
Answers

- 1 The Constitution of Cyprus provides for the protection of fundamental human rights in Part II, articles 6–35. Some of the rights and liberties protected by the Constitution are the following: right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, prohibition of discrimination.

Apart from guaranteeing the protection of certain rights and liberties, these constitutional provisions also provide for circumstances under which the rights and liberties may be lawfully restricted.

The Constitution prevails over all other laws or administrative actions. Thus any law or administrative action, which violates the constitutionally guaranteed individual rights is void.

The European Court of Human Rights ('ECHR') sets forth a number of fundamental rights and freedoms, similar to those protected under the Constitution of Cyprus. More rights are granted by additional protocols to the Convention, such as the right to peaceful enjoyment of one's possessions, the right not to be denied an education, the right to regular free and fair elections (Protocol 1); prohibition of imprisonment for breach of contract (Protocol 2); abolition of death penalty (Protocol 13) and others.

The European Convention of Human Rights was signed by the members of the Council of Europe (of which Cyprus is a member) by the Treaty of Rome 1950. Parties to the Convention undertook to secure these rights and freedoms to everyone within their jurisdiction. The Convention also established an international enforcement machinery: the European Court of Human Rights in Strasbourg which deals with individual and inter-State petitions.

Cyprus has ratified and adopted the European Convention of Human Rights in 1962 with Law 39/62. Thus the Convention has been incorporated to the national legal system of Cyprus, it has the effect of national law of superior force, and it can be invoked before the national courts. Furthermore, a person who claims violation of their rights and liberties protected by the Convention and has exhausted the remedies provided by the national courts is entitled to resort to the ECHR.

- 2 An exclusion clause is a clause in a contract or a term in a notice which appears to exclude or restrict liability or a legal duty which would otherwise arise.

Exclusion clauses define the obligations of the parties in arm's length transactions. However, standard form contracts often include sweeping exclusion clauses, which are imposed on the weaker party to the transaction and thus they may take away the rights of the weaker party and nullify its expectations.

There are a number of common law controls on the use of exclusion clauses, which invalidate their effect through the rules of incorporation. For example, a party cannot rely on an exclusion clause, the effect of which he has misrepresented to the other party. Moreover, an exclusion clause contained in a written document can be overridden by an express inconsistent undertaking given at or before the time of contracting.

The rule of construction *contra proferentem* is applied particularly stringently to exclusion clauses, i.e. in case of doubt or vagueness, exclusion clauses are interpreted against the party which wishes to rely on them.

There are also special rules of interpretation for negligence liability (*Kokkalos v Karayiannis* (1976)). If a clause contains language expressly exempting the party relying on the exclusion clause from the consequences of his own negligence then effect must be given to the clause. However, if negligence is not expressly exempted, then the court must consider whether the words are wide enough, in their ordinary meaning, to cover negligence on the part of the party relying on the exclusion clause. If so, then the courts will consider whether the exclusion clause may cover some kind of liability other than negligence; if there is such liability, the clause will be confined in its application to that alternative source of liability.

The Unfair Terms in Consumer Contracts Law of 1996 provides further statutory protection and imposes specific limitations on the validity of exclusion clauses. The said law applies to contracts made in the course of business and, *inter alia*, provides (i) that any clause purporting to restrict liability for death or personal injury resulting from negligence is void, and (ii) that liability for negligence can be excluded, if negligence causes loss (other than death or personal injury), provided that the clause is reasonable. The reasonableness of the clause is determined having regard to the circumstance of the case, which were known or ought to have been known to the parties when the contract was made.

- 3 (a) The two types of partnership which are recognised under the law are the following:
- (i) the general partnership, in which all partners are jointly liable for all debts and obligations of the firm, and
 - (ii) the limited partnership which consists of at least a 'general partner' who is liable for all debts and obligations of the firm, and one or more limited partners who are not responsible for the firm's debts and obligations beyond the amount they have contributed to the partnership.

The law recognises the above two types of partnership as legal relationships between partners, although it does not recognise the partnerships as entities separate and distinct from the partners who compose them.

- (b) A partnership is said to exist when there is a relationship between two or more persons carrying on business with a view of profit. The business, which is the object of a partnership, may be any trade, occupation or profession. Virtually any activity or venture of a commercial nature, including a 'one off' trading venture, will be regarded as a business within the meaning of the law. It is not necessary that such an activity be a trading or commercial one as it is known in the ordinary common language. Professionals, like lawyers and accountants, when they establish a relationship for carrying on their professions jointly, will be regarded as having a partnership. However, the mere fact that a particular activity is profitable will not of itself turn it into a business within the meaning of the law; for example joint ownership of property does not of itself qualify as a business. It will depend on the specific circumstances whether a business within the meaning of the law exists. In relation to the persons comprising a partnership, these may be natural persons or corporate entities. Although the Partnership Law does not provide for a maximum number of partners, a limitation of 20 persons is provided for in s.370 Companies Law Cap. 113.

Every partnership must be registered with the office of the Registrar and Official Receiver within 30 days as from its establishment. Such 'registration' does not lead to the creation of a legal entity and it is not a prerequisite for the existence of a partnership. The registration, however, is a statutory obligation and the law provides for criminal and other sanctions if it is not met. The registration is effected following submission to the Registrar of the prescribed particulars of the partnership. No partnership agreement is required to be submitted nor is it accepted by the Registrar.

- 4 Once registered, both private and public companies obtain a legal personality, distinct from that of their members. Liability of shareholders in private and public companies is limited in the way provided for in the memorandum of association. A private company by its articles of association:

- (i) restricts the right to transfer its shares;
- (ii) limits the number of members to 50, not including employees or former employees who have continued after the termination of employment to be members of the company; and
- (iii) prohibits an invitation to the public to subscribe for any shares or debentures of the company.

A public company is not required to have the above three restrictions in its articles of association. However, a public company must have at least seven members and requires a minimum capital of approximately €25,630. In addition, a public company needs at least two directors whereas a private company can have only one director, in which case the director cannot also act as the secretary (unless the company has a single member).

- 5 The overall role of company directors is to run the day-to-day business operations of the company.

Company directors have to act within the powers conferred to them by the company's articles of association, the resolutions of the general meetings of the company's members and the decisions of the board of directors, and always in accordance with the Companies Law Cap. 113. The duties of company directors follow from the nature of their relationship with the company as general agents and trustees of the company's property. The company directors have, *inter alia*, the following duties:

- (i) A duty to exercise their powers in good faith, that is, in a manner which in their view would best pursue the interests of the company.
- (ii) A duty not to allow their personal interests to conflict with those of the company.
- (iii) The directors should not act in a way which takes advantage of the company by obtaining personal benefits (*Cook v Deeks* (1916)). Even if the directors act with honesty and transparency they are still not entitled to retain personal benefit from the company's dealings, unless the company consents in a general meeting (*Regal (Hastings) v Gulliver and Ors* (1967)).
- (iv) A duty of care. The company directors owe a duty to the company to use the skill and care reasonably expected from persons of their position and experience.
- (v) It is the duty of the company directors, who are in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of their interest at a meeting of the directors of the company (s.191 Companies Law Cap. 113).
- (vi) The company directors have to notify the company about all the information necessary for the preparation of the necessary reports, e.g. the register of directors and secretary, the register of shareholders, summary of their remuneration, loans, etc.

The duties of company directors can continue to exist even after they lose the office of director (*Industrial Development Consultants Ltd v Cooley* (1972)).

- 6 (a) According to s.178 Companies Law Cap. 113, an ordinary resolution is required to remove a director of the company, irrespective of the provisions of the articles of association or any contract between the company and the director. Similarly, the company may by ordinary resolution remove and replace its auditors.

Moreover, Table A provides that the company may increase its authorised share capital by passing an ordinary resolution.

In case the articles of association provide for some event, at the occurrence of which the company may be wound up, an ordinary resolution suffices to initiate voluntary winding up proceedings.

- (b) A special resolution is required in the following circumstances:
- (i) to change the company's name (s.19 Companies Law);
 - (ii) to alter the company's articles of association (s.12 Companies Law);
 - (iii) to reduce the company's share capital (s.64 Companies Law);
 - (iv) to initiate voluntary winding up proceedings in general (unless the articles of association provide for an event, at the occurrence of which the company may be wound up, or the company cannot, by reason of its obligations, continue its operations) (s.261 Companies Law).

- (c) Table A provides that the issue and allotment of new shares in the company is a matter left for the decision of the company's board of directors.

Moreover, the board of directors may resolve to appoint a new director in case of a reduction in the number of members of the board of directors.

The general day-to-day operations of the company are also left to the decision of the board of directors.

- 7 Corporate governance is a system of structuring, operating and controlling a company with a view to achieve long-term strategic goals to satisfy shareholders, creditors, employees, customers and suppliers. Corporate governance aims to protect investors, enhance the supervisory role of the board of directors and ensure its independence and to ensure transparency. In other words, corporate governance is a set of processes, customs, policies, laws and institutions which affect the way a company is directed and administered.

The Cyprus Corporate Governance Code was issued in Cyprus in September 2000 and the second edition was issued in March 2006.

The application of the Code has not yet been rendered totally compulsory, although public companies listed in the Cyprus Stock Exchange are obligated to include in their annual report, a directors' report in relation to corporate governance. In particular, the company has to state explicitly whether it incorporates the Code and to what extent. The company must also assure that it has complied with the provisions of the code, and otherwise it has to explain why not.

The Code proposes the creation of three committees for the appointment, remuneration and control of the board of directors. For example, the Code provides for the empowerment of the role of non-executive directors, the achievement of balance between executive and non-executive directors, and the board's independence. In addition, the Code states that there has to be transparency with regard to the directors' remuneration and the relevant criteria must be published in the company's report. Finally, the company's directors must, at least once a year, supervise and evaluate the efficiency of the internal controls of the company.

- 8 The first question that needs to be determined is whether Ben and Catherine are employees of Prime Software Ltd, or whether they are engaged to provide their services as independent contractors.

Given the information available, it is likely that Ben will be considered to be a part-time employee of Prime Software Ltd, given that he has a fixed schedule, and receives a fixed annual remuneration. On the contrary, Catherine's agreement appears to be a contract for services, valid for a fixed-term, pursuant to which she provides services to Prime Software Ltd and for which she charges on an hourly basis.

On the basis of the information available, the termination of Ben's engagement will be governed by the Termination of Employment Law 1967 as amended.

If Ben was dismissed because his services were no longer needed by Prime Software Ltd and his employment was terminated because, for example, his employer ceased carrying out the business in which Ben was occupied, or due to abolition of relevant departments or reduction in the amount of work, then Ben may be considered redundant. In this case, Ben will be entitled to recover compensation from the Redundancy Fund, provided that he has been employed continuously at Prime Software Ltd for at least 26 weeks.

Ben, as an employee, is also entitled, on termination of his employment, to a notice or payment in lieu of notice from the employer. The length of notice, or payment in lieu, varies in accordance with the length of his services with the employer. Given that Ben was working five hours per day for five days a week (i.e. more than 18 hours per week), Ben will be entitled to relevant notice or payment in lieu of notice if he worked continuously for 26 weeks or more. The minimum notice period is one week and the maximum is eight weeks.

The rights of Catherine against Prime Software Ltd will depend on the terms of her agreement with the company. If the contract does not provide for the possibility to unilaterally terminate it under the given circumstances, then Catherine may sue for breach of contract. Given the personal nature of the services provided, it is unlikely that a court would order specific performance.

- 9 (a) DEF Consulting Ltd may distribute its profit to its shareholders as a dividend. Table A provides that the company may in a general meeting declare dividends, which shall not exceed the amount recommended by the directors.

The profit amount of €300,000 may be paid off to the shareholders by way of an interim dividend before the end of the financial year. The directors are entitled, under Table A, to declare an interim dividend. They may do so if they satisfy themselves that the financial position of the company warrants the payment of a dividend out of profits.

- (b) The amount of €100,000 is in excess of the wants of DEF Consulting Ltd. Capital in excess of a company's needs is one of the reasons for which the Companies Law permits reduction of capital. Therefore, David and Elena may initiate proceedings for the reduction of the share capital of DEF Consulting Ltd to €200,000. For this to be achieved, the conditions prescribed by the Companies Law (and particularly s.64 thereof) must be satisfied, i.e.:

- (i) authorisation for the reduction under the Articles;
- (ii) special resolution; and
- (iii) confirmation by the court.

Therefore, the board of directors of DEF Consulting Ltd must convene a general meeting, the notice of which must specify that a special resolution to reduce the share capital to €200,000 will be proposed. A copy of the order of the court and of the minutes confirming reduction of the share capital must be delivered to the registrar of companies. The amount of €100,000 will then be paid off to the shareholders in proportion to the shares they each hold.

- 10 George has entered into a contract purportedly on behalf of George Ideal Apartments Ltd before the incorporation of the company.

According to s.15A Companies Law, Cap. 113, any contract entered into before the incorporation of a company by persons who have signed its memorandum of association, on behalf of the company which is to be registered, is temporary and does not bind the company until the date of its incorporation. After the date of incorporation, the contract becomes binding upon the company.

Therefore the contract for the purchase of a plot of land in Athens, which George has entered into on behalf of George Ideal Apartments Ltd, will be binding upon George Ideal Apartments Ltd upon its incorporation.

However, if the objects of George Ideal Apartments Ltd, as defined in its memorandum of association, are limited to the carrying out of operations in Cyprus then the contract for purchasing a plot of land in Athens is *ultra vires* since it falls outside the company's powers. Despite this, the contract will be binding on George Ideal Apartments Ltd in accordance with the provisions of s.33A Companies Law, Cap. 113, unless the seller knew, or under the circumstances could not have ignored, that such operations fell outside the objects of the company. It is noted that publication of the memorandum and articles is not in itself sufficient to impute knowledge to the seller (s.33A(1) Companies Law, Cap. 113).

Therefore George Ideal Apartments Ltd will be bound by the contract entered into by George on its behalf, even though the contract is outside its powers and even though it was entered into prior to its incorporation.

- 1** 6–10 Thorough explanation of human rights protection pursuant to the Constitution and the European Convention of Human Rights.
 0–5 A less complete treatment of the question.
- 2** 8–10 A good treatment of the meaning and legal treatment of exclusion clauses.
 5–7 A sound understanding of the area, although perhaps lacking in detail.
 0–4 An unbalanced answer, showing little understanding of the concept and application of exclusion clauses.
- 3** 8–10 A thorough answer, showing good understanding of the law on partnership.
 5–7 A sound understanding of the area, although perhaps lacking in detail.
 0–4 Little or no understanding of the area.
- 4** 8–10 Detailed explanation of the distinctions between private and public companies.
 5–7 A sound understanding of the area, although lacking in detail.
 0–4 Very unbalanced answer, or one which shows little understanding of the subject matter of the question.
- 5** 8–10 Thorough description and explanation of the duties of company directors.
 5–7 A less complete answer, lacking in detail.
 0–4 Little understanding of the area.
- 6** 8–10 A good explanation of the circumstances under which the various types of resolutions are required.
 5–7 A reasonable treatment of the question, although perhaps lacking in detail.
 0–4 Little understanding of the area.
- 7** 7–10 A complete answer, demonstrating a good understanding of the corporate governance regulation.
 4–6 An accurate recognition of the relevant issues, but perhaps lacking in detail.
 0–3 A weak answer, showing little or no understanding.
- 8** 8–10 A complete answer, highlighting and dealing with all of the issues presented in the problem scenario.
 5–7 An accurate recognition of the problems inherent in the question, together with an attempt to apply the appropriate legal rules to the situation.
 2–4 An ability to recognise some, although not all, of the key issues and suggest appropriate legal responses to them. A recognition of the area of law but no attempt to apply that law.
 0–1 Very weak answer showing no, or very little, understanding of the question.
- 9** 8–10 A complete answer, highlighting and dealing with all of the issues presented in the problem scenario.
 5–7 An accurate recognition of the problems inherent in the question, together with an attempt to apply the appropriate legal rules to the situation.
 2–4 An ability to recognise some, although not all, of the key issues and suggest appropriate legal responses to them. A recognition of the area of law but no attempt to apply that law.
 0–1 Very weak answer showing no, or very little, understanding of the question.

- 10** 8–10 A good analysis of the scenario with a clear explanation of the rules to the facts.
5–7 Some understanding of the situation, but perhaps lacking in detail.
0–4 Weak answer, lacking in knowledge or application.