Registry shall be run by a Registrar whose main function shall be to monitor the foundations at the moment of creation, during operation and also at the moment of termination. By means of registration, the Registrar verifies that the legal conditions required for a foundation to exist have been fulfilled.

With the introduction of the Registry, foundations shall no longer become operative as soon as the constitutive instrument is created. In fact, registration shall no longer be an automatic consequence of the drawing up of the constitutive instrument by means of a public deed. A foundation shall be created as a moral operative person and consequently registered only once the constitutive instrument is vetted and approved by the Registrar. This means that the Registrar shall be in a position to refuse the registration of a foundation if this foundation is not created according to law.

The legal validity of the foundation shall be evidenced by the issue of a certificate of registration and the relative distinguishing number of the said foundation. The certificate of registration shall be conclusive evidence that all the requirements, in respect of registration and of matters incidental thereto, have been complied with. The certificate of registration shall allow the foundation to begin to operate. Prior to the issue of such a certificate any acts, other than acts of mere preservation carried out by the Board of Administrators shall not bind the foundation. This shows that the new concept of registration shall also be beneficial to the interests of the foundation itself.

A foundation shall be allowed to be registered if the objects of the foundation are lawful, not in violation of the public policy of Malta, not aimed at the achievement of immoral ends and not intended solely for making profit. These elements have always been at the core of many foundations created in Malta, however, their importance shall be by far more pronounced once they are introduced in a law regulating foundations. Statutory regulation of foundations shall crystallize the position of foundations, thus leaving less space for abuse and arbitrary interpretation of practices which may be prejudicial to the interests of third parties.

The element of publicity is intrinsic to the nature of foundations and it is of the utmost importance for the accountability of these entities. In order to enhance this element, the Draft imposes the obligation on the Registrar to publish in the Government Gazette all details pertinent to foundations,

[4] This Registry shall operate on similar lines as the Malta Financial Services Centre.

including the name of the founder, the name of the foundation, the date of the constitutive instrument, the name of the Notary who drew up the relative constitutive instrument, the registered office and the date of registration of the foundation.

Rendering public the details of the foundation is not the only manner of rendering these entities more accountable while protecting the foundation itself. The Draft in fact, also enshrines the powers and duties of the Board of Administrators, which powers and duties shall become statutory powers and obligations.

As already stated above, foundations are a moral person, which moral person must be administered by individuals in order to be operative within society. The role of the Board of Administrators within the foundation is the very life source of the entity. The Board of Administrators portrays itself as the owner of the foundation *vis-à-vis* third parties, whilst *vis-à-vis* the foundation, it is an *organo servente*.

This conflict in the position of the Board of Administrators may be the source of abuse to the detriment of the beneficiaries and also of the foundation itself. The Board of Administrators should exercise its function with the best interests of the foundation and beneficiaries in mind, therefore it must administer the affairs of the foundation in such a manner to be always within the parameters of the law. Thus the Board of Administrators itself should operate so as to curtail the possibility of abuse. This may be done only once the powers and duties of the Board are clearly delineated in a law relative to foundations.

Statutory regulation shall render the position of the Board of Administrators more susceptible to public scrutiny and this shall serve as a deterrent to abuse. Once the powers of the Board of Administrators are clearly delineated in a future law relating to foundations, there shall be less space for unfounded interpretation and consequent application of too far reaching powers which can only result in abuse.

The Board of Administrators shall also be susceptible to the scrutiny of the Registrar who shall have the authority to intervene directly and effectively in the appointment and removal of any person on the Board of Administrators. Once the conditions pertinent to the appointment and removal of a person from the Board of Administrators shall be enshrined within the future law, these shall gain the force of statutory provisions, thus they cannot be ignored without the consequent sanction in case of non-observance. This in itself allows the Board of Administrators to operate normally while ensuring that this is done within the parameters of the law and with a view to curtail abuse. In fact, the Permanent Law Reform Commission, with particular reference to maladministration, in its report suggests that in situations involving breaches of duty of a sufficiently serious character there should be a power of removal to enable the checking of abuse.[5]

Even though statutory regulation shall increase the accountability of the Board of Administrators, the aim of a future law relating to foundations is not to render the Board of Administrators a mere figurehead with no say in the administration of the foundation. Statutory regulation simply wants to increase the monitoring of the operations of the Board of Administrators to enable it to function in the best interests of the foundation.

Once the powers and duties are clearly delineated in a law relative to foundations, any constitutive instrument which does not conform with such statutory provisions shall be subjected to amendment, in default of which, the foundation would not be issued with a certificate of registration and the said foundation would not be constituted for purposes of operation.

In its report on the Draft, the Permanent Law Reform Commission specifically states that it should also be possible for the Registrar to exercise his discretion where the provision made in the constitutive instrument for the administration of a foundation proves inadequate.[6] This in itself already shows the beneficial effects which statutory regulation shall have on the whole institute of foundations.

The Permanent Law Reform Commission also seeks to curtail the possibility of collusion between the founder and the Board of Administrators. This is a very important factor within the context of the increased accountability of both the foundation and the Board of Administrators. The Draft under Section 29 (4) provides that any provision in the constitutive instrument exempting an administrator from, or indemnifying him against, any liability in respect of negligence, default or breach of duty of which he may be guilty shall be void. Provided that a foundation may indemnify an administrator against any liability incurred by him in defending any proceedings in which judgement is given in his favour or in which he is acquitted.

By means of statutory regulation, foundations shall be rendered more accountable also at the moment of termination. Accountability at this stage is very important since the rights and benefits of the beneficiaries, third parties and the foundations themselves are directly at stake.

The termination of a foundation may occur due to the 'expiry of the life span' of the foundation as contemplated in the constitutive instrument or due to other circumstances, such as for example, financial problems which lead to the dissolution and winding up of the foundation.

[5] The Permanent Law Reform Commission Report No. 2. Law Relating to Foundations 1992, p. 32.
[6] The Permanent Law Reform Commission Report No. 2. Law Relating to Foundations 1992, p. 21.

Even though foundations are created for the purpose of attaining an aim beneficial to a particular sector of society, it does not mean that foundations must not be dissolved and wound up, particularly when this becomes necessary due to financial. It must be kept in mind that foundations depend largely on donations made to them by third parties, therefore foundations can be considered to be a burden on the economy of society. This burden is not necessarily prejudicial to society, provided it remains of a sustainable nature, but once a foundation can no longer be self-sufficient despite the donations made to it, the burden on the economy does not remain sustainable and therefore the only logical conclusion is the dissolution and winding up of the foundation.

A foundation operates in accordance with the will of the founder and therefore, if he decides that a foundation is to exist only for a particular period of time, then his will must be adhered to. By virtue of the increased publicity revolving round these entities, the will of the founder may be adhered to with increased ease. Once the constitutive instrument is subjected to public scrutiny, in particular to the scrutiny of the Registrar, the termination of the foundation cannot be left in abeyance due to lack of knowledge of such a disposition by the founder. Thus the Board of Administrators shall be bound to dissolve and wind up a foundation once its term is over. If this is not done by the Board, the Registrar may decide ex officio to terminate the existence of the foundation.

This ex officio discretion may be exercised by the Registrar even in those cases where the foundation must be wound up due to financial difficulties it has experienced. This ex officio discretion allows for the increased protection of the rights of the beneficiaries and third parties linked in any manner with the foundation concerned.

The Registrar shall publish in the *Government Gazette* a notice stating that he is in the process of dissolving and winding up a particular foundation. Quite obviously, at this stage the Registrar is acting only on the basis of prima facie evidence and he shall take a final decision only once it is definitely determined that the foundation must be dissolved and wound up.

One of the most important innovations to be introduced by a future law relating to foundations is the obligation imposed on the Board of Administrators to register in the Registry the audited accounts of the foundation.

The financial operation of foundations, due to their very nature, is very important and the benefit of having such audited accounts subjected to public scrutiny, in particular to the scrutiny of the Registrar, may be felt most at the moment of termination. The Registrar shall be in a position to examine these audited accounts from one year to the other and if he encounters any form of irregularity, he can commence verification proceedings into the affairs of the foundation. If these verifications provide an indication of financial problems then he may initiate further proceedings which shall finally translate themselves into dissolution and winding up if these prove necessary.

These audited accounts may also give indications of maladministration and the Registrar in this case, without proceeding with the termination of the foundation, may commence verification proceedings into the operation of the Board of Administrators and possibly proceed with the removal of the said Board and with the appointment of a new Board who would be more competent to administer the affairs of the foundation in accordance with the law.

The process of dissolution and winding up of foundations shall be statutorily provided for in the future law relating to foundations. For there to be complete transparency in the settling of the affairs of the foundation at this particular stage, the process of dissolution and winding up of the foundation is to be carried out by a liquidator who shall be appointed by the Board of Administrators, by the Registrar or by the Appeal Board, which shall be the judicial body before which all matters relating to foundations are to be channelled.

When the foundation is to be dissolved and wound up due to mismanagement of the Board the liquidator shall be appointed by the Registrar. In all other cases for there to be increased accountability, a liquidator nominated by the Board should be appointed only once there is the final approval of the Registrar. In this case, increased accountability of the Board of Administrators may be ensured if the future law relative to foundations were to provide for the personal liability of the members of the Board towards the creditors of the foundation in those cases where the foundation is dissolved, wound up and struck off, due to maladministration of the Board of Administrators.

The process of dissolution and winding up, shall be carried out in accordance with the law and the liquidator shall be obliged to operate as dictated by the law and also within the time limits imposed by the said law. Once the liquidator shall be subjected to the law relating to foundations, it is clear that he too shall be accountable for his actions and decisions. He shall be accountable to the foundation, the beneficiaries and the State. This accountability is of the utmost importance, since the ultimate realization of the assets of the foundation shall be under his control and the main aim of his position is to dissolve and wind up the said foundation in a manner that shall be the least prejudicial to the beneficiaries and interested third parties. The final step following the dissolution and winding up of the foundation shall be the striking off of the name of the foundation from the Registry, thus rendering its termination complete and effective.

All the above is but a general outlook of the benefits that would derive from a future law relating to foundations. The

maximum effect of such statutory regulation of foundations may only be fully determined by a complete reading of the Draft. However, for the accountability of foundations to be complete, a number of amendments should be introduced within the said Draft so as to make good for a number of lacunae which still exist, particularly with reference to the administration of foundations. These amendments however, should also consider the introduction of other options particularly relative to the stage of termination of a foundation. The Draft merely takes into account the dissolution, winding up and striking off of foundations. However, these can be just as accountable if instead of dissolution, winding up and striking off being the only remedy in case of financial difficulties, foundations could be allowed to perform mergers, thus protecting the benefits they give to the particular section of society concerned, which after all, is the main aim behind the very creation of foundations.

11 Certain Features of the Trademarks Act 2000

Audrey Demicoli LL D

There is no doubt that the Trademarks Act 2000 was a most welcome addendum to our statute book. It has provided the owners of trademarks with new channels for protecting their intellectual property and extended the scope of protection afforded to service marks. This latter category was previously afforded no protection whatsoever under our law. The mechanisms formerly obtaining, based primarily on the Industrial Property (Protection) Ordinance 1899, had become outdated and out of touch with the realities of the modern world where some trademarks have acquired tremendous commercial magnetism coupled with an immense financial value.

The roots of the Trademarks Act 2000 are to be found in a number of different sources. Pre-eminent amongst these are the United Kingdom Trademarks Act 1994, EC Directive 84/104/EEC on the approximation of the laws of member states relating to trademarks, the Paris Convention for Protection of Industrial Property 1883 and the TRIPS Agreement of 1995. Stating that the provisions of the 1994 United Kingdom Act were incorporated into our law lock, stock and barrel is hardly an exaggeration; indeed few differences will emerge upon a comparison of the two. Such a state of affairs should be welcome as the learned judgements of the courts of the United Kingdom will undoubtedly serve as a thorough guideline as to the manner in which the provisions of our new law are to be interpreted.

The conclusion of the TRIPS Agreement in Marrakesh and its inclusion within the ambit of the World Trade Organisation Agreement in 1995 was by no means an easy feat. Quite on the contrary, it was a milestone of tremendous magnitude, primarily achieved through the insistence of the United States at the commencement of the Uruguay Round of the GATT talks. The most notable and innovative matter to be incorporated in our new Act, as a consequence of TRIPS is the area of famous and well-known marks. These have finally been afforded the protection they deserve, a state of affairs which had long been acknowledged and put into practice in all advanced and industrialized nations but which, alas, had been neglected and often denied locally. Happily, this will ensure that judgements such as the series of McDonalds cases of the early and mid-nineties will never repeat themselves.

While the Trademarks Act 2000 has enhanced the channels of protection in so far as registration procedures are concerned, one must bear in mind the fact that the sections in the Commercial Code on the 'Limits of Competition' found in Sections 32 *et seq*. still form an integral part of our law. Such provisions may still be relied upon by any person who elects to file an action for unlawful competition concurrently with, or in lieu of, any action available under the Trademarks Act.

The Trademarks Act 2000 is divided in four parts:

Part I (Registered trade marks) defines trademarks and sets out the criteria for their registration. This part also deals with the effects of the registered trade mark and its protection by way of infringement proceedings. This part also contains provisions relating to assignment and the grant of licences by the proprietor.

Part II (international Matters) implements obligations in relation to trademarks under the Paris Convention *interalia* requiring protection of non registered well-known marks, national emblems and emblems of certain international organizations.

Part III (Administrative and other Supplementary Provisions) deals with modifications, provisions concerning the register, the powers and duties of the Comptroller of Industrial Property, legal proceedings, appeals and registered trademark agents. It also provides for the strengthening of criminal sanctions against dealing in counterfeit goods and the power of the court to order forfeiture of such goods.

Part IV (Miscellaneous and General Provisions) is concerned with transitional provisions, consequential amendments, repeals and so forth.

The Act is also supplemented by schedules dealing specifically with collective and certification marks.

It would, perhaps, be safe to state that the most novel feature of this Act is the definition of a trademark found in Section 2 of the Trademarks Act 2000 which holds, that:

> Trademark means any sign capable of being represented graphically that is capable of distinguishing goods and services of one undertaking from those of other undertakings. A trade-

> mark may, in particular, consist of words (including personal names), figurative elements, letters, numerals or the shape of the goods or their packaging: Provided that for the purposes of this Act, 'any sign capable of being represented graphically' includes any sign capable of being put down in words.

From the above it would therefore appear that the overriding criteria for a sign to qualify as trademark are twofold; the fact that the sign is capable of graphical representation and that it is capable of distinguishing the goods and services of one undertaking from those of another.

It is interesting to note that as is the case with the United Kingdom Act, the Trademarks Act 2000 fails to define the word 'sign'. It would appear that the term has been taken directly from EC Directive 89/104 wherein one finds that a sign is, '...a signal, a mark with a meaning, a symbol, an emblem, a device, an indication...' The necessity for the mark to be capable of graphic representation serves to fulfil the practical requirement of being able to record the mark, publish and search for it in a register. The implications of such are that the mark must somehow be capable of representation or description on paper. Once this first requisite is fulfilled then there is the second; the mark must be capable of distinguishing the goods and services of one undertaking from those of another. This second test is of particular importance because it embodies the principle that a trademark must serve to distinguish the goods and services to which it is applied. This renders it capable of performing the basic and fundamental functions of a trademark. Of course, the definition applies to goods and services alike with no distinction arising in this respect.

As is the case with the United Kingdom Act, which in turn is based on the aforementioned EC Directive, the Act has opted for an open ended and non-exhaustive definition. Thus, provided that the double criteria are met the mark in question should be capable of registration. Trademarks may therefore consist of every one of the following, that is to say, words, letters, numbers, symbols, signatures and shapes. A trademark may also consist of a musical tune or a slogan, a combination of colours as well as a smell. In practice, trademarks are often a combination of the above.

While trademarks made up of words, letters and logos have long been afforded protection in Malta, the same cannot be said of trademarks made up of, for example colours, slogans and shapes. As a matter of fact, this area of protection is altogether new and innovative and reflects recent trends that have been adopted as a result of the EC Harmonisation Directive. The same situation had been obtained in the United Kingdom where, prior to the enactment of the Trademarks Act in 1994, an attempt by the Coca Cola Company to register the shape of its world famous bottle as a trademark was refused.

One can safely state that it is an almost universal perception that new forms of non-traditional trademarks play as much of a role and are of equal importance to that performed by traditional forms of trademarks. Consequently the treatment and protection afforded to the latter has, and rightly so, been extended to incorporate this new genre.

With regard to registration of colours, while certain jurisdictions tend to allow the registration of a combination of colours, they have been somewhat cautious in affording protection to single colours *per se*. The latter has, at times, been permitted as a result of proof of a very high level of distinctiveness. In this regard, one must point out the fact that the EC Harmonisation Directive contemplates the possibility of a single colour being registered as a trademark; this should clearly serve as a guideline as to the manner in which member states are to tackle the matter. Notwithstanding this, discrepancies exist within the EU itself and whereas the United Kingdom has permitted the registration of a single colour as a trademark, Spain has not.

In view of the fact that we have tended to follow the steps of the United Kingdom in the realm of trademark law, there is a strong probability that when faced with a request for the registration of a single colour as a trademark, the Comptroller of Industrial Property would allow such. The test in this regard should be based on the fundamental question as to whether or not the particular colour used in connection with a particular product or service serves to distinguish that particular good or service from those of others. If this is the case then there is no reason why registration of that colour as a trademark should be denied.

The registration of shapes as trademarks is also a new area in our law. It is a warranted recognition of the fact that business enterprises the world over invest an enormous amount of time, effort and money in the development of distinctive packaging shapes and designs for their products since they are fundamental to such enterprises in the accumulation of their goodwill. While the EC Harmonisation Directive was the first supranational piece of legislation expressly recognizing the registrability of three-dimensional shapes it highlights the fact that the functional aspects of such shapes are not capable of registration. One ought to bear in mind that acceptance of this principle must be very much assessed on a country by country basis and its implementation has hardly been universal. In this respect, it would be useful to adopt the trends of the United Kingdom and interpret our law accordingly. What clearly emerges is the fact that registration of shapes and three-dimensional objects, although accepted has normally been conditional upon proof of acquired distinctiveness.

The definition of a trademark does not seem to exclude the registration of a sound or of a scent as a trademark. How-

ever, it remains to be seen how these type of marks can be capable of being represented graphically in terms of Section 2. Moreover, in relation to these type of marks, it will obviously be much more difficult to prove distinctiveness and as specified above in relation to shape marks, the proof of acquired distinctiveness will definitely be required for such applications.

Section 4 of the Act sets out the absolute grounds upon which the Comptroller must refuse to register a trademark or upon which a declaration for invalidity may be based. These grounds are absolute because they are not dependent on any earlier trademark or other pre-existing right. These grounds include signs which do not fall within the definition of a trademark as described above, marks which lack distinctive character, marks which consist exclusively of signs or indications which may serve in trade to designate the kind, quality, intended purpose, value or geographical origin of the goods or services for which registration is sought, signs or indications that have become customary, a shape that results from the nature of the goods or a shape that is necessary to achieve a technical result (the functionality theory), a shape that gives substantial value to the goods, marks which are contrary to public policy or accepted principles of morality; marks which may deceive the public as to the nature, quality and geographical origin of the goods or services; marks which are prohibited by any enactment or rule of law, protected emblems and marks whereby the application is made in bad faith.

The second category of grounds whereby a trademark may be refused for registration by the Comptroller or upon which a declaration for invalidity may be based, are set out in Section 6 and described as the 'relative grounds for refusal'. These grounds are relative in the sense that they are concerned with the relation between the mark applied for and earlier trademarks or other earlier rights. These cases of relative grounds concern marks which in themselves do not violate any of the absolute grounds of refusal but are to be refused because they are identical or similar to another mark which has already been registered for the same goods or services or for goods or services which are different from those covered by the new application If such approval will give the trademark for which registration is being sought unfair advantage due to the distinctive character or repute of the earlier trademark it may be refused. Registration may also be refused if its use in Malta is liable to be prevented by virtue of any enactment protecting an unregistered mark or by virtue of an earlier right.

The registration process in the new law is quite similar to the one provided for in The Industrial Property (Protection) Ordinance (Chapter 29). In an attempt to come into line with other EU countries, the period of registration has been reduced from 14 years to 10 years and this period can be renewed. Another difference in the registration process between the old law and the new law relates to the opposition procedure. Under the old law any person could within two months from the date of the publication of the mark in *The Government Gazette*, give notice of his opposition in duplicate at the office of the Comptroller. The applicant would then be granted two months from the date of notification of the notice of opposition within which to file a counter-statement. Failure to file a counter-statement entailed the abandonment of the application. If on the other hand, a counter-statement is filed, the person filing a notice of opposition would be deemed to have withdrawn the said opposition, if within two months from the date of receipt of the counter-statement he fails to file an action by writ of summons before the First Hall of the Civil Court. Under the new law, this procedure has been completely eliminated. As soon as a trademark passes the Comptroller's test *vis-à-vis* the absolute and relative grounds for refusal mentioned above, the trademark is published in *The Government Gazette* and subsequently registered. The only means of opposition under the new law is through the grounds of revocation or invalidity foreseen in sections 42 and 43 respectively.

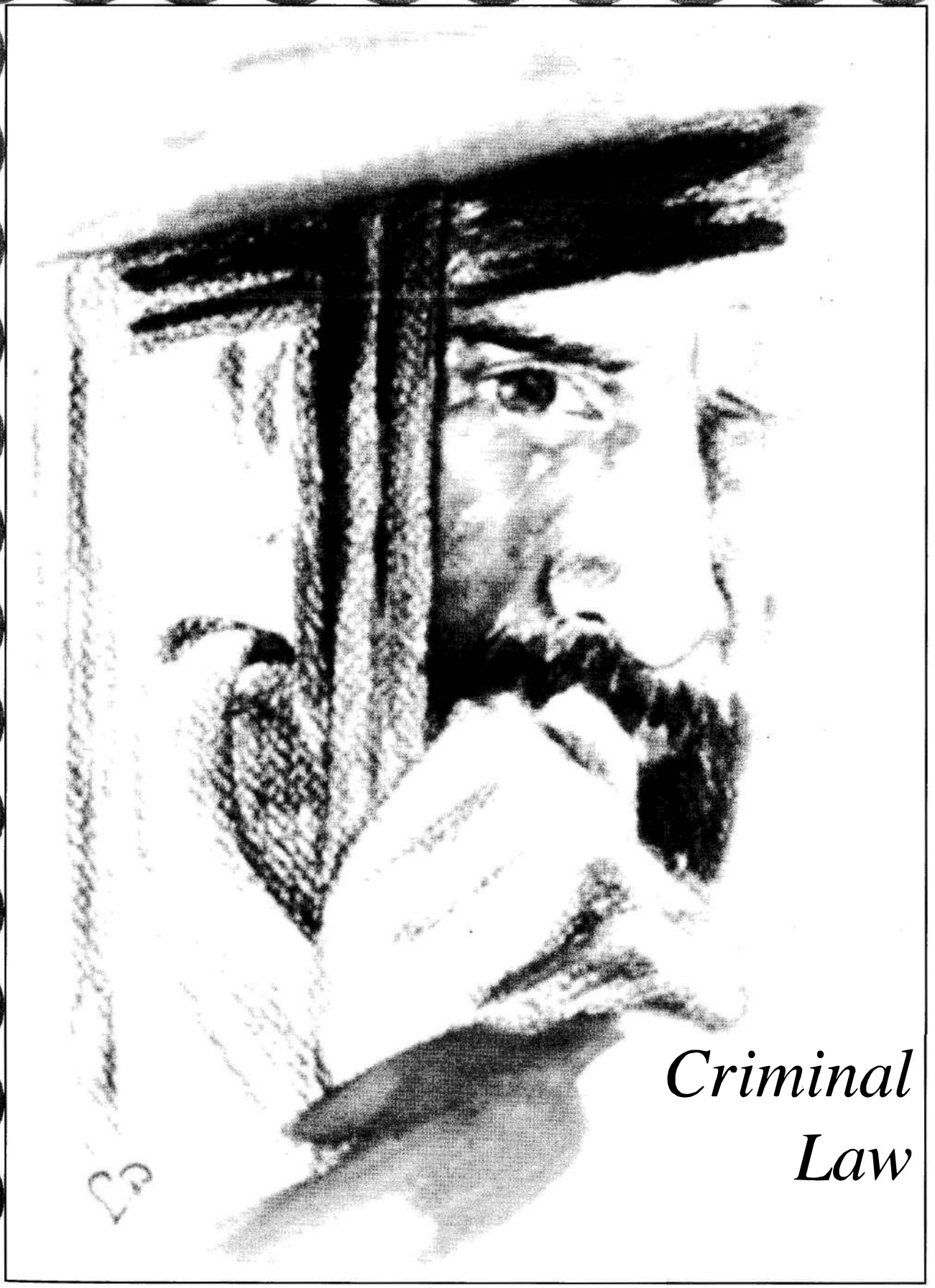
Section 42 introduces a novel ground for revocation. Under the old law it was not possible to request the cancellation of a trademark due to non-use. Therefore if an application for registration was refused by the Comptroller due to similarity to an earlier registered mark, notwithstanding the latter mark had not been used for a long time, or had never been used, the applicant could not ask for cancellation of the earlier mark due to non-use so as to allow his application to proceed. Under the new law, if within a period of five years from the date of completion of the registration procedure, the mark has not been put to genuine use in Malta by the proprietor or a licensee in relation to the goods or services for which it is registered, this would constitute a ground for revocation. The same would apply if the use of a mark has been suspended for an uninterrupted period of five years without any valid reason.

The other grounds for revocation provided for in Section 42 relate to those instances whereby due to non-use a mark has become common to the trade for a product or service for which it is registered or whereby as a consequence of the use made of the said mark, the public would be liable to be misled as to the nature, quality or geographical origin of the goods or services for which the mark is registered. An action for revocation entails that the rights of the proprietor will be deemed to have ceased either from the date of the relative application for revocation, or, if the grounds for revocation existed at an earlier date, at such earlier date.

Section 43 lays down the framework for an action for invalidity of the registration of a trademark. Such an action

may be requested if the registration is contrary to any of the absolute grounds for refusal or otherwise if there is an earlier trademark or earlier right in relation to which the conditions set out in Section 16, that is, the relative grounds for refusal are satisfied. Both actions are to be made by means of a writ of summons filed before the First Hall of the Civil Court. It is to be noted that in those instances where an owner of a registered mark or earlier right was aware of the use of a registered trademark in Malta, and has agreed to such use for a continuous period of five years, and unless the registration of the latter mark was obtained in bad faith, he shall cease to be entitled to any right on the basis of that earlier trademark or other right.

Since the new law brought about a major overhaul in the law of trademarks, it was impossible to deal with all the novelties introduced therein in this article. The new Act because of the said major changes, obviously implies a substantial increase in workload for the Industrial Property office since each trademark must be checked against an ever-increasing database. Moreover, the increase in registrations will have a domino effect on recordal of assignments, renewals and so forth. It is therefore imperative that the Comptroller's office is given adequate human and technical resources so as to be able to guarantee the efficient and smooth operation of the long awaited provisions of the new Trademarks Act.



Criminal Law

12 The Exclusionary Rule of Illegally-Obtained Evidence – An Anglo-Saxon Perspective

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Introduction

Cicero's famous words *Omnes legum servi sumus ut liberi esse possimus* have stood the test of time. Jean-Jacques Rousseau however writes that *Man is born free but everywhere he is in chains,* implying that man is constrained both by legal and social forces. This paradox is reflected in the balance between criminal substantive and procedural law on the one hand and the rights of the citizen, including human rights, on the other. The latter can indeed only be enforced and ensured by a derogation therefrom in certain circumstances. The right to liberty, for instance, can only be ensured by restricting the liberty of others, whether in ordinary behaviour or as a punishment for previous conduct.

This paradoxical situation is also reflected in rules governing illegally obtained evidence. Should the accused be convicted on the grounds of evidence obtained illegally, against his rights; or should his rights be given precedence, excluding the evidence, and in so doing detract from the protection of the rights of others in general?

The examples drawn from various jurisdictions vary greatly owing to historical, social and political reasons.

Discretion to Exclude Improper / Illegal Evidence – A Comparative Analysis

Under English law, the general rule is that all relevant evidence is admissible and the fact that it was obtained improperly is immaterial as far as the case before the court is concerned. These improper methods of obtaining evidence might trigger off remedial action.

Reasons for Arrest

In *Mapp v. Ohio*[1] the US Supreme Court held that an automatically exclusionary rule applied to evidence acquired in breach of the Fourth Amendment of the US Constitution concerned with the right of the citizen not to be subjected to an unlawful search or seizure. With the advent of *Miranda v. Arizona*,[2] a further requirement was added, namely that investigating officers were required to inform the suspect of certain rights which he enjoyed and which they were to respect scrupulously. Even though today, case law has watered down this principle, a prima-facie reading is striking in that the rule is far more stringent than that applied in English common law.[3] It is interesting to point out that Miranda was inspired by the inadequacy of common law to deal with the predicament of the suspect interrogated in the coercive environment of police stations – a headache for any criminal court. It was concerned with the psychological pressures which might be placed on the accused and the fact that custodial interrogation placed a heavy toll on individual liberty and traded on weaknesses of individuals. The Court therefore established a new exclusionary rule, the principle feature of which was that the police would be required, before questioning the suspect, to inform him of his rights of silence and right to have a lawyer's advice. This, it held, followed from the privilege against self-incrimination granted in the Fourth Amendment.

This is a convincing argument but how does it adhere with the English model? Lord Diplock in Sang[4] indeed upheld the *nemo debet* principle. The caution is also a must for the police officer under the Codes of Practice. The Police and Criminal Evidence Act5 ('PACE') however, introduced the possibility of drawing inferences from silence, such that the form of the caution had to be altered. Can it be said that this does not violate the right to compelled non-self incrimination? It is argued that the inferences which are permitted are those which are reasonable and dictated by common sense. In *Murray v. UK*,[6] it was held that the right to silence and privilege against self-incrimination protected one from 'improper

1 (1961) US Supreme Court.
2 384 US 436, 86 S Ct 1602 (1966).
3 Also Statute law – which now is deemed to import the same discretionary rights as available under common law.
4 [1980] AC 402, [1979] 2All ER 1222, 3 WLR 263.
5 1984.
6 (1996) 22 EHRR 29.

compulsion' not from the drawing of inferences. However, in effect, this provision is compelling the accused to speak to prove his innocence. Although it is reasonable and logical it cannot however be argued, in the writer's view, that it is not a form of permissible self-incrimination justified by the circumstances and bolstered by the need to protect society at large. This consideration has forced States, on the Continent to reject such inferences as they are deemed to violate their constitutional provisions on human rights.

Fruit of the Poisonous Tree

It is an established principle under English law dating as far back as in Warickshall,[7] that evidence obtained from otherwise inadmissible evidence, for example forced confession, was admissible. The rule governing evidence so obtained is different. However the US adopted the doctrine of the 'fruit of the poisonous tree'. Consequently evidence deriving from original evidence declared inadmissible as it was obtained by a breach of a constitutional right, is equally inadmissible. The element of causation is implicit in the doctrine, in that the 'derivative' must result from the original piece of evidence. It is only where the taint becomes so attenuated that it is not properly considered as still operative, (but merely as a background material) that the doctrine is inapplicable. A genuine exception is the inevitable discovery rule.

Disparity Between Jurisdictions

Why is there such disparity between laws? US law considered breaches of the Fourth Amendment of their Constitution to be very grave. It is the supreme law of the land and anything tainted with such violation is inadmissible – implying the *maxim fraus omnia corrumpit*. The question being why is it allowed in England? If real evidence is discovered only by virtue of such tainted evidence, oral or otherwise, surely, that real evidence has a taint of illegality (although it can speak for itself once discovered) and this because were it not for the illegally obtained evidence, that subsequent real evidence would not have been discovered. Further, breaches of human rights, are not violations of the supreme law of the land as held in US or Canadian case-law. In such jurisdictions human rights laws are given a higher status than ordinary legislation such that anything inconsistent with such law is void. Further in the US it is entrenched in the Constitution, and the same US adopts the principle of constitutional supremacy. In England human rights are only judicially acknowledged. It was in 1998 that a Human Rights Act was drawn up in England and it is not clear whether such Act enjoys superior status. Is it to be read in conjunction with – as a means of interpretation – or as binding rules rendering void inconsistent provisions? Parliamentary Sovereignty and Supremacy in England mean that all the statutes are given force by the fact that they emanate from Parliament. It may be argued that the Human Rights Act being a *lex specialis* and a *lex posteriori*, has precedence over earlier statutes. But this is hardly a proper way of ensuring human rights, especially with the latter argument, in respect of subsequently enacted legislation.

The application of the European Convention of Human Rights in fact has had an interpretative function so far. In *R. v. Home Secretary ex p. Brind*[8] it was held that if a statute has more than one interpretation, the Courts will presume that Parliament intended it to legislate in conformity with the Convention. And not in conflict with it. But there is no hierarchy. It is a tool of interpretation in cases of ambiguity.

In Scotland, *Lawrie v. Muir*[9] established the rule requiring exclusion of improperly obtained evidence unless the unlawfulness or irregularity could properly be excused. *Chalmers*[10] then held that

> statements by a suspect in answer to police questioning were not admissible as evidence, at any rate if given in a police station, a venue which is a sinister one in the eyes of every ordinary citizen.

The Scottish police were therefore subject to a *sui generis* rule denying them the power in law to question suspects in custody. This is more restrictive than *Miranda* and English obligations by far. Although this rule has been watered down by subsequent cases, it remains a strong proposition.

A Discretion

Corroboration and Supporting Evidence

An interesting aspect is the requirement of supporting corroborating evidence in the case of improperly obtained evidence to render it more reliable, in the light of the court's discretion, to exclude prejudicial evidence in the case of section 82(3) of PACE. The Court here would exercise its discretion to determine whether it is more probable than prejudicial and determine whether exclusion is the best option. Scottish law imposes a general requirement of corroboration in respect of all evidence, and consequently an accused cannot be convicted solely on the basis of his own confession, however freely or voluntarily made.

7 *R. v. Warickshall* (1793) 1 Leach 263.
8 [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720, HL(E).
9 1950 JC 19, 1950 SLT 37.
10 *Chalmers v. HM Advocate* 1954 JC 66, 1954 SLT 177.

Vulnerability of Suspects

In English law discretion in section 78 of PACE can be used against evidence obtained improperly from vulnerable suspects. These would include juveniles, the mentally handicapped and mentally disordered. Special rules apply both in PACE and the Code of Practice to ensure the propriety and reliability of evidence so obtained.

Discretion in Cases of Improperly Obtained Evidence

Reference again must be made to the conflict which arises within this context:

1. The impropriety of acquitting A, who is guilty, on account of the illegal conduct of B – Cardozo, J. in *The People v. Defoe*[11] – on the one hand;
   and
2. view held in *Olmstead v. the US*[12] – "I think it is a less evil that some criminals should escape than that the government should play an ignoble part" (Holmes J), on the other.

a. Facts Discovered in Consequences of Inadmissible Confessions

Reference is to be made to section 76(4), (5) and (6) of PACE 1984. It is held that subsection (4) preserves the proposition in *Warickshall*, which after excluding the confession in that its credit was doubtful, allowed the production of evidence discovered as a result of confession:

> this principle... has no application whatsoever as to the admission or rejection of facts, whether the knowledge of them to be obtained in consequences of an extorted confession whether it arises from any other source; for a fact, if it exists at all, must exist invariably in the same manner whether the confession from which it derives be in other respects true of false. Facts thus obtained, however must be fully and satisfactorily proved without calling in the aid of any part of the confession of any part of the confession from which they may have been derived.

Therefore in the case of *Voisin*,[13] the Criminal Law Reform Commission in England held, as reflected in sub-paragraph (4), that although a confession is inadmissible, a statement whether oral or written may be tendered as evidence to prove that the accused writes or speaks or expresses himself in a particular way. This however needs qualification to my mind: it must be so only where the writing or manner of speaking is the same whatever the circumstances, so that, just as the case with real evidence it can speak for itself. Where the manner of speech, for example a stammer which is inculpatory given the circumstances, is induced by mental/psychological coercion by the police, this might trigger the discretion of the judge under section 78(1) and 82(3), although it is doubtful whether it would be excluded under s.76, it not being a statement of any sort.

Another argument of interest is that confessions obtained unfairly but which fall out of the exclusionary rule of s.76, will be corroborated by the fact that the evidence mentioned in the confession was in fact found as per the confession. Therefore in determining whether or not to exclude evidence, the judge will take into account the fact that the confession was more probably reliable than not as it is corroborated by the fact that the evidence was found. A problem with this is where the confession is excluded on the basis of unfairness, not cogency – and this notwithstanding evidence obtained from that very confession is allowed. In this situation, section 78 provides little safeguard for unfairness in trial.

Further, what if the police are questioned as to the manner in which evidence was found? Can they refer to the statements made by the accused? *Warickshall* allowed this as the confession was less indicative of the accused's guilt. No provision was made in PACE. This is a grey area of the law.

b. Evidence Procured by Improper Means

Modern law stems from *Kuruma v. R.*[14] where the accused was charged with being in possession of ammunition after a search by an officer lower in rank than that permitted by law. It was held that the evidence was relevant no matter how it was obtained; although the judge could exclude the evidence on the basis of his common-law discretion (preserved by PACE in s.78(1) and 82(3)).

Sang subsequently restricted the discretion, making it applicable to evidence obtained from the accused after the commission of an offence. Trickery meant that the accused's will was engaged such that he was induced to give up evidence contrary to the privilege against self-incrimination. However the discretion to exclude on the grounds of unfairness remained.

Exclusion for Unfairness

In *Kuruma* it was held that English law recognized a judicial discretion to exclude both confessional and non-confessional evidence for unfairness, even though after *Sang*, the whole aspect of fairness with which that discretion was concerned

[11] (1926), US.
[12] 277 US 438, 72 L Ed 944, 48 S Ct 564.
[13] *R. v. Voisin* [1918] 1KB 531, 13 Cr App Rep 89, 82 JP 96, 87 LJKB 574, [1918-1919] All ER Rep 491.
[14] Kuruma, Son of *Kaniu v. R.* [1955] AC 197, [1955] 1 All ER 236, [1955] 2WLR 223.

was the one encapsulated in the *maxim nemo debet prodere se ipsum*.

In Scotland, *Muir* upheld the rule requiring exclusion of unlawfully / irregularly obtained non-confessional evidence which is not excused, imposing a reverse onus exclusionary rule burdening the prosecution to prove that it is fair and ought not to be excluded. Exceptions to the rule have been developed (similar to those in *Bunning v. Cross*[15]).

In Ireland, a constitutional breach brings about a reverse onus rule (similar to that in Scotland); while in the case of otherwise unlawful action, there exists a discretion to exclude evidence.

In Australia, *Ireland*[16] departed from English common law by laying emphasis on unlawfulness of police conduct, rather than unfairness. In *Bunning v. Cross*, Barwick J again made unfairness no less than unlawfulness central for the exercise of the discretion. The High Court had held that the unlawful conduct had resulted from a mistake not a deliberate breach. For this reason the nature of the illegality did not effect the cogency of the evidence which determines its admissibility. Subsequently in *Ridgeway v. R.*[17] it was held that the discretion applied only where the evidence was obtained improperly / unlawfully or where obtained in consequence of improper / unlawful conduct. Further the discretion extends to cases involving official conduct that is not unlawful but merely improper. The Justices saw this as a means of reconciling the references in *Ireland* to unfairness with the predominance given to unlawfulness in *Bunning v. Cross*. *Ireland*, indeed fuses together public policy and fairness issues. There was considerable support for the view that *Bunning v. Cross* applies to mere improprieties. The Justices wanted to confine narrowly the idea of impropriety short of unlawfulness. In the English case of *Williams v. DPP*,[18] where the police left an open unattended van full of cigarettes, the Court allowed the evidence even though the conduct was improper under *Ridgeway*. It was held that the accused was not harassed although possibly 'manipulated'.

In Canada, the issue is governed by section 24(2) of the Charter of Rights and Freedoms ruling for exclusion where the evidence brings the administration of justice in disrepute. In *Therens*[19] Le Dain J, held that this principle of autonomy for trial judge seems to be regarded as consistent with the idea that section 24 imports a rule of exclusion (however the judge has a discretion to determine whether or not the evidence brings the administration of justice in disrepute and consequently within the letter of section24(2)).

Forms of Improprieties

1. Improper Searches

The English view was stated in *R. v. Leatham*[20] as

> it matters not how you get it if you steal it even, it would be admissible in evidence.

This was followed in *Kuruma* and *Khan*,[21] even though the impropriety envisaged trespass and violation of privacy. There is a wide range of cases dealing with the admissibility of samples of urine and breath even though obtained by impropriety. It will be difficult for the court to exclude real evidence on the basis of section 78, as was shown in *R. v. Fox*,[22] *R. v. Apicella*[23] (intimate samples), *Cooke*[24] (non-intimate samples), *Hughes*[25] (forcible intrusion with breathing), *Nathaniel*[26] (deliberate breach of promise). It was therefore not surprising that a breach of diplomatic immunity would not suffice to exclude evidence.[27]

2. Preparation of Illegal Acts

Sometimes impropriety arises in inducing or participating in the commission of the crime charged. In *Sang* the main issue was whether there existed a defence of entrapment in English law. The House of Lords held that there is no such defence[28] and that it followed that there is no discretion to exclude evidence of the commission of a crime on the ground that the defendant was trapped into committing it. To allow such a discretion would be to admit the defence by an alternative route. The House distinguished between trickery to cause an offence to be committed and trickery to obtain evidence of an offence after its commission. The latter, but not the former might, in some circumstances, be a ground for the exclusion of evidence in the exercise of judicial discretion.

15 (1978) 19 ALR 641 at 660;141 CLR 54, at 74.
16 *R. v. Ireland* (1970) 126 CLR 321.
17 (1995) 184 CLR 19.
18 [1993] 3 All ER 365, [1994] RTR 61, 98 Cr App Rep 209, [1993] Crim LR 775.
19 [1985] 1 SCR 613, 18 DLR (4th) 655.
20 (1861) 25 JP 468, [1861-73] App ER Rep Ext 1646.
21 [1997] Crim LR 584, CA.
22 [1986] Crim LR 69.
23 [1986] Crim LR 238, CA.
24 [1995] 1 Cr App Rep 286, CA.
25 [1994] 1 WLR 876, 99 Cr App Rep 160.
26 [1995] 2 Cr App R 565.
27 *R. v. Khan* [1996] 3 All ER 289.
28 *R. v. Mealey* (1974) 60 Cr App ReP 59.

Although in the meantime section 78 of PACE was enacted, this preserved the common law discretion. However in *Edwards*[29] the court seemed to be confused. Undercover officers approached D, offered and subsequently agreed to buy from him a quantity of prohibited drugs. D and E were charged with conspiracy to supply persons unknown. The defence argument was the converse of *Sang* – that the evidence should be excluded under section 78 because the officers were *agents provocateurs*. It was held that D and E were not *agents provocateurs* of the offence charged – a conspiracy existing before D and E's approach to supply any suitable customers who might present themselves – and therefore the question of section 78 did not arise. The opinion of the Court seemed to be that there was no discretion unless the officers were *agent provocateurs* – standing Lord Diplock's statement of the law in *Sang* on its head. There would apparently, in the court's view have been a discretion if the charge had been conspiracy to supply the officers because they incited D and E to make the particular agreement – a particular conspiracy to supply any suitable customers who presented themselves. It is not easy to see that there is any difference in fairness or unfairness according to which conspiracy is charged. In either case the defendants had been induced to incriminate themselves by a trick.

Later cases seemed to ignore *Edwards*, as was shown in *Smurthwaite and Gill*,[30] D was charged with soliciting O to murder D's spouse. O was a police officer, who was introduced to D by a third party and pretended to be a contract killer. It was held that evidence of the subsequent solicitation of O by D to commit murder was admissible. O was not an *agent provocateur* because there was no evidence that D had been persuaded or cajoled into an agreement to murder he would not otherwise have entered. The fact that O was not an *agent provocateur* seems to have been a factor in favour of admission. In those cases it seems clear that D must have had the particular crime in mind before O came on the scene. This is not true of *Williams and Another v. DPP*[31] – the court said that the police were not *agents provocateurs* because they had not incited, procured or counselled the commission of the crime. Yet surely they procured its commission. They intended to bring about, and brought about, the commission of a crime which would not otherwise have been committed. If no one had attempted to steal the cartons, they would have regarded the enterprise as a failure. The defendants may perhaps have had a general disposition to commit the crime, but it is impossible to say that they intended to commit this particular crime until the temptation was deliberately put in their way. In *Smurthwaite*, the trap was set for a particular person who was believed to have in mind the commission of a particular crime. In *Williams*, the bait was there for any dishonest opportunist who happened to come along. These may be necessary to keep crime in check.

Valuable guidance as to the application of section 78 was given in Christou.[32] First of all the court stated that the discretion under section 78 and common law were the same. Further, the argument that the evidence obtained should have been excluded under Sang was rejected. In so deciding the Court took account of the following:

i. the whole interview was recorded on tape and film, so there was no doubt about what was said (no reliance on memory);
ii. the question about resale was necessary to maintain cover;
iii. 'the trick was not applied to the appellants; they voluntarily applied themselves to the trick';
iv. if the shop had not attracted the defendants, they would have sold the property to someone else;
v. unlike some cases where evidence was excluded, the defendants were not in custody;
vi. because the parties were on equal terms, PACE, Code C, governing the questioning of persons by police officers, was not applicable.

In Bryce[33] evidence was excluded because the conversation was not recorded and challenged and the question was not necessary to maintain cover.

Discretion and Staying of Proceedings

In the Australian case of *Ridgeway v. R.*,[34] it was held that entrapment is not a substantive defence to a criminal charge. The law recognizes a discretion to exclude, on public policy grounds, evidence of an offence or of an element of an offence, in circumstances where its commission has been brought about by unlawful conduct on the part of law enforcement. This can extend to circumstances where a criminal offence has been induced by improper, though unlawful, conduct on the part of the authorities. The appropriate remedy in an entrapment case is not a stay of proceedings on the ground that the proceedings are an abuse of process. If a stay is ultimately granted, it will be because the exclusion of the

29 *R. v. Edwards* [1991] Crim LR 45.
30 *R. v. Smurthwaite* [1994] 1 All ER 898; R v. Gill [1994] 1 All ER 898.
31 [1993] 3 All ER 365.
32 [1992] 4 ALL ER 599.
33 [1992] 4 ALL ER 567.
34 (1995)184 CLR 19.

charged offence or of an element of it, means that the proceedings will necessarily fail with the consequence that a continuance of them would be oppressive and vexatious.

In the English case of *R. v. Latif and Shahzad*,[35] it was held that where a defendant had been trapped by the deception of the police or customs officers into committing an offence which he would not otherwise have committed, the trial judge had to weigh in the balance the public interest in ensuring that those who were charged with grave crimes should be tried, and the competing public interest in not giving the impression that the court would adopt the approach that the end justified any means when exercising his discretion to decide whether there had been an abuse of process which amounted to an affront to the public conscience and required the criminal proceedings to be stayed. On the facts, the judge had not erred in refusing a stay, since he had taken account of the relevant considerations in performing the balancing exercise and was entitled to take the view that the accused was an organizer in the heroin trade who had taken the initiative in proposing the importation, and that the conduct of the customs officer was not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed.

c. Improper Interception/Recording of Communications

Evidence of communication encouraged by the police and then intercepted was not automatically inadmissible as such at common-law. False statement that the accused was not being recorded or that the phone from which he was told to phone from was bugged, are irrelevant. In Maqsud Ali[36] (1996), it was irrelevant that there was a recording device in a public place. Only in the case of telephone calls made from police premises is there a provision in the Code of Practice for warning the suspect that the call may be overheard.

Interception of phone calls, declared by the European Court of Human Rights to require guarantees against abuse, was subjected to the statutory control of the UK Interception of Communications Act 1985. Under section 2 the Home Secretary may issue a warrant authorizing the interception of communications in the course of transmission by post or by means of a public telecommunications system, for the purpose, *inter alia* 'of preventing or detecting serious crime'. These do not extend to the prosecution of offenders. (*Preston*)[37] These intercepted communications are inadmissible, notwithstanding their relevance to the issues in a criminal trial.

Where a cordless telephone is used, the radio signals assigned between the handset and the base unit are not in the course of transmission by means of a public telecommunications system. The interception of this does not require warrant and is not unlawful under the 1985 Act. (*Effik*).[38] The same applies to a private system which is connected by wire to the public system.

In Khan, the police attached an aural surveillance device to B's home without his consent or knowledge and so obtained a recording of a conversation which confirmed that K was involved in the importation of drugs. The attachment of the device was an unlawful act, involving civil trespass and criminal damage. Yet the evidence was admissible in law.

Although not conclusive, it is taken in consideration, in exercising discretion in section 78, that the interception took place overseas, in breach of foreign or international law, since breach of such law should not be more weighty in the English Courts than a breach of English law. Where a telephone call is recorded by one of the parties to secure evidence, then one of the considerations relating to the operation of section 78 is the extent to which this method has been employed to evade the restrictions of the Code of Practice on Police Questioning.

3 Deception

This category is designed to generate evidence of offences which had already been committed, otherwise than by improper searches or the use of electronic interception of communications. Deception can either be express, as in Mason[39] where the police lied to the accused and his solicitor by telling them that the suspects fingerprints where found on the scene of the crime. They could be implied as in *DPP v. Marshall*,[40] where policemen dressed as civilians and did not say they were policemen. The Court in this case held that the impact was not like that of express deception. Complex stratagems such as Christou would also fall under this head. It was considered in that case that there were no specific targets.

Where the undercover agent plays too active a role in eliciting the evidence it is more likely to be excluded.[41]

[35] [1996] 1 Cr App Rep 270; *R. v. Shahzad* [1996] 1 All ER 353.
[36] *R. v. Masqud Ali* [1965] 2 All ER 464.
[37] *R. v. Preston* [1993] 4 All ER 638.
[38] *R. v. Effik* [1995] 1 AC 309.
[39] *R. v. Mason* [1987] 3 All ER 481.
[40] [1988] 3 All ER 683.
[41] *R. v. Stagg* Central Criminal Court, 14 September, 1994.

Conclusion

The experience derived from different jurisdictions is varied. Reconciling the needs of the administration of justice with the rights of citizens is by no means an easy task. The obligation of police officers to investigate, detect and prosecute crimes must be limited to ensure that the means used by police officers will not themselves spark off or induce further crime. Nor should their duty in any way justify violations of citizens' rights to ensure convictions at all costs. Justice ought to be done but not at any cost. Respect for the rule of law is essential in any just and equitable society.

13 Drug-Related Crime and Criminal Justice Issues in Malta.*

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When I was first approached some three weeks ago to deliver this paper, I was, I must admit, a bit sceptical about the whole idea of participating in this conference. First of all as a judge I am naturally a bit wary of talking in public about matters which, directly or indirectly, fall within the competence of one or more of the courts to which I am ordinarily assigned by the Head of State. A judge – at least a judge of the 'English' or 'Scottish' mould to which Maltese judges have generally looked for inspiration and emulation as to ethical behaviour – is trained to speak his mind on important issues only in the judgements he delivers, and then only to the extent that may be necessary for the determination of the issue or issues in the case and/or to the extent that the judgement in question would benefit from the expression of such views. On the other hand, as a university lecturer, I am occasionally asked some searching question by the unusually bright student which calls for more than just a statement of what the law is. In that case I usually very readily subscribe, at least temporarily, to the 'continental' model of the judge – on the continent judges are less inhibited when it comes to expressing their views in public and out of court (and in some countries, teaching in universities is the only 'other activity' in which a judge may lawfully and ethically indulge).

The second reason why I was sceptical is that so much has been said, and is still being said, about the 'drugs problem' in Malta that I was doubtful whether I could really contribute anything new to the discussion. Much has been said and written over the last fifteen or twenty years in connection with this problem, and much has also been done, both by Government agencies and voluntary agencies by way of attempting to find 'solutions'. On the other hand, and upon further reflection, I realized that much of what the general public knows about the criminal justice system in general, and with regard to the 'drugs problem' in particular, is, of course, mediated through newspapers and radio and television reports and programmes, and not as a result of first hand experience. This often leads to a distorted picture or, perhaps I should say, to 'distorted pictures' (in the plural) of what goes on in court. Judgements, the conduct of the prosecution in a particular case, the conduct of defence counsel, the law itself – all these are criticized even though the person writing in the newspaper or reporting on the radio or TV station in the majority of cases does not have all the facts of the case before him. He is usually more interested in the unusual, in the sensational: after all it is the unusual and the sensational that will attract the reader, the listener or the viewer, that will raise sales or viewership or listenership. Needless to say, it is very easy to criticize, especially when one does not have the responsibility of deciding on the fate of a fellow citizen while at the same time keeping in mind the legitimate interests of society as a whole; it is easy to criticize when one does not have the difficult task of marshalling the evidence for the prosecution, or when one does not have the often unenviable task of testing the prosecution evidence on behalf of the accused. I must admit that I know very few people who work in the media who subscribe to Matthew Arnold's definition of criticism: 'a disinterested endeavour to learn and propagate the best that is known and thought in the world'. What is more, politicians periodically hijack the 'drugs problem'; each one of our two major political parties attempts to outdo and outshine the other as to what is being done to fight the scourge of our times; statistics are thrown about with gay abandon, unmindful of the statistician's first canon of faith, namely 'that there are three types of lies: lies, damned lies and statistics'. Of course, lip service is paid to the proposition that the 'drugs problem' should not be politicized, but make no mistake about it, the 'drugs problem' is a vote catcher or vote loser and a hot potato in political circles: suffice it to remember that in the recent past two ministers of justice have had their ministerial career upset because of what was regarded as 'politically inappropriate' behaviour in administratively handling certain matters related to drug offenders.

What I propose to do in the time allotted to me is to share with you some views on how the law relating to drug abuse

* This paper was delivered at one of the plenary sessions of the Sedqa National Conference on 'Addictive and Risk Behaviours: Insights and Innovations', held at the New Dolmen Hotel, Qawra, Malta, on the 29 and 30 November, 2001.

has evolved over the years in Malta, how it has attempted to deal with the upsurge in drug abuse since the early seventies; and to identify some of the practical difficulties which judges and magistrates in the main, but also prosecutors and defence counsel, encounter in the application of the relevant laws. To some of you what I have to say may not be new, in which case I crave your indulgence and ask you to be patient for the next thirty minutes. I do not expect any of you to agree with opinions that I may express; and, indeed, after I deliver this paper I would be very pleased to have some reaction, especially by way of criticism, to some of the views I will be expressing. I will also be very happy to answer any question on matters which I will not be covering but which are related to the general title of this plenary.

The first thing to bear in mind is that in reality there is not just 'one' law dealing with the fight against drug abuse. Although undoubtedly the most commonly known – I hesitate to use the phrase 'the most popular' – is the Dangerous Drugs Ordinance, there are in reality a number of other laws which are applied, often contemporaneously, in connection with any one particular case: the Criminal Code, the Customs Ordinance, the Medical and Kindred Professions Ordinance, the Probation of Offenders Act, The Prevention of Money Laundering Act are perhaps the most important statutes that generally go, in various permutations or combinations, into the equation. Of course the laws which criminalize certain forms of drug possession, drug taking or drug trafficking are the Dangerous Drugs Ordinance and the Medical and Kindred Professions Ordinance (together, of course, with the subsidiary legislation made pursuant to these two main, or parent, laws). The latter law was promulgated a hundred years ago – in 1901. This law, as the title implies, was never intended to be a weapon in the arsenal for the fight against drug abuse; in 1901 research on drug addiction by the medical profession was still in its infancy. Only years before (in the 1890s), the German scientist Heinrich Dreser had commercialized diacetylmorphine (today known as diamorphine) and called it 'heroin': it was really a trademark to mean powerful or heroic. Its use was advocated as a non-addictive treatment for coughs and chest and lung ailments; and the Bayer company advertised heroin in the same way as it did aspirin and other products until the addictive properties of heroin became apparent. The Medical and Kindred Professions Ordinance was originally intended only to organize or regulate the medical profession in Malta, as well as professions such as those of veterinary surgeon, apothecary, midwife, dentist and so on. This law got dragged into the fight against drug abuse simply because some of its provisions, quite incidentally, happened to deal with the sale and prescription of certain drugs. In fact it was quite late in the day – in the mid-1980s – with the Drugs Control Regulations of 1985, made pursuant to this Medical and Kindred Professions Ordinance, that this law was finally utilized to full effect to try and stem the abuse with the so-called psychotropic drugs, these being in turn subdivided into restricted and specified drugs. It was also in 1985 that some of the provisions of the Dangerous Drugs Ordinance, such as the provision distinguishing between prosecution before the Magistrates' Court and prosecution before the Criminal Court, began to be translated into the Medical and Kindred Professions Ordinance. The result is that to-day we have two separate laws, in many respects with identical provisions (some of which are applied merely by way of cross reference), one of which deals with such drugs as cannabis, heroin and cocaine and the other with drugs such as – to mention the most popular – 'ecstasy' (MDMA) and 'angel dust' (phencyclidine). Over the years the various amendments to the Medical and Kindred Professions Ordinance in that part dealing with drug abuse and the fight against drug trafficking – with its 'freezing orders', 'investigation orders' and 'attachment orders' – have made this law more complicated than the Dangerous Drugs Ordinance. Perhaps it is time that these two laws be consolidated into one, at least as far as drug abuse is concerned, which would do away with unnecessary repetition and cross references. Allow me, however, to concentrate on the Dangerous Drugs Ordinance which is still regarded, and perhaps rightly so, as the main law in connection with the fight against drug abuse.

This law was enacted just before the outbreak of the Second World War, in 1939, and was intended in large measure to give effect to three international conventions which by that time had been signed by the imperial government, namely the Hague Convention of 1912, and the First and Second Geneva Conventions which had been signed on behalf of His Majesty's Government in February 1925 and in July 1931 respectively. For over thirty years this law remained unchanged. No only that, but it was a law with which most lawyers, including criminal lawyers, were totally unfamiliar. When I was a law student at the University here in Malta – and I assure you that that was not in the days of the Boer War but between 1970 and 1975 – none of our lecturers ever even mentioned this law. The reason was, of course, that till that time drug taking or drug abuse was not, or was not perceived as, a social problem. As a student, my perception of illicit drug taking was the smoking of marijuana by American GIs in Vietnam, about which one occasionally heard on the radio and on television. To be honest, I did not even know that marijuana was cannabis, and if anyone asked me what '*qanneb*' was, I would immediately refer him to that stuff which the plumber used to seal the joints of water pipes!

As I am sure most of you know, one of the unusual features of our drugs legislation is the discretion enjoyed by the Attorney General in deciding whether a person is to be tried

before the Court of Magistrates as a Court of Criminal Judicature or before the Criminal Court. Depending on this decision, a person may, for the same offence — for example, trafficking in cannabis — be liable either to life imprisonment (if he is tried before the Criminal Court) or to a maximum of ten years imprisonment (if he is tried before the Inferior Court). This feature is to-day found in both the Dangerous Drugs Ordinance and in the Medical and Kindred Professions Ordinance, but owes its origin to the former law. Let me make it quite clear from the outset that our Constitutional Court some years ago (in 1990) ruled that the existence of this discretion did not *per se* violate the provisions of the Constitution or of the European Convention on Human Rights guaranteeing the right to a fair trial and the right to freedom from discrimination. Even before the first amendment to the Dangerous Drugs Ordinance was effected in 1975, the possibility of trying an individual for the same offence either before the Criminal Court or before the Court of Magistrates existed, but the wording of the relevant provision (it was then subsection (3) of Section 22) was such that it was quite clear that the rule was that a person was to be tried before the Magistrates' Court; only if the Governor certified that it was desirable that that person be tried before the Criminal Court (and therefore liable to the higher punishment) was he to be so tried before that Superior Court. Recourse to the Governor (later the Governor General and the President) was in itself an exceptional measure, and therefore one was justified in arguing that only in exceptional circumstances was a person to be tried before the Criminal Court. And, indeed, the Constitutional Court, in the 1990 judgement I have just mentioned, stated that this discretion is in the nature of a quasi-judicial discretion, and that implicit in this discretion is the understanding that the Attorney General is to bring the more serious cases before the Criminal Court and the less serious ones before the Magistrates' Court. Of course, the gravity of any given offence must be assessed taking into consideration all the circumstances of the case; the gravity of a case cannot be assessed simply by looking at the quantity or the nature of the drug involved, although undoubtedly the quantity and, to a lesser extent, the nature, are prime considerations. What the Constitutional Court seems to be saying is that it would not be correct for the Attorney General to send a person to be tried by the Criminal Court and, for the same or identical facts to send another person to be tried before the Inferior Court.

The first amendment in 1975 merely introduced a distinction, as far as trial before the Magistrates' Court was concerned, between a first conviction and a second or subsequent conviction, making, of course the latter liable to a higher punishment. No distinction was, at this stage, made between what I would call the 'simple addict' – that is the person who is in possession of a drug for his own personal use – and the drug trafficker. The first and substantial change in the law came in 1980. Act XXIII of that year did a number of things. First of all it increased substantially the list of drugs to which the Ordinance applied – these were added in the form of a schedule – the First Schedule – to the Ordinance. Secondly, the punishment in the case of trial before the Criminal Court was increased from a maximum of ten years to a maximum of twenty years (in 1980 twenty five years was the maximum determinate sentence of imprisonment that was possible under the Criminal Code). Thirdly, the discretion which had hitherto been exercised by the Head of State as to the choice of court was transferred to the Attorney General. Finally in 1980 we also have the first attempt to distinguish between the 'simple addict' and the 'trafficker': in fact, although the law provided that the Attorney General was now to direct whether a person was to be tried before the Superior Court or the Inferior Court – with the consequent difference in the punishment to which he was liable – the law also provided that, and I quote:

> ...where the Attorney General or the Court, as the case may be, is satisfied that the offender is not a person who cultivates, produces, sells, or otherwise deals in any drug, and the offence consists only in the possession of a dangerous drug for the exclusive use of the offender, or of utensils for that purpose, or consists in the taking of any such drug (i) any such person shall not be tried before the Criminal Court and shall not be liable to imprisonment and (ii) where any such person as aforesaid is, on the date on which the offence is discovered, registered as a person who is under treatment for addiction to drugs, in such manner and in accordance with such arrangements as may have been made by the Minister responsible for health, and, is certified under those arrangements to be following the treatment prescribed to him, such person shall be exempt from any punishment in respect of any of the said offences committed while he was registered as aforesaid.

Moreover this same amending act, in subsection (8) of Section 22, provided that:

> Where it results to the Court, that the offender, not being a person who cultivates, produces, sells or otherwise deals in any drug, is in need of medical care and assistance for his rehabilitation, the court may, instead of applying any of the punishments provided for in the foregoing subsections, order that the offender be remitted to an institution designated for the purpose by the Minister responsible for health in order that he may be given the necessary treatment. The Court shall cause such order to be forthwith conveyed to the Minister responsible for health, who will give such directives as he may deem fit for the care and treatment of any such person.

Here we have the first indirect admission and recognition by the legislature that the drugs problem, at least in the form represented by the 'simple addict', is in reality not a criminal

justice issue or problem, but a public health issue. The 'simple addict' was not to be tried before the Criminal Court but only before the Magistrates' Court; he was not liable to imprisonment but only to pecuniary punishments; if he was a registered addict and following treatment, he was not to be subjected to any punishment; and, in any case, if he was in need of medical care and assistance for his rehabilitation, the court could, instead of fining him, commit him to an institution designated by the Minister of Health for the purpose, and the Minister of Health would in effect take over by giving the necessary directives as he thought fit for the care and treatment of such person.

This amendment sounded like a perfect solution. In fact it had two fundamental flaws. The first flaw is that 'public health issues' and 'criminal justice issues' do not quite mix with the same ease of gin and tonic – in fact I would say that they do not mix at all. The primary role of the criminal justice system is not to rehabilitate or cure or provide treatment: neither its procedures nor its methods are intended or suited for that purpose. The primary role of the criminal justice system, with its more or less rigid, judgmental attitudes based on concepts or morality, of what is right and of what is wrong, is to protect society by repressing, with its array of punishments, behaviour which is regarded as dangerous to that society. To deter and to put away if necessary remain, in spite of all that is said and written about the rehabilitation of offenders, the primary response of the criminal justice system. 'Public health', on the other hand, is not concerned with assigning guilt or with punishing, but with the prevention of the spread of disease. If the 'simple addict' was a public health issue, he should under no circumstance have been arraigned before the courts of criminal justice, and the matter should have been taken in hand straight away by the Minister of Health without the courts of criminal justice having to intervene. After all it sounds, and I would venture to say it is, inhumane to punish someone simply because he is sick – and health issues imply sickness . Moreover I am sure that those of you who are members of the medical profession will agree with me when I say that lawyers, including judges and magistrates, are among the least competent persons to deal with public health issues (a lawyer and a doctor in court, especially when the latter is being savaged in the course of examination or cross examination, are like the proverbial *diavolo* and *acqua santa*!) But there was another, more practical problem, to the solution proposed in 1980. The line of demarcation between the 'simple addict' and the person who deals in drugs is a very fine one indeed, and very often the one figure merges into the other. We have all come across the person who, in order to support his addiction, resorts to peddling the drug himself, or the drug addict who 'shares' his wares with others who are similarly inclined or equally addicted. And that, as we know, amounts to 'trafficking'. The law did not make, and still does not make, and possibly cannot make, a clear-cut distinction between the trafficker who is primarily an addict and the trafficker whose addiction is only secondary to trafficking. I will, however, later on argue that it may be possible to isolate for practical purposes the 'simple addict'.

But allow me to return to the Dangerous Drugs Ordinance. The next major amendment to this law came in 1986. This amendment was intended to hit hard the 'trafficker', including, of course, the trafficker who was a drug addict. The crime of 'conspiracy for the purpose of selling or dealing in a drug' was introduced; the law also extended its extra-territorial arm and made it a criminal offence for any citizen of Malta or permanent resident of Malta to do any act outside Malta which, if committed in Malta, would amount to the offence of selling or dealing in a drug or to the offence of conspiracy for the purpose of selling or dealing in such drug. As for punishment, the law began to distinguish between trafficking and conspiracy to traffic on the one hand, and most other offences on the other hand, the former being, of course punished more severely by raising the minimum punishment which could be applied. The 1986 amendment did not alter the legal situation as far as the 'simple addict' was concerned: he was still not to be tried before the Criminal Court and was not liable to imprisonment; if he was a registered addict and receiving treatment he was not liable to punishment at all; and if the court was satisfied that he needed 'care and assistance for his rehabilitation', it could, as I have already said, instead of imposing a pecuniary punishment, send him off to be cared for by the Minister of Health in an institution designated for the purpose. To be quite honest, I do not recall from my days in the Attorney General's Office whether any institution was ever designated for the purposes of subsection (8) of Section 22. One other feature of the 1986 amendments was the provision for a diminution of punishment in the case of a person who has helped the police to apprehend the person or persons who supplied him with the drugs. While one can understand the *raison d'être* of this provision, one cannot help feel, in a number of cases that come before the courts, that the accused or the person being interrogated by the police will readily mention anyone as the supplier of the drug in the hope of obtaining a reduction of punishment. It is true that the law requires that the accused should have actually helped the police to apprehend the supplier, and not merely indicated any person who, perhaps, cannot even be traced by the police; it is also true that the courts have generally interpreted the expression 'apprehended by the Police' to mean that the police or, as the case may be, the court is reasonably convinced on a balance of probabilities that the person indicated as the supplier and who has been arrested by the police is in fact the supplier; this provision is, in any case, one that has to be applied with

the greatest caution and circumspection by the police and by the courts – miscarriages of justice in Italy due to the so-called '*pentiti*' are all too familiar to us.

The year 1994 marks an important turning point. Act VI of that year, which amended the Dangerous Drugs Ordinance, did away completely with the idea that the 'simple addict' was not liable to imprisonment. Henceforth, even the 'simple addict' could be imprisoned from a minimum of twelve months to a maximum of ten years if tried and convicted before the Criminal Court or from a minimum of three months to a maximum of twelve months if tried and convicted before the Magistrates' Court. The law no longer stipulated, as it had done until then, that the 'simple addict' was not to be tried before the Criminal Court – though it must be said, and this is a credit to the way the Attorney General has managed the law up to now, that I know of no case where a 'simple addict' was ever tried before the criminal court except in cases where the charge of possession was brought together with charges of other crimes (for example, theft, fraud, living on the earnings of prostitution and so on) which fall to be tried by the said Criminal Court. The 1994 amendments, however, provided that in the case of the 'simple addict', if the court was of the view that the person convicted was 'in need of care and assistance for his rehabilitation from dependence on any dangerous drug' the court could (notice the optional nature of the provision) instead of applying any of the punishments prescribed, place him on probation under the provisions of the Probation of Offenders Act. With regard to the 'trafficker' (irrespective of whether or not he is also an addict) the 1994 amendments expressly ruled out (in subsection (9) of Section 22) the possibility of either a Probation Order or a suspended sentence of imprisonment. However, recognizing that also the 'trafficker' may be 'in need of treatment for his rehabilitation form dependence' on a dangerous drug, the legislator, in subsections (10) to (14), introduced a complicated procedure whereby a so-called 'order for treatment' can be made. To date, I have not seen one such order, and although I have not had the time to research the matter properly, I very much suspect that no such 'treatment order' has in fact ever been made by any of the courts of criminal justice. Basically, the treatment order which may be made with regard to a 'trafficker' involves

1. the written certification by the Minister responsible for public health that such treatment may be given in prison,
2. the person convicted agrees to submit to such treatment,
3. the punishment of imprisonment is reduced by one third and
4. the order must also specify the 'treatment period'.

If the court which made such order is satisfied, upon an application by the Attorney General, that the person in question has, without valid reason, either refused the treatment, or has conducted himself in a manner as to make his treatment, or that of other prisoners, difficult or ineffective, the court will revoke the 'treatment order' and the prisoner looses the benefit of the one third reduction in his prison sentence (that is the original period of imprisonment will have to be served). The order may even be revoked at the request of the prisoner himself, in which case also the original period of imprisonment will have to be served.

Finally, in 1996, in a move clearly designed to send the necessary signals to drug traffickers, Parliament increased the maximum punishment which can be awarded by the Criminal Court to life imprisonment. Life imprisonment is applicable, among other situations, to the following:

1. those who cultivate the opium poppy (the *Papver somniferum*) or the coca plant (*Erythloxylum coca*),
2. those who cultivate the plant cannabis,
3. those who sell or deal in a drug contrary to the provisions of the Ordinance,
4. those who conspire for the purpose of selling or dealing, and
5. those found in possession of a drug under such circumstances that that the Court is satisfied that such possession was not for the exclusive use of the person in whose possession that drug is found.

All these are liable to the punishment of life imprisonment if tried before the Criminal Court. The Criminal Court, however, is authorized (that is may not apply, not must not apply) not to apply the punishment of life imprisonment and to apply instead the punishment of imprisonment from a minimum of four years to a maximum of thirty years in either of these two circumstances:

i. if it is of the opinion, taking into account the age of the offender, his previous conduct, and the quantity of the drug concerned, that the punishment of imprisonment for life would not be appropriate, or (the second circumstance)
ii. if the verdict of the jury is not unanimous.

This second circumstance was clearly intended to mirror a provision in the Criminal Code which provides that in the case of those offences which, as a rule, carry the mandatory sentence of imprisonment for life (for example, wilful homicide, arson endangering life, or if you set fire to a vessel of war, a public dock or an artillery park) a determinate sentence of imprisonment may instead be awarded by the court if the jury is not unanimous in its verdict of guilt (in other words if they return a majority verdict). The first exception (or circumstance) to the life imprisonment rule for 'traffickers' was clearly dictated by the wide definition of the word 'trafficking' or, to be more precise, the word 'dealing' (we generally use the word 'trafficking' because the Maltese rendering of the word 'dealing' is '*jitraffika*'). By an express provision in the Dangerous

Drugs Ordinance, the word 'dealing' with reference to dealing in a drug, includes cultivation of that drug, its importation into Malta in such circumstances that the court is satisfied that such importation was not for the exclusive use of the offender, the manufacture of a drug, its exportation, distribution, production, administration, supply, the offer to do any of these acts (for example, the offer to supply) and – something which is not very widely known – even the giving of information intended to lead to the purchase of such a drug contrary to the provisions of the Ordinance amounts to 'dealing' or 'trafficking'. Let us take this hypothetical scenario: a person – we shall call him John – is a drug addict and, let us say, has been addicted to heroin for a number of years. He has never shared his heroin with anyone, never sold it, and always had in his possession just enough to satisfy his personal needs for that day and for the immediate future. One fine day, however, he tells another person from where he is buying the heroin because that other person wants to buy the stuff himself, and clearly intending that that other person should avail himself of the same source of the drug. If John is tried before the Criminal Court – let us say because the charge of trafficking is brought together with a charge of theft – John is liable to a punishment from a minimum of four years to a maximum of life imprisonment – although one would assume in such a case that the Court will apply the exception and award not life but a determinate prison sentence. The court cannot put John on probation; nor can it award a suspended sentence of imprisonment; nor can it go below the minimum of four years unless it can be ascertained that John has in fact helped the police to apprehend the person who was supplying him with the drug – who could well be another addict! Moreover the Criminal Court must also impose a fine ranging from a minimum of one thousand Malta Liri to a maximum of fifty thousand Malta Liri. Now, what is clear is that what John is most in need of is to help him to part with his drug habit. But faced with such a charge, and aware of the punishment which he could be awarded, even if in its minimum, he is unlikely to plead guilty at the start of committal proceedings. The compilation of evidence commences, and it may be months before the Attorney General files the Bill of Indictment in the Criminal Court. By the time this indictment has been filed, John is undergoing a rehabilitation programme. The question is often asked – did John have to wait until he was caught and arraigned in court to commence such a programme? Is this not just a defence ploy to try and get the court to be as lenient as possible at the sentencing stage? It is here that a judge or magistrate must exercise considerable caution. Undoubtedly there will be cases where the programme is undertaken for improper motives; but one must not forget that very often in a person's life, especially a person whose life is dominated by some form of addiction – be it to drugs, alcohol, cigarettes or gambling – it takes a dramatic turn of events to get that person to change into a different gear and to really start doing something about the problem. From my own experience as a judge, I can tell you that nothing gives me more satisfaction than to see someone whose life was in shambles picking up those pieces with the help of others and putting some order into his life – and I must here pay tribute to the professionalism and dedication of our probation officers without whose help a judge or magistrate is, in some cases, lost when he comes to the sentencing stage in cases similar to John's.

To get back to our John, by the time his case comes up for trial before the Criminal Court, he has successfully completed the rehabilitation programme; he is, perhaps for the first time in his life, gainfully employed: yet the nature of the drugs charge makes it mandatory for the Criminal Court to impose at least a four year prison sentence and a minimum fine of a thousand Malta Liri (convertible into another three months imprisonment if not paid according to law). Even if John were to be tried before the Magistrates Court, he would have to be sentenced at least to the mandatory six months imprisonment and a fine of not less than two hundred Malta Liri. I have chosen an extreme example precisely to illustrate the core problem in the application of the Dangerous Drugs Ordinance. More or less the same could be said to arise as far as the Medical and Kindred Professions Ordinance is concerned. The core problem is: how is the court to deal with the addict? Should the addict be a problem with which the criminal justice system is concerned?

Persons who are charged under the Dangerous Drugs Ordinance could be classified, broadly speaking, into five categories:

There is first of all what I have chosen to call earlier on the 'simple addict'. He is the person who is dependent of drugs, buys drugs for his own personal use and never has more in his possession than he actually needs for that day or the immediate future. He does not 'share' the drug with others nor peddles it in any way. Should the 'simple addict' be the concern of the criminal justice system, or should he be dealt with as a public health issue? On this particular point Avram Goldstein, Professor Emeritus of Pharmacology at Stanford University in the United States, makes the following suggestion in his book *Addiction: From Biology to Drug Policy*: 'Drugs policies,' he says, 'have too often been driven by public panic and media hysteria, to which politicians respond by whatever actions they think will be reassuring in the immediate crisis. This pattern does not address the real need. It is time to return the drug problem to the domain of medicine and public health, where it belongs. For many reasons it is logical to approach drug addiction as if it were an infectious disease. Such concepts as incidence, prevalence, relative immunity and genetic and environmental influences on susceptibility can be applied

to both. Attempts at prevention, eradication, education, treatment, relapse prevention and containment are comparable. And important for preventing the spread of drug addiction is the fact that – as with infectious diseases – it is primarily the newly infected who transmit the condition to their peers. Quarantine, which has sometimes been used in severe and life-threatening epidemics, can be an effective tool... but it always raises ethical and legal issues concerning the degree to which it is permissible to restrict the personal liberties of those who are infected in order to protect those who are not' (p. 308). What I ask you to consider, ladies and gentlemen, is whether the 'simple addict' should remain the concern of the criminal justice system, or whether he should be dealt with by the public health authorities in the same way that they deal with infectious diseases and without reference to the courts of criminal justice. Of course, when referring to the 'simple addict' as the person who may be in possession of a drug for that day's need and for his immediate future, the question invariably arises: but of how much drug are we talking in terms of quantity? This is one of the most difficult questions that judges and magistrates have to address in connection with the offence of possession of a drug in such circumstances which indicate that that drug was not for the exclusive use of the possessor. Possession in such circumstances is equated under our law with trafficking as far as punishment is concerned, whether the person is tried before the Criminal Court or the Inferior Court. The same problem is encountered by English courts with the analogous offence of possession with intent to supply under Section 5(3) of the (English) Misuse of Drugs Act, 1971. How much is a person's requirement for a day or two days is always something very difficult to gauge; in practice I have found that even experts, whether analysts or medical doctors, are often unwilling – or, perhaps, in reality, unable – to give evidence of a person's daily requirement of a drug because of the variables of tolerance and dependence. If, however, the 'simple addict' is to be siphoned off from the criminal justice system, it would be necessary for the legislator to determine the minimum amount of each drug that would indicate possession for one's exclusive use.

The second category is the addict who traffics to maintain his habit. He clearly poses a threat to society, and one can legitimately argue that the criminal justice system should continue to deter his behaviour by its system of punishments. In the case of this person, however, I believe it is important to ensure that once the courts have passed judgement and awarded punishment it should be able for him, either contemporaneously with or after the expiration of the punishment, to undertake the necessary rehabilitation programme. This means that the criminal justice system should not, of itself, be an obstacle to such a programme and to the possibility that he be reintegrated into society. It is highly desirable in the case of people falling into this category that their case be dealt with by the criminal justice system as expeditiously as possible – perhaps a 'fast track' system could be devised for these persons, at least before the Magistrates' Court. A person in this category should also be arraigned in Court as quickly as possible after he is caught, and not months or years after (though, as a former prosecutor, I appreciate that there could be problems with the staggering of cases, so that those whose case has been decided can give evidence in someone else's case) The system should also ensure that if the person has several cases of the same kind pending, these should be joined into one case so that he can benefit from the rules governing concurrence of punishments; this would also ensure that after the person has served time, he will not, instead of picking up his life, have to face further court proceedings. Moreover, in the case of persons in this category, there should be minimal use of fines. According to law, a fine has to be paid upon completion of the more severe type of punishment, that is after serving the period of imprisonment. If, after serving a term of imprisonment, with possibly some progress by way of rehabilitation having been made, the person concerned is faced with a substantial fine which he either cannot pay and therefore has to serve time in lieu, or which will push him into financial debt, it may well be that further progress with his rehabilitation will be impossible.

The third and fourth categories comprise the trafficker who happens to be an addict, and the trafficker who is not an addict. These persons present a law enforcement problem: they are generally the 'big fish' who are not easily caught. Unfortunately it is quite tempting for the police to go after persons in categories one and two to inflate police statistics; to apprehend persons in categories three and four usually requires long term planning, surveillance, the use of precious resources. It is for persons in these two categories that that the legislator has generally kept increasing punishments up to the present life imprisonment.

Finally there are those who 'experiment' with drugs without being either addicts or traffickers. This seems to be particularly the case with young people using designer drugs such as ecstasy. Some people argue that youngsters experimenting with drugs need only a firm slap on the wrist and not criminal sanctions or treatment. I beg to differ. Here we are dealing with a drug (I am referring to ecstasy) which, as most of you know, is particularly dangerous because it gives the appearance of being innocuous – possibly because it does not lead to physical dependence – when in reality it is extremely dangerous because of its unpredictability and the damage it causes to certain brain neurons even in minor doses. If social constraints and the education system have failed to keep youngsters away from this type of drug taking, the short, sharp, shock 'treatment' of moderate fining and/or short terms of

imprisonment could perhaps bring some of these youngsters to their senses. I was particularly disturbed earlier this year when presiding over a trail by jury of a person who was charged, among other things, with the involuntary homicide of his friend after he had supplied him with just one ecstasy pill. What disturbed me was not so much the death itself, as the ease, the nonchalant way, with which the various witnesses, who were friends both of the victim and of the accused, took this drug much in the same way as you or I would consume things like Rowntree's Fruit Pastilles! Clearly something is wrong in the State of Denmark if so many of our youngsters are prepared to play Russian roulette!

Of course, drug related crime includes not only drug taking and drug-pushing; in Malta over the years we have also seen a considerable amount of crimes against property, largely petty thieving, to finance drug taking. Persons charged with these crimes, who also happen to be addicts and where the crime is somehow related to the addiction, should be treated in the same way as those addicts falling into category two.

Ladies and gentlemen, I would have liked to say much more – never let it be said that a lawyer is at a loss for words – but I am sure I have said enough. I hope I have given you a little bit of food for thought. If I have not, I apologize for wasting your time. Thank you.

Maritime Law

14 The Changing Parameters of Compensation for Ship-Source Pollution Damage[1]

Gotthard M. Gauci, LL D (Malta), LL M (Southampton), Ph.D. (Wales).

The Established Regimes

The International Convention on Civil Liability for Oil Pollution Damage 1969 [CLC 1969], the International Convention on the Establishment of an International Fund for Oil Pollution Damage 1971 [Fund Convention 1971], and their amending protocols of 1992,[2] have, for a number of years, provided a largely effective framework for compensation for ship-source oil pollution damage. CLC 1969/1992[3] imposes strict but limited liability on a ship owner for damage caused by a spill of persistent oil from a tanker carrying persistent oil as cargo. The definition of ship has been slightly widened in the 1992 Civil Liability Convention Protocol.[4] The shipowner's liability is subject to a number of exceptions including war and natural phenomenon of an exceptional, inevitable and irresistible nature.[5] The imposition of liability in CLC 1969 and 1992 is backed up by a system of compulsory insurance which also provides for a right of direct action against the person providing security.[6] The current general capping of shipowner's liability in CLC 1992 is set at 59.7 million units of account.[7] The shipowner's liability is complemented by liability imposed on the International Oil Pollution Compensation Funds [IOPC] [that is, 1971 and 1992] in terms of the Fund Convention 1971 and the Fund Convention 1992,[8] to which oil receivers in member States contribute. The current maximum liability of the IOPC Fund 1992 is 135 million units of account which can in certain instances rise to 200 million units of account;[9] the limits contained in CLC 1992 and the Fund Convention 1992 were raised in October 2000 by the tacit amendment procedure contained in the Conventions.[10] The Fund Convention 1971 will be cease to be in force on 24 May 2002;[11] as of 1 December 2001 the number of states parties to the 1992 Fund Convention was seventy-four.[12]

1 I wish to thank Jonathan Pace, BA (Hons) Public Admin. (Malta), M.Sc. (Malmo), M.C.I.T., [Deputy Executive Director, Merchant Shipping Directorate, Malta Maritime Authority] for the helpful discussions we had during the preparation of this article. Any errors remain the responsibility of the author.

2 Protocol of 1992 to Amend the International Convention on Civil liability for Oil Pollution Damage, 1969; Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.

3 References to CLC 1992 constitute a reference to the consolidated text of the International Convention on Civil Liability for Oil Pollution Damage 1992, as amended by the 1992 Protocol.

4 CLC 1969 defined a ship as meaning 'any seagoing vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo' [Article I (1)]. This was widened in CLC 1992, and the same provision now states that 'ship' means 'any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.'

5 Loc. cit., Art. III (2).

6 Loc. cit., ArticleVII, paragraph 8.

7 Loc. cit., Article V. Article V, paragraph 9(a) states that this unit of account is the Special Drawing Right as defined by the International Monetary Fund.

8 References to the Fund Convention 1992 constitute a reference to the consolidated text of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, as amended by the 1992 Protocol.

9 Fund Convention 1992, Article 4, paragraph 4.

10 Resolutions adopting these amendments are reproduced at pages 47 *et seq.* of Texts of the 1992 *Conventions on Liability and Compensation for Oil Pollution Damage*, [2001 Edition]. Amendments will come into force on 1/11/2003, 'unless prior to 1 May 2002 not less than one quarter of the States which were contracting States to the respective Conventions on 18 October 2000 have communicated to the International maritime Organization that they do not accept these amendments". [IOPC Fund 1992, *Text of the 1992 Conventions on Liability and Oil Pollution Damage*, 2001 Edition, p.3]

11 IOPC Fund 1971 Documentation, 71FUND/A.24/4 [1 August 2001].

12 Source: www.iopcfund.org [10/12/2001]. Number of states parties to CLC 1992 was seventy-eight as of 1/12/2001 [ibid]. Malta acceded to CLC 1992 and the Fund Convention 1992 on 6 January 2000 and the said Conventions entered into force for Malta on 6 January 2001.

The liability of the Funds is strict and limited in all cases, and is also subject to a number of defences which are not as extensive as those in CLC 1969/1992. The *Erika* incident,[13] in particular, however has highlighted the possibility of damages from a spill which exceed the limit available under the 1992 Conventions. The European Commission proposed, in the wake of that incident, a regulation of the European Parliament and of the Council on the establishment of a fund for the compensation of oil pollution damage in European waters and related measures.[14] Such a fund would lead to a regional solution; however the international maritime community deliberating within the framework of both the IOPC Fund and the International Maritime Organization [IMO] is actively considering the possibility of establishing a third tier of liability for oil pollution damage. In September 2001 the 1992 Fund Assembly considered a revised draft Protocol[15] establishing a Supplementary Compensation Fund. This supplementary fund would be very closely linked to the existing 1992 IOPC Fund. Indeed the draft protocol adopts the same definition of ship, person, owner, oil, pollution damage, preventive measures and incident.[16] The *raison d'être* of the Supplementary Fund is spelt out in Article 4:

> The Supplementary Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for an established claim for such damage under the terms of the 1992 Fund Convention, because the damage exceeds the applicable limit of compensation laid down in...in respect of any one incident.[17]

It has been suggested that the maximum available from the Supplementary Fund will be one billion US dollars;[18] it has, furthermore been suggested that a diplomatic conference will address the issue in 2003.[19]

The International Convention on Liability and Compensation for Damage in Connexion with the Carriage of Hazardous and Noxious Substances by Sea 1996. [HNS Convention].[20]

The CLC and the Fund Convention regimes do not provide compensation for damage caused by a ship-source spill of hazardous substances other than oil as defined in those Conventions.[21] The problem is addressed in the HNS Convention of 1996, which is still not in force. This Convention makes provision for a regime of compensation for damage caused by the carriage of hazardous substances on ships. Strict but limited liability, as in CLC 1969/1992, is channelled on to the owner, restrictively defined , and the Convention also provides for the setting up of an HNS Fund on lines similar to the IOPC Fund 1992. Despite the attractions of the implementation of this Convention,[22] only limited progress has been made in this direction, and this is probably due to the complexity of administering the Convention. In October 1999 the Legal Committee of the IMO decided to include the implementation of the HNS Convention as part of its programme, and a correspondence group was established to this effect. In October 2001 the 1992 Fund Assembly gave instructions to the IOPC Fund 1992 Director for the development of a system designed 'to assist States and potential contributors in the identification and reporting of contributing cargo under the HNS Convention'.[23] Furthermore the Assembly renewed instructions to the Fund Director 'to carry out the administrative tasks necessary for setting up the HNS Fund'.[24]

The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 [The Bunker Oil Pollution Damage Convention 2001].[25]

Another aspect of the established oil pollution regime which can be considered to be a drawback is that the definition of a 'ship' in both CLC 1969/1992 and the Fund Convention 1971/1992 largely restricts the application of the Convention to tankers. A number of States, including the

13 France, 12 December 1999.
14 Brussels, 6.12.2000, COM (2000) 802 final.
15 This draft protocol is entitled 'Draft Protocol of 200_ to Supplement the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992'.
16 IOPC Fund 1992 Documentation, 92FUND/A.6/28, Annex I, article 1, paragraph 6.
17 IOPC Fund 1992 Assembly Documentation, 92FUND/A.6/28 [19 October 2001], Annex I.
18 O'Mahony, *IMO plans $1bn 'third tier' for oil spill payouts*, 22 November 2001.
19 Ibid.
20 IMO documentation: LEG/CONF. 10/8/2, 9 May 1996.
21 CLC 1992, Article I, paragraph 5; Fund Convention 1992, Article 1(2).
22 The HNS Convention is not in force. It will enter into force 18 months after the date on which the following conditions are fulfilled:
a. at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it, and
b. the Secretary-General has received information in accordance with article 43 that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 1(a) and (c) have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account... [Article 46].
23 IOPC Fund 1992 Assembly Documentation, 92FUND/A.6/28 [19 October 2001], §28.5.
24 IOPC Fund 1992 Assembly Documentation, 92FUND/A.6/28 [19 October 2001], §28.8 .
25 IMO documentation LEG/CONF. 12/19, 27 March 2001. See, further, Gauci, G. & Pace, J., 'Bunker Oil Pollution Damage Convention adopted at IMO', *Shipping and Transport Lawyer International*, Vol. 2, No. 4, 2001, p. 17.

United Kingdom, took unilateral action to impose strict liability in relation to bunker spills from non-CLC vessels.[26] On March 23, 2001, a Convention entitled the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 was adopted at IMO. According to article 14 of the said Convention, the Convention will go into force

> one year following the date on which eighteen States, including five States each with ships whose combined gross tonnage is not less than one million, have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General.[27]

This Convention adopts the broad structure of the 1992 Civil Liability Convention in that it imposes a regime of strict but limited liability accompanied by compulsory insurance. As in CLC 1992, the ship owner is exempted from liability in a number of instances, including instances where the contamination damage is caused by war and hostilities, and a natural phenomenon of an exceptional, inevitable and irresistible character.[28] However, there is one major innovation in the Convention; this relates to the channelling of liability. Whereas CLC 1969/1992 applies a restrictive definition of shipowner,[29] the Bunker Oil Pollution Damage Convention 2001 defines a 'shipowner' as meaning 'the owner, including the registered owner, bareboat charterer, manager and operator of the ship'.[30] In turn 'registered owner' is defined as meaning 'the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship.'[31] The wide definition of 'ship owner' is a very interesting development; it bears similarities to the definition of 'responsible person' in the United States Oil Pollution Act of 1990.[32] It is most likely that the term susceptible to the widest interpretation is 'operator' which can include *inter alia* mortgagees in possession and salvors. The possibility that a salvor might be deemed to be an operator may support the view that the provisions of the Convention may constitute a disincentive to salvors; this problem is compounded by the fact that the Bunker Oil Pollution Damage Convention 2001 does not contain the equivalent of article III(4) of CLC 1992 which largely provides an immunity from liability for pollution damage in relation to salvors.[33] After a long debate on the issue prior to the adoption of the Convention at an IMO diplomatic conference in March 2001, the matter was resolved on the basis of the text of a resolution which recommends 'that persons taking reasonable measures to prevent or minimize the effects of oil pollution be exempt from liability unless the liability in question results from their personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result', and recommended further 'that States consider the provisions of Article 7, paragraphs 5(a), (b), (d), (e) and (f) of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 as a model for their legislation.'[34] It may be noted that the Bunker Oil Pollution Damage Convention 2001 imposes a duty to insure liability only on the registered owner of the vessel; operators and bareboat charterers have no such obligation.[35]

As in the case of the limitation regimes adopted in CLC 1992 and in the HNS Convention 1996, the regime of limitation of liability suggested by the Bunker Oil Pollution Damage Convention 2001 – the Convention on Limitation of Liability for Maritime Claims, 1976, as amended[36] – provides for a virtually unbreakable right of limitation of liability.

> Article 4 of that Convention provides that [a] person shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Common Problems.

There are a number of common problems in the above mentioned three compensatory regimes. These include in particular the issue of compensability or otherwise of damage to the environment. All three systems provide that 'compensation for impairment of the environment other than loss of

[26] See section 154 of the Merchant Shipping Act 1995 [1995 c. 21].
[27] See, further, Article 14(2) of the same Convention.
[28] Loc. cit., Article 3, paragraph 3.
[29] Loc. cit., Article I.
[30] Loc. cit., Article 1, paragraph 3.
[31] Loc. cit., Article 1, paragraph 4.
[32] Public Law 101-380, August 18, 1990, §1001 (32).
[33] See also Article 7 (5) of the HNS Convention 1996.
[34] IMO documentation LEG/CONF. 12/DC/3 22 March 2001.
[35] Loc. cit., Article 7, paragraph 1.
[36] See Resolution on Limitation of Liability – IMO documentation LEG/CONF.12/DC/2 [22 March 2001].

profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken'.[37] Loss of profit gives rise to a particular problem in common law systems, and specifically the extent to which the rule – relating to non-recovery for pure economic loss (normally applied in the context of damages caused by a negligent act) – operates with reference to a national law implementing an international convention and imposing strict liability. The IOPC Funds, in their Claims Manuals, have delineated various criteria for compensability of economic loss.[38] Examples of instances where pure economic loss has been allowed by the IOPC Fund include: claims by self-employed fish-porters and net makers for loss of income indirectly caused by a spill;[39] claims of a car repair firm which lost business as a result of the closure of an area to ensure free movement in connection with preventive measures;[40] claims for loss by fish processing plants deprived of the supply of fish from an exclusion zone.[41] However a number of claims for pure economic loss arising from the *Braer* oil spill[42] have been recently addressed by the Scottish courts. In the case of *Landcatch Ltd v. IOPC Fund*,[43] the claim related to pure economic loss arising from the non-materialization of expected contracts, between Landcatch Ltd – producers of smolt – and salmon farmers, due to the declaration of emergency orders prohibiting the use, landing and supply of fish from the designated affected area. Recovery was not allowed on a number of grounds by both the court of first instance and the appellate court. In particular, Lord Cullen, at the appellate stage, stated that he arrived at his conclusion

> by applying considerations similar, though not identical, to those which have led to the development of a rule against such claims at common law.[44]

Similarly in *P & O Scottish Ferries Ltd v. Braer Corporation and Another*,[45] the claimants, providers of passenger and freight ferry services, provided the sole ferry passenger service between Shetland (where the spill occurred) and the mainland. It was stated in the judgement by Lord Gill, in the court of first instance, that the losses claimed in that case

> were no more than an indirect consequence of adverse publicity affecting the image of Shetland as a source of fish and fish products and as a holiday destination.[46]

The issue of compensability in relation to reinstatement measures and also post-spill environmental studies has been addressed by the Third Intersessional Working Group established by the IOPC Fund, which submitted a number of proposals to the sixth session of the Assembly of the 1992 IOPC Fund;[47] these matters will be further addressed at the next Assembly of the IOPC Fund 1992.[48]

Conclusion.

The Bunker Oil Pollution Damage Convention of 2001 fills one substantial lacuna in the international scheme for ship-source oil pollution damage. It is difficult to predict with any reasonable degree of accuracy when that Convention or the HNS Convention 1996 will come into force. Until that time serious lacunas will remain, and compensation for bunker spills and hazardous chemicals will have to be addressed by

37 See: CLC 1992, article I, paragraph 6; Fund Convention 1992, article 1, paragraph 2; HNS Convention, article 1, paragraph 6; Bunkers Convention Article 1, paragraph 9.

38 The current IOPC Fund 1992 Claims Manual [June 2000] provides that:

> Claims for pure economic loss are admissible only if they are for loss or damage caused by contamination. The starting point is the pollution, not the incident itself.
>
> To qualify for compensation for pure economic loss, there must be a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant. A claim is not admissible for the sole reason that the loss or damage would not have occurred had the oil spill not happened. When considering whether the criterion of reasonable proximity is fulfilled, the following elements are taken into account:
>
> * the geographical proximity between the claimant's activity and the contamination
> * the degree to which a claimant was economically dependent on an affected resource
> * the extent to which a claimant had alternative sources of supply or business opportunities
> * the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.
>
> The 1992 Fund also takes into account the extent to which a claimant was able to mitigate his loss. [loc. cit., pp. 21-22].

39 IOPC Fund Executive Committee documentation, FUND/EXC.35.10, 8 June 1993. §3.3.18.

40 IOPC Fund Executive Committee documentation, FUND/EXC. 36.10, 5 October 1993, §3.3.8-9.

41 IOPC Fund Executive Committee documentation, FUND/EXC.34.9, 12 March 1993, §3.4.14-15.

42 United Kingdom, 5 January 1993.

43 Court of Session, Inner House (Second Division), 19 May 1999, [1999] 2 Lloyd's Rep. 316. See, further, Gauci, G., 'Ship-source Oil Pollution Damage and Recovery for Relational Economic Loss', *Journal of Business Law*, 2000, pp. 356-361.

44 [1999] 2 Lloyd's Rep. 316 at 329.

45 [1999] 2 Lloyd's Rep. 535, per Lord Gill. [Court of Session, Outer House, January 7, 1999].

46 [1999] 2 Lloyd's Rep. 535 at 540.

47 See IOPC Fund 1992 Assembly Documentation, 92FUND/A.6/28 [19 October 2001].

48 IOPC Fund 1992 Assembly Documentation, 92FUND/A.6/28 [19 October 2001], §6.43.

general basic domestic laws. Whereas it may be quite straightforward for some legal systems to impose strict and limited liability on a ship owner in relation to bunker spills or spills of hazardous chemicals, the benefits of an effective fund – such as the HNS Fund – remain inaccessible without international implementation.

15 A Brief Outline of the Legal History of Harbour Pilotage in Malta

George Said, BA, LL D

When a vessel calls at a port infrequently or perhaps even for the first time, it is virtually impossible for her master to have a good knowledge of the winds, seas, currents, tides, traffic separation schemes, geology, infrastructure and traffic of that port and its approaches. Whether a port is a compulsory pilotage area or not depends primarily on the decision of the port authorities of that country. However, the traffic systems of that port have a heavy influence on such decision. In fact, most of the world's ports are compulsory pilotage areas.

The Grand Harbour has been described as 'the finest in the world', but as a port, pilotage was very necessary due to the, 'narrowness of the entrance and the usual variableness of the wind'.[1] Malta's main harbours are compulsory pilotage areas.[2] Therefore, every vessel entering and exiting the Ports of Valletta and Marsaxlokk requires a pilot. The law lays down a number of exceptions to this rule.[3] The Malta Maritime Authority Act also reserves the right of the Director of Ports to exempt any vessel from the compulsory requirement of pilotage services at will.[4]

The institution of pilotage is a very old one. The concept of having a person with knowledge of the local area (coastline, seabed, wind, currents, tidal streams and traffic movements) aiding masters of foreign vessels calling at local ports has been a vital element of seafaring since ancient times.

The procedure is simple to understand. When a vessel calls at a port, a pilot from an organization within that same port is required by the visiting ship to embark on such principal vessel from a fixed boarding point,[5] and to ensure that she is steered safely to her anchorage, moorings or berth, as applicable.

The pilot is transported to the vessel aboard the pilot launch. This craft is a small vessel, which is constructed to specifications suitable for the task. She must be extremely durable and must have a fixed boarding point from where the pilot can transfer safely from the launch to the pilot ladder of the vessel requiring the services of such pilot. Thick rubber fenders, like that of a tug vessel, must surround her hull since she navigates very close to and comes into contact with the principal vessel.

On departing the pilot launch, the pilot must climb a ladder made from rope with wooden rungs. Here, he will either reach a hatch in the ship's freeboard, or a fixed gangway that will lead to a hatch in the ship's side or her main deck, depending on the character and size of the individual vessel or on whether she is travelling loaded or in ballast. At this point, one can already begin to appreciate the amount of effort and concentration required on the part of the pilot. His task is a strenuous and perilous one and such elements of stress, fatigue and peril must be taken into account and catered for appropriately by the legislator and the administrator of the pilotage service alike.

The relationship between the master and the pilot must be a very special one. The trust must be implicit and immediate. Without ever having met the master before, the pilot will depend upon the master to be honest in describing to him the condition of the ship and in disclosing to him any problems or procedures that might exist in connection with the

1 McCullock's *Dictionary of Commerce*, 1867.

2 Malta Maritime Authority Act, (Cap. 352) Part VII, Section 54 (1).

3 Malta Maritime Authority Act, (Cap. 352) Part VII, Section 54 (2) includes:
- Ships owned or operated by the Government of Malta
- Men-of-War belonging to foreign powers.
- Yachts and fishing vessels.
- Ships with a gross tonnage of less than 500grt.
- Ships plying and trading exclusively between Maltese Ports.
- Tugs, dredgers, barges or similar vessels whose ordinary course of navigation does not proceed beyond Maltese Territorial Waters.
- Ships unable to take aboard a pilot due to perilous weather conditions.

4 Malta Maritime Authority Act, (Cap. 352) Part VII, Section 54 (3).

5 All vessels approaching Valletta harbour are asked to proceed to the Fairway Buoy. This is a safe-water marker situated precisely one mile off the breakwater. This is invariably used as the pilot's embarkation and disembarkation station.

safe navigation of the concerned vessel. The pilot must then describe the route in detail to the master. This should include any problems or obstacles that might be expected en route, the situation with the tugs, line handlers and shore facilities. He must also make the master aware of the relevant local rules and regulations; such as any relevant provisions under the Port Regulations 1962, which must be adhered to during the operation. These actions which must be done in the presence of, not just the master, but also the duty deck officers, who will assure the crew that the pilot is competent, diligent and capable of being entrusted with the handling of their ship.

The pilots should also seek the master's advice on any special concern with manœuvres and special characteristics of the ship. Questions such as whether the vessel is constructed with bow thrusters or whether the propeller or propellers have fixed or variable pitch are extremely relevant and must be put forward by the pilot to the ship's officers without hesitation as part of the pilotage plan being discussed. Often, the master will prefer one pilotage manœuvre to another, for reasons, which are properly justified. The pilot should make every attempt to satisfy the master's valid preferences and modify the pilotage plan accordingly. If the pilot cannot, for various reasons, accommodate the master's request, he is duty bound to give such reasons to the master.[6]

Once he has reached the bridge, the pilot's task is not to take over full command of the vessel. Command and responsibility for the vessel and crew's safety remain fully with the master. The pilot's job is solely to advise the master and his bridge team on how his vessel can be navigated most safely through these waters taking into consideration all the different circumstances and characteristics of such port. The pilot is an addition to the bridge team, but simply as an advising officer and not as a commanding officer.

The Pilotage Corps in Malta is regulated by two main government bodies, these being the Malta Maritime Authority Ports Directorate and the Ministry of Transport and Communications, which in turn regulates the Malta Maritime Authority. These two establishments are constantly referred to in all Maltese law related to pilotage. The importance of the inclusion of these two other bodies in the laws of pilotage emanates simply from the fact that if the pilot service does not run smoothly, both the Ministry of Transport and Communications and the Port Authority will have a serious problem on their hands. This is due to the fact that if there are no pilots available round the clock, then the harbours will be virtually closed for the relevant period of time. This, in the long run, will drive away maritime trade from Malta. Consequently, a harmonious working relationship must be established between all parties concerned since ultimately, the continuous operation of the ports depends on the efficiency and order with which the pilot service is run.

The recent grounding of a reefer[7] during pilotage in the Magellan Strait illustrates many of the strong criticisms levelled at pilots.[8] The Magellan Strait, like Valletta and Marsaxlokk, is a compulsory pilotage area. Ship owners prefer to use the passage rather than the open sea to avoid exposing their vessels to the violent seas and heavy swells brought about by the harsh South Pacific winters. To navigate the passage usually takes a duration of about three days. Two pilots usually board each passing vessel at the beginning of the transit. They bring with them their own charts and navigate with reference to these charts as well as with reference to particular known landmarks. Standard procedure allows that the master of the ship and his officer of the watch are authorized to use the charts belonging to the pilots but may not draw up a passage navigation plan on them or in any way mark them.[9] The pilots worked on a watch-on watch-off system, with a change of watch taking place at 0300 hours. One of the pilots was newly qualified and on his first appointment as a pilot of such grade since attaining his licence and papers. This pilot took the watch at 0300 hours. The weather was of an inclement nature with very poor visibility and intermittent rain. When the pilot came onto the bridge and reported for duty, the ship was abeam of Punta Naus , approaching a starboard course change to enter the East Channel between Isla Bedwell and Punta Dashwood. The pilot initiated the course change after checking the ship's position on the GPS.[10] Unfortunately, through lack of foresight and proper training and experience he misjudged the required turning speed, and the reefer grounded hard at a speed of 18 knots at 0312 hours.

This is a typical example of how insufficient training and expertise coupled with poor bridge management and faulty

6 This is not law but emerges from standard pilot practice throughout the world.

7 A reefer is a refrigerated vessel and is constructed with compartments and holds which are insulated with wool, glass, cork, or other materials. The temperature of such compartments and holds is regulated at a level of between 30 degrees Celsius and 12 degrees Celsius.

8 This case has no direct reference but was taken from an article written in *Standard and Safety Magazine*, Issue no. 9, September 2000 published by the Standard Ship Owners' P & I Association.

9 It must be noted that ships' navigational charts are legal documents which will be used as evidence in any Maritime Tribunal, Inquiry or Court. It is therefore understandable that the pilots' charts be marked only by the pilots themselves since they are a true and original reflection of what the pilots' thoughts and plan of passage where at the time of the voyage concerned.

10 Global Positioning System (Satellite). This is a navigational system which is able to plot a vessel's course as she is under way as well as in advance. It may give a vessel's bearings at all times via satellite.

teamwork on behalf of both the pilots and the bridge team can lead to catastrophic events and financial disaster at the very least.[11] One should also point out that it is significant that so many collisions occur close to a changing of watch and especially when such change takes place during the night hours. During the inquiry into this incident, a number of very serious questions which criticize the very professionalism and actual viability of the pilotage service where asked, such as; why did the senior pilot not undertake the turn himself seeing that it was such a difficult and tricky manœuvre and why he did not remain on the bridge until the ship was safely secured on her new course? In addition, questions arose as to whether it was a correct and safe practice to permit a newly qualified pilot to have sole charge during such a critical manœuvre.

It must be emphasized that the pilot is part of the bridge team and that his presence on the bridge is not a signal for the bridge team to relax. The bridge team must make an effort to include the pilot in its proceedings and to take heed of what he is saying. The pilot is an advisor and not a commander. To avoid accidents such as the above mentioned case and to carry out the operation of securing the vessel within the concerned port safely and professionally, it is essential for the pilot's intentions to be fully comprehended by the bridge team, which should then monitor the ship's progress, feeding to the pilot any information relevant to such ship's safety. The bridge team should work closely with the pilot and be ready to rectify immediately any errors, which may be made on his part. Pilots, on the other hand, should make every effort to inform the whole of the bridge team of the nature of the planned passage and of any dangers or obstacles that may be encountered during such passage.

It is important that pilots recognize their obligation to the bridge team and that they render assistance whenever the situation calls for it. Pilots have been known to pass certain hostile remarks such as 'If you want to discuss the passage, Captain, we will anchor and wait for the next tide'.[12] Such an attitude is unacceptable and will only serve to waste valuable time and money and to jeopardize the relationship of the ship's crew with the pilot concerned. This, in turn, may lead to hasty, illogical, anger-based decision taking which may put into peril the very safety of the vessel and third parties.

One should note that certain vessels of unconventional character or proportions require more than one pilot. Examples of such are ULCCs[13] and VLCCs[14] such as the *Shell Lampas*, the *Shell Lepita*, the *Atlantic Prosperity*, and the *Atlantic Liberty*, all of which have called at Valletta, as well as US Navy super-sized aircraft carriers such us the *USS John F. Kennedy* and the *USS America*, both visitors to Grand Harbour too. These vessels, restricted in their manœuvrability due to size, all require a minimum of two pilots since vessels over 800 feet in length require such for safety reasons. Passenger liners are exempted from this rule, even though the reasoning behind this exception is unclear. One would tend to think that port authorities would be more cautious where such a volume of human life is concerned. On the other hand, passenger liners are generally very sophisticated, highly manœuvrable vessels, which call at the same ports frequently so it could be accepted that they require only one pilot on this basis. It is recommended that prospective legislation should include a clear and concise list of those ships that require more than one pilot and the reasons for such categorization of vessels under this requirement.

At this point, the pilot may encounter a substantial amount of problems. Ships' masters do not always speak the language or for that matter any other language knowledgeable to the pilot in spite of the fact that the STCW Convention[15] states that a person holding the rank of coxswain and above must have an acceptable command of nautical English. Moreover, ships vary in character and condition and although methods of navigation and steerage have become more advanced through technology, some characteristics may prove to be somewhat cumbersome for a pilot who is perhaps more acquainted with one type of vessel than with another. This is the reason for which thorough training and upgrading of training is vital. A pilot's task is a very delicate one that requires maximum concentration and preparedness. A pilot cannot afford to waste time getting acquainted with a new type of ship during an actual operation. This would be an inefficient and possibly a very unsafe exercise. He must be fully trained to cope with any situation. He must be versatile and must adapt easily to

[11] The description of this case was taken from an article on Collisions and Grounding During Pilotage from the *Standard and Safety Magazine*, Issue no. 9, September 2000 published by the Standard Steamship Owners' P & I Association. There is no specific reference to the case or the name of the vessel involved.

[12] This quotation was taken from an article on Collisions and Grounding During Pilotage from the *Standard and Safety Magazine*, Issue no. 9, September 2000, published by the Standard Steamship Owners' P & I Association. There is no specific reference to the source of the quotation.

[13] Ultra Large Crude Carriers. This is a tanker of the same characteristics as the VLCC (vide footnote 14), but of much larger proportions. (Dodman).

[14] Very Large Crude Carriers. This is a tanker of immense size with a single bridge structure close to the stern. Most VLCCs have bulbous bows and are single screw. They have a very deep draught and their activities are limited to a few terminal ports. (Dodman).

[15] International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995.

the circumstances at hand. The harbour pilot must be the most highly trained and experienced officer within that port. He will, after all, be handling practically each and every vessel entering and exiting that port.

In order to produce this specimen, one must establish the correct legal and administrative set up. There is certainly room for improvement in Maltese law where pilotage is concerned. In order to be able to do this, however, one must analyze, very meticulously the history of harbour pilotage in Malta since it began to be regulated by the law, the present operational and administrative problems, and most importantly what is lacking in the law applicable at present.

Historical Background

Until not so long ago, civilian harbour pilots did not require any qualifications at all to achieve a pilot's licence. During the one-hundred-and-eighty year British Period in Malta, the Maltese were allowed to administer their part of the harbour as long as they did not interfere with or hinder the activities of the Royal Navy. The British Fleet had its own pilotage, towing and mooring facilities. The Maltese were therefore given a free hand in running their own port section. Dockyard tug masters were permitted to act as pilots for all merchantmen and liners. Other persons who were well acquainted with the Grand Harbour and its characteristics also took on the job as pilot. Individual agents who represented various shipping lines employed their own pilots. Competition was fierce and it was not unheard of that a group of pilots who became involved in some heated industrial argument would resort to physical and verbal violence. Pilots used to embark the principal vessel via the pilot launch, which was literally a Maltese *Dgħajsa tal-Pass*[16] with the words 'Pilot Boat' painted crudely on the bows. Ships without agents were arduously fought for, and people of an older generation can still tell amusing stories of three or four pilot boats departing frantically from Customs Steps and all racing towards an open hatch in the same ship. It was literally a case of survival of the fittest.

The Pilot Boat carried a blue flag flown on an eight-foot stern mast. Each boat contained four men, two of which had to be licenced pilots, the other two being oarsmen. The boarding point for the pilots was Ricasoli Point, but this largely depended on the weather conditions. Pilots wore a bowler hat with a ribbon with the word 'Pilot' printed in large lettering on it. They also had to wear a badge with their licence number on their right arm.

After boarding, the pilot was obliged to ask the master or the first officer whether the vessel carried gunpowder or any other combustible material on board. Masters who declared that their vessels were carrying more than three barrels of any such material were made to extinguish all naked flames and had to hoist a red flag on the main mast. After this safety practice was complied with, the ship was given the green light to proceed into Valletta. The pilots were also given a special allowance for boarding a quarantined vessel, and this allowance varied depending on whether they victualled aboard such vessel or not.

Traditionally, the harbour pilots' job was handed down from father to son and was granted on a closed-shop basis. Nowadays, however, applications are open to the public and to anyone that can fulfil the requirements so that the average harbour pilot is a person who is fully qualified according to the law and who has spent a considerable amount of time at sea.

1856 Regulations

The law regulates pilotage as a service. The earliest piece of legislation that gave recognition to harbour pilots as an official organization appeared in 1856.[17] In these regulations, there is a first reference to the licensing of pilots together with some procedural regulations of a technical nature regarding signals, navigation and uniform. More importantly, however, we have the first indication of pilot professionalism and responsibility. Section 19 of these Regulations states that of the four men comprising a Pilot Boat's crew, two, at least, shall be licensed pilots whilst Section 22 states that when a pilot takes charge of a ship, he is to produce his licence for the inspection of the master as well as a copy of the above mentioned Regulations, if they are so required by the master.

The new regulations for port craft therefore attempted for the first time to regulate the harbour pilots who until then had a free hand in running their operations as they deemed fit. The introduction of a licence would now assign a certain amount of accountability and professionalism to the harbour pilots. The Superintendent of Ports was to award the licence and this is confirmed by Section 21 of the 1856 Regulations which states that 'a pilot, when on duty, shall wear on his hat a ribbon with Pilot on it, and shall carry on his right arm a badge

[16] This is a traditional Maltese harbour craft made out of wood, propelled by oars and which was used, and is still used today, though to a lesser extent, to transport persons across the harbours or between moored ships and the shore. The vessels are painted in bright colours and are built with a hull which is of *c*. twenty-one feet in length but which has a beam of only *c*. 1.5 metres at its broadest in order to be able to achieve relatively high speeds.

[17] These were the 1856 Regulations for preserving good order in the Ports, for regulating the service of Passage and Ballast Boats and the Transport of Passengers and the Luggage, and the service of Pilots and Pilot Boats by order of the Chief Secretary to Government Mr Victor Houlton, 26th February 1856.

(to be fixed by the Superintendent of the Ports) bearing the number of his licence'. Therefore, the pilots now had to conform to the orders and requirements of the contemporary equivalent to port authority. This is a situation that is still present in the present day laws on pilotage in Malta..

In October 1880, the pilots formed an organization called the Malta Pilots Service. The concept was to gather all the different groups of harbour pilots under one umbrella and to minimize if not eliminate abuse. This brought about the co-operative system whereby earnings were pooled and distributed proportionately amongst the members of the Service. It also introduced a retirement plan as well as a benefit system for widows and orphans. The role of Chief Pilot, who was in actual fact the general manager of the pilotage service, was introduced. He was to administer the distribution of work, earnings and to manage the maintenance and cost funds.

1907 Report

In 1907, a commission appointed by the government with the specific purpose of investigating the organization of the Pilotage Service in Malta published a report on 'The System of Pilotage in Malta'.[18] The report found that there was an excess of pilots operating in Grand Harbour. The administrative and auditing systems as well as the remuneration systems were highly confusing and extremely vague and there was urgent need for reform.

The Commission urged the Government to nationalize the Pilotage Service and to designate Grand Harbour as a compulsory pilotage area. This latter proposal was based on the complicated, high-level navigational skills, which were required to negotiate the narrow waterway created by the construction of the new breakwater arms at the entrance to Grand Harbour.[19] Two steam launches were to be acquired for use as the official pilot launches but the old boats which were used in the past were also to continue their service.

Pilots Regulations 1938

By 1938, it was felt that a separate set of laws had to be drafted in order to regulate properly the pilotage service in Malta. The traffic inside Grand Harbour had become much heavier and navigational systems were rapidly becoming more complicated. After extensive discussions between the harbour pilots, the port authority, the shipping agents and the cabinet, a set of draft regulations that was to be referred to as the Pilotage Ordinance[20] were presented to His Majesty's Government for implementation. A committee (consisting of the Senior Crown Council, the Captain of the Ports, the King's Assistant Harbour Master, the Chief Pilot and a representative of the Chamber of Commerce), which was eventually to constitute the Pilotage Board, was set up specifically to carry out the task of formulating this set of regulations. These regulations were drawn up according to guidelines given to the committee through the Attorney General[21] by the Government. The committee, on drawing up the regulations, took exception to a number of points and requested their amendment. Most interestingly, the language question regarding the use of English, Italian and Maltese which had dominated both politics and the media towards the late 1930s arose too. According to Regulation 4 (g), the Italian language was to be abolished from the requirements to obtain a pilot's licence. The pilots, through Dr Enrico Mizzi who was then President of the Pilot's Society, asked that Italian (Reading and Conversation) should be included amongst the subjects of examination for the granting of a pilot's licence. The government turned down this request stating that the official languages were to be English and Maltese, and there was no reason whatsoever why special arrangements were to be made to benefit Italian ships, to the obvious discrimination of those vessels of other nationalities, for which no special arrangements were to be made.

The Regulations also called for the establishment of the Pilotage Board and for a system whereby the Government on advice of the other members of the Pilotage Board who, in turn would consult the Pilots themselves would elect the Chief Pilot. The Regulations laid down a list of requirements (academic and technical) for persons to be suitable candidates for obtaining a Pilots licence. The Regulations also put the pilots directly under the authority of the Superintendent of Ports[22] as well as laying out the duties and responsibilities of the Chief Pilot and the Pilotage Board, many of which apply until this very day.

[18] This report is available at the National Archives, Santo Spirito Hospital, Rabat.

[19] Incidentally, the construction of St Elmo and the shorter Ricasoli breakwater arms created a navigational hazard, particularly to vessels of a particular length and draught when entering Valletta Port. When the vessel's stern clears Ricasoli breakwater arm, the ship must, aided by tugs, turn hard a-port to clear a reef which protrudes right underneath the Mediterranean Conference Centre known as 'Taħt iż-Żiemel'. This is an extremely difficult and complicated task and a serious highly trained bridge team together with one or more good pilots are required.

[20] Pilotage Ordinance No. XX of 1937, (National Archives).

[21] Refer to document dated 26th November 1938 emanating from the Attorney General's Office and addressed to the Lieutenant-Governor (National Archives).

[22] Refer to section 9 of the 1938 Pilots Regulations which states that Pilots shall not berth ships or shift them from their berths without the approval of the Superintendent of the Ports.

These proposed Regulations met heavy opposition from the Pilots and the Pilotage Board alike, in particular the sections relating to the appointment of the Chief Pilot and the dispensation of the Italian Language from the requirements for new candidates. However, the Government turned down all requests. The Regulations, after negligible amendment were passed as law and came into effect as from the 1st February 1939.

Ports Ordinance 1962

In 1961 the Pilotage Corps was reorganized under the new Port Division. In 1962, under the Ports Ordinance, a Pilotage Board was set up in order to licence and appoint pilots and to create legislation that was to regulate the Pilot Service in a proper manner according to the law. This was done in the light of Malta's forthcoming independence and the foreseeing of the closure of the naval base. In 1968, new regulations came into force but these were subsequently amended in 1975. This new law included provisions which were taken out of the old legislation as well as new additions such as those involving pilot training, practices and procedures as well as legislation referring to fund management and tariffs.

Pilotage and Mooring Regulations 1975

The most important piece of legislation to have emerged from the development of Pilotage in Malta was in the form of the Pilotage and Mooring Regulations Legal Notice 1975. This law also provided for the licensing and examining of pilots, the specific role of the chief pilot, a limited amount of pilot procedure, and the administration and financial management of the Pilotage Corps. The pilots now became recognized as semi-autonomous employees under the name of the Malta Pilotage Corps. The major development was that the new law abolished once and for all the unhealthy father-to-son system. The new regulations laid down certain criteria that applicants for the post of harbour pilot were to meet. They were to possess skills which included a good knowledge of the International Code of Signals, the International Convention on the Prevention of Collisions at Sea, proper use of navigation lights, manœuvring, chart work, Maltese Territorial and Internal Waters Geography, helm orders, steaming, anchoring, clearing of foul anchors, hawser procedures, mooring and berthing procedures and dry-docking procedures. A good command of the Maltese and English Language was also essential.

Procedures for the election of the Chief Pilot were laid down as well as an outline of his duties. The Chief Pilot was to set the duty rosters and to make sure that the high standard of the pilot service was maintained.

The stabilization fund was also set up under these regulations. This served to finance ancillary equipment and other requirements of the pilotage corps such as ropes, life and indemnity insurance of the pilots, uniforms, radio equipment and pilot station bills. The stabilization fund is made up of a percentage (ten per cent), which is charged over and above the fees for pilotage and is paid by the ship owner, charterer, agent, etc.

The regulations laid down, also, the procedures that should be followed in case of any disciplinary action, which was taken against any one of the pilots for any shortcoming on his part in the line of duty. This was also an innovation in the law.

These regulations, albeit their great improvement on past legislation, created a certain amount of legal and administrative difficulties that are having awkward repercussions up to this very day. By virtue of this legal notice, pilots were officially placed under the same umbrella and given the same terms of employment and working conditions as mooring men.[23] The mooring men share the same quarters as the pilots. It is therefore not difficult to understand that, in comparison to the task of a pilot, the task of a mooring man presents virtually no academic or physical challenge or responsibility. This state of affairs has created an operational problem, which is still very evident, more than ever before, in today's Pilotage Corps. The mooring men have a totally different task from the pilots and therefore they must be catered for under a different section of the law. Pilotage is a very serious, delicate and perilous profession, which may have consequences of a very grave nature with huge, possibly inconceivable, liabilities. Therefore it must be regulated very stringently and specifically and with much concentration. The pilots should be the most qualified persons in the port area who bear a large amount of responsibility for port safety. As a result of this they should be allowed to operate within an establishment which is correctly set up by the law and which allows them to work professionally and safely and with as few administrative difficulties as possible.

Malta Maritime Authority Act 1981

Part 7 of the Malta Maritime Authority Act 1981 deals with pilotage under Maltese Law. This act virtually uplifted and incorporated the 1975 Pilotage and Mooring Regulations into itself with one difference. By doing so, this area of the law tries to observe matters from an objective point of view. That is

[23] The task of the mooring-man or line-handler, is effectively that of catching the rope cast from the vessel and securing the ship in her berthing or mooring place. The mooring men had been operating hand-in-hand with the pilots since the early days of pilotage in Malta. However, it is evident that, as time, progressed both professions grew far apart both physically and academically.

[24] Malta Maritime Authority Act XVII 1991, Sections 54 to 64.

[25] Malta Maritime Authority Act (Cap. 352), Sections 54 to 64.

to say, the law caters for the requirements and regulation of the pilots, as well as the roles of the Port. What must be noted is that the Malta Maritime Authority Act[24] includes both the 1975 Pilotage and Mooring Regulations since these were never repealed, as well as the new sections,[25] which are general in nature, and which cover the general principles governing harbour pilotage in Malta. The more specific principles of the law are provided for under the Pilotage and Mooring Regulations 1975 incorporated into the Malta Maritime Authority Act in 1981. Therefore, these two areas of law together with a number of legal notices constitute the law of pilotage in Malta. The Malta Maritime Authority Act is the final piece of legislation on which pilotage is based.

Pilotage is a serious business, which entails dedication, knowledge and skill on the part of a handful of highly qualified professionals. The consequences of bad organization and poor training can be very serious indeed if not possibly tragic. In order to give the Pilotage Corps the legal strength that it requires and indeed deserves, a piece of legislation which regulates this body thoroughly and separately from any other entity must be drafted and put into force. This is a project, which is currently underway, and which, when completed, will hopefully bring to an end many of the administrative and practical problems which this important but often underrated institution has had to encounter since its inception.

16 The Impact of EU Accession on Ship Registration in Malta*

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The Maltese political scene is undoubtedly dominated by the frenzied debate concerning Malta's possible full membership within the European Union. Impact Assessments have naturally been carried out for a number of areas, each analyzing the effects of EU accession. One such Impact Assessment is the one studying the effects of the adoption of the EU *Acquis Communitaire* with regard to Ship Registration. In fact, considerable attention is being reserved to the prospected impact of Malta's entry into the EU on the Maltese Shipping Registry.

The Report, commissioned by the Malta Maritime Authority, and now available to the public, is divided into two parts. The first part considers legal issues whilst the second part tackles the economic implications of full membership on the Maltese Shipping Register.

The Report focuses on four main areas:

a. Ship Registration and associated tax regimes,
b. Maritime safety and marine pollution prevention in the operation of vessels,
c. Conditions of Employment of seafarers,
d. The regime regulating shipping companies.

The relevant EU legislation was identified and subsequently compared and contrasted with the Maltese Merchant Shipping Act, as amended, as well as other relevant subsidiary legislation. The scope of this exercise, the Report states, was to determine the degree of compliance of Maltese legislation with EU law, to identify any deficiencies, to make suggestions and finally, to establish the cost factor involved in respect to their implementation and supervision. The Report was compiled following consultations with various local and foreign legal experts.

The Report tackles key legal issues such as the Right of Establishment, the Freedom of Movement, Crew Nationality and the Transfer of Vessels within Member States. The creation of a Community Ship Register, the 'Euros', was also given its due importance, notwithstanding the fact this concept has now been shelved by the Council of the European Communities. The Report also deals with the role played by the European Court of Justice in the establishment and strengthening of certain fundamental principles of European law by analyzing a number of landmark judgements.

The importance reserved by Maltese to the shipping sector can be easily appreciated if one realizes that Malta currently boasts the fourth largest register of ships in the world in terms of tonnage. Furthermore, the Maltese shipping industry has not only contributed substantially in providing much needed revenue to our coffers but has also created a good number of working opportunities for locals. It is thus in the national interest for this 'success story' to continue developing positively and for Malta to safeguard its position as a world leader in the field of maritime services. This position guarantees Malta a strong voice in the international arena when it comes to maritime related matters and this factor alone is essential to its interests as a State in general and as an island enjoying the geographical position that it does. It must also be mentioned, however, that the Maltese Registry has navigated through its fair share of troubled waters and in recent times faced an intense image-clearing exercise particularly in the wake of the *Erika* disaster on the 12th December 1999 and the more recent *Kristal* and *Balu* incidents.

The Maltese flag owes its success to a number of factors amongst which; modern and effective legislation, attractive fiscal incentives and the acceptance of the Maltese mortgage system by international financiers. The recent amendments to the Merchant Shipping Act have removed certain cumbersome and frustrating procedures and can generally be regarded as a fine tuning to the Act. Moreover, there are promising signs that ancillary areas may also develop in the near future such as ship management and insurance brokerage services and these would also undoubtedly make their valid economic contribution to the country. The recent amendments to the Merchant Shipping Act clearly reveal the determination of the regulatory authority in Malta to constructively

* This article was published in two parts in *The Malta Independent on Sunday*, 5th August 2001 (Part One), and 12th August 2001, (Part Two).It is to be considered as correct at the time of the publication of this issue of *Id-Dritt*.

rebut allegations that the Maltese flag is one of convenience and to aim for a quality flag and a registry of confidence. The European Union reserves special attention to the Maltese Shipping Registry. In fact, all those Maltese nationals declaring that Malta has nothing to give the EU should think again. Europe has a lot to gain from Malta's accession in relation to the Shipping Registry from three significant aspects. First of all, it would represent a welcome return for European ship owners who currently have their vessels flying the Maltese flag and secondly, together with the accession of Cyprus, it would boost the number of ships registered in European Registries to such an extent that Europe would once again become a major player in the shipping industry following years of difficulties and uncertainty. Finally, the European Union's voting power in the international shipping fora would increase, particularly at the International Maritime Organization (IMO), where international maritime regulations and conventions are created and developed. This voting power is particularly important because Malta and Cyprus represent a very high shipping tonnage.

Maltese registered ships are broadly in line with the provisions of the *acquis*. In its acceptance of the *acquis*, Malta has made it clear, however, that measures to enhance the performance of the Merchant Shipping Directorate with regard to the control of Malta flag ships are well underway. Steps are also being taken to improve the port state control detention rate of Maltese flagged vessels which is considered to be too high (close to 10%) when compared with the current average detention rate of EU vessels (just over 4%). In spite of increased port state control targeting of Maltese ships, particularly in EU ports, the detention rate appears to be steadily on the decline. Generally speaking, no insurmountable hurdles are envisaged for the Malta flag to be in line with European Union requirements, even though it is expected that operating costs will necessarily increase as a result of the role to be played by the MMA particularly in respect to port state control, and to a lesser extent, flag state control.

Factors that a ship owner would, without fail, take into consideration, are the areas of ownership eligibility, operational management of the ship, the popularity or otherwise of the flag with regard to port state control and potential charterers and insurers as well as crew nationality or trading restrictions. Financing considerations would also come into the picture and a ship owner would consider the attractiveness of the flag to potential financiers with regard to the validity and enforceability of mortgages as well as to the costs, time and reliability factors linked to enforcement actions. The taxation of profits, tax treatment in general and the fees charged are also issues taken into account by any ship owner. It is immediately evident that the registration and operation of ships and shipping companies are vital elements in the study of possible effects of EU accession on the Maltese register.

The Report highlights a few major areas of concern in respect of the shipping sector and these are duly outlined and commented on below.

Preparation and Disclosure of Accounts

In the present scenario, when one registers his vessel under the Maltese flag in the name of a company, there is no requirement, as such, to file accounts with the Maltese Registrar of Companies. Shipping companies registered in Malta today are regulated by the Commercial Partnerships Ordinance, Cap.168 of the Laws of Malta.

The provisions dealing with shipping organizations introduced by the Act amending the Merchant Shipping Act, wherein there is an option for the company to be governed by the said Ordinance or by the Companies Act, 1995, are not yet in force. The Companies Act of 1995, unlike the said Ordinance, is deemed to be EU law compliant.

It is envisaged that the Commercial Partnerships Ordinance will be gradually phased out and thus Maltese companies would be subject to the requirements on disclosure of accounts as required by the Companies Act regime. It is clear that shipping companies formed in the European Union will have to comply with certain requirements of an accounting nature concerning the obligation to prepare and disclose audited financial statements. The EU requires the preparation of annual accounts in the form of a balance sheet, a profit and loss account and notes on the accounts. The annual accounts must then be approved and the annual report, together with the auditor's opinion, must be published according to the laws of the Member State in question. Publication of the annual report may be derogated from by member states yet, it must be made available to anyone wishing to obtain a copy.

The Fourth Council Directive of the 25th July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC) allows member states to draw up abridged balance sheets as long as certain conditions are satisfied and also relieves such companies from the obligation to publish their profit and loss account, annual reports and the auditor's opinions. These conditions are mainly concerned with the size of the business since the idea was to allow derogations for small companies. The same Directive also permits medium-sized companies to be exempted from the requirements to disclose turnover and gross margins in their profit and loss accounts and to disclose turnover in the notes to the accounts.

Malta-flag ship owners will find this situation distressing from two separate points of view. First of all, the entire exercise brings about considerable costs and secondly, and prob-

ably more alarming to ship owners, the previous advantage of confidentiality in this respect will vanish into thin air.

The Report recommends that the MMA looks into circumstances where EU companies do not require an audit, as well as into the UK concept of elective resolutions not to publish accounts. The Report also identifies mechanisms created by Greek shipping companies whereby the company is formed outside the EU with a branch duly set up in Greece and with a simple declaration being filed in the registry to the effect that all accounts have been kept and submitted to the competent authorities and are available for inspection. Confidentiality of Beneficial Owners

Another problem area is that of nominee relationships and the confidentiality of beneficial owners which might need to be revised in the near future, due to the pressure being applied by the OECD for the disclosure and identification of ship owners. There is always a possibility that if Malta removes this incentive in the light of EU accession requirements, then ship owners could pull out of Malta and register their ships in non- member registers which can guarantee confidentiality of the beneficial owner. The Report recommends that the MMA, in tandem with the MFSC, continues to monitor international developments closely in order to create and utilize alternative corporate bodies and vehicles such as Trusts or Overseas Holding Companies in anticipation of these fears actually materializing.

Shipping Companies

EU legislation does not explicitly establish the nature of the legal entity required to be set up for the exercise of shipping operations and the matter is left to the discretion of the member states. The amendments to the Merchant Shipping Act have introduced a new corporate body on the local scene in the form of shipping organizations, the specific provisions of which however, have not yet come into force. The overall impact of these organizations is expected to be positive and could be regarded as a welcome solution in the light of the phasing-out of offshore companies.

Furthermore, by virtue of the recent amendments, the shipping company may now be a foreign entity. This is in line with EU principles establishing that the register of a member state must be accessible to all European legal entities. This is a step which may naturally lead to a reduction of ship owning companies incorporated in Malta. The fact that the shipping company may be a foreign entity, however, has its importance and continues to add to the attractiveness of the Maltese flag. It is indeed a pity that the provisions dealing with Shipping Organizations are not yet in force and their introduction and implementation should be encouraged and accelerated.

Registration of Ships and Crewing Requirements

By lowering the age-limit of ships for first-time registration, the Maltese registry shows its manifest intention to achieve higher quality levels, though it must be said that these age levels still contrast with the practice adopted by other Open Registers whose ceiling age for first time registration is still significantly lower than twenty-five years.

With respect to the transfer of ships from the registry of a country to the Maltese registry, this is by no means automatic and the requirements for registration as laid down by Maltese law and by International Conventions to which Malta is a party have to be respected. The relevant certificates must also be produced.

An essential feature of the Maltese Registry, and of the open registry system in general is the fact that no restrictions as to the nationality of crews are imposed. Member states of the EU are free to impose their own requirements pertaining to crewing. The European Commission is determined to safeguard the rights and living conditions of seafarers through the implementation and enforcement of common rules and international conventions at Community level. The MMA-commissioned Report clearly establishes that the Maltese Merchant Shipping Act lacks detailed provisions which reflect the requirements contained in the various EU directives and regulations. However, it must be said that the Act contains a number of enabling provisions empowering the Minister to enact detailed regulations and subsidiary legislation. The Merchant Shipping Act, as amended, now provides that the Minister may make regulations related to, for instance:

a. the presence of medical supplies and facilities on board Maltese-flagged ships,
b. safe working conditions on board Maltese vessels,
c. safe working conditions for Maltese citizens working on foreign ships.

Subsidiary legislation transposing various Directives will also be adopted and will enter into force in the near future, amongst which:

a. Directive 92/29/EEC (minimum safety and health requirements for improved medical treatment on board vessels),
b. Directive 99/63/EC (organization of working time of seafarers),
c. Directive 99/95/EC (provisions in respect of seafarers' hours on board ships calling at Community ports).

It is pertinent to mention, at this stage, that the majority of these provisions, or their equivalent, would have to be implemented irrespective of EU membership due to the coming into force of the 1995 amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW Convention), on the 1st February, 2002.

Taxation Issues

The OECD has vigorously pursued its work in this field with the ultimate goal of establishing a multilateral approach under which countries can operate individually or collectively to limit the extent and effects of harmful taxation practices. The EU has also repeatedly expressed its concern on harmful tax competition. It must be said that Malta has taken a firm stand in this matter and is determined to be in harmony with OECD practices and standards.

Since harmonization and uniformity amongst member states in the field of maritime services has proved to be very difficult, the European Union has not legislated on specific aspects of taxation in the context of maritime law. It is interesting to note, however, that whereas certain member states support their maritime industry through tax reductions, others make direct payments such as reimbursements of seafarers' income tax. The EU Commission increased the use of state aid through guidelines established in 1989 and 1996.

State aid was considered to be fundamental for the operation of ship owners in member states in order for the European fleets to regain some lost ground but the European Commission realized that it must closely monitor the effects of state aid in order to avoid possible distortion of competition between member states. It is interesting to note that the EU takes a clear stand with regard to state aid and deems it acceptable in those cases where:

- safety will be generally improved,
- it leads to the development of maritime skills and preserves maritime know-how within the EU,
- employment within the EU is safeguarded.

The Position Paper on the Transport Chapter of the *acquis* reveals that Malta considers its existing tonnage tax system as compatible with the Community guidelines on state aid to maritime transport, except in the case of registration fees for ships engaging Maltese crew members. This will be brought in line with the *acquis* at a later date through subsidiary legislation under the Merchant Shipping Act.

Zero taxation dominates the international shipping industry nowadays. Zero taxation is the practice of operating in a fiscal climate with little or no tax on profits. The possibilities of establishing a ship-owning business in tax-free yet commercially attractive locations abound and it has now become very difficult for countries where profit taxation is still levied to remain competitive.

EU law views tax incentives or exemptions of this nature as a form of state aid. Whilst being true that member states are free to design and establish their own tax regimes, it must also be noted that forms of state aid such as tax incentives, for instance, require prior approval by the European Commission.

The Maltese Merchant Shipping Act establishes that a ship will be exempt from taxation either when declared to be so by the Minister responsible for Shipping, irrespective of tonnage, operations or trade; or alternatively, when the ship is owned or chartered by a company registered under the Act as long as the registration fees have been duly paid, the vessel is not less than 1,000 net tons and it is engaged in the carriage of goods or passengers. Only those persons ordinarily resident or domiciled in Malta, or a body of persons formed and registered in Malta, or having its principal place of business in Malta, or which is controlled by Maltese residents, may in fact own an exempted ship. Exempt ship owners must submit a declaration to the Commissioner of Inland Revenue instead of a tax return in terms of the Income Tax Act. No tax is charged on the income of a shipping company or on any profits made from the ownership and operation of an exempted ship, or on any dividend paid to shareholders for that matter. Where the shareholder is another company, any dividend paid to the shareholders is not taxable as long as the dividends are paid out of gains and profits derived from the ownership and operation of an exempted ship, or out of such company's share in the profits.

Malta has also ratified a large number of double taxation treaties and other attractive bilateral agreements with other states. Finally, the new provisions of the Merchant Shipping Act concerning shipping organizations, still to come into force, also extend favourable tax conditions to the said organizations. Effects of the Post-*Erika* Proposals

The *Erika* 1 and *Erika* 2 packages created by the European Commission have far-reaching effects and represent the reaction of the EU to the immense pressure applied by international public opinion in the wake of the *Erika* incident. For illustrative purposes, the post-*Erika* proposals deal with the following issues:

Erika 1 Package:

- Important amendments to the existing directive on classification societies,
- Substantial modification of the existing directive on port state control,
- The phasing out of single hull tankers from EU waters.

Erika 2 Package:

- The creation of a European Maritime Safety Agency,
- Improvements to the system for liability and compensation for oil pollution damage,
- Establishing a new regime for the surveillance and control of navigation in EU waters.

It could be anticipated that the costs incurred by the MMA in implementing EU port state control policies and standards will increase as the Maltese authorities will be determined to maintain a high level of enforcement. Improved port state control mechanisms require more frequent and intense controls

in the quest of eliminating substandard shipping. Expenses incurred by the MMA in enforcing flag state control are also expected to increase as the inspections will be more frequent and possibly of a higher standard.

The phasing-out of single hull tankers is also expected to leave its mark on the Maltese Registry particularly because the number of Maltese-flagged single-hulled tankers over a certain age is considerably high. The accelerated elimination of such vessels could significantly affect the Maltese Registry.

Other EU standards related to maritime safety, marine pollution and the conditions of employment of seafarers are not expected to have any drastic effect on the Maltese Registry except that costs for compliance will inevitably increase.

Malta has already ratified major maritime conventions and is currently modernizing its legislation, an exercise felt necessary irrespective of EU accession. Seafarers' conditions and crew certification procedures must also be reviewed but no drastic changes are envisaged. Replying to a Parliamentary question in May 2001, the Transport Minister stated that a large number of ships were struck off the Maltese shipping register or actually turned away and refused registration following the introduction of stricter measures and the lowering of the maximum age limit in the wake of the *Erika* disaster. These actions translated themselves into a tonnage loss totaling 1.4 million gross tons. There is therefore, an evident determination on the part of the Malta Maritime Authority to ensure that the Maltese flag will not serve as a safe platform for those who do not maintain acceptable standards. The Maltese Government wants to paint a new picture of its Registry and there is a conviction that the standards to be applied could be upgraded to any standard the EU itself is likely to apply.

Malta has accepted the *acquis communautaire* with respect to Transport Policy, except for certain transition periods being requested for certain issues related to land transport.

It may be noted that in respect of the issue of the right of establishment, subsidiary legislation under the Merchant Shipping Act providing for ownership or charter of vessels by EU nationals will be published at a later stage and will enter into force on eventual accession.

The part of the Report dealing with the actual costs in figures to be incurred by the MMA, should Malta become a full member of the European Union, was tackled on a scenario-based approach based on five different percentages of reduction in tonnage on the Maltese Register. From a general perspective, there is no doubt that costs would increase considerably. The fact that such a wide spectrum of scenarios was adopted for the cost-analysis exercise, together with the fact that a number of assumptions were made in respect of the MMA's revenue and expenditure reveal that, as the Report itself states,

> any projection of the potential impact of joining the EU on the Malta Register is excessively subjective.

With such a wide spectrum of possibilities being adopted, however, figures and calculations vary considerably and thus, the Report still leaves us with a certain feeling of uncertainty in this respect. It must also be said, however, that clear-cut indications of the economic impact on the Maltese Registry are not possible to obtain at this stage and as such, the decision to work on five different scenarios could be justified in order to cover varying circumstances and percentages of tonnage withdrawal from the Maltese Registry.

Conclusion

Malta is determined to clear its image and reinstate its position as a flag of confidence rather than of convenience, irrespective of EU membership. Malta wants to be a registry of quality and though it is in its interest to also have a registry of quantity, quality must be given absolute priority. The Malta Maritime Authority is gearing itself in preparation for the greatest challenge it has ever faced in recent years.

The European Union itself has realized that over-regulation and the imposition of too many burdens on ship owners would lead to a situation where ship owners will leave Malta, and consequently Europe, and establish themselves in other parts of the world. Ancillary services would also be eventually withdrawn from Europe. Whilst maintaining certain standards, conditions have to remain competitive with those offered by other players in the market.

It is crystal clear, in my view, that there is a very fine line between absolute success and downright failure in the sphere of European shipping. The fulcrum, as I see it, is represented by the European Union itself. Through the regulatory system that will be in force, the EU will decide whether the balance will shift towards success or tilt the other way towards failure.

Success, in my view, is represented by safeguarding the tonnage and ancillary services so assiduously created and maintained by Malta and other aspiring states like Cyprus in order to have a healthy European shipping industry and give Europe rediscovered pride in this particular area. This must naturally be balanced by appropriate and effective monitoring and the maintenance of acceptable standards.

What I would personally envisage as a failure on the EU's part, is letting the fruit of years of sacrifice and efforts by registries such as Malta and Cyprus, escape from its comfortable reach and allow other regions of the world to take full advantage of Europe's 'generosity'.

This scenario has indeed led to a situation where international competitive mechanisms allowing fiscal advantages have been recognized, in tandem with an overall dilution of opposition to incentives offered by open registers in general.

The former was mainly done by issuing revised guidelines related to State Aid to maritime transport whilst the latter step was rendered necessary in the light of similar incentives being offered by international and second Registers within the European Union itself.

The fact that offshore registers operated by European states from their dependencies or colonies are being treated by the EU as falling outside the territorial boundaries of the Union clearly goes to show that the EU is diluting its opposition to the open registry system. Moreover, land-locked Luxembourg, a founding member of the EU, is also currently offering fiscal incentives similar to those enjoyed in the typical open registers.

Several European member states are also opening and operating second registers which offer fiscal and employment-related benefits. One would instinctively think that these are in blatant non-compliance with EU law but in fact they have received their blessing from the European Court of Justice which established, for instance, that the German Second Register is not in contravention of the European Union's Competition rules *(Firma Sloman Neptun Schiffahrts AG v. Seebetriebsrat Bodo Ziesemer, de la Sloman Neptun Schiffahrts AG*; Joined cases C-72/91 and C-73/91).

Several member states have now taken special measures to improve the fiscal climate for ship-owning companies which can, strictly speaking, be regarded as state aid. The 1997 Community Guidelines also state that the system adopted in some member states replacing normal corporate tax regimes by a tonnage tax amounts to state aid. Tonnage tax, as the name implies, is tax paid according to the tonnage operated and is payable irrespective of the company's actual earnings. These fiscal incentives have been endorsed by the EU since they have the effect of guaranteeing employment in the maritime sector. The maximum level of state aid to be permitted is reached through a reduction to zero of taxation and social charges for seafarers as well as corporate taxation of shipping activities.

Malta's future, in the light of possible forthcoming accession to the European Union, holds many exciting challenges. One of these challenges, in line with the island's vision for growth and prosperity, is the continued success of its shipping industry in general. Malta unquestionably has the determination and potential to firmly strengthen its position as a hub for shipping services and to consolidate its position as a strong but also reputable flag. In addition to the considerable size of its Registry, Malta can also boast a wide gamut of shipping services, such as shipbuilding and ship repairs, Malta Freeport operations, as well as bunkering and supply services. Finally, the competent and efficient professional and administrative bodies involved in the local shipping scene must also be given their due importance since they have also contributed greatly to the success of the Maltese flag throughout the years.

European Law

17

The State of the Union

European Community Competition Law at the Crossroads.

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Competition Law has proved to be a dynamic legal institute of great economic, legal and social significance. Indeed, the over-all positive effect this institute has had in the United States of America since the Sherman Act (1890), and in Europe since the Treaty of Rome (1957), is plainly manifest. Other contending economic strategies have in the long run proved to be inconsequential. Fair Competition is paradoxically dominating the economic environment, at least, in democracies.

Like all other legal institutes, this too naturally directly effects the well being of those falling within this regimen. Strategists therefore, have to be quite alert to avoid situations that rather than leading to the intended positive effects advocated by academic analysis instead lead in the opposite direction to the detriment of those that have to bear its weight. The emphasis within the European Community for prospective Member States to adopt this legal regime in their legal order has therefore to be treated with great circumspection. The pre-accession period does not consequentially necessitate a period of mere structural readjustment. It also demands a period of deep reflection for the redefinition and proper assimilation of the delicate issues involved.

Since the positing of those early foundations referred to above at least eighty regimes of competition law have sprouted and flourished to different degrees in a variety of economic realities worldwide. Obviously, whilst each competition law regime naturally derives inspiration from a common liberal economic theory and from its appropriate translation into legal terminology, each regime has also been obviously influenced by a variety of other autochthonous sources. In this respect, geo-political and particular social realities offer the more difficult perceptions requiring proper consideration and call for a deeper understanding of the various issues raised.

This melange, although necessarily safeguarding the very same principles of Competition Law common to all other regimes, can be said to have at the same time given each regime its own particular imprint determining its specific historical evolution and direction. Naturally, this has rendered each competition law regime unique in many respects, notwithstanding the fact that each aims principally at securing a common, fair and level playing field in economic and commercial matters for the benefit both of consumers and of the other major protagonists involved.

This general flourishing, although beneficial and most welcome, has in many jurisdictions, however, been achieved within a very limited period of time. Drastic attitudinal changes have more often than not been unceremoniously imposed on economies that were previously run on diametrically opposite lines. Very often the change from a controlled- to a market-economy in these regimes has been too abrupt to fathom. There was no adequate period of adaptation, adjustment and maturation. A profound cultural change can be said to have been imposed from on high. It has not had the time to be gradually internally nurtured at grassroots level. This made it very difficult for those who were negatively affected to both fully identify themselves with and own this new institute to any particular degree. Fissures in the general edifice of these regimes can therefore not only be expected to appear but can actually already be observed.

This has obviously had its toll not only on the various legal regimes involved but also on the very European Community that is directly trying to spearhead this cultural direction even in applicant countries. A modicum of uniformity of application and of execution is imperative if the European Community is to survive as a strong economic entity of global significance. The European Commission itself has realized this. Strategists for the European Community have realized that the Commission can never hope to retain its present prerogative of acting as the sole guardian on competition issues – especially in an enlarged European Community. The direction ahead is clear.

As things now stand, the Commission itself is hopelessly inundated with such an unsustainable workload that it is exploring new avenues to avoid a total collapse in the not too distant future. As a result of the changes in the geographic and socio-political realities witnessed at the present historical juncture, a qualitative procedural quantum leap is actively being nurtured, indeed solicited and perhaps even deemed outright indispensable.

The various successes witnessed in this specific field of law are nothing but milestones of European Community

Law. Although they require no in-depth consideration here, it may be emphasized that its single most important contribution can be said to be that of establishing a proper and equitable regulation of the single market for the benefit of the community.

Past experience has led to a general re-thinking of extant strategies. A scholarly and at the same time pragmatic debate of unprecedented proportions has been unleashed involving experts from the European Community itself, from Member States and also from prospective members to the said Community. Early rumblings have now reached hurricane proportions. This has now led the European Commission to unleash a thorough re-examination of the state of the Union in this regard.

Future strategies concerning the direction which European antitrust law will eventually take are under detailed scrutiny by all concerned. The atmosphere is electric. Decisions that will be taken in the not too distant future in this regard will necessarily have a momentous effect on one and all – from the protagonist prime movers to the passive recipients involved.

It is now a moot point amongst scholars and practitioners alike that the present system of enforcement of European Community competition law has remained virtually unaltered since the early years of the Community. Notwithstanding this, the socio-economic and the geo-political contexts within which the whole competition law edifice operates have undergone radical transformation.

The present European Community notification and authorization systems operate in a rather slow, cumbersome and rather expensive manner. It is claimed by many that the fruits reaped, although quite tangible, have not proved to be as abundant as expected. At best, they are generally considered proportionately overtly expensive. Modern business cannot afford long-winded, time-consuming, hair-splitting, misdirected procedures. Bottlenecks occur at a cost.

The speed and immediacy of modern technology have also contributed to a re-drawing and re-shaping of the confines of legal wrangling. This has lead to an increasingly ever-changing dynamic reality to which the legal forum is urgently expected to respond. This legal institute does not afford to be way laid by technical progress. Even the business world, which is naturally greatly sensitive and immediately effected by any direction undertaken in this regard is justifiably demanding a proper re-focusing of future legal strategies and procedures rendering the whole regime more efficient, adequately uniform and affordable.

Waters have been rendered murkier by the fact that at the present juncture the European Community is undergoing a process of enlargement where prospective entrants have mostly only become susceptible to a market-economy in recent years. Teething troubles are obvious. The economic systems of these hopefuls can still be seen as torn between pursuing the interests of their business communities and the aims of accession. At this stage, these interests may still be seen as being at odds with each other, notwithstanding one's pious intentions. Finding the golden mean is not simple at all.

The task of efficiently and consistently applying European Community competition law strategies has thus been rendered more difficult. This added dimension has put further demands on those whose task it is to identify the proper directions to be pursued and adopted throughout the Community. Yet, although difficulties still lay ahead, progress cannot be withheld.

The proposal that presently seems to have met with the approval of a consistent majority of academics is that which requires the substitution of the present notification system required by Regulation 17/62, with the legal exception system in Community competition affairs. If this is acceded to not only the present procedure but also the present mentality will necessarily have to change. A redefinition of the limits of the competence of the European Commission will be required. National competition authorities and national courts will necessarily be catapulted to center-stage as they will assume onerous duties in this regard.

The not so subtle message that is currently being driven home is therefore that the European Commission's present monopoly with regards to competition law issues might in actual fact be obstructing the effective application of competition rules in a European and perhaps global competitive environment. The assistance of national authorities and courts is going to be indispensable. These need to be effectively roped in to jointly shoulder the heavy burdens of this legal institute with the European Commission.

As things presently stand it is deemed to be virtually impossible for the European Commission to continue to shoulder this heavy burden and play its present sole pivotal role. This will definitely be more so if the prospected enlargement of the Community goes ahead as scheduled. The Commission's own success in placing it uniquely at the center of the European Competition Law universe has proved to be a major vehicle of change in this direction. Diversification is being seen as essential. Business, especially small and medium-sized enterprises, cannot afford the excessive economic burdens involved in the present procedural set-up. Resources on both sides of the divide are over-stretched and at present both are being prevented from being utilized to their optimum.

This latest proposal, although positive in many respects especially in alleviating the heavy burdens of the European Commission, has however met with harsh criticism. This is mainly focused on the grounds that if a multiplicity of national authorities and courts are to be involved in the determi-

nation of the highly complicated competition law issues then inconsistency of decision and of execution will prevail. Forum shopping will abound. Legal certainty will be thrown to the winds.

Yet, although the effective exercise of a widely shared competence will naturally increase the probability of diversity of interpretation and of application, it is the considered opinion of many scholars and practitioners alike that this decentralized structure need not necessarily lead to such a bleak and negative outlook. It is hoped that this change will actually lead to a more systematic, timely, effective and affordable enforcement strategy. Here too, the principal of subsidiarity is being seen as vital to this drive for coherent expansion.

It is envisaged that it will indeed be beneficial to the notion of fair competition itself as different scientific approaches may be adopted towards the attainment of the same end. There is absolutely no harm in this. Indeed, the cliché unity in diversity will thus acquire a further dimension. In fact, most academics rightly hold and experience actually dictates, that deadly uniformity is obnoxious. Perfect uniform implementation is neither possible nor indispensable, especially in democracies.

The role of the European Commission will thus evolve from that of a sole, central and unique player-manager, to that of a supra-national authority working in close proximity with the national authorities and courts for the attainment of the common objectives established in the Treaty. Its guiding mission, strengthened as it is by years of experience, will definitely be of extreme benefit to the attainment of the pre-established aims of the Treaty. Hence, the fear of frustrating consistency of application can be rendered structurally impossible.

The European Commission's proposed coordinating role is intended to go a long way in achieving this common and consistent strategy. The establishment of this general network will ensure that uniform enforcement is achieved through sound information, free and open discussion, personal networking and ultimately reciprocal persuasion. Hence, national courts will be able to have direct access to the European Commission to request information and opinions as to the proper application of European Community competition rules.

It is thus deemed that as a result coherence of application will be ensured. This new approach will have the added value of having the in-built advantage of creating a one-stop shop system whereby the much-feared forum shopping will be nipped in the bud or at least minimized to a considerable extent. Furthermore, inconsistencies of application may be eradicated when one considers the possible utilization of the preliminary reference procedure to the European Court of Justice.

Yet, this is still a leap in the dark and uncertainty naturally prevails. Acute observers cannot really effect a proper assessment of the proposed direction, positive as it may seem at first hand. The precise conditions under which this network will materialize have not yet been fully finalized. As things stand problems, even of a constitutional law nature, can be foreseen.

Furthermore, some light can be thrown on this issue from the European Commission's own White Paper published in this regard. It transpires that the Commission intends to arrogate to itself the freedom of intervention in the procedures instituted in national courts and at the same time preside over the above-mentioned multi-national network where it can freely be accessed, even electronically, for advice and direction. The effect of this proposal will be to give the European Commission direct access to the national authorities and courts on the pretext of imparting expert knowledgeable advice.

Such direct access and communication might however lead to quite an untenable situation. Here, the Commission may be accused that at one and the same time it is acting both as prosecutor – through its infiltration of the national authorities who are parties in the proceedings – and as judge – through the advice it may give to the presiding tribunal. Such a scenario might prima facie legitimately be seen as infringing the principle of the independence of the judiciary and as undermining one of the major principles of natural justice – *nemo iudex in causa propria*. Many fear the consequences of allowing the European Commission to sit on both sides of the fence. This would be totally against our legal culture. A remedy is urgently sought.

Notwithstanding the dangers briefly referred to above, self-regulation, strengthened through the assistance of the Commission, seem to be gaining more ground – at least within the confines broadly outlined. Yet, inspire of the difficulties so encountered the hardest nut to crack remains that concerning the effective and uniform determination and enforcement of competition law infringements. In this respect it goes without saying that it is obvious that sometimes it may still be quite lucrative for offenders to flaunt competition law, even risking the administrative fines envisaged. Experience shows that financial sanctions do not seem to be enough of a deterrent if they are not imposed with the necessary celerity said sanctions call for in this highly sensitive field. Speed of determination and execution is crucial. Some even argue that this is more relevant than the quantum that might be imposed.

This particular aspect concerning the enforcement strategies that might be adopted in fact calls for an in-depth comparative scrutiny of the kaleidoscope of legal issues that emerge. This is all the more pertinent with respect to Malta's

own Competition Law enforcement regime, which cries out for an urgent overhaul of extant strategies. Past calls for a proper re-evaluation of this particular aspect of Malta's Competition Law regime have unceremoniously gone unheeded. The amendments to the Maltese Competition Act which have recently come into force have not even come anywhere close to resolving this delicate issue positively and intelligently. A unique opportunity to remedy this situation has been missed. Perhaps, the lobbies involved have again had their day against the national interest.

This particularly delicate aspect seems to have failed to attract the attention of those responsible for steering the ship of state in the proper direction. Synchronization with the most qualified and advanced international competition regimes is still lacking. The situation calls for an immediate remedy if Malta is to achieve and maintain any international relevance. Things cannot remain as they are. Those responsible and their advisors cannot be allowed to continue to passively thwart the true spirit of the principles of competition law by expressing mere lip service to the notions espoused by this regime, whilst at the same time putting spokes in the wheels where it matters most.

Extant enforcement strategy is farcical. The situation calls for urgent remedy to respect the intelligence of operators in this sensitive field and bring it in line with the most progressive international regimes. As things stand the local competition regime is toothless. Operators must be given a fair opportunity to be effective. Adequate procedural tools are required to enable them to act according to the spirit of competition law. Obviously, if the local situation remains as is, when the aforementioned general unitary strategy of the European Community becomes operative the whole European regime might even be jeopardized. This regime is only as strong as its weakest link.

Finally, although decentralization of competition law is attractive, one must yet be wary that this will not inadvertently lead to re-nationalization. Competition law is not just an institute that ensures fair competition. It is not only a cold economic tool for the raising of productivity and for the increasing of industrial growth. It is much more than that. It is also a tool for general social welfare. The benefit of the consumer is central to this regime as it also contributes to the lowering of prices and affords a wider choice. The competition regime does not operate in a vacuum. The precepts of the single internal market, although remaining paramount, have to come to terms with this social reality too.

It must be remembered with humility that regardless of its faults the present international regime, inclusive of fair competition law, has definitely contributed to the well being, prosperity and peace witnessed in Europe during the last fifty odd years. Any changes envisaged should bear this reality in mind. Any direction that is eventually decided upon must keep the basic issues briefly referred to above in proper perspective.

Indeed, a coherent, flexible, transparent and workable enforcement strategy will strengthen and broaden the social-welfare structure within the present social-market economy. All told, it must be remembered that this social sensitivity has been painstakingly achieved over the years and cannot be allowed to gradually disappear. When the proposed strategy involving the concerted action of the European Commission, national authorities and national courts resolves the difficulties previously addressed, the resulting mechanism will go a long way in securing the enforcement of the true spirit of Competition Law for the benefit of the whole European community.

18 Europe 2004 – *Le Grand Débat*

Setting the Agenda and Outlining the Options

Peter G. Xuereb, Professor of European and Comparative Law
Jean Monnet, Professor of EU Law and European Integration

The Future of Europe was the theme of a conference organized in Brussels between the 15th and 16th of October 2001 by the European Commission and the European University Council under the umbrella of the Jean Monnet Project. Some two hundred Jean Monnet Professors and other delegates participated. The Conference was intended as a free-wheeling debate on the future of Europe, and as the title suggests the idea was to identify some of the options. It came just as the debate was being launched in the Member States and the candidate countries: in Malta the national event was set to take place on the 17th and 18th of the month.

The background is the IGC due to be held in 2004 to lead, it is thought, to reform of the Treaties post-Nice. The largest issue is whether the European Union should be unequivocally vested with some express legal personality, the nature of which is as yet undetermined, and whether a Constitution should be drafted for the 'Union'. Nice left over four points for debate, namely

(a) the delimitation of the powers of the Union and the Member States,
(b) the status of the Charter of Fundamental Rights,
(c) the simplification of the Treaties,
(d) the role of the national parliaments in the 'European Architecture'.

It is clear that the Member States felt at Nice that there was a priority to clarify and to simplify the treaties. The Commission speakers at the conference were adamant on this point. The Commission obviously feels very strongly that Member states and the Institutions should have clear lines drawn on their respective competences, that those competences should be clearly stated and delimited, and that citizens should be and feel that they are part of the European Project.

The Process

The summit at Laeken in Belgium in December 2001 (which will have taken place by the time this is published) will decide whether a blueprint for all this will come from the Council Secretariat or from a Convention in the sense and in the model of the gathering, or forum, constituted to produce the Charter of fundamental Rights, which experiment many see as having worked. Let it be said that at the conference there were those who warned against that model. Strong views were expressed, for example by Prof. J. Weiler, that the Charter was a document which would fail the scrutiny of a legal draftsman and was much coloured by the need to produce a document for 'the citizen' rather than a binding legal text. This although it is clear that the European Court will cite it, as it already has. Yet we wait to see exactly what the Court will make of it when a case arises which calls for strict interpretation and a possible conflict of sources. Whatever the argument of substance, the Commission seems very keen to use the 'Convention procedure' for arriving at proposals, and this will certainly involve the participation of the European Parliament, of national members of parliament from the Member States, probably two each, and will likely involve also 'representatives' from the candidate countries as well as representatives from the commission and possibly some academics. No final conclusion was reached on this at the Conference, and it will be for Laeken to decide on the procedure, but as I say there were serious misgivings on the part of several academics in general terms as to the suitability of the convention process, one merit of which was that it operated in the case of the Charter on the basis of consensus. This meant that all participants agreed on the text, which then all Member States agreed upon but, it was argued by some, that this result was at the cost of ambiguity and uncertainty. It is not clear that a Convention will lead to the sort of text which can then be used for Treaty amendment, at least directly.

A Constitutional Architecture?

From the discussion on process, the conference moved on to the 'Constitutional Architecture' of the Union. The point was made early on that we perhaps do not yet even have the vocabulary we need. The prevalent view seemed to emerge quite early that there was no foreseeable prospect (not in our lifetime, some said) of a super-state emerging. So, no federal state was in the offing, most agreed. However, it was acknowledged that the mix of federal and intergovernmental elements needs to be clarified somehow, even while avoiding statist terminology. The idea of a Constitution was not pushed hard, except that it was suggested by some that calling something like a basic document to be produced the Constitution of the Union

would give a message to the citizens of the Union. The main paper was presented by Professor Griller whose approach was conservative: avoid any reference to the '*finalité politique*' because there is no shared ultimate goal; rather, he suggested, the goal should be to remedy the deficiencies in the system: lack of clarity and transparency etc. Of course, on the face of it this is simply a call for more of the same approach of the last twenty years, 'incrementalism', but Professor Griller did speak of legal personality for the Union and amending the Treaty amendment rules, including that of unanimity, and he would give the European Parliament a say in treaty amendment. He advocated extended co-decision, would restrain the use of enhanced co-operation, and generally argued for deepening on such lines. It is not clear whether this is Joschka Fisher's idea of a 'Federation but not a super-state', but there are certainly many overtones thereof.

On the question of listing respective competencies, while one would have thought this would clarify some very difficult areas in European Law, such as which powers are exclusive, some speakers thought that there should not be such a listing. The general view was that there could be some clarification but that the evolutionary approach should be retained. Of course the backdrop is that all member states would have to agree on the list. Bruno de Witte in fact proposed dividing competencies into exclusive, 'complementary' (as in education, culture etc., where the role of the Community is, at the highest, only to co-ordinate national policies, and 'shared' (the vast majority of competences). The exclusive powers would be named: there are only two (international trade in goods, and the protection of marine resources). He proposed the inclusion of a new 'Article 5 bis,' which would cover the issue but with the emphasis on clarification of the existing position.

Again here the gist is that while it is agreed that the Treaties are of constitutional effect, the Union construct is atypical and that federal constitutional models do not necessarily assist, so what is required mainly is for the gaps or deficiencies in terms of legal certainty to be filled by minimalist drafting changes.

Let it be said that while the suggestions for reform of the Treaties made at this first academic conference can be described as modest, this does not exclude ambitious proposals from being made by a Convention in theory. However, I doubt that they will be, at this stage. While there seems to be general agreement that there must be further clarity in view of enlargement in particular, I derived the sense that most of the delegates feel that the legal order of the Community and Union can well cope with the demands of enlargement without radical constitutionalization. However, as I say, there are those who think otherwise, who are concerned at the retention of unanimity in certain areas on the ground that it may prove impossible to secure unanimity on, for example, proposals for Treaty amendments in the future (leading to sclerosis, or widespread use of enhanced co-operation).

On the whole, it is perhaps fair to state that the general feeling was that both the Union and the Member States contribute to a system of multi-level governance in which power and action capacities are shared rather than divided and that this should not change. This would not necessarily be the Fischer model, but could involve further 'federalization' of the model of governance in Europe. If the essential issue is whether the Union should be based on a system of shared or of divided sovereignty, then the bias seems in favour of the former. The member states would remain at the heart of the Union. National Parliaments would be brought into the model in an unprecedented, but as yet undetermined, way.

What this leaves is to determine, or at least clarify, what is to be done at Union level, how it is to be done, and how the institutions can be made more democratic and more representative. Nor was the creation of new institutions or bodies excluded.

There was full support at the conference for the inclusion of national parliaments in the decision-making processes of the Union, but no clear vision as to how this might happen. One suggestion worthy of note was that a 'Subsidiarity Committee' might be set up involving national parliamentarians, one of whose tasks would be to examine European law for observance of subsidiarity (and proportionality). Added to national parliamentary scrutiny procedures, which in some Member States need to be strengthened in any case, it seems to me that this would be a powerful tool for national control of the exercise of power by the Institutions.

The Status of the Charter of Fundamental Freedoms

As to the Charter and the question of its legal effect and possible incorporation into a basic constitution, again no clear line in favour emerged. Most of the speakers were hesitant. Indeed there was general hesitancy about rocking the boat too much; about raising too starkly the albeit mostly theoretical points of conflict. Indeed, the tendency was to regard the possibility of conflict as hypothetical. Professor MacCrudden pointed out that while we now have a Charter of Fundamental Rights, it is not clear whether this is to signify a real shift in the nature of the Union.

A strong thread of thought expressed by many was that while the Commission is emphasizing the use of the 'Community method' (commission proposal, co-decision, European Court of Justice) wherever possible, ostensibly at least (some said) for simplicity's sake, the reality is that its paper on European governance of July 2001 itself points out the use which is being made and could further be made of other mechanisms of co-operation, that is of soft law and soft procedure, such as the 'open method of co-operation' being used in a

number of sensitive areas, including Justice and Home affairs, with its emphasis on guidelines, national plans, peer review and exchange of experience and so on.

This has been an attempt to do justice to the papers presented at the Conference and to the discussion which took place there, while informing and stimulating readers totake the debate further in this country. Readers are urged to study these issues further by referring to the various web sites covering the Future of Europe debate and the related European Governance (and its contribution to global governance) debate. In particular, readers can visit:

www.europa.eu.int/futurum
www.europa.eu.int/comm/governance
www.jeanmonnetprogram.org/papers

What is clear, as Peter Ludlow has put it, is that whatever the outcome in 2004, the IGC will be the closest thing to a constitutional conference that there has been in the EU's 50-year history. It is vital that in such a process there be the widest public debate across Europe.

Note: At the time of submission of this piece for publication, the Laeken summit had just taken place putting into place the mechanism for the Convention, much on the lines foreseen at the Conference. Work will now start in earnest in March of 2002.

19 Brussels and the War Against Terrorism
The Response Until the Fall of Kabul

Stefan Vella, LL D

The EU v. US: Miss Lilliput?[1]

EC foreign policy, in the prelude to the 'war against terror' and during its build up, until the dramatic fall of Kabul, manifested itself as a two-tier system, where one finds that the EC took measures supra-nationally and the Member States made their contribution each separately, the way each state deemed fit and appropriate, given the feared repercussions of the 11th September tragedy in New York.

It seems that the EC as a community and several Member States played different but converging roles. Every responding Member State played the part it wished to play and no move was coincidental.

Again, this time within the field of foreign policy, Member States played the game of variable geometry. The United Kingdom positioned itself early, well in advance of the other Member States, as one of the key players in the 'war against terror', featuring as a shoulder-to-shoulder ally of the United States, while the other Member States started threading warily, getting more assertive as the conflict in Afghanistan gradually tapered to an end, reaching its climax with the summit in Bonn.

The form of contribution varied from one Member State to another. Undoubtedly, Great Britain featured conspicuously in the military role it played. Italy at first offered its air space and passage by sea ,lending its air bases for use, when necessary, for the attacks on Afghanistan, now employing its naval forces in its closing down on Tora Bora. Germany demonstrated its superiority Metternich style by hosting the construction of a new Afghan government in Bonn.

It is clear that in its involvement in the combat against terrorism the EC gave a two-speed response, with the EC responding supranationally and the Member States responding as Europeans each according to its political and military prowess. Here one could perceive that within the field of EC foreign policy, Member States have more room to exercise their sovereignty.

However, the doubt still remains on how pungent the EC was in its response and whether it is accurate to say that the US dwarfed the EU in the combat against terrorism.

Evidently, the US had all the necessary elements to fuel its urge to act as the primadonna in the offensive against Osama Bin Laden and Al-Qaeda.

One has to bear in mind that Al-Qaeda humbled the US on two counts:

a. Al-Qaeda demonstrated to the whole world that the US is a vulnerable state as any other state; and
b. that the CIA failed miserably in screening scheming Muslim kamikazes on its own soil.

Following this huge embarrassment the US had to show the world that it can rapidly and effectively, with unflinching strength, exterminate these terrorists and bring Osama Bin Laden to justice, as well as, gather support of other nations in this bid to fight terrorism, reserving its seat as a 'globocop'.

It is even more important to remember that the US has one big advantage over the EC. It has one common army acting in the name of the people of one nation which is a federation of states, unified by a more or less uniform agenda, at least, when it comes to external relations, which agenda is drawn up and piloted by a President directly elected from amongst the American populace.

Moreover, the US has a long-standing foreign policy which marketed the US as a role model for all prosperous and democratic states, and the tenacious protector of world democracy and order.

Within the EC one has a foreign policy still in the making, being as it is, a confederation of states with diverse political and legal traditions, following the steps of past nations that were in conflict one against the other, both in the remote past, and in a less remote past, with a long history of sovereignty being exercised for years by each Member State, without a common army, as yet.

However, given the circumstances leading to the 'war against terror', it is rather unjust to compare the EU's diplomatic strength with the US's global stature, once the backdrop of the issue – the combat against international terrorism,

[1] The inspiration for this satiric sub-title is precisely the interview with Mr Chris Patten MP, EU External Relations Commissioner on the BBC 11/11/01 with the theme titled 'Has the European Union been sidelined in the war against terrorism?'

was an attack by Al-Qaeda on America, on its own soil, killing thousands of American citizens, crippling temporarily America's economy, bringing the world for a few hours to a standstill.

The Supra-National Initiatives by the EC

The Diplomatic Offensive – Wearing the Cowboy's Boots[2]

The EC's diplomatic offensive was a drama in two acts. Act I was an exercise in exchange of solidarity with the US. Act II was an exercise of velvet talk to consolidate the legitimacy of the US attack on Afghanistan, and promotion of aid to the 'Cinderella' countries in the Arab world, in a bid for building a long-term strategy against terrorism.

Act I – Wisdom and Tears

The EC voiced its solidarity with the United States on the day the attacks occurred. On the 12th September the EU Commission met in the morning to discuss the tragedy of the 11th September in New York.

The EC recognized that to be more effective in the fight against terrorism and on the world stage generally it must make its European Security and Defence Policy (ESDP) fully operational. It also understood that now is the time to initiate an in-depth political dialogue with those countries and regions of the world where terrorism comes into being.

Act II – From Tears to Action

From the 24th-28th September a team of senior European officials consisting of Belgian Foreign Minister Louis Michel, Josep Piqué (the High Representative for the CFSP), Javier Solana and the Commissioner responsible for external relations, Christ Patten, visited Pakistan, Iran, Saudi Arabia, and Syria. It found a broad measure of agreement and a common desire to combat terrorism, coupled with a unanimous recognition of the crucial part to be played by the UN. With a single exception, none of the countries visited disputed the United States's right to deliver a retaliatory attack on Afghanistan, provided it was targeted, avoided civilian losses, and was based on tangible evidence of complicity of Afghanistan in the 11th September attacks.

On 3rd October the EC and Russia agreed to strengthen political cooperation and joint efforts to combat terrorism.

On 7th October the President of the European Commission Romano Prodi expressed the Commission's total solidarity with the action. The EC Foreign Minister in a statement issued, following the General Affairs Council on 8th October, declared the EC's 'wholehearted support for the action that is being taken in self-defence'.

The Council also promised action to avert a humanitarian disaster in Afghanistan and neighbouring countries.

The Commission has been asked to consider stepping up the EC's assistance to Pakistan under a new cooperation agreement.

A European Conference was scheduled to take place in Brussels on 20th October. The EU, the thirteen acceding countries, the EEA countries (Norway, Iceland and Liechtenstein), Switzerland, and Russia, Ukraine and Moldova and the Western Balkan Countries had to meet to coordinate their policies in the fight against international terrorism.

During this preliminary diplomatic offensive one could perceive Bush's words seep through the parlance of his counterparts in the struggle against terrorism back in Brussels, sometimes, taken lock, stock and barrel as if engaged in an effort to have their speeches also in line with US talk from the White House.

Clear examples are the following proverbial phrases:

a. The European Union adamantly rejects any equation of terrorism with the Arab and the Muslim world.[3]
b. We should never see this as a struggle between different civilizations. Its a struggle between decency and evil.[4]
c. We are united, and will remain united, in this struggle against those who attack the very foundations of civilization. Our fight is not against religions or peoples.[5]
d. Our message to them today, in this fight for democracy and against terrorism, is that our only choice is to stand united; for united we stand but divided we shall fall.[6]

The Response – The EC's Agility[7]

On the 21st September 2001 in Brussels, the Extraordinary European Council adopted a Plan of Action which gave impetus to a series of measures in those areas where it must and

2 *Vide* MEMO/01/327 Brussels 15th October 2001 pp. 1-6.
3 *Vide* MEMO/01/327 Brussels, 15th October 2001 p. 4.
4 Paul Ames (Associated Press Writer) – 'EU's Patten calls for international cooperation at 'unprecedented level' to combat terrorism', Article by Associated Press based on an interview with the Rt. Hon. Chris Patten, CH, Member of the European Commission responsible for External Relations.
5 Statement by European Commission President Romano Prodi on the military action against terrorism, Brussels, 7th October 2001, IP/01/1375.
6 COX (ELDR), Extraordinary Formal Sitting of Wednesday 12th September 2001, 3-013, p. 7.
7 *Vide* MEMO/01/327 Brussels, 15th October 2001 for further details.

can make an effective contribution: external relations, police and judicial cooperation, air transport, humanitarian aid and economic and financial policy.

Combating Terrorism

By the 13th September the Commission had tabled proposals for a European arrest warrant to supplant the current system of extradition between Member States and a common definition of terrorism and related penalties.

On the 8th October the Council of Ministers asked the Commission to take the necessary measures to freeze the assets of 27 organizations or individuals suspected of having links to the attacks of 11th September, pursuant to a decision adopted by the UN Sanctions Committee on 6th October.[8] On the 2nd October the Commission submitted a proposal for a regulation designed to curb the funding of organizations and individuals involved in international terrorism. The EP responded swiftly endorsing the measure on 4th October.

The EU is conducting currently legal reforms to tighten laws concerning money laundering. The directive in force applies to the proceeds of drug-related crime. An extension is being proposed to make it mandatory for Member States to combat laundering of the proceeds of any type of crime.

The amended legislation unlike the existing directive extends coverage to a series of non-financial activities and professions, which are vulnerable to misuse by money launderers. Requirements as regards client identification, record keeping and reporting of suspicious transactions would therefore be extended to external accountants and auditors, real estate agents, notaries and lawyers carrying on financial transactions, dealers in precious stones and metals, transporters of funds and casinos.

The EC is studying a proposal designed to counter market manipulation more effectively by obliging the competent national authorities to cooperate more closely and exchange more information.

At the Commission's initiatives, Member States agreed to bring forward the introduction of the new Civil Protection Mechanism which reinforces EU cooperation in this field and which is coordinated by the Commission. In particular, this cooperation includes:

a. the creation of a group of Nuclear, Biological and Chemical (NBC) experts, available 24 hours a day to assist any country which requests help;
b. enhanced cooperation on information-sharing concerning antidotes, vaccines, antibiotics, and access to hospital treatment for any victims of such attacks;
c. creation of a system of immediate and systematic exchange of information relating to accidents or threats of terrorist attacks; and
d. reinforcement of the Commission's Civil Protection Unit with national experts to set-up a monitoring and information center.

The European Council called on EU transport ministers to take measures covering classification of weapons, technical training for crew, checking and monitoring of hold luggage. It also proposed to the Member States that a series of inspections of airport safety standards should take place with the aim of enhancing the level of checks carried out in Europe.

The Commission put forward proposals designed to ensure that they do not have to bear any extra costs. These include flexible application of the rules on slots, possible compensation for losses incurred and government support to cover the costs of security measures.

In the wake of moves by insurance companies drastically increasing the cost of cover for acts of war or terrorism, the Commission asked the ECOFIN Council to come up with a coordinated response. The Council agreed that Member States should exceptionally, and as a short term measure be allowed to provide cover or pay the higher premiums for a month pending a more lasting solution.

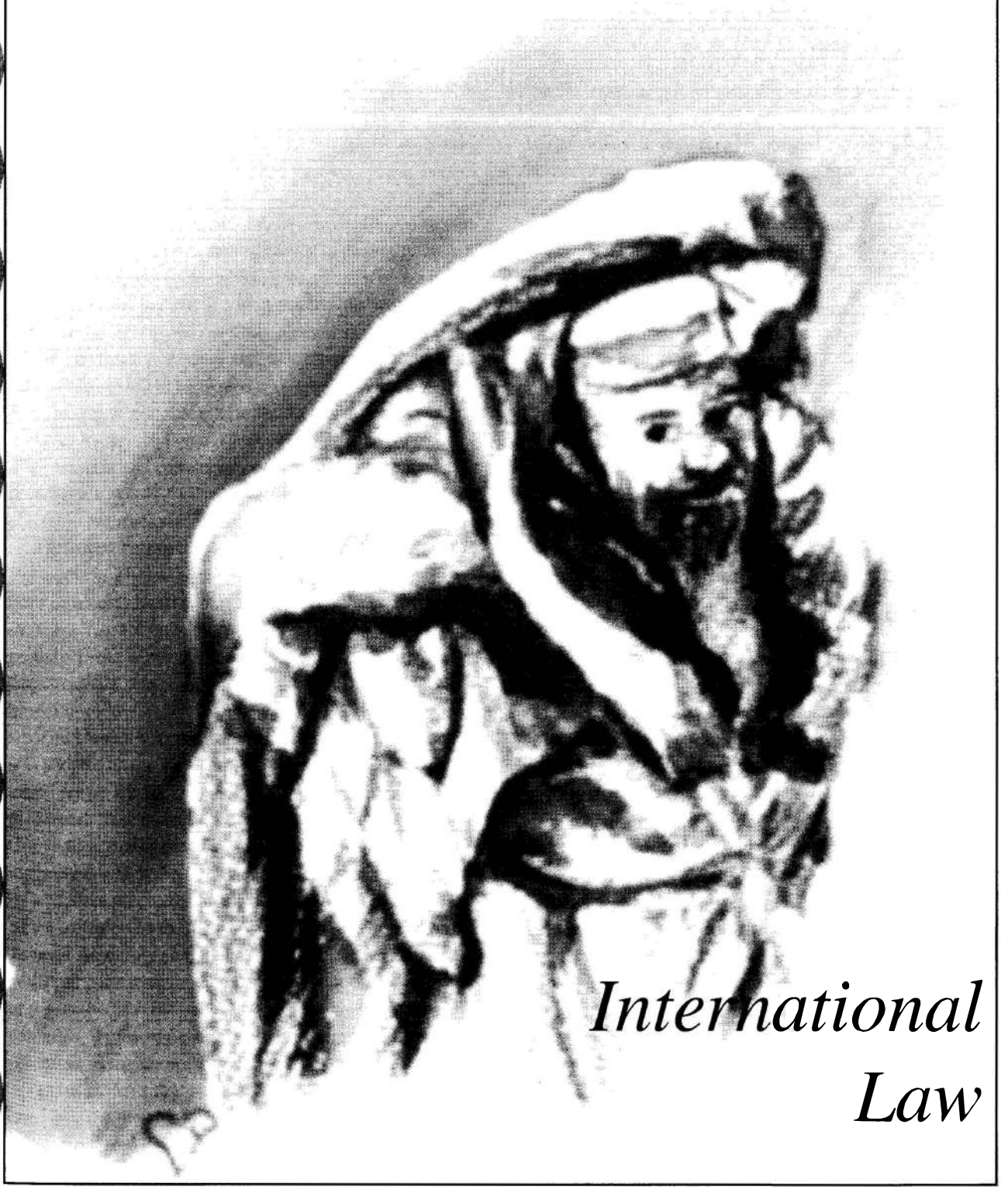
The Commission has left open the possibility of extending these measures until the end of the year. Failing that, the Commission will consider an alternative solution in consultation with Member States.

The Commission is also considering what measures might be taken against the excessive reaction of some insurance companies.

This year ECHO has mobilized 27.3 million euros and on the 11th November ECHO has mobilized 15 million euros for food distribution medico-nutritional assistance, medical kits, winter needs items and other essential non-food items, support for the UNHCR operations in Pakistan, and UN coordination.[9]

On the 15th October the Budgetary Authority has approved the Commission's proposal for the mobilization of 25 million euros in Afghan aid.

8 Brussels, 2nd October 2001, IP/01/1349.
9 *Vide* MEMO/01/368 Brussels, 14th November 2001, p. 10.



International Law

20

A Universal Constitution for the Oceans

David J. Attard, Professor and Head of the Department of International Law, University of Malta.

This oration was delivered on 1st February 1995, on the occasion of the unveiling of the monument commemorating the entry into force of the United Nations Convention on the Law of the Sea.

The entry into force of a multilateral convention, particularly one which has global ramifications, is generally considered to be a joyous event marking the triumph of the rule of law. It is usually the end of a long and tedious voyage which has to be diligently and carefully charted in the light of the sovereign equality of States and their often conflicting interests. The adoption of an agreed text, after complex and intricate diplomatic negotiations, reflects a desire to provide legal formulas for the solution of international questions or disputes. The precision and certainty of written rules, it is hoped, will contribute towards the realization of an effective, just and equitable international legal order.

However, before this adopted text is endowed with the force of law, it has to obtain the requisite number of ratifications or accessions. It is only after this requirement has been satisfied that a Convention enters into force and is transported – in the words of the late Judge Manfred Lachs of the International Court of Justice – "across the threshold into the kingdom of law".

The United Nations Convention on the Law of the Sea was adopted on the 30th April 1982 by 130 States, and entered into force on the 16th November, 1994, twelve months after the sixtieth State had adhered to it. The entry into force of the Convention marks the culmination of a long and painstaking process which can be considered as having been initiated by a Maltese proposal, dated 18th August 1967. This requested the inclusion on the agenda of the 1967 Session of the UN General Assembly an item entitled 'Declaration and Treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind'.

In his address to the General Assembly of the 6th October 1967, the then Maltese Prime Minister, Dr George Borg Olivier, referred to the proposal and focused on the need to regulate the exploitation of international sea-bed resources. Furthermore, he put forward the idea that the revenue deriving from such exploitation should be employed as a source of development capital to be utilized in promoting the economic growth of the less developing States.

Initially, the 'Maltese Move' – as some commentators have described the initiative – raised considerable astonishment if not suspicion. In the Congress of the United States, one member asked:

> First... why did the Maltese Ambassador, Arvid Pardo, make this premature proposal? Second, who put the Maltese government up to the proposal? Are they perhaps the sounding board of the British? Third, and most of all, why the rush? It is my conviction that there is no rush... There is little reason to set up additional unknown and additional legal barriers which will impair and deter investment and retard exploration in the depths of the sea even before capabilities and resources are developed.

Despite these expressions of doubt, history confirms that the Maltese initiative was indigenous. As His Excellency President Ugo Mifsud Bonnici pertinently observed in his illuminating address delivered at last year's International Maritime Law Institute graduation ceremony:

> Very early in our post-independence political life, our Government realized that not only was Malta's destiny indissolubly tied to our marine environment, but that the proper utilization of the sea and the seabed as well as a good ordering of the interests of all nations lie in the common heritage of mankind.

Indeed, just after Independence, Prime Minister Borg Olivier invited our current Rector to provide the Government with ideas as to how Malta's new sovereign interests could best be pursued at international fora. This invitation led to the creation of the necessary awareness of ocean space problems and the adoption by the Maltese Government of its law of the sea policy. I feel that it is appropriate to record the assistance and guidance which Fr. Peter, as he is best known on campus, has offered students and members of the University. In fact, it was through his encouragement – some twenty years ago – that the present speaker undertook research in the law of the sea at the University of Oxford.

The 1967 Maltese proposal was further amended to seek

a revision of the whole spectrum of the law of the sea. This proposal obtained overwhelming support and led to the convening of the Third United Nations Conference on the Law of the Sea, which is possibly the longest, largest and most expensive diplomatic conference in the history of mankind. It involved the participation of over 150 States negotiating, for over nine years, rules which concern some of their most vital interests.

The 1982 Law of the Sea Convention, which emerged from this Conference, provides a comprehensive legal framework regulating mankind's activities over the oceans. It recognizes that the problems of ocean space are closely interrelated and deals with them as a whole. The Convention replaces the fragmented approach adopted by the four 1958 Geneva Conventions on the Law of the Sea which had become inadequate largely due to: the proliferation of States in the era of decolonization; the astounding rate of marine technological developments, particularly in the field of offshore resource exploitation; and the quest of developing States to establish a New International Economic Order.

The legal maritime order established by the Convention has eight principal goals:

i. the facilitation of international navigation and communication;
ii. the promotion of the peaceful uses of the oceans;
iii. the equitable and efficient utilization of marine resources;
iv. the conservation of marine living resources;
v. the protection and preservation of the marine environment;
vi. the promotion of marine scientific research;
vii. the development and transfer of marine technology; and
viii. the peaceful settlement of disputes.

Possibly one of the most innovative and controversial features of the Convention is found in Part XI wherein the seabed and subsoil, beyond the limits of national jurisdiction, and the resources therein are declared to be the common heritage of mankind. Furthermore, this Part establishes the institutional and regulatory mechanism necessary to exploit the said resources on behalf of mankind. Although Part XI reflects a compromise solution agreed to in 1976 after intensive and turbulent negotiations, the election of President Reagan brought about a change in the US position, which led it to vote, together with three other States, against the adoption of the Convention.

This opposition to certain provisions of Part XI risked destabilizing the Convention's success. For whilst most of its articles attracted general widespread support, there was a pronounced reluctance, particularly by industrialized and maritime States, to adhere to the Convention. A further twelve years, after the Convention's 1982 adoption, had to pass before a solution to the said opposition could be achieved. This settlement is embodied in the Agreement Relating to the Implementation of Part XI of the 28th July, 1994. Some critics consider this agreement as having eroded the application of the common heritage of mankind regime in the interest of the industrialized States.

Nevertheless, it is also true to state that the 1994 Agreement, by taking into account the changes in the post-Cold War era and the realization that the said resources will not be exploitable on a commercial basis before the next century, has ensured that the 1982 Convention enjoys widespread, general and practically universal support. It can now be safely asserted that the Law of the Sea Convention can be characterized as a universal constitution regulating mankind's activities over the oceans, which cover over seventy percent of our planet's surface.

Ladies and Gentlemen, Malta's role in the promulgation of the 1982 Convention is not the only reason for this evening's commemoration. There is certainly another important reason: our University's modest, but influential, involvement in the development, elaboration and enforcement of the law of the sea.

For decades – if not centuries – particularly through its Faculty of Laws, the University of Malta has been actively involved in promoting the rule of maritime law, particularly through its teaching and influence. It has fostered, amongst generations of lawyers, the learned study of both public and private maritime law. In the early seventies, the University established, the now defunct, Chair of Ocean Affairs. In fact, given the University's increasing interests in maritime affairs, it may be appropriate to consider the re-establishment of this Chair.

The current LL.D. syllabus offers comprehensive courses both in commercial maritime law and in international law of the sea. The University, not surprisingly, has produced outstanding legal minds which have left a considerable mark on the international codification and progressive development of the law of the sea.

I therefore wish to pay homage to two of the most eminent amongst them. The first is Dr Constantine John Colombos, QC, LL D (London); a graduate of our University, who settled in London and became a leading Queen's Counsel specializing in maritime and international law. His two leading works, for years considered by publicists to be authoritative statements of the law, were: *A Treatise on the Law of Prize* published in London by the Grotius Society in 1940; and *The International Law of the Sea* first published in 1943. The latter work had six editions and had the distinction of having been translated into French, Italian, Russian, Chinese, Spanish, German, Portuguese, Greek and Rumanian. It is

noteworthy that the translators were distinguished publicists, including a judge of the International Court of Justice. *The Times*, on the 10th January 1964, described this achievement as "a record which remains unique in the modern legal literature of any nation".

Last summer, whilst undertaking research at the Università di Roma, 'Tor Vergata', I was fortunate to find a copy of the Italian version translated in 1953 by Professor Roberto Sandiford, who was a distinguished academic and President of the Italian Council of State. In his Preface, the translator notes that with the exception of one book published in 1938, there did not seem to be

> *nella moderna letteratura guridica alcuna opera che consideri in modo completo tutti gli instituti del diritto internazionale marittimo.*

Despite his many years abroad, Dr Colombos retained a healthy and devoted interest in the legal and political developments occurring in Malta. He was the Government's legal adviser until the suspension of the Constitution in 1933. This was a turbulent period in Malta's political and constitutional history; nevertheless, Dr Colombos was prepared to provide counsel and guidance. I have had the good fortune of being granted copies, thanks to the generosity of His Excellency the President, of certain correspondence between his late magnanimous father and Dr Colombos. In a letter dated 20th March 1934, Dr Colombos gives his 'dearest Gros' authoritative legal advice in respect of a lawsuit of a political character, which Lord Strickland had lodged against him in the Privy Council. He also demonstrates an in-depth knowledge of the ongoing political developments and offers brotherly guidance with respect to the 'constitutional liberties of the Maltese people'.

I should also add that in 1964 on the suggestion of the late Judge William Harding, Dr Colombos established a travelling scholarship enabling a deserving law student from the University to read international law overseas.

The other notable lawyer, I wish to pay tribute to, is Arvid Pardo, who was Malta's Permanent Representative at the United Nations when the 1967 Maltese proposal was presented. Arvid Pardo, son of a Maltese father and a Swedish mother was born in Rome on the 12th February, 1914. Imprisoned under the fascists, he spent years of solitary confinement until he was released by the Red Cross in 1945. Prior to joining Malta's diplomatic services, he had already achieved a distinguished career as a UN civil servant.

On the 18th November 1967, Ambassador Pardo for three hours addressed the members of the First Committee of the UN General Assembly with an illuminating and eloquent disquisition on the need to declare the seabed, beyond national jurisdiction, and its resources the 'common heritage of mankind'.

The UN delegates' reaction to Malta's proposal, as elaborated by Dr Pardo, are best described by Evan Luard, a member of the UK delegation to the UN General Assembly, in his book The Control of the Sea-Bed:

> There is no doubt that the Maltese initiative, and Dr Pardo's speech in particular, made a profound impact on the Assembly. In the delegates' lounge, the spacious bar and smoking room where the delegates congregate between meetings, conversation tended to centre on the Maltese initiative. In the innumerable and interminable cocktail parties, representatives would ask one another how their government would react to Dr Pardo's proposals. There was a general feeling that the UN had here become involved in a new subject, of profound importance but great complexity and fascination, which would command the attention of delegates and officials for many years to come.

It is noteworthy that Ambassador Tommy T. B. Koh, in his capacity as President of the Third UN Conference on the Law of the Sea, publicly expressed the Conference's collective debt to Arvid Pardo for having contributed two seminal ideas to its work: first that the resources of the deep sea-bed constitute the common heritage of mankind, and second, that all aspects of ocean space are inter-related and should be treated as an integral whole.

Dr Pardo's vision of the common heritage of mankind is pertinently described in a work he co-authored with Professor Elizabeth Mann Borgese – *The New International Economic Order and the Law of the Sea* – and reveals the influence his ideas have exerted on the relevant provisions of Part XI:

> The concept of the common heritage of mankind must supersede the traditional freedoms of the sea. This concept has five basic implications, first, the common heritage of mankind cannot be appropriated. It can be used but not owned (functional concept of ownership). Second, the use of the common heritage of mankind requires a system of management in which all users must share. Third, it implies an active sharing of benefits, including not only financial benefits but the benefits derived from shared management and the transfer of technologies. These latter two implications, shared management and benefit sharing, change the structural relationship between rich and poor nations and the traditional concepts of development aid. Fourth, the concept of the common heritage implies reservation of peaceful purposes (disarmament implications); and fifth, it implies reservation for future generations (environmental implications).

Although Arvid Pardo has retired and lives in the United States, he is still a regular visiting professor to our University. He has already taught this academic year, and next March he will inaugurate the establishment of the Common

Heritage of Mankind Depositary and Programme at our University.

The University also hosts two important international bodies, which play an important role in the field of international maritime law. The first is the International Ocean Institute, founded in 1972 and has served as intellectual think-tank providing inspiration to the deliberations at UNCLOS III. It has organized over 21 annual Pacem in Maribus Conferences where matters of topical and futuristic interest concerning the oceans are discussed.

The second – which I have the privilege to direct – is the International Maritime Law Institute, which is an autonomous residential institution established in 1988 by the International Maritime Organisation, as a centre for training graduate lawyers, particularly those coming from developing States. For nine months, they are required to observe a quasi-monastic dedication towards the pursuit of excellence in their studies of the international maritime law, and in the development of legislative drafting techniques. This legal expertise is designed to assist governments in the adoption and implementation into their municipal law, the some 40 IMO Conventions, and the literally hundred of IMO-sponsored codes and recommendations. By the end of this academic year, a hundred maritime lawyers from over 55 States will have graduated from IMLI. There will practically be no major port, in the developing world, where you will not find an IMLI-trained maritime lawyer, or as I prefer to describe our graduates, an apostle pursuing the goals of safer shipping and cleaner seas.

The role of our University in the development of the law of the sea brings to mind the inscription that was engraved on the Doric Gate, at the Old University Building in Valletta, constructed in the first half of the last century: Learning is the gateway to distinction.

I feel that this wise observation of our forefathers is most appropriate when explaining why, despite its modest size, the University of Malta has given a distinguished contribution to the formulation of important proposals dedicated to the codification and progressive development of international law. Certainly, its efforts to bring about the promulgation of a universal and comprehensive constitution for the oceans, has helped in turning – as Secretary General Boutros-Ghali has noted:

> A dream into a reality, which is one of the greatest achievements of this century. It is one of the decisive contributions of our era. It will be one of our most enduring legacies.

Thank you.

21

First Arvid Pardo Memorial Lecture

A Renewed Trusteeship Council-Guardian of Future Generations:

Malta's Initiative at the United Nations

HE Prof. Guido De Marco – President of Malta

The University of the South Pacific, Fiji.
Tuesday 9th November 1999.

We islanders are born dreamers. We are touched by the magic of the sea. As we gaze at the horizon, we have a feeling of reaching out. Sometimes we feel the sea as a barrier keeping us away from the rest of the world. Sometimes we feel the protective nature of the sea holding us in a fold, creating a sense of inward-looking affection. But more often than not the sea is us; a sense of collective *mare nostrum* which inspires us, leads us to adventure, makes of us navigators, inquisitive and acquisitive. The hidden Ulysses in us waves through dangers and mishaps. For the sea is adventure, faring the unknown, meeting people, bearer of a 'people to people' approach.

And whether we daydreamers come from the Mediterranean or the Pacific, whether we face the Atlantic or pass through the Sea of Marmara or splash down the Indian Ocean, for us the sea is never the dead sea.

For the peace of the seas which we aim for – our *Pacem in Maribus* – is one which extends to seventy-one per cent of the earth's surface. Over eighty per cent of the world's trade involves transit via the ocean. Twelve of the twenty most highly populated urban areas in the world are located within one hundred miles of the coast; for the sea provides us with food through fishing, and through fishing the source of livelihood for many. For the oceans can no longer be considered as existing in isolation from the land. Technology in the hands of the few laid open the riches of the seas to the exploitation of dominant countries.

The *mare liberum* theory propounded by Grotius has enshrined the concept that 'any nation is free to travel to any other nation and to trade with it'. This has fostered international trade, tourism and recreation; it has encouraged international co-operation in maritime safety and environmental protection.

But as we of the Independent World Commission on the Oceans had occasion to observe in the chapter on peace and security in *The Oceans... Our Future*, 'the doctrine of the freedom of the seas has paved the way to power politics, gunboat diplomacy, and the colonial order; it has been used to give legitimacy to the ambitions and priorities of the strong while adding to the vulnerabilities of the weak. In this situation, the principle of the freedom of the seas must be understood to imply a recognition of the legitimate need for effective security, a respect for international law and a new balance between the discretion of the strong and the vulnerability of the weak'.

We are still trying to define the concept behind the principle of 'peaceful uses of the sea'. Article 301 of the UN Convention on the Law of the Seas asserts that 'in exercising the right and performing their duties under this Convention, State Parties shall refrain from the threat or use of force against the territorial integrity or political independence of any State or in any manner inconsistent with the principles of international law embodied in the Charter of the United Nations'.

The right of innocent passage is queried by several states when this involves nuclear-powered ships or ships carrying nuclear or other inherently dangerous or noxious substances.

The percentage of off-shore oil and gas production of the world total, has grown to around twenty-six per cent.

The FAO, the IMO, the IOC, and the International Seabed Authority have provided a framework that has given the United Nations a determining role in ocean governance but we have not as yet created a global agency or institution for taking decisions at the global level in questions affecting the marine environment. Climate change is linked to the ocean processes.

This is the first Arvid Pardo Memorial Lecture. It is perhaps an act of historical justice that in Fiji at the *Pacem in Maribus* Conference, the first to be held since the death of Pardo, Malta's President should have been given the privilege to deliver this lecture.

For Arvid Pardo, in the words of Prof. Tony Koh, 'contributed two seminal ideas to our world: first that the resources of the deep seabed constitute the common heritage of mankind; and secondly, that all aspects of ocean space are interrelated and should be treated as an integral whole'.

We present here are all, to a greater or lesser extent, disciples of Arvid Pardo.

In chairing the study group on 'Peaceful uses of the Ocean, Security and Sovereignty', of the Independent World Com-

mission of the Oceans, I was certainly influenced by Pardo who warned that the traditional freedom of the high seas would be gravely endangered should a militarization of the ocean floor be allowed to take place.

The principles first expounded by Pardo were:

a. the seabed and the ocean floor, underlying the seas beyond the limits of national jurisdiction as defined in the treaty are not subject to national appropriation in any manner whatsoever.
b. the seabed and the ocean floor beyond the limits of national jurisdiction shall be reserved exclusively for peaceful purpose.
c. scientific research with regard to the deep seas and ocean floor not directly connected with defence, shall be freely permissible and its result available to all.
d. the resources of the seabed and ocean floor beyond the limit of national jurisdiction shall be exploited primarily in the interest of mankind with particular regard to the needs of poor countries.
e. the exploration and exploitation of the seabed and ocean floor beyond the limits of national jurisdiction shall be conducted in a manner consistent with the principles and purposes of the UN Charter and in a manner not causing obstruction of the high seas or serious impairment of the marine environment.

Pardo revolutionized the thinking of politicians, jurists, and scientists alike when he proclaimed that the seabed and the ocean floor are a common heritage of mankind, and should be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole.

Pardo's last appeal on that memorable 1st November 1967 was 'to moral concepts, to reason, and to well-understood national interests'. The language of diplomacy was used by Pardo in his logic of persuasion.

Thirty-two years, almost to the day, have passed since that rendezvous with history.

The expected riches from the deep have failed to materialize.

The need of poor countries to receive preferential consideration in the event of financial benefits being derived from the exploitation of the seabed and ocean floor for commercial purposes has remained a dead letter.

The general economic climate has been transformed as a result of the changing perception with respect to the role of the public and private sectors with a marked shift towards a more market-oriented economy.

But a beacon was lit not destined to be put off. The concept of common heritage of mankind has become a standard-bearer of an idealism which extends itself to other areas: the environment, climate change, the global commons, human rights, the rights of future generations. These we hold in trust.

It is this concept of trust which led me to propose in my concluding statement as President of the forty-fifth Session of the UN General Assembly on 16th September 1991 that 'in addition to its role under the Charter, the Trusteeship Council should hold in trust, for humanity its common heritage and its common concerns: the environment, the protection of the extra-territorial zones and of the resources of the sea and seabed, the climate and the right of future generations. These we have to hold in trust for humanity and the Trusteeship Council can be the right organ for this purpose'.

Since then, we have never let go of our initiative to have this radical transformation in the role of the Trusteeship Council. For we wanted to convey our philosophy that the Trusteeship Council should hold in trust not only territories but also peoples.

For we believe that the Trusteeship Council is acting for and on behalf of peoples in safeguarding the environment, in protecting the global commons, in monitoring the governance of the oceans. The Trusteeship Council shall ensure that 'the area' as defined in the convention, be open to use exclusively for peaceful purposes and that its exploration and the exploitation of resources be carried out for the benefit of mankind as a whole.

It is this concept of trust vested in the Council which shall ensure that the 'area' be not subjected by any means, by states or persons, natural or juridical, and that no state may claim or exercise sovereignty or sovereign rights over any part thereof.

As Minister of Foreign Affairs I ensured that Malta's proposal be raised in the appropriate fora with particular attention to the UN General Assembly.

I had the privilege of addressing the Special Commemorative Meeting of the UN General Assembly on the occasion of the 50th Anniversary of the United Nations on the 24th October 1995 and I observed that 'universality is the keystone of the United Nations. This notion of universality has consistently guided Malta's action within this organization, it inspires our role in the pursuit of global and regional peace and co-operation. It underpinned our effort to promote and develop the concept of the common heritage of mankind in the context of the Law of the Sea and the concerns over climate change. It continues to motivate us in our role as guardians and trustees of the rights and interests of future generations by giving the Trusteeship Council the role to co-ordinate international effort to maintain the legacy'.

This new global trusteeship also needs to encompass the responsibilities that each generation must accept towards future generations.

In a book which I co-authored with Ambassador Michael Bartolo, entitled *A Second Generation United Nations*, (published in 1997) a chapter is dedicated to the

Trusteeship Council: 'a Malta initiative whose time has come'.

We have expressed the view that the holding in trust shared values of humanity makes it imperative to reinterpret extensively the mandate of the Trusteeship Council. Apart from the areas already mentioned we envisaged in our study that the Trusteeship Council should hold in trust the rights of peoples in situations where there has been a complete breakdown of the state.

We resisted with determination the then prevailing view in the UN Secretariat and elsewhere to abolish the Trusteeship Council. We stated that 'abolition of a principal organ affects the balance which pervades the Charter. It is not mere institutional pruning'. The Maltese proposal was also adopted by the Commission on Global Governance which states in its report *Our Global Neighborhood* that 'meanwhile a new need has emerged for trusteeship to be exercised over the global commons in the collective interest of humanity including future generations.

The global commons include the atmosphere, outer space, the oceans beyond national jurisdiction and the related environment and life support system that contribute to the support of human life.'

On the 24th May 1996, the Ministry of Foreign Affairs of Malta distributed an *aide-mémoire* entitled *Review of the Role of the United Nations Trusteeship Council* to all member-states of the United Nations.

In this *aide-mémoire*, we observe that 'conflict potential is pre-empted when certain areas or sectors, rather than left open to unrestrained competition, become the responsibility of the international community as a whole. This awareness led to the recognition of such concepts as common heritage, global commons, and global concerns. Trust is their common denominator. These concepts now form the basis of a number of conventions considered indispensable to international peace and security. The agencies instituted by the conventions to manage and maintain these sectors are the administrators of these new trust territories. The body most appropriate to co-ordinate these intertwined activities of trust is the Trusteeship Council'.

It was for me and for Malta and for all who believe in Malta's initiative a measure of satisfaction when Kofi Annan took up our proposal in his report to the 55th Session of the General Assembly entitled Renewing the United Nations: a Program for Reform. Under the heading 'A new concept of trusteeship', he states that the 'Trusteeship Council be reconstituted as the forum through which member-states exercise their collective trusteeship for the integrity of the global environment and common areas such as the oceans, atmosphere, and outer space. At the same time, it should serve to link the United Nations and civil society in addressing these areas of global concern which require the active contribution of public, private, and voluntary sectors.'

As recently as April 1999, the Commission on Sustainable Development in the Report of the Secretary General on Oceans and Seas, stated that 'the concept of integrated management of ocean space has been before the international community for more than three decades. Ideas of how to manage the 'common heritage of mankind' (the high seas beyond national jurisdiction) were put before the General Assembly back in 1967 by the Government of Malta and the issue was relaunched by Malta's subsequent Foreign Minister and President of the 45th General Assembly who in 1990 proposed that the Trusteeship Council be given the new mandate of coordinating the international protection including the oceans and seas, the atmosphere, and outer space. That new concept of trusteeship was endorsed by the Secretary General in his July 1997 Report on UN Reform (see A/51/950 para. 84 and 85).'

Our good friend Elizabeth Mann Borgese in her inspiring book *Ocean Governance and United Nations*, in applauding Malta's initiative has this to say in rewriting Article 88 of the UN Charter: 'The Trusteeship Council shall hold in sacred trust the principle of the common heritage of mankind. It shall monitor compliance with this principle in accordance with international law, international ocean space, outer space, the atmosphere as well as Antarctica and report any infringement thereof to the General Assembly. It shall deliberate in its wider application to matters of common concern affecting comprehensive security and sustainable development and the dignity of human life and make its recommendations to the authorities and institutions concerned. The Trusteeship Council shall act as the conscience of the United Nations and the guardian of the future generations.'

As she herself pointed out, within a few years, Malta's proposal moved from the realm of utopia, which could be conveniently ignored, to the realm of politics and it may be there to stay.

We have hitched our wagon to a star. Some at the time considered our proposal to be utopian. Others, perhaps more positively inclined, considered us as idealists, while subtlety arguing that there is a wide gap between idealism and realism. I have always maintained that there is no incompatibility in being both an idealist and a realist at the same time.

A realist is an idealist who knows when the time is ripe for his ideas and ideals to become a reality. We believe that the Trusteeship Council must be the focal point for that coordination which pre-empts tensions while securing the commonwealth of present and future generations.

I started this lecture with the premise that we islanders are born dreamers, that we are touched by the magic of the

sea. But we are dreamers with determination: that of making a reality of our dreams.

In the villages of Kenya the wise men there may never have heard of the concept of trust which the common law jurists have built into an international institution, but they have nourished the love for mother earth. An old Kenyan proverb encapsulates this concept boldly:

> Treat the earth well. It was not given to you by your parents, but loaned to you by your children.

This, is our philosophy for a renewed Trusteeship Council.

22

The Human Rights Limitation to Diplomatic Immunity: The Pinochet Appeals Under Focus*

Ian Brownlie, Q.C., Blackstone Chambers

Honourable Chief Justice, Distinguished Justices, Mr. Chairman, Ladies and Gentlemen. First I would like to express my thanks to the Law Society for inviting me to Malta.

The two House of Lords Appeals to be discussed are reported as follows:

First: [1998] 3 WLR 1456

Second: [1999] 2 WLR 827

By way of introduction the facts must be outlined. In the Second Appeal they were presented as follows by the presiding Law Lord:

> On 11 September 1973 a right-wing coup evicted the left-wing regime of President Allende. The coup was led by a military junta, of whom Senator (then General) Pinochet was the leader. At some stage he became head of state. The Pinochet regime remained in power until 11 March 1990 when Senator Pinochet resigned.
>
> There is no real dispute that during the period of the Senator Pinochet regime appalling acts of barbarism were committed in Chile and elsewhere in the world: torture, murder and the unexplained disappearance of individuals on a large scale. Although it is not alleged that Senator Pinochet himself committed any of those acts, it is alleged that they were done in pursuance of a conspiracy to which he was a party, at his instigation and with his knowledge. He denies these allegations. None of the conduct alleged was committed by or against citizens of the United Kingdom or in the United Kingdom.
>
> In 1998 Senator Pinochet came to the United Kingdom for medical treatment. The judicial authorities in Spain sought to extradite him in order to stand trial in Spain on a large number of charges. Some of those charges had links with Spain. But most of the charges had no connection with Spain. The background to the case is that to those of left-wing political convictions Senator Pinochet is seen as an arch-devil: to those of right-wing persuasions he is seen as the saviour of Chile. It may well be thought that the trial of Senator Pinochet in Spain for offences all of which related to the State of Chile and most of which occurred in Chile is not calculated to achieve the best justice. But I cannot emphasize too strongly that this is no concern of your Lordships. Although others perceive our task as being to choose between the two sides on the grounds of personal preference or political inclination, that is an entire misconception. Our job is to decide two questions of law: are there any extradition crimes and if so, is Senator Pinochet immune from trial for committing those crimes. If, as a matter of law, there are no extradition crimes or he is entitled to immunity in relation to whatever crimes there are, then there is no legal right to extradite Senator Pinochet to Spain or, indeed, to stand in the way of his return to Chile. If, on the other hand, there are extradition crimes in relation to which Senator Pinochet is not entitled to state immunity then it will be open to the Home Secretary to extradite him. The task of this House is only to decide those points of law.
>
> On 16 October 1998 an international warrant for the arrest of Senator Pinochet was issued in Spain. On the same day, a magistrate in London issued a provisional warrant ('the first warrant) under Section 8 of the Extradition Act 1989. He was arrested in a London hospital on 17 October 1998. On 18 October the Spanish authorities issued a second international warrant.
>
> Senator Pinochet started proceedings for habeas corpus and for leave to move for judicial review of both the first and the second provisional warrants. Those proceedings came before the Divisional Court (Lord Bingham of Cornhill CJ, Collins and Richards JJ.) which on 28 October 1998 quashed both warrants. Nothing turns on the first warrant which was quashed since no appeal was brought to this House. The grounds on which the Divisional Court quashed the second warrant were that Senator Pinochet (as former head of state) was entitled to state immunity in respect of the acts with which he was charged. However, it has also been argued before the Divisional Court that certain of the crimes alleged in the second warrant were not 'extradition crimes' within the meaning of the Act of 1989 because they were not crimes under UK law at the date they were committed. Whilst not determining this point directly, Lord Bingham of Cornhill C.J. held that, in order to be an extradition crime, it was not necessary that the conduct should be criminal at the date of the conduct relied upon but only at the date of request for extradition.

* This paper was delivered on the 10th of January 2002, at a seminmar held by the GhSL.

> The Crown Prosecution Service (acting on behalf of the Government of Spain) appealed to this House with the leave of the Divisional Court. The Divisional Court certified the point of law of general importance as being 'the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state.' Before the appeal came on for hearing in this House for the first time, on 4 November 1998 the Government of Spain submitted a formal request for extradition which greatly expanded the list of crimes alleged in the second provisional warrant so as to allege a widespread conspiracy to take over the Government of Chile by a coup and thereafter to reduce the country to submission by committing genocide, murder, torture and the taking of hostages, such conduct taking place primarily in Chile but also elsewhere.

The subject of this lecture is the family of issues concerning the exercise of criminal jurisdiction in situations in which this involves the co-operation of other States and possible resort to international criminal courts.

The background consists of the recognition of the existence of international crimes which attract the principle of universal jurisdiction.

Such crimes include piracy, war crimes, crimes against humanity and torture.

There are other forms of jurisdiction related to international crimes, for example, on the basis of standard – setting conventions such as the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971. Such conventions adopt the principle of imposing the duty either to punish or to extradite.

Ad hoc arrangements may be made by treaty as in the case of the trial of two suspects in the Lockerbie case by a Scottish Court sitting at Camp Zeist in the Netherlands.

A further development is the appearance of regional tribunals such as the International Criminal Tribunal for the Former Yugoslavia.

And at least some States will accept the jurisdiction of the ICC created by the Rome Statute.

Limitations on the procedure of extradition of suspects may derive from human rights standards, as in the Soering case, in which the European Court of Human Rights placed limits on extradition to the United States if the receiving jurisdiction exhibited the death-row phenomenon.

By way of further introduction, the role of municipal law has to be reckoned with. There is always a filter of local institutions and standards. Thus local constitutional principles may enforce the principle *nulla poena sine lege*.

A connected question is the recognition of customary international law by municipal courts. In the absence of treaty provisions incorporated into English law the English courts are reluctant to rely upon principles of customary law. The decisions of the House of Lords in the Pinochet Appeals hinged on the fact that the United Kingdom was a party to the Torture Convention.

I shall present a short history of the proceedings. First, obviously there was the Spanish Request on basis of the European Convention on Extradition.

In the Divisional Court, Senator Pinochet applied for habeas corpus and leave for judicial review. Various issues of statutory construction arose and in the result the warrants of arrest were quashed. There was then an appeal by the Crown Prosecution Service acting on behalf of the Government of Spain.

The first House of Lords Appeal involved six days of argument. The Decision was 3 : 2 in favour of the Government of Spain. There were interventions allowed at the special application by Amnesty International and five other intervenors on the basis of having the right to speak. Human Rights Watch was also allowed to intervene but on the basis of written argument and Mr David Lloyd-Jones QC appeared as *amicus curiae*.

In January 1999 there were some special proceedings. The First Appeal was annulled. This was on account of the disqualification of Lord Hoffmann for having a non-pecuniary interest in the outcome of the case. He had the status of the trustee of a charitable foundation supporting Amnesty International, my client. And so the appeal then had to be heard again.

So in the Second Appeal we had twelve days of hearings. The decision this time was 6 : 1 in favour of the Government of Spain. The Intervenors were the same as before, but the Government of Chile was also permitted to intervene in the Second Appeal.

These were interesting questions as to the status of the First Appeal in the second hearings. The first Appeal had been formally set aside. However, it had been published in the Weekly Law Reports and it had appeared also on the desks of the Judges in the Second Appeal. During the proceedings of the Second Appeal, it seemed to everyone common sense to refer to the speeches of the Law Lords in the first Appeal as a shorthand way of discussing the different aspects of the arguments. I think common sense prevailed.

The last step I regret to say was the ultimate decision of the Home Secretary, given in a letter to the Spanish Ambassador. On the basis of an independent medical report, it had been decided that in a criminal trial in England, Senator Pinochet would be found unfit to stand trial. On this basis it was said that a fair trial would not be possible either in England or elsewhere. Consequently Senator Pinochet was permitted to return to Chile.

The offences charged in Spain were as follows (in terms of the English equivalents) The first was Genocide under the

Genocide Act, 1969. The second was Torture; under Section 134 of the Criminal Justice Act, 1985. The third, hostage-taking under the Taking of Hostages Act, 1972 and fourth, conspiracy to murder under the Criminal Law Act, 1977.

The various positions adopted by the Law Lords in the two Appeals can now be summarized.

A. The conservative approach upholding immunity was adopted in the Speeches of Lords Slynn, Lloyd, and Goff.

B. The treatment of the act of State issue: The Law Lords did take an interest in the Act of State in the First Appeal but they did not regard it as relevant in the second Appeal. The presiding Law Lord, Lord Browne-Wilkinson told Counsel that they were not interested in the argument on the act of state. The principle explained was that if as in the law of extradition there is a clear matrix of law governing the subject, then there should be no role for something as ambivalent and vague as the act of State doctrine. So the act of State doctrine played no role in the Second Appeal.

C. Then there was the majority position, a strong majority position in the Second Appeal denied immunity by 6 votes to 1.

D. Lastly there was the position adopted by Lords Millett and Phillips, who took the view that there was no immunity even prior to the coming into force of the Torture Convention.

The statutory context of immunity must be explained. The context was the State Immunity Act 1978.

Part I: Section 16 (1) provides that nothing in Part I of the Act is to apply to criminal proceedings, and thus Part I is not applicable.

But Part III of the Act contains Section 20 (1) which provides:

> Subject to... any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to –
>
> (a) a sovereign or other Head of State...
>
> as it applies to a head of diplomatic mission.

This involves a reference to Article 39 (2) of the Vienna Convention on Diplomatic Relations, 1961 but there are difficulties in applying these provisions to a former Head of State.

The next question is 'What is an Extradition Crime?' This involves the construction of Section 2 of Extradition Act, 1989.

The material date is that of the conduct, not the request for extradition. Thus the Second Appeal involved a change in view from the First Appeal.

The Torture Convention was ratified by the UK on 8 December 1988 following the coming into force of section 134 of the Criminal Justice Act 1988.

The requirement in Section 2 that the alleged conduct, the subject of the request, be a crime under UK law as well as the law of the requesting State involved the condition that the conduct be a crime in the UK at the time when the alleged offence was committed. This principle eliminated charges relating to alleged crimes committed before 1988. And so although the appeal succeeded in the Second Appeal in terms of the quantity of charges, it was not a substantial victory.

Was there an obligation to extradite those suspected of crimes under customary or general international law?

- The key question is whether the law recognizes such a duty.
- Much of the literature is silent on the question and the inference must be that the doctrine is reluctant to recognize such a duty. It is also to be recalled that the relevant resolution of the Institut de Droit International at the Cambridge Session in 1983, *Annuaire*, Vol. 60, Part II, makes no reference to international crimes.
- My preference is for the view that there is a duty to extradite those suspected of international crimes. This is a duty under general customary international law.
- This view is supported by a small number of writers, for example,

  (a) Sir Hersch Lauterpacht, as the editor of *Oppenheim*, Vol. II, 7th ed., 1952, pp. 588-9.
- He also expressed a similar view in an article in the *British Yearbook*, in 21 *BYIL* (1944), pp. 93-5.

  (b) The present speaker who expressed this view in *Principles*, 1st ed., 1966, p. 268., *Principles*, 5th ed., 1998, p. 318.

The case for the duty of extradition under general international law is quite simple. If a certain action is established as a crime under customary international law, the duty to extradite appears as a necessary corollary of such a principle.

I turn now to the difficulties which have prevented the acceptance or establishment of the corollary.

First, there is the assumption that the duty to extradite must consist of an autonomous principle which is developing separately in customary law, but has not yet crystallized.

Secondly, it is asserted that there is no international crime in existence unless certain pre-conditions are satisfied, such as the existence of universal jurisdiction in respect of the international crime concerned.

Lord Hope in the second Pinochet Appeal places emphasis on the criterion that the prohibition of the acts concerned should have acquired the status of *jus cogens*.

It is not clear to me that either of these two pre-conditions is a necessary condition of a duty to extradite.

The essential problem here seems to be that of the sources of International Law.

Can a principle of customary law have a purely logical extension? Thus, if an international crime is involved, logically there should be a duty to extradite.

Similar difficulties occur in relation to the question of the immunity of former or serving Heads of State. In other words, is there a necessary corollary, in this case denying

immunity, which flows from the status of the act, for which extradition is called for, as an international crime.

On the basis of such a corollary, the question of immunity as such does not arise. If the Head of State is charged with an international crime, the question of immunity is a non-issue. Seen in this way the problem becomes one of legal characterization and priority, as between different legal principles.

Unfortunately, the legal sources do not always assess the situation in this way.

The strange circumstance is that the standard authorities, and nearly all the cases, relate to the immunity of the State itself in civil cases, and not the immunity of individuals in criminal proceedings.

The trial of Eichmann (1962), the case of *Demjanjuk v. Petrovsky* (1985), and the Honecker (1984) case are exceptional. Moreover, as precedents, these decisions have idiosyncrasies.

The more significant evidence of the position in general international law must now be examined.

1. There is the Charter of the Nuremberg Tribunal, 1945, Art. 7, according to which

   > the official position of defendants, whether as a Head of State or responsible officials in Government Departments shall not be considered as freeing them from responsibility or mitigating punishment.

2. On 11 December 1946 the General Assembly of the United Nations adopted the following Resolution (Resol. 95 (1)):

   > Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.
   >
   > Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December, 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

   The Resolution is declaratory in form and was adopted unanimously in a General Assembly consisting of 51 States. It was a vehicle for the expression of State practice. This development is reported with approval in 1992 by the editors of Oppenheim's International Law (9th ed.: by Sir Robert Jennings and Sir Arthur Watts), pp. 505-506.

3. The Tokyo Charter (Charter of the International Military Tribunal for the Far East), dated 26 April 1946, provided in Article 6:

   > Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

4. The United Nations General Assembly Resolution 3074 of 1973, which proclaimed (*inter alia*) the following principles:

   > 1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.
   > 4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.
   > 8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.

5. The Statute of the International Tribunal for the Former Yugoslavia, adopted by the Security Council in 1993, provides as follows in Article 7:

   > 'Article 7. Individual criminal responsibility
   > 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
   > 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
   > 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
   > 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

   (In addition Article 9 gives the International Tribunal and States' national courts concurrent jurisdiction.)

6. The Statute of the International Tribunal for Rwanda, adopted by the United Nations Security Council in 1994, which contains the same clause (Article 6) (and also provides for concurrent jurisdiction: Article 8).

And lastly

7. The Rome Statute of the International Criminal Court, adopted by 120 states in July 1998 (and signed, *inter alia*, by the United Kingdom, Spain and Chile), which provides as follows (in Article 27 (1)):

   Irrelevance of official capacity

   1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

   The more cautious Law Lords regarded these Treaty provisions simply as special instances of jurisdiction and not as evidence of emergent principles of general or customary international law.

The issues facing the English Courts can now be summarized.

1. The request of the Government of Spain by virtue of the European Convention on Extradition.
2. As a consequence, the Extradition Act 1989 applies. Do the crimes alleged constitute extradition crimes?
3. The Home Secretary did not authorize the proceedings to go ahead on the charge of genocide.
4. The identification of extradition crimes involved a temporal criterion which could be either the date of the request for extradition or the date of the conduct.

The conclusion of the Law Lords was that the conduct must be a crime under English law at the conduct date and not at the date the request for extradition was made.

5. In the result:-
   (a) Genocide had already been dropped by the Home Secretary.
   (b) There was no evidence of hostage-taking.
   (c) Charges of murder and conspiracy to murder were extraditable crimes, provided the murders took place in Spain.
   (d) Torture was an extradition crime after 1988 when Section 134 of the Criminal Justice Act came into effect.
6. Immunity from criminal jurisdiction existed under UK legislation but not in respect of international crimes and thus the immunity *ratione materiae* normally applicable to former Heads of State does not apply.
7. The more specific conditions for removal of immunity for Heads of State were as follows:
   (a) The UK and Chile are parties to the Torture Convention.
   (b) Torture must be a crime under English law at the date of the conduct alleged.
8. The Torture Convention did not preserve immunity *ratione materiae*.

   The other view of this was expressed by Lord Goff, who was a rather lone dissenter in the second Appeal. He took the position that waiver of immunity by treaty must be express.

   An important point of interpretation was involved here: was it reasonable to assume that the draftsmen of the Torture Convention accepted that the senior officials who are those most likely to authorize torture would be immune from responsibility? If that were the case, the Convention would be to a great extent nugatory. This point of interpretation played a major role in the proceedings.

I shall now move on to examine the Obligation to Extradite Those suspected of International Crimes under Customary Law – as seen in the House of Lords.

In the House of Lords' first Appeal

- Lord Slynn stated that crimes against humanity were recognized since 1946 but no rule as to the restriction of immunity had emerged. (pp. 1473-4).
- Lord Lloyd took the view that immunity was accepted by virtue of well established principles of customary law. (pp. 1488-91)
- Lord Nicholls stated that crimes against humanity had existed since 1946 and no immunity was accepted as a consequence. (pp. 1500-2)
- Lord Steyn took a sharper view (p. 1506). At least since 1973 genocide, torture, hostage-taking, and crimes against humanity were recognized (p. 1508). Consequently no immunity was available.
- Lord Hoffmann simply agreed with Nicholls and Steyn.

There is a certain oddity about the speeches in the first appeal. The most lengthy and well articulated speech was by Lord Slynn, who was in a minority. The speech by Nicholls was relatively short and so was Lord Steyn's. Hoffmann simply agreed with the other two.

A key distinction in the Appeals was between the two types of immunity.

The first type, immunity *ratione personae*, attaches to the person of the official while he is in post as a Head of State or diplomat. It is an immunity linked to status.

The second type, immunity *ratione materiae*, attaches to the official acts of States and is related not to the person but to the subject-matter and thus it is a subject-matter immunity. Normally, this immunity survives the loss of office by the Head of State or diplomat.

In the Second Appeal the majority view was that ex-Heads of State did not have the protection of immunity *ratione materiae*.

1. Lord Browne-Wilkinson, (pp. 844-8) held that if Pinochet

organized and authorized torture after 8 December 1988, he

was not acting in any capacity which gives rise to immunity *ratione materiae* because such acts were contrary to international law.

2. Lord Hope, (pp. 879-87 at p. 886-7) was of the view that there was no protection in respect of crimes committed after ratification of the Torture Convention.
3. Lord Hutton, (pp. 887-902 / pp. 898-9) adopted the same position.
4. Lord Saville, (pp. 902-4) held that as the result of the Convention, States had agreed to the exercise of jurisdiction and that there was no immunity *ratione materiae* (p. 903).
5. Lord Millett, (pp. 905-14 at p.913) was of the view that as a result of the Torture Convention there was no immunity.
6. Lord Phillips, (pp. 920-25) held that the Convention was incompatible with the applicability of immunity *ratione materiae*.

The Law Lords in the Second Appeal had different positions both on the criteria for the development of international crimes in customary law and on the degree of the immunity. The question may be asked "What was the most radical position adopted?" Even the less conservative Law Lords still accepted the application of immunity *ratione personae*.

Lord Millett still accepted that immunity *ratione personae* applies, even though he was the least conservative of the Law Lords in the Second Appeal (p. 905, p. 913).

Lord Phillips was of a similar opinion (pp. 923-7).

Lords Hutton and Phillips emphasize that the standard is set by International Law. Thus torture cannot constitute acts committed in performance of the official functions of a head of State. (See also Lord Steyn in the first Appeal (pp. 1505-7), Lord Millett (pp. 913-4), Lord Nichols, p.1501). But all the Law Lords recognized the principle of immunity *rationae personae* and that was a concession made by Counsel on behalf of the Government of Spain.

However, the principle emphasized by Lord Phillips should in principle apply also to serving Heads of State. This was the position of Amnesty International in the Appeals.

Furthermore, the majority of the Law Lords held that the Torture Convention did not preserve immunity *ratione materiae*. But is it not equally possible that it does not preserve immunity *ratione personae*?

The positions adopted in the Second Appeal were directly related to the special characteristics of the crime of torture and the prohibition of torture as a form of *jus cogens*.

However, it is difficult to restrict the reasoning exclusively to the case of torture. It is difficult to see why genocide or hostage-taking should be treated differently.

As I near my conclusion, it is necessary to emphasize the complex interests involved in extradition cases relating to international crimes.

First, there is the Rule of law interest.

This is directed to the goals of ensuring that the extradition process is applied in accordance with the law, and also that the rights of the suspect are sufficiently protected.

Secondly, there is the possible interest of the State of the forum in trying the offences concerned.

And, thirdly, there is the interest of the requesting State, in this case Spain.

There is, however, the interest of third States other than the requesting State. The preponderance of the crimes associated with the Pinochet regime were committed in Chile. The Chilean interest was recognized in that in the Second Appeal the House of Lords permitted the Chilean Government to appear as an intervenor. It is also the case that many Chileans who were opponents or victims of the Pinochet Government believed that he should be tried in Chile and not in the Spain.

By way of conclusion it is necessary to utter a caution. The logic of the decision of the House of Lords in the Second Appeal, inexorable though it appears to be, is not yet generally accepted.

Two pieces of evidence may be adduced for this view.

The first is the resolution adopted by the Institut de Droit International at the Vancouver Session last year, entitled Immunities from Jurisdiction and Measures of Execution of Heads of State and Former Heads of State in International Law. This resolution is very conservative in essence and continues to recognize the immunities of Serving Heads of State.

The second piece of evidence consists of three recent decisions of the European Court of Human Rights in which the Grand Chamber of the Court accepted that the right to a fair hearing in accordance with Article 6 of the European Convention had not been breached where State immunity had prevented the Applicants from pursuing cases in the domestic courts.

Thus, the Court observed that

> In al-Adsani, while noting the growing recognition of the overriding importance of the prohibition of torture, the Court did not find it established that there was yet acceptance in international law of the proposition that states were not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum state.
>
> The 1978 Act which granted immunity to states in respect of personal injury claims unless the damage was caused within the United Kingdom, was not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of state immunity.

> The application by the English courts of the provisions of the 1978 Act to uphold Kuwait's claim to immunity could not, therefore, be said to have amounted to an unjustified restriction on the applicant's access to court. It followed that there had been no violation of article 6.1.
>
> Judges Rozakis, Caflisch, Wildhaber, Costa, Cabral Barreto, Vajic, Ferrari Bravo and Loucaides dissented.

One final observation is called for. A depressing aspect of the subject of extradition is the extent to which consistency in approach is subject to political circumstance and discretionary elements even in Rule of law States. Thus, there is a regional jurisdiction for the International Criminal Tribunal for the Former Yugoslavia and also one for Rwanda but not for other regions or situations. And even multilateral standard-setting conventions may be the subject of compromise, as in the Lockerbie case.

In conclusion there was a strong logical case for the denial of immunity both in relation to former and to serving heads of state. This was the position of Amnesty in the two House of Lords appeals. Unfortunately as we have seen, this position is not yet reflected in the sources of Customary International Law. The relevant majority of the House of Lords did not approve of the view that immunity could be restricted as a consequence of the principles of customary international law as opposed to express Treaty obligations.

General

23 Professional Ideals in Maltese Legal Practice

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Introduction

In his landmark study of American lawyers, Richard Abel, (Abel: 1989) observed that structural-functionalist theories of the professions share a common basis with professional ideals themselves,[1] since both assume that: 'if protected from outside interference, (professionals) will use their expertise for the general good' (Abel 1989: 35).[2] As Abel (ibid.) also remarks, however, the alleged social effects of ideals of professional independence in actively inducing professionals to pursue the public interest have rarely been empirically investigated. This is the aim of this paper which draws on anthropological fieldwork carried out in Malta to examine the ways in which Maltese lawyers interpret and invoke professional ideals in the course of their legal practice and when confronting recent reforms to the court procedures for compiling evidence. In so doing, it follows the trend in the sociology of the professions to view professionalism as primarily an 'emic' or folk-concept and investigate it as such (Cant & Sharma 1998: 246; Bourdieu 1992: 42; Johnson 1972). An anthropological approach, which concentrates on the role played by professional ideals in the daily practice of lawyers, makes it possible to overcome what has been described as the: 'arbitrary separation between the sociology of law and the sociology of the legal profession' (Buchanan 1997: 364).[3] Moreover this approach highlights the complex inter-relationships between professional ideals and the specific social and cultural contexts in which they are implemented.

Fieldwork

These themes will here be approached from the standpoint of my fieldwork on legal practice in Malta. Fieldwork was carried out for a total of twenty two months, between April 1995 and May 1997.[4] It was based on participant observation in the offices of four Maltese lawyers[5] and in the civil courts. I had access to these offices because I have a law degree, having trained in law before studying anthropology. My research concentrated on the ways in which lawyers and clients negotiate the 'facts' of the case, the production of evidence during court litigation and its assessment during adjudication. The aim was to acquire a holistic understanding of Maltese legal representation in civil litigation by exploring the social relations through which it is carried out. Through focusing on legal practice, I tried to build on my own legal background so as to carry out a more reflexive and practice-orientated ethnography, of the sort that Bourdieu (1997) has recommended.

This paper will initially focus on the pressures clients place on their lawyers in office interviews. Against this backdrop, the way Maltese lawyers interpret and invoke professional ideals in their legal practice will be explored. This will be followed by an account of the recent reforms to Maltese court procedures for compiling evidence. Lawyers' reactions and the role played by professional ideals in the resulting 'problematization' of evidence will be analysed. Finally these observations will be placed in a comparative perspective and their implications highlighted.

Lawyer-Client Interviews

Office interviews with lawyers, in which clients communicate the facts and receive legal advice and guidance, are an indispensable starting point to explore the social uses of professional ideologies. These interviews are central to lawyer/client interaction as during their discussion of the case both parties

1 Abel notes the intimate relationship between Parson's portrayal of the professions and the: 'dominant 'trait' approach to professions which demarcated them from other occupations by elaborating their allegedly socially integrative functions into a series of distinguishing characteristics' (Abel 1989: 16). He shows how this approach has influenced both the English Royal Commission on Legal Services and the American Bar Association's Model Rules of Professional Conduct, observing that this approach reduces sociological analysis to 'little more than professional apologetics' (Abel 1989: 17; cf. Johnson 1972: 25).

2 In support of his argument, he refers to Parson's (1964) analysis of the lawyer's role in terms of the need to resist clients' pressures in their own long-term interest.

3 Buchanan is here quoting Pierre Bourdieu. However the exact reference could not be traced.

4 I am grateful to the Universities of Malta and Durham for funding my research. This was made possible through a staff scholarship by the University of Malta and an ORS grant on the part of the University of Durham.

will also informally negotiate their relationship. During my fieldwork, story-telling was the most prominent feature of the interviews I observed. While my training in law had led me to expect clients to state 'facts' structured according to legal categories, what I experienced was a more confused and contested process. Rural and working class clients in particular would smuggle stories stressing their own morally upright behaviour within their narrative accounts of the facts. Such stories were told despite the inattention of lawyers and although they seemed legally irrelevant. In one case, for instance, a rural small businessman seeking his lawyers' help in some financial matters, explained that he had always 'walked straight', (that is, acted honourably) and that while he was prepared to give away free gifts, he could not tolerate being robbed by others. Similarly, a working-class widow who was trying to repatriate her husband's money kept insisting with her lawyer that she did not want this money for herself, but so as to leave it to her children equally in the event of her death. The persistence of clients in recounting these personalized stories seemed even more paradoxical since lawyers told me that their only aim was to get the facts straight and disclaimed any interest in the moral qualities of their clients 'who should only be judged once'.

Certain features of clients' stories throw light on their significance. These narratives create moral sympathy for clients because they inject powerful cultural values into descriptions of past actions. This can be illustrated by the story of the rural businessman earlier mentioned. He talked about 'walking straight', because in Maltese 'walking' is used metaphorically to morally evaluate the way in which a person relates to others. A person who 'walks straight' is one who avoids corrupting social obligations which deviate one's life-walk, impeding straightforward adherence to moral ideals. Consequently the businessman endowed himself with an honourable autonomy, which could be used to exert pressure on his lawyer,[6] authorizing him to express powerful emotions and thump on his desk in anger at being robbed. Through these stories, moreover, clients also try to translate their moral virtue into legal entitlement in their lawyers' eyes. This is made explicit in the businessman's case, since the expression '*nimxi dritt*', or 'I walk straight' plays on the way '*dritt*' in Maltese not only means straightness, but also a legal right, or even the undifferentiated whole of legal and moral rules.

This analysis indicates that clients' narratives are best understood not solely as ways of communicating the facts, but also as attempts to control their relationships with their lawyers. They operate as what linguist Deborah Tannen (1989) has called: 'involvement strategies', since they are a medium through which clients can involve lawyers in personal relationships based on shared moral values, obliging them to actively 'advocate' their interests. Anthropologists have observed such patronage relationships in Malta (Boissevain 1993) and elsewhere in the Mediterranean region (Campbell 1974). Their ideological structure has been aptly described as 'the moral englobing of political asymmetry that allows the client to maintain self-respect while gaining material advantage' (Herzfeld 1987: 86). Clients use various strategies to try to create these patronage relationships.[7]

These efforts to create patronage derive from complex social causes, which can only be briefly indicated here. Some seem to be common to other Mediterranean societies. Thus, the anthropologist Michael Herzfeld (1993) has related the need for mechanisms of social incorporation in Greek society to the absence of a fully integrated capitalist economy, the competitive and hostile character of extra-familial social relations and the weakness and relative youth of the nation-state.[8] Other causes relate more specifically to Malta, such as the historically derived sense of alienation of the Maltese from a state apparatus belonging to a foreign colonial power (Zammit 1984) or the modelling of political power on Catholic religion with its stress on saintly mediators between person and God (Boissevain 1993). In a small-scale society impersonality can become a scarce (and valued) commodity. As one Maltese proverb has it, 'Malta is small and people are known.'

Popular perceptions of lawyers and the court system may also motivate clients to try to create patronage relationships. Rampant delays in litigation have given a bad name to the Maltese courts and clients may seek their lawyers' patronage to ensure that their cases are handled efficiently. The ambiguous social role of lawyers as mediators between their clients and the state legal system may make it difficult to discover whose side the lawyer is on. If middle-class clients complain about the links between lawyers and criminals, those coming from a rural or working-class background see lawyers as part of a dominating and exploitative upper class. Significantly, it is clients who are the most socially distant from the urban professional classes who often seem to try hardest to involve their lawyers in patronage relationships.

It seems clear, therefore, that Maltese lawyers often come under intense pressure from clients, especially those coming

5 According to my calculations, there were, during the period of my research, close to three hundred lawyers involved in court litigation.

6 Analogously, by stressing her impartial concern for her children, the widow sought to portray herself as a good wife and mother as the role was traditionally conceived in Malta.

7 For instance, clients give gifts to their lawyers and try to involve them in discussions about non-legal matters.

8 Herzfeld, (1993) explains that consequently the Greek nation-state has not absorbed into itself all the idioms of social identity; so that these can function independently of and be employed to contest the state structure.

from a rural or lower-class background, who try to create personal relationships with them in order to control the way they carry out their work. Clients make indirect attempts to develop these patronage ties, evoking moral sympathy through the way they narrate the 'facts' of the case. This strategy is difficult to rebuff, given the 'inescapably moral' (Bruner 1990: 50) character of the stories through which the 'facts' are communicated.

The Social Uses of Professional Ideals

Lawyers' professional ideals have been approached from the standpoint of their interviews with clients because these ideals are not simply abstract principles to which lawyers pay lip-service. On the contrary, they have a direct practical application, helping to equip lawyers to cope with the pressures clients place on them. These social uses of professional ideals are revealed by the way they are taught to new generations of lawyers. Professional ethics are not fully incorporated into the standard academic curriculum at university. They are usually taught to young lawyers by practitioners during the minimal period of transition from the University to legal practice.[9] Moreover a Maltese code of professional ethics for lawyers was only published in 1996.[10] Thus the transmission of professional ideology forms part of a process of oral socialization through which young lawyers learn to view themselves as members of a professional community with its own distinct interests.

An important practical use of professional ideals is that of justifying lawyers' non-response to their clients' stories. During my fieldwork, I often observed lawyers keeping a sceptical distance based on the need to preserve their professional detachment. This refusal to fully endorse clients' narratives was signalled by the ironical comments lawyers sometimes made, the contextual absurdity of which showed they were not 'taken in'.[11] A sense of professional detachment could also be transmitted through formal clothing, the organization of space in legal offices[12] and an aloof attitude when interacting with clients. These invocations of professional ideals clearly reflect attempts by lawyers to resist entanglement in patron/client relationships.

The connection between the professional ideals upheld by Maltese lawyers and their clients' involvement strategies can be perceived by exploring the way the task of legal representation is described according to professional ideology. The comments of one established and highly respected lawyer are typical in this regard. When I interviewed him on this point, this lawyer made a distinction between the 'case', which the lawyer is duty bound to present to the court as effectively as possible, and 'facts', which are 'in the hands of the client' to prove. He observed that the stories clients tell under oath and in the courtroom context are often very different from the ones they originally told their lawyers. Consequently facts should emerge in the court-room setting of an oral hearing, which he termed a 'search for truth' undertaken before the judge. He therefore objected to the use of written affidavits[13] as an alternative way of collecting evidence; claiming that they tempted lawyers to write their clients' stories for them and risk perjuring themselves. He also observed that he had never witnessed a signature in the absence of the person concerned.

Thus, professional ideals portray legal representation as a process where the lawyer's concern with the issues at stake is distinguished from that of his or her client. Lawyers are concerned solely with the 'case'; consisting of the legal arguments and claims to be made.[14] The proof of the 'facts', on the basis of which these legal arguments are raised, is the client's job. This distinction establishes a conceptual boundary between the domain of the client, which is one of potentially changeable oral stories of dubious credibility, and the domain of the lawyer, which is one of legally valid writing. By drawing such a boundary, lawyers escape responsibility for proving their clients' stories, confining their role to legal argumentation. In fact, Maltese lawyers constantly assert their detachment through expressions like: 'trying to win the case for the client', which imply they have no personal interest in the outcome.[15]

9 Generally professional ethics are taught in the sixth year of the LL D course, which was until very recently perceived as a period when the academic teaching of law was at an end, so that students concentrate on their apprenticeship and on preparing their dissertation. Professional ethics are also favourite subjects for speeches on such occasions as the granting of the professional warrant, or in seminars organized by the law students' society.

10 Reference is made to the 'Code of Ethics and Conduct for Advocates', published in 1996 by the Commission for the Administration of Justice, The Palace, Valletta, Malta.

11 For instance, in one case, a landlord kept telling his lawyer what a gentlemanly relationship he enjoyed with his tenants, while he also sought advice on how he could legally increase the rent. His lawyer calmly observed that as the tenants were professional people, it was going to be difficult for the landlord to make fools of them!

12 Professional detachment was conveyed by maintaining a spatial demarcation between the 'front office', where clients wait and their files are located and the 'inner office', where lawyers sit surrounded by law-books.

13 An affidavit is a written statement of the client's version of the facts. They are supposed to be precise reproductions of their stories and clients must confirm them on oath. Maltese judges are increasingly requesting the presentation of affidavits instead of oral testimony.

14 Lawyers are prepared to accept more involvement with the facts in criminal cases.

15 Strictly speaking, lawyers have no financial interest in winning law-suits. This is because their fees are calculated according to an official tariff, according to such matters as the value of the object of the suit. Naturally, however, lawyers who consistently lose suits will probably fail to attract as many clients as others.

This professional model of legal representation is significant for two principal reasons. Firstly, it is almost diametrically opposed to the way most clients would like to construct their working relationships with lawyers. Whereas clients would like to start from a moral consensus with their lawyers concerning the facts of the case; the professional model requires lawyers to base their court-room representation on a prima facie assessment of the facts which is solely intended to clarify the legal issues involved. Clients often believe that once they take on a case, lawyers assume responsibility for ensuring a successful outcome in the court-room. By contrast, the professional model places the burden of producing convincing evidence firmly in the hands of the client, restricting the lawyer's role to 'purely' legal argumentation.[16] Consequently, although the client might feel that this is unethical, the professional model authorizes a lawyer to institute a court case on behalf of an insistent client even if the lawyer believes that he will lose the case because his evidence is not sufficiently persuasive or credible.[17] Evidence belongs in the clients' hands and lawyers are distanced from any responsibility for it.

Secondly and more importantly, it seems clear that professional ideals which have the effect of distancing them from responsibility for the 'facts' can be very useful to lawyers in a social context where clients try to use their narration of the 'facts' to implicate them in patronage relationships. I suggest that Maltese lawyers favour an extensive interpretation of the meaning of professional detachment when representing clients in litigation precisely because it allows them to escape the pressures which clients exert through the medium of the 'facts'. If this is correct, then it shows how the interpretation of professional ideals is influenced by the practical context in which it occurs.

This analysis is open to the objection that I have overemphasized the homogeneity of Maltese lawyers, ignoring the occupational differentiation of the profession and possible differences in style and approach which might lead to different interpretations of professionalism. However, the internal differentiation of the Maltese legal profession is not very great. My statistics[18] show that in 1994, 44% of lawyers were sole private practitioners, 28% were employed with law-firms and 13% with the Government. The remainder were either non-practising or employed with various private companies. Moreover, Maltese law-firms are usually small partnerships where the type of work closely resembles that of a sole practitioner. Indeed, only four of the law-firms listed in 1994 had a membership of seven or more and the largest of these grouped eleven lawyers. In the exercise of their profession, most firm lawyers find that it is important to be flexible and to be prepared to carry out different types of work, even if they have specialized in certain fields.[19]

Stylistic differences in handling clients exist and they do seem to be broadly correlated to occupational status. Sole practitioners are more likely to devote time to listening to their clients and to provide some endorsement of their stories, while firm lawyers tend to place a higher premium on efficient time management. However most lawyers find it necessary to strategically balance between patronage and professionalism when handling clients. The attractions of professionalism are obvious, since it frees lawyers from clients' pressures and allows greater efficiency. Yet there are important reasons why even firm lawyers find that they cannot avoid acting as if they were, to some extent, their clients' patrons.[20] Thus, as already observed, many clients want to create patronage relationships and lawyers, who operate in a very competitive market, are eager not to alienate them. Moreover certain clients do not feel able to confide secrets to their lawyers unless they have a personal relationship with them (Du Boulay 1974). Finally, as was previously argued, patronage relations are in a way in-built into clients' stories.

It follows that despite the existence of occupational and stylistic differences among Maltese lawyers, they generally attempt to strike a balance by providing limited endorsement of their clients' narratives while also trying to emphasize their professional detachment from them. Few lawyers are willing to forego the benefits of belonging to the '*Professjoni Libera*', or 'free profession' as they call it, by wholeheartedly identifying themselves with their clients in patronage relationships. Indeed certain lawyers were criticized by their colleagues both because they develop close patronage relations with clients and because they help to draft affidavits on their behalf. This criticism clearly shows how lawyers tend to equate professional

16 Thus, clients' views on affidavits contrast to those of lawyers. In fact, clients complained to me that their lawyers had barely glanced at the affidavits they wrote. While clients expected their lawyers to take responsibility for the evidence, this is precisely what the latter wanted to avoid.

17 Of course the lawyer has a recognized duty to inform his client that he thinks he will lose the case.

18 Data was culled from the 'Legal and Court Directory' produced by the Camera degli Avvocati, the Maltese lawyers' association. The directory contains a list of practising lawyers which can be considered as fairly exhaustive, given that practically all practising lawyers are members. I consulted the 1994 and 1992 issues of this Directory.

19 This is due to the small size of Malta, which means that the number of legal jobs available in any area of practice is necessarily limited.

20 By, for instance, occasionally waiving payment for legal advice and giving more attention to clients.

detachment, in the sense of keeping the necessary distance from the client,[21] with professional legal representation, in the sense of confining oneself to the legal issues and leaving ultimate responsibility for the 'facts' to the client. Clearly, most Maltese lawyers believe their professional detachment requires the avoidance of excessive involvement with the 'facts', viewed as a potential source of 'symbolic pollution', in Mary Douglas's (1988) usage.

The Reforms and their Outcome

Having explored the way lawyers interpret professional ideals in the ordinary course of their legal practice, it is now possible to reach a deeper understanding of the obstacles impeding certain reforms which the Maltese Government carried out in 1996 to the system by which evidence is compiled in court. By focusing on this particular case-study, the broader social effects of professional ideals will be highlighted. Firstly, however, it is necessary to explain the pre-1996 system for compilation of evidence and the public discontent which motivated these reforms in the first place.

Litigation before the Maltese civil courts traditionally occurs in two broad, successive, phases. A preliminary written phase, in which the litigants send each other their respective written legal claims and statements of defence, is followed by an oral phase when the parties and their witnesses testify and the lawyers question witnesses and present their own arguments. During the written phase and together with their legal claims, the litigants are obliged to send each other a 'declaration of facts' which should contain their respective statements of the 'facts' at stake. Together with this, each of the litigants is also expected to file a list of the documents and a list of the witnesses which s/he intends to produce during the case. After the preliminary exchange of their written claims, the case then shifts to the oral stage where each of the litigants has a chance to testify and to produce any witnesses mentioned in her list. Testimony is usually heard in a certain order: starting from the plaintiff and continuing with his witnesses and followed by the defendant and his witnesses. Witnesses are first examined by the lawyer for the party who summoned them and then cross-examined by the opposing lawyer. Their replies are transcribed by the court clerk. Often, important documents are handed over to the court by witnesses in the course of testimony After all the witnesses have been examined, the judge defers the case so that he can pronounce his judgement.

What this account omits are all the delays which are caused when this system is implemented in practice. These are due to various causes. For instance, litigants often find it impossible to summon all their witnesses to testify on the same day. Consequently, cases are usually postponed for three months so as to hear the testimony of new witnesses. Some litigants tend to name fifty or sixty witnesses and expect to be allowed to summon them all to testify! Additional problems are caused when particular witnesses do not come to court or cannot be traced and the case is normally put off to allow lawyers to try to contact these witnesses. There are many other causes of delay which cannot be mentioned here. Delays mostly arise during the oral phase when testimony is being produced. Court delays have multiplied during the past few years. Statistics for 1997[22] indicate that by the end of January 1997, there were a total of 22,861 cases pending before all the Maltese courts.[23]

Recently, increased media attention has focused on the issue of court delays. It is increasingly acknowledged as a serious problem which results in the denial of justice and alienates people from the courts.[24] Partly in reaction to this growing public concern and in order to enhance the efficiency of the courts, the Maltese government in July 1995 enacted a law to reform various procedural rules.[25] This law contained provisions relating to the trial of law-suits which caused controversy. In particular attention has focused on the new procedure to be followed by judges when compiling evidence in civil trials.

In terms of this new procedure, a pre-trial hearing was to be held before the first sitting in the case. The aim of this hearing in the words of the government minister – himself a lawyer – who introduced the amendments, was to allow the court to: 'identify and record the points of law and fact in contention

[21] A similar model of legal representation is found in the Maltese code of ethics for lawyers (op. cit.). Significantly, this code prescribes that an advocate representing clients in civil litigation: 'is under a duty to say on behalf of the client what the client should properly say for himself or herself if the client were allowed to plead for himself or herself and possessed the requisite skill, knowledge and legal training' (Rule 11, Part IV, Cap 1). By requiring advocates to restrict their representation to what clients should 'properly' say, this code prevents their complete identification with clients.

[22] These figures were given by Justice Minister Charles Mangion in a reply to a Parliamentary Question. They were reproduced in the Maltese daily newspaper *The Times*, March 5th 1997.

[23] Of these, 1,067 cases were pending before the Court of Appeal; 8,318 before the Civil Courts and 11,150 before the Magistrates' Courts.

[24] A good example of the tone of the comments made by the Maltese newspapers are two newspaper editorials which both appeared during June 1997, while I was doing my research. While the editorial of the conservative daily *The Times* emphasized the need to speed up court proceedings, that of the left-wing weekly *It-Torċa* claimed that 'In the administration of justice, the citizen expects the legal process to be *efficient* (my italics), comprehensible and really just. The citizen is not satisfied on any one of these points.'

[25] The law in question is Act 24 of 1995, which amended the Code of Organisation and Civil Procedure. The provisions of this law which concern us were brought into effect by means of a legal notice in 1996.

and the proof to be given by each witness' (Fenech: 1996b). The second major innovation was that after the pre-trial hearing, judges were given the option of choosing the system by which evidence was to be heard. Previously the principle was that all testimony had to be heard orally. Instead judges were now given the option of compiling all[26] evidence by means of written affidavits prepared by parties and their witnesses and deposited in court. However, even if this 'affidavit system' were to be chosen, the opposing lawyer was to continue to enjoy the facility of conducting an oral cross-examination of parties and witnesses on the testimony contained in their affidavits. Finally the third innovation was that judges were then to fix a date for a full hearing of testimony (if the evidence was to be compiled 'viva voce') or for hearing by cross-examination (if the affidavits system was selected). During this sitting all the oral testimony to be presented in the case was to be heard uninterruptedly. There were to be no adjournments except in very special circumstances. This contrasted with the previous system, in which witnesses were heard on several different sittings and adjournments were frequently granted.

Before exploring these innovations further, it is important to consider the way they were implemented. The collective response of judges to the amendments was to introduce a new judicial role: that of the Master, which was not contemplated in the amendments.[27] By agreement among the bench, one of the judges assumed this role and was entrusted with around 3,000 cases in which, to quote the current Chief Justice: 'very little was being done' (Said Pullicino 1997). His task was to be that of conducting a pre-trial hearing in this case and in all new cases to be filed in the future. After he had clarified the points in issue and the proof to be made by different witnesses, he was to transfer these files to the other judges before whom the actual court sittings would be held. Consequently while the amendments had contemplated that all judges would hold a pre-trial hearing in every law-suit they adjudicated, the effect of the judges' decision was that only one of the judges would conduct the pre-trial hearings. Moreover this judge would not be the one before whom these cases were actually heard. The Chief Justice justified these changes on the grounds that:

> in a situation like ours where the administrative infrastructure is lacking, where the number of judges was inadequate and the culture of accepting certain systems of control on the compilation of evidence and the regulation of the cause by the judge objected to, all these amendments, rigidly applied, could not have the desired beneficial effect without bringing about a traumatic experience. There was, on the contrary, the danger that this would bring about a total collapse of the system. It was principally for this reason, therefore, that through an administrative process – which was not contemplated in the amendments and introduced clandestinely – the system of the Master was introduced. (Said Pullicino 1997)

In November 1996 there was a change of Government. On meeting with the new Minister of Justice, the President of the Chamber of Advocates called for the abolition of the affidavits system, which was the second plank of the newly introduced reforms. He claimed that this worked against the conscience and professional training of lawyers. He hoped, however, that the Master system: 'would be operated more effectively' (Cremona: 1996). Following this, there was mounting criticism of the new Master system from various lawyers and judges, on the grounds that it had only served to create another bottle-neck, since one judge could not possibly hold pre-trial hearings in 3,000 cases together with all the new law-suits that were being filed.

The next development occurred in April 1997, when a seminar was organized to discuss the implementation of the new amendments. Opening this seminar, the Chief Justice admitted that the Master system was not working as well as originally planned (Said Pullicino 1997). Then, in June 1997, the Minister of Justice announced the setting up an 'Advisory Committee for the Law-Courts'. The committee was given an extensive brief, which included continuous monitoring of the situation and recommending changes to the laws, administrative set-up and the Master system in order to increase the efficiency of the courts. More recently, in January 1999, the President of the Chamber of Advocates gave a speech in which he called on the legal profession to give the new Master system a proper try, asking them: 'not to discard the system before attempting to employ it in its entirety' (Cremona 1999).

My reason for recounting the ongoing history of these procedural reforms is to draw attention to the relationship all the protagonists draw between court delays and the manner in which evidence is compiled. They argue that there is a Maltese culture or 'ingrained mentality' (Brincat 1997) which resists greater control on the process of compilation of evidence. This mentality is so powerful that it induced judges to introduce the Master system, so as to avoid a: 'traumatic change' (Said Pullicino 1997) which could: 'lead to the total collapse of the system' (ibid.) Moreover, it has even subverted the Master system itself. However, in the light of the preceding discussion of the way Maltese lawyers interpret their professional role, the failure of these reforms does not seem so surprising. If Maltese lawyers believe that professionalism is asserted through avoiding excessive involvement with the facts of the case by leaving them in the hands of their clients

[26] Previously affidavits tended to be restricted to the testimony of the litigating parties.
[27] The master system was modelled on English procedures.

to prove, then they might not be too keen about reforms which operate precisely by obliging lawyers to take more responsibility for the factual aspect of cases.

Taking more responsibility for the facts is the common thread which links the various proposed reforms to the system of compilation of evidence of the Maltese courts. This is most evident in the case of the proposed system for compiling evidence through affidavits, which did in fact provoke lawyers' protests that it obliged them to act unprofessionally. However even the proposed 'pre-trial' and Master systems operate by requiring the parties to state the facts as they see them at the start of the case in a less formal arena than that of ordinary litigation. In such a setting, lawyers would not have such a clearly defined role as they have during a court-room trial and it would be more difficult for them to assert their detachment from the factual aspect of the case. Lawyers would be more personally involved in telling and validating their clients' stories.

In resisting these reforms, lawyers followed a well established tradition. As part of an attempt at reforming the Maltese courts, the British Royal Commission of 1913 had recommended that a written 'declaration of facts' be submitted by litigating parties at the start of their lawsuit. While this requirement was incorporated into the law, it was negatively received by the lawyers, who scented a threat to their professional detachment. Their collective reaction was to draft these 'declarations of facts' in such an elliptical way as to turn them into what are effectively summaries of the statements of the legal claims being made in the case; thus leaving the 'facts' to emerge in the course of the oral court-room hearing.[28]

Analogously, lawyers have expressed resistance to the new procedural reforms in both direct and indirect ways. As the earlier-quoted extract from the Chief Justice's speech made clear, it was actually judges rather than lawyers who aborted the system of pre-trial hearings by 'clandestinely' (Said Pullicino 1997) introducing the Master system. However, as the Chief Justice also noted, they were anticipating the objections lawyers would make; given their objections to: 'certain systems of control on the process of compilation of evidence' (ibid.) All Maltese judges are drawn from the pool of practising lawyers, together with whom they constitute a tightly-knit court community. Maltese judges are keen to uphold their independence in the face of possible government interference. They are therefore disinclined to rigidly apply administrative reforms which could antagonize lawyers, especially if these reforms appear to raise problems of professional ethics. These attitudes seem also to have contributed to widespread non-compliance with the rule that all evidence be produced in one court sitting and to a notable lack of enthusiasm for the new option of compiling most of the evidence by means of affidavits.

Through their resistance, Maltese lawyers have managed to safeguard their understanding of their professional role in the face of administrative reforms which threatened to define it differently. However there is also a negative side to these assertions of professionalism. By leading lawyers to avoid taking responsibility for the 'facts' and to insist that these must be proved by clients in the courtroom, they create room for various strategies through which the process of the production of evidence is made more elaborate and time consuming. These strategies depend for their success on the increased time it takes to produce oral, as opposed to written, evidence in court. Written affidavits also take less time to read and make it easier to establish the points of contrast and similarity between the versions of the different parties and their witnesses. Conversely, if the 'facts' are orally produced, then it becomes possible to:

i. Produce irrelevant testimony or contest all the evidence presented by one's opponent in litigation. This is because the relevant 'facts in issue' remain unclear for a longer time.
ii. Summon many witnesses to testify to the same 'facts'.
iii. Conceal valuable evidence from the opposing party in litigation, until it becomes strategically appropriate to disclose it.

The effect of these strategies is to produce what could be termed the 'problematization' of evidence. By referring to 'problematization', I want to highlight how difficult and problematic the process of compilation of evidence can be made and to suggest that such an outcome may sometimes be actively intended. After all, it can be in the interest of both lawyers and their clients to create delays. In this way, lawyers can gain more control over the evolution of litigated cases and acquire more space to manœuvre in the interests of their clients. Moreover, a client who looks set to lose a case may benefit from such delays. It seems, in brief, that professional interests may easily fuse with professional ideals in a powerful combination which explains the perseverance with which lawyers have resisted attempts to reform the system by which evidence is compiled.

Conclusion

The implications of this research appear in sharper relief if it is placed in a comparative perspective. A touchstone is provided by Merry's (1990) study of the legal consciousness of

[28] So as to explore this issue, I examined the first fifty law-suits filed in February 1997. There were only three instances in which the 'declaration of facts' filed by the plaintiff was substantially different from the 'ċitazzjoni', the statement of the plaintiff's legal claims; containing additional details which were not mentioned in it.

working class American clients. She showed how these clients often view court proceedings as a way to escape the close and constricting communities in which they are embedded. Litigation offers the possibility of socially distancing oneself by asserting one's rights as a citizen of a bureaucratically organized nation-state. By comparison, the present study focuses on the other side of the coin, by showing how lawyers try to socially distance themselves from their clients and invoke professional ideals for this purpose. Yet this professional detachment cannot always be maintained. Maltese lawyers cannot afford to excessively discourage their clients and must therefore walk the tightrope between patronage and professionalism. Paradoxically, this may create a situation where the professional ideals of lawyers are themselves utilized to service their patronage relationships with their clients; since they allow lawyers to create delays by 'problematizing' the compilation of evidence.

To sum up, this research confirms the original argument that the actual social context of implementation of professional ideals needs to be examined very thoroughly. The way Maltese lawyers have interpreted their professional role appears highly influenced by the social pressures their clients place on them. At the same time, the social effects of these ideals have been shown to be potentially negative, since they favour the 'problematization' of evidence which creates court delays.

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24 The Arab Charter of Human Rights

Bartolomeo Conti

The effort made by various sectors of the Muslim culture to define an Islamic doctrine of human rights was part of a large movement which united all the Muslim Community in a search through its past:[1] That is, a search through its own religious and cultural traditions to find answers to the challenges of modernity.

According to important exponents of Islamic thought and in contrast to other concepts, like democracy, 'the notion of inherent rights to the human person has from its origins been inscribed in the Islamic conscience.'[2] Like any other civilization, even Islamic civilization has developed its own vision of Man and of the totality of rights and obligations that are inherent to his person.

Islamic speech on human rights is therefore not simply a concession to the spirit of an era, but is an integral part of the traditional and cultural tradition of Islam. Undoubtedly, though, both the ideological conflict on one hand and the Western model of development on the other, have pushed the Arab-Muslim world to express, in a different form, its own vision of man and in particular of the rights and obligations that belong to his person. The search for a definition of an authentic Islamic vision of human rights is also enhanced by Muslim culture's need to define itself, aiming to present itself as a valid interlocutor on the international scene.

The Western tendency of considering the human rights debate to be its own, exclusive property – even if this can in part be justified by the universal force which the elaboration of Western Illuminist philosophy has taken on – is associated with the tendency of excluding Islam from the cultural sphere in which human rights have been elaborated and proclaimed. The exclusion of the Islamic civilization from the sacred fence of human rights has provoked a reaction on the part of the same Muslims who have attempted to outline their version of man in a language which conforms with the needs of modernity. Central to the Islamic 'counter-offensive', is the idea, common to the greater part of contemporary Islamic thought, that Islam, being of divine origin, has reached the apex in the regulation of human relations; it is thus deduced that the original matrix of human rights is already included in the religion which *Allah* granted to man more than thirteen centuries ago.

This type of speech in apologetic tones, aims to reject the Western cultural models while searching for common elements between the original Islamic message and the values which govern international relations. In fact beyond the theoretical disputes as to who 'invented' them, 'human rights represent an important determined policy'[3] which no civilization can ignore. Certainly they cannot be ignored by the Islamic community which particularly, 'in virtue of the idea it has made of its own original vocation – that of a witness – community amongst men (2,143 – Koran) – it cannot remain indifferent to questions which are raised, at an international level by the human rights issue'.[4]

To this need, which we might consider 'international', one is to add that the debate on the concept of 'rights inherent to the human person', reflects a proper need of the religious and cultural tradition of Islam.[5]

1 'When analyzing the question of human rights, one must not forget, that the year 622, is now present more than ever in the elaboration of strategies for the future.' Bennani, B. P., *L'Islamisme et les droits de l'homme*, Lausanne, Ed. de L'Aire, 1984, p. 96.

2 Merad, A., 'Droit de Dieu, Droit de l'homme en Islam', in *Universalité des droits de l'homme et diversité des cultures: Les Actes du premier Colloque Interuniversitaire*, Fribourg 1982, Ed. Universitaires Fribourg Suisse, 1984, p. 129.

3 Abu-Sahlieh Sami, A. A., *Les Musulmans face aux droit de l'homme: religion et droit et politique*: *Etude et documents,* Bochum, Verlag D. Winkler, 1994 p. 13.

4 Merad, A., *Droit de Dieu, droit de l'homme en Islam*, op. Cit. p. 128.

5 Man is imprinted with a dignity that has no equal amongst the creatures of God: Man is the 'vicar (califa) of God on earth' (2,30 – Koran), Ali Merad specifies that 'the concept of vicarage of God on earth establishes the equal dignity of the sons of Adam in Islam. This is the essential principle of every charter of human rights' (Ali Merad, "Le concept de 'droits de l'homme' en Islam', in Hirsch, E., *Islam et droits de l'homme*, Paris, Libraire de Libertes, 1984, p. 193. The concept of 'vicarage of God' implies certain responsibilities, obligations which the human being has with regards to God: it is such duties that define the quality of the believer. 'Signifying submission, obedience to God, the Master of the Universe, the law of Islam affirms the rights of God over the creature that means the duties the latter has *vis-à-vis* the former, before thinking of the duties of man *vis-à-vis* himself' (Santucci, R., 'Le regard de l'Islam',

As Ali Merad rightly observes, 'Islamic speech reflects – today as yesterday – a searching thought process',[6] in which the efforts aimed at defining an Islamic doctrine of human rights have assumed an ever increasing importance. Starting from the Universal Declaration of 1948, the debate on human rights and the necessity of a specific Islamic or Arab position on the question has slowly increased between Muslim countries. Such a necessity has been fueled by the sentiment, much diffused amongst Muslims, that the West had imposed a Universal Declaration, designed by its own jurists, without an authentic participation of the Arab countries. [7] The Arab or Islamic declarations of human rights, first of all express the need of Muslim countries to have a proper position on the international scene and, in the case of explicit Islamic declarations, to represent the attempt to bring the universality of human rights within the universal perspective of the Islamic religion: they are thus an attempt at 'Islamizing' human rights.[8]

One of the most interesting official documents issued within the Arab Muslim ambit is undoubtedly the Arab Charter of Human Rights. Adopted on the 15th September 1994 by the Council of the League of Arab States,[9] the Charter is made up of a preamble and 43 articles, subdivided into four sections. The first section sanctions the right of people to self-determination; the second contains general principles, rules of application, the limitations and enunciation of the rights and fundamental freedoms; the third section is dedicated to the creation of the Committee of Experts of Human Rights; the fourth deals with the regulation of signature, ratification and the entry into force of the document.

The idea of a specifically Arab codification of human rights had already appeared in 1969 in the action programme of the Permanent Arab Commission of Human Rights, but despite various attempts, the project was only concluded in 1994, that is only four years after the Organization of the Islamic Conference had adopted the 'Declaration of Human Rights in Islam'. In content as in timing, the Arab Charter represented a response on the part of the Arab States,[10] now more secular and more modern, to the traditional Islamic vision expressed by the Declaration of Human Rights in Islam.[11]

The Charter in fact differentiates itself from Islamic documents not only for the rights and liberties enunciated, but above anything else by its basis, which is not religious but

in Hirsch, E., op. cit., p. 212). Carrying out the rights of God / duties of man is thus the way of participating in the divine truth. This dialectic couple constitutes one of the fundamental tenets of Islamic theological-juridical thought; the rights of God / duties of man are in fact the original matrix of the rights of man. It is in this manner that sharia prescribes a series of duties of man, both as an individual as well part of a community, which correspond to other rights which man enjoys with regards to nature, to the community, to others and to himself. This is the Islamic origin of human rights: the rights that appertain to the human being are derived from the duties prescribed by the Koran and by tradition.

6 Merad, A., 'Le concept de 'droits de l'homme' en Islam', in Hirsch, E., *Islam et droit de l'homme*, Paris, Librairie de Libertes, 1984, p. 190.

7 For a complete overview of the accession of Muslim-Arab States to international treaties vide Tavernier, P., 'Les Etats arabes, l'ONU et les droits de l'Homme: La Declaration universelle des droit de l'Homme et les Pactes de 1966', in Conac, G., & Amor, A., *Islam et droits de l'homme*, Economica, 1994, pp. 57-72.

8 They in fact express the principle that Islamic law is absolute and eternal in that it is a direct emanation of God and that therefore it must be directly translated into positive law.

9 Established by the Pact of Cairo of 22nd March, 1945, the Arab league is the most important inter-governmental organization of the Arab world. It is at present constituted of 22 Arab Muslim states including the Palestinian Authority, which according to the language used by the League is emblematically 'The State of Palestine.' These 22 Arab states, besides forming part of the league, also constitute 'nervous system' of the 'Organization of the Islamic Conference' of which Saudi Arabia is considered to be the leader state. The Arab League is the oldest of the international organization that emerged in the post war period, even prior to the United Nations. It was in fact because of the imminent birth of the United Nations that the institutional treaty was drafted in a particularly flexible form granting ample space for modifications and explicitly expressing the will to collaborate with future international organizations. Since it was set up, the Arab league has notably modified its structure as well as its aims. It has in fact expanded from the 7 founding states to 22 states; besides the initial commissions, others have been added, including The Permanent Arab Commission of Human Rights established in 1968.

10 The internal contrast in the League itself between the traditionalists and progressists is exemplified in the reservations which 7 states expressed in 1994. From among the 7 states (Saudi Arabia, United Arab Emirates, Bahrain, Kuwait, Oman, Sudan, and Yemen), Saudi Arabia is undoubtedly the most intransigent and is the one who contested the validity of the Charter on the basis that it was not in conformity with Sharia and the Declaration of the Organization of the Islamic Conference.

11 The Declaration of Human Rights in Islam, known as the Cairo Declaration was adopted at the 19th Foreign Affairs Ministers' Conference of the Organization of the Islamic Conference, held in Cairo between the 31st July and 5th August, 1990. The declaration distinguishes itself for its attachment to a traditional Islam in which is reaffirmed the eminent religious foundation of human rights. Such a position, instead of conceiving Islam as particular within what is universal, tries to bring back the universality of human rights within the specificity of the Islamic religion, conceding little or nothing at all to the conquests of modernity and the inter-cultural dialogue. The best comment about The Declaration of Human Rights In Islam is supplied nonetheless by the last two articles of the same declaration in that they affirm that 'all the rights and freedoms laid down in this document are subordinate to the dispositions of Islamic Law' (Art. 24) and 'Islamic law is the only source of reference as to the interpretation and clarification of every article of this Declaration'. It is thus an expression of one of the most traditional and orthodox viewpoints that characterize the Islamic community, which is of more significance in that it is made within the ambit of an international organization constituted by sovereign independent states.

fundamentally secular. In fact, although evoking in the preamble 'the eternal principles of fraternity and equality amongst human beings, established by the Islamic Sharia and', significantly 'by the other celestial religions' the Charter is characterized by, 'the presence of explicit references to the ideal of Arabic unity (from the Arabian Gulf to the Atlantic). It is also characterized by values and principles, which besides being religious, are human – and thus secular – values which are common to the Arabic nation and consolidated all throughout its long history.[12]

The text of the League, therefore, presents itself in a positive form, 'in the sense of a laity and secular codification, adopting a religious reference, only in so far as the sum of inspiring cultural values'.[13] The originative matrix of the Arab Charter of Human Rights does not lie, therefore, in the Islamic religion, but principally in *Arabité*,[14] that is in the other identifying factor which defines the Arab Muslim countries.[15] Since its expression is the Charter, *Arabité* refers to 'a certain idea of the Arab nation, or of that which can be defined as a classic Arab humanism: a nation that believes in the dignity of man, ever since *Allah* honoured it by making it the cradle of religious and the place of origin of the civilization that has declared the right of every man to a dignified life, based on liberty, justice and peace'.[16] *Arabité* is also defined by the pride in values and human principles consolidated all through its long history, which are at the basis of a re-establishment of one's own ideology, believing in its unity, fighting for its liberty, defending the rights of nations to self-determination and the safeguarding of one's own riches.

An ulterior confirmation of the Charter's secular aspects and its aspiration of participating in the intercultural dialogue, subsists from the explicit reaffirmation of 'the principles of the United Nations Charter, of the Universal Declaration of Human Rights, of the disposition of the two United Nation's Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights…'[17]

After the glorification of the history and culture of the Arab Nation, which is taken on as the source of legitimacy and inspiration, and from which are deduced the principles of liberty, fraternity and justice which govern the international cooperation and inter-cultural consensus, the Preamble, 'Recalling the close relationship between human rights and peace', affirms the strong refusal 'of racism and Zionism, both of which constitute a violation of human rights and threat to world peace'. These concepts are then condensed in Article 35, which confirms the bond between the pride of Arab nationalism, human rights, the refusal of any discrimination and world peace.

The second section starts with what is undoubtedly the Charter's most important article. Article 2 in fact sanctions in an extensive manner, the principal of equality, affirming that:

> all the State parties to the present Charter, bind themselves to guarantee to every person present in their territory and to submit to their jurisdiction, the enjoyment of all the rights and liberties established in this Charter without distinction as to race, colour, sex, language, religion, political opinion, national or social origin, richness, birth or any other condition and without discrimination between men and women.

12 Modica, M., 'La progressiva internazionalizzazione dei diritti dell'uomo nel mondo arabo-islamico e africano', in Ungari, P., & Modica, M., *Per una convergenza mediterranea sui diritti dell'uomo*, Euroma, La Goliardica, 1997, pp. 124-25.

13 Ibid., p. 125.

14 As defined in *Nouveau Petit Le Robert*, (1993).

15 '… in the majority of Muslim countries, Islam still constitutes the supreme criterion of loyalty and group identity. It is Islam which distinguishes between him and the other, between whose within and whose without, between brother and foreigner… as recent events have repeatedly shown, Islam guarantees the most efficient system of symbols for a political mobilization, intended to raise the peoples, be it to defend a regime perceived as gifted of the necessary legitimacy or to reprimand one held to lack such legitimacy, in other words which is non-Islamic.' (Louis, B., *Il linguaggio politico dell'Islam*, Roma, Laterza, 1991, pp. 7-8). For the Arab populations, side by side with the Muslim Identity lies another identifying factor, represented by *arabité*. According to Radinson, M., 'we can consider as belonging to the Arab ethnicity, people or nationality, those who:

1. speak a variant of the Arab language and at the same time consider it as their natural language, that which they should speak, or else even though they do not speak it, consider it as such;
2. hold as their own patrimony the history and cultural traits of the people who have called themselves or which others call Arabs, merging into these cultural traits, from the 7th century AD, the massive adhesion to the Muslim religion (which is far from being their own exclusivity);
3. reaffirm the Arab identity, have an Arab conscience' (Rodinson, M., *Gli Arabi*, Firenze, Sansoni Ed., p. 54).

The Arab ethnicity has without doubt a particularly close relationship with Islam, but *arabité* and islamicity are two terms which, even though they have often been erroneously confused with one another and which have often been used one instead of the other in the definition of the Muslim – Arab identity, express two different identifying poles, in some cases representative of irreconcilable visions of man and society.

16 Redissi, H., 'L'universalità alla prova delle culture: le dichiarazione islamiche dei diritti dell'uomo', a paper presented at the Convention 'La Dichiarazione Universale dei diritti del uomo cinquant'anni dopo', held at Bologna from the 18th to the 20th December 1998, p. 627.

17 Besides these documents, the Charter also refers to the Cairo Declaration of Human Rights in Islam, that is to a traditionalist and confessional document. The motive behind this reference to a text in which the basis and rights laid down are completely different, lies in the existing contrast within the Arab League between traditionalists and modernists.

It is an Article which takes up exactly what was established in Article 2 of the Universal Declaration of 1948, with the notable specification of the Arab perspective, that there should be no discrimination between men and women.[18]

The proclamation of an absolute equality between sexes is clear and precise, even though the Charter then does not provide specific rights that define such principle in detail; in fact Article 38, besides considering the family to be the root of fundamental unity within society, does not provide anything about the obligations and rights of spouses and at the same time, lacks an article which clearly defines the right to marriage without restrictions as to religion.

However, the Charter's avant-garde approach is also evident in the proclamation of the freedom of belief, thought and opinion of every person – (Article 26). Article 27 then determines the forms of exercising this freedom in a wide and liberal manner, conceding, 'to every person of whatever religion the right to express one's opinions by word, practice or teaching without prejudice to the rights of others'.[19] A limitation to the exercise of such a right may only be imposed by the law of the state,[20] but that does not exclude that this right be sanctioned in a clear manner, conforming to international norms. It would however have augured well, were the Charter to have also explicitly contemplated the freedom of changing religion. This would have unequivocally affirmed a right that opposes the orthodox reading of the Sharia which in its most extreme form also prescribes the death penalty for those who stain themselves with the crime of apostasy.

As regards another problematic question in Arab-Muslim countries – that is, the right to life – the Charter establishes that 'every individual has a right to life, to freedom and to the security of his person' (art. 5). It is evidently a step forward in respect to the Islamic declarations,[21] but at the same time the protection of life does not reach the point of eliminating the death penalty; Art. 10 in fact foresees that 'the death penalty is not permitted except in the cases of crimes of extreme gravity,' but is nonetheless permitted. Yet, the Charter attempts to limit it as much as possible, surrounding it with guarantees to such an extent that the accused may hope to obtain 'mercy or a reduction in punishment' (Art. 10) to benefit of its suspension in case of pregnancy or lactation and its cancellation in case of minors (Art. 12). Moreover the death penalty is absolutely not permitted in cases of crimes of a political nature.

In so far as corporal punishments are concerned, Art 13(a) is explicit in saying that

> the State parties to the Charter protect all individuals present in their territories from physical or moral torture as well as cruel, inhuman or degrading treatment.

Contrary to the Universal Declaration, the Charter omits the term 'punishments' thus leaving certain doubts as to the possible acceptance of the corporal punishment foreseen in Islamic law. In this case, as in that of apostasy and the condition of women in marriage, the drafters of the Charter could have been more explicit in proclaiming these rights with the aim of eliminating any possible doubt.

[18] In the Declaration of Human Rights In Islam of the Organization of the Islamic Conference, the discrimination against women emerges in Art 7(b), relative to the rights of the child, where it is affirmed that the child's education is in the hands of the father or who is in his stead; the women are excluded from choosing their children's education. Art. 6 is more explicit in that it states: 'the woman is equal to man in human dignity; her rights are equivalent to her duties… the husband has the duty of maintaining the family and the responsibility for its protection.' All of this corresponds to the traditional vision, according to which moral equality between man and woman does not include juridical equality because of the fact that the woman is socially and economically dependent on her husband. In this respect the phrase 'her rights are equivalent to her duties' is quite indicative: in fact since Islam prescribes to the woman lesser duties and responsibilities than the man, she consequently has different (or lesser) rights.

[19] In the Cairo Declaration, Art. 10 establishes that Islam being the natural religion of man, 'it is not permissible to submit the latter to any pressure or to make gain from his poverty or his ignorance in order to convert him to another religion or to atheism' It is a norm which is decisively in contrast with international norms, as it indirectly eliminates the freedom of religion and explicitly indicates the impossibility for a Muslim to change religion, thus negatively resolving the problem of apostasy. Religious discrimination is indirectly present even in the attribution of political rights (Art. 23) and in Art. 5 relative to the right to marriage and the right to form a family. In this last article it is in fact affirmed that 'men and women have the right to marry and no restriction as to race, colour or nationality will impede them from exercising this right.' It is clear that restrictions relative to differences in religion are not mentioned as these are presently in force in many Islamic countries and are foreseen by the orthodox Islamic law. As to art. 23(b) one can read that 'every individual has the right to participate directly or indirectly, in the administration of the public affairs of his country. He also has the right to occupy public posts in conformity with the dispositions of Islamic Law.' The recourse to sharia norms, beyond the falsities put forward, means that non-Muslims do not have the same rights as Muslims and women cannot carry out certain public functions which Sharia reserves exclusively for men.

[20] The possible limitation by the law of the state is common even in international declarations. However, it is not posed as an instrument for the state to arbitrarily limit fundamental rights, as articles 3 and 4 of this Charter demonstrate, which themselves put limitations as to the possible limitations by the law of the state.

[21] The Declaration of the Organization of the Islamic Conference, in integrating the limitations foreseen by Art. 2 with the affirmation of Art 19(d) that there are 'neither crimes nor penalties other than those in conformity with the norms of Islamic law', in practice sanctions both the law of eye for an eye, tooth for tooth (inflicting on one as much harm as he has inflicted on others) as well as the attack on the physical integrity of the person.

A large part of the second section deals with the protection of the freedom of the individual and procedural guarantees. It is affirmed in a clear and simple manner that 'legal personality is inherent to every individual' (Art. 18), that law may not have retroactive effect (Art. 6), that 'no one may be tried twice for the same crime' (Art. 16), that 'every accused is innocent so long as his guilt has not been legally proved in a trial' (Art. 7), that all are equal before justice and that the statement must guarantee to anyone recourse to it (justice) [Art. 9].

The Charter also establishes a series of principles and rights of a political nature, first of all intended to eliminate any possible form of discrimination against non-Muslims and women. After having affirmed that 'the people are the source of power' (Art. 19), the Charter continues to say that 'political capacity is a right of every citizen having reached majority' (Art. 19) and every citizen may accede to public employment (Art. 33). Even more important, because they are not contemplated in the Islamic declarations[22] and because they are at the basis of a pluralistic and democratic society, are the right to the freedom of assembly and of association (Art. 28) and the right to form unions and the right to strike (Art. 29). The rights of minorities are also posed in the perspective of a tolerant and pluralistic society, in which minorities 'may not be denied the right to enjoy one's cultural life and to follow the teachings of one's religion' (Art. 37). The enunciation of minority rights carries great weight considering the fact that in the name of 'Arabization', many Arab countries have undertaken policies aimed at the gradual destruction of non-Arab cultures (for example the Berbers in the Maghreb region and the Kurds in Kurdistan). It is thus an enuciation that reduces (at least in theory) the fear that Islamic intolerance be substituted by an Arab intolerance in the name of belonging to the Arab culture and Nation.

It is also worth noticing all the dispositions relative to citizenship and national belonging, even though the nationalism that arises there from 'manifests itself solely in a statal vision without managing to develop the primordial design of the League of the Union of Arab people'.[23] The dispositions first of all take into consideration the prohibition of weakening or denying anyone of his original citizenship in an arbitrary manner (Art. 24); of the prohibition of limiting the freedom of residence and free movement (Art. 20); of the prohibition of exile (Art. 22) and finally of 'the right of asking for political asylum in another country so as to escape persecution' (Art. 23).

Other important rights sanctioned in the second section are the economic and social rights, which include amongst others the right to work (Art 30), the right to private property (Art. 25) and the right to education (Art. 34).[24]

The third and fourth articles which protect the rights and freedoms laid down in the Charter in two manners are also of note. In the first instance, the Charter prohibits States from restricting or limiting human rights on the basis of law, conventions or custom. It also prohibits States from arguing on the basis of the fact that the Charter does not enunciate or finally give effect to the rule of reciprocity between States against a State which does not respect human rights.

The only limitations are conventional and even these are surrounded by guarantees. In particular art 4(c) foresees that 'in no case, can such limitations or derogations concern the rights and guarantees relative to the prohibition of torture and degrading treatment, of returning to one's homeland, of political asylum, of not being tried twice for the same action or crimes not foreseen by the law or suffer non-legal punishment.' The second form of protection of rights is indicated in the third section, which is entirely dedicated to the creation of a 'Committee of Experts of Human Rights'. Both the structure as well as the functioning of the Committee[25] are established within the aforementioned section. The fourth and last section foresees that 'the Charter will enter into force after two months from the deposit of the seventh instrument of ratification or adhesion' (Art 42(b)).

Conclusion

The Arab Charter of Human Rights is undoubtedly one of the most interesting official documents ever produced by the Arab-Muslim world on the subject of Human Rights. It clearly

[22] Besides the already cited Declaration of the Organization of the Islamic Conference, reference is to be made to the first Islamic declaration made in order of time: The Universal Islamic Declaration of Human Rights. It is a document adopted in 1981 by the Islamic Council of Europe, which expresses a vision no less traditionalist than the Cairo Declaration. According to the vision expressed in The Universal Islamic Declaration of Human Rights, only Sharia may guide the human being, and the status of reason is degraded in that human reasoning is judged incapable of providing valid models of life if it ignores divine guidance and inspiration.

[23] Modica, M., op. cit., p. 42.

[24] The Cairo Declaration reserves the right of education of the child exclusively to the father. As regards union rights, the Declaration does not provide anything just as the fundamental right to freedom of association is not recognized.

[25] It is to be underlined that art. 40, subsection 4 lays down that 'the candidates... carry out their functions on an individual basis and with absolute impartiality and conscience.' The job of the Committee is that of examining the reports which the single states are obliged to present every three years and to present its own report about what has been referred to it by the various countries (Art. 41) to the Permanent Commission of Human Rights.

distinguishes itself from the Islamic documents not only as regards to its basis but also with regards to the whole sum of rights and freedoms enunciated.

Notwithstanding a little grey area which exists with regards to the most problematic matters such as the condition of women, the freedom of religion and the freedom to change religion, the Charter distinguishes itself both for its convergence from the principles enunciated by international norms as well as for its reaffirmation of the dignity of Arab civilization.

What has changed though, in respect to the Islamic Declarations is the basis itself, which is no longer religious but fundamentally secular. The Charter is in fact a secular and lay document, in which the principles enunciated are defined as eternal while the rights and freedoms are eminently historical and thus susceptible to the modifications of man. Although not as explicitly as the Universal Declaration,[26] the Charter proposes a vision in which the use of reason is the principle means utilized by man to govern himself and the world. [27]

In the second instance, the Charter adds the glorification of Arab history and identity to the most important rights expressed in the International Convention on Human Rights, without wholly resolving the convention within the Islamic religion. The Charter in fact dedicates ample parts of the preamble and several articles to the definition of an Arab Identity and to the rights which define the Arab person, placing emphasis on the importance 'of living in an intellectual and cultural atmosphere which is proud of Arab Nationalism' (Art. 35). Islam is instead indicated as a fundamental component of the Arab identity to which it provides, together with the other monotheistic religions, 'the eternal principles of fraternity and equality between human beings' (preamble). Nonetheless, this does not mean the dissolution of *Arabité* with the Islamic religion; instead it is actually *Arabité* which is the originative identifying matrix on which to build the rights and freedoms which belong to every individual, without making of *Arabité* a new ideology against ethnic and cultural minorities.

Thus, the Charter re-establishes the right proportion between the universal and the particular,[28] presenting itself as a particularistic document in the context of the international community, to which it provides its specific contribution without claiming for itself the right of representing what is best or the whole. Rebalancing the distances between universalism and particularism, the Charter of the League thus presents itself in a favourable light, contributing to intercultural dialogue and to a more incisive internationalization of the fundamental rights of man.

As Hamad Redissi concludes, because

> the charter is twice as much at the forefront, in respect of the Cairo Declaration and the internal or municipal legislations of the States and the League... it will probably have little possibility of entering into force. Were one to accept that it actually takes place, it is difficult to see how the states which do not respect human rights can accept the control of the Committee of Experts and the Permanent Commission of the League.[29]

A limitation as well as a merit of the Charter is actually that it seems to go beyond what the Arab-Muslim countries seem to concede in practice.

[26] The first article of the Universal Declaration affirms that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'

[27] While both Islamic Declarations propose a restrictive interpretation of Sharia as a positive law which establishes the sum of rights and obligations prescribed to man by religion, the Arab Charter of Human Rights views Sharia in the wide sense as the sum of principles which provide an Islamic vision of the world without it being directly translated into positive law. In the first specification, Sharia becomes a non-modifiable sum of positive law which finds full application in statal case law without granting to man the faculty of historifying them or modifying them. This results in a vision of nature and man completely contrary to the philosophy of human rights. In the second specification, the value of Sharia lies in the ends which it proposes, ends which, according to Ferjani – 'can be reduced to the Koranic principle that establishes that God orders the good and justice (16, 90). The content of the good and justice can be deduced from the sense of evolution of the Koranic dispositions, which is what supposes a historic reading which relativizes the Koranic annunciation.' (Ferjani, M. C., *Islamisé, laicité et droits de l'homme*, Paris, L'Harmattan, 1991, p. 270). Such a relativization goes against the dogma of the uncreated Koran (according to which the book and laws which it contains are derived directly from God) thus restoring to man his primary function of guide of the research and thus legislative activity. A reading of the Sharia in accordance with Islamic Principles is thus fully compatible with the human rights. Moreover it may serve as a huge support to the same cause.

[28] The Islamic declarations of Human Rights have a religious basis and thus construct their identity on Islamicity: For them universality lies within the Islamic religion in so far as it is the religion of the only and omnipotent God. Making of the Islamic religion a possible but not necessary part of not being Arab, the Arab Charter of Human Rights expresses a lay and secular foundation built on *arabité*. In this way, the relationship between universality and particularity is also overturned: The Arab Nation in fact expresses the particularity with the universality represented by the United Nations, or to be more precise, from the sum of the peoples of the earth, while Islam represents on its part, only an eventual part of *arabité*.

[29] Redissi, H., op. cit; p. 7.

25 The Enforcement of ADR Clauses

Marco Ciliberti, BA, LL D.

The term ADR, or Alternative Dispute Resolution, refers to a variety of techniques alternative to litigation, including arbitration,[1] apt for the resolution of disputes. The main difference between arbitration and other alternative dispute resolution processes is that whilst the former is regulated by statute, that is the 1996 Arbitration Act,[2] none of the latter processes is so fettered. ADR clauses may be drafted either in simple form, referring a dispute to a single process for resolution, or in multi-tiered form, referring the dispute to two or more ADR processes sequentially, generally escalating from facilitative towards adjudicative processes. The advantage of multi-tiered clauses lies in the fact that the various facets of a complex dispute may be resolved by the most appropriate process at the relevant stage, even though such clauses may render the process more cumbersome. For the purpose of the current analysis, the enforcement of arbitration clauses, simple ADR clauses and multi-tiered clauses will be considered separately.

Arbitration Clauses

The relationship between the arbitral process and the courts has, in default of appropriate provisions regulating arbitration, proved to be a cause of great contention, not least because the courts have, in various cases,[3] refused to enforce an arbitration agreement. Courts often perceive such clauses as an attempt by the parties to oust their jurisdiction. Subsequent judgements however demonstrate that the courts did on occasion tend to give effect to the intention of the parties enshrined in the agreement to arbitrate a future dispute by ordering a *liberatio ab observantia iudicii* in view of the lack of appropriate statutory provisions specifically regulating the matter. Section 15 (3) of the Arbitration Act has radically altered the position subsisting prior to its promulgation by divesting the courts of their discretion in this matter, and thus, in accordance with that particular provision, the courts are bound in such cases to stay proceedings in favour of arbitration. This course of action is not however directed by the courts ex officio in cases where the plaintiff has, in breach of the agreement to arbitrate, instituted litigation proceedings, and thus, the court shall only order a stay of proceedings so brought when the relevant plea has been raised in *limine litis*. In fact, failure on the part of the defendant to raise the plea for a stay at the appropriate stage amounts to a tacit waiver on the part of defendant to enforce such clause at a later stage. Moreover, for the plea for a stay to succeed, the arbitration clause should comply in form with the provisions of the Arbitration Act, and thus the agreement to arbitrate must necessarily be in writing,[4] this provision being a common provision in most statutes[5] regulating arbitration, on the basis that by entering into such agreement the parties would be renouncing their right of recourse before a court of law in respect of such claim. Though the clause may include further particulars, including, *inter alia*, the number, quality and appointment of arbitrators and the applicable law or other considerations on which the award is to be based, no other particular formality is required by the act, any lacunae being regulated by the default non-mandatory provisions of the Act itself. However, for an arbitration agreement to be enforceable, its terms must be clear and certain in the sense that it must be evident that the parties intended any future contention to be resolved by the decision of an arbitrator other than by the courts.

A thorough reading of the Act proves that the courts do play a residual role, despite being limited and delayed, in respect of arbitration, such residual role consisting in the supervision and support of the arbitral process itself. Such jurisdiction arises on the issue of the award which, in virtue of section 70 enjoys the status of executive title, and therefore

1 Some authors do not consider arbitration as falling within the realm of ADR even though it is an alternative in itself

2 Prior to the enactment of the Arbitration Act, the arbitral process was regulated by a number of provisions in the Code of Organisation and Civil Procedure (Sections 968-987) and prior legislation.

3 *Portelli v. Felice Inglott* [Vol.XXII-III-195]; *Needham Foster v. Gatt* [Vol.XXV-I-1071]; *Simpson v. Huber* [Vol. XXVIII-I-647]

4 Section 2, Arbitration Act

5 Article 7, UNCITRAL Model Law on International Commercial Arbitration

equal to a court judgement. The court also exercises a residual role in that a challenge of the award on any of the grounds listed in Section 70 of the Act is to be lodged before the Court of Appeal. Finally, a meticulous examination of the arbitration clause is warranted in every case as the clause may itself limit the jurisdiction of the arbitral tribunal, by, *inter alia*, limiting the reference only to issues of quantum, or liability, such issues of substantive jurisdiction being within the power of the arbitral tribunal itself, subject to challenge in terms of section 70 (3) (iii) of the Act.

ADR Clauses

ADR clauses which refer to any process apt for the resolution of disputes other than arbitration are not subject to any statutory formalities, and on this basis, their enforcement may give rise to difficulty. It should however be noted at this preliminary stage that sub-section (7) of section 10 of the Act does refer to 'mediation, conciliation or other procedures' which may be utilized in a bid to encourage the settlement of the dispute and further that if the dispute is resolved prior to the commencement of the arbitral proceedings or prior to the issue of an award, the tribunal is to issue an order for termination of the arbitral proceedings, or, if requested by both parties, to record the settlement in a consent award.[6] Since, as stated above, ADR clauses are not fettered by any statutory formalities, the clause need not be in writing, the only applicable principles being those of general contract law, including that the parties should have achieved consensus *ad idem*, in the sense that both should have intended to refer any future dispute arising between them to some ADR process. In other words, proof of a verbal agreement to refer the dispute to any ADR process is theoretically valid and may be invoked by one party against the other. The pertinent question however relates to the enforcement of such clauses, and thus whether a court will enforce an ADR clause or decline so to do when any of the parties to such a clause has instituted litigation proceedings in breach thereof. Due to the fact that such issues have never surfaced before our courts, reference will be made to judgements of foreign courts which have sought to resolve this dilemma.

It is sound to state that under English law the enforceability of ADR clauses depends on the intrinsic nature of the clause itself and the processes to which it refers. In *Walford v. Miles & Courtney*[7] and *Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd.*,[8] the English courts asserted that an agreement to negotiate is not enforceable at law, and this on the basis that a court cannot establish with sufficient certainty what the obligations which it is being asked to enforce are, nor can a court monitor or assess compliance thereto. However, English courts have demonstrated their willingness to enforce such clauses when compliance thereto was easily determinable, such being especially applicable when the process provided for is a process which is binding as to its result. Thus, in *Jones v. Sherwood Computers Services plc.*,[9] a clause which provided that any disputes should be referred to the expert determination of a neutral, which determination was to be final, conclusive and binding on the parties, was enforced by the courts.

A clause which refers any future dispute to a non-binding ADR technique may also be enforced if, other than being in *Scott v. Avery* form, that is by making the reference to such ADR process a condition precedent to the right of either party to refer the dispute to arbitration or litigation, the clause includes a time-limit within which settlement of the dispute must be attempted. A clause drafted in this form overrides the difficulties faced by the courts in *Walford v. Miles*, in which case the relevant clause provided for negotiations 'for such time as is reasonable'.

Though early decisions of the Australian courts have declined to enforce ADR clauses, the same courts have recently found grounds on the basis of which an ADR clause may be enforced. The courts, in one of the earlier decisions, that is *Allco (Queensland) Pty. Ltd. v. Torres Strait Gold Pty. Ltd.*[10] refused to enforce an ADR clause, and this on the basis that such clauses constituted an attempt by the parties to oust the jurisdiction of the courts, whilst in another case, *Coal Cliff Collieries Pty. Ltd. v. Sijehama Pty. Ltd.*,[11] the courts decided, in consonance with the decision of the English Courts in *Walford v. Miles*, that an agreement to negotiate lacks the necessary certainty to create legally binding obligations. With regard to the Allco case it is noted that such clauses do not oust the jurisdiction of the Courts, but, as our own courts have held with reference to arbitration clauses, ADR clauses merely limit and delay such jurisdiction so that the right of either

6 Section 46(1), Arbitration Act
7 *Walford v. Miles* [1992] 1 All ER 453
8 *Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd.* [1975] 1 All ER 716
9 *Jones v. Sherwood Computers Services plc.* [1992] 1 WLR 227
10 *Allco (Queensland) Pty. Ltd. v. Torres Strait Gold Pty. Ltd.*, unreported, Supreme Court of Queensland, 12th March 1990
11 *Coal Cliff Collieries Pty. Ltd. v. Sijehama Pty. Ltd.* [1992] 28 NSWLR 194

party to refer the dispute to litigation subsists unless the parties have successfully negotiated settlement and reduced such terms to writing, in which case they would be contractually bound thereto. The same arguments relating to the issue of uncertainty raised above with regards to the status of ADR clauses under English law may be availed of to counter the Australian court's decision in *Coal Cliff Collieries Pty. Ltd. v. Sijehama Pty. Ltd.* The Supreme Court of New South Wales, in *Hooper Bailie Associated Ltd. v. Natcon Group Pty. Ltd.*[12] whilst ordering the stay of arbitration proceedings pending the conclusion of conciliation proceedings, held as follows:

> An Agreement to conciliate or mediate is not to be likened... to an agreement to agree... Depending upon its express terms and any terms to be implied, it may require of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement.

And the same court, in *AWA Limited v. Daniels and Others*,[13] whilst expressly disapproving of the decision handed down in *Allco (Queensland) Pty. Ltd. v. Torres Strait Gold Pty. Ltd.*, considered the commencement of litigation without compliance with contractual provisions as an abuse of the process. The obtaining situation in Australia is applicable in the United States, so that the courts, in *Southerland Corp. v. Keating*[14] held that

> A contract providing for alternative dispute resolution should be enforced and one party should not be allowed to evade the contract and resort prematurely to the courts.

It is evident, from the judgements of the courts themselves that the specific problems relating to enforcement of ADR clauses are reminiscent of the difficulties which emerged in the past in relation to contractual agreements to arbitrate, and thus it is envisaged, as the evolving situation within the English and Australian jurisdiction demonstrates, that due to the developing nature of ADR, problems of enforcement should be gradually eradicated and the status of ADR clauses clearly defined.

Multi-Tiered Clauses

A theoretical analysis of the enforcement of ADR clauses involves an admixture of the principles and suggestions outlined above. Hence, a multi-tiered clause gives rise to the same problems above with regards to the enforcement of ADR clauses, even though the extent of such problems depends on the type of processes for the use of which such clause provides. In other words, a multi-tiered clause which comprises, *inter alia*, a reference to arbitration should be capable of enforcement, at least in so far as it relates to arbitration, and this in view of section 15 (3) of the Arbitration Act providing for a stay of court proceedings. An essential requirement which must be satisfied nonetheless is that of writing, and thus, unless such multi-tiered clause is written into a contract or incorporated by reference, such clause, or part thereof, would not be capable of enforcement. It is noted that the UK Arbitration Act expressly provides for the enforcement of such clauses, article 9 (2) thereof providing that an application requesting the court to stay proceedings brought before it may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures. The introduction of a similar clause in the Arbitration Act would alleviate some of the difficulties which could arise in an attempt to enforce a multi-tiered arbitration clause.

On the other hand, multi-tiered clauses which are entirely devoid of a reference to arbitration, enjoy the same status of a simple ADR clause, to which the above analysis applies.

[12] *Hooper Bailie Associated Ltd. v. Natcon Group Pty. Ltd.* [1992] 28 NSWLR 194
[13] *AWA Limited v. Daniels and Others*, unreported, Supreme Court of New South Wales, 24th February 1992
[14] *Southerland Corp. v. Keating* [1984] 456 U.S. 17

Id-Dritt
2002
A Publication of the Law Students' Society of the University of Malta

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The Enforcement of ADR Clauses.

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Mireva
Publications

ISBN 1-870579-96-8

9 781870 579964